

Overall Score:

69 - Weak

Legal Framework Score:

79 - Moderate

Actual Implementation Score:

56 - Very Weak

Category I. Civil Society, Public Information and Media

I-1. ⁶⁹Civil 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:

Into the late 1990s, the government was uncomfortable with the proliferation of independent, donor-funded good governance CSOs/NGOs. Financial mismanagement in some of these organizations added weight to the government's proposal to donors to improve scrutiny over such organizations. This resulted in the basket-funded Justice Governance Law and Order Sector Programme [GJLOS] under the Justice and Constitutional Affairs [JCA] ministry, which severely curtailed direct funding to CSOs/NGOs.

A product of GJLOS is the Kenya National Commission of Human Rights [KNCHR], an autonomous institution created by an act of Parliament. Yet, KNCHR proved too independent for the government, causing JCA to interfere with funding, amongst other threats. A KNCHR report, for example, exposed the extra-judicial killing of 500 youths allegedly belonging to the banned Mungiki sect. Its reports also exposed the brutality against civilians meted out by the military, which had been sent to put down militias in Mt. Elgon. KNCHR was also at the forefront of initiatives to investigate the post-2007 election violence that killed 1,500 people and displaced another 500,000.

References:

Constitution of Kenya (Section 80) 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 nongovernmental organizations are also regulated under the NGO Coordination Act.

http://www.kenyalaw.org/kenyalaw/klr_home/

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:

The Justice Governance Law and Order Sector Programme (GJLOS) was designed to, and successfully curtailed direct-donor funding to NGOs/CSOs by creating a basket, sector-wide approach. However, there have been instances when good governance NGOs/CSOs continue to get direct funding.

References:

There is no specific law that bars any particular 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 information on accounts (Section 31).

http://www.kenyalaw.org/kenyalaw/klr_home/

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:

Societies Act (sections 26, 30 and 31).

http://www.kenyalaw.org/kenyalaw/klr_home/

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?

92

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

100 | 75 | 50 | 25 | 0

References:

Largely, the government has not created barriers to the organization of new anti-corruption/good governance CSOs. However, the government's attitude to the Kenya National Commission of Human Rights, an autonomous public body created by an act of Parliament, is to retain a clear indication of its attitude to any organization that might try to be too independent of the mainstream.

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

References:

Anti-corruption and good governance CSOs/NGOs are very active in the policy suggesting arena, even if this does not necessarily translate into substantive policy. CSOs, like the Institute of Economic Affairs and CLARION, undertake extensive research without any commitment that the government will adopt their outputs. This was the case with the Society for International Development's work on inequalities in Kenya; an effort that was co-sponsored by the Planning Ministry.

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

References:

No anti-corruption or good governance CSO/NGO has been shut down during the period. However, the conduct of key people in government leave no doubt on the government's position with respect to excessive" scrutiny. For example, the chair of the Kenya National Commission of Human Rights [KNCHR] happens to be of the same Kikuyu ethnic stock as the president who won the 2002 elections on a Narc ticket, but contested the 2007 election on a PNU ticket. KNCHR exposures against NARC government excesses were adjudged a conspiracy to take power out of Kikuyu hands. Thus, when the KNCHR chair visited the victims of an arson attack against a church during the 2008 violence, the Kikuyu victims confronted him as a traitor against the community.

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. YES is a positive score.

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:

In August 2007, a group of CSO activists marched on Parliament to protest against a proposal to pay each of the outgoing 210

parliamentarians a gratuity of 6 million shillings (US\$77,000) when 60 percent of Kenyans live on 70 shillings (US\$0.90) a day. That the protest had been duly notified to the police as provided by law was not an adequate deterrent to the police who broke up the demonstration and detained five leading protesters, including an ailing woman. A cabinet minister who went to inquire after these irregular arrests soon found herself on the receiving end. The protesters were detained (but not fully imprisoned) and later, arraigned before the courts. Eventually charges were dropped.

References:

<http://www.marsgroupkenya.org/user/?p=63>

YES: A YES score is earned if there were no CSO activists imprisoned because of their work covering corruption. YES is a positive score.

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 person 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. Imprisoned" is defined here as detention by the government lasting more than 24 hours.

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

YES | **NO**

References:

While there is no conclusive evidence of civil society activists working on corruption issues being physically harmed, there are a lot of incidents that might cause one to question motives. Arising from the protests against parliamentarians' arbitrary attempt to pay themselves a massive gratuity, the police decided to transfer the arrested protesters out of the city center. In the process, the police vehicle had an accident about which one of the detained protesters said: "We have just had an accident on Limuru Road near the Aga Khan University Hospital. The police are trying to kill us for fighting against corruption. Their car is the murder weapon in the hands of the kamikaze driver."

<http://www.marsgroupkenya.org/user/?p=63> (item 10)

Besides the specific incident above, it has been normal for police to employ violent means, such as truncheoning or tear gassing, in breaking up demonstrations. Such methods obviously incur physical harm on victims even if their effects are not specifically documented.

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. YES is a positive score.

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

References:

There have been no specific reports of killings of CSO activists working on corruption. However, the persistence of intermittent extra-judicial executions of dangerous criminals” leaves doubts about whether this might not be an avenue to rid targeted gadflies. The Mungiki menace is a real threat to national security, yet it persists, because key people in government resort to its thugs in times of political need. Other vigilante groups whose “godfathers” are not in key government positions do not have Mungiki’s leeway. That the same government’s police undertake seemingly random attacks against Mungiki, such as were reported by the Kenya National Commission of Human Rights(KNCHR), raises doubts about motives.

YES: A YES score is earned if there were no documented cases of CSO activists being killed because of their work covering corruption in the specific study period. YES is a positive score.

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

References:

Constitution of Kenya (Section 80) provides for the freedom to assemble and associate freely and to form and belong to trade unions whose business is conducted under the Trade Unions Act (Cap 233 of the Laws of Kenya).

Trade Disputes Act (Cap 234) provides for an Industrial Court.

http://www.kenyalaw.org/kenyalaw/klr_home/

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

References:

For details on the state of the trade union movement, go to http://www.cotu-kenya.org/historical_background.htm

The umbrella trade union body is the Central Organization of Trade Unions, established in 1965. After the 1980s liberalization of structural adjustment programs pruned its individual membership by half to 250,000 workers, much reorganization has raised membership to 1.5 million, spread over 34 affiliated national unions, with the umbrella body being affiliated to six international worker confederations.

The greatest obstacle to worker organization is that 80 percent of Kenya's labor force is in the itinerant, informal sector, which by definition and character is non-unionizing. For the unionizable formal sector, practice is that the Labor 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 underemployment, employed people are wary of radical unionism for fear of retrenchment. Furthermore, Kenya's endeavor to attract foreign investment has seen the government give great concessions to investors (through arrangements such as the processing zones), which invariably impinge on workers' rights.

<http://www3.interscience.wiley.com/journal/119039755/abstract?CRETRY=1&SRETRY=0economic>

100: Trade unions are common and are an important part of 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:

Chapter V, Section 79 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.

During 2007, the Media Act came into force, as a means through which the Media Council of Kenya will self-regulate.

http://www.kenyalaw.org/kenyalaw/klr_home/

References:

Constitution of Kenya (Chapter V, Section 79).

Media Act (2007).

http://www.kenyalaw.org/kenyalaw/klr_home/

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

NO: A NO score is earned if any specific publication relating to government affairs 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

References:

Constitution of Kenya (Section 79).

http://www.kenyalaw.org/kenyalaw/klr_home/

YES: A YES score is earned if freedom of individual speech is guaranteed in law, including to 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 print media entities?

75

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

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

Comments:

Provisions for the registration of print media entities are as provided by pertinent legislation backed by Section 79 of the Constitution, which guarantees freedoms including that of speech.

Over the last year, there has been no evidence that the government has tried to derail any significant attempt to establish a print media entity; the government still probably smarting from the negative publicity it generated over its handling of the Standard newspapers in 2006. Meanwhile, the emergence and sustained publication of various entities of the alternative” media or “gutter”

press is evidence that the arena is comparatively open, despite the periodic publishing of material that can be quite embarrassing to the government and its senior people. However, the government seems to be more concerned with the prospects of exposes from the mainstream media, which is why there was a tug of war with civil society over the development of the Media Act of 2007 and the constitution of the Media Council of Kenya.

References:

Constitution of Kenya (Section 79).

100: Print media entities can freely organize with little to no interaction with the government. This score may still be earned if groups or individuals with a history of political violence or terrorism (within last ten years) are banned from forming media entities.

75:

50: Formation of print 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.

25:

0: Print media groups are effectively prohibited, either by official requirements or by unofficial means, such as intimidation or fear.

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

YES | **NO**

Comments:

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 license or conditional license or revoking a license; or (b) imposing conditions in a license or conditional license; or (c) refusing to grant authority in a license for the purposes of section 5 (2); or (d) refusing to amend a license under section 10, may within 14 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 license, the Commission may, upon expiry of the period of notice under section 78 grant a license to the applicant if satisfied that the applicant should be licensed, subject to such conditions, including the payment of such license fee as may be prescribed: Provided that where the Commission does not grant a license, 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.

References:

Kenya Communications Act (Part 1V, Radio Communications (35), Licensing requirements; and Cap 497 Trade Licensing Act (15)).

Kenya Communications Act (Section 79).

http://www.kenyalaw.org/kenyalaw/klr_home/

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

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

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

100 | 75 | 50 | 25 | 0

Comments:

The management of licensing has improved, as is reflected in the proliferation of the alternative media. However, acquisition of licenses can still be a long, drawn-out process.

Sec 79 Grant of License: The Commission may, upon expiry of the period of notice under Section 78, grant a license to the applicant if satisfied that the applicant should be licensed, subject to such conditions, including the payment of such license fee as may be prescribed.

Provided that where the Commission does not grant a license, it shall notify the applicant in writing of the reasons for refusal within 60 days of such refusal and the applicant may, if aggrieved, appeal to the Tribunal.

References:

Kenya Communications Act (Section 79).

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 print media license at a reasonable cost.

100 | 75 | 50 | 25 | 0

References:

While the proportion of Kenyans living in poverty has diminished since 2005-2006, investment in the print media remains an exclusive domain of the non-poor, for while license costs might not be prohibitive, this must be seen in the context of the overall costs of running the publication.

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 citizens able to form broadcast (radio and TV) media entities?

63

7a. In practice, the government does not create barriers to form a broadcast (radio and TV) media entity.

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

References:

While the legal frameworks for licensing are quite sound, its application often reflects some bias. Anecdotal evidence suggests one application for nationwide bandwidth for a regional station has been pending for more than a year. Whether such impediments are placed in an applicant's way depend on whether they are perceived to be pro- or anti-government.

100: Broadcast 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. This score may still be earned if groups or individuals with a history of political violence or terrorism (within last ten years) are banned from forming media entities.

75:

50: Formation of broadcast 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: Broadcast media groups are effectively prohibited, either by official requirements or by unofficial means, such as intimidation or fear. This score is appropriate if the division of broadcast bandwidth is widely viewed to be used as a political tool.

7b. In law, where a broadcast (radio and TV) media license is necessary, there is an appeal mechanism if a license is denied or revoked.

YES | NO

Comments:

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 license or conditional license or revoking a license; or (b) imposing conditions in a license or conditional license; or (c) refusing to grant authority in a license for the purposes of section 5 (2); or (d)

refusing to amend a license 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 license, the Commission may, upon expiry of the period of notice under section 78 grant a license to the applicant if satisfied that the applicant should be licensed, subject to such conditions, including the payment of such license fee as may be prescribed: Provided that where the Commission does not grant a license, 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.

References:

Kenya Communications Act (Part 1V) Radio Communications (35) Licensing requirements; and Cap 497 Trade Licensing Act (15).

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

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

7c. In practice, where necessary, citizens can obtain a broadcast (radio and TV) media license within a reasonable time period.

100 | 75 | 50 | 25 | 0

Comments:

The licensing authority, the Communications Commission of Kenya commits as follows:

On receipt of fully completed applications: “We will make the outcome of applications for new Telecom, Commercial VSAT and Postal/Courier Licenses within 135 days from the date of receipt of such applications provided all requirements including attachments have been furnished to the Commission by the applicant; Applications for the transfer of operational Licenses shall be processed within 30 working days upon receipt; Where the 60-day gazette notice is not required, the outcome will be made known within forty (40) working days from the date of application; We will process applications for Private VSAT, Vendor, Telecommunication Contractor or Telecommunication Technical Personnel certificates within 30 working days following receipt of complete applications from qualified applicants; We will make our decision known on applications for License-term extensions for facility-based Licenses within 12 months; We will process applications for annual renewal Certificates within five working days of receipt; We will respond to applications for modification of License conditions within 10 working days of receipt; Where public consultations are merited, such consultations will commence within 21 working days following receipt of applications; We will comply with procurement time frames as may be revised from time to time and further endeavor to comply with the time-frames specified for each tender where a tender process is used in the issuance of License; We will make Licenses available for viewing by the public at the Commission’s offices upon payment of a fee of 250 schillings (US\$3.20) per License requested.”

References:

The Communications Commission of Kenya.
http://www.cck.go.ke/html/service_satndards.asp

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.

7d. In practice, where necessary, citizens can obtain a broadcast (radio and TV) media license at a reasonable cost.

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

Comments:

A radio license goes for between 30,000 and 130,000 shillings (US\$385 and US\$1,668) while a TV license is 360,000 shillings (US\$4,618). Broadcast licenses are consequently the preserve of the non-poor, not because of their costs, but rather the cost of operating a broadcast station. This exclusion is even worse than in the case of the print media, because the latter can hire equipment, whereas the former must more or less have permanent, installed capabilities. Thus, wherever in Kenya one sees a new entry into the broadcast media, there is definitely a substantive financier.

References:

Communications Commission of Kenya.
http://www.cck.go.ke/information_licensing_fees/

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.

8. Can citizens freely use the Internet?

100

8a. In practice, the government does not prevent citizens from accessing content published on-line.

100 | 75 | 50 | 25 | 0

References:

The main constraint to people's access to the Internet is their personal circumstances, determining whether they can afford personal computers or visit a cyber cafe. In the aftermath of the disputed 2007 elections, a common perception was that the poor TV reception was the result of government interference, a perception eventually given credence with an announcement that news could not be broadcast live. However, on the balance, Kenyans have more or less unfettered access to global websites.

Meanwhile, the management of the government's own ministerial and state corporation websites is in instances quite inefficient and could be a way of denying the public immediate access to the latest information.

100: The government does not prevent Internet users from accessing online content. While some forms of content may be illegal to download or own (such as child pornography), the government does not manipulate networks to prevent access to this information. This indicator addresses direct government intervention in the transfer of information, not indirect deterrents such as intimidation, surveillance or technical difficulties in countries with poor infrastructure.

75:

50: Internet users are prevented by the government from reaching online content in some cases. Government tactics may include firewalls preventing access to networks in other countries, or manipulating search engine results to exclude politically sensitive topics.

25:

0: Internet users are routinely prevented from accessing online content. Government restrictions are in place at all times for certain topics. Government tactics may include firewalls preventing access to networks in other countries, or manipulating search engine results to exclude politically sensitive topics.

8b. In practice, the government does not censor citizens creating content on-line.

100 | 75 | 50 | 25 | 0

Comments:

While the government may comment with distaste on supposedly disparaging stories doing the rounds on the Internet, it does not have the capacity to censor content. Indeed, as Internet services have been liberalized since 2004, the scope of such censor is likely to become even less tenable, short of the government using the Communications Commission of Kenya to jam already licensed portals. For a study of the state of the industry, see http://www.cck.go.ke/internet_market_study/

References:

Communications Commission of Kenya.

100: The government never removes online information or disables servers due to their political content. All political speech is protected with limited exceptions, such as legitimate intellectual property restrictions; direct calls to violence; or pornography.

75:

50: In some cases, the government restricts political speech by its citizens on the Internet. This is accomplished either directly by controlling servers hosting restricted content, or indirectly through threats or intimidation against the persons posting political content.

25:

0: The government regularly restricts political speech by its citizens on the Internet. This is accomplished either directly by controlling servers hosting the restricted content, or indirectly through threats or intimidation against the persons posting political content.

9. Are the media able to report on corruption?

9a. In law, it is legal to report accurate news even if it damages the reputation of a public figure.

YES | NO

Comments:

Freedom of speech is guaranteed by the Constitution, as is evident in the thriving alternative media. However, such reporting is subject to the provisions of the Defamation Act (Cap 36), which addresses libel and slander.

http://www.kenyalaw.org/kenyalaw/klr_home/

References:

Constitution of Kenya.

Defamation Act (Cap 36).

http://www.kenyalaw.org/kenyalaw/klr_home/

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.

9b. 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 original Media Council of Kenya (MCK) was set up privately in 2003 to undertake self-censorship of the sector. See <http://www.mediacouncil.or.ke/>

The large private media presence in the newly launched, statutory MCK means self-censorship will continue. However, it is not clear what will happen to the composition of its board, for a large government presence could facilitate the state censorship the government had wished to introduce. It is significant that on Oct. 2, 2008 a judge complained of excessively large awards in libel cases, such large awards having been employed by the government as a deterrent for journalists publishing exposes.

References:

Media Council of Kenya (MCK).

<http://www.mediacouncil.or.ke/>

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.

9c. In practice, there is no prior government restraint (pre-publication censoring) on publishing corruption-related stories.

100 | 75 | 50 | 25 | 0

References:

The government does not explicitly censor material intended for publication. However, it does make its preferences known. Furthermore, the government's very vibrant Office of Public Communications (read: propaganda) either preempts exposes with its own version or undertakes damage limitation activities. See <http://www.communication.go.ke/default.asp>

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. This score is appropriate if in countries where illiteracy is high, 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. This score is appropriate even if the government restricts only politically damaging news while allowing favorable coverage.

10. Are the media credible sources of information?

70

10a. In law, print media companies are required to publicly disclose their ownership.

YES | NO

Comments:

Disclosure of ownership is a precondition for registration of any enterprise under the Companies Act (Cap 486).

References:

Companies Act (Cap 486).

http://www.kenyalaw.org/kenyalaw/klr_home/

YES: A YES score is earned if print media companies are required by law to publicly 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 types of entities or agents from being publicly disclosed.

10b. In law, broadcast (radio and TV) media companies are required to publicly disclose their ownership.

YES | NO

Comments:

Disclosure of ownership is a precondition for registration of any enterprise under the Companies Act (Cap 486).

References:

Companies Act (Cap 486).

http://www.kenyalaw.org/kenyalaw/klr_home/

YES: A YES score is earned if broadcast media companies are required by law to publicly 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 publicly disclosed.

10c. In practice, journalists and editors adhere to strict, professional practices in their reporting.

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

Comments:

In response to a growing alternative, so-called gutter” press, the mainstream media institutions in Kenya feared that irresponsible journalism among their colleagues would give the government the excuse to regulate the sector. Consequently, they got together under the auspices of the Media Industry Steering Committee to regulate conduct in their profession, developing a Code of Conduct accessible at <http://www.mediacouncil.or.ke/>. By the 2006 enactment of the controversial Media Act, the profession felt it was sufficiently well regulated not to warrant a heavy hand from the government.

However, there have been instances of irresponsible journalism resulting in successful libel and defamation lawsuits. However, it is instructive that in October 2008, a judge decried the high awards previously meted by the judiciary in defamation cases, consequently awarding a modest 5 million shillings (US\$64,100) to a parliamentarian who had demanded 35 million shillings (US\$449,000) for defamation.

<http://www.mediacouncil.or.ke/>

References:

Media Industry Steering Committee Code of Conduct.

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.

10d. In practice, during the most recent election, political parties or independent candidates received fair media coverage.

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

Comments:

As in previous electoral contests, media coverage of campaigns has never been fair. The national broadcaster, KBC, will invariably favor the outgoing president and (his) party. The proliferation of FM (radio) and TV stations has also meant that these will reflect their own biases, whether such are determined by social (ethnic) or economic (who pays best for air-time) interests. See the following links for analysis of the situation in the run-up to the 2007 general elections:

References:

<http://www.voanews.com/english/archive/2007-11/2007-11-29-voa37.cfm>

<http://www.propertykenya.com/news/502372-high-poll-stakes-lead-to-in-depth-media-coverage-scrutiny>

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.

10e. In practice, political parties and candidates have equitable access to state-owned media outlets.

Comments:

Traditionally, the state-owned media unashamedly favored the (out-going) president and his party. While this was the case during the 2007 general elections, it is also true that some breakthroughs were made by opposition parties and candidates in terms of getting space on the state-owned media, both in terms of reporting activities and in terms of advertising. On the balance however, the pendulum remains in favor of incumbency.

References:

<http://www.propertykenya.com/news/502372-high-poll-stakes-lead-to-in-depth-media-coverage-scrutiny>

<http://www.voanews.com/english/archive/2007-11/2007-11-29-voa37.cfm>

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. All parties and candidates are offered consistent and equivalent rates for campaign advertising on state-owned media outlets.

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.

11. Are journalists safe when investigating corruption?

100

11a. In practice, in the past year, no journalists investigating corruption have been imprisoned.

YES | NO

References:

Neither the grapevine, nor the local media, nor international watchdog bodies have reported any such instances specifically for Kenya. See for example, the Committee to Protect Journalists' website

at http://www.cpj.org/regions_08/africa_08/africa_08.html#kenya

Also see http://www.internews.org/articles/2008/20080208_onthemedial_kenya.shtm

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

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. Imprisoned” is defined here as detention by the government lasting more than 24 hours.

11b. In practice, in the past year, no journalists investigating corruption have been physically harmed.

YES | NO

References:

There have been no local or international reports of any such incidents.

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. A YES score is positive.

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.

11c. In practice, in the past year, no journalists investigating corruption have been killed.

YES | NO

References:

There have been no local or international reports of any such incident. However, a foreign journalist, Trent Keegan, who was apparently investigating a land dispute across the border in Tanzania, was recently murdered, and investigations are continuing. See <http://www.cpj.org/news/2008/africa/kenya26jun08na.html>

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. A YES score is positive.

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.

12a. In law, citizens have a right of access to government information and basic government records.

YES | NO

References:

Much government information is published and available through the government printer and respective departments. Indeed, the Kenya Gazette Supplement (Number 65 of 2005) guarantees such access. The introduction of e-government has also meant that a lot of basic department information is available online. See, for example: <http://www.communication.go.ke/>

However, various other legislation hampers such access, notably the Official Secrets Act, which binds civil servants not to divulge certain categories of information without authorization from their respective accounting officers, the permanent secretary.

Other legislation that hampers access includes 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 government documents, including constitutional guarantees. 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.

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

12b. In law, citizens have a right of appeal if access to a basic government record is denied.

YES | NO

Comments:

There is no blanket formal appeal process against denied access to government information. Different departments might have their own rules, regulations or procedures. For instance, the Public Procurement Act mandates the Public Procurement Oversight Authority to provide information on tenders to interested parties. However, one could file a civil suit against the government for such access.

While mid-2007 saw Kenya launch the Public Complaints Standing Committee (effectively, Kenya's ombudsman) the office's effect on accessing government information remains to be seen, as it has only been given substance a year later.

References:

Kenya Gets Ombudsman," by Nation Reporter
<http://www.bizcommunity.com/Article/111/15/15682.html>

YES: A YES score is earned if there is a formal process of appeal for rejected information requests. A YES score can still be earned if the appeals process involves redress through the courts rather than administrative appeal.

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

12c. In law, there is an established institutional mechanism through which citizens can request government records.

YES | **NO**

Comments:

There is no blanket formal appeal process against denied access to government information. Different departments might have their own rules, regulations or procedures. For instance, the Public Procurement Act mandates the Public Procurement Oversight Authority to provide information on tenders to interested parties. However, one could file a civil suit against the government for such access.

Kenya has a pending Public Information Bill which proposes to give citizens the right of access to government information currently curtailed by the Official Secrets Act. Once passed, the Public Information Act would provide grounds for a 'Yes' answer to the question. Otherwise, the current situation is as described above, and individual offices/departments remain very much in the driving seat over whether to give or not give information, notwithstanding the existence of the somewhat muted Public Complaints Standing Committee

References:

Kenya Gets Ombudsman," by Nation Reporter
<http://www.bizcommunity.com/Article/111/15/15682.html>

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.

13. Is the right of access to information effective?

40

13a. In practice, citizens receive responses to access to information requests within a reasonable time period.

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

Comments:

Government information is categorized, meaning some of it can be obtained with relative ease, while other categories might take a long while, and other still may never be accessed.

Government publications (policy documents, legislation, etc.) can be bought over-the-counter, if in stock at the government printer or respective agencies or departments. However, information that has to be compiled on request can take very long to acquire, possibly even requiring the applicant to bribe the relevant officer. The recent introduction of performance contracts and service charters should greatly improve the management of such requests. Typical of most state corporations, the Communications Commission of Kenya has very specific time frames within which to provide responses.

See http://www.cck.go.ke/html/service_satndards.asp for the service standards that apply to all areas of the Communications Commission of Kenya.

References:

Communications Commission of Kenya

http://www.cck.go.ke/html/service_satndards.asp

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.

13b. In practice, citizens can use the access to information mechanism at a reasonable cost.

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

References:

The introduction of performance contracts is likely to improve access to information, as illustrated by the Communications Commission of Kenya's (CCK) commitments at http://www.cck.go.ke/html/service_satndards.asp. This would make access to information less costly even if it will not necessarily become affordable for the average Kenyan who lives on less than one U.S. dollar a day. Such a person will not have access to the Internet to benefit from e-government driven reforms, such as are committed to by CCK posting material on its website.

However, the other problem is that key information is centralized at ministry and institution head offices in Nairobi, requiring those demanding it to travel great distances that can be financially prohibitive.

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.

13c. In practice, citizens can resolve appeals to access to information requests within a reasonable time period.

References:

Public servants sign the Official Secrets Act (OSA), which provides non-specific guides to categories of information they may and may not release to the public. OSA hangs like an albatross around their necks, killing initiative regarding information dissemination, so that even the most harmless information and data must be subjected to time-consuming red tape. Indeed, government in Kenya's lingua franca, Kiswahili, is 'serikali,' which translates to great secret."

Notwithstanding OSA, however, there is not a blanket treatment of information requests across the whole public service with some institutions having formal information provision regulations that specify procedures and duration within which a response must be availed, such as the Communications Commission of Kenya's service charter at <http://report.wordpress-158395-729720.cloudwaysapps.com/Kenya/2007/scorecard/15>

However, the government is bound to provide timely responses to parliamentary questions, an option which is not open to the average citizen.

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.

13d. In practice, citizens can resolve appeals to information requests at a reasonable cost.

References:

For the average citizen, where information has been denied, then that is likely to be it. However, the costs to be incurred depend on the information sought. Where people have to travel in search of information, as is the case with the centralized government pension system, then costs can be quite high. Hopefully, the introduction of performance contracts and service charters will improve efficiency and lower costs incurred, especially if the contracts provide an adequate disincentive for demanding bribes.

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.

13e. In practice, the government gives reasons for denying an information request.

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

References:

When information is denied, the Official Secrets Act is justification. However, since the Act fosters a pervading fear of information dissemination, many officers do not even know when their actions are backed by the Act, and simply refuse to grant information.

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

II-1. ⁶² Voting & Citizen Participation

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

100

14a. In law, universal and equal adult suffrage is guaranteed to all citizens.

YES | NO

Comments:

Constitution of Kenya (Section 43) provides that any citizen of Kenya over the age of 18 can register as a voter. However, this

right is presently reserved for Kenyans who are in the country both during voter registration and balloting. There has been a strong campaign to enable non-resident Kenyans to participate.

At <http://www.eck.or.ke/>, the Electoral Commission of Kenya [ECK] clarifies as follows:

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 therefrom 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."

References:

Constitution of Kenya (Section 43).

YES: A YES score is earned if the right to vote is guaranteed to all citizens of the country (basic age limitations are allowed). 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.

14b. In law, there is a legal framework requiring that elections be held at regular intervals.

YES | **NO**

Comments:

Constitution of Kenya (Chapter 2, Part I, Section 9) 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.

References:

Constitution of Kenya (Chapter 2, Part I, Section 9).

http://www.kenyalaw.org/kenyalaw/klr_home/

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.

15. Can all citizens exercise their right to vote?

15a. In practice, all adult citizens can vote.

100 | 75 | 50 | 25 | 0

References:

One needs a national identity card (ID) acquirable on reaching age 18 to register as a voter; yet the issuance of such cards has been very inefficient. During the last days of the most recent voter registration exercise (July 2007), for example, the queue of people seeking IDs was greater than that of those seeking voters' cards. See "Voter Registration Exercise to Close Tuesday," by Naisula Lesuuda (July 9, 2007) at <http://www.kbc.co.ke/story.asp?ID=43689>.

Furthermore, registered voters are disenfranchised by the mismanagement of the exercise. Polling stations may be too far away or overcrowded; violence may deter participation; ballot papers may be inadequate; voter cards may be purchased by candidates to undermine opponents, etc. And of course, one has to be in the country at the time of the balloting to participate.

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.

15b. In practice, ballots are secret or equivalently protected.

100 | 75 | 50 | 25 | 0

Comments:

Provisions exist for secret balloting; however, these are often violated for various reasons. A primary impediment to secret balloting is illiteracy, meaning a presiding officer must assist a voter to mark their ballot paper, albeit in the presence of all candidates' agents.

This provides room for chicanery where some candidates are unrepresented. The logistics of getting materials to polling stations also provides room for mischief as negotiating Kenyan roads can be quite difficult, especially during the rains. What this means is that candidates from the outgoing ruling party often have a head start, since their party controls the government resources that are used to facilitate election process, such as transportation, police security, etc.

References:

Electoral Commission of Kenya

<http://www.eck.or.ke/index.php/Electoral-Process/>

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.

15c. In practice, elections are held according to a regular schedule.

100 | 75 | 50 | 25 | 0

Comments:

The constitutional provision for a general election every five years has been observed consistently since independence. Where a parliamentary seat falls vacant because of the 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.

However, election petitions have often taken too long to resolve, denying justice to electors and petitioners. Kenya approaches the December 2007 elections with about 10 petitions from the December 2002 elections still unresolved, meaning that affected constituencies might have been represented by the wrong person for the last five years.

References:

Electoral Commission of Kenya

<http://www.eck.or.ke/index.php/Electoral-Process/>

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.

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

85

16a. In law, all citizens have a right to form political parties.

YES | NO

Comments:

Constitution of Kenya (Chapter V) provides for freedom of assembly, which enables people to register political parties under the Societies Act (Cap 108 of the Laws of Kenya). Up to now, applicants simply provided the Registrar of Societies with details of the new party, such as name, constitution, location of head office and interim officials. However, the new Political Parties Act (Cap 10 of 2007), which comes into force in January 2009, has established the office of the Registrar of Political Parties working under the Electoral Commission of Kenya, who shall be responsible for maintaining a register of political parties.

References:

Constitution of Kenya (Chapter V).

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.

16b. In law, all citizens have a right to run for political office.

YES | NO

Comments:

Constitution of Kenya (Sections 70, 78, 79, 80 and 81) guarantee fundamental freedoms and rights of conscience, expression, assembly and movement. However, participation in electoral parliamentary and civic politics, and indeed in registration of political parties, requires one to be at least 18 and therefore eligible for a national identity card. Such prospective candidates must also be literate. The National Assemblies and Presidential Elections Act also requires candidates for the presidency to be 35.

References:

Constitution of Kenya (Sections 70, 78, 79, 80 and 81).

The National Assemblies and Presidential Elections Act.

http://www.kenyalaw.org/kenyalaw/klr_home/

<http://www.eck.or.ke/index.php/Laws-and-Regulations-Governing-Elections/>

<http://www.eck.or.ke/index.php/Electoral-Process/Nominations.html>

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.

16c. In practice, all citizens are able to form political parties.

100 | 75 | 50 | 25 | 0

References:

The link between the age of maturity (18) and access to the national ID means that only adults may form political parties. Besides this caveat, there is nothing barring any category of adult citizen from forming a party. However, inefficient procedures may deter people from forming parties. For one, party registration remains centralized in the national capital, Nairobi, which imposes additional costs on prospective applicants. Illiteracy is a further impediment to such an undertaking, as is gender bias, with a disproportionately few of Kenya's 144 registered political parties headed by women. However, the arena is comparatively open.

The Political Parties Act (2007) will specifically block formation of factional parties based on any form of discrimination (gender, ethnicity, faith, etc.) and will also specifically bar certain categories of public officers from party activity.

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.

16d. In practice, all citizens can run for political office.

100 | 75 | 50 | 25 | 0

Comments:

In practice, only adult citizens can run for political office. Furthermore, public servants, including members of the uniformed cadres, may not run for political office. Given the multi-party system, candidates must find a sponsoring party, as independent candidates are not permitted to run.

Since the 1992 removal of the 40,000 shilling (US\$6,000) campaign spending ceiling, electioneering has become a very expensive preserve of the non-poor and/or well-connected. Whereas civic candidates might thrive on small loyalties, such as being a local football coach, parliamentary candidates must establish a worthy budget for posters, T-shirts, travel and direct handouts. These costs disenfranchise more than just the approximately 50 percent of Kenyans living below the poverty line. However, there have been instances where some unlikely candidates have been nominated to contest, such as an unemployed candidate in 2007.

References:

Electoral Commission of Kenya

<http://www.eck.or.ke/index.php/Electoral-Process/Nominations.html>

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. A system of party lists may discourage or prevent independent 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.

16e. In practice, an opposition party is represented in the legislature.

100 | 75 | 50 | 25 | 0

Comments:

Out of Kenya's 144 registered parties, only a handful had sitting members in the legislature before this was dissolved in October 2007, to pave the way for the December 27 general elections. As Kenyans approached the polls, the main parties were Party of National Unity (PNU) (composed of about 12 different parties), Orange Democratic Movement (ODM) and Orange Democratic Movement-Kenya (ODM-K). While ODM won the majority of parliamentary seats, the presidential results were disputed between ODM and PNU (which quickly co-opted ODM-K into its ranks), the latter quickly rushing to swear in the outgoing president for further term.

These events led to an outbreak of extensive nationwide violence that accounted for about 1,500 deaths and nearly 500,000 displaced people by the February signing of an internationally brokered peace accord. The accord created a government of national unity in which ODM and PNU would share power equally. Effectively, therefore, there would be no official opposition. However, some backbenchers from both parties have been campaigning to table a bill in Parliament creating grand coalition opposition. The bill will be debated in October 2008.

References:

Traditionally, Kenya's parliamentary opposition received due recognition, its official leader having the status of a cabinet minister, while it also chaired key parliamentary committees such as the Public Accounts Committee, which reviews the auditor general's report. However, certain events in 2007 led to having no clear cut opposition, as its official leader abandoned his position to campaign for the re-election of the immediate past president, while some parliamentarians who had come in on the same ticket as that president were then campaigning against him.

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.

18. Is the election monitoring agency effective?

55

18a. In law, the agency or set of agencies/entities is protected from political interference.

YES | NO

Comments:

Constitution of Kenya (Section 41 (9)) 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.

References:

Constitution of Kenya (Section 41 (9)).

YES: A YES score is earned only if the agency or set of agencies/entities has some formal organizational independence from the bodies contesting 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 domestic election monitoring agency.

18b. In practice, agency (or set of agencies/entities) appointments are made that support the independence of the agency.

100 | 75 | 50 | 25 | 0

Comments:

Constitution of Kenya (Section 41(3)) provides that a person shall not be qualified to be appointed a commissioner if he or she 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.

Faced with a critical standoff over reforms ahead of the 1997 general elections, a compromise was reached with minimal reforms, dubbed the Inter Parties Parliamentary Group (IPPG), which among other things, provided that parliamentary parties would nominate electoral commissioners on a pro rata basis. Into the 2007 elections, the outgoing president ignored IPPG and unilaterally replaced commissioners whose terms had expired. The opposition has judged this action to be an exercise in rigging the impending elections. Indeed, this was the basis of the stand-off after the December 2007 elections which led to protracted violence that killed 1,500 people and displaced another 500,000.

For insights into the electoral commission malpractices, see <http://www.eastandard.net/InsidePage.php?&id=1143996301&catid=4&a=1>

References:

Constitution of Kenya (Section 41(3)).

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.

18c. In practice, the agency or set of agencies/entities has a professional, full-time staff.

100 | 75 | 50 | 25 | 0

References:

The Electoral Commission of Kenya is chaired by a lawyer with extensive experience who has previously been a parliamentarian. Various other commissioners are lawyers with vast experience while others are people with distinguished public careers. The Commission's head office in Nairobi is well staffed, but its operations outside Nairobi rely to an extent on civil servants who could manipulate things in favor of their employer, the ruling party. Furthermore, the Commission does not have its own security apparatus, forcing it to rely on government security officers, such as the regular and administration police who take orders from their superiors. In the run-up to the 2007 elections, for example, some police officers imported into the western Kenya stronghold of the opposition ODM, were lynched by mobs who argued they had been sent as advance rigging teams.

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.

18d. In practice, the agency or set of agencies/entities makes timely, publicly available reports following an election cycle.

100 | 75 | 50 | 25 | 0

Comments:

Besides the presidential contest, balloting in 2007 elections also involved over 100 local authorities (of thousands of councilors) and 210 parliamentary constituencies. The inflow of results – regardless of the questionable quality of the management of balloting and of counting – was 'normal' for the local authority and parliamentary contests. It was only when it became apparent the outgoing president was losing the presidential contest – after results were in from more than 75% of constituencies, that the electoral agency decided to withhold available results to facilitate doctoring.

References:

Traditionally, Electoral Commission of Kenya (ECK) has announced electoral outcomes quite promptly, especially since ballot counting was decentralized to the district level. However, in its management of the 2007 elections, ECK apparently intentionally delayed announcement of results to facilitate fiddling of numbers, the ECK chair announcing publicly that he thought delays in returns reaching Nairobi were because electoral officers were cooking figures. This situation contributed greatly to Kenya's post-election violence witnessed up to March 2008. See one version of events at <http://www.eastandard.net/InsidePage.php?&id=1143996301&catid=4&a=1>

While it has a website, ECK has not made full use of this. Attempts to enable people to check their voter status have floundered due to technical hitches. Furthermore, ECK seemingly turned down offers to finance the computerization of the tallying process, which would have enhanced efficiency in reporting.

The Kenya National Commission on Human Rights has also been very prompt in releasing its findings, as have been the other independent national and international election monitors.

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.

18e. In practice, when necessary, the agency or set of agencies/entities imposes penalties on offenders.

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

References:

The Electoral Commission of Kenya (ECK) has identified many electoral offenses but has been statutorily powerless to take action against any key offenders. One of the major problems in this regard concerns where to draw the line between the (outgoing) president's executive functions and his political functions.

Since the whole cabinet remains in office until a new one is sworn in, this also allows ministers to take advantage of the gray area, continuing to employ state resources even as they campaign as politicians. Widespread electoral violence and vote buying also go unpunished since they are participated in by politicians across the board.

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.

19. Are elections systems transparent and effective?

79

19a. In practice, there is a clear and transparent system of voter registration.

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

References:

While all Kenyans over 18 may acquire voting cards, this has not worked smoothly. Acquisition of ID cards has been quite problematic, more so in some than in other areas. Thus, for example, Kenyan of Arab stock are likely to have greater difficulties obtaining an ID because of their resemblance to neighboring Somalis. School dropouts attaining age 18 also have problems obtaining national IDs, meaning they might be barred from voting. While the Electoral Commission of Kenya (ECK) is mandated to ensure the smooth conduct of the whole electoral process, vested interests have undermined the smooth flow of elections, resulting from the inequitable distribution of constituencies, polling stations and ballot papers.

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, as was the case with 2007 presidential candidate Raila Odinga. At the end of the most recent 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" voting by non-existent voters is common.

19b. In law, election results can be contested through the judicial system.

YES | NO

Comments:

Chapter 66 of the Laws of Kenya is the Election Offences Act, established to prevent election offenses and corrupt and illegal practices at elections, and to challenge such misconduct through the judicial system. The Criminal Procedure Code and the Penal Code, as well as other laws, also provide grounds for contesting electoral outcomes.

References:

Election Offenses Act (Chapter 66).
The Criminal Procedure Code.
The Penal Code.

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.

19c. In practice, election results can be effectively appealed through the judicial system.

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

Comments:

For the 2007 presidential elections, the Electoral Commission of Kenya (ECK) declared outgoing president Kibaki the winner under circumstances considered dubious by loser Odinga, a position vindicated by the findings of an independent international inquiry. Odinga opted not to challenge the results in court before the same chief justice who had gone to State House to secretly swear in the winner, even as the tallying of results was being challenged at ECK.

References:

By law, electoral outcomes can be challenged in court. However, it is disheartening that some such cases have remained unresolved through the life of the Parliament about which they were filed, i.e. by the time of the following general election five years later. Mostly, such electoral appeals are filed by losing contestants rather than an ordinary aggrieved voter.

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.

19d. In practice, the military and security forces remain neutral during elections.

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

References:

The armed forces are ineligible to participate in an electoral activity: for one, all people joining the forces surrender their civilian identification papers. In the case of Kenya, soldiers have largely remained neutral during elections.

As for the police, the situation is somewhat different. Since all public rallies must be cleared with them, and they fall under the office of the president, they have been known to manipulate matters depending on an applicant's relationship with the government. Indeed, the run up to the 2007 general elections saw movements of police across the country, suggesting they were being deployed to influence electoral outcomes. See <http://www.eastandard.net/InsidePage.php?id=1143996301&cid=4&>

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 overtly 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.

19e. In law, domestic and international election observers are allowed to monitor elections.

YES | NO

Comments:

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

References:

The Presidential and Parliamentary Elections (Amendment) Regulation 2002.

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.

19f. In practice, election observers are able to effectively monitor elections.

100 | 75 | 50 | 25 | 0

Comments:

A major constraint to their effectiveness might often arise from poor infrastructure hampering their movement. The government will often view their findings with distaste, especially because of their focus on government excesses. However, such findings have never caused any change in electoral outcomes, meaning government objections are quite perfunctory.

References:

For election observers to succeed in their work, 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.

17. Is there an election monitoring agency or set of election monitoring agencies/entities?

100

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

YES

NO

Comments:

Constitution of Kenya (Section 41) provides for an Electoral Commission of Kenya (ECK) with a chairman and not less than four and not more than 22 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. Specifically, the Commission is established by the Constitution of Kenya (Amendment) Act No. 17 of 1990.

Besides ECK, the Kenya National Commission on Human Rights also has been very active in monitoring elections, as has its private sector counterpart, the Kenya Human Rights Commission. Numerous other nongovernmental agencies also monitor the electoral process, as the law permits monitoring by local and international observers.

References:

Constitution of Kenya (Section 41).

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

NO: A NO score is earned if no domestic agency or set of domestic agencies/entities exists 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, only by international observers, or only by NGOs. A NO score is earned if the domestic election agency or set of domestic agencies simply facilitates the process of voting but is not empowered to report violations or abuses.

78 II-3. Political Financing

20. Are there regulations governing the financing of political parties?

57

20a. In law, there are regulations governing private contributions to political parties.

YES | NO

Comments:

Section 31 of Part V of the Political Parties Act (2007) deals with funding of political parties from sources other than the Political Parties Fund held by the registrar of political parties. It places an individual's annual contribution at no more than 5 million shillings (US\$64,000) and does not allow any contributions from aliens." However, this law comes into force in January 2009.

References:

Political Parties Act (2007) (Section 31 of Part V).

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

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

20b. In law, there are limits on individual donations to political parties.

YES | NO

Comments:

Section 31 of Part V of the Political Parties Act (2007) deals with funding of political parties from sources other than the Political Parties Fund held by the registrar of political parties. It places an individual's annual contribution at no more than 5 million shillings (US\$64,000) and does not allow any contributions from aliens." However, this law comes into force in January 2009.

References:

Political Parties Act (2007) (Section 31 of Part V).

YES: A YES score is earned if there are any limits in size on individual contributions to political parties. A YES score is also 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 in a discriminatory manner.

20c. In law, there are limits on corporate donations to political parties.

YES | **NO**

References:

At present, there are no restrictions to corporate donations to political parties. Indeed, the rushed privatization of state corporation Telkom Kenya Ltd. and attempts to similarly rush the privatization of state corporation SafariCom Ltd., were seen by opposition parties as endeavors by the the president's party to raise campaign funding.

The Political Parties Act, which comes into force in January 2009, does not address corporate funding, limiting itself to personal funding limited of 5 million shillings (US\$64,000). Besides membership fees as a source of party funding, it talks of 'voluntary contributions' and 'donations, bequests and grants from any source' (that is not alien). It also recognizes 'donations' without specifying from whom.

YES: A YES score is earned if there are any limits in size on corporate contributions to political parties. A YES score is earned if corporate contributions are prohibited.

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

20d. In law, there are limits on total political party expenditures.

YES | **NO**

References:

There has been no limit on political party expenditures to date. The Political Parties Act (2007), which comes into force in January 2009, places no limit either; but Section 33 will require parties to account for their sources of funding within three months of the close of the financial year.

YES: A YES score is earned if there are any limits in 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.

20e. In law, there are requirements for the disclosure of donations to political parties.

YES | NO

Comments:

While this has not been a requirement up to this point, Sections 32 and 33 of the Political Parties Act (2007), which comes into force in January 2009, will require this.

References:

Political Parties Act (2007) (Sections 32, 33).

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

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

20f. In law, there are requirements for the independent auditing of the finances and expenditures of political parties.

YES | NO

Comments:

The Societies Act, under which political parties are currently registered, requires adopted audited accounts to be submitted with the minutes of the annual general meeting. Section 34 of the Political Parties Act (2007), which comes into force in January 2009, will require such accounts to be audited by the Auditor General for submission to Parliament and the registrar of parties.

References:

Societies Act.
Political Parties Act (2007) (Section 34).

YES: A YES score is earned if there is a legal or regulatory requirement for the independent auditing of party finances and expenditures. 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' finances and expenditures or if such requirements exist but allow for parties to self-audit.

20g. In law, there is an agency or entity that monitors the financing of political parties.

YES | **NO**

Comments:

There has hitherto been no agency monitoring the financing of political parties. The Political Parties Act (2007), which comes into force in January 2009, does not provide for such an agency, only providing for an ex-post audit of funding.

References:

Political Parties Act (2007).

YES: A YES score is earned if there is a domestic agency or set of domestic agencies/entities formally assigned to monitor and enforce laws and regulations around the financing of political parties. A YES score is earned even if the agency/entity is ineffective in practice.

NO: A NO score is earned if there is no such agency or entity.

21. Are there regulations governing the financing of individual political candidates?

0

21a. In law, there are regulations governing private contributions to individual political candidates.

YES | **NO**

Comments:

There is no law governing contributions to individual political candidates. When it comes into force in January 2009, Section 31 of the Political Parties Act (2007) will only address contributions to parties, limiting individuals to 5 million shillings (US\$64,100). However, the law is silent on corporate contributions, but bars contributions from aliens, foreign governments, and inter-governmental or non-governmental organizations.

References:

Political Parties Act (2007) (Section 31).

YES: A YES score is earned if there are any formal rules (by law or regulation) controlling private contributions to individual political candidates, including prohibitions against foreign donations.

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

21b. In law, there are limits on individual donations to political candidates.

YES | **NO**

Comments:

No law restricts individual contributions to candidates. However, Section 31 of the impending Political Parties Act (2007) will limit annual individual contributions to parties to 5 million shillings (US\$64,100).

References:

Political Parties Act (2007) (Section 31).

YES: A YES score is earned if there are any limits in size on individual contributions to political candidates. A YES score is also 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 candidates in a discriminatory manner.

21c. In law, there are limits on corporate donations to individual political candidates.

YES | **NO**

Comments:

The Political Parties Act became operational on January 1st 2009 (not under the period in review). Section 33 of the PPA mandates parties to reveal their funding sources but does not limit amounts. Neither does it refer specifically to 'corporate' sources.

References:

The law, including the impending Political Parties Act (2007) is silent on this.

YES: A YES score is earned if there are any limits in size on corporate contributions to individual political candidates. A YES score is earned if corporate contributions are prohibited.

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

21d. In law, there are requirements for the disclosure of donations to individual political candidates.

YES | **NO**

References:

There are no such requirements in law, not even in the impending Political Parties Act (2007).

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

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

21e. In law, there are requirements for the independent auditing of the campaign finances of individual political candidates.

YES | **NO**

References:

There are no requirements for political candidates specifically, such person's spending only being accessible when they file their regular income tax returns.

YES: A YES score is earned if there is a legal or regulatory requirement for the independent auditing of an individual candidate's campaign finances and expenditures. 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 an individual candidate's campaign finances and expenditures or if such requirements exist but allow for candidates to self-audit.

21f. In law, there is an agency or entity that monitors the financing of individual political candidates' campaigns.

YES | **NO**

References:

There is no agency or entity that monitors the financing of individual political candidates' campaigns.

YES: A YES score is earned if there is a domestic agency or set of domestic agencies/entities formally assigned to monitor and enforce laws and regulations around the financing of individual political candidates' campaigns. A YES score is earned even if the agency/entity is ineffective in practice.

NO: A NO score is earned if there is no such agency or entity.

22. Are the regulations governing the political financing of parties effective?

4

22a. In practice, the limits on individual donations to political parties are effective in regulating an individual's ability to financially support a political party.

Comments:

In the past, there have been no limits. Limitations outlined in the Political Parties Act (2007) will go into effect in 2009.

References:

Political Parties Act (2007).

100: Existing limits represent the full extent to which an individual can directly or indirectly financially support a 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 political party. However, exceptions and loopholes exist through which individuals can indirectly support 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 party; unregulated loans to 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 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.

22b. In practice, the limits on corporate donations to political parties are effective in regulating a company's ability to financially support a political party.

References:

There are no limits. Some party leaders seem not to have a dividing line between their corporate and political identities.

100: Existing limits represent the full extent to which a company can directly or indirectly financially support a 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 political party. However, exceptions and loopholes exist through which companies can indirectly support 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 party; unregulated loans to 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 political parties 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.

22c. 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

References:

There are no limits to party spending.

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.

22d. In practice, when necessary, an agency or entity monitoring the financing of political parties independently initiates investigations.

100 | 75 | 50 | 25 | 0

References:

There are no agencies specifically monitoring party spending. The Political Parties Act (2007) will only require audits.

100: The agency or entity aggressively starts investigations into allegations of wrong doing with respect to the financing of political parties. 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.

22e. In practice, when necessary, an agency or entity monitoring the financing of political parties imposes penalties on offenders.

100 | 75 | 50 | 25 | 0

References:

There are no such agencies or penalties.

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.

22f. In practice, contributions to political parties are audited.

100 | 75 | 50 | 25 | 0

Comments:

Such auditing will only be to the extent that the Registrar of Societies requires parties to submit audited accounts alongside their minutes of annual general meetings. Similarly, the impending Political Parties Act (2007) will require public contributions to political parties be audited.

References:

Political Parties Act (2007).

100: Political party 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 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 may be sufficiently audited, but the auditing of nominally independent extensions of the party may not be.

25:

0: Party 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.

23. Are the regulations governing the political financing of individual candidates effective?

0

23a. In practice, the limits on individual donations to political candidates are effective in regulating an individual's ability to financially support a particular candidate.

100 | 75 | 50 | 25 | 0

References:

There are no limits to individual contributions to candidates.

100: Existing limits represent the full extent to which an individual can directly or indirectly financially support a political candidate. 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 particular candidate. However, exceptions and loopholes exist through which individuals can indirectly support particular political candidates 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; unregulated loans to candidates (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 particular political candidate 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.

23b. In practice, the limits on corporate donations to individual candidates are effective in regulating a company's ability to financially support a candidate.

100 | 75 | 50 | 25 | 0

References:

There are no limits to corporate donations to candidates. Indeed, electioneering is so expensive in Kenya that the majority of successful candidates are professionals (lawyers, engineers, etc.) who draw directly and extensively on their corporate resources.

100: Existing limits represent the full extent to which a company can directly or indirectly financially support an individual candidate. 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 an individual candidate. However, exceptions and loopholes exist through which companies can indirectly support individual candidates 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; unregulated loans to candidates (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 individual candidates 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.

23c. In practice, when necessary, an agency or entity monitoring the financing of individual candidates' campaigns independently initiates investigations.

100 | 75 | 50 | 25 | 0

References:

There is no provision in law or otherwise for such investigations or penalties.

100: The agency or entity aggressively starts investigations into allegations of wrong doing with respect to the financing of individual candidates' campaigns. 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.

23d. In practice, when necessary, an agency or entity monitoring the financing of individual candidates' campaigns imposes penalties on offenders.

100 | 75 | 50 | 25 | 0

References:

There is no provision in law or elsewhere for such penalties to be imposed.

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.

23e. In practice, the finances of individual candidates' campaigns are audited.

100 | 75 | 50 | 25 | 0

References:

There is no law requiring the auditing of the finances of an individual's campaign funds.

100: The finances of individual candidates' campaigns are regularly audited using generally accepted auditing practices.

75:

50: The finances of individual candidates' campaigns are audited, but audits are limited in some way, such as using inadequate auditing standards, or the presence of exceptions to disclosed contributions.

25:

0: The finances of individual candidates' campaigns 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.

24. Can citizens access records related to the financing of political parties?

42

24a. In practice, political parties disclose data relating to financial support and expenditures within a reasonable time period.

100 | 75 | 50 | 25 | 0

References:

Only to the extent that they are required by the Registrar of Societies to submit audited accounts alongside minutes of their

annual general meetings are parties accountable for disclosing data relating to financial support and expenditures within a reasonable time period.

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

75:

50: Political parties 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 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.

24b. In practice, citizens can access the financial records of political parties within a reasonable time period.

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

References:

In the rare instances that parties submit their annual returns to the Registrar of Societies, it is possible for anyone to pay for a search of the financial records of political parties.

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.

24c. In practice, citizens can access the financial records of political parties at a reasonable cost.

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

References:

The search fee at the Registrar of Societies' office is a nominal 200 shillings (USD\$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.

25. Can citizens access records related to the financing of individual candidates' campaigns?

0

25a. In practice, individual political candidates disclose data relating to financial support and expenditures within a reasonable time period.

100 | 75 | 50 | 25 | 0

References:

There is no such a requirement on the political front; but such individuals would disclose such spending – if the so wish – as part of their annual income tax returns.

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

75:

50: Individual 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: Individual 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.

25b. In practice, citizens can access the financial records of individual candidates (their campaign revenues and expenditures) within a reasonable time period.

100 | 75 | 50 | 25 | 0

References:

Since such candidates are not required to submit such returns, they are unavailable to citizens.

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.

25c. In practice, citizens can access the financial records of individual candidates (their campaign revenues and expenditures) at a reasonable cost.

100 | 75 | 50 | 25 | 0

References:

Such financial records are not required and are therefore not available to ordinary 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.

Category III. Government Accountability

III-1. ⁵³Executive Accountability

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

75

27a. In practice, the chief executive gives reasons for his/her policy decisions.

100 | 75 | 50 | 25 | 0

References:

Kenya's parliamentary process provides opportunity to debate executive decisions. Furthermore, Kenya has a five-year national development plan that broadly outlines the direction of development. These broad directions arise from, or are interpreted through policy papers, session papers, the medium-term expenditure framework budget system and the annual budget. Obviously, in a multi-party context in which elections are held regularly, the chief executive faces elections where performance and accountability may be a factor in voters' minds.

However, there are instances where policy is the product of roadside decrees" even if this practice has diminished since the 2002 ouster of the 40-year KANU regime. Such decrees are especially numerous during electoral campaigns, as was seen during the 2007 electioneering when for example, the outgoing president decreed some 30-odd administrative districts into existence.

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.

27b. In law, the judiciary can review the actions of the executive.

YES | NO

Comments:

The courts can and do habitually review the legality and/or constitutionality of executive actions. For example, a former cabinet minister is currently before the courts challenging the constitutionality of the anti-corruption authority's demand of him to declare his wealth.

Indeed, in Kenyan law, the president alone 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 president is physically or mentally incapable of exercising his functions, it may ask the Speaker of the National Assembly to request the Chief Justice to appoint a tribunal to inquire into the situation.

References:

Constitution of Kenya (Section 14).
Constitution of Kenya (Section 12).

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).

27c. In practice, when necessary, the judiciary reviews the actions of the executive.

100 | 75 | 50 | 25 | 0

References:

In practice, the judiciary does review actions of the executive. However, events connected to the 2007 general elections have spotlighted the extent to which the judiciary is unlikely to be entirely objective in such reviews. At a time when matters were nearly exploding over question tallies of presidential votes, the Chief Justice went to State House and swore in the immediate former president for a further term, making clear his partiality to the man who had appointed him to the judicial job. This was, in effect, a loud statement to Kenyans that the Chief Justice is unlikely to take measures that discomfit the president.

In January 2008, the judiciary dismissed a suit barring the illegal and irregular sale of the giant mobile phone company, Safaricom, arguably because members of the president's cabinet were promoting the sale of the state asset.

However, at other less sensitive levels, the judiciary does provide a semblance of objectivity in reviewing executive actions.

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. It does not need to rely upon the executive to initiate a constitutional or legal review.

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.

27d. In practice, the chief executive limits the use of executive orders for establishing new regulations, policies, or government practices.

100 | 75 | 50 | 25 | 0

References:

The use of executive orders (roadside decrees) was a stock in trade of the KANU regime to 2002, with the practice diminishing into the NARC regime from 2003. However, when the president faced defeat in the 2005 referendum over the draft constitution, executive orders returned, but failed to swing the vote in his favor. His consequent concern over failing to acquire a second and

final tenure in office in the 2007 general elections induced further, rampant decrees and promulgations, which similarly failed to swing the tide in his favor.

When the president does not issue such orders personally, this has been done by his lieutenants.

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.

28. Is the executive leadership subject to criminal proceedings?

50

28a. In law, the heads of state and government can be prosecuted for crimes they commit.

YES | **NO**

Comments:

The debacle of the 2007 elections was resolved by instituting a coalition government of the two main political parties, which resulted in the February 2008 separation of the head of state (president) from that of government (prime minister). However, in the urgency to institute a solution to curb widespread post-election violence, these changes were not cascaded to the rest of the Constitution. Thus, while Section 14 of the Constitution protects the head of state from prosecution while in office, the Constitution is silent on the status of the prime minister.

References:

Constitution of Kenya (Section 14).

YES: A YES score is earned if the heads of state and government can be investigated, charged or prosecuted for criminal allegations. Figurehead officials (symbolic figures without day-to-day authority) may be exempt.

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.

28b. 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 offenses and for matters incidental thereto and connected therewith.”

Further, the Public Officers Ethics Act (No 4 of 2003) 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. section 37 of the Act provides that: “If, as a result of an investigation under this Part, the Commission is of the view that civil or criminal proceedings ought to be considered (against a public officer, including ministers), the Commission shall refer the matter to the Attorney-General or other appropriate authority.”

References:

Anti-Corruption and Economic Crimes Act 2003.
Public Officers Ethics Act (No 4 of 2003) (Section 37).

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.

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

47

29a. In law, the heads of state and government are required to file a regular asset disclosure form.

YES | NO

Comments:

The head of state is required to file a regular asset disclosure form 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.”

References:

Public Officer Ethics Act 2003.

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. Figurehead officials (symbolic figures without day-to-day authority) may be exempt.

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

29b. In law, ministerial-level officials are required to file a regular asset disclosure form.

YES | NO

Comments:

Ministers are required to file a regular asset disclosure form 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.”

References:

Public Officer Ethics Act 2003.

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.

29c. In law, there are regulations governing gifts and hospitality offered to members of the executive branch.

YES | NO

Comments:

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 a gift shall be deemed to be a gift to the public officer’s organization.”

References:

Public Officers Ethics Act of 2003 (Section 10 (3)).

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.

29d. 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

Comments:

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.

References:

Part IV of the Public Officers Ethics Act (Cap 203).

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. Figurehead officials (symbolic figures without day-to-day authority) may be exempt.

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.

29e. In law, there are restrictions on heads of state and government and ministers entering the private sector after leaving the government.

YES | NO

Comments:

Section 11 of the Public Officers Ethics Act (Cap 203) only addresses conflicts of interest during employment. There is no law governing involvement in private business bot during and after tenure of public office. Indeed, the Kenyan political elite is the cream of the private sector.

References:

Public Officers Ethics Act (Section 11) (Cap 203).

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. Figurehead officials (symbolic figures without day-to-day authority) may be exempt.

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

29f. 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

References:

No laws exist restricting private sector participation by former senior executives of the government.

100: The regulations restricting post-government private sector employment for heads of state/government and ministers are uniformly enforced. There are no cases 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.

29g. In practice, the regulations governing gifts and hospitality offered to members of the executive branch are effective.

100 | 75 | 50 | 25 | 0

References:

The inclination is to score '0' since there are no such laws. However, the conflict of interest provisions of the Public Officers Ethics Act and the moral crusade of civil society has, in instances, been a deterrent to officers who would otherwise have gladly accepted such gifts.

100: The regulations governing gifts and hospitality to members of the executive branch are regularly enforced. 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.

29h. In practice, executive branch asset disclosures (defined here as ministers and above) are audited.

100 | 75 | 50 | 25 | 0

References:

It is unclear who should audit these declarations beyond the accounting officer and employing commission who receive and handle them confidentially. While there was a lot of fanfare when originally introduced in 2003, the issue of asset declarations has taken a back seat on the national radar even as the Kenya Anti Corruption Commission seemingly face a stalemate in prosecuting a former cabinet minister who refused to declare his wealth.

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. Audits may be performed by entities known to be partisan or biased in their practices.

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

0

30a. In law, citizens can access the asset disclosure records of the heads of state and government.

YES | **NO**

Comments:

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.

References:

Public Officers Ethics Act (Part IV) (Section 29) (Cap 203).

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.

30b. 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**

References:

Citizens cannot access such disclosure forms. 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.

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.

30c. 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

References:

The cost factor does not arise because the law protects the confidentiality of such declarations. 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.

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. Can citizens sue the government for infringement of their civil rights?

100

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

YES | NO

Comments:

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. However, ignorance and the costs implied are often a deterrent.

Meanwhile, Kenya has recently established the Public Complaints Standing Committee, which is mandated to, receive, register, sort, classify and document all complaints against public officers in Ministries, Parastatals/State Corporations, Statutory Bodies or any other public institution. In addition, the PCSC is mandated to inquire into allegations of misuse of office, corruption, and unethical conduct, breach of integrity, maladministration, delay, injustice, discourtesy, inattention, incompetence, misbehavior, inefficiency or ineptitude.”

See http://www.justice.go.ke/index.php?Itemid=83&id=22&option=com_content&task=view

References:

Constitution of Kenya (Chapter 5, Sections 70-83).

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.

31. Official government functions are kept separate and distinct from the functions of the ruling political party.

50

31. In practice, official government functions are kept separate and distinct from the functions of the ruling political party.

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

References:

During the KANU era that ended in 2002, there was hardly any distinction between party and state activities/resources primarily because for much of that 40-year period, Kenya was a de facto, single-party state. For example, while KANU had no known resources, such as finances, it could in 2003 claim to have built and to own the 30-story Kenyatta International Conference Center.

Into the post-2002 NARC era, use of state resources declined somewhat. However, when Kibaki was faced with imminent defeat in the 2005 referendum on the draft constitution and a similar outcome for the 2007 general elections, good governance and the dividing line between party and government were thrown out of the window, as research by the Kenya National Commission of Human Rights shows clearly.

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 the 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 bureaucracy 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

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

100

32a. In law, the judiciary can review laws passed by the legislature.

YES | NO

References:

The Kenyan judicial system provides for constitutional courts whose purpose is often to determine the legality (vis a vis the constitution) of laws enacted by Parliament. Indeed, the High Court is, the final arbiter in matters concerning the interpretation of the Constitution. This jurisdiction is conferred upon it by Section 67(1) of the Constitution. When any question as to the interpretation of the Constitution arises in proceedings in any subordinate court, that court shall, if any party to the proceedings so requests, refer the matter to the High Court for interpretation.”

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).

32b. In practice, when necessary, the judiciary reviews laws passed by the legislature.

100 | 75 | 50 | 25 | 0

References:

There have been many instances in which the judiciary has reviewed the constitutionality or otherwise of laws enacted by the legislature. A 2002 ruling that the Kenya Anti Corruption Authority was illegal led to the enactment of the Anti-Corruption and Economic Crimes Act (2003), which established the Kenya Anti Corruption Commission. Currently, a case is pending in a constitutional court in which a former minister is challenging the right of the anti-corruption body to examine his wealth. See www.kacc.go.ke/archives/PressReleases/MURUNGARU_STATEMENT.pdf

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.

32c. In law, are members of the national legislature subject to criminal proceedings?

YES | **NO**

Comments:

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 may also not be arrested within the precincts of the assembly.

References:

Kenya Ch 6 National Assembly (Powers and Privileges) Act.

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. A NO score is also earned if the legislative branch itself controls whether investigative or prosecutorial immunity can be lifted on members of the legislature.

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

29

33a. In law, members of the national legislature are required to file an asset disclosure form.

YES | NO

References:

Public Officers Ethics Act (Part IV) (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.

33b. In law, there are restrictions for national legislators entering the private sector after leaving the government.

YES | NO

References:

To the extent that legislators straddle the government/back-bench/opposition divide, they do not necessarily belong to the government. There is no law barring them from private business during or after their tenure in the legislature. Indeed, many among them are professionals (engineers, lawyers, etc.), which is how they made the money that enabled them to negotiate Kenya's expensive electioneering landscape.

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.

33c. In law, there are regulations governing gifts and hospitality offered to members of the national legislature.

YES | NO

References:

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.

33d. 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 the Public Officer Ethics Act (4 of 2003) 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.

33e. In practice, the regulations restricting post-government private sector employment for national legislators are effective.

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

References:

There is no law barring them from private business during or after their tenure in the legislature. Indeed, many are professionals (engineers, lawyers, etc.), which is how they made the money that enabled them to negotiate Kenya's expensive electioneering landscape.

100: The regulations restricting post-government private sector employment for national legislators are uniformly enforced. There are no cases 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.

33f. In practice, the regulations governing gifts and hospitality offered to national legislators are effective.

100 | 75 | 50 | 25 | 0

References:

The regulations are rarely, if ever, enforced.

100: The regulations governing gifts and hospitality to national legislators are regularly enforced. 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.

33g. In practice, national legislative branch asset disclosures are audited.

100 | 75 | 50 | 25 | 0

References:

It is unclear what happens to the disclosure forms once submitted. No one has ever been called out for questionable acquisition of wealth.

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. Audits may be performed by entities known to be partisan or biased in their practices.

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

0

34a. In law, citizens can access the asset disclosure records of members of the national legislature.

YES | **NO**

Comments:

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

References:

Public Officers Ethics Act (Cap 203) (Section 29).

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.

34b. In practice, citizens can access legislative asset disclosure records within a reasonable time period.

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

References:

The greatest likelihood of citizens accessing such forms is through an investigative journalist's scoop. Indeed, this is why the government wanted to write a clause into the Media Bill requiring journalists to disclose their sources of information.

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.

34c. In practice, citizens can access legislative asset disclosure records at a reasonable cost.

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

References:

Only a journalistic scoop could divulge such information, which the journalist would invariably have to offer a bribe to obtain.

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.

35. Can citizens access legislative processes and documents?

100

35a. In law, citizens can access records of legislative processes and documents.

YES | NO

Comments:

The National Assembly has a public gallery 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. Debates for 2006 and 2008 are available on the Assembly's Web site at http://www.bunge.go.ke/hansard_weekly.php

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.

References:

The National Assembly.

http://www.bunge.go.ke/hansard_weekly.php

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.

35b. In practice, citizens can access records of legislative processes and documents within a reasonable time period.

100 | 75 | 50 | 25 | 0

References:

Records of parliamentary matters are accessible during the debates, and also in hard copy and online, while prompt media reports are also 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.

35c. In practice, citizens can access records of legislative processes and documents at a reasonable cost.

100 | 75 | 50 | 25 | 0

References:

Parliamentary records are available at little cost for most (literate) Kenyans.

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.

36. Are judges appointed fairly?

17

36a. In law, there is a transparent procedure for selecting national-level judges.

YES | **NO**

Comments:

Section 61 of Chapter IV of the Constitution provides for the president to appoint Judges of the High Court while Section 64 addresses appointments by the president to the Court of Appeal. The other officers of the judiciary are appointed by the Judicial Service Commission whose chair, the Chief Justice, like all its members, are appointed by the president. None of these processes offer opportunities for public participation even .

Recently, the Kenya Law Society has acquired concessions allowing it to nominate candidates for the position of judge, the final choice rests with the president. Judges have constitutional security of tenure, which highlights the risk posed by the appointment structure in Kenya.

The Kenya Chapter of the International Commission of Jurists has previously noted that:

14. The appointment and promotion procedures for both Judges and Magistrates need to be improved to allow clear, transparent and objective criteria to be applied and verified for all judicial positions, including the position of Chief Justice.

15. In addition to nominal qualifications required by law, additional criteria should be required of candidates for judicial positions. These should include academic qualifications, integrity, ability and experience, and other objective criteria based on proper professional qualifications. These criteria should be applied to all appointments and promotions, including the position of the Chief Justice.

16. The Judiciary should adopt a policy for the progressive attainment of gender equality and remove discriminatory factors in all judicial appointments in the country.

17. Clear procedures in the nomination, selection and appointment of members of the Judiciary should be established. All Judicial vacancies, including those of the higher courts, should be advertised with clear deadlines for receiving applications. A consultative process must be set up where other stakeholders, such as the Law Society of Kenya, Federation of Women Lawyers-Kenya (FIDA), and other organizations, may provide nominations according to previously set criteria. A “vetting procedure” is recommended through the publication of final nominations that would invite any substantiated submissions from the public and other interested parties.”

See <http://www.icj-kenya.org/news.asp?ID=33>

References:

Constitution of Kenya (Section 61).
Constitution of Kenya (Chapter IV).
Constitution of Kenya (Section 64).

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. National-level judges are defined as judges who have powers that derive from a national law or constitution; are nominated/appointed by a national governmental body (head of state/government or national legislature); and/or are elected nationally.

NO: A NO score is given if there is no formal process of selection or the process is conducted without public oversight. National-level judges are defined as judges who have powers that derive from a national law or constitution; are nominated/appointed by a national governmental body (head of state/government or national legislature); and/or are elected nationally.

36b. In practice, professional criteria are followed in selecting national-level judges.

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

Comments:

Sections 61 and 62 of the Constitution (in Chapter IV Part 1) address the appointment of the Chief Justice and High Court judges, while Sections 68 and 69 address the work of the Judicial Service Commission. Chapter IV Part 2 addresses the status of the other courts” subordinate to the High Court, such as the Kadhi’s Court. Besides the basic law degree, basic qualifications for these offices are invariably spelled out, such as Section 61 (3) specifying qualifications for judges of the High Court. However, appointments at the very top often appear politically contrived.

References:

Constitution of Kenya (Sections 61 and 62, Chapter IV Part 1).
Constitution of Kenya (Sections 68 and 69).
Constitution of Kenya (Chapter IV Part 2).
Constitution of Kenya (Section 61 (3)).

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.

36c. In law, there is a confirmation process for national-level judges (i.e. conducted by the legislature or an independent body).

YES | **NO**

References:

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. These seeming anomalies have been addressed by the Draft Constitution of 2004, which has yet to be finalized and adopted.

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).

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

75

37a. In law, members of the national-level judiciary are obliged to give reasons for their decisions.

YES | NO

References:

While delivering judgment, 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. However, decisions in the lower courts can be quite peremptory.

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).

37b. In practice, members of the national-level judiciary give reasons for their decisions.

100 | 75 | 50 | 25 | 0

References:

The judgment will always 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. For example, in petty offenses, such as failing to carry a national identification card (interpreted as loitering) or drinking after hours, the accused will appear in groups in anticipation of their joint plea of guilty and have their judgments passed similarly. Besides the right of appeal, which is expensive, some outright dubious judgments have been subjected to review by senior judicial officers.

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.

37c. In law, there is a disciplinary agency (or equivalent mechanism) for the national-level judicial system.

YES | NO

References:

The judicial system has its own internal disciplinary mechanism based on the Judicial Service Commission, handling issues of employment, professional conduct, etc. Members of the public can report judicial misconduct to the Registrar of the High Court, while complaints against advocates can be lodged with the Advocates Complaints Commission established by the Advocates Act (Cap 16). Kenya has also recently also acquired the Public Complaint Standing Committee described as, a one stop shop where you can report any case of misuse of office, corruption, unethical behavior, breach of integrity, maladministration, delay in provision of necessary services, any form of injustice, discourtesy incompetence, misbehavior or any efficiency or ineptitude on the part of public officials.”

YES: A YES score is earned if there is a disciplinary agency (or equivalent mechanism) for the judicial system. A disciplinary agency 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 disciplinary mechanism for the national-level judiciary.

37d. In law, the judicial disciplinary agency (or equivalent mechanism) is protected from political interference.

YES | NO

Comments:

On the Judicial Service Commission, Section 68 (2) of the Constitution provides that: In the exercise of its functions under this Constitution, the Commission shall not be subject to the direction or control of any other person or authority.”

References:

Constitution of Kenya (Section 68 (2)).

YES: A YES score is earned if there are formal rules establishing that the judicial disciplinary agency (or equivalent mechanism) is protected from political interference by the executive and legislative branches.

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

37e. In practice, when necessary, the judicial disciplinary agency (or equivalent mechanism) initiates investigations.

Comments:

In the last decade or so, the Kenya judicial system has been the subject of several investigations, leading most recently to the much cited Kwach and Ringera Reports. While the latter cited more than 100 magistrates and judges for misconduct, only 20 challenged the allegations against them, reflecting the rot in the judiciary. As for the Advocates Complaints Commission, one of its mandates is for its 25-member team to investigate complaints received. One hopes that the fanfare surrounding the launch of the Public Complaints Committee will also translate into some positive actions.

References:

Advocates Complaints Commission.

100: The judicial disciplinary agency (or equivalent mechanism) aggressively starts investigations — or participates fully with cooperating agencies' investigations — into judicial misconduct. The judicial disciplinary agency (or equivalent mechanism) is fair in its application of this power.

75:

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

25:

0: The judicial disciplinary agency (or equivalent mechanism) rarely investigates on its own or cooperates in other agencies' investigations, or the judicial disciplinary agency (or equivalent mechanism) is partisan in its application of this power.

37f. In practice, when necessary, the judicial disciplinary agency (or equivalent mechanism) imposes penalties on offenders.

References:

Quite a number of the judicial cases arising from the Ringera Report that have been concluded have resulted in the reinstatement of officers who were originally suspended. Those that chose not to challenge allegations against them seem to have implicitly accepted their guilt, which amounts to the judiciary imposing a penalty on them. Elsewhere, a Nairobi magistrate and lawyer remain before the courts for allegedly abetting the escape of a prisoner late last year.

As for the Advocates Complaints Commission, its greater problem is denying justice through delayed resolution of cases. However, it does impose penalties, such as by withdrawing the practicing licenses of errant lawyers. Indeed, a long-serving parliamentarian who is currently a full cabinet minister remains debarred over impropriety with a client's money.

100: When rules violations are discovered, the judicial disciplinary agency (or equivalent mechanism) is aggressive in penalizing offenders or in cooperating with other agencies who penalize offenders.

75:

50: The judicial disciplinary agency (or equivalent mechanism) enforces rules, but is limited in its effectiveness. The judicial disciplinary agency (or equivalent mechanism) 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 judicial disciplinary agency (or equivalent mechanism) does not effectively penalize offenders. The judicial disciplinary agency (or equivalent mechanism) 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 judicial disciplinary agency (or equivalent mechanism) may be partisan in its application of power.

38. Are there regulations governing conflicts of interest for the national-level judiciary?

29

38a. In law, members of the national-level judiciary are required to file an asset disclosure form.

YES | NO

Comments:

As public officers, judicial officers are also governed by the Public Officers Ethics Act (Cap 203).

References:

Public Officers Ethics Act (Cap 203).

YES: A YES score is earned if all members of the national-level judiciary 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 national-level judiciary is not required to publicly disclose assets.

38b. In law, there are regulations governing gifts and hospitality offered to members of the national-level judiciary.

YES | NO

Comments:

As public officers, judicial officers are also governed by the Public Officers Ethics Act (Cap 203).

References:

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 national-level judiciary.

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

38c. In law, there are requirements for the independent auditing of the asset disclosure forms of members of the national-level judiciary.

YES | **NO**

References:

As with other public officer cadres, there are no clear guidelines on what is to be done with respect to the audit of asset declaration forms after these are submitted to the Judicial Service Commission.

YES: A YES score is earned if there is a legal or regulatory requirement for independent auditing of national-level judiciary 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 national-level judiciary asset disclosures or if such requirements exist but allow for self-auditing.

38d. In law, there are restrictions for national-level judges entering the private sector after leaving the government.

YES | **NO**

References:

There are no such legal restrictions for national-level judges entering the private sector after leaving the government. Indeed, judicial officers, especially the judges, are often sourced from private practice, which they leave but do not shut down during service. On departure from public service, many simply return to their private firms.

YES: A YES score is earned if there are regulations restricting national-level judges' 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.

38e. In practice, the regulations restricting post-government private sector employment for national-level judges are effective.

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

References:

There are no such restrictions, with many judicial officers simply returning to their old private firms. Some of the officers whose practicing licenses were revoked during the 2003 purge have actually or reportedly established consultancies through which junior lawyers come to them for advice on how to conduct cases.

100: The regulations restricting post-government private sector employment for national-level judges are uniformly enforced. There are no cases or few cases of judges 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 cases, judges 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. Judges 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.

38f. In practice, the regulations governing gifts and hospitality offered to members of the national-level judiciary are effective.

100 | 75 | 50 | 25 | 0

References:

As with the other branches of government, there is not an effective means of enforcing the law concerning gifts and other considerations.

100: The regulations governing gifts and hospitality to members of the national-level judiciary are regularly enforced. Judges never or rarely accept gifts or hospitality above what is allowed.

75:

50: The regulations governing gifts and hospitality to members of the national-level judiciary are generally applied though exceptions exist. Some judges 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 national-level judiciary are routinely ignored and unenforced. Judges routinely accept significant amounts of gifts and hospitality from outside interest groups and actors seeking to influence their decisions.

38g. In practice, national-level judiciary asset disclosures are audited.

100 | 75 | 50 | 25 | 0

Comments:

The law (Public Officers Ethics Act) does not provide for this.

References:
Public Officers Ethics Act.

100: National-level judiciary asset disclosures are regularly audited using generally accepted auditing practices.

75:

50: National-level judiciary 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: National-level judiciary asset disclosures are not audited, or the audits performed have no value. Audits may be performed by entities known to be partisan or biased in their practices.

39. Can citizens access the asset disclosure records of members of the national-level judiciary?

0

39a. In law, citizens can access the asset disclosure records of members of the national-level judiciary.

YES | **NO**

Comments:
The law (Public Officers Ethics Act) does not provide for this.

References:
Public Officers Ethics Act.

YES: A YES score is earned if members of the national-level judiciary 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-level judiciary. A NO score is earned if the form is filed, but not available to the public.

39b. In practice, citizens can access judicial asset disclosure records within a reasonable time period.

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

Comments:
The law (Public Officers Ethics Act) does not provide for this.

References:

Public Officers Ethics Act.

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.

39c. In practice, citizens can access judicial asset disclosure records at a reasonable cost.

100 | 75 | 50 | 25 | 0

Comments:

The law (Public Officers Ethics Act) does not provide for this.

References:

Public Officers Ethics Act.

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.

III-4. Budget Processes

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

40a. In law, the legislature can amend the budget.

YES | NO

Comments:

Constitution of Kenya (Chapter VII, Section 99) addresses financial management, stating 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 the Finance Bill of revenue generating proposals and the 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.

References:

Constitution of Kenya (Chapter VII, Section 99).

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

40b. In practice, significant public expenditures require legislative approval.

100 | 75 | 50 | 25 | 0

References:

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. The numerous roadside decrees by the president and his ministers during the campaigns leading to the December 2007 general elections, would typically lead to some spending that is not regulated by Parliament.

During those campaigns, the government was also in curiously great haste to sell/privatize state communications giants, Telkom and SafariCom. The suspicion among disinterested observers was that the government intended to lope off part of the profits for use in the campaigns, money it could not have obtained through Parliament.

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.

40c. In practice, the legislature has sufficient capacity to monitor the budget process and provide input or changes.

100 | 75 | 50 | 25 | 0

References:

Legislators have several opportunities for interrogating the budget before it is presented to Parliament, such as the district level planning, the Medium Term Expenditure Framework (MTEF) process and the parliamentary budget committees. However, their weak understanding of budget matters and their busy schedules involving other pursuits mean that they do not often take advantage of available opportunities. The recent establishment of a Parliamentary Budget Office through a private member's motion will go a long way towards enabling parliamentarians to be able to digest and respond to budget proposals.

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.

41. Can citizens access the national budgetary process?

67

41a. 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

References:

Kenya's budgeting process is based on the Medium Term Expenditure Framework (MTEF), which incorporates top-down and (in theory) 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, nongovernmental 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. This debating window is often too short, given the low levels of understanding of financial matters among parliamentarians as well as the fact that the debating takes place at a time when other equally important national events might distract parliamentarians.

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 negligence 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. Hopefully, the Parliamentary Budget Office will improve legislators' focus on the budget.

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.

41b. In practice, citizens provide input at budget hearings.

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

References:

Within the Finance ministry, the basic means for a citizens' (representatives') input is the Medium Term Expenditure Framework (MTEF) process, through its sector working groups. However, these have not worked efficiently due to the logistics of synchronizing their activities.

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 an Alternative Budget. 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.

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.

41c. In practice, citizens can access itemized budget allocations.

References:

The budget speech is a general statement of the minister's revenue generation and expenditure intentions. However, the Finance Ministry also produces ministerial printed estimates, which disaggregate expenditure proposals to the district level. The printed estimates are available from the government printer immediately after the budget speech is delivered. However, Kenya has 40 ministries, meaning the average citizen could never afford to access all the estimates at once.

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.

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

42

43a. In practice, department heads regularly submit reports to this committee.

References:

The operations of the Public Accounts Committee (PAC) and the Public Investment Committee (PIC) of Parliament 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 in response 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.

43b. 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

References:

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 of 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 composition of the opposition, however, became increasingly unclear towards the end of the last Parliament, with official opposition leader deciding to support the outgoing president who had also co-opted members from other opposition parties into a Government of National Unity," having sacked several dissenting ministers from the party that won the 2002 elections.

Consequent to the HBC status, a private member's motion has been drafted, seeking 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.

43c. In practice, when necessary, this committee initiates independent investigations into financial irregularities.

100 | 75 | 50 | 25 | 0

References:

While the parliamentary standing orders provide for some semblance of independence in the watchdog committees, the 2006 decision to politically interfere with the composition of the House Business Committee caused this important body to be politicized in a way that would have undermined the objectivity of its functioning towards the end of the last Parliament. Further confusion over its objectivity could arise from the current composition of the government, which has, in a sense, killed the opposition. There

is a campaign by backbenchers to legislate for a grand opposition” to counter the Grand Coalition Government, but this awaits debate in Parliament.

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.

42. Is there a separate legislative committee which provides oversight of public funds?

100

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

YES | NO

References:

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.

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 within the legislature. A NO score is earned if there is a body executing this function but it is not part of the legislature (such as a separate supreme audit institution).

Category IV. Administration and Civil Service

IV-1. ⁷⁷Civil Service Regulations

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

100

44a. In law, there are regulations requiring an impartial, independent and fairly managed civil service.

YES | NO

Comments:

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, and 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).

Appointment to the civil service below the level of the permanent secretary is managed by PSC, which declares its vision to be, "a partner in creating a non-partisan Public Service that offers quality service and holds the nation together for socio-economic growth."

See http://www.publicservice.go.ke/index.php?option=com_content&task=blogcategory&id=13&Itemid=30

The other service commissions (judicial, police, prisons, etc.) have very similar visions.

References:

Constitution of Kenya (Chapter VIII, Sections 106, 107, 108, 110, 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.

44b. In law, there are regulations to prevent nepotism, cronyism, and patronage within the civil service.

YES | NO

Comments:

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 fund raising (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>

The Public Service Commission further declares its core values to be: meritocracy, reliability, team spirit, integrity, confidentiality and fairness.

References:

Constitution of Kenya.

Public Officers Ethics Act (Cap 203, Part III, Sections 7, 8, 9, 10, 11, 12, 15, 16, 19, 20).

Directorate of Personnel Management's Public Service Recruitment and Training Policy (dated May 2005). declares that recruitment will be

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

The Public Service Commission.

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.

44c. In law, there is an independent redress mechanism for the civil service.

YES | NO

Comments:

The Public Service Commission (PSC) deals with grievances of 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. PSC 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.

The other service commissions serve the same purposes for the other arms of the government, the judiciary, armed forces, police, teachers, etc.

References:

Public Service Commission (PSC).

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. The mechanism should be independent of their supervisors but can still be located within the government agency or entity (such as a special commission or board). Civil servants are able to appeal the mechanism's decisions to the judiciary.

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

44d. In law, civil servants convicted of corruption are prohibited from future government employment.

YES | NO

Comments:

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 10 years with Subsection 4 providing for names of disqualified persons to be gazetted once a year.

References:

Anti-Corruption and Economic Crimes Act (Section 64 (1), Subsection 4).

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 or if the ban is not a lifetime ban.

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

64

45a. In practice, civil servants are protected from political interference.

100 | 75 | 50 | 25 | 0

Comments:

The constitutional provisions of Chapter VIII giving the exclusive powers to appoint Public Service Commissioners and various top civil servants in a multi-party context not only leaves room for excessive subjectivity, but also manipulation of those in office. 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.”

These gross powers at the top mean that officers with links to the president and his party are likely to be protected while those with links to other centers of power are vulnerable to witch-hunting. A deputy governor of the Central Bank was recently demoted because she queried shady procurements handled by people close to the president. She opted for retirement.

References:

Constitution of Kenya (Chapter VIII).

Constitution of Kenya (Chapter II/Part 2).

Constitution of Kenya (Sections 24, 25).

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.

45b. In practice, civil servants are appointed and evaluated according to professional criteria.

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

References:

After the 2002 defeat of the KANU government, many Kenyans hoped merit would be the keyword in employment during the NARC regime. While initially, this seemed to be the case, it was soon obvious that ethnic and sectarian loyalties had crept back into public appointments. This was most graphically manifest in the stand-offs over sharing cabinet portfolios among PNU and ODM leaders who formed the Grand Coalition born of the debacle that was the 2007 presidential election. But it has also been illustrated in the manner in which key civil service jobs have been shared out. For example, while the official retirement age to which the head of the civil service is subject is 55, he is into his mid-60s and shows no signs of stepping down.

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.

45c. In practice, civil service management actions (e.g. hiring, firing, promotions) are not based on nepotism, cronyism, or patronage.

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

References:

Nepotism, cronyism and other forms of corruption persist in appointments, promotions, etc., even if their extents might not be as glaring as in the previous Moi regime. The continuing tenure of an exceedingly overage head of civil service is evidence of this and sets the pattern for various other instances of such indiscretions.

Such is especially the case with appointments at the very top and the bottom of the service, which are based on political patronage. Appointments among technocrats in the middle of the service are more merit based, even if biases are still discernible. As the government of national unity was formed after 2005, it is obvious that the new arrivals would seek to bring in their own lieutenants to replace those in place.

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.

45d. In practice, civil servants have clear job descriptions.

100 | 75 | 50 | 25 | 0

Comments:

Chapter 4 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.

Kenya's public sector performance contracts were launched in 1999 and have since been implemented in much of the public sector, the current debate being whether the judiciary and teaching professions should sign on.

References:

Directorate of Personnel Management's Public Service Recruitment and Training Policy" (Chapter 4) (May 2005).

100: Civil servants almost always have formal job descriptions establishing levels of seniority, assigned functions, and compensation. Job descriptions are a reliable representation of positions in terms of a person's authority, responsibility 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.

45e. In practice, civil servant bonuses constitute only a small fraction of total pay.

100 | 75 | 50 | 25 | 0

Comments:

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.” 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:

Pay Policy for the Public Service” (January 2006) (Section 3.8/71 (iii)).

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.

45f. 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

References:

Public service recruitment malpractices into the 1970s led to a cessation of the publication of the annual staff list, which had summarized the full employment details of all civil servants. Currently, a source of such information is the ministerial estimates for personnel emoluments in the printed estimates of the budget, which show authorized and in-place officers. However, civil service censuses have revealed the existence of ghost workers” beyond provisions.

More recently, PSC has undertaken to publish vacancies, interview short lists and the names of successful applicants for some but not all positions. However, there continue to be complaints about transparency in recruitment into the uniformed cadre whose numbers of vacancies and names of successful applicants are not always published.

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.

45g. In practice, the independent redress mechanism for the civil service is effective.

100 | 75 | 50 | 25 | 0

References:

Whether PSC is objective in the case of senior officers it handles depends on the nature of the complaint by or against the officer; but for the junior officers, departmental committees are unlikely to rule for a subordinate staffer (who can easily be transferred elsewhere) against a department head. Given that PSC officers are largely political appointees, officer cases with political under/overtone are unlikely to get an objective hearing. For the junior officers, departmental hearings are largely kangaroo courts without ceremony.

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.

45h. In practice, in the past year, the government has paid civil servants on time.

100 | 75 | 50 | 25 | 0

References:

The timeliness of salary payments has improved from the years when payments to teachers could be as late as three months. However, problems persist among local authorities with narrow revenue bases. Nairobi city council workers often take to the streets in protest despite their being the authority with the largest revenue potential. Indeed, the Nairobi mayor declared the need to borrow money in early October (2008) because council revenues could not cover salaries.

Timeliness of payments is likely to improve as we move deeper into the performance contract era.

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.

45i. In practice, civil servants convicted of corruption are prohibited from future government employment.

100 | 75 | 50 | 25 | 0

Comments:

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.

Since the law came into force, some officers have been affected. However, the government has appeared to be lenient in this respect. For example, two cabinet ministers who were stood down in the Anglo leasing scandal have been reinstated even before the cases against their alleged co-conspirator civil servants have been finalized. This suggests the cases against the civil servants are as good as shelved even if they are unlikely to return to work. Thus it would appear that where allegations are against civil servants alone, then their cases are dealt with expeditiously; but when their alleged misconduct touches politicians, then things become less clear cut.

References:

Anti-Corruption and Economic Crimes Act (2003) (Section 64 (1)).

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. Some bans are only temporary.

25:

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

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

39

46a. In law, senior members of the civil service are required to file an asset disclosure form.

YES | NO

Comments:

Section 26 of the Public Officers Ethics act (Cap 4 of the Laws of Kenya) requires a public officer to submit to the responsible commission for the public officer a declaration of the income, assets and liabilities of himself, his spouse or spouses and his dependent children under the age of 18 years."

References:

Public Officers Ethics Act (Section 26) (Cap 4 of the Laws of Kenya).

YES: A YES score is earned if senior members of the civil service 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 senior member of the civil service is not required to disclose assets.

46b. In law, there are requirements for civil servants to recuse themselves from policy decisions where their personal interests may be affected.

YES | NO

Comments:

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 or 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.”

References:

Public Officers Ethics Act (2003) (Section 11 (1)).
Public Officers Ethics Act (2003) (Section 11 (3)).
Anti-Corruption and Economic Crimes Act (Section 42 (3)).

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.

46c. In law, there are restrictions for civil servants entering the private sector after leaving the government.

YES | NO

References:

Not only are there no such legal restrictions for civil servants entering the private sector after leaving the government, but serving public officers are allowed to have private sector interests, such as directorships. This freedom arises from a mid-1960s commission of inquiry, The Ndegwa Report, 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. Indeed, many of the original civil servants who benefited from the provision are the main actors in contemporary politics.

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.

46d. In law, there are regulations governing gifts and hospitality offered to civil servants.

YES | NO

Comments:

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.

References:

Public Officers Ethics Act (2003) (Section 10 (2)).
Public Officers Ethics Act (2003) (Section 10 (3)), subsection (4)).

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.

46e. In law, there are requirements for the independent auditing of the asset disclosure forms of senior members of the civil service.

YES | NO

Comments:

Section 25 of the Public Officers Ethics Act requires servants to make declarations to respective commissions (of employment). However, Section 29 adjudges such information to be confidential to respective commissions, or to a person authorized by the High Court.

References:

Public Officers Ethics Act (Sections 25, 29).

YES: A YES score is earned if there is a legal or regulatory requirement for independent auditing of civil service 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 civil service asset disclosures or if such requirements exist but allow for self-auditing.

46f. In practice, the regulations restricting post-government private sector employment for civil servants are effective.

100 | 75 | 50 | 25 | 0

References:

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. Indeed, the private sector often head hunts the cream of the civil service.

100: The regulations restricting post-government private sector employment for civil servants are uniformly enforced. There are no cases 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.

46g. In practice, the regulations governing gifts and hospitality offered to civil servants are effective.

100 | 75 | 50 | 25 | 0

References:

As in other arms of the government, regulations governing gifts and hospitality offered to civil servants are effective are impossible to uphold, because the dividing line between gifts, hospitality and bribery is clouded by cultural values. Thus, officers resolving disputes will be entertained by either or both litigants, often to no one's consternation.

100: The regulations governing gifts and hospitality to civil servants are regularly enforced. 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.

46h. In practice, the requirements for civil service recusal from policy decisions affecting personal interests are effective.

100 | 75 | 50 | 25 | 0

References:

While 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. This is an expectation of the extended family system in Africa.

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.

46i. In practice, civil service asset disclosures are audited.

100 | 75 | 50 | 25 | 0

References:

It is not clear what happens with the asset disclosure forms as their contents remain confidential to the commission to which the declaration was made. To date, a former cabinet minister remains before the courts three years after he challenged his constitutional right not to have to disclose how he acquired his wealth. That this case has taken so long to resolve suggests the government is not in a hurry to resolve it, as it might open a Pandora's box with respect to disclosure requirements.

100: Civil service asset disclosures are regularly audited using generally accepted auditing practices.

75:

50: Civil service 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: Civil service asset disclosures are not audited, or the audits performed have no value. Audits may be performed by entities known to be partisan or biased in their practices.

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

0

47a. 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 2 million shillings (US\$30,000), a prison term of up to two years or both.

References:

Public Officers Ethics Act (Section 29 (1) to (3)).

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.

47b. In practice, citizens can access the asset disclosure records of senior civil servants within a reasonable time period.

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

References:

The law imposes a heavy fine on anyone accessing such records, meaning that only an adventurous investigative journalist might dare do so. However, some assets of such officers can be tracked through agencies such as the land registry, company registry, 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.

47c. In practice, citizens can access the asset disclosure records of senior civil servants at a reasonable cost.

100 | 75 | 50 | 25 | 0

References:

Since citizens cannot access such information legally, the costs implied are not pertinent.

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

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

75

48a. 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:

Section 65 (1) and (4) of the Anti-Corruption and Economic Crimes Act and the Witness Protection Act (2006) apply. 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 that might disclose the identity of the informer.

References:

Anti-Corruption and Economic Crimes Act (Section 65 (1) and (4)).
Witness Protection Act (2006).

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.

48b. 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

References:

The law provides for such protection, but it is not clear what is happening behind the scenes as one often only hears of the high-profile cases, such as that of former Ethics Permanent Secretary who voluntarily returned from (self-) exile over his revelations concerning the Anglo Leasing scam, in which the government lost billions of shillings in payments for unfulfilled contracts. During the tallying of the presidential results, an Electoral Commission officer walked out in disgust at what he perceived to be massive rigging in favor of the outgoing president. After the latter was declared the winner, the officer fled into exile to Europe. After the formation of the Grand Coalition Government, he has since returned and joined the government as a opposition nominee.

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.

48c. 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:

Section 65 (1) and (4) of the Anti-Corruption and Economic Crimes Act and the Witness Protection Act (2006) apply. 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 that might disclose the identity of the informer.

References:

Anti-Corruption and Economic Crimes Act (Section 65 (1) and (4)).
Witness Protection Act (2006).

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.

48d. 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

References:

Two Charterhouse Bank employees who exposed its money laundering activities remain in exile in the United States fearing for their lives. While the Witness Protection Act promises extensive measures, such as identity switching and relocation, these are unlikely to be afforded in a poor country like Kenya. Furthermore, in a liberalized labor market context such as Kenya's, it would be difficult to distinguish bona fide efficiency reforms in a company (that for instance retrench an officer) from actions that punish a whistleblower or other gadfly.

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.

50. In practice, is the internal mechanism (i.e. phone hotline, e-mail address, local office) through which civil servants can report corruption effective?

69

50a. In practice, the internal reporting mechanism for public sector corruption has a professional, full-time staff.

100 | 75 | 50 | 25 | 0

References:

The Kenya Anti Corruption Commission (KACC) has a massive annual budget, with its chief executive receiving a salary greater than that of the president. Its other staff are all better remunerated than their public, and indeed, private-sector counterparts. The staff of the related anti-corruption agency, the Kenya National Commission on Human Rights, are also well qualified and well remunerated.

However, there does not seem to be any special provisions for officers deployed to anti-corruption desks, meaning they might still be amenable to shady deals. Indeed, a KACC investigator is currently before the courts for having taken a consideration not to prosecute a suspect, a case which involves a former mayor of the capital city.

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.

50b. In practice, the internal reporting mechanism for public sector corruption receives regular funding.

100 | 75 | 50 | 25 | 0

References:

The Kenya Anti Corruption Commission (KACC) continues to be very well funded, even if it has fallen far short of many people's expectations in terms of fighting grand corruption. To date, it has yet to bring a single high-profile corruption case to conclusion, focusing instead of petty corruption among junior officers, for example. This has led many to demand that the government prune its resources and fund other more expedient activities. As for the departmental anti-corruption initiatives, these are likely to be funded to the extent that the whole department receives regular funding.

The Kenya National Commission on Human Rights is also well funded and has rubbed the government the wrong way because of its single-minded pursuit of its mandate. This has caused the government to want to prune its wings, its chairman being under threat of prosecution for corrupt procurement for the last two years.

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.

50c. In practice, the internal reporting mechanism for public sector corruption acts on complaints within a reasonable time period.

References:

The Kenya Anti Corruption Commission (KACC) apparently has two levels of desirable, prompt actions: (1) sifting through complaints to verify whether they are within KACC mandate; and (2) investigations of bona fide KACC cases. During the financial year 2004-2005, KACC received nearly 8,000 complaints, 85 percent of which it deemed to be outside its remit, meaning it set out to act on about 1,200 complaints. Since its inception in 2003, KACC has obtained 51 convictions and 65 acquittals of the 187 cases it has taken to court. Given KACC's overabundant technical expertise in deciding what to prosecute, its performance at the bar is obviously wanting. Further, if we assume an average 1,000 out of all complaints per year fit its remit, then taking a modest 187 cases to court in five odd years of operation suggests KACC has a very slow work rate.

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.

50d. In practice, when necessary, the internal reporting mechanism for public sector corruption initiates investigations.

References:

The Kenya Anti Corruption Commission (KACC) is mandated to investigate all complaints brought to its attention. It is on the basis of such investigations that it identifies which complaints fit within its mandate and which are to be forwarded to other authorities for further actions. Its findings are handed over to the Attorney General who decides whether or not to prosecute.

However, KACC has been lax over certain instances of alleged irregularities. For instance, KACC has apparently refused to act on the recommendation of the parliamentary Public Accounts Committee's recommendation that the sale of communications giants, Telkom Kenya and SafariCom be investigated.

Little is known outside of what really happens with the internal corruption reports received within ministries and/or government departments. It is likely that credible ones are handed over to KACC.

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.

49. Is there an internal mechanism (i.e. phone hotline, e-mail address, local office) through which civil servants can report corruption?

100

49. In law, is there an internal mechanism (i.e. phone hotline, e-mail address, local office) through which civil servants can report corruption?

YES | NO

References:

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 hotlines and a reporting area on its website. The Kenya Police also have dedicated hotlines.

YES: A YES score is earned if there is a mechanism, or multiple mechanisms for multiple national government agencies, through which civil servants can report cases of graft, misuse of public funds, or corruption.

NO: A NO score is earned if no such mechanism (or equivalent series of mechanisms) exists.

81
IV-3. Procurement

51. Is the public procurement process effective?

90

51a. In law, there are regulations addressing conflicts of interest for public procurement officials.

YES | NO

Comments:

Section 43 (1-3) of the Public Procurement and Disposal Act, 2005 provides that 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 or any contract won could be declared void.

References:

Public Procurement and Disposal Act, 2005 (Section 43 (1-3)).

YES: A YES score is earned if there are specific formal regulations defining and regulating conflicts of interest between official public duty and private interests for public procurement officials. A YES score is earned if such regulations cover all civil servants, including procurement officials.

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

51b. In law, there is mandatory professional training for public procurement officials.

YES | NO

Comments:

Section 9 (c) of the Public Procurement and Disposal Act provides that 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 that it should ensure engage professional staff.

References:

Public Procurement and Disposal Act (Section 9 (c)).

YES: A YES score is earned if public procurement officials receive regular mandatory training to ensure professional standards in supervising the tendering process. A YES score is earned if such training is mandated for portions of the broader civil service, to include procurement officials.

NO: A NO score is earned if there is no regular required training of public procurement officials or if training is sporadic, inconsistent, unrelated to procurement processes, or voluntary.

51c. In practice, the conflicts of interest regulations for public procurement officials are enforced.

100 | 75 | 50 | 25 | 0

References:

That conflict-of-interest regulations are not enforced diligently is evident in the Anglo-Leasing saga in which contracts were awarded to offshore companies where key government officers have interests. More recently, it has been revealed that members of the former president's family might have established offshore facilities to buy shares in the privatized Safaricom. The most far-reaching indictment must, however, be a High Court advocate's analysis titled Procurement (Act) is not Tamper-proof," found at www.tkenya.org/documents/Adili92.pdf

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.

51d. In law, there is a mechanism that monitors the assets, incomes and spending habits of public procurement officials.

YES | NO

Comments:

As public officers, procurement officers must declare their assets annually to their service commission (the advisory board) as mandated by Part IV of the Public Officers Ethics Act.

References:

Public Officers Ethics Act (Part IV).

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.

51e. In law, major procurements require competitive bidding.

YES | NO

Comments:

Section 4 of the Public Procurement and Disposal Act, Part V, Part VI Sections 72A-72C provide that all procurements by public entities, contract management, supply chain management and disposal of stores and equipment that are not serviceable, or are obsolete or are surplus. Transactions will be by open tender, with provisions that allow for restricted tendering, direct procurement and requests for proposals.

References:

Public Procurement and Disposal Act (Section 4, 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).

51f. In law, strict formal requirements limit the extent of sole sourcing.

YES | NO

Comments:

Public Procurement and Disposal Act, Section 74, Part VI allows that 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.

51g. In law, unsuccessful bidders can instigate an official review of procurement decisions.

YES | NO

Comments:

Public Procurement and Disposal Act, sections 25 and 100 provide that 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, 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.

51h. In law, unsuccessful bidders can challenge procurement decisions in a court of law.

YES | NO

Comments:

Section 100, of the Public Procurement and Disposal Act provides that unsuccessful tenders who are dissatisfied with the decisions of the Public Procurement Administrative Review Board can go to court within 14 days.

References:

Public Procurement and Disposal Act (Section 100).

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.

51i. In law, companies guilty of major violations of procurement regulations (i.e. bribery) are prohibited from participating in future procurement bids.

YES | NO

Comments:

Public Procurement and Disposal Act, Part IX and sections 115, 117, 122 and 125 provide that 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, 125).

YES: A YES score is earned if there are formal procurement blacklists, designed to prevent convicted companies from doing business with the government.

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

51j. 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:

It is unclear the extent to which companies that have previously violated regulations are barred from future activities. For example, the proprietor of a road construction firm that had been blacklisted by the NARC government has since become a parliamentarian in the president's own backyard and is considered a mover and shaker for the 2012 elections. See Raila, Kalonzo out to win over Central Kenya," by Gakiha Weru, Dec. 12, 2008: <http://www.nation.co.ke/News/politics/-/1064/473016/-/ywvcj2z/-/index.html>

Interestingly, while the Finance Ministry's website previously had a link to a list of companies barred from future procurement transactions, that link is no longer on either the Ministry website or that of the Public Procurement Oversight Authority.

Might these goings on suggest the government is taken a more tolerant line towards violators of procurement regulations?

References:

Raila, Kalonzo out to win over Central Kenya," by Gakiha Weru, Dec. 12, 2008
<http://www.nation.co.ke/News/politics/-/1064/473016/-/ywvcj2z/-/index.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.

52. Can citizens access the public procurement process?

92

52a. In law, citizens can access public procurement regulations.

YES | **NO**

Comments:

Public Procurement and Disposal Act, Section 54 requires that 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. These regulations are defined here as the rules governing the competitive procurement process.

NO: A NO score is earned if procurement rules are officially secret for any reason or if there are no procurement rules.

52b. 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, as stipulated by the Public Procurement and Disposal Act, Section 46. These can be viewed at http://www.ppoa.go.ke/index.php?option=com_wrapper&Itemid=47

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.

52c. In practice, citizens can access public procurement regulations within a reasonable time period.

100 | 75 | 50 | 25 | 0

References:

The Public Procurement and Disposal Act is available online at various websites, including those of the Public Procurement Oversight Authority, the Finance Ministry and the Kenya Anti-Corruption Commission. The law also can be purchased at the government printers in Nairobi.

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. These records are defined here as the rules governing the competitive procurement process.

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.

52d. In practice, citizens can access public procurement regulations at a reasonable cost.

100 | 75 | 50 | 25 | 0

References:

Given the expenditure levels involved in procurement, interested 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. These records are defined here as the rules governing the competitive procurement process.

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.

52e. In practice, major public procurements are effectively advertised.

100 | 75 | 50 | 25 | 0

References:

The extent to which major procurements are widely advertised in practice is difficult to tell. However, the daily print media is full of tender advertisements while the treasury website also has a log of procurement contracts.

It has come to light that in the recent privatization of Telkom Kenya and its sister company, elements of the Privatization Act were ignored, suggesting the transactions were not above board. Under such circumstances, it is conceivable that the processes were not effectively advertised.

100: There is a formal process of advertising public procurements. This may include a government website, newspaper advertising, or other official announcements. All major procurements are advertised in this way. Sufficient time is allowed for bidders to respond to advertisements.

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. The time between advertisements and bidding may be too short to allow full participation.

25:

0: There is no formal process of advertising major public procurements or the process is superficial and ineffective.

52f. In practice, citizens can access the results of major public procurement bids.

100 | 75 | 50 | 25 | 0

References:

The average citizen is unlikely to be too interested in procurement activities and would therefore not be too concerned with who has won what. However, procurement stakeholders have the right of information (by law) and can demand outcomes from the government department apart from getting it from other sources, such as the media and Internet.

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

53. Is the privatization process effective?

83

53a. In law, all businesses are eligible to compete for privatized state assets.

YES | NO

Comments:

Privatization Act (2005), Section 29 allows all interests, Kenyan or foreign, to participate in privatization, even if there may be caveats placed on the extent of foreign ownership. However, state corporations are barred from participation except in the cases of funds such as social security and pension.

References:

Privatization Act (2005) (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.

53b. In law, there are regulations addressing conflicts of interest for government officials involved in privatization.

YES | NO

Comments:

Parts 8 and 9 of the First Schedule of the Privatization Act require members of the Privatization Commission who might have personal, family, professional or business interests in privatization to declare such interests to the Commission before transacting business.

References:

Privatization Act (2005) (First Schedule, Parts 8, 9).

YES: A YES score is earned if there are specific formal regulations defining and regulating conflicts of interest between official public duty and private interests for privatization officials. A YES score is earned if such regulations cover all civil servants, including privatization officials.

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

53c. In practice, conflicts of interest regulations for government officials involved in privatization are enforced.

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

Comments:

While a framework for greater transparency in privatization management has been put in place in the form of the Privatization Act (2005), this is not necessarily being exploited.

For example, while the president assented to the Act in 2005, the Finance Minister did not gazette the establishment of the Privatization Commission until December 2007, at a point when he had been taken to court for privatizing Telkom Kenya and Safaricom in disregard of the Act. There is reason to believe the minister was serving a partisan agenda in illegally disposing of the state corporations prior to the December 2007 general elections.

References:

Privatization Act (2005).

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.

54. Can citizens access the terms and conditions of privatization bids?

54a. In law, citizens can access privatization regulations.

YES | NO

Comments:

Section 30 of the Privatization Act requires the cabinet to 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:

Privatization Act (2005) (Section 30).

YES: A YES score is earned if privatization rules (defined here as the rules governing the competitive privatization process) are, by law, open to the public. Even if privatization is infrequent or rare, the most recent privatization should be used as the basis for scoring this indicator.

NO: A NO score is earned if privatization rules are officially secret for any reason or if there are no privatization rules.

54b. In practice, privatizations are effectively advertised.

100 | 75 | 50 | 25 | 0

References:

Because of the underhand dealings that have characterized the realm of privatization, an extensive diligence over the activity has developed. This means that nothing can go undetected, causing the publication of intentions. However, the illegalities noted in the privatization of Telkom Kenya and SafariCom undermine the flow of valid information, adverts notwithstanding.

100: There is a formal process of advertising privatizations. This may include a government website, newspaper advertising, or other official announcements. All major procurements are advertised in this way. Sufficient time is allowed for bidders to respond to advertisements.

75:

50: There is a formal process of advertisement but it is flawed. Some privatizations may not be advertised, or the advertising process may not be effective. The time between advertisements and bidding may be too short to allow full participation.

25:

0: There is no formal process of advertising privatizations or the process is superficial and ineffective.

54c. In law, the government is required to publicly announce the results of privatization decisions.

YES | NO

Comments:

Section 36 of the Act 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:

Privatization Act (2005) (Section 36).

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.

54d. In practice, citizens can access privatization regulations within a reasonable time period.

100 | 75 | 50 | 25 | 0

References:

When privatization is through a public offer, then regulations are easily accessible, as Kenyans have taken to the stock exchange in droves. However, regulations on privatization by tender will only interest those who are seriously considering participation, and it might be too expensive for the average Kenyan.

100: Records (defined here as the rules governing the competitive privatization process) 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.

54e. In practice, citizens can access privatization regulations at a reasonable cost.

100 | 75 | 50 | 25 | 0

References:

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 (defined here as the rules governing the competitive privatization process) 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 V. Oversight and Regulation

V-1. ⁷⁴National Ombudsman

56. Is the national ombudsman effective?

20

56a. In law, the ombudsman is protected from political interference.

YES | **NO**

Comments:

The appointing gazette notice provides that in the performance of its duties, the Public Complaints Standing Committee:

- (i) Shall be responsible to His Excellency the President;
- (ii) Shall prepare quarterly reports for his Excellency the President;

See http://www.kenyalaw.org/KenyaGazette/view_gazette.php?title=2109

References:

Kenya Law Reports, Kenya Gazette, Vol. CIX-No. 42, June 29, 2007.

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.

56b. In practice, the ombudsman is protected from political interference.

100 | 75 | 50 | 25 | 0

References:

To the extent that it is appointed by, and reports to the president, it is unlikely that the Public Complaints Standing Committee (PCSC) will operate independently. In any case, the Committee only began serious operations in August 2008, meaning we have yet to see the fruits of its labor. That people are skeptical of the Committee's effectiveness is probably reflected in a recent TV talk show where the PCSC chair was at great pains to illustrate the academic credentials of Committee members.

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.

56c. In practice, the head of the ombudsman agency/entity is protected from removal without relevant justification.

100 | 75 | 50 | 25 | 0

Comments:

The head and members of the Public Complaints Standing Committee (PCSC) are appointed by the President under Section 23 (1) of the Constitution for three-year terms. The gazette notice does not specify whether or how they can be removed, or whether their tenures are renewable.

References:

Constitution of Kenya (Section 23 (1)).

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.

56d. In practice, the ombudsman agency (or agencies) has a professional, full-time staff.

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

Comments:

Given that the Public Complaints Standing Committee (PCSC) is operationally new, it is not clear what it has already managed to put in place in terms of personnel. However, the appointing gazette notice states that PCSC:

1. Shall hold such number of meetings in such places and at such times as the Committee shall consider necessary for the proper discharge of its functions;
2. May use official reports of any previous investigations or complaint of a public nature relevant to its mandate;
3. May carry out or cause to be carried out such studies or research and may inform the Committee on its mandate;
4. Shall have all the powers necessary or expedient for the proper execution of its mandate, including the power to regulate its own procedure;
5. May create offices at Provincial or District levels to expedite the discharge of its functions;
6. May make regulations for the conduct of its affairs.

Further, PCSC shall have a Secretariat consisting of:

- (i) The Executive Director appointed by the Minister responsible for matters related to the administration of justice, who shall be head of the Secretariat: and
- (ii) Such other members of staff appointed by the Committee as the Committee may deem necessary.

See http://www.kenyalaw.org/KenyaGazette/view_gazette.php?title=2109

References:

Kenya Law Reports, Kenya Gazette, Vol. CIX-No. 42, June 29, 2007.
http://www.kenyalaw.org/KenyaGazette/view_gazette.php?title=2109

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.

56e. In practice, agency appointments support the independence of the ombudsman agency (or agencies).

100 | 75 | 50 | 25 | 0

References:

The Public Complaints Standing Committee (PCSC) is operationally new, meaning it is still not clear what institutional structures it will adopt and how it will staff these. However, the initial appointments to the Committee seem to emphasize legal training. If the Committee will handle complaints from all government departments, then it will be necessary to acquire technocrats with diverse educational qualifications.

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.

56f. In practice, the ombudsman agency (or agencies) receives regular funding.

100 | 75 | 50 | 25 | 0

References:

As with the Kenya National Commission of Human Rights (KNCHR), the Public Complaints Standing Committee (PCSC) has been established under the Justice Governance Law Order and Security (JGLOS) program of the Ministry of Justice and Constitutional Affairs. JGLOS is a sector-wide approach to governance funding. However, when KNCHR tried to cut an independent path, it was punished through denial of funding and other forms of repression. One would not expect the PCSC to have the same ability to stand up to the minister, especially because of its lower statutory profile, being based on an executive decision rather than a parliamentary mandate.

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.

56g. In practice, the ombudsman agency (or agencies) makes publicly available reports.

100 | 75 | 50 | 25 | 0

References:

The agency is new and has yet to make any reports.

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.

56h. In practice, when necessary, the national ombudsman (or equivalent agency or agencies) initiates investigations.

100 | 75 | 50 | 25 | 0

References:

The Committee is new and has yet to make public any such information.

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.

56i. In practice, when necessary, the national ombudsman (or equivalent agency or agencies) imposes penalties on offenders.

100 | 75 | 50 | 25 | 0

References:

Besides the Committee being new, imposition of penalties is not within its mandate. It merely investigate complaints within its mandate in conjunction with the relevant government department.

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.

56j. In practice, the government acts on the findings of the ombudsman agency (or agencies).

100 | 75 | 50 | 25 | 0

References:

It is the expectation that the government will act conclusively on complaints forwarded to it by the Committee. However, being a new enterprise, we have yet to see what actually happens.

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's reports are often ignored, or given superficial attention. Ombudsman's reports do not lead to policy changes.

56k. In practice, the ombudsman agency (or agencies) acts on citizen complaints within a reasonable time period.

References:

One expects complaints to be addressed in a reasonable amount of time, however, there has yet to be a test case of promptness of action.

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.

57. Can citizens access the reports of the ombudsman?

0

57a. In law, citizens can access reports of the ombudsman(s).

YES | **NO**

Comments:

Beyond the gazette notice at http://www.kenyalaw.org/KenyaGazette/view_gazette.php?title=2109, the Committee has yet to establish systems.

References:

Kenya Law Reports, Kenya Gazette, Vol. CIX-No. 42, June 29, 2007.

http://www.kenyalaw.org/KenyaGazette/view_gazette.php?title=2109, the Committee has yet to establish systems.

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.

57b. In practice, citizens can access the reports of the ombudsman(s) within a reasonable time period.

100 | 75 | 50 | 25 | 0

References:

There is no precedent to go by since the Committee is new.

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.

57c. In practice, citizens can access the reports of the ombudsman(s) at a reasonable cost.

100 | 75 | 50 | 25 | 0

References:

There is no precedent to go by since the Committee is new.

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.

55. Is there a national ombudsman, public protector or equivalent agency (or collection of agencies) covering the entire public sector?

100

55. In law, is there a national ombudsman, public protector or equivalent agency (or collection of agencies) covering the entire public sector?

YES | NO

References:

The government recently established the Public Complaints Standing Committee (PCSC) via gazette notice No. 5826 of June 29, 2007 and No. 6327 of July 13, 2007. The PCSC is mandated to receive, register, sort, classify and document all complaints against public officers in Ministries, Parastatals/State Corporations, Statutory Bodies or any other public institution. In addition, the PCSC is mandated to inquire into allegations of misuse of office, corruption, and unethical conduct, breach of integrity, maladministration, delay, injustice, discourtesy, inattention, incompetence, misbehavior, inefficiency or ineptitude.”

Prior to PCSC’s establishment, the Kenya National Commission of Human Rights had acted quite effectively as an ad hoc ombudsman.

See <http://www.nation.co.ke/News/politics/-/1064/473016/-/ywvcj2z/-/index.html>

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.

V-2. Supreme Audit Institution

59. Is the supreme audit institution effective?

81

59a. In law, the supreme audit institution is protected from political interference.

YES | NO

Comments:

Section 105 (5) of the Constitution 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.

Further, the Public Audit Act 2003 established the Kenya National Audit Office (KENAO) and the Kenya National Audit Commission (KENAC) which amongst other duties approves the budget of KENAO and determines the remuneration and other terms of appointment of staff of KENAO.

Adding to KENAC’s independence is to include the following:

The Controller and Auditor General
The Chairman of the Public Accounts Committee of the National Assembly
The Chairman of the Public Investments Committee of the National Assembly
The Chairman of the Public Service Commission
The Attorney General or his nominee
A Practicing member of the Institute of Certified Public Accountants of Kenya co-opted by the other members of the Commission.

References:

Constitution of Kenya (Section 105 (5)).
Public Audit Act 2003.

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.

59b. In practice, the head of the audit agency is protected from removal without relevant justification.

100 | 75 | 50 | 25 | 0

References:

The Controller and Auditor General (CAG) has security of tenure of office and 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.

59c. In practice, the audit agency has a professional, full-time staff.

100 | 75 | 50 | 25 | 0

References:

Serious staffing problems in the past have led to a backlog of Controller and Auditor General (CAG) reports. However, in the last three years, reforms have enabled the CAG to be comparatively up to date with national audits. One means of achieving this has been the engagement on contract of retired officers.

Presently, the Kenya National Audit Office (KENAO) has a staff capacity of 915 (722 auditors and examiners and 193 administrative and support staff). The members of staff are deployed in five departments, namely;
Finance, Administration and Human Resource
Central Government
State Corporations
Local Authorities
Specialized Audits

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.

59d. In practice, audit agency appointments support the independence of the agency.

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

References:

The Controller and Auditor General (CAG) is a presidential appointee, which in theory leaves some room for political manipulation. However, the Kenyan CAG is a professional, as is his staff, thanks to the security of tenure provision. While CAG staffers will have political leanings, there has not been any overt suggestion that such loyalties affect their work.

Furthermore, the Kenya National Audit Commission is composed of the following professionals:

The Controller and Auditor General

The Chairman of the Public Accounts Committee of the National Assembly

The Chairman of the Public Investments Committee of the National Assembly

The Chairman of the Public Service Commission

The Attorney General or his nominee

A Practicing member of the Institute of Certified Public Accountants of Kenya co-opted by the other members of the Commission.

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.

59e. In practice, the audit agency receives regular funding.

100 | 75 | 50 | 25 | 0

References:

The Controller and Auditor General (CAG) and Kenya National Audit 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 to manipulate 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.

59f. In practice, the audit agency makes regular public reports.

100 | 75 | 50 | 25 | 0

References:

Since 2003, there has been a marked improvement in the performance of the Controller and Auditor General's (CAG) 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.

59g. In practice, the government acts on the findings of the audit agency.

100 | 75 | 50 | 25 | 0

References:

The Controller and Auditor General (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 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.

59h. In practice, the audit agency is able to initiate its own investigations.

100 | 75 | 50 | 25 | 0

Comments:

The Controller and Auditor General (CAG) prime function is investigative. Sections 105 (2) (b-c) and 106 of the Constitution of Kenya provide the CAG with 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 of Kenya (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.

60. Can citizens access reports of the supreme audit institution?

92

60a. In law, citizens can access reports of the audit agency.

YES | NO

Comments:

Section 105 (2) (c) and 105 (4) of the Constitution requires the Auditor General to conduct annual audits and to submit the report to the Finance Minister who must deliver the same to the Speaker of the National Assembly within seven days. The speaker promptly lays the report before the House after which it becomes a public document debated by parliamentarians, at which point, the document can be purchased from the government printer. Its findings are often widely reported in the media. It is conceivable that at some point in the future, this massive document could be available online through Parliament's website.

References:

Constitution of Kenya (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.

60b. In practice, citizens can access audit reports within a reasonable time period.

100 | 75 | 50 | 25 | 0

References:

Citizens have full access to the document once it has been tabled in Parliament.

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.

60c. In practice, citizens can access the audit reports at a reasonable cost.

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

References:

The Controller and Auditor General (CAG) report is a massive, expensive technical document in several volumes which really only interests government officers and 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. The document might eventually be available online.

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.

58. Is there a national supreme audit institution, auditor general or equivalent agency covering the entire public sector?

100

58. In law, is there a national supreme audit institution, auditor general or equivalent agency covering the entire public sector?

YES | NO

Comments:

Sections 105 and 110 of the Constitution specify the functions of the Controller and Auditor General as well as the means of appointment to and removal from office. There has also been established a Kenya National Audit Office whose details are specified at <http://www.kenao.go.ke/about%20us.html>.

References:

Constitution of Kenya (Sections 105 and 110).

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.

91
V-3. Taxes and Customs

62. Is the tax collection agency effective?

100

62a. In practice, the tax collection agency has a professional, full-time staff.

100 | 75 | 50 | 25 | 0

References:

The Kenya Revenue Authority (KRA) has a professional, highly qualified staff who are also very well remunerated to deter corruption. 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.

62b. In practice, the tax agency receives regular funding.

100 | 75 | 50 | 25 | 0

Comments:

The Kenya Revenue Authority (KRA) Act provides that the corporation retain 1 percent of the revenues it collects to finance its operations.

References:

The Kenya Revenue Authority (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.

65. Is the customs and excise agency effective?

100

65a. In practice, the customs and excise agency has a professional, full-time staff.

100 | 75 | 50 | 25 | 0

References:

The customs and excise agency staff are fully professional in the context of the professionalism of the whole Kenya Revenue Authority.

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.

65b. In practice, the customs and excise agency receives regular funding.

100 | 75 | 50 | 25 | 0

References:

The customs and excise agency receives regular funding in the context of the mandate funding received by the Kenya Revenue Authority.

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.

61. Is there a national tax collection agency?

100

61. 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. 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).

References:

The Laws of Kenya (Chapter 469).
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).
he 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.

63. Are tax laws enforced uniformly and without discrimination?

75

63. In practice, are tax laws enforced uniformly and without discrimination?

100 | 75 | 50 | 25 | 0

References:

While tax laws are meant to be applied without fear or favor, politically connected people have managed to evade paying taxes. For example, the media has reported improprieties which have not been dealt with in courts of law. However, revenue collection has improved greatly since the end of the KANU regime in 2003, suggesting that various tax evasion loopholes have been plugged.

One problem for the tax net is to capture all who should pay. Employment (growth) in Kenya is mainly in the informal non-licensed sector, where taxation is not imposed on incomes, for instance. The attraction of this is such that some fundamentally formal occupations actually find it attractive to operate in the informal sector, simply to evade taxation.

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.

64. Is there a national customs and excise agency?

100

64. In law, is there a national customs and excise agency?

YES | NO

References:

The Kenya Revenue Authority (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.

66. Are customs and excise laws enforced uniformly and without discrimination?

75

66. In practice, are customs and excise laws enforced uniformly and without discrimination?

100 | 75 | 50 | 25 | 0

References:

While the laws should be applied evenly, no less than the Kenya Revenue Agency (KRA) Commissioner General acknowledges limitations. See www.kra.go.ke/speeches/cgspeechcataottawa280808.htm.

However, improved revenue generation suggests that there is a reduced discretion in charging taxes.

See http://news.xinhuanet.com/english/2008-10/22/content_10234209.htm

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. State-Owned Enterprises

68. Is the agency, series of agencies, or equivalent mechanism overseeing state-owned companies effective?

60

68a. In law, the agency, series of agencies, or equivalent mechanism overseeing state-owned companies is protected from political interference.

YES | **NO**

References:

There is no protection from political interference, because the corporations report to a politically appointed minister, and indeed, often have the executive head of the ministry – its permanent secretary – sitting on the board of directors, and is therefore able to drive the agenda. Further, the creation of the Grand Coalition Government, in the wake of the botched 2007 presidential elections, has meant the need to balance partisan interests so that appointments are directly sponsored either by the ODM party or the PNU party. However, in an era of performance contracts, it is hoped that officers will be objective about delivering services.

YES: A YES score is earned only if the agency, series of agencies, or equivalent mechanism has some formal operational 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, series of agencies, or equivalent mechanism is a subordinate part of any government ministry or agency.

68b. In practice, the agency, series of agencies, or equivalent mechanism overseeing state-owned companies has a professional, full-time staff.

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

References:

State corporations report to respective parent ministries but are audited by the Controller and Auditor General (CAG). Thus the extent to which their oversight bodies will have fully qualified professional staff will depend on respective ministries' situations. However, the CAG has increasingly improved its auditing capacity, such as through contracting retired officers. Indeed, the Kenya National Audit Office chaired by the CAG has a staff capacity of 915 (722 auditors and examiners and 193 administrative and support staff) deployed in five departments, namely; Finance, Administration and Human Resource, Central Government, State Corporations, Local Authorities and Specialized Audits.

100: The agency, series of agencies, or equivalent mechanism has staff sufficient to fulfill its basic mandate.

75:

50: The agency, series of agencies, or equivalent mechanism has limited staff that hinders its ability to fulfill its basic mandate.

25:

0: The agency, series of agencies, or equivalent mechanism has no staff, or a limited staff that is clearly unqualified to fulfill its mandate.

68c. In practice, the agency, series of agencies, or equivalent mechanism overseeing state-owned companies receives regular funding.

100 | 75 | 50 | 25 | 0

References:

Ministry funding comes through the annual budget and will be as efficient as is the flow of revenues into the exchequer and disbursement there from. As for the Controller and Auditor General's (CAG) resources, these are also provided in the annual budget.

100: The agency, series of agencies, or equivalent mechanism 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, series of agencies, or equivalent mechanism 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.

68d. In practice, when necessary, the agency, series of agencies, or equivalent mechanism overseeing state-owned companies independently initiates investigations.

100 | 75 | 50 | 25 | 0

References:

Ministries can initiate investigations into the conduct of the managers of state corporations, and indeed, such managers have subsequently been interdicted, taken to court or lost their jobs. The most recent high-profile case has been that of the managing director of Kenya Ports Authority, who has been sent on leave pending retirement, but whose conduct is also being investigated. Meanwhile, a tender for bulk handling services at the port has been suspended pending investigations by the Public Accounts Committee.

100: When irregularities are discovered, the agency, series of agencies, or equivalent mechanism is aggressive in investigating and/or in cooperating with other investigative bodies.

75:

50: The agency, series of agencies, or equivalent mechanism starts investigations, but is limited in its effectiveness or in its cooperation with other investigative agencies. The agency, series of agencies, or equivalent mechanism may be slow to act, unwilling to take on politically powerful offenders, or occasionally unable to enforce its judgments.

25:

0: The agency, series of agencies, or equivalent mechanism does not effectively investigate financial irregularities or cooperate with other investigative agencies. The agency, series of agencies, or equivalent mechanism may start investigations but not complete them, or may fail to detect offenders. The agency may be partisan in its application of power.

68e. In practice, when necessary, the agency, series of agencies, or equivalent mechanism overseeing state-owned companies imposes penalties on offenders.

100 | 75 | 50 | 25 | 0

References:

A parent ministry can take action against errant state corporation managers, including interdiction, suspension and delivery to the Kenya Anti Corruption Commission for further investigation. The Commission can then forward its recommendations to the Attorney General for prosecution and dismissal. In the case of the Controller and Auditor General (CAG), however, the role is limited to reporting audit queries, misappropriation and other questionable conduct to the Finance Minister who surrenders such reports to Parliament.

100: When rules violations are discovered, the agency, series of agencies, or equivalent mechanism is aggressive in penalizing offenders and/or in cooperating with other agencies that impose penalties.

75:

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

25:

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

69. Can citizens access the financial records of state-owned companies?

80

69a. In law, citizens can access the financial records of state-owned companies.

YES | NO

References:

Fundamentally, yes, citizens can access the financial records of state-owned companies to the extent that all such corporations must be audited annually and such reports be published. However, little is heard of the financial records of less glamorous corporations unless there is a scandal. Thus, one is certain to see the accounts of the Central Bank but hears little about Agriculture Finance Corporation or the Kenya Film Censorship Board.

YES: A YES score is earned if the financial information of all state-owned companies is required by law to be public. State-owned companies are defined as companies owned in whole or in part by the government.

NO: A NO score is earned if any category of state-owned company is exempt from this rule, or no such rules exist.

69b. In practice, the financial records of state-owned companies are regularly updated.

100 | 75 | 50 | 25 | 0

References:

All corporations must be audited annually, but such audits can be delayed and sometimes, there are questions over the quality of data availed to the Controller and Auditor General (CAG).

100: State-owned companies always publicly disclose financial data, which is generally accurate and up to date.

75:

50: State-owned companies disclose financial data, but it is flawed. Some companies may misstate financial data, file the information behind schedule, or not publicly disclose certain data.

25:

0: Financial data is not publicly available, or is consistently superficial or otherwise of no value.

69c. In practice, the financial records of state-owned companies are audited according to international accounting standards.

100 | 75 | 50 | 25 | 0

Comments:

Since the establishment of the Kenya National Audit Office (KENAO), reforms have been undertaken to improve the quality of audits even if challenges remain. However, KENAO seeks to build professional excellence in the provision of audit services through objective, reliable and timely audit reports as a contribution to enhanced accountability and transparency in the use of public resources.

<http://www.kenao.go.ke/index.html>

References:

Kenya National Audit Office (KENAO).

<http://www.kenao.go.ke/index.html>

100: Financial records of all state-owned companies are regularly audited by a trained third party auditor using accepted international standards.

75:

50: Financial records of state-owned 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: State-owned 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.

69d. In practice, citizens can access the financial records of state-owned companies within a reasonable time period.

100 | 75 | 50 | 25 | 0

References:

The Controller and Auditor General (CAG) submits state corporation audits to the Finance Minister, who forwards these to the Speaker of the National Assembly. Subsequently, these become public documents.

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.

69e. In practice, citizens can access the financial records of state-owned companies at a reasonable cost.

100 | 75 | 50 | 25 | 0

References:

As with central government audits, these technical documents are not affordable to all but professionals. State corporations with websites will, however, post them there.

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.

67. Is there an agency, series of agencies, or equivalent mechanism overseeing state-owned companies?

100

67. In law, is there an agency, series of agencies, or equivalent mechanism overseeing state-owned companies?

YES | NO

References:

There are various shades of state-ownership of companies. Very few corporations remain fully government-owned, such as the Central Bank, Kenya-Re-insurance, Agriculture Finance Corporation, Agriculture Development Corporation and the public universities. Many state corporations are majority-owned by government while in many others, the government remains a minority share-holder. In this section, we assume a state-owned corporation to be in which the government has a majority shareholding.

There is no single agency overseeing state-owned companies as these are answerable to the respective ministries under which they fall: thus the Central Bank and state-owned commercial banks and insurance agencies report directly to the Finance Minister while the public universities report to the Education Minister. However, all these corporations are audited by the Comptroller and Auditor General who audits government departments/ministries and local authorities.

YES: A YES score is earned if there is an agency, series of agencies, or equivalent mechanism tasked with overseeing the conduct and performance of state-owned companies on behalf of the public. A YES score can be earned if several government agencies or ministries oversee different state-owned enterprises. State-owned companies are defined as companies owned in whole or in part by the government.

NO: A NO score is earned if this function does not exist, or if some state-owned companies are free from government oversight.

80
V-5. Business Licensing and Regulation

70. Are business licenses available to all citizens?

81

70a. In law, anyone may apply for a business license.

YES | NO

Comments:

The Trade Licensing Act (Cap 497) permits anyone to apply for a business license. Useful information can be found at www.ke.undp.org/InvestorsHandbook.pdf.

References:

The Trade Licensing Act (Cap 497).
www.ke.undp.org/InvestorsHandbook.pdf

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

70b. In law, a complaint mechanism exists if a business license request is denied.

YES | NO

Comments:

Section 15 of the Trade Licensing Act permits an appeal to the minister by any person who is aggrieved by the action of a licensing officer in refusing to grant a license or conditional license, or revoking a license, 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.

70c. 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:

A 2005 working committee pared Kenya's 1,500-odd different business licenses to 195 by June 2006. The process of obtaining licensing for a domestic business is fairly straightforward, but corruption in government means that there will be delays in processing licenses. However, relief might come from the recent introduction of performance contracts for public officers. Where the proposed business involves security, health or environmental issues, there could be additional delays.

For further details, see http://www.trade.go.ke/index.php?option=com_content&task=view&id=22&Itemid=29&limit=1&limitstart=1

Also see: <http://www.businesslicense.go.ke/faqs.php>

References:

http://www.trade.go.ke/index.php?option=com_content&task=view&id=22&Itemid=29&limit=1&limitstart=1

<http://www.businesslicense.go.ke/faqs.php>

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.

70d. 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

References:

The maximum fees for the single business permit is about 100,000 shillings (US\$1,500) for the supermarket category. At the bottom of the scale, the fees are less than one-tenth the above. Obviously, the license fee is the smallest outlay for one intending to start a business.

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.

71. Are there transparent business regulatory requirements for basic health, environmental, and safety standards?

71a. In law, basic business regulatory requirements for meeting public health standards are transparent and publicly available.

YES | NO

Comments:

Besides the website cited above, these laws are on sale at the Government Printer

References:

Act No. 11 of 2007 – Employment Act
Act No. 12 of 2007 – Labour Institutions Act,
Act No. 13 of 2007 – Work Injury Benefits Act,
Act No. 14 of 2007 – Labour Relations Act

Available at http://www.kenyalaw.co.ke/kenyalaw/klr_home/

YES: A YES score is earned if basic regulatory requirements for meeting public health standards are publicly accessible and transparent.

NO: A NO score is earned if such requirements are not made public or are otherwise not transparent.

71b. In law, basic business regulatory requirements for meeting public environmental standards are transparent and publicly available.

YES | NO

Comments:

The National Environment Management Agency's affairs are conducted under the Environmental Management and Coordination Act of 1999. Further, pertinent regulations are the Environmental (Impact Assessment and Audit) Regulations, 2002. Both documents are available at <http://www.nema.go.ke/>.

References:

Environmental Management and Coordination Act of 1999.
Environmental (Impact Assessment and Audit) Regulations, 2002.
<http://www.nema.go.ke/>

YES: A YES score is earned if basic regulatory requirements for meeting public 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.

71c. In law, basic business regulatory requirements for meeting public safety standards are transparent and publicly available.

YES | NO

References:

Act No. 11 of 2007 – Employment Act
Act No. 12 of 2007 – Labour Institutions Act,
Act No. 13 of 2007 – Work Injury Benefits Act,
Act No. 14 of 2007 – Labour Relations Act

Available at http://www.kenyalaw.co.ke/kenyalaw/klr_home/

YES: A YES score is earned if basic regulatory requirements for meeting public safety standards are publicly accessible and transparent.

NO: A NO score is earned if such requirements are not made public or are otherwise not transparent.

72. Does government effectively enforce basic health, environmental, and safety standards on businesses?

25

72a. In practice, business inspections by government officials to ensure public health standards are being met are carried out in a uniform and even-handed manner.

100 | 75 | 50 | 25 | 0

References:

For the formal sector, performance in such inspection is subject to the integrity of relevant departments. However, the likelihood is that inspection is not very efficient. Daily, Kenya has horrendous road accidents that are largely due to poor conformity with road safety rules, despite a large presence of traffic officers who should detain non-roadworthy vehicles. Further, Kenya has experienced industrial accidents that could easily have been avoided were regulations observed and/or enforced.

As for the informal sector which is the main employment growth area, such inspection is either totally nonexistent, or only occurs when a safety officer wishes to generate a bit of money through intimidation with threats of closure.

100: Business inspections by the government to ensure that public health standards are being met 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 to ensure public health standards are met 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 to ensure that public health standards are met are routinely carried out by government officials in an ad hoc, arbitrary fashion designed to extract extra payments from businesses in exchange for favorable treatment.

72b. In practice, business inspections by government officials to ensure public environmental standards are being met are carried out in a uniform and even-handed manner.

100 | 75 | 50 | 25 | 0

References:

Inspection for environmental standards will largely focus on the formal sector and nearly totally exclude the informal sector, which is the main growth area of employment. However, even formal-sector inspection is compromised by corrupt officers and entrepreneurs.

100: Business inspections by the government to ensure that public environmental standards are being met 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 to ensure public environmental standards are met 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 to ensure that public environmental standards are met are routinely carried out by government officials in an ad hoc, arbitrary fashion designed to extract extra payments from businesses in exchange for favorable treatment.

72c. In practice, business inspections by government officials to ensure public safety standards are being met are carried out in a uniform and even-handed manner.

100 | 75 | 50 | 25 | 0

References:

The formal/informal sector divide is pertinent. Further, inspectors are often easily compromised by entrepreneurs.

100: Business inspections by the government to ensure that public safety standards are being met 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 to ensure public safety standards are met 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 to ensure that public safety standards are met are routinely carried out by government officials 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. ⁸²Anti-Corruption Law

73. Is there legislation criminalizing corruption?

100

73a. In law, attempted corruption is illegal.

YES | NO

References:

Anti Corruption and Economic Crimes Act.
Public Officers Ethics Act.
Public Procurement and Disposal Act.

See http://www.kenyalaw.co.ke/kenyalaw/klr_home/

YES: A YES score is earned if corruption laws include attempted acts.

NO: A NO score is earned if this is not illegal.

73b. In law, extortion is illegal.

YES | NO

Comments:

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.

References:

Anti Corruption and Economic Crimes Act (Section 40 (2)).

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.

73c. In law, offering a bribe (i.e. active corruption) is illegal.

YES | NO

Comments:

Section 39 (3) (b) of the Anti Corruption and Economic Crimes Act declares a person guilty of an offense if they corruptly give or offer, or corruptly agree to give or offer, a benefit.

References:

Anti Corruption and Economic Crimes Act (Section 39 (3) (b)).

YES: A YES score is earned if offering a bribe is illegal.

NO: A NO score is earned if this is not illegal.

73d. In law, receiving a bribe (i.e. passive corruption) is illegal.

YES | NO

Comments:

Section 39 (3) (a) of the Anti Corruption and Economic Crimes Act declares a person guilty of an offense if they corruptly receive or solicit, or corruptly agree to receive or solicit benefits.

References:

Anti Corruption and Economic Crimes Act (Section 39 (3) (a)).

YES: A YES score is earned if receiving a bribe is illegal.

NO: A NO score is earned if this is not illegal.

73e. In law, bribing a foreign official is illegal.

YES | NO

Comments:

Section 39 of the Anti Corruption and Economic Crimes Act provides that bribing anyone, including foreign officials, is illegal.

References:

Anti Corruption and Economic Crimes Act (Section 39).

YES: A YES score is earned if bribing a foreign official is illegal.

NO: A NO score is earned if this is not illegal.

73f. In law, using public resources for private gain is illegal.

YES | NO

Comments:

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.

References:

Anti Corruption and Economic Crimes Act (Section 46).
Public Officers Ethics Act (Sections 10, 11, 15, 16, 19, 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.

73g. In law, using confidential state information for private gain is illegal.

YES | NO

Comments:

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, and top secret) and defines what category of officer may release such information.

References:

Public Officers Ethics Act (various sections).

Anti Corruption and Economic Crimes Act (various sections).
Official Secrets Act.

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.

73h. In law, money laundering is illegal.

YES | NO

Comments:

In February 2006, the government tabled the Proceeds of Crime and Money Laundering (Prevention) Bill (2006). The bill was, however, rejected and was returned to Parliament in 2008. 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.

References:

Proceeds of Crime and Money Laundering (Prevention) Bill (2006).
Narcotic Drugs and Psychotropic Substances (Control) Act (1994) (Section 49).

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.

73i. In law, conspiracy to commit a crime (i.e. organized crime) is illegal.

YES | NO

Comments:

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.

References:

Narcotic Drugs and Psychotropic Substances (Control) Act (Section 22).
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

75. Is the anti-corruption agency effective?

89

75a. In law, the anti-corruption agency (or agencies) is protected from political interference.

YES | NO

Comments:

Section 10 of the Anti-Corruption and Economic Crimes Act (2003) provides that the The Kenya Anti-Corruption Commission (KACC) 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 meaning s/he cannot be threatened into particular actions against the threat of dismissal.

References:

Anti-Corruption and Economic Crimes Act (2003) (Sections 10, 18).

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.

75b. In practice, the anti-corruption agency (or agencies) is protected from political interference.

100 | 75 | 50 | 25 | 0

References:

That (the anti-corruption agency is protected from political interference) does not seem to be the case entirely. Despite the numerous corrupt incidents established by the Controller and Auditor General (CAG), for example, Kenya has only seen a single big case brought to conclusion (of the embezzlement by the chair and manager of the national AIDS fund). Part of the problem seems to be that corruption in the last decade or so has been perpetrated by key people across the political divide, meaning that prosecutions would touch key people in the current and past governments. Furthermore, a former governance and ethics permanent secretary, who recently returned from self-exile in the United Kingdom, apparently recorded the The Kenya Anti-Corruption Commission (KACC) director pleading with him not to make further revelations on high corruption as the secretary would be victimizing his own Kikuyu people.

Further, early 2007 saw the Justice and Constitutional Affairs minister threaten measures to clip the KACC director's wings, including reducing his salary and resources when it seemed KACC was determined to bring key people in the current government

to task over the Anglo leasing scandal. The KACC director seems to have consequently relented. Thus despite direction by the parliamentary Public Accounts Committee that KACC investigate the suspicious sale of government shares in two key state corporations, KACC has refused to do so.

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.

75c. In practice, the head of the anti-corruption agency (or agencies) is protected from removal without relevant justification.

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

Comments:

Part 5 of the First Schedule of the Anti-Corruption and Economic Crimes Act (2003) establishes that the the Kenya Anti-Corruption Commission (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. However, to the extent that the Kenyan Judiciary is highly compromised vis a vis the Executive which appoints the chief justice and Judicial Service Commission, it is conceivably that a desirable bench could be established to remove the KACC director.

References:

Anti-Corruption and Economic Crimes Act (2003) (Part 5 of the First Schedule).

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.

75d. In practice, appointments to the anti-corruption agency (or agencies) are based on professional criteria.

100 | 75 | 50 | 25 | 0

Comments:

Section 8 of the Anti-Corruption and Economic Crimes Act (2003) 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 employ other full-time and part-time staff as may be necessary to perform its functions.

References:

Section 8 of the Anti-Corruption and Economic Crimes Act (2003) (Subsection 6).

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.

75e. In practice, the anti-corruption agency (or agencies) has a professional, full-time staff.

100 | 75 | 50 | 25 | 0

References:

The Kenya Anti-Corruption Commission (KACC) has a professional staff cohort, among the best-paid public officers in Kenya, with the director receiving a higher salary than the national 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.

75f. In practice, the anti-corruption agency (or agencies) receives regular funding.

100 | 75 | 50 | 25 | 0

Comments:

Section 13 of the Anti-Corruption and Economic Crimes Act (2003) 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 reliable income sources.

References:

Anti-Corruption and Economic Crimes Act (2003) (Section 13).

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.

75g. In practice, the anti-corruption agency (or agencies) makes regular public reports.

100 | 75 | 50 | 25 | 0

Comments:

Sections 15 and 36 of the Anti-Corruption and Economic Crimes Act (2003) require the commission to produce annual and quarterly reports of its activities respectively. See <http://www.kacc.go.ke/default.asp?pageid=45>

References:

Anti-Corruption and Economic Crimes Act (2003) (Sections 15 and 36).

<http://www.kacc.go.ke/default.asp?pageid=45>

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.

75h. In practice, the anti-corruption agency (or agencies) has sufficient powers to carry out its mandate.

100 | 75 | 50 | 25 | 0

Comments:

Section 7 of the Anti-Corruption and Economic Crimes Act (2003) empowers the commission to investigate any matter that raises suspicion that corruption or an economic crime might have been committed. While these powers have been enough to enable the commission to investigate many instances without hindrance, a former cabinet minister challenged the constitutionality of its powers, leading to a more than one year delay in the Kenya Anti-Corruption Commission's (KACC) work. A major problem for KACC is that it does not have prosecuting powers, meaning it must hand over its investigative findings to the AG who decides whether or not to prosecute.

References:

Anti-Corruption and Economic Crimes Act (2003) (Section 7).

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.

75i. In practice, when necessary, the anti-corruption agency (or agencies) independently initiates investigations.

100 | 75 | 50 | 25 | 0

Comments:

Section 7 of the Anti Corruption and Economic Crimes Act directs the Kenya Anti-Corruption Commission (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.

References:

Anti Corruption and Economic Crimes Act (Section 7).

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.

76. Can citizens access the anti-corruption agency?

75

76a. In practice, the anti-corruption agency (or agencies) acts on complaints within a reasonable time period.

100 | 75 | 50 | 25 | 0

References:

The Kenya Anti-Corruption Commission (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. From January to June 2007, 3,749 corruption reports were received, of which only 819 were adjudged worthy of investigation.

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.

76b. In practice, citizens can complain to the anti-corruption agency (or agencies) without fear of recrimination.

100 | 75 | 50 | 25 | 0

Comments:

Section 65 of the Anti-Corruption and Economic Crimes Act (2003) offers protection from prosecution for informers and also requires that court proceedings ensure that informers are not compromised. The Witness Protection Act, designed to take care of whistle-blowers, 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.

Since the Act came into force, it is not clear the extent to which it has been applied to protect vulnerable whistle-blowers. Neither is it clear if anyone has been victimized for whistle-blowing.

References:

Anti-Corruption and Economic Crimes Act (2003) (Section 65).
The Witness Protection Act.

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.

74. Is there an agency (or group of agencies) with a legal mandate to address corruption?

100

74. In law, is there an agency (or group of agencies) with a legal mandate to address corruption?

YES | NO

Comments:

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.

References:

Anti-Corruption and Economic Crimes Act (2003) (Section 6).

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.

77. Is there an appeals mechanism for challenging criminal judgments?

58

77a. In law, there is a general right of appeal.

YES | NO

References:

Judgments in magistrates' courts can be appealed in the High Court while the latter's 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.

77b. In practice, appeals are resolved within a reasonable time period.

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

References:

The 2003 (judge) Ringera inquiry into judicial integrity found more than half of the Court of Appeals 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 pretrial cases, highlighting inefficiency in the judicial system.

In efforts to shore up efficiency in service delivery, the prime minister recently demanded that the judiciary should also sign performance contracts (on service delivery). The judiciary has objected to this requirement on grounds that it would amount to executive interference in judiciary matters, which is barred by the constitution.

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.

77c. 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 fend for themselves, consequently foregoing their right of appeal.

100: In most cases, the appeals mechanism is an affordable option to middle class citizens seeking to challenge criminal judgments. Attorneys fees are not a barrier to appeals.

75:

50: In some cases, the appeals mechanism is not an affordable option to middle class citizens seeking to challenge criminal judgments. Attorneys fees present somewhat of a barrier to pursuing appeal.

25:

0: The prohibitive cost of utilizing the appeals mechanism prevents middle class citizens from challenging criminal judgments. Attorneys fees greatly discourage the use of the appeals process.

78. Do judgments in the criminal system follow written law?

75

78. In practice, do judgments in the criminal system follow written law?

100 | 75 | 50 | 25 | 0

References:

Judgments in the criminal system follow written law, with judges and magistrates required to cite the law under which judgment is made as well as precedents being followed. While this may be the practice in the majority of substantive cases, it is not always so for the average Kenyan who will often be railroaded in batches before a magistrate and be induced to plead guilty so as not to incur the bench's wrath by 'wasting' its time arguing one's case.

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.

79. Are judicial decisions enforced by the state?

75

79. In practice, are judicial decisions enforced by the state?

100 | 75 | 50 | 25 | 0

References:

The majority of judicial decisions are enforced by the state, but the quality or diligence of enforcement varies substantially. For example, acquittals, even under bizarre circumstances, result in freedom. However, while Kenyan prisons are a dour environment, rich convicts can buy relative comfort, both in terms of their food and upkeep and by feigning illness to be detained at a luxury hospital (albeit under prison guards).

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.

80. Is the judiciary able to act independently?

69

80a. In law, the independence of the judiciary is guaranteed.

YES | NO

Comments:

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 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.

References:

Constitution of Kenya (Section 68).

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.

80b. In practice, national-level judges are protected from political interference.

100 | 75 | 50 | 25 | 0

References:

While the constitution provides for such independence, judicial appointment are highly politicized, a factor which can, and has been perceived, to influence judgments. Indeed, the chief justice's presence at State House on Dec. 30, 2007 to swear in Kibaki even as the country sat on the precipice over irregular tallying of the presidential ballots, has left many believing that office holder is incapable of objectivity in the conduct of his duties where a decision involves the president. The ODM party, whose candidate challenged the electoral commission's declaration of Kibaki as winner, insisted there was no point going before the same chief justice to contest Kibaki's victory.

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.

80c. In law, there is a transparent and objective system for distributing cases to national-level judges.

YES | NO

References:

There is no objective means of distributing cases to judges. The chief justice allocates cases among High Court judges while the registrar handles magistrates' courts. In any case, the regional high court branches are understaffed, meaning cases go to whoever is there, seemingly regardless of whether there might be a conflict of interest. The same under-staffing affects magistrate courts across the countryside.

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.

80d. In law, national-level judges are protected from removal without relevant justification.

YES | NO

Comments:

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, only four cases have been resolved. One judge was actually re-instated without her case being heard; but her husband won his case.

References:

Constitution of Kenya (Section 62 (4-8)).

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.

81. Are judges safe when adjudicating corruption cases?

100

81a. In practice, in the last year, no judges have been physically harmed because of adjudicating corruption cases.

YES | NO

References:

No such instance has 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. YES is a positive score.

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.

81b. In practice, in the last year, no judges have been killed because of adjudicating corruption cases.

YES | NO

References:

No such instance has been reported 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. YES is a positive score.

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.

82. Do citizens have equal access to the justice system?

32

82a. In practice, judicial decisions are not affected by racial or ethnic bias.

100 | 75 | 50 | 25 | 0

References:

While no sub-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. Some marginalized communities (such as the Ogieks) have struggled through the courts system for decades in search of their land rights, with little to show for their endeavors. Furthermore, the race factor plays up indirectly through wealth and association, with rich people being able to delay or contrive judgments in their favor. Thus, for example, a white farmer/rancher of the original British settler stock shot an African (black) game ranger on duty; and the case was terminated. Less than a year later, he shot dead a farm worker, and the case has dragged through the courts.

However, the excesses of the United States' war on terror have featured prominently in Kenya since the August 1998 bombing of the U.S. embassy in Nairobi. Consequently, the Muslim community has felt, quite justifiably in instances, that the judiciary has been manipulated to victimize it.

Further, the battle lines in the 2005 referendum on the Draft Constitution and the last (2007) general elections seemed to pit continued Kikuyu/GEMA/Mt. Kenya hegemony against the rest of the Kenyans. Many saw the chief justice's action in conducting

a swearing in ceremony amidst dubious circumstances as his loyalty to ethnic agenda, which might be seen to be carried into his conduct within the judiciary.

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.

82b. In practice, women have full access to the judicial system.

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

Comments:

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."

However, while the recent passage of the Sexual Offenses Act will, for instance, reduce the extent to which judgments (such as cited above) can be made, various incidents of violence against women that have come to the courts over the last year suggest the Act is still a long way from becoming an effective deterrent on crimes against women. In the last general election, for instance, a woman was assaulted and fed on her excreta because she 'had the audacity to be a candidate.

References:

Sexual Offenses Act.

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. For this indicator, discrimination against women should reflect specific biases that confront women in the justice system as opposed to difficulties resulting from broader socio-economic disadvantages or discrimination against women.

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. For this indicator, discrimination against women should reflect specific biases that confront women in the justice system as opposed to difficulties resulting from broader socio-economic disadvantages or discrimination against women.

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. For this indicator, discrimination against women should reflect specific biases that confront women in the justice system as opposed to difficulties resulting from broader socio-economic disadvantages or discrimination against women.

82c. In law, the state provides legal counsel for defendants in criminal cases who cannot afford it.

YES | **NO**

References:

There has been no mandatory legal aid scheme for criminals in the country, except for people on capital charges. Meanwhile, several faith-based and other nongovernmental organizations have often stepped up to the plate, even if their coverage has not been anywhere near fulfilling need, such as FIDA and Kituo cha Sheria.

However, September 2008 saw the vice president launch a three-year, pilot legal aid scheme, which will eventually be rolled out across the country. See http://www.vice-president.go.ke/index.php?option=com_content&task=view&id=39&Itemid=13

YES: A YES score is earned if the government is required by law to provide impoverished defendants with legal counsel to defend themselves against criminal charges.

NO: A NO score is earned if there is no legal requirement for the government to provide impoverished defendants with legal counsel to defend themselves against criminal charges.

82d. In practice, the state provides adequate legal counsel for defendants in criminal cases who cannot afford it.

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

References:

Up to this point, the state has only provided legal aid to people on capital charges. However, a three-year pilot scheme has been launched to eventually extend the service across the whole country.

See http://www.vice-president.go.ke/index.php?option=com_content&task=view&id=39&Itemid=13

100: State-provided legal aid is basic, but well-trained and effective in representing the rights of impoverished defendants.

75:

50: State-provided legal aid is available, but flawed. Legal aid may be unavailable to some impoverished 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 impoverished defendants. State legal aid/public defenders may be consistently incompetent or unwilling to fairly represent all defendants.

82e. In practice, citizens earning the median yearly income can afford to bring a legal suit.

100 | 75 | 50 | 25 | 0

References:

With 46 percent of the population currently living below the (U.S) dollar-a-day poverty line, the median income is well below the national income per capita of about US\$500. Coupled with the burdens arising from the extended family system, persons on or near the median income cannot afford legal assistance. The growing number of organizations offering pro bono services are overwhelmed by demand.

100: In most cases, the legal system is an affordable option to middle class citizens seeking to redress a grievance. Attorneys fees do not represent a major cost to citizens.

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. Attorneys fees are a significant consideration in whether to bring a case.

25:

0: The cost of engaging the legal system prevents middle class citizens from filing suits. Attorneys fees are high enough to discourage most citizens from bringing a case.

82f. In practice, a typical small retail business can afford to bring a legal suit.

100 | 75 | 50 | 25 | 0

References:

If small" is determined by turn-over rather than numbers of employees or inputs, then the score should actually be '0'. Kenyans are mainly employed in self-provisioning (subsistence) agriculture or in the informal sector (offering services, manufacturing or retailing (hawking/vending)). Such people regularly have needs for litigation but cannot afford it, often being forced to resort to informal courts of elders or public administrators that have no basis in modern law. Small retailers at the very top of the ladder might afford litigation, especially if the business is complemented by other sources of income.

100: In most cases, the legal system is an affordable option to a small retail business seeking to redress a grievance. Attorneys fees do not represent a major cost to small businesses.

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. Attorneys fees are a significant consideration in whether to bring a case.

25:

0: The cost of engaging the legal system prevents small businesses from filing suits. Attorneys fees are high enough to discourage most small businesses from bringing a case.

82g. 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 traveling 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. Further, such parts of the country are relatively insecure making it additionally difficult for people to access facilities, such as courts or hospitals.

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

83. Is the law enforcement agency (i.e. the police) effective?

50

83a. In practice, appointments to the law enforcement agency (or agencies) are made according to professional criteria.

100 | 75 | 50 | 25 | 0

References:

Appointments at the very top of law enforcement agencies (commissioners of police, prisons, intelligence, etc.) are political, even if the candidates are professionally qualified. The current police commissioner was sourced from the armed forces, despite the fact that several senior career police officers could have taken the job.

Other middle-level appointments in the agencies are handled by respective service commissions. Recruitment of the junior uniformed cadre is done through an open field exercise in which applicants with appropriate paper qualifications go through rigorous physical exercises. However, the shortlisting of candidates for the interviews is often fraught with corruption as politicians and senior officers within the agencies pressurize for their preferred candidates to be interviewed and absorbed.

See a discussion on a recruitment scandal at http://www.communication.go.ke/forum_new/forum_posts.asp?TID=1499

Also see similar concerns with the army, at <http://www.eastandard.net/InsidePage.php?id=1143993811&cid=4>

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.

83b. In practice, the law enforcement 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 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.

Since 2003, the NARC government has invested substantially in improving the living conditions of junior police officers in barracks that had been atrocious, yet these efforts have not been widespread with officers in the smaller towns and rural areas continuing to live in sub-standard conditions. More resources are required to improve the dress of officers, while operational budgets also need to improve so that members of the public are not asked to pay for security services, such as fueling a police vehicle or buying airtime to get the police to investigate a complaint.

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.

83c. In practice, the law enforcement agency is protected from political interference.

References:

Given the nature of the recruitment process, and in light of the fact that these agencies are funded by and serve the government, their operations are substantially politicized. This was quite apparent during electioneering ahead of the Dec. 27 general election. While police bias may not have been apparent or rampant, isolated instances like the last-minute cancellation of a permit for an opposition rally illustrate the force's vulnerability to political manipulation.

After the peace accord that ushered in the Grand Coalition Government, a major sticking point was how to share powerful ministries, a key one being Internal Security, which is responsible for the police and state intelligence services.

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.

84. Can law enforcement officials be held accountable for their actions?

92

84a. In law, there is an independent mechanism for citizens to complain about police action.

YES | NO

References:

Within government, there used to be the Kenya Anti Corruption Commission and the Kenya National Commission of Human Rights to handle such complaints. Now, these will be handled by the newly launched Public Complaints Standing Committee, even if people continue going to the former, with which they might have developed some rapport. Outside the 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, the credibility of which depends on the police ensuring the trust of the community.

YES: A YES score is earned if there is a formal process or mechanism by which citizens can complain about police actions. A YES score is earned if a broader mechanism such as the national ombudsman, human rights commission, or anti-corruption agency has jurisdiction over the police.

NO: A NO score is earned if there is no such mechanism

84b. In practice, the independent law enforcement complaint reporting mechanism responds to citizen's complaints within a reasonable time period.

100 | 75 | 50 | 25 | 0

References:

The Kenya Anti-Corruption Commission (KACC) and the Kenya National Commission of Human Rights (KNCHR) respond to public complaints more or less immediately. However, action against errant officers might take some time, especially if it involves litigation. On the other hand, the police might close ranks and decide that nothing is being done about the complaint. 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. However, the police commissioner's reaction to KNCHR's allegation of 500 extra-judicial killings is an illustration of the force closing ranks to protect their own.

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.

84c. In law, there is an agency/entity to investigate and prosecute corruption committed by law enforcement officials.

YES | NO

Comments:

Section 7 of the Anti-Corruption and Economic Crisis Act mandates the Kenya Anti-Corruption Commission (KACC) exclusively to investigate any matter or person that is thought to be involved in corruption. However, prosecution is handled by the attorney general's office.

References:

Anti-Corruption and Economic Crisis Act (Section 7).

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 may be internal to the police department (provided it has a degree of independence, such as an internal affairs unit) or part of a broader national mechanism such as the national ombudsman, human rights commission, or anti-corruption agency.

NO: A NO score is earned if no such agency/entity exists.

84d. In practice, when necessary, the agency/entity independently initiates investigations into allegations of corruption by law enforcement officials.

100 | 75 | 50 | 25 | 0

References:

The Kenya Anti-Corruption Commission's (KACC) mandate given by Section 7 of its Act provides for investigations into allegations of corruption by law enforcement officials. KACC, for example, investigated reports about bribery during the police recruitment exercise of 3,000 officers, which was subsequently canceled. Sixty senior officers managing the exercise were promptly suspended. See "Bribes paid to join Kenya police," by The Journal of Turkish Weekly, Dec. 16, 2005: <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.

84e. In law, law enforcement officials are not immune from criminal proceedings.

YES | NO

References:

Besides the president's constitutional protection under Section 14 from criminal and/or civil proceedings while in office, and the protection afforded diplomats under the Geneva Convention, no one else in Kenya is by law 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.

84f. In practice, law enforcement officials are not immune from criminal proceedings.

References:

The Kenya Anti-Corruption Commission (KACC) returns reveal many instances in which police officers have been prosecuted for criminal offenses such as corruption. However, other categories of serious crime by police officers go unpunished primarily because these involve the police investigating their colleagues. For example, suspects have been physically and sexually assaulted in police custody with impunity.

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.