

Overall Score:

71 - Moderate

Legal Framework Score:

85 - Strong

Actual Implementation Score:

57 - Very Weak

Category I. Civil Society, Public Information and Media

I-1. ⁶⁸Civil Society Organizations

1. Are anti-corruption/good governance CSOs legally protected?

100

1a. In law, citizens have a right to form civil society organizations (CSOs) focused on anti-corruption or good governance.

YES

NO

Comments:

Notwithstanding these provisions, there have been instances when registration applications have been delayed unduly, such as the application by the Chama cha Maskini, literally the Party of the Poor.

References:

Section 80 of the Constitution of Kenya provides that: no person shall be hindered in the enjoyment of his freedom of assembly and association, that is to say, his right to assemble freely and associate with other persons and in particular to form or belong to trade unions, or other associations for the protection of their interests." Registration of such activities is provided for under the Societies Act, Cap 108 of the Laws of Kenya, while non-government organisations are also regulated under the NGO Coordination Act.

YES: A YES score is earned when freedom to assemble into groups promoting good governance or anti-corruption is protected by law, regardless of political ideology, religion or objectives. Groups with a history of violence or terrorism (within last ten years) may be banned. Groups sympathetic to or related to banned groups must be allowed if they have no history of violence.

NO: A NO score is earned when any single non-violent group is legally prohibited from organizing to promote good governance or anti-corruption. These groups may include non-violent separatist groups, political parties or religious groups.

1b. In law, anti-corruption/good governance CSOs are free to accept funding from any foreign or domestic sources.

YES | NO

Comments:

Indeed, most such CSOs have traditionally been donor funded. However, the government recently has moved to undermine donor/CSO interactions by establishing a sector-wide reform program, the Governance, Justice, Law and Order Sector program (GJLOS) under its Ministry of Justice and Constitutional Affairs. Meanwhile, the war on terror” has narrowed options for donor funding as accusations have been leveled against some CSOs with Islamic leanings of being channels through which fundamentalists operate. The bombing of the U.S. embassy in Nairobi in August 1998 was seen to have been facilitated by such links.

References:

There is no law that bars any funding source. However, the Societies Act (Cap 108) requires such organizations to keep books of accounts (Section 26) and submit annual returns while the Registrar of Societies can demand to information on accounts (Section 31).

YES: A YES score is earned if anti-corruption/good governance CSOs face no legal or regulatory restrictions to raise or accept funds from any foreign or domestic sources. A YES score may still be earned if funds from groups with a history of violence or terrorism (within last ten years) are banned.

NO: A NO score is earned if there any formal legal or regulatory bans on foreign or domestic funding sources for CSOs focused on anti-corruption or good governance.

1c. In law, anti-corruption/good governance CSOs are required to disclose their sources of funding.

YES | NO

References:

Sections 26, 30 and 31 of the Societies Act requires this.

YES: A YES score is earned if anti-corruption/good governance CSOs are required to publicly disclose their sources of funding.

NO: A NO score is earned if no such public disclosure requirement exists.

2. Are good governance/anti-corruption CSOs able to operate freely?

83

2a. In practice, the government does not create barriers to the organization of new anti-corruption/good governance CSOs.

100 | 75 | 50 | 25 | 0

Comments:

While Kenya's 1990 return to multi-partism opened up space for CSO activities, the Registrar of Societies and the NGO Coordination Bureau often have been manipulated to block or undermine some initiatives that are seen to be radical. The hue and cry over the September 2006 registration of umbrella opposition party ODM-Kenya is a recent example of the Registrar of Societies' lack of independence.

References:

The Societies Act (Cap 108) provides for the mandatory registration of all CSOs, including names of officials, physical addresses, etc. The NGO Coordination Act also requires such detail.

100: CSOs focused on promoting good governance or anti-corruption can freely organize with little to no interaction with the government, other than voluntary registration.

75:

50: CSOs focused on promoting good governance or anti-corruption must go through formal steps to form, requiring interaction with the state such as licenses or registration. Formation is possible, though there is some burden on the CSO. Some unofficial barriers, such as harassment of minority groups, may occur.

25:

0: Other than pro-government groups, CSOs focused on promoting good governance or anti-corruption are effectively prohibited, either by official requirements or by unofficial means, such as intimidation or fear.

2b. In practice, anti-corruption/good governance CSOs actively engage in the political and policymaking process.

100 | 75 | 50 | 25 | 0

Comments:

CSO activities in advocacy, capacity-building and whistle-blowing have increased greatly in the multiparty era. Apart from their high-profile participation in the drafting of the constitution, they have monitored elections and had a significant role in the November 2005 defeat of the government's preferred version of the draft constitution. Opportunity for CSOs often are tied to rules and regulation governing the domain in which they operate. For instance, Kenya's long-running constitution review process was heavily chaperoned by CSO activists operating within the context of the Constitution of Kenya Review Commission Act. The budget process also provides some scope for CSO interventions in policymaking, through the Medium Term Expenditure Framework system.

100: Civil society organizations focused on anti-corruption or good governance are an essential component of the political process. CSOs provide widely valued insights and have political power. Those CSOs play a leading role in shaping public opinion on political matters.

75:

50: Anti-corruption/good governance CSOs are active, but may not be relevant to political decisions or the policymaking process. Those CSOs are willing to articulate opinions on political matters, but have little access to decision makers. They have some influence over public opinion, but considerably less than political figures.

25:

0: Anti-corruption/good governance CSOs are effectively prohibited from engaging in the political process. Those CSOs are unwilling to take positions on political issues. They are not relevant to changes in public opinion.

2c. In practice, no anti-corruption/good governance CSOs have been shut down by the government for their work on corruption-related issues during the study period.

YES | NO

Comments:

No CSOs have been shut down, but the government often has viewed radicalism” with disfavor. For example, in the spirit of GJLOS programme, the government established its own human rights watchdog, the Kenya National Commission on Human Rights (KNCHR) to take the wind out of the sail of the long-running Kenya Human Rights Commission. However, KNCHR’s director is now under siege for being too independent, literally stalling the Commission’s work.

Furthermore, Transparency International’s (TI) local executive director was forced out of office by a board which is viewed as highly pro-government. The previous TI director, who became a permanent secretary on governance and corruption in the government, fled into self-exile because he had revealed instances of corruption in high government.

YES: A YES score is earned if there were no CSOs shut down by the government or forced to cease operations because of their work on corruption-related issues during the study period.

NO: A NO score is earned if any CSO has been effectively shut down by the government or forced to cease operations because of its work on corruption-related issues during the study period. The causal relationship between the cessation of operations and the CSO’s work may not be explicit, however the burden of proof here is low. If it seems likely that the CSO was forced to cease operations due to its work, then the indicator is scored as a NO. Corruption is defined broadly to include any abuses of power, not just the passing of bribes.

3. Are civil society activists safe when working on corruption issues?

67

3a. In practice, in the past year, no civil society activists working on corruption issues have been imprisoned.

YES | NO

Comments:

The shift to decentralised project funding has opened opportunities for fungibility of project funds. It is likely, therefore, that enthusiastic activists at the grass-roots level might be experiencing different forms of harrassment that do not reach the media.

In the case of the man who went to examine the construction site, it is the Kenya Human Rights Commission (KHRC) that reported to a workshop on decentralised funds management that the people they were training to monitor such funds’ use are asking for protection since one of them was in custody for making inquiries. IN late December 2006, KHRC informed this researcher that the man was out of jail on bond, awaiting trial for impersonating a public officer.” Much evidence is emerging countrywide of gross misuse of such funds, which is why politicians do not want people “snooping around” their projects.

References:

The Kenya Human Rights Commission has reported that a Mombasa graduate of its awareness campaign on the use of decentralized funds was detained at Shimo la Tewa prison pending trial for having questioned contractors at a construction site.

YES: A YES score is earned if there were no CSO activists imprisoned related to work covering corruption.

NO: A NO score is earned if any activist was jailed in relation to work covering corruption. The causal relationship between the official charges and the person's work may not be explicit, however the burden of proof here is low. If it seems likely that the p

3b. In practice, in the past year, no civil society activists working on corruption issues have been physically harmed.

YES | NO

Comments:

However, Nairobi City Council police assaulted activist Omondi Odhiambo when he intervened on behalf of a breast-feeding hawker who was being roughed up for not being able to bribe against her arrest. The officers involved were arraigned in court, but Odhiambo left the country before the matter was finalized.

References:

No high-profile cases have been reported by the media.

YES: A YES score is earned if there were no documented cases of CSO activists covering corruption being assaulted in the specific study period. A YES score can be earned if there was an attack but it was clearly unrelated to the activist's work.

NO: A NO score is earned if there were any documented cases during the study period of assault to an activist who covers corruption. Corruption is defined broadly to include any abuses of power, not just the passing of bribes.

3c. In practice, in the past year, no civil society activists working on corruption issues have been killed.

YES | NO

Comments:

No deaths have been reported specifically relating to corruption.

However, the national and global meadia (notably BBC) has widely reported the former corruption and governance permanent secretary (PS) revealing from self-exile in UK that the then Justice minister warned him of threats to his life over his revelations of corruption in high government, dubbed the Anglo-Leasing Scandal in which multimillion-dollar payments were made by government agencies to nonexistent companies in the West. The former PS also revealed that the current director of the Kenya Anti-Corruption Commission warned him against returning to Kenya as his life would be in danger.

References:

<http://www.timesnews.co.ke/20sep06/editorials/editorial1.html>

YES: A YES score is earned if there were no documented cases of CSO activists being killed related to a corruption case in the specific study period.

NO: A NO score is earned if there were any documented cases during the study period where a person was killed related to a corruption trial, scandal or investigation. The relationship between a mysterious death and an individual's history may not

be clear, however the burden of proof here is low. If it is reasonable that a person was killed in relation to his or her work on corruption issues, then the indicator is scored as a NO. Corruption is defined broadly to include any abuses of power, not just the passing of bribes.

4. Can citizens organize into trade unions?

75

4a. In law, citizens have a right to organize into trade unions.

YES | NO

Comments:

Although trade unions are permitted, liberalization reforms that saw the government retrench thousands of public employees have enhanced the rights of private-sector employers to hire and fire, considerably reducing the bargaining strength of unions. The strength of trade union leadership also has been considerably eroded, the Kenya National Teachers Union being unable to extract the full benefits of a 1997 pay award by the Industrial Court against the government.

References:

Section 80 of the Constitution provides for the freedom to assemble and associate freely, and to form and belong to trade unions, whose business are conducted under the Trade Unions Act (Cap 233 of the Laws of Kenya). The Trade Disputes Act (Cap 234) provides for an Industrial Court.

YES: A YES score is earned when trade unions are allowed by law, regardless of political ideology, religion or objectives. Groups with a history of violence or terrorism (within last ten years) may be banned. Groups sympathetic to or related to banned groups must be allowed if they have no history of violence.

NO: A NO score is earned when any single non-violent trade union is legally prohibited by the government from organizing.

4b. In practice, citizens are able to organize into trade unions.

100 | 75 | 50 | 25 | 0

Comments:

In practice, the Labour minister rarely endorses strike action, a union's ultimate weapon. In the absence of worker safety nets, such as health insurance and welfare payments, and in the face of massive unemployment and under-employment, people in employment are wary of union radicalism.

The umbrella trade union body is the Central Organisation of Trade Unions, established in 1965. While its individual membership reached 400,000 in the 1980s, structural adjustment programs have reduced its strength to 250,000 workers spread over 39 affiliated unions.

References:

http://www.cotu-kenya.org/historical_background.htm

100: Trade unions are common and are an important part to the political process and political discourse. Trade union organizers have widely understood rights. Trade unions are free from intimidation or violence.

75:

50: Trade unions exist, but are not always relevant to politics or policy debates. Barriers to organizing trade unions exist, such as intimidation at work, or retribution firings. Trade union organizers have some rights, but these may not be commonly known, or are difficult to defend.

25:

0: Trade unions are rare. Significant barriers to organization exist, including direct violence. Rights of union organizers are not widely known, or are ineffective in protecting organizers.

I-2. Media

5. Are media and free speech protected?

100

5a. In law, freedom of the media is guaranteed.

YES | NO

Comments:

The 1990 return to multi-partism opened up space for the greater enjoyment of these freedoms, which had always existed but were trampled on by the single-party dictatorship. Besides the emergence of a somewhat informal print media (gutter press"), increased freedom has been manifest in the proliferation of the electronic media, including numerous regional FM radio stations.

References:

Section 79 of Chapter V of the constitution protects the freedom of expression, providing that except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, there will be no interference to freedoms to hold opinions, receive ideas and information, communicate ideas and information (to the public generally or to any persons) and to correspondence.

YES: A YES score is earned if freedom of the press is guaranteed in law, including all political parties, religions, and ideologies.

NO: A NO score is earned if any specific publication relating to government is legally banned, or any general topic is prohibited from publication. Specific restrictions on media regarding privacy or slander are allowed, but not if these amount to legal censorship of a general topic, such as corruption or defense. A NO score is earned if non-government media is prohibited or restricted.

5b. In law, freedom of speech is guaranteed.

YES | NO

Comments:

A major indicator of increased freedom of speech is manifest in the discussions on FM radio stations and the numerous TV talk shows, as well as the elimination of previously cumbersome processes that were required to licence a rally or public meeting.

References:

Secton 79 of the constitution provides for this.

YES: A YES score is earned if freedom of individual speech is guaranteed in law, including all political parties, religions, and ideologies.

NO: A NO score is earned if any individual speech is legally prohibited, regardless of topic. Specific exceptions for speech linked with a criminal act, such as a prohibition on death threats, are allowed. However, any non-specific prohibition earns a NO score.

6. Are citizens able to form media entities?

63

6a. In practice, the government does not create barriers to form a media entity.

100 | 75 | 50 | 25 | 0

Comments:

While FM radio stations and the print media have proliferated, problems remain with access to broadcast bandwidth and frequency from Communications Commission of Kenya. The government's recent criminal raid on the Standard newspapers and its TV station KTN remains unpunished, while another raid on an evangelical FM station at which a security officer was shot dead remains unresolved. Such actions could obviously deter further expansion in the sector.

A bill pending before Parliament proposes to transform the self-regulating Media Council of Kenya into a state agency with powers to accredit journalists on an annual basis, meaning that undesirable elements" could be barred from the profession.

References:

Kenya Communications Act 77(1) Every application for a licence under this Act shall be in the prescribed form addressed to the Commission and shall be accompanied by such fee as may be prescribed.(2) The Commission may, with respect to any application, require the applicant to supply such additional information as it may consider necessary in considering the application.

100: Media entities can freely organize with little to no interaction with the government. Media groups have equal access to broadcast bandwidth through a reasonably fair distribution system.

75:

50: Formation of media groups is possible, though there is some burden on the media group including overly complicated registration or licensing requirements. Some unofficial barriers, such as harassment of minority groups, may occur. Division of broadcast bandwidth is widely viewed to be somewhat unfair.

25:

0: Media groups are effectively prohibited, either by official requirements or by unofficial means, such as intimidation or fear. Division of broadcast bandwidth is widely viewed to be used as a political tool.

6b. In law, where a media license is necessary, there is an appeal mechanism if a license is denied or revoked.

YES | NO

Comments:

During the November 2005 referendum on the draft constitution, the closure of an FM radio station perceived to be against the draft resulted in widespread protests leading to its re-opening. The government also shut down the operations of the Standard/KTN Group after its violent raid on their premises during which property was destroyed, burnt or confiscated and journalists arrested. However, the company resumed operations thereafter.

References:

http://africa.rights.apc.org/index.shtml?apc=21872n21843e_1

Licensing authority lies with the Communications Commission of Kenya, a state corporation under the Ministry of Information. The pertinent legislation include the Kenya Communications Act Part 1V Radio Communications (35) Licensing requirements; and Cap 497 Trade Licensing Act (15) Appeals:(1) Subject to subsection (2), which provides that any person who is aggrieved by the action of a licensing officer in:

- (a) refusing to grant a licence or conditional licence or revoking a licence; or
 - (b) imposing conditions in a licence or conditional licence; or
 - (c) refusing to grant authority in a licence for the purposes of section 5 (2); or
 - (d) refusing to amend a licence under section 10, may within fourteen days of receipt by him of written notification of such action, appeal to the Minister, whose decision shall be final.
- (2) The Minister shall not dismiss an appeal under subsection (1) unless he has first referred it to an appeals advisory committee and considered the advice of that committee.
- (3) The appeals advisory committee provided for in subsection (2) shall consist of not less than:
- (a) three members of the National Assembly;
 - (b) two advocates; and
 - (c) three persons who have experience in one of the occupations specified in the definition of business” in section 2(1).

Under the Communication Act’s Sec 79 on the grant of licence, the Commission may, upon expiry of the period of notice under section 78 grant a licence to the applicant if satisfied that the applicant should be licensed, subject to such conditions, including the payment of such licence fee as may be prescribed:

Provided that where the Commission does not grant a licence, it shall notify the applicant in writing of the reasons for refusal within sixty days of such refusal and the applicant may, if aggrieved, appeal to the Tribunal.

YES: A YES score is earned if there is, in law or in accompanying regulations, a formal process to appeal a denied media license. A YES score is also earned if no license is necessary.

NO: A NO score is earned if there is no appeal process for media licenses.

6c. In practice, where necessary, citizens can obtain a media license within a reasonable time period.

100 | 75 | 50 | 25 | 0

Comments:

Licences are issued by the Communications Commission of Kenya on behalf of the Information and Communications minister.

References:

Sec 79 Grant of licence: The Commission may, upon expiry of the period of notice under Section 78 grant a licence to the applicant if satisfied that the applicant should be licensed, subject to such conditions, including the payment of such licence fee as may be prescribed. Provided that where the Commission does not grant a licence, it shall notify the applicant in writing of the reasons for refusal within sixty days of such refusal and the applicant may, if aggrieved, appeal to the Tribunal.

100: Licenses are not required or licenses can be obtained within two months.

75:

50: Licensing is required and takes more than two months. Some groups may be delayed up to six months.

25:

0: Licensing takes close to or more than one year for most groups.

6d. In practice, where necessary, citizens can obtain a media license at a reasonable cost.

100 | 75 | **50** | 25 | 0

Comments:

The Communications Commission of Kenya advise that there is no application fee for a licence to operate a radio or TV station. However, the annual fees payable once the station is operational are K Sh130,000 (approximately US\$1,800) and K Sh360,000 (US\$5,000) respectively. These fees are well beyond the means of an average Kenyan in a country where nearly 60% of the population live on less than K Sh2,500 (US\$35) per month.

100: Licenses are not required or can be obtained at minimal cost to the organization. Licenses can be obtained on-line or through the mail.

75:

50: Licenses are required, and impose a financial burden on the organization. Licenses may require a visit to a specific office, such as a regional or national capital.

25:

0: Licenses are required, and impose a major financial burden on the organization. Licensing costs are prohibitive to the organization.

7. Are the media able to report on corruption?

75

7a. In law, it is legal to report accurate news even if it damages the reputation of a public figure.

YES | NO

Comments:

Reporting on public figures is legal, and Kenya has a thriving gutter press” which provide lurid details on leaders’ private lives.

However, the government’s Official Secrets Act provides a useful screen behind which to hide sensitive information. And the impending Media Council of Kenya Bill designed to place media regulation in state hands reflects the government’s desire to shackle the media.

References:

Such reporting is provided for by the constitutional freedom of speech, only subject to the provisions of the Defamation Act (Cap 36) which consolidates and amends the statute law relating to libel, other than criminal libel, slander and other malicious falsehoods.

YES: A YES score is earned if it is legal to report accurate information on public figures regardless of damage to their reputations. Public figures are defined broadly, including anyone in a position of responsibility in the government or civil service; any political leader; leaders of civil society groups including religious groups, trade unions, or NGOs; leaders or officers of large businesses. A YES score can still be earned if a reckless disregard for the truth (i.e. slander) is prohibited.

NO: A NO score is earned if privacy laws protect any public figures (as defined in the YES coding) from accurate information.

7b. In practice, the government or media owners/distribution groups do not encourage self-censorship of corruption-related stories.

100 | 75 | 50 | 25 | 0

Comments:

The media avidly reports corruption-related stories even when the government is discomfited, as we saw with the Anglo-Leasing saga and the misuse of state resources during the November 2005 referendum on the draft constitution and the 2006 by-elections. Indeed, state-owned Kenya Broadcasting Corp. lost a managing director who was seen not to toe the line on coverage of corruption and other irregularities.

References:

In conjunction with the Friedrich-Ebert-Stiftung Foundation, the media fraternity’s self-regulating Media Council of Kenya publishes and regularly updates the Code of Conduct and Practice of Journalism in Kenya, most recently in 2004. The document is a product of deliberations by stakeholders including the state media under the auspices of the Media Industry Steering Committee. See <http://library.fes.de/pdf-files/bueros/kenia/01392.pdf>.

100: The government, its proxies, or media ownership/distribution groups make no attempt to restrict media coverage of corruption-related issues through unofficial means.

75:

50: The government, its proxies, or media ownership/distribution groups make some attempts to restrict media coverage of corruption-related issues through unofficial means, such as restricting access by disfavored media outlets, or other short-term consequences. Violent reprisals against media outlets are rare.

25:

0: The government, its proxies, or media ownership/distribution groups actively use illegal methods to restrict reporting of corruption-related issues. This may include harassment, arrests, and threats. Journalists and publishers take a personal risk to report on corruption, and media outlets who commonly report on corruption face long-term consequences or violent reprisals.

7c. In practice, there is no prior government restraint on publishing corruption-related stories.

100 | 75 | 50 | 25 | 0

Comments:

There is no pre-publication censorship – no prior government restraint.”

However, the previous government discourage reporting with excessive punitive court fines in libel cases filed by senior cabinet officers mentioned in corruption cases. Proof in these reports was undermined by the Official Secrets Act. Such implicit “prior restraint” has been carried into the new regime via the first lady’s all-night siege of a TV station and the government’s police raid on another TV station and newspaper.

100: The government never prevents publication of controversial corruption-related materials.

75:

50: The government prevents publication of controversial corruption-related material in cases where there is a strong political incentive to suppress the information. In countries where illiteracy is higher, the government may allow a free print press but censor broadcast media.

25:

0: The government regularly censors material prior to publication, especially politically sensitive or damaging corruption-related material.

8. Are the media credible sources of information?

69

8a. In law, media companies are required to disclose their ownership.

YES | NO

References:

This is a requirement under the Companies Act (Cap 486) and the Trade Licensing Act (Cap 497). Such information would also be required by the Communications Commission of Kenya. Kenyan law does not allow wholly owned foreign companies.

YES: A YES score is earned if media companies are required by law to disclose all owners of the company.

NO: A NO score is earned if there is no such requirement or if the requirement is optional, only partially applicable, or exempts certain type of entities or agents from being disclosed.

8b. In practice, journalists and editors adhere to strict, professional practices in their reporting.

100 | 75 | **50** | 25 | 0

Comments:

The media self-regulates through the Media Council of Kenya, which publishes the Code of Conduct and Practice of Journalism in Kenya. While the mainstream media is largely quite professional, there is anecdotal evidence that some managers can bow to parochial interests, including suppressing issues on behalf of the government. Among the alternative press, "allegations are rife of demands for bribes to manipulate information to serve partial interests.

100: Editors and journalists at the major media outlets abide by a strict journalistic code of conduct and are unwilling to alter their coverage of a particular issue, event or person in exchange for money, gifts, or other favors or remuneration.

75:

50: Editors and journalists at the major media outlets generally avoid altering coverage in exchange for favors but some exceptions have been noted. Not all newsrooms abide by a formal journalistic code of conduct.

25:

0: Editors and journalists are widely known to sell "favorable or unfavorable coverage in exchange for money, gifts, or other remuneration. The major media outlets do not abide by any formal journalistic code of conduct.

8c. In practice, during the most recent election, political parties or independent candidates received fair media coverage.

100 | **75** | 50 | 25 | 0

Comments:

The main media houses try to be professional, but there is evidence of parochial considerations from time to time. The ex-managing director of state-owned Kenya Broadcasting Corp. was replaced for being too impartial.

100: All political parties and independent candidates have some access to media outlets. Individual media outlets may have biases, but on balance, the national media coverage reflects the interests of the electorate. Media groups generally act as disinterested parties in an election. In places where a government is popular with the public, opposition viewpoints can access the public via media outlets.

75:

50: Major popular media outlets have a persistent bias regarding some parties or independent candidates. Some major parties may be partially excluded from media coverage, or draw more negative coverage. Media sectors may have distinct biases, such as newspapers favoring one party, while radio favors another.

25:

0: The mass media, on balance, have clear preferences in election outcomes and coverage is driven to achieve these goals. Some major parties or independent candidates are excluded or consistently negatively portrayed by mass media. Dissenting political opinions are only found on fringe or elite media outlets, such as Web sites.

8d. In practice, political parties and candidates have equitable access to state-owned media outlets.

100 | 75 | **50** | 25 | 0

Comments:

Even after the 1990 re-introduction of multipartism, the ruling KANU government continued to use the state media as its exclusive preserve. Toward the end of the 1990s, much space opened up for opposition and independent interest leading up to the 2002 ouster of the KANU government. However, the NARC government in power since 2003 has taken a leaf from KANU's books, transferring an independent-minded managing director out of the national radio and TV station.

100: The government ensures that equal access and fair treatment of election contestants is provided by all state-owned media outlets, including all electronic and print media. This obligation extends to news reports, editorial comment, and all other content.

75:

50: The government generally ensures equal access and fair treatment of all candidates and parties by state-owned media outlets but some exceptions exist. State-owned media may occasionally discriminate against particular parties or candidates and advertising rates may be confusing or non-transparent.

25:

0: The government uses state-owned media to routinely discriminate against opposition candidates and parties. Advertising space may be denied to opposition candidates and parties or higher rates may be charged.

9. Are journalists safe when investigating corruption?

33

9a. In practice, in the past year, no journalists investigating corruption have been imprisoned.

YES | **NO**

Comments:

The past year has seen many instances of journalists being harassed and jailed (detained in police custody pending appearance in court) over reports related to various types of abuse of power.

However, a draft bill would guarantee the right to information, applications and accessing information, appeals, offences and penalties, whistleblower protection, annual reporting, as well as repeal the Official Secrets Act.

References:

See http://www.freemedia.at/cms/ipi/freedom_detail.html?country=/KW0001/KW0006/KW0160/&year=2005.

See also http://www.rsf.org/article.php3?id_article=16515

YES: A YES score is earned if there were no journalists imprisoned related to work covering corruption during the study period.

NO: A NO score is earned if any journalist was jailed because of his/her work covering corruption during the study period. The causal relationship between the official charges and the journalist's work may not be explicit, however the burden of proof here is low. If it seems likely that the journalist was imprisoned due to his or her work, then the indicator is scored as a NO. Corruption is defined broadly to include any abuses of power, not just the passing of bribes.

9b. In practice, in the past year, no journalists investigating corruption have been physically harmed.

YES | **NO**

Comments:

There have been many instances of journalists being injured while covering such activities, including the case of Clifford Otieno, who fled to South Africa following his attempts to sue the first lady for allegedly assaulting him while on duty and damaging his camera.

References:

The following Reporters Without Borders report summarizes the extent of these problems in Kenya – http://www.rsf.org/article.php3?id_article=13814

YES: A YES score is earned if there were no documented cases of journalists being assaulted during the specific study period for their work covering corruption issues.

NO: A NO score is earned if there were any documented cases of assault to a journalist covering corruption during the study period. Corruption is defined broadly to include any abuses of power, not just the passing of bribes.

9c. In practice, in the past year, no journalists investigating corruption have been killed.

YES | NO

Comments:

There is no report as such.

YES: A YES score is earned if there were no documented cases of journalists being killed because of their work covering corruption-related issues during the study period.

NO: A NO score is earned if there were any documented cases where a journalist was killed in relation to his or her work covering corruption-related issues in the study period. The relationship between a mysterious death and an individual's work may not be clear, however the burden of proof here is low. If it is a reasonable guess that a person was killed in relation to his or her work on corruption issues, then the indicator is scored as a NO. Corruption is defined broadly to include any abuses of power, not just the passing of bribes.

10. Do citizens have a legal right of access to information?

67

10a. In law, citizens have a right of access to government information and basic government records.

YES | NO

Comments:

The Government Printers regularly publishes data, such as census returns, the constitution, acts of Parliament, statistical abstracts, economic surveys, etc. Further, information can be obtained from the Office of Public Communications (at) or through respective ministry and agency accounting officers.

The International Commission of Jurists (ICJ), Kenya chapter, has been at the forefront of demanding that the government enact legislation concerning the freedom of information, having produced the Draft Access to Information Bill of 2000. ICJ organized the International Right to Know Day (Sept. 28th) on the doorsteps of the Information ministry to emphasize such rights to the government. In 2006, a Freedom of Information Bill was introduced in the Parliament but it will take a long time to enact, if ever.

References:

<http://www.communication.go.ke>

While the Kenya Gazette Supplement No. 63 of 2005 provides for the right of access to information, various statutes undermine such access, primary among these being the Official Secrets Act. The other statutes involved include the Public Archives and Documentation Service Act, the Preservation of Public Security Act, the Defamation Act, the National Security Intelligence Act, the National Assembly (Powers and Privileges Act) and the Public Officers Ethics Act.

YES: A YES score is earned if there is a formal right to access any government documents. Exceptions can be made for national security reasons or individual privacy, but they should be limited in scope. All other government documents should be available upon a public request. There should be a formal process for requesting this information.

NO: A NO score is earned if there is no such right.

10b. In law, citizens have a right of appeal if access to a basic government record is denied.

YES | NO

Comments:

There is no formal appeal process against denied access to government data. However, one could file a civil suit against the government for such access.

YES: A YES score is earned if there is a formal process of appeal for rejected information requests.

NO: A NO score is earned if there is no such formal process.

10c. In law, there is an established institutional mechanism through which citizens can request government records.

YES | NO

Comments:

While there is no freedom of information law, the Official Secrets Act defines categories of information and government documentation indicating who may handle such. Officially therefore, citizens can request information from respective ministries' or agencies' chief accounting officers, normally the permanent secretaries or chief executive officers.

YES: A YES score is earned if there is a formal government mechanism/institution through which citizens can access government records available under freedom of information laws. This mechanism could be a government office (or offices within agencies or ministries) or an electronic request system.

NO: A NO score is earned if there is no such formal mechanism or institution.

11. Is the right of access to information effective?

45

11a. In practice, citizens receive responses to access to information requests within a reasonable time period.

100 | 75 | 50 | 25 | 0

Comments:

Publications can be purchased over the counter at the Government Printers, but written requests for information might take time and in some instances require the officer concerned to be bribed.

100: Records are available on-line, or records can be obtained within two weeks. Records are uniformly available; there are no delays for politically sensitive information. Legitimate exceptions are allowed for sensitive national security-related information.

75:

50: Records take around one to two months to obtain. Some additional delays may be experienced. Politically-sensitive information may be withheld without sufficient justification.

25:

0: Records take more than four months to acquire. In some cases, most records may be available sooner, but there may be persistent delays in obtaining politically sensitive records. National security exemptions may be abused to avoid disclosure of government information.

11b. In practice, citizens can use the access to information mechanism at a reasonable cost.

100 | 75 | 50 | 25 | 0

Comments:

Some records are published and sold by the Government Printer; other information is available online. Where access to information must be approved by an accounting officer, this can be time consuming and expensive, as junior officers use such conditions to extort the public.

100: Records are free to all citizens, or available for the cost of photocopying. Records can be obtained at little cost, such as by mail, or on-line.

75:

50: Records impose a financial burden on citizens, journalists or CSOs. Retrieving records may require a visit to a specific office, such as a regional or national capital.

25:

0: Retrieving records imposes a major financial burden on citizens. Records costs are prohibitive to most citizens, journalists, or CSOs trying to access this information.

11c. In practice, citizens can resolve appeals to access to information requests within a reasonable time period.

100 | 75 | 50 | 25 | 0

Comments:

Response to appeals varies with agencies or departments as there is no formal institution for these. However, recently instituted performance contracts mean that one should expect greater responsiveness from government officers.

100: The agency/entity acts on appeals quickly. While some backlog is expected and inevitable, appeals are acknowledged promptly and cases move steadily towards resolution.

75:

50: The agency/entity acts on appeals quickly but with some exceptions. Some appeals may not be acknowledged, and simple issues may take more than two months to resolve.

25:

0: The agency/entity does not resolve appeals in a timely fashion quickly. Appeals may be unacknowledged for many months and simple issues may take more than three months to resolve.

11d. In practice, citizens can resolve appeals to information requests at a reasonable cost.

100 | 75 | 50 | 25 | 0

Comments:

It depends on the agency or department. Where information is not decentralized to the sub-district level or available online, appeal for access to it will be expensive because of the need to travel.

100: In most cases, the appeals mechanism is an affordable option to middle class citizens seeking to challenge an access to information determination.

75:

50: In some cases, the appeals mechanism is not an affordable option to middle class citizens seeking to challenge an access to information determination.

25:

0: The prohibitive cost of utilizing the access to information appeals mechanism prevents middle class citizens from challenging access to information determinations.

11e. In practice, the government gives reasons for denying an information request.

100 | 75 | 50 | 25 | 0

Comments:

The typical explanation for denied access is some aspect of the Official Secrets Act, but this is not always stated categorically.

100: The government always discloses to the requestor the specific, formal reasons for denying information requests.

75:

50: The government usually discloses reasons for denying an information request to the requestor, with some exceptions. The reasons may be vague or difficult to obtain.

25:

0: The government does not regularly give reasons for denying an information request to the requestor.

Category II. Elections

64
II-1. Voting & Citizen Participation

12. Is there a legal framework guaranteeing the right to vote?

12a. In law, universal and equal adult suffrage is guaranteed to all citizens.

YES | NO

Comments:

The laws governing eligibility to vote or contest electoral office have often been flouted, with the electoral Commission of Kenya failing to indict persons violating electoral laws, such as through bribing voters or using government officers to campaign.

References:

Section 43 of the Constitution provides that any citizen of Kenya over the age of 18 can register as a voter. However, this right is presently reserved for resident Kenyans alone. The Electoral Commission of Kenya clarifies as follows at <http://www.eck.or.ke>: A person shall be qualified to be registered as a voter in Elections to the National Assembly and in the elections of the President if he/she is a Kenyan citizen of age 18 who has been ordinarily resident in Kenya either for a period of not less than one year immediately preceding that date or for a period of, or periods amounting in the aggregate to, not less than four years in the eight years immediately preceding that date. Alternatively, the person should have, for a period of, or periods amounting in the aggregate to, not less than five months in the twelve months immediately preceding that date, been ordinarily resident in the constituency in which he applies to be registered, or has for such a period or periods carried on business there or has for such a period or periods been employed there or has for such a period or periods lawfully possessed land or residential buildings there. No person shall be qualified to be registered as a voter in elections if:

Under any law in force in Kenya, he/she is adjudged or otherwise declared to be of unsound mind, is an undischarged bankrupt, having been adjudged, or otherwise declared bankrupt under a law in force in Kenya, is detained in lawfully custody, or is disqualified there from by Act of Parliament on the grounds of his/her having been convicted of an offence connected with elections or on the grounds of his/her having been reported guilty of the offence by the court trying an election petition.

YES: A YES score is earned if the right to vote is guaranteed to all citizens of that country. A YES score can still be earned if voting procedures are, in practice, inconvenient or unfair.

NO: A NO score is earned if suffrage is denied by law to any group of adult citizens for any reason. Citizen is defined broadly, to include all ethnicities, or anyone born in the country. A NO score is earned if homeless or impoverished people are legally prohibited from voting.

12b. In law, there is a legal framework requiring that elections be held at regular intervals.

YES | NO

Comments:

Kenya has abided by this provision diligently during its 40-odd years of independence.

References:

Chapter 2 (Part I Sec 9) of the constitution provides that a president shall hold office for a term of five years beginning from the date of swearing in, after which there will be a general election covering the presidency, Parliament and local authorities.

YES: A YES score is earned if there is a statutory or other framework enshrined in law that mandates elections at reasonable intervals.

NO: A NO score is earned if no such framework exists.

13. Can all citizens exercise their right to vote?

83

13a. In practice, all adult citizens can vote.

100 | 75 | 50 | 25 | 0

Comments:

While voting is open to all adult citizens, electioneering often involves violence which engenders apathy and deters people from voting.

100: Voting is open to all citizens regardless of race, gender, prior political affiliations, physical disability, or other traditional barriers.

75:

50: Voting is often open to all citizens regardless of race, gender, prior political affiliations, physical disability, or other traditional barriers, with some exceptions.

25:

0: Voting is not available to some demographics through some form of official or unofficial pressure. Voting may be too dangerous, expensive, or difficult for many people.

13b. In practice, ballots are secret or equivalently protected.

100 | 75 | 50 | 25 | 0

Comments:

These provisions are prone to abuse, especially because the large numbers of illiterate voters must rely on others to mark their ballots. Furthermore, the ruling party often takes advantage of its incumbency to use government officers in the districts to influence election management processes.

100: Ballots are secret, or there is a functional equivalent protection, in all cases.

75:

50: Ballots are secret, or there is a functional equivalent protection, in most cases. Some exceptions to this practice have occurred. Ballots may be subject to tampering during transport or counting.

25:

0: Ballot preferences are not secret. Ballots are routinely tampered with during transport and counting.

13c. In practice, elections are held according to a regular schedule.

100 | 75 | 50 | 25 | 0

Comments:

The constitutional provision for a general election every 5 years has been observed consistently since independence. Where a parliamentary seat falls vacant by cause of death of a sitting member, or through some other disqualification, such as nullification of an election through a court petition, by-elections have also been held according to the letter of the law.

100: Elections are always held according to a regular schedule, or there is a formal democratic process for calling a new election, with deadlines for mandatory elections.

75:

50: Elections are normally held according to a regular schedule, but there have been recent exceptions. The formal process for calling a new election may be flawed or abused.

25:

0: Elections are called arbitrarily by the government. There is no functioning schedule or deadline for new elections.

14. Are citizens able to participate equally in the political process?

85

14a. In law, all citizens have a right to form political parties.

YES | NO

Comments:

Registration of political parties is vested in the Registrar of Societies. Applicants furnish the registrar with details of the new party, such as name, constitution, location of head office and interim officials.

References:

Societies Act (Cap 108 of the Laws of Kenya)

YES: A YES score is earned if citizens have the right to form political parties without interference from government. A YES score may still be earned if groups or individuals with a history of violence or terrorism (within last ten years) are banned from forming political parties. Non-discriminatory minimal criteria (e.g. minimum age) are also allowed.

NO: A NO score is earned if there are any legal or regulatory restrictions or prohibitions barring any types of political parties from being formed.

14b. In law, all citizens have a right to run for political office.

YES

NO

Comments:

The country does not provide for independent candidates, meaning that persons desiring to run for political office have to attach themselves to an existing political party, which will nominate them for candidacy.

References:

Sections 70, 78, 79, 80 and 81 of the Constitution guarantee fundamental freedoms and rights of conscience, expression, assembly and movement.

YES: A YES score is earned if all citizens (citizen is defined broadly, to include all ethnicities, or anyone born in the country) have the right under law to run for political office. A YES score may still be earned if Individuals with a history of violence, terrorism, or criminality are banned from running for office.

NO: A NO score is earned if there are any legal restrictions barring certain individuals or groups from running for political office.

14c. In practice, all citizens are able to form political parties.

100

75

50

25

0

Comments:

The law permitting registration of parties has in the past been extensively abused by the government, especially where it felt threatened by a prospective party. Currently, there are several party registration applications that have been pending for over a year, causing an Information assistant minister to accuse the registrar of partiality towards applications by the rich and influential.

Barriers to registration of political parties include the management the paperwork for illiterate and semi-literate people. The centralization of the Registrar of Societies office in Nairobi might also be an impediment to some. Prospective parties with a radical agenda are often also compromised in the application process, to wit the delayed registration of Chama cha Maskini (the Party of the Poor).

100: While there is no guarantee of electoral success, political parties can form freely without opposition.

75:

50: Some barriers to formation are present, such as burdensome registration requirements that may not be fairly applied. Some parties' political viewpoints may draw pressure from the government, such as surveillance or intimidation. Some political parties or organizations may have extra barriers to getting on a ballot.

25:

0: Some political parties are effectively barred from forming through some manner of official or unofficial pressure. This may include threats, arrest, or violence from competing parties or other groups.

14d. In practice, all citizens can run for political office.

100 | 75 | 50 | 25 | 0

Comments:

The electoral process is an expensive affair that can only be managed by well-heeled individuals in a country in which 60% of the population lives below the poverty line. A K Sh40,000 (US\$600) expenditure ceiling imposed on parliamentary candidates was removed in 1992, paving the way for very expensive politicking, including the use of helicopters and teams of youth wingers.

Also, the nomination process, which is run through the existing political parties, has been used to bar undesirable” candidates from contesting political office.

100: While there is no guarantee of electoral success, anyone can run for office under transparent and equitable guidelines. There is a formal process for access to the ballot which is fairly applied. The costs of running a campaign are reasonable and do not deter candidates from entering a race.

75:

50: Some barriers exist to getting on the ballot and bureaucratic or regulatory requirements for doing so may be unfairly applied. The costs of running a political campaign are significant and result in dissuading some candidates from running for office.

25:

0: Citizens can effectively be barred from the ballot through government abuse of official rules and/or unofficial pressure. The costs of running a campaign are extremely high and result in most average citizens being unable to run an effective campaign for office.

14e. In practice, an opposition party is represented in the legislature.

100 | 75 | 50 | 25 | 0

Comments:

In theory, the Kenyan parliament has four opposition parties, while the ruling NARC party, which won the 2002 general elections, is a coalition of about 7 parties. In practice, squabbles and the November 2005 referendum defeat of a NARC-backed draft constitution led NARC to sack some of its own ministers. They were replaced by politicians from opposition parties to form a national unity government.

100: The opposition party always has some influence on the proceedings of the legislature. The opposition party can introduce legislation or bring pending matters to a vote without the consent of the ruling party.

75:

50: The opposition party has influence on the proceeding of the legislature, but it is limited in scope. The opposition’s ability to force votes or publicly debate certain topics may be limited.

25:

0: The opposition party has only token participation in the legislature’s proceedings and cannot advance legislation or force a debate.

II-2. Election Integrity

15. In law, is there an election monitoring agency or set of election monitoring agencies/entities?

100

15. In law, is there an election monitoring agency or set of election monitoring agencies/entities?

YES | NO

Comments:

While the Constitution provides for an autonomous Electoral Commission, the agency has often been compromised through the lack of adequate, timely resources. For example, with a general election due in 2007, and several commissioners' terms expiring, the government has yet to address the mode of replacing them. Given the government of national unity, it is unclear which are the parties in power and which are in the opposition – a factor which is significant if, as in 1997, opposition parties are to nominate candidates to the commission.

Besides the Electoral Commission, the Kenya National Commission on Human Rights (<http://www.knchr.org>) also has been very active in monitoring elections, as has been its private sector counterpart, the Kenya Human Rights Commission. Numerous other private agencies also monitor the electoral process.

References:

Section 41 of the constitution provides for an Electoral Commission with a chairman and not less than four and not more than 21 members appointed by the president. Subsection 9 provides that the commission shall not be subject to the direction of any other person or authority in exercise of its functions. The law permits the monitoring of elections by local and international observers. On the eve of the 1997 general elections, the opposition was allowed to add 10 commissioners to the existing 12 previously appointed by the ruling party.

YES: A YES score is earned if there is an agency or set of agencies/entities formally assigned to ensure the integrity of the election process.

NO: A NO score is earned if no agency or set of agencies/entities that monitors elections. A NO score is earned if elections are only monitored by an agency informally, such as poll booth monitoring by the police.

16. Is the election monitoring agency effective?

75

16a. In law, the agency or set of agencies/entities is protected from political interference.

YES | NO

Comments:

Both agencies have been quite vocal in highlighting instances of misuse of government resources during the November 2005

draft constitution referendum and the by-elections of August 2006. KNCHR collaborated with the Kenya Human Rights Commission in producing BEHAVING BADLY: Deception, Chauvinism and Waste during the Referendum Campaigns.”

References:

Section 41 (9) of the Constitution provides that no person or agency shall interfere with the Electoral Commission in the performance of its functions. The Kenya National Commission on Human Rights (KNCHR) is also similarly autonomous.

YES: A YES score is earned only if the agency or set of agencies/entities has some formal organizational independence from the bodies being contested in the election. A YES score is still earned even if the entity is legally separate but in practice staffed by partisans.

NO: A NO score is earned if the election monitoring agency or set of agencies/entities is legally tied to bodies contesting the election (i.e. an executive branch agency such as the Interior Ministry, or a committee of the legislature). A NO score is automatically earned if there is no election monitoring agency.

16b. In practice, agency (or set of agencies/entities) appointments are made that support the independence of the agency.

100 | 75 | 50 | 25 | 0

Comments:

Appointments are not entirely objective. For example, prior to the 1997 elections, all Electoral Commissioners were hand-picked by the president. After that year, opposition parties were allowed to nominate candidates to the commission who are subsequently appointed by the president. In effect, therefore, the commissioners are partisan, a factor that might enhance the transparency of the commission's work in a multiparty context. The current hiatus in the matter of replacing commissioners whose terms are expiring suggests that the government has painted itself into a corner of sorts since it is unclear which parties make up the government and which are in opposition.

References:

Section 41(3) of the constitution provides that a person shall not be qualified to be appointed a commission if he is a member of the National Assembly or holds or acts in any office in the public service or in the armed forces of the Republic.

100: Appointments to the agency or set of agencies/entities are made based on professional qualifications. Individuals appointed are free of conflicts of interest due to personal loyalties, family connections or other biases. Individuals appointed usually do not have clear political party affiliations.

75:

50: Appointments are usually based on professional qualifications. However, individuals appointed may have clear party loyalties.

25:

0: Appointments are often based on political considerations. Individuals appointed often have conflicts of interest due to personal loyalties, family connections or other biases. Individuals appointed often have clear party loyalties.

16c. In practice, the agency or set of agencies/entities has a professional, full-time staff.

100 | 75 | 50 | 25 | 0

Comments:

The Electoral Commission of Kenya is chaired by a lawyer with long experience who also has served in Parliament. At least one other commissioner is a former parliamentarian, while the others are people with distinguished public careers. While the commission's head office in Nairobi is well staffed, its operations outside Nairobi rely to an extent on civil servants who could manipulate things in favor of their employer, the ruling party.

100: The agency or set of agencies/entities has staff sufficient to fulfill its basic mandate.

75:

50: The agency or set of agencies/entities has limited staff, or staff without necessary qualifications to fulfill its basic mandate.

25:

0: The agency or set of agencies/entities has no staff, or such a limited staff that is clearly unqualified to fulfill its mandate.

16d. In practice, the agency or set of agencies/entities makes timely, publicly available reports following an election cycle.

100 | 75 | 50 | 25 | 0

Comments:

The Electoral Commission and election monitors repeatedly point to electoral irregularities, such as voter bribery and instigation to violence. However, the commission has yet to disqualify any high-profile offenders from participating in elections or to nullify a vote under such circumstances. The commission normally announces electoral outcomes promptly and eventually submits a report to the National Assembly after each election. The commission established a Web site in 2002 and one expects that future reports will be posted there.

100: Reports are released to the public on a predictable schedule, without exceptions.

75:

50: Reports are released, but may be delayed, difficult to access, or otherwise limited.

25:

0: The agency or set of agencies/entities makes no public reports, issues reports which are effectively secret, or issues reports of no value.

16e. In practice, when necessary, the agency or set of agencies/entities imposes penalties on offenders.

100 | 75 | 50 | 25 | 0

Comments:

While the commission has previously punished some offenders, there have always been individuals on the political fringes. The commission has yet to act against any high-profile politician who has bribed and instigated violence. In both the 2005 draft constitution referendum and the 2006 by-elections, the commission and other observers repeatedly highlighted government ministers using state vehicles including helicopters to further partisan interests. However, none of these people was punished nor their candidates penalized.

100: When rules violations are discovered, the agency or set of agencies/entities is aggressive in penalizing offenders and/or in cooperating with other agencies in penalizing offenders.

75:

50: The agency or set of agencies/entities enforces rules, but is limited in its effectiveness. The agency may be slow to act, unwilling to take on politically powerful offenders, reluctant to cooperate with other agencies, or occasionally unable to enforce its judgments.

25:

0: The agency or set of agencies/entities does not effectively penalize offenders and/or cooperate with other agencies in penalizing offenders. The agency may make judgments but not enforce them, or may fail to make reasonable judgments against offenders. The agency may be partisan in its application of power.

17. Are elections systems transparent and effective?

83

17a. In practice, there is a clear and transparent system of voter registration.

100 | 75 | 50 | 25 | 0

Comments:

Voter registration is open to Kenyans over 18 who have either a national identity card or a passport. In practice, the registration for national identity cards has been mismanaged, often seemingly manipulated to disadvantage some people or areas in terms of obtaining voting cards. The failure to facilitate year-round registration means that some people are excluded due to the rush to register. The voter registers are also not as well maintained, with complaints arising of card holders not finding their names on the roll. At the end of the immediate past voter registration which closed at the end of August 2006, some reports estimated that millions of youths who had recently reached age 18 were not allowed to participate because they didn't yet have national identity cards.

100: There is a transparent system of voter registration that provides voters with sufficient time to understand their rights, check the accuracy of their registration, and ensure that errors are corrected before they vote.

75:

50: There is a transparent voter registration system that provides voters with sufficient time to understand their rights, check the accuracy of their registration, and ensure that errors are corrected before they vote but there are some problems. Voters may have not access to registration lists with sufficient time to correct errors before voting or registration lists may at times be inaccessible.

25:

0: The system of voter registration is incomplete or does not exist. Government may routinely falsify registration lists to affect voting patterns and limit access to the polls. Double voting and ghost^o voting by non-existent voters is common.

17b. In law, election results can be contested through the judicial system.

YES | NO

Comments:

Cap 66 provides for petitions challenges to electoral outcomes.

References:

Chapter 66 of the Laws of Kenya is the Election Offences Act, established to prevent election offenses and corrupt and illegal practices at elections.

YES: A YES score is earned if citizens or political parties can challenge allegedly fraudulent election results through the courts or other judicial mechanisms.

NO: A NO score is earned if there is no legal right for citizens or political parties to challenge allegedly fraudulent election results in the courts or other judicial mechanisms.

17c. In practice, election results can be effectively appealed through the judicial system.

100 | 75 | 50 | 25 | 0

Comments:

While electoral outcomes can be appealed in the High Court, the process can be slow and cumbersome. For instance, some petitions instituted after the December 2002 election have yet to be resolved to date, four-fifths of the way through the term of the sitting parliamentarians whose election were contested. Electoral appeals have mainly been used by candidates rather than citizens with grievances against the electoral process.

100: The electoral appeals mechanism takes cases from both candidates complaining of flaws in the electoral process as well as citizens bringing complaints related to denial of suffrage or registration errors. There is an expedited process for resolving such complaints to avoid delaying a timely announcement of electoral results.

75:

50: The electoral appeals mechanism takes complaints from both candidates and voters but may not always act on complaints promptly. The appeals mechanism may be abused at times by parties or candidates seeking to delay the announcement of electoral results.

25:

0: The electoral appeals mechanism rarely or never acts on complaints brought by candidates or citizens. Citizens may not be able to bring complaints related to denial of suffrage or voter registration errors.

17d. In practice, the military and security forces remain neutral during elections.

Comments:

The military often has remained neutral, and members of the military are by law barred from voting. However, police have previously been misused by the sitting government. Reforms in 1997 transferred authority over licensing political gatherings to the police, who have in instances been used to inconvenience the organization of meetings by perceived opponents of the government. The police can, for instance, deny authority for a planned meeting on the grounds of its being a threat to public security.

100: The military, military officers, and other security forces refrain from overtly supporting or opposing political candidates or commenting on elections. The military or security forces refrain from physically interfering with political campaigns, rallies, or voting.

75:

50: The military, military officers, and security forces may be known to unofficially support or oppose particular candidates or parties. The military or security forces generally refrain from the use of force to support or oppose particular candidates or parties but there are exceptions.

25:

0: The military or other security forces are an active and explicit player in politics and overly support or oppose particular candidates or parties. The military or security forces routinely exercise the use of force to support or oppose parties or candidates.

17e. In law, domestic and international election observers are allowed to monitor elections.

YES | NO

References:

The Presidential and Parliamentary Elections (Amendment) Regulation 2002 provides as follows: –

(1) Regulation 45(1). The Electoral Commission may, at any election, accredit any individual, association, organization, or institution who or which is manifestly non-partisan to act as election observers.

(2) The Electoral Commission shall issue guidelines for election observers, which shall be binding on election observers upon accreditation by the Electoral Commission.

See <http://www.eck.or.ke/OBSERVERS%20GUIDE.htm>

YES: A YES score is earned if domestic and international election observers are allowed to monitor the electoral process.

NO: A NO score is earned if there are any legal or regulatory prohibitions on the monitoring of the electoral process by domestic or international election observers.

17f. In practice, election observers are able to effectively monitor elections.

References:

For election observers to succeed in all these they are entitled to the following:

- (a) Have access to polling stations, counting venues and the Electoral Commission national and local offices;
- (b) Obtain official information about the country and elections from all election officials so long as the information is factual public and within the official's knowledge;
- (c) Attend meetings convened for the briefing of election observers or for any other purpose;
- (d) Receive cooperation from all election officials within the law;
- (e) Speak or communicate with any person at any place outside the polling station on matters connected with election or any other matter;
- (f) Communicate with any person inside the polling station (other than a voter) but even in this case, they must obtain the permission of the presiding officer and do so in a manner that does not interfere with the flow of the polling;
- (g) Attend campaign rallies and such like functions;
- (h) Be protected by political parties against any exposure to insult, hazard or threat in the course of their official duties;
- (i) Protection and security from Kenya police while in Kenya.

100: Election observers have unfettered access to polling sites, counting stations, and voters themselves. The government does not interfere with the observers' activities.

75:

50: Election observers generally have access to polling sites, counting stations, and voters but encounter restrictions in certain areas. The government may impose burdensome regulatory or bureaucratic requirements on observers to discourage their involvement.

25:

0: Election observers' movements are significantly limited by the government and many polling and counting sites are restricted or barred from observers. The government imposes so many bureaucratic or regulatory burdens on the observers that their mission is rendered ineffective.

86 II-3. Political Financing

18. Are there regulations governing political financing?

17

18a. In law, there are regulations governing private contributions to political parties.

YES | **NO**

Comments:

There are no laws governing private funding of political parties, or indeed, individual candidates. However, a Political Parties Bill has been pending introduction in Parliament since 2002.

References:

http://www.accessdemocracy.org/library/1882_ke_cgdbilldigest.pdf

YES: A YES score is earned if there are any formal rules (by law or regulation) controlling private contributions to political parties.

NO: A NO score is earned if there is no regulation of private contributions to political parties.

18b. In law, there are limits on individual donations to candidates and political parties.

YES | **NO**

Comments:

There is no current law governing private contributions to political parties. However, the Political Parties Bill pending since 2002 addresses this issue extensively.

YES: A YES score is earned if there are any limits, regardless of size, on individual contributions to political candidates and political parties. A YES score is earned if individual contributions are prohibited.

NO: A NO score is earned if there are no limits on contributions from individuals. A NO score is also earned if limits are applied by the government on opposition parties/candidates in a discriminatory manner.

18c. In law, there are limits on corporate donations to candidates and political parties.

YES | **NO**

Comments:

There is no such law since the removal from the statutes of the previous ceiling of K Sh40,000 (US\$555) limit. Indeed, Kenya has seen a number of grand scams involving the misappropriation of billions of shillings from the public coffers, which evidence suggests to have used to oil campaign wheels. For example, the chief architect of the Goldenberg Scandal" has repeatedly revealed in court how he bankrolled political godfathers with the K Sh58 billion (US\$500 million) he allegedly stole.

YES: A YES score is earned if there are any limits, regardless of size, on corporate contributions to political candidates and political parties. A YES score is earned if contributions are prohibited.

NO: A NO score is earned if there are no limits on corporate contributions to candidates or political parties. A NO score is also earned if limits are applied by the government on opposition parties/candidates in a discriminatory manner.

18d. In law, there are limits on total political party expenditures.

YES | **NO**

Comments:

There is no current law limiting total party expenditure. Indeed, the ruling party often finds it conveniently difficult to distinguish its own resources from those of the government, with sitting ministers and other officials openly using their offices to campaign.

References:

See the Kenya National Commission of Human Rights report at <http://www.knchr.org>

YES: A YES score is earned if there are any limits, regardless of size, on political party expenditures. A YES score is earned if all party expenditures are prohibited.

NO: A NO score is earned if there are no limits on political party expenditures. A NO score is also earned if limits are applied by the government on opposition parties in a discriminatory manner.

18e. In law, there are requirements for disclosure of donations to political candidates and parties.

YES | **NO**

Comments:

There are no laws requiring disclosure of contribution to individual or party war chests. However, one could argue that through laws governing submission of income tax returns, it should be possible to determine how much an individual candidate or party spent.

YES: A YES score is earned if there are any requirements mandating the disclosure of financial contributions to political parties or candidates.

NO: A NO score is earned if there are no requirements mandating the disclosure of contributions to political parties or candidates, existing regulations do not require a donor's name or amount given, or the regulations allow for anonymous donations.

18f. In law, there are requirements for the independent auditing of the finances of political parties and candidates.

YES | NO

Comments:

Furthermore, the Societies Act (Cap 108) under which political parties are registered requires them to submit annual audited returns which have been duly endorsed by an annual general meeting, failing which the party could be de-registered.

References:

The Societies Act (Cap 108)

YES: A YES score is earned if there is a legal or regulatory requirement for independent auditing of candidate and party finances. The auditing is performed by an impartial third-party.

NO: A NO score is earned if there are no legal or regulatory requirements for the independent auditing of political parties and candidates or if such requirements exist but allow for candidates or parties to self-audit.

19a. In practice, the limits on individual donations to candidates and political parties are effective in regulating an individual's ability to financially support a candidate or political party.

100 | 75 | 50 | 25 | 0

Comments:

There are no laws governing donations. Furthermore, politicians had extensively disregarded the pre-1992 law imposing a ceiling on spending. Also, the party accountability provisions in the Societies Act (Cap 108) has been managed very poorly over the years. For example, it dawned on Kenyans at the 1990 advent of multipartism that the ruling KANU party had never submitted returns in 30-odd years.

100: Existing limits represent the full extent to which an individual can directly or indirectly financially support a candidate or political party. Limits are reasonably low enough in the context of the total costs of running a campaign.

75:

50: Existing limits generally represent the full extent to which an individual can directly or indirectly financially support a candidate or political party. However, exceptions and loopholes exist through which individuals can indirectly support candidates or political parties above and beyond those formal limitations. Such loopholes could include making donations to third-party groups that advocate on behalf of (or against) a particular candidate or party; unregulated loans to candidates or parties (rather than direct donations); or in-kind support that is not explicitly regulated by laws or regulations. The limits may be too high in the context of the overall costs of running a campaign.

25:

0: Existing limits are routinely bypassed or willfully ignored. The vast majority of individual contributions to a candidate or political party are made outside of the formal limitation system. There is no enforcement of violations. Limits are so high that they are meaningless in the context of the overall costs of running a campaign.

19b. In practice, the limits on corporate donations to candidates and political parties are effective in regulating a company's ability to financially support a candidate or political party.

100 | 75 | 50 | 25 | 0

Comments:

There is no law covering corporate contributions.

100: Existing limits represent the full extent to which a company can directly or indirectly financially support a candidate or political party. Limits are reasonably low enough in the context of the total costs of running a campaign to be meaningful.

75:

50: Existing limits generally represent the full extent to which a company can directly or indirectly financially support a candidate or political party. However, exceptions and loopholes exist through which companies can indirectly support candidates or political parties above and beyond those formal limitations. Such loopholes could include making to donations to third-party groups that advocate on behalf of (or against) a particular candidate or party; unregulated loans to candidates or parties (rather than direct donations); or in-kind support that is not explicitly regulated by laws or regulations. The limits may be too high in the context of the overall costs of running a campaign.

25:

0: Existing limits are routinely bypassed or willfully ignored. The majority of corporate contributions to a candidate or political party are made outside of the formal limitation system. There is no enforcement of violations. Limits are so high that they are meaningless in the context of the overall costs of running a campaign.

19c. In practice, the limits on total party expenditures are effective in regulating a political party's ability to fund campaigns or politically-related activities.

100 | 75 | 50 | 25 | 0

Comments:

There is no law covering limits to total party expenditure.

100: Existing limits represent the full extent to which political parties are able to finance their activities. Limits are reasonably low enough in the context of the total costs of running a party to be meaningful.

75:

50: Existing limits generally represent the full extent to which a political party can finance its activities. However, exceptions and loopholes exist through which parties can generate revenue or finance their activities beyond the scope of existing regulations. Such loopholes could include taking loans that are outside of the scope of regulations covering direct donations; links to revenue-generating business activities that are beyond the scope of electoral or campaign-related regulations; or accepting in-kind support that is not explicitly regulated by laws or regulations. The limits may be too high in the context of the overall costs of running a party.

25:

0: Existing limits are routinely bypassed or willfully ignored. The majority of expenditures are made outside of the formal limitation system. Limits are so high that they are meaningless in the context of the overall costs of running a party.

19d. In practice, when necessary, an agency or entity monitoring political financing independently initiates investigations.

100 | 75 | 50 | 25 | 0

Comments:

The Registrar of Societies has been ineffective in investigating failure to audit accounts or submit returns.

100: The agency or entity aggressively starts investigations into allegations of wrong doing with respect to political financing. The agency is fair in its application of this power.

75:

50: The agency or entity will start investigations, but often relies on external pressure to set priorities, or has limited effectiveness when investigating. The agency, though limited in effectiveness, is still fair in its application of power.

25:

0: The agency or entity rarely investigates on its own, or the agency or entity is partisan in its application of this power.

19e. In practice, when necessary, an agency or entity monitoring political financing imposes penalties on offenders.

100 | 75 | 50 | 25 | 0

Comments:

Generally, the Registrar of Societies has been ineffective in punishing offenders. However, the provisions of Cap 108 have been used to intimidate or punish selectively.

100: When rules violations are discovered, the agency or entity is aggressive in penalizing offenders.

75:

50: The agency or entity enforces rules, but is limited in its effectiveness. The agency or entity may be slow to act, unwilling to take on politically powerful offenders, or occasionally unable to enforce its judgments.

25:

0: The agency or entity does not effectively penalize offenders. The agency or entity may make judgments but not enforce them, or may fail to make reasonable judgments against offenders. The agency or entity may be partisan in its application of power.

19f. In practice, contributions to political parties and candidates are audited.

100 | 75 | 50 | 25 | 0

Comments:

In theory, it should be possible to audit contributions, such as through these entities' income tax returns. In practice, however, this does not happen.

100: Political party and candidate finances are regularly audited using generally accepted auditing practices. This includes the auditing of nominally independent financial organizations that act as financial extensions of the party.

75:

50: Political party and candidate finances (as defined) are audited, but audits are limited in some way, such as using inadequate auditing standards, or the presence of exceptions to disclosed contributions. Contributions to the political party or candidate may be sufficiently audited, but the auditing of nominally independent extensions of the party may not be.

25:

0: Party and candidate finances are not audited, or the audits performed have no value in tracking contributions. Audits may be performed by entities known to be partisan or biased in their practices.

20. Can citizens access records related to political financing?

20a. In practice, political parties and candidates disclose data relating to financial support and expenditures within a reasonable time period.

100 | 75 | 50 | 25 | 0

Comments:

This does not happen diligently, even in the long run.

100: Political parties and candidates disclose their sources of funding and expenditures at least every quarter.

75:

50: Political parties and candidates disclose their sources of funding and expenditures only one or two times per year. Delays may occur when sensitive political information is involved.

25:

0: Political parties and candidates never publish their sources of funding or expenditures or publish that information only rarely with more than a year in between publication. Politically sensitive information is regular withheld from public disclosure.

20b. In practice, citizens can access the financial records of political parties and candidates within a reasonable time period.

100 | 75 | 50 | 25 | 0

Comments:

Where party records have been submitted to the registrar, there should be little problem in accessing them. However, the records for individuals are inaccessible to the general public.

100: Records are available on-line, or records can be obtained within two days. Records are uniformly available; there are no delays for politically sensitive information.

75:

50: Records take two to four weeks to obtain. Some delays may be experienced.

25:

0: Records take more than a month to acquire. There may be persistent delays in obtaining politically sensitive records.

20c. In practice, citizens can access the financial records of political parties and candidates at a reasonable cost.

Comments:

The costs of perusing the Registrar's records are minimal, a nominal K Sh200 (less than US\$3).

100: Records are free to all citizens, or available for the cost of photocopying. Records can be obtained at little cost, such as by mail, or on-line.

75:

50: Records impose a financial burden on citizens, journalists or CSOs. Retrieving records may require a visit to a specific office, such as a regional or national capital.

25:

0: Retrieving records imposes a major financial burden on citizens. Records costs are prohibitive to most citizens, journalists, or CSOs trying to access this information.

Category III. Government Accountability

III-1. ⁵⁶Executive Accountability

21. In law, can citizens sue the government for infringement of their civil rights?

100

21. In law, can citizens sue the government for infringement of their civil rights?

YES | NO

Comments:

There is a constitutional provision for ensuring personal civil rights, but it has not been used very frequently. During the pre-1990, single-party era in which the statutes provided for detention without trial, people were imprisoned for enjoying their constitutional freedoms of conscience, expression and assembly in ways that caused the government to feel threatened. While one would have expected many victims to sue the government for unlawful detention, the extent of state repression was such as to make such endeavours futile. However, application of the provision has not increased even though the government's detention powers have been watered down. This is in part because litigation through the High Court is too expensive for most Kenyans.

References:

Chapter Five of the Constitution provides for fundamental rights. Section 84 provides that any allegation of the violation or its likelihood, of Section 70 to 83, should be taken to the High Court for redress, subject to procedural rules made by the Chief Justice.

YES: A YES score is earned if all citizens (citizen is defined broadly, to include all ethnicities, or anyone born in the country) can receive compensation or redress through the courts for civil rights violations committed by the government, such as failure to follow due process of law when detaining suspected criminals.

NO: A NO score is earned if any group of citizens is excluded from the right to sue the government, or no such mechanism exists.

22. Can the chief executive be held accountable for his/her actions?

81

22a. In practice, the chief executive gives reasons for his/her policy decisions.

100 | 75 | 50 | 25 | 0

Comments:

The three most recent chief executives have, in instances, decreed actions that seem patently outside statutory limits, such as a 2003 decision for the government to assume responsibility for all the personal debts and obligations of a vice-president who had just died.

References:

Kenya's parliamentary process provides opportunity to debate executive decisions. Furthermore, Kenya has a five-year national development plan which broadly outlines the direction of development. The broad directions are interpreted through policy papers, sessional papers, the Medium Term Expenditure Framework budget system and the annual budget. Obviously in a multiparty context in which elections are held regularly, the chief executive faces elections in which performance and accountability may be a factor in voters' minds.

100: The chief executive and/or cabinet ministers give formal explanations of all policy matters. The chief executive regularly takes critical questions from journalists or an opposition party, usually at least once a month. There is no censoring of such sessions.

75:

50: The chief executive and/or cabinet ministers give explanations of policy, but not always in a timely or complete way. The chief executive occasionally takes critical questions from journalists or an opposition party, but not in a regular or formalized process. Particular issues of political sensitivity may be censored by government broadcasters.

25:

0: The chief executive and/or cabinet ministers do not give substantial justifications for policy. Public appearances by the chief executive offer no exposure to critical questions. The government and government-run media routinely censor such sessions.

22b. In law, the judiciary can review the actions of the executive.

YES | NO

References:

The chief executive is protected by Section 14 of the constitution against civil and criminal proceedings during tenure of office. However, Section 12 of the constitution provides that if the Cabinet resolves that the chief executive is incapable of exercising his functions on physical or mental grounds, it may ask the speaker of the National Assembly to request the Chief Justice to appoint a tribunal to inquire into the situation. Other executive officials are subject to the same laws as the general public.

YES: A YES score is earned if there is a formal process by which the judiciary can pass judgments on the legality or constitutionality of actions taken by the executive.

NO: A NO score is earned if no such mechanism exists. A NO score is earned if judicial review is vaguely established in law or regulation without formal procedures. A NO score is earned if general exemptions exist with respect to executive actions that are reviewable (a national security exemption, for example).

22c. In practice, when necessary, the judiciary reviews the actions of the executive.

100 | 75 | 50 | 25 | 0

Comments:

The judiciary frequently reviews the conduct of executive officials as necessary. For example, the Goldenberg Scandal⁷ of the early 1990s saw two former vice presidents, finance ministers, permanent secretaries and various other senior public officers arraigned before the courts for complicity. In the more recent Anglo-Leasing Scandal of false payments against undelivered goods to fictitious companies, the current vice president is among the many senior executive officials under investigation.

100: When constitutional or legal questions or possible violations are raised, the judiciary is aggressive in reviewing executive actions and can void illegal or unconstitutional actions. The judiciary is fair and nonpartisan in its application of this power.

75:

50: The judiciary will review executive actions, but is limited in its effectiveness. The judiciary may be slow to act, unwilling to take on politically sensitive issues, or occasionally unable to enforce its judgments.

25:

0: The judiciary does not effectively review executive policy. The judiciary may make judgments but not enforce them, or may fail to pass judgments on executive abuses. The judiciary may be partisan in its application of power. It must rely on instructions from the executive in order to initiate a legal or constitutional review.

22d. In practice, the chief executive limits the use of executive orders for establishing new regulations, policies, or government practices.

100 | 75 | 50 | 25 | 0

Comments:

Chief executives have always leaned towards misuse of their office directly or through senior members of the executive. Changes have often been promulgated and then legalized in response to an outcry. For example, there was no provision in the existing constitution for the November 2005 referendum on the draft constitution; yet this went ahead. In the present regime, for instance, the attorney general assumed and terminated a private citizen's prosecution of an assault case against the first lady.

100: The chief executive utilizes executive orders only when there is no constitutional or legal requirement for official legislative action or approval. Executive orders are limited in number and narrow in scope.

75:

50: The chief executive sometimes relies on executive orders to implement policies and regulations opposed by the legislature. Some executive orders are overly broad in scope and are designed to circumvent constitutional or legal requirements for legislative action or approval.

25:

0: The chief executive routinely abuses executive orders to render the legislature practically useless. Executive orders are the norm, not the exception, and directly contravene constitutional or legal requirements for legislative action or approval.

23. Is the executive leadership subject to criminal proceedings?

50

23a. In law, the heads of state and government can be prosecuted for crimes they commit.

YES | **NO**

References:

Section 14 of the Constitution protects the head of state and government from prosecution while in office.

YES: A YES score is earned if the heads of state and government can be investigated, charged or prosecuted for criminal allegations.

NO: A NO score is earned if either the head of state or government cannot be investigated, charged or prosecuted for criminal allegations or the executive branch controls whether investigative or prosecutorial immunity can be lifted on the heads of state or government.

23b. In law, ministerial-level officials can be prosecuted for crimes they commit.

YES | NO

Comments:

The law does not protect ministers and other high executive officials from prosecution for civil and criminal complaints. For example, the Anti-Corruption and Economic Crimes Act 2003 was enacted to provide for the prevention, investigation and punishment of corruption, economic crime and related offences and for matters incidental thereto and connected therewith.”

However, all prosecution decisions reside in the attorney general’s office. Whether prosecution of ministers and other high officials occurs depends much on their proximity to the seat of power. Thus there are numerous officials in the current unity government who allegedly were associated with incidents of grand looting in the previous regime who have yet to face the law even as less prominent accomplices are perpetually in and out of the courts.

YES: A YES score is earned if ministerial-level officials, or their equivalents, can all be investigated, charged or prosecuted for criminal allegations.

NO: A NO score is earned if any ministerial-level official, or equivalent official, cannot be investigated, charged or prosecuted for criminal allegations or the executive branch controls whether investigative or prosecutorial immunity can be lifted on ministerial-level officials.

24. Are there regulations governing conflicts of interest by the executive branch?

38

24a. In law, the heads of state and government are required to file a regular asset disclosure form.

YES | NO

References:

The Head of State is so required by the Public Officer Ethics Act 2003, which was enacted to advance the ethics of public officers by providing for a Code of Conduct and Ethics for public officers and requiring financial declarations from certain public officers and to provide for connected purposes.”

YES: A YES score is earned if the heads of state and government are required by law to file an asset disclosure form while in office, illustrating sources of income, stock holdings, and other assets. This form need not be publicly available to score a YES.

NO: A NO score is earned if either the head of state or government is not required to disclose assets.

24b. In law, ministerial-level officials are required to file a regular asset disclosure form.

YES | NO

References:

Public Officer Ethics Act 2003 requires all public officers to declare their wealth.

YES: A YES score is earned if ministerial-level officials, or their equivalents, are all required by law to file an asset disclosure form while in office, illustrating sources of income, stock holdings, and other assets.

NO: A NO score is earned if ministers are not required to disclose assets. A NO score is earned if some ministers must disclose assets, but other ministers are not required.

24c. In law, there are regulations governing gifts and hospitality offered to members of the executive branch.

YES | NO

Comments:

This is a weakly observed law. In the rural areas, for example, peasants will give goats and chicken to distinguished visitors in fulfillment of cultural dictates. The logistics of surrendering such gifts are not in place and might be cost-ineffective.

References:

Section 10 (3) of the Public Officers Ethics Act of 2003 provides that A public officer may accept a gift given to him in his official capacity but, unless the gift is a souvenir or ornament that does not exceed the value prescribed by regulation, such as gift shall be deemed to be a gift to the public officer's organisation."

YES: A YES score is earned if there are formal guidelines regulating gifts and hospitality offered to members of the executive branch of government.

NO: A NO score is earned if there are no guidelines or regulations with respect to gifts and hospitality offered to members of the executive branch. A NO score is earned if the guidelines are overly general and do not specify what is and is not appropriate.

24d. In law, there are requirements for the independent auditing of the executive branch asset disclosure forms (defined here as ministers and heads of state and government).

YES | NO

References:

Part IV of the Public Officers Ethics Act (Cap 203) requires officers to declare their own assets and those of spouses and children younger than 18. This annual declaration is made to the service commission employing such officers. However, the law is not clear on who audits these reports, and the media have yet to report any action arising out of these declarations of wealth.

YES: A YES score is earned if there is a legal or regulatory requirement for independent auditing of executive branch asset disclosures. The auditing is performed by an impartial third-party.

NO: A NO score is earned if there are no legal or regulatory requirements for the independent auditing of executive branch asset disclosures or if such requirements exist but allow for self-auditing.

24e. In law, there are restrictions on heads of state and government and ministers entering the private sector after leaving the government.

YES | NO

Comments:

There is nothing barring the head of state from having private sector interest both while in office and after leaving.

References:

Section 11 of Cap 203 only addresses conflict of interest during employment.

YES: A YES score is earned if there are regulations restricting the ability of heads of state/government and ministers to take positions in the private sector after leaving government that would present a conflict of interest, including positions that directly seek to influence their former government colleagues.

NO: A NO score is earned if no such restrictions exist.

24f. In practice, the regulations restricting post-government private sector employment for heads of state and government and ministers are effective.

100 | 75 | 50 | 25 | 0

Comments:

No such laws exist. Indeed, most senior politicians have long-running private interests to which they return after leaving politics.

100: The regulations restricting post-government private sector employment for heads of state/government and ministers are uniformly enforced. There are no or few cases of those officials taking jobs in the private sector after leaving government where they directly lobby or seek to influence their former government colleagues without an adequate cooling off" period.

75:

50: The regulations are generally enforced though some exceptions exist. In certain sectors, heads of state/government or ministers are known to regularly take jobs in the private sector that entail directly lobbying or seeking to influence their former government colleagues. Cooling off periods are short and sometimes ignored.

25:

0: The regulations are rarely or never enforced. Heads of state/government or ministers routinely take jobs in the private sector following government employment that involve direct lobbying or influencing of former government colleagues. Cooling off periods are non-existent or never enforced.

24g. In practice, the regulations governing gifts and hospitality offered to members of the executive branch are effective.

100 | 75 | 50 | 25 | 0

References:

Notwithstanding the provisions of Cap 203 (10), there has never been a single report in the public domain of officers surrendering gifts.

100: The regulations governing gifts and hospitality to members of the executive branch are regularly enforced and sufficiently restrict the amounts of gifts and hospitality that can be given. Members of the executive branch never or rarely accept gifts or hospitality above what is allowed.

75:

50: The regulations governing gifts and hospitality to members of the executive branch are generally applied though exceptions exist. Some ministers in certain sectors are known to accept greater amounts of gifts and hospitality from outside interest groups or private sector actors than is allowed.

25:

0: The regulations governing gifts and hospitality to members of the executive branch are routinely ignored and unenforced. Ministers and other members of the executive branch routinely accept significant amounts of gifts and hospitality from outside interest groups and actors seeking to influence their decisions.

24h. In practice, executive branch asset disclosures (defined here as ministers and above) are audited.

100 | 75 | 50 | 25 | 0

Comments:

The asset declarations are reviewed by respective service commissions. However, it is unclear what happens thereafter.

100: Executive branch asset disclosures are regularly audited using generally accepted auditing practices.

75:

50: Executive branch asset disclosures are audited, but audits are limited in some way, such as using inadequate auditing standards, or the presence of exceptions to disclosed assets.

25:

0: Executive branch asset disclosures are not audited, or the audits performed have no value in tracking contributions. Audits may be performed by entities known to be partisan or biased in their practices.

25. Can citizens access the asset disclosure records of the heads of state and government?

0

25a. In law, citizens can access the asset disclosure records of the heads of state and government.

YES | NO

References:

Part IV, Section 29 of Cap 203 binds service commissions to confidentiality over all information received and may only avail this on a High Court order or to an agent of the person who made the declaration.

YES: A YES score is earned if the heads of state and government file an asset disclosure form that is, in law, accessible to the public (individuals, civil society groups or journalists).

NO: A NO score is earned if there is no asset disclosure for either the head of state or government. A NO score is earned if the form is filed, but not available to the public.

25b. In practice, citizens can access the asset disclosure records of the heads of state and government within a reasonable time period.

100 | 75 | 50 | 25 | 0

Comments:

Citizens may not ever access such disclosures.

100: Records are available on-line, or records can be obtained within two days. Records are uniformly available; there are no delays for politically sensitive information.

75:

50: Records take around two weeks to obtain. Some additional delays may be experienced.

25:

0: Records take more than a month to acquire. In some cases, most records may be available sooner, but there may be persistent delays in obtaining politically sensitive records.

25c. In practice, citizens can access the asset disclosure records of the heads of state and government at a reasonable cost.

100 | 75 | 50 | 25 | 0

Comments:

Asset declarations are by law confidential and cannot be accessed by citizens.

100: Records are free to all citizens, or available for the cost of photocopying. Records can be obtained at little cost, such as by mail, or on-line.

75:

50: Records impose a financial burden on citizens, journalists or CSOs. Retrieving records may require a visit to a specific office, such as a regional or national capital.

25:

0: Retrieving records imposes a major financial burden on citizens. Records costs are prohibitive to most citizens, journalists, or CSOs trying to access this information.

26. In practice, is the ruling party distinct from the state?

26. In practice, is the ruling party distinct from the state?

100 | 75 | 50 | 25 | 0

Comments:

During the single-party era before 1990, there was no distinction between the ruling KANU party and the state. This indistinction continued into the multiparty era as long as KANU remained in power. After KANU was defeated in 2002, the situation improved somewhat with the new NARC government. However, events during the November 2005 referendum and the July 2006 by-elections showed that the NARC government did not distinguish the party from the state.

References:

KNCHR report, <http://www.knchr.org>

100: Clear rules are followed distinguishing state functions from party activities. Government funds are never used for party activities. The civil service is completely distinct from party bureaucracy.

75:

50: The ruling party is, in principal, separate from the state, but exceptions to this standard sometimes occur. Examples may be use of civil servants to organize political rallies, use of government vehicles on campaign trips, or use of government funds for party purposes.

25:

0: The government is an extension of the ruling party. There are few boundaries between government and party activities. Government funds, equipment and personnel are regularly used to support party activities.

III-2. Legislative Accountability

27. Can members of the legislature be held accountable for their actions?

100

27a. In law, the judiciary can review laws passed by the legislature.

YES | NO

Comments:

Kenyan law follows the British tradition. There have been numerous instances in which the legality or constitutionality of the law

has been challenged in the High Court. For example, a 2002 court ruling that the Kenya Anti-Corruption Authority could not prosecute caused all pending corruption cases to be thrown out. The government went back to the drawing board to redefine the legal status of the anti-corruption authority, resulting in the Anti-Corruption and Economic Crimes Act (2003) that established the Kenya Anti-Corruption Commission.

YES: A YES score is earned if there is a formal process by which the judiciary or constitutional courts can pass judgments on the legality or constitutionality of laws passed by the legislature.

NO: A NO score is earned if no such mechanism exists. A NO score is earned if judicial review is vaguely established in law or regulation without formal procedures. A NO score is earned if general exceptions exist exempting certain legislative actions from being reviewed (a national security exemption, for example).

27b. In practice, when necessary, the judiciary reviews laws passed by the legislature.

100 | 75 | 50 | 25 | 0

Comments:

This happens frequently. However, this says nothing about the quality of outcomes, as some reviews are unduly politicized.

100: When constitutional or legal questions or possible violations are raised, the judiciary is aggressive in reviewing laws passed and can void illegal or unconstitutional actions. The judiciary is fair and nonpartisan in its application of this power.

75:

50: The judiciary will review laws passed, but is limited in its effectiveness. The judiciary may be slow to act, unwilling to take on politically sensitive issues, or occasionally unable to enforce its judgments.

25:

0: The judiciary does not effectively review laws passed. The judiciary may make judgments but not enforce them, or may fail to pass judgments on executive abuses. The judiciary may be partisan in its application of power.

27c. In law, are members of the national legislature subject to criminal proceedings?

YES | NO

Comments:

Notwithstanding these provisions, decades ago, two members were arrested within the precincts for statements made on the floor and detained without trial. The situation has much improved since.

References:

Members of the legislature are subject to investigation and prosecution like all other citizens. However, the Laws of Kenya Ch 6 National Assembly (Powers and Privileges) Act exempts members from prosecution for anything said in the Assembly. Members also may not be arrested within the precincts of the Assembly.

YES: A YES score is earned if all members of the legislature can, in law, be investigated and prosecuted for criminal allegations.

NO: A NO score is earned if any member of the legislature cannot, in law, be investigated and prosecuted for criminal proceedings.

28. Are there regulations governing conflicts of interest by members of the national legislature?

29

28a. In law, members of the national legislature are required to file an asset disclosure form.

YES | NO

References:

This is a requirement of Part IV of the Public Officers Ethics Act (Cap 203).

YES: A YES score is earned if all members of the legislature are required by law to file an asset disclosure form while in office, illustrating sources of income, stock holdings, and other assets. This form does not need to be publicly available to score a YES.

NO: A NO score is earned if any member of the legislature is not required to disclose assets.

28b. In law, there are restrictions for national legislators entering the private sector after leaving the government.

YES | **NO**

Comments:

There is no legal barrier to national legislators operating in the private sector while in office or thereafter. Indeed, the Kenyan parliament is full of professionals (lawyers, engineers, accountants) with ongoing practices.

YES: A YES score is earned if there are regulations restricting national legislators' ability to take positions in the private sector after leaving government that would present a conflict of interest, including positions that directly seek to influence their former government colleagues.

NO: A NO score is earned if no such restrictions exist.

28c. In law, there are regulations governing gifts and hospitality offered to members of the national legislature.

YES | NO

References:

Legislators are considered public officers and are covered by the provisions of the Public Officers Ethics Act (Cap 203).

YES: A YES score is earned if there are formal guidelines regulating gifts and hospitality for members of the legislature.

NO: A NO score is earned if there are no guidelines or regulations with respect to gifts or hospitality offered to members of the legislature. A NO score is earned if the guidelines are general and do not specify what is and is not appropriate.

28d. In law, there are requirements for the independent auditing of the asset disclosure forms of members of the national legislature.

YES | **NO**

References:

Legislators submit their returns to the Parliamentary Service Commission, but Cap 203 does not provide for a separate independent audit of these.

YES: A YES score is earned if there is a legal or regulatory requirement for independent auditing of legislative branch asset disclosures. The auditing is performed by an impartial third-party.

NO: A NO score is earned if there are no legal or regulatory requirements for the independent auditing of legislative branch asset disclosures or if such requirements exist but allow for self-auditing.

28e. In practice, the regulations restricting post-government private sector employment for national legislators are effective.

100 | 75 | 50 | 25 | **0**

Comments:

There are no restrictions.

100: The regulations restricting post-government private sector employment for national legislators are uniformly enforced. There are no or few cases of legislators taking jobs in the private sector after leaving government where they directly lobby or seek to influence their former government colleagues without an adequate cooling off" period.

75:

50: The regulations are generally enforced though some exceptions exist. In certain sectors, legislators are known to regularly take jobs in the private sector that entail directly lobbying or seeking to influence their former government colleagues. Cooling off periods are short and sometimes ignored.

25:

0: The regulations are rarely or never enforced. Legislators routinely take jobs in the private sector following government employment that involve direct lobbying or influencing of former government colleagues. Cooling off periods are non-existent or never enforced.

28f. In practice, the regulations governing gifts and hospitality offered to national legislators are effective.

100 | 75 | 50 | 25 | 0

Comments:

These regulations are rarely, if ever, enforced.

100: The regulations governing gifts and hospitality to national legislators are regularly enforced and sufficiently restrict the amounts of gifts and hospitality that can be given to legislators. Legislators never or rarely accept gifts or hospitality above what is allowed.

75:

50: The regulations governing gifts and hospitality to national legislators are generally applied though exceptions exist. Some legislators in certain sectors are known to accept greater amounts of gifts and hospitality from outside interest groups or private sector actors than is allowed.

25:

0: The regulations governing gifts and hospitality to national legislators are routinely ignored and unenforced. Legislators routinely accept significant amounts of gifts and hospitality from outside interest groups and actors seeking to influence their decisions.

28g. In practice, national legislative branch asset disclosures are audited.

100 | 75 | 50 | 25 | 0

Comments:

As with other branches of the public sector, legislators submit returns to their service commission, but it is unclear what happens thereafter.

100: Legislative branch asset disclosures are regularly audited using generally accepted auditing practices.

75:

50: Legislative branch asset disclosures are audited, but audits are limited in some way, such as using inadequate auditing standards, or the presence of exceptions to disclosed assets.

25:

0: Legislative branch asset disclosures are not audited, or the audits performed have no value in tracking contributions. Audits may be performed by entities known to be partisan or biased in their practices.

29. Can citizens access the asset disclosure records of members of the national legislature?

0

29a. In law, citizens can access the asset disclosure records of members of the national legislature.

YES | **NO**

References:

Asset disclosure records are protected by Section 29 of the Public Officers Ethics Act (Cap 203).

YES: A YES score is earned if members of the national legislature file an asset disclosure form that is, in law, accessible to the public (individuals, civil society groups or journalists).

NO: A NO score is earned if there is no asset disclosure for members of the national legislature. A NO score is earned if the form is filed, but not available to the public.

29b. In practice, citizens can access these records within a reasonable time period.

100 | 75 | 50 | 25 | **0**

Comments:

The greatest likelihood of citizens accessing the contents of such disclosure is in the event that an investigative journalist explores them.

100: Records are available on-line, or records can be obtained within two days. Records are uniformly available; there are no delays for politically sensitive information.

75:

50: Records take around two weeks to obtain. Some delays may be experienced.

25:

0: Records take more than a month to acquire. In some cases, most records may be available sooner, but there may be persistent delays in obtaining politically sensitive records.

29c. In practice, citizens can access these records at a reasonable cost.

Comments:

There is no legal provision for accessing such documents. A journalist's report containing such data likely would be the product of bribing an officer in the service commission.

100: Records are free to all citizens, or available for the cost of photocopying. Records can be obtained at little cost, such as by mail, or on-line.

75:

50: Records impose a financial burden on citizens, journalists or CSOs. Retrieving records may require a visit to a specific office, such as a regional or national capital.

25:

0: Retrieving records imposes a major financial burden on citizens. Records costs are prohibitive to most citizens, journalists, or CSOs trying to access this information.

30. Can citizens access legislative processes and documents?

100

30a. In law, citizens can access records of legislative processes and documents.

YES | NO

Comments:

The National Assembly has a public gallery which is open to citizens during most proceedings. Parliament itself has a Hansard office which records proceedings verbatim, with copies of the records being available in the library. Furthermore, most proceedings in the Assembly are covered by the local media, with summaries appearing in the local press the following day and on radio on the same day. There is a proposal to carry parliamentary debates live on TV. Meanwhile, the National Assembly is upgrading its Web site, offering the possibility of its resources being provided online in the future.

YES: A YES score is earned if there is a general legal right to access records of legislative proceedings including voting records. A YES score can still be given if there are formal rules for specific exemptions to the right to disclosure (special secret sessions related to national security).

NO: A NO score is earned if there is no general right to access documents recording legislative proceedings. A NO score is earned if there exemptions to the general right that are not clearly defined by formal rules.

30b. In practice, citizens can access these records within a reasonable time period.

Comments:

Besides attending the parliamentary session, there are daily summaries in the print and electronic media and the Hansard (record) is available.

100: Records are available on-line, or records can be obtained within two days. Records are uniformly available; there are no delays for politically sensitive information.

75:

50: Records take around two weeks to obtain. Some delays may be experienced.

25:

0: Records take more than a month to acquire. In some cases, most records may be available sooner, but there may be persistent delays in obtaining politically sensitive records.

30c. In practice, citizens can access these records at a reasonable cost.

100 | 75 | 50 | 25 | 0

Comments:

Records are available at little cost.

100: Records are free to all citizens, or available for the cost of photocopying. Records can be obtained at little cost, such as by mail, or on-line.

75:

50: Records impose a financial burden on citizens, journalists or CSOs. Retrieving records may require a visit to a specific office, such as a regional or national capital.

25:

0: Retrieving records imposes a major financial burden on citizens. Records costs are prohibitive to most citizens, journalists, or CSOs trying to access this information.

57
III-3. Judicial Accountability

31. Are judges appointed fairly?

25

31a. In practice, there is a transparent procedure for selecting national-level judges.

YES | **NO**

References:

Section 61 of Chapter IV of the constitution provides for the appointment of Judges of the High Court while section 64 addresses the Court of Appeal. The other officers of the Judiciary are appointed by the Judicial Service Commission. None of these processes offer opportunities for public participation.

YES: A YES score is earned if there is a formal process for selecting national level justices. This process should be public in the debating and confirmation stages.

NO: A NO score is given if there is no formal process of selection or the process is conducted without public oversight.

31b. In practice, there are certain professional criteria required for the selection of national-level judges.

100 | **75** | 50 | 25 | 0

References:

Sections 61 and 62 of the constitution address the appointment of the Chief Justice and High Court judges, while sections 68 and 69 address the work of the Judicial Service Commission. However, appointments at the very top often appear politically contrived.

100: National-level judges selected have relevant professional qualifications such as formal legal training, experience as a lower court judge or a career as a litigator.

75:

50: Most national-level judges selected meet these qualifications, with some exceptions.

25:

0: National-level judges are often unqualified due to lack of training or experience.

31c. In law, there is a confirmation process for national-level judges (i.e. conducted by the legislature or an independent body).

YES | **NO**

Comments:

There is no independent review of the president's appointment of the chief justice or of the Judicial Service Commission's appointment of individual officers. Note that the chief justice is a political appointee and presides over the Judicial Service Commission.

YES: A YES score is earned if there is a formal process establishing a review of national-level judicial nominees by an agency independent from the body appointing the judges.

NO: A NO score is earned if there is no formal review. A NO score is earned if the review is conducted by a body directed by the body appointing the judges (such as review by the head of police if judges are appointed by the executive).

32. Can members of the judiciary be held accountable for their actions?

58

32a. In law, members of the national-level judiciary are obliged to give reasons for their decisions.

YES | NO

Comments:

While delivering judgement, the members of the judiciary are required to make an elaborate justification of the decision, citing the case law applied or whatever other precedence might be the basis of the decision.

YES: A YES score is earned if there is a formal and mandatory process for judges to explain their decisions.

NO: A NO score is earned if justices are not required to explain decisions. A NO score is earned if there is a general exemption from explaining some decisions (such as national security).

32b. In practice, members of the national-level judiciary give reasons for their decisions.

100 | 75 | 50 | 25 | 0

Comments:

Always, the judgement will cite the pertinent law under which the case is being tried, especially so in prosecutions (as opposed to civil disputes). In high-profile cases where litigants have hired lawyers, judges will justify their decisions. But in the majority of cases involving the average citizen, often unrepresented by a counsel, judgments can be quite flippant. In petty crimes, such as failing to carry a national identification card (interpreted as loitering) or drinking after hours, the accused will appear in batches in anticipation of their joint plea of guilty and have their judgments passed similarly.

100: Judges are formally required to explain their judgments in detail, establishing a body of precedent. All judges comply with these requirements.

75:

50: Judges are compelled to give substantial reasons for their decisions, but some exceptions exist. These may include special courts, such as military courts or tribunals.

25:

0: Judges commonly issue decisions without formal explanations.

32c. In law, there is an ombudsman (or equivalent agency or mechanism) for the national-level judicial system.

YES | NO

Comments:

There is no ombudsman in the Kenyan judicial system, or indeed, anywhere else in the public sector. Complaints against the judiciary are made to the registrar of the High Court.

References:

Complaints against advocates are made to the Advocates Complaints Commission established by the Advocates Act (Cap 16).

YES: A YES score is earned if there is a ombudsman or equivalent mechanism for the judicial system. A judicial ombudsman is defined here as an agency or mechanism specifically mandated to investigate breaches of procedure, abuses of power or other failures of the judiciary.

NO: A NO score is earned if no agency or mechanism is specifically mandated to act as a judicial ombudsman.

32d. In law, the judicial ombudsman (or equivalent agency or mechanism) is protected from political interference.

YES | NO

Comments:

Kenyan courts have no ombudsman. The registrar's appointment is quite political, meaning that he or she is exposed to manipulation by the politically appointed chief justice. The Advocates Complaints Commission is independent but often overwhelmed by work.

YES: A YES score is earned if there are formal rules establishing that the judicial ombudsman is operationally independent from political interference by the executive, legislative or judicial branches.

NO: A NO score is earned if there are no formal rules establishing the independence of the judicial ombudsman. A NO score is given if the judicial ombudsman function is carried out by an inherently subordinate organization, such as an executive ministry or legislative committee.

32e. In practice, when necessary, the judicial ombudsman (or equivalent agency or mechanism) initiates investigations.

100 | 75 | 50 | 25 | 0

Comments:

If the registrar does investigate, then it is not very effective, or people do not file enough complaints. Meanwhile, the chief justice instituted an Integrity and Ethics Committee to receive complaints against the judiciary. In a 2003 purge of corrupt judicial officers, 82 magistrates, 17 judges and 5 appellate judges were cited for misconduct, with only 13 magistrates, 5 judges and 2 appellate judges challenging the allegations against them. Recently, there was an allegation that judges regularly get a junior lawyer to write their judgments. An efficient registrar would ensure such misdeeds do not occur.

As for complaints against advocates, the Advocates Complaints Commission reports an incredible 15,000 every quarter of the year, whose resolution is very slow.

100: The ombudsman aggressively starts investigations — or participates fully with cooperating agencies' investigations — into judicial misconduct. The ombudsman is fair in its application of this power.

75:

50: The ombudsman will start or cooperate in investigations, but often relies on external pressure to set priorities, or has limited effectiveness when investigating. The ombudsman, though limited in effectiveness, is still fair in its application of power.

25:

0: The ombudsman rarely investigates on its own or cooperates in other agencies' investigations, or the ombudsman is partisan in its application of this power.

32f. In practice, when necessary, the judicial ombudsman (or equivalent agency or mechanism) imposes penalties on offenders.

100 | 75 | **50** | 25 | 0

Comments:

While a judicial commission identified the magistrates and judges cited for misconduct and action was taken against them, there were suggestions of selective prosecution of these judges. Of those who contested the allegations against them, the only completed case 2 years down the road is that of an appeals court judge who was cleared of corruption and is back at work. The practicing licences of those who did not contest allegations against them were withdrawn, but a number have since been reinstated. It is unclear why the licences have been returned.

100: When rules violations are discovered, the ombudsman is aggressive in penalizing offenders or in cooperating with other agencies who penalize offenders.

75:

50: The ombudsman enforces rules, but is limited in its effectiveness. The ombudsman may be slow to act, unwilling to take on politically powerful offenders, resistant to cooperating with other agencies, or occasionally unable to enforce its judgments.

25:

0: The ombudsman does not effectively penalize offenders. The ombudsman may make judgments but not enforce them, does not cooperate with other agencies in enforcing penalties, or may fail to make reasonable judgments against offenders. The ombudsman may be partisan in its application of power.

III-4. Budget Processes

33. Can the legislature provide input to the national budget?

33a. In law, the legislature can amend the budget.

YES | NO

Comments:

Debate on the appropriation bill could be quite lively but the time allocated is often inadequate.

References:

Chapter VII of the constitution addresses financial management. Its Section 99 states that all government revenues must be paid into the Consolidated Fund, from which money can only be withdrawn following constitutional provisions or by an act of Parliament. During the budget speech, the finance minister tables a finance bill of revenue generating proposals and an Appropriation Bill of intended expenditure, a procedure provided for by Section 100 of the constitution. During the ensuing debate on the latter bill, members consider each ministry's action plan" and the resources allocated and are at liberty to change the activities and resources allocated for them. On the members' satisfaction with the bill, it becomes the Appropriation Act, which allows money to be appropriated from the Consolidated Fund.

YES: A YES score is earned if the legislature has the power to add or remove items to the national government budget.

NO: A NO score is earned if the legislature can approve, but not change details of the budget. A NO score is earned if the legislature has no input into the budget process.

33b. In practice, significant public expenditures require legislative approval.

100 | 75 | 50 | 25 | 0

Comments:

During the Moi/KANU regime, spending decrees were common, three prominent ones including the construction of Eldoret International Airport and the Eldoret-based, Belgian-built ammunition plant, and the purchase of the presidential jet. Into the post-2003, NARC era, illegal payments generally dubbed the Anglo Leasing Scandal, have cost Kenyan taxpayers millions of dollars paid for undelivered contracts with foreign firms.

Notwithstanding the provisions of Section 99 of the constitution, some spending evades parliamentary scrutiny, especially if it touches on expenditure around the president and on national security matters. However, since the 2003 accession of the NARC government, there has been a marked decline in surreptitious spending.

100: All significant government expenditures (defined as any project costing more than 1% of the total national budget), must be approved by the legislature. This includes defense and secret programs, which may be debated in closed hearings.

75:

50: Most significant government expenditures (as defined) are approved by the legislature, but some exceptions to this rule exist. This may include defense programs, an executive's personal budget, or other expenses.

25:

0: The legislature does not have the power to approve or disapprove large portions of the government budget, or the legislature does not exercise this power in a meaningful way.

33c. In practice, the legislature has sufficient capacity to monitor the budget process and provide input or changes.

100 | 75 | 50 | 25 | 0

Comments:

While there are several entry points for legislators in the budget process, they have rarely exploited these, meaning that their first contact with the process is the reading of the finance and appropriation bill on Budget Day. Failure to exploit opportunities arises primarily because many legislators are uncomfortable with numbers. The short debate on the Budget Speech (June 20 to Oct. 31) affords little opportunity to effect far-reaching changes. Consequently, a private member's motion, originally thrown out in 2002, was recently passed to facilitate the establishment of a Parliamentary Budget Office which will have adequate resources to enable members to monitor the budget process at all stages prior to the presentation of the two spending bills.

References:

www.idasa.org.za/gbOutputFiles.asp?WriteContent=Y&RID=1077

100: Legislators benefit from a sufficient and qualified staff as well as adequate financial and physical resources. Lack of capacity is never a reason why legislators cannot carry out their duties effectively.

75:

50: Legislators have some staff and financial resources but are limited by a shortfall of resources to adequately perform all of their budgetary oversight functions. Legislators are occasionally overwhelmed by the volume of work to be performed.

25:

0: Legislators have little to no staff and virtually no financial resources with which to perform their budgetary oversight role. Lack of resources is a regular and systemic problem that cripples the performance of the legislature.

34. Can citizens access the national budgetary process?

75

34a. In practice, the national budgetary process is conducted in a transparent manner in the debating stage (i.e. before final approval).

100 | 75 | 50 | 25 | 0

Comments:

Kenya's budgeting process is based on the Medium Term Expenditure Framework (MTEF), which incorporates top-down and bottom-up approaches. The finance ministry's budget office determines the size of the resource envelope," which is subdivided among sector working groups (SWG). The latter use their given ceiling to distribute resources among their own priorities. In theory, non-government stakeholders can participate in the SWG deliberations, but in practice such participation is minimal.

These processes culminate in the finance minister's budget speech, presented in mid-June and debated up to Oct. 31. The budget debate is transparent to the extent that all parliamentary debates are open to the public and media. However, legislators' poor understanding of the technical contents of the budget speech and the relatively brief window for debate limits their useful contributions. Frequent lack of quorum in the house (due to professional sloth or other commitments) also means that certain

debates are concluded among a parliamentary minority. When the debating window is nearly over, ministerial budgets are often passed without serious scrutiny.

100: Budget debates are public and records of these proceedings are easily accessible. Authors of individual budget items can easily be identified. Nearly all budget negotiations are conducted in these official proceedings.

75:

50: There is a formal, transparent process for budget debate, but major budget modifications may be negotiated in separate, closed sessions. Some items, such as non-secret defense projects, may be negotiated in closed sessions. Authors of individual line items may be difficult to identify.

25:

0: Budget negotiations are effectively closed to the public. There may be a formal, transparent process, but most real discussion and debate happens in other, closed settings.

34b. In practice, citizens provide input at budget hearings.

100 | 75 | **50** | 25 | 0

Comments:

Several CSOs have instituted public and sectoral pre-budget hearings. The Institute of Economic Affairs (IEA) regularly compiles the feedback from across the country into a report submitted to the finance minister. Its Budget Network Initiative, geared toward greater transparency in budgeting, produces The Alternative Budget 2005/2006. Other frequent participants in the budget process include the Institute of Certified Public Accountants, Kenya Private Sector Foundation, Kenya Association of Manufacturers and the Institute of Policy Analysis and Research.

However, it is difficult to gauge the extent to which these contributions actually determine what is eventually presented in the budget speech. A major problem is that the congested budget timetable means that the outputs of these private initiatives could easily be ignored due to time constraints, irrespective of their quality.

References:

The Alternative Budget 2005/2006: <http://www.ieakenya.or.ke/subsection.asp?ID=6>

www.idasa.org.za/gbOutputFiles.asp?WriteContent=Y&RID=843

100: Citizens, usually acting through CSOs, can provide information or commentary to the budget debate through a formal process. This information is essential to the process of evaluating budget priorities.

75:

50: Citizens or CSOs can provide input, but this information is often not relevant to budget decisions.

25:

0: Citizens or CSOs have no formal access to provide input to the budget debate.

34c. In practice, citizens can access itemized budget allocations.

Comments:

The budget speech reading is covered live on TV and radio and is subsequently published for sale by the Government Printer. Debates on the speech are also covered by the media and recorded verbatim in the parliamentary Hansard. Once Parliament's Web site has been upgraded, it is likely that budget details will be posted there as well.

100: Citizens, journalists and CSOs can access itemized lists of budget allocations. This information is easily available and up to date.

75:

50: Citizens, journalists and CSOs can access itemized lists of budget allocations but this information may be difficult to access, incomplete or out of date.

25:

0: Citizens cannot access an itemized list of budget allocations, due to secrecy, prohibitive barriers or government inefficiency.

35. In law, is there a separate legislative committee which provides oversight of public funds?

100

35. In law, is there a separate legislative committee which provides oversight of public funds?

YES | NO

Comments:

Kenya's National Assembly Standing Orders establish a Public Accounts Committee (PAC) and a Public Investment Committee (PIC) of Parliament. The controller and auditor general's annual audit report is submitted to the speaker of the National Assembly, who forwards it to the two committees. PAC reviews the performance of the central government budget, while PIC examines the performance of state corporations. Parliament also has seven departmental committees that review sectoral policies and their implementation.

References:

For more detail, see www.nepru.org.na/index.php?id=247&no_cache=1&file=885&uid=424

YES: A YES score is earned if there is a dedicated legislative committee (or equivalent group located in the legislature) that oversees the expenditure of public funds.

NO: A NO score is earned if no such body exists. A NO score is earned if there is a body executing this function but it is not under the direction of the legislature.

36. Is the legislative committee overseeing the expenditure of public funds effective?

36a. In practice, department heads regularly submit reports to this committee.

100 | 75 | 50 | 25 | 0

Comments:

The operations of the PAC, PIC and parliamentary departmental committees do not require regular reports from departmental heads. Parliamentary departmental committees can summon departmental heads as necessary, while in their reviews of the auditor general's reports, the PAC and PIC can summon departmental heads for clarifications as might be necessary for their complete reporting to Parliament. However, in the past, certain politically connected department heads have refused to appear before these committees, while others have given inadequate explanations to the issues raised.

100: Heads of ministry- or cabinet-level agencies submit regular, formal reports of expenses to a budget oversight committee.

75:

50: Agency heads submit reports to a budget oversight committee, but these reports are flawed in some way. The reports may be inconsistently delivered, or lacking important details.

25:

0: There is no budget oversight committee or equivalent, or heads of agencies do not submit meaningful reports to the agency.

36b. In practice, the committee acts in a non-partisan manner with members of opposition parties serving on the committee in an equitable fashion.

100 | 75 | 50 | 25 | 0

Comments:

The composition of the various oversight committees cited above is determined by provisions of the parliamentary standing orders supervised by the House Business Committee (HBC), which should have a minimum of five members and a maximum 20. In August 2006, key opposition parties walked out of HBC citing government dictatorship in reserving only eight seats for the opposition while also insisting on determining specifically which members would occupy those seats. The definition of the opposition, however, is not very clear, as a split in the ruling NARC party caused the president to invite bona fide opposition MPs into government to replace sacked rebels" in what is now considered a government of national unity.

Consequent to the HBC status, a private member's motion has been drafted which seeks to create a Parliamentary Select Committee that would establish and determine the composition of the various House Committees. In the case of the PAC, the standing orders provide that its chair may not be from the ruling party.

100: The committee is comprised of legislators from both the ruling party (or parties) and opposition parties in a roughly equitable distribution. All members of the committee — including opposition party members — are able to fully participate in the activities of the committee and influence the committee's work to roughly the same extent as any other member of the committee.

75:

50: The committee is comprised of legislators from both the ruling party (or parties) and opposition parties although the ruling party has a disproportionate share of committee seats. The chairperson of the committee may be overly influential and curb other members' ability to shape the committee's activities.

25:

0: The committee is dominated by legislators of the ruling party and/or the committee chairperson. Opposition legislators serving on the committee have in practice no way to influence the work of the committee.

36c. In practice, this committee is protected from political interference.

100 | 75 | **50** | 25 | 0

Comments:

Members of the opposition walked out of the House Business Committee, meaning that oversight of parliamentary business has been left entirely in the hands of the unity government. However, the unity government allows a semblance of objectivity in non-controversial areas.

100: This committee operates independently of the political process, without incentive or pressure to render favorable judgments on politically sensitive issues. Investigations are rarely praised or criticized by political figures.

75:

50: This committee is usually independent but is sometimes influenced by negative or positive political incentives. This may include public praise or criticism by the government.

25:

0: This committee is commonly influenced by personal or political forces or incentives. This may include conflicting family relationships, professional partnerships, or other personal loyalties that ultimately influence the committee's behavior and decision-making. Negative incentives may include threats, harassment or other abuses of power by the government.

36d. In practice, when necessary, this committee initiates independent investigations into financial irregularities.

100 | **75** | 50 | 25 | 0

Comments:

The various House Committees do initiate investigations (hearings), but whether their findings are acted on often depends on the government's interest in the matter. For example, the Official Secrets Act has been used to stop public officers from giving evidence to the PAC concerning the Anglo Leasing Scandal, in which the state lost billions through false payments to fictitious companies. In another instance, to pre-empt adverse findings by the House Departmental Committee on the Administration of Justice and Legal Affairs, the government quickly constituted a commission of inquiry which interviewed individuals peripheral to the core of the matter.

References:

www.nepru.org.na/index.php?id=247&no_cache=1&file=885&uid=424

100: When irregularities are discovered, the committee is aggressive in investigating the government.

75:

50: The committee starts investigations, but is limited in its effectiveness. The committee may be slow to act, unwilling to take on politically powerful offenders, or occasionally unable to enforce its judgments.

25:

0: The committee does not effectively investigate financial irregularities. The committee may start investigations but not complete them, or may fail to detect offenders. The committee may be partisan in its application of power.

Category IV. Administration and Civil Service

IV-1. ⁷⁰Civil Service Regulations

37. Are there national regulations for the civil service encompassing, at least, the managerial and professional staff?

100

37a. In law, there are regulations requiring an impartial, independent and fairly managed civil service.

YES | NO

Comments:

To the extent that all these important offices are appointed exclusively by the president, there obviously is room for bias as the likelihood of rewarding political loyalty in a multiparty context cannot be ruled out.

References:

Chapter VIII of the constitution provides for the establishment of the Public Service. Section 106 of the chapter establishes a Public Service Commission (PSC) whose 17 commissioners appointed exclusively by the president; they must never have been involved in party politics. Section 107 vests in PSC the power to appoint, confirm and discipline civil servants, a function in which it must not be subject to the direction or control of any other person or authority (Section 106 (12)). Chapter VIII also provides for the president's appointment of the Police Commissioner (Section 108), Attorney General (Section 109), Controller and Auditor General (Section 110) and permanent secretaries and diplomats (Section 111).

YES: A YES score is earned if there are specific formal rules establishing that the civil service carry out its duties independent of political interference.

NO: A NO score is earned if there are no formal rules establishing an independent civil service.

37b. In law, there are regulations to prevent nepotism, cronyism, and patronage within the civil service.

YES | NO

Comments:

These provisions are frequently violated with impunity by officers at all levels of the public service. See the reports at <http://www.knchr.org>

References:

Besides the constitutional provisions for an objective public service, Part III (Guiding Provisions for Codes of Conduct and Ethics) of the Public Officers Ethics Act (Cap 203) addresses efficiency and honesty (Section 7), professionalism (Section 8), legality (Section 9), improper enrichment (Section 10), conflict of interest (Section 11), improper fundraising (Section 12), political neutrality (Section 15), nepotism (Section 16), private affairs (Section 19) and sexual harassment (Section 20).

With respect to recruitment, the Directorate of Personnel Management's Public Service Recruitment and Training Policy (dated May 2005) declares that recruitment will be undertaken on the basis of meritocracy and equity... "and that selection will be "transparent, ethical... by a Committee composed of persons with appropriate expertise and of high integrity."

See <http://www.dpm.go.ke/pages/recruit.pdf>

YES: A YES score is earned if there are specific formal rules prohibiting nepotism, cronyism, and patronage in the civil service. These should include competitive recruitment and promotion procedures as well as safeguards against arbitrary disciplinary actions and dismissal.

NO: A NO score is earned if no such regulations exist.

37c. In law, there is an independent redress mechanism for the civil service.

YES | NO

Comments:

PSC deals with middle and senior level officers, while junior officers are handled by departmental bodies. The option of litigation is often beyond the reach of most officers because of the costs involved.

The Public Service Commission will adjudicate disputes between officers and their superiors. Officer grievances may be taken to court by individuals or through the Union of Kenyan Civil Servants.

YES: A YES score is earned if there is a mechanism to which civil servants and applicants for the civil service can take grievances regarding civil service management actions. Civil servants are able to appeal the mechanism's decisions to the judiciary.

NO: A NO score is earned if no such mechanism exists.

37d. In law, civil servants convicted of corruption are prohibited from future government employment.

YES | NO

References:

Section 64(1) of the Anti Corruption and Economic Crimes Act provides that conviction disqualifies an ex-officer from holding an appointed or elected office for ten years with subsection 4 providing for names of disqualified persons to be gazetted once a year.

YES: A YES score is earned if there are specific rules prohibiting continued government employment following a corruption conviction.

NO: A NO score is earned if no such rules exist.

38. Is the law governing the administration and civil service effective?

61

38a. In practice, civil servants are protected from political interference.

100 | 75 | 50 | 25 | 0

References:

The constitutional provisions of Chapter VIII giving the president exclusive powers to appoint Public Service Commissioners and various top civil servants in a multiparty context not only leaves room for excessive subjectivity, but also manipulation of those officers. Chapter II/Part 2 of the constitution also empowers the president to appoint Cabinet ministers and their assistants under whom civil servants work. Section 24 provides that the president can constitute and abolish offices, make appointments to them and terminate the same, while Section 25 provides that all offices are held at the pleasure of the president.”

100: Civil servants operate independently of the political process, without incentive or pressure to render favorable treatment or policy decisions on politically sensitive issues. Civil servants rarely comment on political debates. Individual judgments are rarely praised or criticized by political figures. Civil servants can bring a case to the courts challenging politically-motivated firings.

75:

50: Civil servants are typically independent, yet are sometimes influenced in their judgments by negative or positive political or personal incentives. This may include favorable or unfavorable treatment by superiors, public criticism or praise by the government, or other forms of influence. Civil servants may bring a case to the judicial system challenging politically-motivated firings but the case may encounter delays or bureaucratic hurdles.

25:

0: Civil servants are commonly influenced by political or personal matters. This may include conflicting family relationships, professional partnerships, or other personal loyalties. Negative incentives may include threats, harassment or other abuses of power. Civil servants are unable to find a remedy in the courts for unjustified or politically-motivated firings.

38b. In practice, civil servants are appointed and evaluated according to professional criteria.

100 | 75 | 50 | 25 | 0

Comments:

It is likely that most appointees have the basic qualifications for the jobs they get. However, recruitment to the top echelons of the service has always been highly subjective and/or politicized; especially because these are often presidential appointments. Recruitment to lower echelons also is often politicized to allow the political class to reward loyalty. Thus whereas most permanent secretaries, senior provincial administrators and parastatal heads would have been of Kalenjin descent like the previous president who lost the 2002 election, these offices will gradually be filled by Kikuyu kinsfolk of the current president.

100: Appointments to the civil service and their professional evaluations are made based on professional qualifications. Individuals appointed are free of conflicts of interest arising from personal loyalties, family connections or other biases. Individuals appointed usually do not have clear political party affiliations.

75:

50: Appointments and professional assessments are usually based on professional qualifications. Individuals appointed may have clear party loyalties, however.

25:

0: Appointments and professional assessments are often based on political considerations. Individuals appointed often have conflicts of interest due to personal loyalties, family connections or other biases. Individuals appointed often have clear party loyalties.

38c. In practice, civil service management actions (e.g. hiring, firing, promotions) are not based on nepotism, cronyism, or patronage.

100 | 75 | 50 | 25 | 0

Comments:

There is a lot of patronage, cronyism and nepotism in public appointments. The situation has been worsened by the creation of the so-called unity government. This has required room for nominees of the opposition politicians joining the Government while also getting rid of nominees of sacked, former NARC politicians.

100: Nepotism (favorable treatment of family members), cronyism (favorable treatment of friends and colleagues), and patronage (favorable treatment of those who reward their superiors) are actively discouraged at all levels of the civil service. Hirings, firings, and promotions are based on merit and performance.

75:

50: Nepotism, cronyism, and patronage are discouraged, but exceptions exist. Political leaders or senior officials sometimes appoint family member or friends to favorable positions in the civil service, or lend other favorable treatment.

25:

0: Nepotism, cronyism, and patronage are commonly accepted principles in hiring, firing and promotions of civil servants.

38d. In practice, civil servants have clear job descriptions.

100 | 75 | 50 | 25 | 0

Comments:

A major conference is scheduled for late this year entitled Results for Kenyans: leadership, integrity and results in public life,” the objective of which is to review the country’s experience with performance-based management.

References:

Chapter Four of the Directorate of Personnel Management’s Public Service Recruitment and Training Policy” (May 2005) states that the frameworks for performance management and targets are agreed on to improve productivity. See <http://www.dpm.go.ke/pages/recruit.pdf>. Kenya’s public sector performance contracts were launched in 1999 and have since been implemented in much of the public sector.

100: Civil servants almost always have formal job descriptions establishing levels of seniority, assigned functions, and compensation. Job descriptions are a reliable means to map positions to both human capital requirements (including the position’s authority and responsibilities) and base pay.

75:

50: Civil servants often have formal job descriptions, but exceptions exist. Some civil servants may not be part of the formal assignment of duties and compensations. Some job descriptions may not map clearly to pay or responsibilities in some cases.

25:

0: Civil servants do not have formal roles or job descriptions. If they do, such job descriptions have little or nothing to do with the position’s responsibilities, authority, or pay.

38e. In practice, civil servant bonuses constitute only a small fraction of total pay.

100 | 75 | 50 | 25 | 0

Comments:

There is no ready evidence of the extent to which such bonuses have been paid, even though performance contracts have been in place for nearly five years. Nonetheless, it is safe to say that such bonuses do not constitute more than 10 percent of neither the total wage bill nor individual take-home pay.

References:

Section 3.8/71 (iii) of Pay Policy for the Public Service” (January 2006) provides that “the performance related component of the compensation package will be paid in the form of a performance bonus (based on) well thought out and objectively identified performance indicators.” See <http://www.dpm.go.ke/pages/pay%20policy.pdf>

100: Civil servant bonuses constitute no more than 10% of total pay and do not represent a major element of take-home pay.

75:

50: Civil servant bonuses are generally a small percentage of total take-home pay for most civil servants though exceptions exist where some civil servants’ bonuses represent a significant part of total pay.

25:

0: Most civil servants receive bonuses that represent a significant amount of total take-home pay. In some cases bonuses represent the majority of total pay to civil servants.

38f. In practice, the government publishes the number of authorized civil service positions along with the number of positions actually filled.

100 | 75 | 50 | 25 | 0

Comments:

As malpractice pervaded recruitment in the public service into the 1970s, the government ceased to publish the annual Staff List” which had summarised the full employment details of all civil servants. Presently, the indirect way of obtaining this information is to review the ministry printed estimates of the budget, which shows authorized and in-place officers. However, various civil service censuses have revealed the existence of “ghost workers” beyond provisions.

100: The government publishes such a list on a regular basis.

75:

50: The government publishes such a list but it is often delayed or incomplete. There may be multiple years in between each successive publication.

25:

0: The government rarely or never publishes such a list, or when it does it is wholly incomplete.

38g. In practice, the independent redress mechanism for the civil service is effective.

100 | 75 | 50 | 25 | 0

Comments:

What might amount to an independent redress mechanism” is the Public Service Commission, which handles recruitment and discipline issues for officers of Job Group J and above. Officers below Job Group J are handled departmentally. The public service objectivity factors also extend to the domain of investigations. The Kenya Anti-Corruption Commission, which in theory is independent, only investigates allegations of corruption.

100: The independent redress mechanism for the civil service can control the timing and pace of its investigations without any input from the bodies that manage civil servants on a day-to-day basis.

75:

50: The independent civil service redress mechanism can generally decide what to investigate and when but is sometimes subject to pressure from the executive or the bodies that manage civil servants on a day-to-day basis on politically sensitive issues.

25:

0: The civil service redress mechanism must rely on approval from the executive or the bodies that manage civil servants on a day-to-day basis before initiating investigations. Politically sensitive investigations are almost impossible to move forward on.

38h. In practice, in the past year, the government has paid civil servants on time.

100 | 75 | 50 | 25 | 0

Comments:

Payment of core civil servant salaries has improved from the days when teacher salaries could be weeks late. However, this remains a problem for local authorities, who must generate revenues from a narrow tax base. Employees of the Nairobi City Council, the local authority with the greatest revenue-generating potential, in the past year have had to contend with delays of up to three months. Such delays will be unacceptable in the coming era of performance contracts recently signed by City Council officers.

100: In the past year, no civil servants have been paid late.

75:

50: In the past year, some civil servants have been paid late.

25:

0: In the past year, civil servants have frequently been denied due pay.

38i. In practice, civil servants convicted of corruption are prohibited from future government employment.

100 | 75 | 50 | 25 | 0

Comments:

Since the Anti-Corruption and Economic Crimes Act came into force in 2003, nine public officers have been convicted. One officer serving a one-year jail term for defrauding the national HIV/AIDS agency of US\$370,000 was granted amnesty by the president, suggesting that the act's provision barring re-appointment might be flouted.

References:

Section 64 (1) of the Anti-Corruption and Economic Crimes Act (2003) provides that convicted officers must not hold office for at least 10 years, while subsection (3) makes the provision not retrogressive.

100: A system of formal blacklists and cooling off periods is in place for civil servants convicted of corruption. All civil servants are subject to this system.

75:

50: A system of formal blacklists and cooling off periods is in place, but the system has flaws. Some civil servants may not be affected by the system, or the prohibitions are sometimes not effective.

25:

0: There is no such system, or the system is consistently ineffective in prohibiting future employment of convicted civil servants.

39. Are there regulations addressing conflicts of interest for civil servants?

39a. In law, there are requirements for civil servants to recuse themselves from policy decisions where their personal interests may be affected.

YES | NO

References:

Section 11 (1) of the Public Officers Ethics Act (2003) requires that public officers avoid conflict between personal interests and official duties. Section 11 (3) requires such an officer to declare such a conflict to his/her superior officer or other appropriate body, and to comply with given directions. Personal interests extend to spouses, relatives, business associates and any body in which the officer has an interest.

Section 42 (3) of the Anti-Corruption and Economic Crimes Act also adjudges a public agent guilty of an offense if he or she knowingly acquires or holds, directly or indirectly, a private interest in any contract, agreement or investment emanating from or connected with the public body.”

YES: A YES score is earned if there are requirements for civil servants to recuse themselves from policy decisions where their personal interests, including personal financial interests as well as those of their family and friends, are affected.

NO: A NO score exists if no such requirements exist in regulation or law.

39b. In law, there are restrictions for civil servants entering the private sector after leaving the government.

YES | NO

Comments:

Not only are there no such legal restrictions, but serving public officers are allowed to have private sector interests, such as directorships. This freedom arises from a mid-1960s commission of inquiry recommendation that argued that the cream of newly independent Kenya’s educated elite were needed in both sectors. Much of Kenya’s rampant corruption is blamed on the report.

YES: A YES score is earned if there are regulations restricting civil servants’ ability to take positions in the private sector after leaving government that would present a conflict of interest, including positions that directly seek to influence their former government colleagues.

NO: A NO score is earned if no such restrictions exist.

39c. In law, there are regulations governing gifts and hospitality offered to civil servants.

YES | NO

References:

Section 10 (2) a, an officer shall not accept gifts or favors from a person with an interest that may be affected by the officer's conduct of duties, or undertakes regulated duties for or has a contractual arrangement with the officer's organization. However, Section 10 (3) allows gifts of ornaments or souvenirs, while subsection (4) exempts gifts given by relatives or friends in cultural occasions.

YES: A YES score is earned if there are formal guidelines regarding gifts and hospitality given to civil servants.

NO: A NO score is earned if there are no such guidelines or regulations.

39d. In practice, the regulations restricting post-government private sector employment for civil servants are effective.

100 | 75 | 50 | 25 | 0

Comments:

There are no such regulations. Former civil servants can go into the private sector at will, while many active civil servants have extensive private sector interests, especially because real civil service wages are so modest.

100: The regulations restricting post-government private sector employment for civil servants are uniformly enforced. There are no or few cases of civil servants taking jobs in the private sector after leaving government where they directly lobby or seek to influence their former government colleagues without an adequate cooling off" period.

75:

50: The regulations are generally enforced though some exceptions exist. In certain sectors, civil servants are known to regularly take jobs in the private sector that entail directly lobbying or seeking to influence their former government colleagues. Cooling off periods are short and sometimes ignored.

25:

0: The regulations are rarely or never enforced. Civil servants routinely take jobs in the private sector following government employment that involve direct lobbying or influencing of former government colleagues. Cooling off periods are non-existent or never enforced.

39e. In practice, the regulations governing gifts and hospitality offered to civil servants are effective.

100 | 75 | 50 | 25 | 0

Comments:

The regulations governing gifts to public servants are difficult to effect. In rural areas, for example, disputes might be resolved by public officers who will typically be offered refreshments by the litigants as part of traditional hospitality, even if this might cast them in a positive light in the eyes of the public officers.

100: The regulations governing gifts and hospitality to civil servants are regularly enforced and sufficiently restrict the amounts of gifts and hospitality that can be given to civil servants. Civil servants never or rarely accept gifts or hospitality above what is allowed.

75:

50: The regulations governing gifts and hospitality to civil servants are generally applied though exceptions exist. Some civil servants in certain sectors are known to accept greater amounts of gifts and hospitality from outside interest groups or private sector actors than is allowed.

25:

0: The regulations governing gifts and hospitality to the civil service are routinely ignored and unenforced. Civil servants routinely accept significant amounts of gifts and hospitality from outside interest groups and actors seeking to influence their decisions.

39f. In practice, the requirements for civil service recusal from policy decisions affecting personal interests are effective.

100 | 75 | 50 | 25 | 0

Comments:

While in the judiciary it is common to read of judges removing themselves from cases where there is conflict of interest, there is no publicly accessible documentation of the extent to which this happens in the civil service. On the contrary, there are many overt instances where public officers push the interests of friends and relatives to the front of the queue, such as at police stations, immigration and customs departments, registrars' offices, etc.

100: The requirements that civil servants recuse themselves from policy decisions where their personal interests are affected are routinely followed by most or all civil servants.

75:

50: The requirements that civil servants recuse themselves from policy decisions where their personal interests are affected are followed by most civil servants though exceptions exist. In certain sectors, civil servants are known to routinely participate in policy decisions where their personal interests are affected.

25:

0: Most civil servants routinely ignore recusal requirements and continue to participate in policy decisions where their personal interests are affected.

40. Can citizens access the asset disclosure records of senior civil servants?

0

40a. In law, citizens can access the asset disclosure records of senior civil servants.

YES | NO

Comments:

Any commission or its agents are forbidden from receiving wealth/asset declarations and from divulging the contents to anyone other than the provider, their representative or a person identified by a High Court order. Where such information has been acquired contrary to the provisions above, it may not even be disclosed by a third party. This offense is punishable by a fine of up to K Sh 2 million (US \$30,000), a prison term of up to 2 years or both.

References:

Section 29 (1) to (3) of the Public Officers Ethics Act

YES: A YES score is earned if laws or regulations guarantee that citizens can access the asset records of senior civil servants.

NO: A NO score is earned if senior civil servants do not file an asset disclosure. A NO score is earned if senior civil servants file an asset disclosure, but it is not available to the public.

40b. In practice, citizens can access the asset disclosure records of senior civil servants within a reasonable time period.

100 | 75 | 50 | 25 | 0

Comments:

Asset declaration has only been in practice since 2003. In that time, one does not readily recall an instance where information from the disclosure records has been divulged in toto, even by investigative journalists, because of the severe penalties. However, there are other avenues through which the assets of senior civil servants can be determined, such as by conducting the readily accessible search of the records of the Commissioner of Lands, Registrar of Companies, etc.

100: Records are available on-line, or records can be obtained within two days. Records are uniformly available; there are no delays for politically sensitive information.

75:

50: Records take around two weeks to obtain. Some delays may be experienced.

25:

0: Records take more than a month to acquire. In some cases, most records may be available sooner, but there may be persistent delays in obtaining politically sensitive records.

40c. In practice, citizens can access the asset disclosure records of senior civil servants at a reasonable cost.

100 | 75 | 50 | 25 | 0

Comments:

Not the disclosure records.

100: Records are free to all citizens, or available for the cost of photocopying. Records can be obtained at little cost, such as by mail, or on-line.

75:

50: Records impose a financial burden on citizens, journalists or CSOs. Retrieving records may require a visit to a specific office, such as a regional or national capital.

25:

0: Retrieving records imposes a major financial burden on citizens. Records costs are prohibitive to most citizens, journalists, or CSOs trying to access this information.

IV-2. Whistle-blowing Measures

41. Are employees protected from recrimination or other negative consequences when reporting corruption (i.e. whistle-blowing)?

56

41a. In law, civil servants who report cases of corruption, graft, abuse of power, or abuse of resources are protected from recrimination or other negative consequences.

YES | NO

Comments:

No disciplinary action may be instituted or continued against a person who assists an investigation or discloses information for such an investigation. Courts are required to conceal or remove from any documents any information information that might disclose the identity of the informer.

References:

Section 65 (1) and (4) of the Anti-Corruption and Economic Crimes Act

YES: A YES score is earned if there are specific laws against recrimination against public sector whistleblowers. This may include prohibitions on termination, transfer, harassment or other consequences.

NO: A NO score is earned if there are no legal protections for public-sector whistleblowers.

41b. In practice, civil servants who report cases of corruption, graft, abuse of power, or abuse of resources are protected from recrimination or other negative consequences.

100 | 75 | 50 | 25 | 0

Comments:

A Central Bank employee who exposed the Goldenberg Scandal in 1993 lost his job in the process. Despite repeated pleas to the government to have his job restored, or be assigned to a different post, he died a pauper in September 2006. There are also cases where whistle-blowers have not been subject to reprisal, but more positive treatment of such incidents would have gone a long way toward institutionalizing whistle-blowing.

100: Public sector whistleblowers can report abuses of power without fear of negative consequences. This may be due to robust mechanisms to protect the identity of whistleblowers or may be due to a culture that encourages disclosure and accountability.

75:

50: Public sector whistleblowers are sometimes able to come forward without negative consequences, but in other cases, whistleblowers are punished for disclosing, either through official or unofficial means.

25:

0: Public sector whistleblowers often face substantial negative consequences, such as losing a job, relocating to a less prominent position, or some form of harassment.

41c. In law, private sector employees who report cases of corruption, graft, abuse of power, or abuse of resources are protected from recrimination or other negative consequences.

YES | NO

Comments:

The Anti-Corruption and Economic Crimes Act provides for the protection of all whistleblowers. However, it does not state how protection can be enforced in the private sector when liberalization laws allow private sector employers to declare redundancies. Even for the public sector where retrenchment has been common, it is not clear how the law can distinguish targeting of whistleblowers.

YES: A YES score is earned if there are specific laws against recrimination against private sector whistleblowers. This may include prohibitions on termination, transfer, harassment or other consequences.

NO: A NO score is earned if there are no legal protections for private-sector whistleblowers.

41d. In practice, private sector employees who report cases of corruption, graft, abuse of power, or abuse of resources are protected from recrimination or other negative consequences.

100 | 75 | 50 | 25 | 0

Comments:

A bank employee who recently fled to exile in the U.S. had already lost his private sector job. It is inconceivable that some form of workplace harassment would not be experienced by a whistleblower who causes the private investor to lose through prosecution. A long-standing victimization of Kenyan shop stewards points to persons facing hard times for informing on their employers.

100: Private sector whistleblowers can report abuses of power without fear of negative consequences. This may be due to robust mechanisms to protect the identity of whistleblowers or may be due to a culture that encourages disclosure and accountability.

75:

50: Private sector whistleblowers are sometimes able to come forward without negative consequences, but in other cases, whistleblowers are punished for disclosing, either through official or unofficial means.

25:

0: Private sector whistleblowers often face substantial negative consequences, such as losing a job, relocating to a less prominent position, or some form of harassment.

42. Is there an effective internal mechanism (i.e. phone hotline, e-mail address, local office) where civil servants can report corruption?

75

42a. In practice, the internal reporting mechanism for public sector corruption has a professional, full-time staff.

100 | 75 | 50 | 25 | 0

Comments:

Since the enactment of the Anti-Corruption and Economic Crimes Act, many government agencies have declared themselves "Corruption Free Zones" including such notorious agencies as the lands office and immigration department. Many departments have set up drop-boxes for reporting malfeasance and others have appointed dedicated anti-corruption staff. The Kenya Anti Corruption Commission has established hot lines and a reporting area on its Web site. The Kenya Police also have dedicated hot lines.

100: The agency/entity has staff sufficient to fulfill its basic mandate.

75:

50: The agency/entity has limited staff, a fact that hinders its ability to fulfill its basic mandate.

25:

0: The agency/entity has no staff, or a limited staff that is clearly unqualified to fulfill its mandate.

42b. In practice, the internal reporting mechanism for public sector corruption receives regular funding.

100 | 75 | 50 | 25 | 0

Comments:

The Kenya Anti Corruption Commission has a massive annual budget, with its chief executive receiving a salary greater than that of the president. As for the departmental anti-corruption initiatives, these are likely to be funded to the extent that the whole department receives regular funding.

100: The agency/entity has a predictable source of funding that is fairly consistent from year to year. Political considerations are not a major factor in determining agency funding.

75:

50: The agency/entity has a regular source of funding but may be pressured by cuts, or threats of cuts to the agency budget. Political considerations have an effect on agency funding.

25:

0: Funding source is unreliable. Funding may be removed arbitrarily or as retaliation for agency actions.

42c. In practice, the internal reporting mechanism for public sector corruption acts on complaints within a reasonable time period.

100 | 75 | **50** | 25 | 0

Comments:

However, the attorney general recently rejected grand corruption cases against Cabinet ministers and senior politicians that the commission had recommended for prosecution, raising questions about the commission's efficacy. The corruption reports from the other government departments also are handed over to the commission for investigation.

References:

Despite its massive resources, the Kenya Anti Corruption Commission has not resolved a single instance of grand corruption. In 2005, it received 5,678 reports; 754 were investigated and 1,436 were referred to government departments for administrative action. Of the 754 complaints investigated, some have been concluded and suspects arraigned whereas others are at various stages of investigation.

100: The agency/entity acts on complaints quickly. While some backlog is expected and inevitable, complaints are acknowledged promptly and investigations into serious abuses move steadily towards resolution. Citizens with simple issues can expect a resolution within a month.

75:

50: The agency/entity acts on complaints quickly, with some exceptions. Some complaints may not be acknowledged, and simple issues may take more than two months to resolve.

25:

0: The agency/entity cannot resolve complaints quickly. Complaints may be unacknowledged for more than a month, and simple issues may take more than three months to resolve. Serious abuses are not investigated with any urgency.

42d. In practice, when necessary, the internal reporting mechanism for public sector corruption initiates investigations.

100 | **75** | 50 | 25 | 0

References:

Despite its massive resources, the Kenya Anti Corruption Commission has not resolved a single instance of grand corruption. In 2005, it received 5,678 reports; 754 were investigated and 1,436 were referred to government departments for administrative action. Of the 754 complaints investigated, some have been concluded and suspects arraigned whereas others are at various stages of investigation.

100: When irregularities are discovered, the agency/entity is aggressive in investigating the government or in cooperating with other agencies' investigations.

75:

50: The agency/entity starts investigations, but is limited in its effectiveness. The agency/entity may be slow to act, unwilling to take on politically powerful offenders, reluctant to cooperate with other investigative agencies, or occasionally unable to enforce its judgments.

25:

0: The agency/entity does not effectively investigate. The agency/entity may start investigations but not complete them, may refuse to cooperate with other investigative agencies, or may fail to detect offenders. The agency/entity may be partisan in its application of power.

66
IV-3. Procurement

43. Is the public procurement process effective?

90

43a. In law, there are regulations addressing conflicts of interest for public procurement officials.

YES | NO

Comments:

An employee, agent or member of a procurement board or committee who has a conflict of interest may neither participate in proceedings nor take part in decisions relating to the contract. Such a person also must disclose such conflict to the procuring entity, failing which any contract won could be declared void.

References:

Section 43 (1-3) of the Public Procurement and Disposal Act, 2005

YES: A YES score is earned if there are specific formal regulations defining and regulating conflicts of interest between official public duty and private gain for public procurement officials.

NO: A NO score is earned if no such rules exist.

43b. In law, there is mandatory professional training for public procurement officials.

YES | NO

Comments:

The Public Procurement Oversight Authority (PPOA) must assist in the implementation and operation of the procurement system by advising and assisting procuring entities. The law further requires PPOA to develop, promote and support training and professional development of procurement staff, giving written directions to procurement entities who it should ensure engage professional staff.

References:

Section 9 (c) of the Public Procurement and Disposal Act

YES: A YES score is earned if public procurement officials receive regular mandatory training to ensure professional standards in supervising the tendering process.

NO: A NO score is earned if there is no regular required training of public procurement officials or if training is sporadic, inconsistent, or voluntary.

43c. In practice, the conflicts of interest regulations for public procurement officials are enforced.

100 | 75 | **50** | 25 | 0

Comments:

It seems too early to evaluate implementation and impact of the new Public Procurement and Disposal Act. Prior to its arrival, the procurement domain was controlled by the Procurement Regulations, under which conflict-of-interest regulations were not observed to the letter. For instance, the regulations provided for a Public Procurement Complaints, Review and Appeals Board on which the permanent secretaries of finance and of the president's office sat alongside the solicitor general. Yet often, it was complaints against their very departments that the board would be reviewing.

100: Regulations regarding conflicts of interest for procurement officials are aggressively enforced.

75:

50: Conflict of interest regulations exist, but are flawed. Some violations may not be enforced, or some officials may be exempt from regulations.

25:

0: Conflict of interest regulations do not exist, or are consistently ineffective.

43d. In law, there is a mechanism that monitors the assets, incomes and spending habits of public procurement officials.

YES | NO

Comments:

As with other public officers, procurement officers must declare their assets annually.

References:

Part IV, Public Officers Ethics Act

YES: A YES score is earned if there is a formal mandate to some agency to monitor the assets, incomes and spending habits of public procurement officials, such as an inspector general, or ombudsman.

NO: A NO score is earned if no such mandate exists.

43e. In law, major procurements require competitive bidding.

YES | NO

Comments:

All procurements by public entities, contract management, supply chain management and disposal of stores and equipment that are unservicable, obsolete or surplus. Transactions will be by open tender, with provisions that allow for restricted tendering, direct procurement and request for proposals.

References:

Section 4 of the Public Procurement and Disposal Act, Part V, Part VI Sections 72A-72C

YES: A YES score is earned if all major procurements (defined as those greater than 0.5% of GDP) require competitive bidding.

NO: A NO score is earned if competitive bidding is not required by law or regulation for major procurement (greater than 0.5% OF GDP).

43f. In law, strict formal requirements limit the extent of sole sourcing.

YES | NO

Comments:

Under exceptional circumstances stipulated by law, direct procurement may be used as long as the purpose is not to avoid competition." Direct procurement is permitted when there is only a single supplier and there is no reasonable alternative for the good; and where there is an unforeseen urgency that alternative procurement methods cannot accommodate.

References:

Public Procurement and Disposal Act, Section 74, Part VI

YES: A YES score is earned if sole sourcing is limited to specific, tightly defined conditions, such as when a supplier is the only source of a skill or technology.

NO: A NO score is earned if there are no prohibitions on sole sourcing. A NO score is earned if the prohibitions on sole sourcing are general and unspecific.

43g. In law, unsuccessful bidders can instigate an official review of procurement decisions.

YES | NO

Comments:

Procurement complaints are handled by the Review and Appeals Board, whose decisions are final unless a judicial review of its decision commences within 14 days.

References:

Public Procurement and Disposal Act, sections 25 and 100

YES: A YES score is earned if there is a formal appeal process for unsuccessful bidders.

NO: A NO score is earned if no such process exists.

43h. In law, unsuccessful bidders can challenge procurement decisions in a court of law.

YES | NO

Comments:

Unsuccessful tenders who are dissatisfied with the decisions of the Public Procurement Administrative Review Board can go to court within 14 days.

References:

Section 100, of the Public Procurement and Disposal Act

YES: A YES score is earned if unsuccessful bidders can use the courts to appeal a procurement decision.

NO: A NO score is earned if no such process exists.

43i. In law, companies guilty of major violations of procurement regulations (i.e. bribery) are prohibited from participating in future procurement bids.

YES | NO

Comments:

Companies guilty of violations may be shut out of future bids, at the discretion of the director general. After such rulings, affected parties may seek a review of the matter, after which the Review Board can confirm or overturn the director general's debarment.

A confirmed debarment can be challenged in the High Court within 14 days. The authority must publish and circulate a list of all debarred persons or entities.

References:

Public Procurement and Disposal Act, Part IX and sections 115, 117, 122 and 125.

YES: A YES score is earned if there are formal procurement blacklists, preventing convicted companies from doing business with the government.

NO: A NO score is earned if no such process exists.

43j. In practice, companies guilty of major violations of procurement regulations (i.e. bribery) are prohibited from participating in future procurement bids.

100 | 75 | **50** | 25 | 0

Comments:

There have been many instances in which Parliament’s Public Accounts Committee has blacklisted contractors. The Roads department also has blacklisted cowboy contractors.” However, it is unclear whether these actions amounted to debarment. The Public Procurement Directorate has a Web site with a “Debarred Firms” section, however, it has no entries.

References:

<http://www.treasury.go.ke/ppd/debarred.html>

100: A system of formal blacklists and cooling off periods is in place for companies convicted of corruption. All companies are subject to this system.

75:

50: A system of formal blacklists and cooling off periods is in place, but the system has flaws. Some procurements or companies may not be affected by the system, or the prohibitions are sometimes not effective.

25:

0: There is no such system, or the system is consistently ineffective in prohibiting future hiring of blacklisted companies.

44. Can citizens access the public procurement process?

88

44a. In law, citizens can access public procurement regulations.

YES | NO

Comments:

Procuring entities must take (reasonable) steps to bring the invitation to tender to the attention of those who may wish to submit tenders." Law stipulates the frequency with which different tenders must be advertised in the media.

References:

Public Procurement and Disposal Act, Section 54

YES: A YES score is earned if procurement rules are, by law, open to the public.

NO: A NO score is earned if procurement rules are officially secret for any reason or if there are no procurement rules.

44b. In law, the government is required to publicly announce the results of procurement decisions.

YES | NO

Comments:

The government must publish contracts it has awarded.

References:

Public Procurement and Disposal Act, Section 46

YES: A YES score is earned if the government is required to publicly post or announce the results of the public procurement process. This can be done through major media outlets or on a publicly-accessible government register or log.

NO: A NO score is earned if there is no requirement for the government to publicly announce the results of the public procurement process.

44c. In practice, citizens can access public procurement regulations within a reasonable time period.

100 | 75 | 50 | 25 | 0

Comments:

The new Public Procurement and Disposal Act is available online at various Web sites, including those of the finance ministry and the Kenya Anti-Corruption Commission. The law also can be purchased at the Government Printers in Nairobi.

References:

<http://www.treasury.go.ke/ppd/bill.html>, <http://www.kacc.go.ke/PPA2005.asp>

100: Records are available on-line, or records can be obtained within two days. Records are uniformly available; there are no delays for politically sensitive information.

75:

50: Records take around two weeks to obtain. Some delays may be experienced.

25:

0: Records take more than a month to acquire. In some cases, most records may be available sooner, but there may be persistent delays in obtaining politically sensitive records.

44d. In practice, citizens can access public procurement regulations at a reasonable cost.

100 | 75 | 50 | 25 | 0

Comments:

Citizens can access the laws either through the Internet or by purchasing the documents at a nominal fee from Government Printers.

100: Records are free to all citizens, or available for the cost of photocopying. Records can be obtained at little cost, such as by mail, or on-line.

75:

50: Records impose a financial burden on citizens, journalists or CSOs. Retrieving records may require a visit to a specific office, such as a regional or national capital.

25:

0: Retrieving records imposes a major financial burden on citizens. Records costs are prohibitive to most citizens, journalists, or CSOs trying to access this information.

44e. In practice, major public procurements are widely advertised.

100 | 75 | 50 | 25 | 0

Comments:

The extent to which major procurements are widely advertised in practice is difficult to tell. Kenyans have often only become aware of the conceit when, as in the case of the Anglo Leasing Scandal, a matter has been exposed by national audit reports or investigative journalists. However, the daily print media is full of tender advertisements.

100: There is a formal process of advertising public procurements. This may include a government Web site, newspaper advertising, or other official announcements. All major procurements are advertised in this way.

75:

50: There is a formal process of advertisement but it is flawed. Some major procurements may not be advertised, or the advertising process may not be effective.

25:

0: There is no formal process of advertising major public procurements or the process is superficial and ineffective.

44f. In practice, citizens can access the results of major public procurement bids.

100 | 75 | **50** | 25 | 0

Comments:

There is no formal provision, such as a central office or Web site, from which the average citizen can access procurement results or prospective tenders. Consequently, an average citizen would his or her work cut out trying to obtain such information. However, interested parties, such as individuals or companies that had competed in the tendering process, can demand such information from the tenderer, failing which they can approach the Review Board and ultimately go to the High Court. Investigative journalists are able to secure such information, at a price.

100: Records of public procurement results are publicly available through a formal process.

75:

50: Records of public procurements are available, but there are exceptions to this practice. Some information may not be available, or some citizens may not be able to access information.

25:

0: This information is not available to the public through an official process.

IV-4. Privatization

45. Is the privatization process effective?

75

45a. In law, all businesses are eligible to compete for privatized state assets.

YES | NO

Comments:

After many attempts at passing a privatisation legislation, this was finally done in 2005. The law allows all interests, Kenyan or

foreign, to participate in privatization. However, state corporations are barred from participation except in the cases of funds such as social security and pension.

References:

Privatisation Act, Section 29

YES: A YES score is earned if all businesses are equally eligible to compete for privatized assets. A YES score is still earned if the government did not privatize any state-owned assets during the study period.

NO: A NO score is earned if any group of businesses (other than those blacklisted due to corruption charges) is excluded by law.

45b. In law, there are regulations addressing conflicts of interest for government officials involved in privatization.

YES | NO

Comments:

Members of the Privatisation Commission who might have personal, family, professional or business interests in privatization are required to declare such interests to the commission before transaction of business.

References:

Parts 8 and 9 of the First Schedule of the Privatisation Act

YES: A YES score is earned if there are formal regulations defining and regulating conflicts of interest for government officials involved in privatization.

NO: A NO score is earned if there are no such formal regulations.

45c. In practice, conflicts of interest regulations for government officials involved in privatization are enforced.

100 | 75 | 50 | **25** | 0

Comments:

The Privatisation Act has only just come into force, even though privatisation of state resources has been ongoing. Previous privatization had ignored the principle of conflict of interest. Government officers have habitually identified key, politically connected individuals to allocate state resources at throw-away prices, using such an umbrella to also allocate resources to themselves. The use of offshore companies also has been prominent.

100: Regulations regarding conflicts of interest for privatization officials are aggressively enforced.

75:

50: Conflict of interest regulations exist, but are flawed. Some violations may not be enforced, or some officials may be exempt from the regulations.

25:

0: Conflict of interest regulations do not exist, or are consistently ineffective.

46. Can citizens access the terms and conditions of privatization bids?

81

46a. In law, citizens can access the terms and conditions of privatization bids.

YES | NO

Comments:

The cabinet must publish privatization decisions in two high-profile print media outlets. The publication must be on two occasions, seven days apart. The ads must contain details of what is being privatized, how it is to be done, and any pertinent deadlines.

References:

Section 30 of the Privatisation Act

YES: A YES score is earned if there is a formal process of publishing the details of privatization bids that makes information available to all citizens.

NO: A NO score is earned if there is no formal publication process, or if any citizens are excluded by law from accessing this information.

46b. In law, the government is required to publicly announce the results of privatization decisions.

YES | NO

Comments:

Law requires the publication of a privatization awards or other agreements in the official Kenya Gazette, after which 14 days are allowed for appeals or objections.

References:

Section 36 of the Privatisation Act

YES: A YES score is earned if the government is required to publicly post or announce the results of the privatization process. This can be done through major media outlets or on a publicly-accessible government register or log.

NO: A NO score is earned if there is no requirement for the government to publicly announce the results of the privatization process.

46c. In practice, citizens can access the terms and conditions of privatization bids within a reasonable time period.

100 | 75 | 50 | 25 | 0

Comments:

Where the Cabinet's privatization intent is advertised in the media (as required by law), this will be readily available to the citizens. The recent privatization of KenGen, the near-monopoly generator of electricity, through sale of shares on the stock exchange was very well publicized, resulting in a massive over-subscription that forced a rationing of the shares. However, it is not clear whether this will be the norm. In the past, however, such publication was not undertaken and there have been complaints of selective allocation of privatized assets.

100: Records are available on-line, or records can be obtained within two days. Records are uniformly available; there are no delays for politically sensitive information.

75:

50: Records take around two weeks to obtain. Some delays may be experienced.

25:

0: Records take more than a month to acquire. In some cases, most records may be available sooner, but there may be persistent delays in obtaining politically sensitive records.

46d. In practice, citizens can access the terms and conditions of privatization bids at a reasonable cost.

100 | 75 | 50 | 25 | 0

Comments:

Where the proposed privatization is through an initial public offering of stock, the contracted brokers undertake very effective publicity, meaning citizens can access information for free. However, where privatization is by tender, the fees payable for tender documents are often prohibitive for the average citizen.

100: Records are free to all citizens, or available for the cost of photocopying. Records can be obtained at little cost, such as by mail, or on-line.

75:

50: Records impose a financial burden on citizens, journalists or CSOs. Retrieving records may require a visit to a specific office, such as a regional or national capital.

25:

0: Retrieving records imposes a major financial burden on citizens. Records costs are prohibitive to most citizens, journalists, or CSOs trying to access this information.

V-1. National Ombudsman

47. In law, is there a national ombudsman, public protector or equivalent agency (or collection of agencies) covering the entire public sector?

100

47. In law, is there a national ombudsman, public protector or equivalent agency (or collection of agencies) covering the entire public sector?

YES

NO

Comments:

There is no national ombudsman in the Western tradition. However, it had been provided for in the draft constitution of November 2005 (rejected for other, unrelated issues). In one of the Kenya Anti Corruption Commission's work reports, the director noted that many compliants to KACC were over administration rather than corruption, concluding this to be further evidence of the need for an ombudsman.

However, after many years of civil society elements acting as an ad hoc ombudsman collective, Parliament enacted the Kenya National Commission of Human Rights (KNCHR) Act (2002). KNCHR was supposed to counter the high profile anti-government: "Kenya Human Rights Commission. KNCHR has turned out to be even more aggressive in campaigning against misuse of authority than had been done by the private/civil society entities. KNCHR has argued that its coverage of matters that are not narrowly in the human rights domain is justified because, for example, the mismangement of public funds reduces the resources with which the government can ensure the rights to education, health, etc., of society's poorest.

References:

<http://www.knchr.org/news.asp?ID=59>

YES: A YES score is earned if there is a specific agency or set of agencies whose primary mandate is to investigate the actions of government on the behalf of common citizens. This agency or set of agencies should be specifically charged with seeking out and documenting abuses of power.

NO: A NO score is earned if no such agency or set of agencies exists, or that function is a secondary concern of a larger body, such as the legislature.

48. Is the national ombudsman effective?

80

48a. In law, the ombudsman is protected from political interference.

YES | NO

Comments:

KNCHR is assumed to be performing the functions of an ombudsman (alongside other agencies with which it has collaborated, such as the Kenya Human Rights Commission and the Kenya Land Alliance). By law the agency is not subject to the direction or control of any other person or authority, and it is endowed with the powers of a court of law to investigate any allegations of abuse of power. It is significant for the commission's independence that its budget resources are ratified by Parliament and come directly from the Consolidated Fund rather than through a particular ministry, which could be used to arm-twist the agency if desired.

References:

KNCHR Act, Section 18

<http://www.knchr.org/section.asp?ID=1>

YES: A YES score is earned only if the agency (or set of agencies) has some formal organizational independence from the government. A YES score is earned even if the entity is legally separate but in practice staffed by partisans.

NO: A NO score is earned if the agency is a subordinate part of any government ministry or agency, such as the Department of Interior or the Justice Department.

48b. In practice, the ombudsman is protected from political interference.

100 | 75 | 50 | 25 | 0

Comments:

Assuming that KNCHR is the nearest institution to an ombudsman, the agency does operate relatively independently. This has been in evidence during the second half of 2006, as KNCHR has carried on in spite of massive political interference from the government. KNCHR is under investigation by the Kenya Anti Corruption Commission for abuse of office on matters that have been cleared by the Auditor General. One allegation is that the agency bought a small, cheap four-wheel-drive vehicle rather than the larger types characteristic of public sector executives. This investigation appears to stem from the independent spirit of KNCHR's chief executive, who has refused to toe the government line.

100: This agency (or set of agencies) operates independently of the political process, without incentive or pressure to render favorable judgments in politically sensitive cases. Investigations can operate without hindrance from the government, including access to politically sensitive information.

75:

50: This agency (or set of agencies) is typically independent, yet is sometimes influenced in its work by negative or positive political incentives. This may include public criticism or praise by the government. The ombudsman may not be provided with some information needed to carry out its investigations.

25:

0: This agency (or set of agencies) is commonly influenced by political or personal incentives. This may include conflicting family relationships, professional partnerships, or other personal loyalties. Negative incentives may include threats, harassment or other abuses of power. The ombudsman cannot compel the government to reveal sensitive information.

48c. In practice, the head of the ombudsman agency/entity is protected from removal without relevant justification.

100 | 75 | 50 | 25 | 0

Comments:

Removal of the KNCHR chair and commissioners requires the Chief Justice to appoint and gazette a tribunal. The eventual removal must be gazetted by the president. These provisions have yet to be tested.

References:

KNCHR Act, Section 11

100: The director of the ombudsman (or directors of multiple agencies) serves a defined term and cannot be removed without a significant justification through a formal process, such as impeachment for abuse of power.

75:

50: The director of the ombudsman (or directors of multiple agencies) serves a defined term, but can in some cases be removed through a combination of official or unofficial pressure.

25:

0: The director of the ombudsman (or directors of multiple agencies) can be removed at the will of political leadership.

48d. In practice, the ombudsman agency (or agencies) has a professional, full-time staff.

100 | 75 | 50 | 25 | 0

Comments:

KNCHR has a chair and nine commissioners. Since the commission is fully funded by the Consolidated Fund, its Web site declaration that there are no current vacancies must be taken to mean that it is adequately staffed.

100: The ombudsman agency (or agencies) has staff sufficient to fulfill its basic mandate.

75:

50: The ombudsman agency (or agencies) has limited staff that hinders its ability to fulfill its basic mandate.

25:

0: The ombudsman agency (or agencies) has no staff, or a limited staff that is clearly unqualified to fulfill its mandate.

48e. In practice, agency appointments support the independence of the ombudsman agency (or agencies).

100 | 75 | 50 | 25 | 0

Comments:

There has been some grumbling over the appointments of the first two slates of KNCHR commissioners. Parliament selects 12 candidates from applications received from the public, and the president appoints the final nine commissioners. Some feel the commissioners do not reflect the law's requirement that final appointments reflect Kenya's ethnic, geographical, cultural, political, social and economic diversity and ... gender equity."

100: Appointments to the agency (or agencies) are made based on professional qualifications. Individuals appointed are free of conflicts of interest due to personal loyalties, family connections or other biases. Individuals appointed usually do not have clear political party affiliations.

75:

50: Appointments are usually based on professional qualifications. Individuals appointed may have clear party loyalties.

25:

0: Appointments are often based on political considerations. Individuals appointed often have conflicts of interest due to personal loyalties, family connections or other biases. Individuals appointed often have clear party loyalties.

48f. In practice, the ombudsman agency (or agencies) receives regular funding.

100 | 75 | 50 | 25 | 0

Comments:

KNCHR's funds are approved by Parliament and drawn from the Consolidated Fund. The law further permits the agency to receive grants and donations from any other source." There has never been any indication that the agency is resource constrained.

References:

KNCHR Act, Section 26

100: The agency (or agencies) has a predictable source of funding that is fairly consistent from year to year. Political considerations are not a major factor in determining agency funding.

75:

50: The agency (or agencies) has a regular source of funding, but may be pressured by cuts, or threats of cuts to the agency budget. Political considerations have an effect on agency funding.

25:

0: Funding source is unreliable. Funding may be removed arbitrarily or as retaliation for agency functions.

48g. In practice, the agency (or agencies) makes publicly available reports.

100 | 75 | 50 | 25 | 0

Comments:

KNCHR publishes reports of its findings as they come up.

References:

Some of their reports can be accessed at <http://www.knchr.org/publications.asp?subjectid=1> or <http://www.knchr.org/publications.asp?subjectid=2>

100: The agency (or agencies) makes regular, publicly available, substantial reports either to the legislature or directly to the public outlining the full scope of its work.

75:

50: The agency (or agencies) makes publicly available reports to the legislature and/or directly to the public that are sometimes delayed or incomplete.

25:

0: The agency (or agencies) makes no reports of its activities, or makes reports that are consistently out of date, unavailable to the public, or insubstantial.

48h. In practice, when necessary, the national ombudsman (or equivalent agency or agencies) initiates investigations.

100 | 75 | 50 | 25 | 0

Comments:

KNCHR's mission includes investigation of violation of any human rights and visiting prisons and jails with a view to assessing and inspecting the conditions.

References:

KNCHR Act, Section 16

100: The agency aggressively starts investigations — or participates fully with cooperating agencies' investigations — into judicial misconduct. The agency is fair in its application of this power.

75:

50: The agency will start or cooperate in investigations, but often relies on external pressure to set priorities, or has limited effectiveness when investigating. The agency, though limited in effectiveness, is still fair in its application of power.

25:

0: The agency rarely investigates on its own or cooperates in other agencies' investigations, or the agency is partisan in its application of this power.

48i. In practice, when necessary, the national ombudsman (or equivalent agency or agencies) imposes penalties on offenders.

100 | 75 | 50 | 25 | 0

Comments:

On completion of investigations, KNCHR may recommend that the attorney general prosecute or that some other relevant agency take appropriate action. Alternatively, KNCHR can initiate its own prosecution. In one instance, KNHCR has sued the Kenya Police for denying it access to some police stations across the country.

References:

KNCHR Act, Section 25

<http://www.knchr.org/section.asp?ID=34>

100: When rules violations are discovered, the agency is aggressive in penalizing offenders or in cooperating with other agencies who penalize offenders.

75:

50: The agency enforces rules, but is limited in its effectiveness. The agency may be slow to act, unwilling to take on politically powerful offenders, resistant to cooperating with other agencies, or occasionally unable to enforce its judgments.

25:

0: The agency does not effectively penalize offenders. The agency may make judgments but not enforce them, does not cooperate with other agencies in enforcing penalties, or may fail to make reasonable judgments against offenders. The agency may be partisan in its application of power.

48j. In practice, the government acts on the findings of the agency (or agencies).

100 | 75 | 50 | 25 | 0

Comments:

There is no evidence that the government acts on KNHCR's findings. The various reports that the agency has produced have often stepped on the toes of high people in government, such as land grabbers or misappropriators of public resources. The current siege of the KNHCR director is an attempt to intimidate the organization into turning a blind eye on such people's conduct.

100: Ombudsman's reports are taken seriously, with negative findings drawing prompt corrective action.

75:

50: In most cases, ombudsman's reports are acted on, though some exceptions may occur for politically sensitive issues, or particularly resistant agencies.

25:

0: Ombudsman reports are often ignored, or given superficial attention. Ombudsman reports do not lead to policy changes.

48k. In practice, the agency (or agencies) acts on citizen complaints within a reasonable time period.

100 | 75 | 50 | 25 | 0

Comments:

While there is no information on how quickly the commission responds to complaints, there is every reason to believe that it is done promptly and diligently.

100: The agency (or agencies) acts on complaints quickly. While some backlog is expected and inevitable, complaints are acknowledged promptly and investigations into serious abuses move steadily towards resolution. Citizens with simple issues can expect a resolution within a month.

75:

50: The agency (or agencies) acts on complaints quickly, with some exceptions. Some complaints may not be acknowledged, and simple issues may take more than two months to resolve.

25:

0: The agency (or agencies) cannot resolve complaints quickly. Complaints may be unacknowledged for more than a month, and simple issues may take more than three months to resolve. Serious abuses are not investigated with any urgency.

49. Can citizens access the reports of the ombudsman?

100

49a. In law, citizens can access reports of the ombudsman(s).

YES | NO

Comments:

KNHCR has a Web site on which it posts all its reports. It also invites the public to join its mailing lists and conducts extensive public education on the findings of its investigations.

YES: A YES score is earned if all ombudsman reports are publicly available.

NO: A NO score is earned if any ombudsman reports are not publicly available. This may include reports made exclusively to the legislature or the executive, which those bodies may choose not to distribute the reports.

49b. In practice, citizens can access the reports of the ombudsman(s) within a reasonable time period.

100 | 75 | 50 | 25 | 0

Comments:

The Web site reports are more or less instantly accessible. It is likely that anyone requesting a KNHCR publication will get one promptly.

100: Reports are available on-line, or records can be obtained within two days. Records are uniformly available; there are no delays for politically sensitive information.

75:

50: Reports take around two weeks to obtain. Some delays may be experienced.

25:

0: Reports take more than a month to acquire. In some cases, most records may be available sooner, but there may be persistent delays in obtaining politically sensitive records.

49c. In practice, citizens can access the reports of the ombudsman(s) at a reasonable cost.

100 | 75 | 50 | 25 | 0

Comments:

The publications are disseminated free of charge to the extent that they remain in print, after which they can be accessed via the Internet.

100: Reports are free to all citizens, or available for the cost of photocopying. Reports can be obtained at little cost, such as by mail, or on-line.

75:

50: Reports impose a financial burden on citizens, journalists or CSOs. Retrieving reports may require a visit to a specific office, such as a regional or national capital.

25:

0: Retrieving reports imposes a major financial burden on citizens. Reports costs are prohibitive to most citizens, journalists, or CSOs trying to access this information.

V-2. Supreme Audit Institution

50. In law, is there a national supreme audit institution, auditor general or equivalent agency covering the entire public sector?

50. In law, is there a national supreme audit institution, auditor general or equivalent agency covering the entire public sector?

YES | NO

Comments:

The functions of the controller and auditor general are specified by law, as are the means of appointment to and removal from office.

References:

Sections 105 and 110 of the constitution

YES: A YES score is earned if there is a specific agency whose primary mandate is to audit and track the movement of money through the government. This agency should be specifically charged to investigate and document the misuse of funds. A system of agencies located in each department is equivalent.

NO: A NO score is earned if no such agency exists, or that function is a secondary concern of a larger body, such as the executive.

51. Is the supreme audit institution effective?

78

51a. In law, the supreme audit institution is protected from political interference.

YES | NO

Comments:

Law states that in the performance of his or her duties, the controller and auditor general (CAG) shall not be subject to the direction or control of any other person or authority." Furthermore, the CAG has security of tenure and can only be removed from office on the recommendations of a tribunal of judges, senior counsels or persons qualified to hold such positions.

References:

Section 105 (5) of the constitution

YES: A YES score is earned only if the agency has some formal organizational independence from the government. A YES score is earned even if the entity is legally separate but in practice staffed by partisans.

NO: A NO score is earned if the agency is a subordinate part of any government ministry or agency, such as the Department of Interior or the Justice Department.

51b. In practice, the head of the agency is protected from removal without relevant justification.

100 | 75 | 50 | 25 | 0

Comments:

The CAG may only be removed from office on the findings of a tribunal. The need for such a tribunal has never arisen, though the previous KANU regime tried unsuccessfully to remove the CAG's security of tenure.

100: The director of the agency serves a defined term and cannot be removed without a significant justification through a formal process, such as impeachment for abuse of power.

75:

50: The director of the agency serves a defined term, but can in some cases be removed through a combination of official or unofficial pressure.

25:

0: The director of the agency can be removed at the will of political leadership.

51c. In practice, the agency has a professional, full-time staff.

100 | 75 | 50 | 25 | 0

Comments:

Serious staffing problems in the past have led to a backlog of CAG reports. However, in the last three years, reforms have enabled the CAG to be up to date with national audits. One means of achieving this has been the engagement on contract of retired officers.

100: The agency has staff sufficient to fulfill its basic mandate.

75:

50: The agency has limited staff that hinders its ability to fulfill its basic mandate.

25:

0: The agency has no staff, or a limited staff that is clearly unqualified to fulfill its mandate.

51d. In practice, agency appointments support the independence of the agency.

100 | 75 | 50 | 25 | 0

Comments:

The CAG is a presidential appointee, which in theory leaves some room for manipulation. However, the Kenyan CAG is a professional, as is his staff, thanks to the security of tenure provision. As with other Kenyans, these officers have political leanings, but this does not necessarily show in their work.

100: Appointments to the agency are made based on professional qualifications. Individuals appointed are free of conflicts of interest due to personal loyalties, family connections or other biases. Individuals appointed usually do not have clear political party affiliations.

75:

50: Appointments are usually based on professional qualifications. Individuals appointed may have clear party loyalties.

25:

0: Appointments are often based on political considerations. Individuals appointed often have conflicts of interest due to personal loyalties, family connections or other biases. Individuals appointed often have clear party loyalties.

51e. In practice, the agency receives regular funding.

100 | 75 | 50 | 25 | 0

Comments:

The CAG's office has a budget approved by Parliament alongside the budgets for other government departments. While the CAG reports have always unearthed numerous instances of misappropriation of government funds, little has come of these revelations. Thus the government has never needed to use funding as a weapon against the CAG.

100: The agency has a predictable source of funding that is fairly consistent from year to year. Political considerations are not a major factor in determining agency funding.

75:

50: The agency has a regular source of funding, but may be pressured by cuts, or threats of cuts to the agency budget. Political considerations have an effect on agency funding.

25:

0: Funding source is unreliable. Funding may be removed arbitrarily or as retaliation for agency actions.

51f. In practice, the agency makes regular public reports.

100 | 75 | 50 | 25 | 0

Comments:

During the KANU regime, the annual CAG reports were always late, the backlog at one point being as much as four years. However, since the NARC government came to power in 2003, there has been a marked improvement in the performance of the office, which is now up to date with its audits. Once the CAG report has been presented to Parliament, it is a public document which can be purchased from the Government Printer.

100: The agency makes regular, publicly available, substantial reports to the legislature and/or to the public directly outlining the full scope of its work.

75:

50: The agency makes publicly available reports to the legislature and/or to the public directly that are sometimes delayed or incomplete.

25:

0: The agency makes no reports of its activities, or makes reports that are consistently out of date, unavailable to the public, or insubstantial.

51g. In practice, the government acts on the findings of the agency.

100 | 75 | 50 | **25** | 0

Comments:

The CAG reports are examined by Parliament's Public Accounts Committee and Public Investment Committee, which make recommendations on the actions that should be taken. Instances of malfeasance by junior officers, such as recovering travel imprests that have not been surrendered, often have been pursued. However, the government has for the most part ignored larger malfeasances that eat into ministry budgets.

100: Audit agency reports are taken seriously, with negative findings drawing prompt corrective action.

75:

50: In most cases, audit agency reports are acted on, though some exceptions may occur for politically sensitive issues, or particularly resistant agencies.

25:

0: Audit reports are often ignored, or given superficial attention. Audit reports do not lead to policy changes.

51h. In practice, the supreme audit institution is able to initiate its own investigations.

100 | **75** | 50 | 25 | 0

Comments:

The CAG has power to satisfy himself that all moneys that have been appropriated by Parliament and disbursed have been applied to the purposes to which they were so appropriated and that the expenditure conforms to the authority that governs it." The CAG must undertake an annual audit of the accounts of the government and its officers and authorities, courts, commissions and the Clerk of the National Assembly. The office has at its disposal in these investigations "access to all books, records, returns, reports and other documents which in his opinion relate to any accounts" under the CAG's oversight. However, there have been instances where politically connected individuals have been reluctant to surrender such records, thereby delaying the CAG's work.

References:

Constitution sections 105 (2) (b-c) and 106

100: The supreme audit institution can control the timing and pace of its investigations without any input from the executive or legislature.

75:

50: The supreme audit institution can generally decide what to investigate, and when, but is subject to pressure from the executive or legislature on politically sensitive issues.

25:

0: The supreme audit institution must rely on approval from the executive or legislature before initiating investigations. Politically sensitive investigations are almost impossible to move forward on.

52. Can citizens access reports of the supreme audit institution?

83

52a. In law, citizens can access reports of the agency.

YES | NO

Comments:

The CAG must audit public finances at least once a year, then hand the audit report to the finance minister, who must submit it to the National Assembly within seven days. The speaker must then promptly table the report, at which point it becomes a public document to be debated by parliamentarians and subsequently reported in the media. At that point, anyone can purchase the report from the Government Printer.

References:

Constitution section 105 (2) (c) and 105 (4)

YES: A YES score is earned if all supreme auditor reports are available to the general public.

NO: A NO score is earned if any auditor reports are not publicly available. This may include reports made exclusively to the legislature or the executive, which those bodies may choose not to distribute.

52b. In practice, citizens can access audit reports within a reasonable time period.

100 | 75 | 50 | 25 | 0

Comments:

Once the CAG report has been presented to Parliament, it becomes a public document which can be accessed immediately.

100: Reports are available on-line, or records can be obtained within two days. Reports are uniformly available; there are no delays for politically sensitive information.

75:

50: Reports take around two weeks to obtain. Some delays may be experienced.

25:

0: Reports take more than a month to acquire. In some cases, most reports may be available sooner, but there may be persistent delays in obtaining politically sensitive records.

52c. In practice, citizens can access the audit reports at a reasonable cost.

100 | 75 | **50** | 25 | 0

Comments:

The CAG report is a massive, expensive document in several volumes which really only interests government professionals. However, the print and electronic media often publish highlights from the report, enabling citizens to have an idea of the level of transparency and accountability of public resources.

100: Reports are free to all citizens, or available for the cost of photocopying. Reports can be obtained at little cost, such as by mail, or on-line.

75:

50: Reports impose a financial burden on citizens, journalists or CSOs. Retrieving reports may require a visit to a specific office, such as a regional or national capital.

25:

0: Retrieving reports imposes a major financial burden on citizens. Report costs are prohibitive to most citizens, journalists, or CSOs trying to access this information.

87
V-3. Taxes and Customs

53. In law, is there a national tax collection agency?

100

53. In law, is there a national tax collection agency?

YES | NO

Comments:

The Kenya Revenue Authority (KRA) was established by Parliament in 1995. The KRA is charged with collecting revenue on behalf of the government.

References:

In order fulfill its mandates, the KRA administers the following written laws relating to revenue:

Creation of the KRA – Chapter 469 of the Laws of Kenya

The Income Tax Act (Cap. 470).

The Customs and Excise Act (Cap.472).

The Value Added Tax Act (Cap.476).

The Road Maintenance Levy Fund Act 1993 (No.9 of 1993).

The Air Passenger Service Charge Act (Cap. 475).

The Entertainment Tax Act (Cap. 479).

The Traffic Act (Cap. 403).

The Transport Licensing Act (Cap. 404).

The Second Hand Motor Vehicle Purchase Tax Act (Cap. 484).

The Widows and Children s Pensions Act (Cap. 195).

The Parliamentary Pensions Act (Cap.196).

The Stamp Duty Act (Cap. 480).

The Betting, Lotteries and Gaming Act (Cap.131).

The Directorate of Civil Aviation Act (Cap.394).

YES: A YES score is earned if there is a national agency formally mandated to collect taxes.

NO: A NO score is earned if that function is spread over several agencies, or does not exist. A NO score is earned if national government ministries can collect taxes independently.

54. Is the tax collection agency effective?

100

54a. In practice, the tax collection agency has a professional, full-time staff.

100 | 75 | 50 | 25 | 0

Comments:

KRA has a professional, highly paid staff to deter corruptability. The KRA Commissioner General, for example, is among the top five highly paid public officials in Kenya.

100: The agency has staff sufficient to fulfill its basic mandate.

75:

50: The agency has limited staff that hinders its ability to fulfill its basic mandate.

25:

0: The agency has no staff, or a limited staff that is clearly unqualified to fulfill its mandate.

54b. In practice, the agency receives regular funding.

100 | 75 | 50 | 25 | 0

Comments:

To finance its operations, the agency is allowed to retain 1 percent of the revenues it collects.

References:

KRA Act

100: The agency has a predictable source of funding that is fairly consistent from year to year. Political considerations are not a major factor in determining agency funding.

75:

50: The agency has a regular source of funding, but may be pressured by cuts, or threats of cuts to the agency budget. Political considerations have an effect on agency funding.

25:

0: Funding source is unreliable. Funding may be removed arbitrarily or as retaliation for agency actions.

55. In practice, are tax laws enforced uniformly and without discrimination?

75

55. In practice, are tax laws enforced uniformly and without discrimination?

100 | 75 | 50 | 25 | 0

Comments:

While tax laws are meant to be applied without fear or favor, politically connected people have managed to evade paying taxes. Other tax evaders bribe tax officers to waive their taxes. However, revenue collection has improved greatly since the end of the KANU regime in 2003, suggesting that some tax evasion loopholes have been plugged.

100: Tax laws (which may be economically unfair as written) are enforced consistently for all citizens. No general group of citizens is more or less likely to evade tax law than another.

75:

50: Tax laws are generally enforced consistently, but some exceptions exist. For example, some groups may occasionally evade tax law. Some arbitrary and discriminatory tax rules exist.

25:

0: Tax law is unequally applied. Some groups of citizens are consistently more or less likely to evade tax law than others. Tax regulations are, as a rule, written to be discriminatory and/or arbitrary.

56. In law, is there a national customs and excise agency?

100

56. In law, is there a national customs and excise agency?

YES | NO

Comments:

KRA is the umbrella revenue collecting agency that houses the Customs and Excise Department, Income Tax Department, Value Added Tax Department and the Registrar of Motor Vehicle Department.

YES: A YES score is earned if there is an agency formally mandated to collect excises and inspect customs.

NO: A NO score is earned if that function is spread over several agencies, or does not exist.

57. Is the customs and excise agency effective?

100

57a. In practice, the customs and excise agency has a professional, full-time staff.

100 | 75 | 50 | 25 | 0

Comments:

As with the whole KRA, the Customs and Excise Department has sufficient staff to fulfill its mandate.

100: The agency has staff sufficient to fulfill its basic mandate.

75:

50: The agency has limited staff that hinders its ability to fulfill its basic mandate.

25:

0: The agency has no staff, or a limited staff that is clearly unqualified to fulfill its mandate.

57b. In practice, the agency receives regular funding.

100 | 75 | 50 | 25 | 0

Comments:

The department is fully funded through the provisions of the KRA Act.

100: The agency has a predictable source of funding that is fairly consistent from year to year. Political considerations are not a major factor in determining agency funding.

75:

50: The agency has a regular source of funding, but may be pressured by cuts, or threats of cuts to the agency budget. Political considerations have an effect on agency funding.

25:

0: Funding source is unreliable. Funding may be removed arbitrarily or as retaliation for agency actions.

58. In practice, are customs and excise laws enforced uniformly and without discrimination?

50

58. In practice, are customs and excise laws enforced uniformly and without discrimination?

100 | 75 | 50 | 25 | 0

Comments:

Politically connected people continue to receive favors with respect to the payment of customs and excise dues. The extent of such improprieties was recently revealed to Kenyans in case of the Artur brothers,” who allegedly used political connections to evade taxes while getting away with various other criminal activities.

References:

http://www.eastandard.net/hm_news/news.php?articleid=1143953778

100: Customs and excise laws (which may be economically unfair as written) are enforced consistently for all citizens. No general group of citizens is more or less likely to evade customs than another.

75:

50: Customs and excise laws are generally enforced consistently, but some exceptions exist. For example, some groups may occasionally evade customs requirements.

25:

0: Customs and excise laws are unequally applied. Some groups of citizens are consistently more or less likely to evade customs and excise laws than others.

V-4. Financial Sector Regulation

59. In law, is there a financial regulatory agency overseeing publicly listed companies?

100

59. In law, is there a financial regulatory agency overseeing publicly listed companies?

YES | NO

Comments:

The Capital Markets Authority is charged with promoting, regulating and facilitating the development of orderly, fair and efficient capital markets in Kenya. The principle objectives of the authority include:

- 1.The development of all aspects of the capital markets, with particular emphasis on the removal of impediments to, and the creation of incentives for, longer-term investments;
- 2.To facilitate the existence of a nationwide system of stock market and brokerage services to enable wider participation of the general public in the stock market;
- 3.The creation, maintenance and regulation of a market in which securities can be issued and traded in an orderly, fair, and efficient manner, through the implementation of a system in which the market participants are self-regulatory to the maximum practicable extent;
- 4.The protection of investor interests;
- 5.The operation of a compensation fund to protect investors from financial loss arising from the failure of a licensed broker or dealer to meet his contractual obligations; and
- 6.The development of a framework to facilitate the use of electronic commerce for the development of capital markets in Kenya.

References:

Act of Parliament (Cap 485)

YES: A YES score is earned if there is an agency tasked with overseeing publicly listed companies in the public interest and ensuring that disclosure rules are met.

NO: A NO score is earned if this function is spread over several agencies or does not exist.

60. Is the financial regulatory agency effective?

95

60a. In law, the financial regulatory agency is protected from political interference.

YES | NO

Comments:

While CMA is an autonomous body corporate, its chair and chief executive are presidential appointments advised by the finance minister. Six CMA board members are appointed by the finance minister and are joined by the finance permanent secretary, the Central Bank governor and the attorney general, all of whom are also presidential appointees. These appointments suggest that the authority can be amenable to manipulation if desired.

YES: A YES score is earned only if the agency has some formal organizational independence from the government. A YES score is earned even if the entity is legally separate but in practice staffed by partisans.

NO: A NO score is earned if the agency is a subordinate part of any government ministry or agency, such as the Department of Interior or the Justice Department.

60b. In practice, the agency has a professional, full-time staff.

100 | 75 | 50 | 25 | 0

Comments:

The CMA may appoint other officers and staff as it considers necessary.

References:

CMA Act, Section 9 (1-2)

100: The agency has staff sufficient to fulfill its basic mandate.

75:

50: The agency has limited staff that hinders its ability to fulfill its basic mandate.

25:

0: The agency has no staff, or a limited staff that is clearly unqualified to fulfill its mandate.

60c. In practice, the agency receives regular funding.

100 | 75 | 50 | 25 | 0

Comments:

Law dictates an independent general fund into which will be paid all such sums of money as may be paid as fees under this Act; and all such sums of money as may be received by the Authority for its operations from any other source approved by the Minister." The fund will finance "all such sums of money required to defray the expenditure incurred by the Authority in the exercise, discharge and performance of its objectives, functions and duties."

References:

CMA Act, Section 15

100: The agency has a predictable source of funding that is fairly consistent from year to year. Political considerations are not a major factor in determining agency funding.

75:

50: The agency has a regular source of funding, but may be pressured by cuts, or threats of cuts to the agency budget. Political considerations have an effect on agency funding.

25:

0: Funding source is unreliable. Funding may be removed arbitrarily or as retaliation for agency functions.

60d. In practice, when necessary, the financial regulatory agency independently initiates investigations.

100 | 75 | 50 | 25 | 0

Comments:

Among the CMA's powers, it may:

inquire, either on its own motion or at the request of any other person, into the affairs of any person which the Authority has approved or to which it has granted a licence and any public company the securities of which are traded on an approved securities exchange;

(j) conduct inspection of the activities, books and records of any persons approved or licenced by the Authority;

(m) appoint an auditor to carry out a specific audit of the financial operations of any collective investment scheme or public company the securities of which are traded on an approved securities exchange, if such action is deemed to be in the interest of the investors, at the expense of such collective investment scheme or company;

(p) act as an appellate body in respect of appeals against any securities exchange or central depository in actions by parties aggrieved thereby;

(t) trace any assets, including bank accounts, of any person who, upon investigation by the Authority, is found to have engaged in any fraudulent dealings in securities or insider trading.”

References:

CMA Act, Section 11

100: When irregularities are discovered, the agency is aggressive in investigating and/or in cooperating with other investigative bodies.

75:

50: The agency starts investigations, but is limited in its effectiveness or in its cooperation with other investigative agencies. The agency may be slow to act, unwilling to take on politically powerful offenders, or occasionally unable to enforce its judgments.

25:

0: The agency does not effectively investigate financial irregularities or cooperate with other investigative agencies. The agency may start investigations but not complete them, or may fail to detect offenders. The agency may be partisan in its application of power.

60e. In practice, when necessary, the financial regulatory agency imposes penalties on offenders.

100 | 75 | 50 | 25 | 0

Comments:

The CMA may issue rules and regulations governing the securities market and has the power to discipline violators, including revoking trading licenses and intervening in management. A recent example of this last power was the suspension of Shah Munge and Partners brokers for suspected fraudulent dealing that led to the loss of some K Sh260 million from the National Social Security Fund.

However, it is not clear how diligent CMA has been. Over the last year or so there have been questions raised about transparency. One case involved the collapse of Uchumi Supermarket chain, while eyebrows have been raised at the meteoric rise in the share prices of East African Cables.

References:

CMA Act, sections 12, 22, 26 and 33

100: When rules violations are discovered, the agency is aggressive in penalizing offenders and/or in cooperating with other agencies that impose penalties.

75:

50: The agency enforces rules, but is limited in its effectiveness or reluctant to cooperate with other agencies. The agency may be slow to act, unwilling to take on politically powerful offenders, or occasionally unable to enforce its judgments.

25:

0: The agency does not effectively penalize offenders or refuses to cooperate with other agencies that enforce penalties. The agency may make judgments but not enforce them, or may fail to make reasonable judgments against offenders. The agency may be partis

61. Can citizens access the financial records of publicly listed companies?

83

61a. In law, citizens can access the financial records of publicly listed companies.

YES | NO

Comments:

Nairobi Stock Exchange trading data is published in the media on a daily basis. The exchange also has a Web site that provides such information.

References:

<http://www.nse.co.ke/>

YES: A YES score is earned if the financial information of all publicly traded companies is required by law to be public.

NO: A NO score is earned if any category of publicly- owned or publicly-traded company is exempt from this rule, or no such rules exist.

61b. In practice, the financial records of publicly listed companies are regularly updated.

100 | 75 | 50 | 25 | 0

Comments:

All listed companies must publish audited accounts in the media.

100: Publicly traded companies always disclose financial data, which is generally accurate and up to date.

75:

50: Publicly traded companies disclose financial data, but it is flawed. Some companies may misstate financial data, or file the information behind schedule.

25:

0: Financial data is not available, or is consistently superficial or otherwise of no value to investors.

61c. In practice, the financial records of publicly listed companies are audited according to international accounting standards.

100 | 75 | 50 | 25 | 0

Comments:

The accounting profession in Kenya is quite advanced, with several companies having global recognition. This is manifest in the instances when international organizations have deposited funds for local projects with such firms, an example being the Global Fund for Aids, Tuberculosis and Malaria. Such high-profile accounting firms typically audit publicly listed companies.

100: Financial records of all public companies are regularly audited by a trained third party auditor using accepted international standards.

75:

50: Financial records of public companies are regularly audited, but exceptions may exist. Some companies may use flawed or deceptive accounting procedures, or some companies may be exempted from this requirement.

25:

0: Publicly traded companies are not audited, or the audits have no functional value. The auditors may collude with the companies in providing misleading or false information to the public.

61d. In practice, citizens can access the records of disciplinary decisions imposed by the government on publicly-listed companies.

100 | 75 | 50 | 25 | 0

Comments:

CMA does not habitually publish its disciplinary proceedings or outcomes, the greatest public source of such information being the media. Persons interested in the details can make a request to CMA.

100: These records are freely available to all citizens through a formal official process.

75:

50: These records are available to all citizens, with some exceptions.

25:

0: These records are generally not available through official processes.

61e. In practice, citizens can access the financial records of publicly listed companies within a reasonable time period.

100 | 75 | 50 | 25 | 0

Comments:

Listed companies must publish these within six months of a new financial year.

100: Records are available on-line, or records can be obtained within two days. Records are uniformly available; there are no delays for politically sensitive information.

75:

50: Records take around two weeks to obtain. Some delays may be experienced.

25:

0: Records take more than a month to acquire. In some cases, most records may be available sooner, but there may be persistent delays in obtaining politically sensitive records.

61f. In practice, citizens can access the financial records of publicly listed companies at a reasonable cost.

100 | 75 | 50 | 25 | 0

Comments:

Listed companies' records are published in the print media, making them quite accessible to the public.

100: Records are free to all citizens, or available for the cost of photocopying. Records can be obtained at little cost, such as by mail, or on-line.

75:

50: Records impose a financial burden on citizens, journalists or CSOs. Retrieving records may require a visit to a specific office, such as a regional or national capital.

25:

0: Retrieving records imposes a major financial burden on citizens. Records costs are prohibitive to most citizens, journalists, or CSOs trying to access this information.

93
V-5. Business Licensing and Regulation

62. Are business licenses available to all citizens?

94

62a. In law, anyone may apply for a business license.

YES | NO

Comments:

The law permits any citizen to apply for a business license.

References:

Trade Licensing Act (Cap 497)

YES: A YES score is earned if no particular group or category of citizens is excluded from applying for a business license, when required. A YES score is also earned if basic business licenses are not required.

NO: A NO score is earned if any group of citizens are categorically excluded from applying for a business license, when required.

62b. In law, a complaint mechanism exists if a business license request is denied.

YES | NO

Comments:

An appeal to the minister is allowed by any person who is aggrieved by the action of a licensing officer in refusing to grant a license or conditional licence, or revoking a licence, as well as imposing conditions in a license or conditional license and other complaints.

References:

Trade Licensing Act, Section 15

YES: A YES score is earned if there is a formal process for appealing a rejected license.

NO: A NO score is earned if no such mechanism exists.

62c. In practice, citizens can obtain any necessary business license (i.e. for a small import business) within a reasonable time period.

100 | 75 | 50 | 25 | 0

Comments:

In 2005, Kenya set up a working committee to pare its 1,500-odd different business licences. By June 2006, the licences had been reduced to 195. The process of obtaining licensing for a domestic business is fairly straightforward. Import licensing has also been simplified as a result of the liberalization undertaken during the 1990s. Corruption in government means that there will be delays in processing licences; but relief might come from the recent introduction of performance contracts for public officers.

100: Licenses are not required, or licenses can be obtained within roughly one week.

75:

50: Licensing is required and takes around one month. Some groups may be delayed up to a three months.

25:

0: Licensing takes more than three months for most groups. Some groups may wait six months to one year to get necessary licenses.

62d. In practice, citizens can obtain any necessary business license (i.e. for a small import business) at a reasonable cost.

100 | 75 | 50 | 25 | 0

Comments:

Previous Kenyan studies of the impact of reducing the number of licenses required showed that the fee rates would increase. However, licenses can be obtained for as little as US \$10.

100: Licenses are not required, or licenses are free. Licenses can be obtained at little cost to the organization, such as by mail, or on-line.

75:

50: Licenses are required, and impose a financial burden on the organization. Licenses may require a visit to a specific office, such as a regional or national capital.

25:

0: Licenses are required, and impose a major financial burden on the organization. Licensing costs are prohibitive to the organization.

63. Do businesses receive equitable regulatory treatment from the government?

75

63a. In law, basic business regulatory requirements for meeting health, safety, and environmental standards are transparent and publicly available.

YES | NO

Comments:

Various laws, readily available from the Government Printer, govern standards for health, safety and the environment.

References:

Employment Act (Cap. 226), Regulation of Wages and Conditions of Employment Act (Cap. 229), Factories Act (Cap. 514) and the Occupational Health and Safety Act.

YES: A YES score is earned if basic regulatory requirements for meeting health, safety, and environmental standards are publicly accessible and transparent.

NO: A NO score is earned if such requirements are not made public or are otherwise not transparent.

63b. In practice, business inspections by the government are carried out in a uniform and even-handed manner.

100 | 75 | **50** | 25 | 0

References:

While the frameworks for transparent and accountable inspection are in place, there is some corruption among officers who want to make quick money and businesses that want to take shortcuts.

100: Business inspections by the government (i.e. health, safety, or environmental inspections) are designed and carried out in such a way as to ensure comprehensive compliance by all businesses with transparent regulatory requirements.

75:

50: Business inspections by the government (i.e. health, safety, or environmental inspections) are generally carried out in an even-handed way though exceptions exist. Bribes are occasionally paid to extract favorable treatment or expedited processing.

25:

0: Business inspections (i.e. health, safety, or environmental inspections) are routinely carried out by the government in an ad hoc, arbitrary fashion designed to extract extra payments from businesses in exchange for favorable treatment.

Category VI. Anti-Corruption and Rule of Law

VI-1. ⁷⁹Anti-Corruption Law

64. Is there legislation criminalizing corruption?

100

64a. In law, attempted corruption is illegal.

YES | NO

References:

Various laws address the issue of corruption. These include the Anti Corruption and Economic Crimes Act, the Public Officers Ethics Act and the Public Procurement and Disposal Act.

YES: A YES score is earned if corruption laws include attempted acts.

NO: A NO score is earned if this is not illegal.

64b. In law, extortion is illegal.

YES | NO

References:

The corruption laws all address the issue of extortion in some way or other. For example, Section 40 (2) of the Anti Corruption and Economic Crimes Act declares a person guilty of an offense if they receive, solicit, or agree to receive or solicit, a benefit.

YES: A YES score is earned if corruption laws include extortion. Extortion is defined as demanding favorable treatment (such as a bribe) to withhold a punishment.

NO: A NO score is earned if this is not illegal.

64c. In law, offering a bribe (i.e. active corruption) is illegal.

YES | NO

References:

Section 39 (3) (b) of the same Act declares a person guilty of an offense if they corruptly give or offer, or corruptly agree to give or offer, a benefit.

YES: A YES score is earned if offering a bribe is illegal.

NO: A NO score is earned if this is not illegal.

64d. In law, receiving a bribe (i.e. passive corruption) is illegal.

YES | NO

References:

Section 39 (3) (a) declares a person guilty of an offense if they corruptly receive or solicit, or corruptly agree to receive or solicit benefits.

YES: A YES score is earned if receiving a bribe is illegal.

NO: A NO score is earned if this is not illegal.

64e. In law, bribing a foreign official is illegal.

YES | NO

References:

Section 39 of the Act provides that bribing anyone, including foreign officials, is illegal.

YES: A YES score is earned if bribing a foreign official is illegal.

NO: A NO score is earned if this is not illegal.

64f. In law, using public resources for private gain is illegal.

YES | NO

References:

Section 46 of the Anti Corruption and Economic Crimes Act addresses abuse of public office. It declares a person guilty if they use their office to improperly confer benefits on themselves or anyone else. Various sections of the Public Officers Ethics Act also address this issue, including Sections 10, 11, 15, 16, 19 and 20.

YES: A YES score is earned if using public resources for private gain is illegal.

NO: A NO score is earned if this is not illegal.

64g. In law, using confidential state information for private gain is illegal.

YES | NO

References:

Various sections of the Public Officers Ethics Act and the Anti-Corruption and Economic Crimes Act imply that selling state secrets is an offense. Furthermore, the Official Secrets Act categorizes government information (Confidential, Secret, Top Secret) and defines what category of officer may release such information.

YES: A YES score is earned if using confidential state information for private gain is illegal.

NO: A NO score is earned if this is not illegal.

64h. In law, money laundering is illegal.

YES | NO

References:

In February 2006, the government tabled the Proceeds of Crime and Money Laundering (Prevention) Bill (2006). While this law awaits enactment, money laundering in Kenya is treated as corruption. Section 49 of the Narcotic Drugs and Psychotropic Substances (Control) Act (1994) also addresses the concealment or transfer of the proceeds of drug trafficking.

YES: A YES score is earned if money laundering is illegal. Money laundering is defined as concealing the origin of funds to hide wrongdoing or avoid confiscation.

NO: A NO score is earned if this is not illegal.

64i. In law, conspiracy to commit a crime (i.e. organized crime) is illegal.

YES | NO

References:

Section 22 of the Narcotic Drugs and Psychotropic Substances (Control) Act addresses conspiracy to commit drug related crimes. However, conspiracy over other crimes is handled by the Criminal Procedure Code.

YES: A YES score is earned if organized crime is illegal.

NO: A NO score is earned if this is not illegal.

VI-2. Anti-Corruption Agency

65. In law, is there an agency (or group of agencies) with a legal mandate to address corruption?

100

65. In law, is there an agency (or group of agencies) with a legal mandate to address corruption?

YES | NO

References:

Section 6 of the Anti-Corruption and Economic Crimes Act of 2003 establishes the Kenya Anti Corruption Commission, which has the exclusive mandate of investigating allegations of corruption.

YES: A YES score is earned if an agency is specifically mandated to address corruption. A YES score is earned if there are several agencies or entities with specific roles in fighting corruption, including special prosecutorial entities.

NO: A NO score is earned if no agency (or group of agencies/entities) is specifically mandated to prevent or prosecute corruption.

66. Is the anti-corruption agency effective?

86

66a. In law, the agency (or agencies) is protected from political interference.

YES | NO

References:

Section 10 of the Act provides that the commission and its director shall be independent of any external direction or control, while Section 18 provides for the independence of the Commission's Advisory Board. The director of the commission has security of tenure.

YES: A YES score is earned only if the agency (or agencies) has some formal organizational or operational independence from the government. A YES score is earned even if the agency/agencies is legally separate but in practice staffed by partisans.

NO: A NO score is earned if the agency (or agencies) is a subordinate part of any government ministry or agency, such as the Department of Interior or the Justice Department, in such a way that limits its operational independence.

66b. In practice, the agency (or agencies) is protected from political interference.

100 | 75 | 50 | 25 | 0

References:

That does not seem to be the case entirely. Despite the numerous corruption cases established by the auditor general, for example, Kenya has yet to see a single big case brought to conclusion. Part of the problem seems to be that past corruption was perpetuated by key people across the political divide, meaning that prosecutions would touch key people in the current government. Furthermore, a former governance and ethics permanent secretary living in self-exile in the UK alleged that the KACC director pleaded with him not to make further revelations on high corruption. These comments were made in a taped interview, the recording of which has since vanished.

100: This agency (or agencies) operates independently of the political process, without incentive or pressure to render favorable judgments in politically sensitive cases. Investigations can operate without hindrance from the government, including access to politically sensitive information.

75:

50: This agency (or agencies) is typically independent, yet is sometimes influenced in its work by negative or positive political incentives. This may include favorable or unfavorable public criticism by the government, political appointments, or other forms of influence. The agency (or agencies) may not be provided with some information needed to carry out its investigations.

25:

0: This agency (or agencies) is commonly influenced by political or personal incentives. These may include conflicting family relationships, professional partnerships, or other personal loyalties. Negative incentives may include threats, harassment or other abuses of power. The agency (or agencies) cannot compel the government to reveal sensitive information.

66c. In practice, the head of the agency (or agencies) is protected from removal without relevant justification.

100 | 75 | 50 | 25 | 0

References:

Part 5 of the First Schedule of the Act establishes that the KACC director can only be removed on the recommendation of a tribunal constituted to investigate his or her conduct. The three-member tribunal will have persons qualified to be judges of the High Court of the Court of Appeal.

100: The director(s) cannot be removed without a significant justification through a formal process, such as impeachment for abuse of power.

75:

50: The director(s) can in some cases be removed through a combination of official or unofficial pressure.

25:

0: The director(s) can be removed at the will of political leadership.

66d. In practice, appointments to the agency (or agencies) are based on professional criteria.

100 | 75 | 50 | 25 | 0

References:

Section 8 of the Act provides that the candidates for director and assistant directors be recommended by the advisory board and approved by Parliament, after which the president appoints. Subsection 6 empowers the commission to other full-time and part-time staff as may be necessary to perform its functions.

100: Appointments to the agency (or agencies) are made based on professional qualifications. Individuals appointed are free of conflicts of interest arising from personal loyalties, family connections or other biases. Individuals appointed usually do not have clear political party affiliations.

75:

50: Appointments are usually based on professional qualifications. Individuals appointed may have clear party loyalties, however.

25:

0: Appointments are often based on political considerations. Individuals appointed often have conflicts of interest arising from personal loyalties, family connections or other biases. Individuals appointed often have clear party loyalties.

66e. In practice, the agency (or agencies) has a professional, full-time staff.

100 | 75 | 50 | 25 | 0

References:

KACC has a professional staff cohort, among the best-paid public officers in Kenya, with the director receiving a higher salary than the president.

100: The agency (or agencies) has staff sufficient to fulfill its basic mandate.

75:

50: The agency (or agencies) has limited staff, or staff without necessary qualifications to fulfill its basic mandate.

25:

0: The agency (or agencies) has no staff, or a limited staff, that is clearly unqualified to fulfill its mandate.

66f. In practice, the agency (or agencies) receives regular funding.

100 | 75 | 50 | 25 | 0

References:

Section 13 of the Act provides that the expenditures of the commission be charged to the Consolidated Fund. The advisory board may approve grants, gifts, donations and bequests that might be offered to the commission. Consequently, the commission has predictable income sources.

100: The agency (or agencies) has a predictable source of funding that is fairly consistent from year to year. Political considerations are not a major factor in determining agency funding.

75:

50: The agency (or agencies) has a regular source of funding, but may be pressured by cuts, or threats of cuts to the agency budget. Political considerations have an effect on agency funding.

25:

0: The agency's funding sources are unreliable. Funding may be removed arbitrarily or as retaliation for agency actions.

66g. In practice, the agency (or agencies) makes regular public reports.

100 | 75 | 50 | 25 | 0

References:

Sections 15 and 36 require the commission to produce annual and quarterly reports of its activities respectively. See <http://www.kacc.go.ke/default.asp?pageid=45>. The commission also regularly releases press statements.

100: The agency (or agencies) makes regular, publicly available, substantial reports to the legislature and/or to the public directly outlining the full scope of its work.

75:

50: The agency (or agencies) makes publicly available reports to the legislature that are sometimes delayed or incomplete.

25:

0: The agency (or agencies) makes no reports of its activities, or makes reports that are consistently out of date, unavailable to the public, or insubstantial.

66h. In practice, the agency (or agencies) has sufficient powers to carry out its mandate.

100 | 75 | 50 | 25 | 0

References:

Section 7 empowers the commission to investigate any matter that raises suspicion that corruption or an economic crime might have been committed. These powers have been enough to enable the commission to investigate without hindrance.

100: The agency (or agencies) has powers to gather information, including politically sensitive information. The agency (or agencies) can question suspects, order arrests and bring suspects to trial (or rely on related agencies or law enforcement authorities to perform such functions).

75:

50: The agency (or agencies) has most of the powers needed to carry out its mandate with some exceptions.

25:

0: The agency (or agencies) lacks significant powers which limit its effectiveness.

66i. In practice, when necessary, the agency (or agencies) independently initiates investigations.

100 | 75 | 50 | 25 | 0

References:

Section 7 of the Anti Corruption and Economic Crimes Act directs KACC to investigate any matter raising suspicion that corruption or an economic crime might have been committed. However, public perception is that KACC has not been objective and aggressive in fulfilling its mandate, which is why perpetrators of grand corruption never get before the courts. Indeed, the KACC director is alleged to have advised a whistle-blower to back off allegations of grand corruption because the people being accused had suffered enough.

100: When irregularities are discovered, the agency (or agencies) is aggressive in investigating the government or in cooperating with other investigative agencies.

75:

50: The agency (or agencies) starts investigations, but is limited in its effectiveness or is reluctant to cooperate with other investigative agencies. The agency (or agencies) may be slow to act, unwilling to take on politically powerful offenders, or occasionally unable to enforce its judgments.

25:

0: The agency (or agencies) does not effectively investigate or does not cooperate with other investigative agencies. The agency (or agencies) may start investigations but not complete them, or may fail to detect offenders. The agency (or agencies) may be partisan in its application of power.

67. Can citizens access the anti-corruption agency?

67a. In practice, the anti-corruption agency (or agencies) acts on complaints within a reasonable time period.

100 | 75 | 50 | 25 | 0

References:

KACC has just one office countrywide, which limits its accessibility to citizens. Besides an annual report, the law requires KACC to submit quarterly reports, which has been done diligently. This suggests that complaints are acted upon promptly even if they may take much longer to finalize. KACC's 2005-06 annual report released in August 2006 states that only 15 percent of the 7,888 reports/complaints received fell within the KACC mandate. Initial investigations into June 2006 complaints had been carried out by August.

100: The agency (or agencies) acts on complaints quickly. While some backlog is expected and inevitable, complaints are acknowledged promptly and investigations into serious abuses move steadily towards resolution. Citizens with simple issues can expect a resolution within a month.

75:

50: The agency (or agencies) acts on complaints quickly, with some exceptions. Some complaints may not be acknowledged, and simple issues may take more than two months to resolve.

25:

0: The agency (or agencies) cannot resolve complaints quickly. Complaints may be unacknowledged for more than a month, and simple issues may take more than three months to resolve. Serious abuses are not investigated with any urgency.

67b. In practice, citizens can complain to the agency (or agencies) without fear of recrimination.

100 | 75 | 50 | 25 | 0

References:

Section 65 of the Act offers protection from prosecution for informers and also requires that court proceedings ensure that informers are not compromised. In practice, however, informers have been victimized by employers. A Central Bank officer who lost his job in the early 1990s for providing opposition parliamentarians with information about the Goldenberg Scandal did not get any retroactive consideration even after the Act came into force. More recently, a Charterhouse Bank clerk who divulged money laundering to the Central Bank lost his job and has fled into exile in fear of his life.

Meanwhile, the government has tabled the Witness Protection Bill designed to take care of whistle-blowers. It provides that the attorney general can:

- (a) make arrangements necessary to allow the witness to establish a new identity or otherwise to protect the witness;
- (b) relocate the witness;
- (c) provide accommodation for the witness;
- (d) provide transport for the property of the witness;
- (e) provide reasonable financial assistance to the witness;
- (f) provide to the witness services in the nature of counseling and vocational training;
- (g) do anything else the attorney general considers necessary to ensure the witness's safety and welfare.

100: Whistleblowers can report abuses of power without fear of negative consequences. This may be due to robust mechanisms to protect the identity of whistleblowers, or may be due to a culture that encourages disclosure and accountability.

75:

50: Whistleblowers are sometimes able to come forward without negative consequences, but in other cases, whistleblowers are punished for disclosing, either through official or unofficial means.

25:

0: Whistleblowers often face substantial negative consequences, such as losing a job, relocating to a less prominent position, or some form of harassment.

83
VI-3. Rule of Law

68. Is there an appeals mechanism for challenging criminal judgments?

67

68a. In law, there is a general right of appeal.

YES | NO

References:

Judgments in magistrates' courts can be appealed in the High Court; those judgments can be appealed in the Court of Appeal.

YES: A YES score is earned if there is a formal process of appeal for challenging criminal judgments.

NO: A NO score is earned if there is no such process.

68b. In practice, appeals are resolved within a reasonable time period.

100 | 75 | 50 | 25 | 0

References:

A 2003 commission of inquiry into judicial integrity found more than half of the Court of Appeal and High Court judges to be of

unsatisfactory conduct. One High Court judge had reportedly not written a judgment three years later. Indeed, there is no time limit within which an appeal must be resolved. A 2004 government report admitted that 40 percent of the prison population is composed of pre-trial cases, highlighting inefficiency in the judicial system.

100: Appeals are acted upon quickly. While some backlog is expected and inevitable, appeals are acknowledged promptly and cases move steadily towards resolution.

75:

50: Appeals are generally acted upon quickly but with some exceptions. Some appeals may not be acknowledged, and simple cases may take years to resolve.

25:

0: Most appeals are not resolved in a timely fashion. Appeals may go unacknowledged for months or years and simple cases may never be resolved.

68c. In practice, citizens can use the appeals mechanism at a reasonable cost.

100 | 75 | 50 | 25 | 0

References:

While defendants in capital cases must have legal representation, this is not the case for other offenders. Thus, while the right of appeal is open to all, the high cost of legal representation means the poor often are left to defend themselves.

100: In most cases, the appeals mechanism is an affordable option to middle class citizens seeking to challenge criminal judgments.

75:

50: In some cases, the appeals mechanism is not an affordable option to middle class citizens seeking to challenge criminal judgments.

25:

0: The prohibitive cost of utilizing the appeals mechanism prevents middle class citizens from challenging criminal judgments.

69. In practice, do judgments in the criminal system follow written law?

50

69. In practice, do judgments in the criminal system follow written law?

References:

The Kenya judicial system follows the British tradition. However, endemic judicial corruption means that judgments often are contrived. The extent of this is reflected in the findings of a 2003, including that more than half of the judges of the High Court and Court of Appeal lack integrity. A common reaction among the accused was not to plead their innocence but rather to complain that the list of shame was selective.

100: Judgments in the criminal system are made according to established legal code and conduct. There are no exceptional cases in which individuals are treated by a separate process. Political interference, bribery, cronyism or other flaws are rarely factors in judicial outcomes.

75:

50: Judgments in the criminal system usually follow the protocols of written law. There are sometimes exceptions when political concerns, corruption or other flaws in the system decide outcomes.

25:

0: Judgments in the criminal system are often decided by factors other than written law. Bribery and corruption in the criminal judicial process are common elements affecting decisions.

70. In practice, are judicial decisions enforced by the state?

75

70. In practice, are judicial decisions enforced by the state?

References:

While the majority of judicial decisions are enforced by the state, the quality or diligence of enforcement varies substantially. For example, Kenyan prisons are a dour environment; but rich convicts can buy relative comfort. The chief architect of the Goldenberg Scandal spent months in the private wing of a high-cost hospital. Politically connected individuals also can compromise the enforcement of judgments.

100: Judicial decisions are enforced quickly regardless of what is being decided or who is appearing before the court. Failure to comply brings penalties enforced by the state.

75:

50: Judicial decisions are generally enforced by the state, with some exceptions. Certain areas of law may be ignored, or certain parties appearing before the courts may evade or delay enforcement.

25:

0: Judicial decisions are often ignored. The state lacks the will or capacity to consistently enforce these decisions.

71. Is the judiciary able to act independently?

69

71a. In law, the independence of the judiciary is guaranteed.

YES | NO

References:

Section 68 of the constitution provides for a Judicial Service Commission (JSC) which shall not be subject to the direction of control of any other person or authority in the performance of its duties. Among the JSC's duties is the appointment of puisne judges from among whom the president appoints the chief justice. All judges have security of tenure, meaning they can only be removed before their due retirement date on the findings of a tribunal inquiry into their conduct.

YES: A YES score is earned if there are formal rules establishing that the judiciary is independent from political interference by the executive and legislative branches. Independence include financial issues (drafting, allocation and managing the budget of the courts).

NO: A NO score is earned if there are no formal rules establishing an independent judiciary.

71b. In practice, national-level judges are protected from political interference.

100 | 75 | 50 | 25 | 0

References:

While the constitution provides for such independence, the appointment of judges is highly politicized, a factor which can, and has been perceived to, influence judgments. Indeed in the 2003 judicial purge, some victims wondered at the selectivity of the exercise.

100: National level judges operate independently of the political process, without incentive or pressure to render favorable judgments in politically sensitive cases. Judges never comment on political debates. Individual judgments are rarely praised or criticized by political figures.

75:

50: National level judges are typically independent, yet are sometimes influenced in their judgments by negative or positive political incentives. This may include favorable or unfavorable treatment by the government or public criticism. Some judges may be demoted or relocated in retaliation for unfavorable decisions.

25:

0: National level judges are commonly influenced by politics and personal biases or incentives. This may include conflicting family relationships, professional partnerships, or other personal loyalties. Negative incentives may include demotion, pay

cuts, relocation, threats or harassment.

71c. In law, there is a transparent and objective system for distributing cases to national-level judges.

YES | **NO**

References:

There is no transparent and objective method of distributing cases among the judges. This task is undertaken independently by the chief justice, while the registrar handles the magistrates' courts.

YES: A YES score is earned if there is an objective system that is transparent to the public that equitably or randomly assigns cases to individual judges. The executive branch does not control this process.

NO: A NO score is earned if the case assignment system is non-transparent or subjective where judges themselves have influence over which cases they adjudicate. A NO score is also earned if the executive branch controls this process.

71d. In law, national-level judges are protected from removal without relevant justification.

YES | NO

References:

Once judges are appointed, their removal before reaching retirement age can only be on the decision of a tribunal as provided by Section 62 (4-8) of the constitution. However, during the 2003 judicial purge, the chief justice offered the option of voluntary retirement to judges against whom adverse allegations had been made. Of the eight who challenged allegations against them, the one case resolved to date resulted in the reinstatement of the judge.

YES: A YES score is earned if there are specific, formal rules for removal of a justice. Removal must be related to abuse of power or other offenses related to job performance.

NO: A NO score is earned if justices can be removed without justification, or for purely political reasons. A NO score is earned if the removal process is not transparent, or not based on written rules.

72. Are judges safe when adjudicating corruption cases?

100

72a. In practice, in the last year, no judges have been physically harmed because of adjudicating corruption cases.

YES | NO

References:

No such cases have been reported in the last year.

YES: A YES score is earned if there were no documented cases of judges being assaulted because of their involvement in a corruption case during the specific study period.

NO: A NO score is earned if there were any documented cases of assault to a judge related to his/her participation in a corruption trial. Corruption is defined broadly to include any abuses of power, not just the passing of bribes.

72b. In practice, in the last year, no judges have been killed because of adjudicating corruption cases.

YES | NO

References:

There has been no documented case of a judicial death under such circumstances in the last year.

YES: A YES score is earned if there were no documented cases of judges being killed related to their involvement in a corruption case during the study period.

NO: A NO score is earned if there were any documented cases where a judge was killed because of his/her participation in a corruption trial. The relationship between a mysterious death and a judge's involvement in a case may not be clear, however the burden of proof here is low. If it is a reasonable assumption that a judge was killed in relation to his or her work on corruption issues, then the indicator is scored as a NO. Corruption is defined broadly to include any abuses of power, not just the passing of bribes.

73. Do citizens have equal access to the justice system?

42

73a. In practice, judicial decisions are not affected by racial or ethnic bias.

100 | 75 | 50 | 25 | 0

References:

While no groups seem overtly discriminated against, it seems that decisions are likely to be stacked against the poor, who might be unable to afford quality legal advice. Confidence in advocates is also likely to be weak as the Advocates Complaints

Commission reports receiving 14,000 complaints against lawyers between July and September 2006, of which the Commission resolved only 900 cases. <http://allafrica.com/stories/200610300235.html>

100: Judicial decisions are not affected by racial or ethnic bias.

75:

50: Judicial decisions are generally not affected by racial or ethnic bias, with some exceptions. Some groups may be occasionally discriminated against, or some groups may occasionally receive favorable treatment.

25:

0: Judicial decisions are regularly distorted by racial or ethnic bias. Some groups consistently receive favorable or unfavorable treatment by the courts.

73b. In practice, women have full access to the judicial system.

100 | 75 | 50 | **25** | 0

References:

Besides women being the majority in Kenya, they are also the majority of poor, less-educated Kenyans. Besides their greater likelihood of not knowing their rights, judicial inefficiency means greater sacrifices of their home-making time in pursuing litigation – which might deter such action. Little has changed of what is described in a 2002 Amnesty International report: The (Kenyan) judicial system is perceived to be inefficient, expensive, inaccessible and discriminatory towards women. Female judges constitute only around 18 percent of the judiciary, and training on gender issues and international standards in relation to women's rights is limited in scope and not as readily available to judges in rural areas as those based in major urban areas. Access to justice for women victims of marital rape is extremely difficult. It is rare for a case of marital rape to reach the courts, and the perpetrator is more commonly charged with assault than rape. Often courts take the view that there was some provocation by the woman and treat cases of domestic violence lightly. In August 2000 a High Court ... set free (a man) who had admitted stabbing to death his wife ... because of her alleged infidelity. The court reasoned that the accused had been highly provoked by his wife's infidelity."

100: Women enjoy full and equal status in the eyes of the courts. There are no exceptions or practices in which women are treated differently by the judicial system.

75:

50: Women generally have use of the judicial system, with some exceptions. In some cases, women may be limited in their access to courts, or gender biases may affect court outcomes.

25:

0: Women generally have less access to the courts than men. Court decisions are commonly distorted by gender bias. Women may have to go through intermediaries to interact with the court, or are unable to present evidence.

73c. In practice, the state provides legal counsel for defendants in criminal cases who cannot afford it.

100 | 75 | 50 | 25 | 0

References:

The Lawyers Christian Fellowship summarizes the situations as follows: In Kenya there is no legal aid – except in murder (and treason) cases. With more than 56 percent of Kenyans living below the poverty line, most people are too poor to afford legal fees and are required to conduct their own cases, typically with very little understanding of the legal process. Among ordinary remand prisoners, approximately 96 percent handle their own cases.”

www.lawcf.org/intlmiss_clear_k.php

100: State-provided legal aid is basic, but well trained and effective in representing the rights of indigent defendants.

75:

50: State-provided legal aid is available, but flawed. Legal aid may be unavailable to some indigent defendants. Legal aid/public defenders may be sometimes unable or unwilling to competently represent all defendants.

25:

0: State-provided legal aid is unavailable to most indigent defendants. State legal aid/public defenders may be consistently incompetent or unwilling to fairly represent all defendants.

73d. In practice, citizens earning the median yearly income can afford to bring a legal suit.

100 | 75 | 50 | 25 | 0

References:

This is possible for some middle-income earners, but not all. The extended family system in which financial obligations stretch beyond the nuclear family has varied effects on people with the same income. There is a growing number of organizations offering pro bono services, but the demand is overwhelming.

100: In most cases, the legal system is an affordable option to middle class citizens seeking to redress a grievance.

75:

50: In some cases, the legal system is an affordable option to middle class citizens seeking to redress a grievance. In other cases, the cost is prohibitive.

25:

0: The cost of engaging the legal system prevents middle class citizens from filing suits.

73e. In practice, a typical small retail business can afford to bring a legal suit.

100 | 75 | 50 | 25 | 0

References:

Kenyans are mainly employed in self-provisioning (subsistence) agriculture or in the informal sector either manufacturing or retailing (hawking/vending). Such people regularly have needs for litigation but cannot afford it. Small retailers at the top of the ladder might afford litigation, but the majority could not.

100: In most cases, the legal system is an affordable option to a small retail business seeking to redress a grievance.

75:

50: In some cases, the legal system is an affordable option to a small retail business seeking to redress a grievance. In other cases, the cost is prohibitive.

25:

0: The cost of engaging the legal system prevents small businesses from filing suits.

73f. In practice, all citizens have access to a court of law, regardless of geographic location.

100 | 75 | 50 | 25 | 0

References:

High Courts sit permanently or periodically at all provincial headquarters, while magistrates' courts are found at all district headquarters. Nonetheless, the cost of travelling to these courts can be prohibitive, especially in parts of the country with a poor road network that undermines the cost and availability of transport.

100: Courtrooms are always accessible to citizens at low cost, either through rural courthouses or through a system of traveling magistrates.

75:

50: Courts are available to most citizens. Some citizens may be unable to reach a courtroom at low cost due to location.

25:

0: Courts are unavailable to some regions without significant travel on the part of citizens.

VI-4. Law Enforcement

74. Is the law enforcement agency (i.e. the police) effective?

42

74a. In practice, appointments to the law enforcement agency (or agencies) are made according to professional criteria.

100 | 75 | **50** | 25 | 0

References:

While there are specified criteria for recruitment of the law enforcement professionals, there is also much deviousness about whom among those qualified should get appointed. In the last year, complaints of favoritism have led to the wholesale cancellation of recruitment of officers in the Kenya Police, Administration Police and Kenya Wildlife Services. See for example, <http://www.communication.go.ke/media.asp?id=126>

100: Appointments to the agency (or agencies) are made based on professional qualifications. Individuals appointed are free of conflicts of interest due to personal loyalties, family connections or other biases. Individuals appointed usually do not have clear political party affiliations.

75:

50: Appointments are usually based on professional qualifications. Individuals appointed may have clear party loyalties, however.

25:

0: Appointments are often based on political considerations. Individuals appointed often have conflicts of interest due to personal loyalties, family connections or other biases. Individuals appointed often have clear party loyalties.

74b. In practice, the agency (or agencies) has a budget sufficient to carry out its mandate.

100 | 75 | **50** | 25 | 0

References:

The budgets of law enforcement agencies are voted through Parliament like all other government departmental budgets. While elite" elements of the law enforcement agencies like the National Security Intelligence Service and the Tourism Police Unit have adequate and timely resources, other elements like the regular Kenya Police and Kenya Prisons are visibly resource constrained. Junior police officers' families living in "barracks" share accommodations that do not benefit an individual family. It is unremarkable to find junior police officers in bedraggled uniforms, or to have officers asking civilians to fuel vehicles for them to respond to complaints.

100: The agency (or agencies) has a budget sufficient to fulfill its basic mandate.

75:

50: The agency (or agencies) has limited budget, generally considered somewhat insufficient to fulfill its basic mandate.

25:

0: The agency (or agencies) has no budget or an obviously insufficient budget that hinders the agency's ability to fulfill its mandate.

74c. In practice, the agency is protected from political interference.

100 | 75 | 50 | **25** | 0

References:

The law enforcement agencies are quite politicized agents of the ruling government. In spite of the political space created since the 2002 defeat of the KANU government, the Internal Security ministry still expects the Kenya Police to be partisan, even if elements in the force are struggling for professionalism. For instance, the security minister and the police commissioner had a serious falling out when the former by-passed the latter in ordering an elite squad to attack and destroy the property of a major media house he claimed to be on the verge of publishing embarrassing information about the president's family.

<http://allafrica.com/stories/200610190038.html>

100: The agency (or agencies) operates independently of the political process and has operational independence from the government. All laws can be enforced regardless of the status of suspects or the sensitivity of the investigation.

75:

50: The agency (or agencies) is typically independent, yet is sometimes influenced in its investigations or enforcement actions by negative or positive political incentives. This may include favorable or unfavorable public criticism by the government or other forms of influence. The agency (or agencies) may not be provided with some information needed to carry out its investigations.

25:

0: The investigative and enforcement work of the agency (or agencies) is commonly influenced by political actors or the government. These may include conflicting family relationships, professional partnerships, or other personal loyalties. Negative incentives may include threats, harassment or other abuses of power by the government.

75. Can law enforcement officials be held accountable for their actions?

88

75a. In law, there is an independent mechanism for citizens to complain about police action.

YES | NO

References:

Within government, the Kenya Anti Corruption Commission and the Kenya National Commission of Human Rights handle such complaints. Outside government, there are quite a number of civil society organizations that handle such complaints, including Kituo cha Sheria and Kenya Human Rights Commission. The Kenya Police has itself launched a community policing scheme whose credibility depends on the police ensuring the trust of the community.

See <http://www.kenyapolice.go.ke/community%20policing.asp> Finally, the Kenya Police Web site also has a section for lodging complaints, and most police stations are establishing dedicated public help desks.

YES: A YES score is earned if there is a formal process or mechanism by which citizens can complain about police actions.

NO: A NO score is earned if there is no such mechanism.

75b. In practice, the independent reporting mechanism responds to citizen's complaints within a reasonable time period.

100 | 75 | 50 | 25 | 0

References:

KACC and KNCHR respond to public complaints immediately. However, action against errant officers might take some time, especially if it involves litigation. There are numerous instances in the KACC quarterly reports in which police officers have been indicted for soliciting bribery, the standard evidence being treated money given to the complainant by KACC to hand over to the officer.

100: The agency/entity responds to complaints quickly. While some backlog is expected and inevitable, complaints are acknowledged promptly and investigations into serious abuses move steadily towards resolution. Citizens with simple issues can expect a resolution within a month.

75:

50: The agency/entity responds to complaints quickly, with some exceptions. Some complaints may not be acknowledged, and simple issues may take more than two months to resolve.

25:

0: The agency/entity cannot resolve complaints quickly. Complaints may be unacknowledged for more than a month, and simple issues may take three to six months to resolve. Serious abuses are not investigated with any urgency.

75c. In law, there is an agency/entity to investigate and prosecute corruption committed by law enforcement officials.

YES | NO

References:

Section 7 of the Anti Corruption and Economic Crimes Act mandates KACC exclusively to investigate any matter or person that is thought to be involved in corruption.

YES: A YES score is earned if there is an agency/entity specifically mandated to investigate corruption-related activity within law enforcement. This agency/entity is separate from the regular police department.

NO: A NO score is earned if no such agency/entity exists.

75d. In practice, when necessary, the agency/entity independently initiates investigations into allegations of corruption by law enforcement officials.

100 | 75 | 50 | 25 | 0

References:

KACC's mandate given by Section 7 of its Act provides for this. KACC, for example, investigated reports about bribery during the police recruitment exercise of 3,000 officers, which was subsequently cancelled. Sixty senior officers managing the exercise were promptly suspended. See <http://www.turkishweekly.net/news.php?id=23760>

100: When irregularities are discovered, the agency/entity is aggressive in investigating government law enforcement officials or in cooperating with other investigative agencies.

75:

50: The agency/entity starts investigations, but is limited in its effectiveness or is reluctant to cooperate with other investigative agencies. The agency/entity may be slow to act, unwilling to take on politically powerful offenders, or occasionally unable to enforce its judgments.

25:

0: The agency/entity does not effectively investigate or does not cooperate with other investigative agencies. The agency may start investigations but not complete them, or may fail to detect offenders. The agency may be partisan in its application of power.

75e. In law, law enforcement officials are not immune from criminal proceedings.

YES | NO

References:

Section 14 of the constitution protects the president against criminal and/or civil proceedings while in office. Besides that provision, no one else is immune from prosecution.

YES: A YES score is earned if law enforcement officers are fully accountable for their actions under the law and can be investigated and prosecuted for their actions.

NO: A NO score is earned if law enforcement enjoys any special protection from criminal investigation or prosecution.

75f. In practice, law enforcement officials are not immune from criminal proceedings.

100 | 75 | 50 | 25 | 0

References:

KACC reports many officers being prosecuted and convicted to fines or custodial sentences for corruption. However, where police officers commit political crimes, as in the raid on the media house, then these are able to escape prosecution. Furthermore, police officers commit numerous other crimes, such as violating people in custody, which have been difficult to prosecute because these are investigated and prosecuted by their colleagues.

100: Law enforcement officers are subject to criminal investigation for official misconduct. No crimes are exempt from prosecution.

75:

50: Law enforcement is generally subject to criminal investigation but exceptions may exist where criminal actions are overlooked by the police or prosecutors. Some crimes may be exempt from prosecution, such as actions taken in the line of duty.

25:

0: Law enforcement enjoys a general protection from most criminal investigation. This may be due to a formal immunity or an informal understanding that the law enforcement community protects itself.