

Overall Score:

69 - Weak

Legal Framework Score:

80 - Moderate

Actual Implementation Score:

55 - Very Weak

Category I. Civil Society, Public Information and Media

I-1. ⁶¹Civil 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

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 for CSO activities pursuing anti-corruption and good governance 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.

The Kenyan Constitution and all its statutes are available at 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

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).

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:

The Societies Act (Cap 108) requires such organizations to keep books of accounts (Section 26) and submit annual returns (Section 30), while the Registrar of Societies can demand information on accounts (Section 31). Section 48 provides that: "On payment of the prescribed fees, any person may inspect at the office of the Registrar the register and any documents relating to any society lodged with the Registrar under this Act, and may obtain from the Registrar a copy of or extract from such register or document."

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

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

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

83

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

100 | 75 | 50 | 25 | 0

Comments:

Since the ouster of the KANU government in the 2002 general elections, the tendency has been toward greater freedoms of association, including the formation of new anti-corruption/good governance CSOs. Indeed, the government has even toned down its previous hostility to the Kenya National Commission of Human Rights (KNCHR), a public body formed through an act of Parliament. This change in stance probably arises from the pioneering research work that KNCHR did on the violence that arose after the disputed 2007 presidential election; work that shaped the processes by which the 2008 conflicts were mediated by the international community.

References:

The print and electronic media regularly report on any adverse government reaction to the formation of anti-corruption and good governance institutions. During the review period, there was no such report. Indeed, the period saw the Kenya Human Rights Commission team up with seven other institutions to form the Social and Public Accountability Network (SPAN) to monitor the

management of decentralized development delivery. SPAN operates under the auspices of the CDF Accountability Project (<http://www.cdfproject.org/>). Member organizations include Abantu for Development, ActionAid International Kenya, Centre for Enhancing Democracy and Good Governance, Centre for Peace and Democracy, The Institute for Social Accountability, MS Kenya Danish Association for International Co-operation, Social Economic Rights Foundation and World Vision International Kenya.

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

75:

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

25:

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

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

100 | 75 | 50 | 25 | 0

Comments:

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.

However, since the mediated truce to the 2007/2008 post-election violence, CSO involvement in policy-making and planning has been enhanced. The mediation process produced Agenda 4, far-reaching reform proposals whose implementation has increasingly involved CSOs whose international monitors of the process find useful in keeping the government on its toes.

References:

See Kenya Human Rights Commission's contribution at http://www.khrc.or.ke/documents/Bitter_Better_Options4Kenya_in_Fight4Justice.pdf.

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

75:

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

25:

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

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

YES | NO

Comments:

No CSO has been shut down. Indeed, CSOs have played a growing role in key areas, such as in monitoring the reforms arising from the 2007/2008 post-election violence. Indeed, CSOs have traveled to Geneva to make representations and have often met international overseers of Kenyan reforms, such as Kofi Annan and the U.N.'s Rapporteur on Human Rights, Professor Philip Alston. Further, CSOs followed up initial contact at the Hague with ICC Prosecutor Moreno Ocampo with a meeting during the latter's November 2009 visit to Kenya (see <http://www.kbc.co.ke/story.asp?ID=60762>).

References:

Print and electronic media reports.

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?

33

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

YES | NO

References:

Print and electronic media.

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

Comments:

There have been quite a number of instances when CSO activists have been physically harmed and even killed. During the December 2008 Jamhuri (Independence) Day celebrations, various CSO activists ended up in police custody for demonstrating during the President's speech. Among those detained were 'Bunge la Wanachi' (the People's Parliament) activist Fred Odhiambo who was beaten severely. Others included former Transparency International-Kenya director and a group of journalists from a prominent FM station that hosts daily call-in shows discussing governance issues.

References:

The detention of CSO activists protesting attempts to muzzle the media was widely reported in both the print and electronic

media. See for example, <http://majimbokenya.com/home/2008/12/12/how-african-new-dictator-kibaki-was-forced-to-cut-short-his-speech-as-arrests-mark-kenyan-45th-independence-celebrations/>.

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

Comments:

In March 2009, two CSO activists, Oscar Kingara and John Paul Oulu, who had investigated extra-judicial killings were ambushed and shot dead, ironically a day after the government's official spokesman had warned at his weekly briefings that they would be dealt with.

References:

See <http://news.bbc.co.uk/2/hi/africa/7927427.stm>.

Also see <http://www.dailymail.co.uk/news/worldnews/article-1160226/Two-death-squad-activists-shot-dead-Kenya-sparking-fatal-clashes-police-students.html>

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?

88

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

YES | NO

References:

The 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 Labor Relations Act (Act No. 14 of 2007), which gives employees more rights than existed under previous legislation. For instance, section 4 thereof provides that every employee has the right to:

- (a) participate in forming a trade union of federation of trade unions;
- (b) join a trade union; or
- (c) leave a trade union;
- (d) to participate in the trade union's lawful activities; and
- (e) to participate in the election of its officials and representatives.

YES: A YES score is earned when trade unions are allowed by law, regardless of political ideology, religion or objectives. Groups with a history of violence or terrorism (within last ten years) may be banned. Groups sympathetic to or related to

banned groups must be allowed if they have no history of violence.

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

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

100 | 75 | 50 | 25 | 0

Comments:

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 continues to be itinerant labor in the informal sector, which by definition and character is non-unionizing. For the unionizable formal sector, while the new legislative framework has enhanced the scope for industrial action, the landscape is still fraught with political obstacles. For example, an Industrial Court directive to a public university to reinstate two lecturers ended up in the High Court, resulting in an ongoing debate on the relative authorities of the two judicial systems. Meanwhile, the lecturers remain in the cold. By and large, the government looks adversely on industrial action.

Meanwhile, 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 export processing zones and call centers), which invariably impinge on workers' rights.

References:

For details of trade unionism in Kenya, go to <http://www.cotu-kenya.org/>. However, the site seems to be under re-construction.

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. The Media Act provides for the sector's self-regulation. However, early 2009 saw the government amend the Communications Act to provide itself with power to raid media houses and control the distribution of content. It also gave the government the right to penalize media infractions with heavy fines and prison terms. It would also have the sole discretion in granting broadcast licenses and in the control of program content and broadcasts. These proposals were strongly resisted, with the support of the Prime Minister, and the government relented over them, returning the Act to the drawing board.

During 2007, the Media Act came into force, as a means through which the Media Council of Kenya will self-regulate. The Media Council's website at www.mediacouncil.or.ke/ is currently under construction.

References:

See the Constitution of Kenya and the Media Act available at http://www.kenyalaw.org/kenyalaw/klr_home/. The media also operates within the ambit of the Kenya Communications Act (2008).

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:

Section 79 of the Constitution provides for this. Specifically, it states:

79. (1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons) and freedom from interference with his correspondence.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision –

(a) that is reasonably required in the interests of defense, public safety, public order, public morality or public health;

(b) that is reasonably required for the purpose of protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts or regulating the technical administration or the technical operation of telephony, telegraphy, posts, wireless broadcasting or television; or

(c) that imposes restrictions upon public officers or upon persons in the service of a local government authority, and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

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?

50

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

100 | 75 | 50 | 25 | 0

Comments:

On the one hand, the sustained publication of various entities of the alternative” media or “gutter” press is evidence that the arena is comparatively open, despite its regular publication of material that is 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 it proposed highly controversial amendments to section 88 to 92 of the Kenya Communications Act (1998). The resulting hue and cry after the President assented to the Act led to the government refraining from gazetting the Act, instead returning it to the drafting team.

References:

The Kenya Communications (Amendment) Act 2009.

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 appeals mechanism if a license is denied or revoked.

YES | NO

Comments:

REGISTRATION OF NEWSPAPERS & MAGAZINES

Upon receipt of the application forms by the Registrar for newspapers or magazine, the Registrar shall take one hundred and twenty (120) days period to consider the applicants application and upon satisfaction that the said application is in order, the applicants shall be issued with a certificate within seven (7) days of such approval.

Note: In some cases where the Registrar deems it fit to send the application for verification to another sister Ministry, the application shall take more than the one hundred and twenty (120) days as stated above to be considered for registration.

See http://www.attorney-general.go.ke/index.php?option=com_content&task=view&id=65&Itemid=110

References:

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 60 days of such refusal and the applicant may, if aggrieved, appeal to the Tribunal.

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 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.

References:

Section 79 of the Kenya Communications Act addresses 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 60 days of such refusal and the applicant may, if aggrieved, appeal to the Tribunal.

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

75:

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

25:

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

6d. In practice, where necessary, citizens can obtain a 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 mainstream print media remains an exclusive domain of the non-poor. While license costs might not be prohibitive, this must be seen in the context of the overall costs of running the publication. However, Kenya has a thriving alternative/gutter press whose operational costs must be quite minimal, since they hardly generate revenue through advertising, which is the mainstream print media's key revenue source. Thus while this alternative press represents a gateway for non-corporate entrepreneurs, it still requires one to be financially well-off.

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?

75

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

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

Comments:

Notwithstanding the espousal of policies such as that of universal access, the government has been uncomfortable with an entirely free print and electronic media. So much so, that early 2009 saw amendments to the Kenya Communications Act to enable the government to literally walk into an institution and confiscate equipment. The changes to the law also sought to regulate content and timing of programs, amongst several other repressive measures. Public outcry against these changes led to the shelving of the revised Act, which the president had already signed into law. See <http://fortysouth.com/tag/kenya-communications-act/>.

References:

The main source of information on regulation of print and electronic media is the Communications Commission of Kenya (<http://www.cck.go.ke>). Recently, the government has adopted the policy of Universal Access, which is meant to enhance accessibility to the media by promoting affordability and availability. (http://www.cck.go.ke/universal_access/)

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 appeals 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 60 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

References:

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.

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, even if they are steep, 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. Thus even rural or ghetto contexts where there are FM stations, invariably there will be such a financier, even if it is a donor-funded NGO/CSO, such stations using amateur/trainee broadcasters to minimize costs. However, fees for an amateur station stands at 2,000 shilling (US\$30).

Meanwhile, in recognition of the central place of ICT in socio-economic development, the government has adopted a policy of Universal Access aimed at enhancing accessibility, availability and affordability. (http://www.cck.go.ke/universal_access/)

References:

The substantive data on licensing fees is from the Communications Commission of Kenya accessible at 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:

There is no current legislation or practice regulating access to the Internet. However, there is a ICT Bill pending from 2007 through which the government sought to harmonize the law and policy in the ICT industry, which is the fastest growing industry in the country."

However, following the violence of the 2007 elections, the government has increasingly sought to control material in the media, including the Internet. Part of this objective was sought through revisions to the Kenya Communications Act.

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

References:

For a brief history of such conduct, go to [http://www.privacyinternational.org/article.shtml?cmd\[347\]=x-347-103568](http://www.privacyinternational.org/article.shtml?cmd[347]=x-347-103568).

However, Internet services have been liberalized since 2004, largely diminishing the scope of censorship, 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/.

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?

83

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

YES | NO

References:

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. See legislation at 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

References:

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. Indeed, the 13-person Council only has two direct government officers (from the Kenya Institute of Mass Communications and Kenya News agency). 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.

The current Council is manned by individuals who were prominent in the fight for press freedom. However, this has not stopped a perception that MCK might try to muzzle independence. See <http://allafrica.com/stories/200807240112.html>.

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. Its 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?

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

YES | NO

References:

Disclosure of ownership is a precondition for registration of any enterprise under the Companies Act (Cap 486). Section 384 provides that any member of the public may access any company information lodged with the registrar of companies on payment of a search fee. See http://www.kenyalaw.org/kenyalaw/klr_app/frames.php.

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

References:

Disclosure of ownership is a precondition for registration of any enterprise under the Companies Act (Cap 486). Section 384 provides that any member of the public may access any company information lodged with the registrar of companies on payment of a search fee. See http://www.kenyalaw.org/kenyalaw/klr_app/frames.php.

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 types 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

References:

The Kenyan media early realized the need to regulate and professionalize itself to avert undue government interference, thereby establishing the Media Council of Kenya [MCK] in 2003. Since then, the Media Act has been introduced to strengthen the capacity for such self-regulation, and the resulting Council is composed largely of private sector operators. There is also a full-fledged Media Industry Steering Committee Code of Conduct. Nonetheless, elements of the media have often found themselves confronting the government over published material. Further, there is a thriving alternative media (gutter press), which operates largely independently of the Media Council, and is therefore not bound by the MCK's standards. See <http://www.mediacouncil.or.ke/>.

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

References:

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: http://www.voanews.com/english/archive/2007-11/2007-11-29-voa37_cfm and http://downloads.bbc.co.uk/worldservice/trust/pdf/kenya_policy_briefing_08.pdf.

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.

100 | 75 | 50 | 25 | 0

References:

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.

See http://www.voanews.com/english/archive/2007-11/2007-11-29-voa37_cfm and http://downloads.bbc.co.uk/worldservice/trust/pdf/kenya_policy_briefing_08.pdf, <http://www.propertykenya.com/news/502372-high-poll-stakes-lead-to-in-depth-media-coverage-scrutiny>.

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?

0

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

YES | **NO**

References:

Journalists handling corruption-related issues have been detained by the police.

See <http://www.internationalpen.org.uk/index.cfm?objectid=AD0B8776-3048-676E-26B0CA129DA0015C>. Also see <http://www.religiousintelligence.co.uk/news/?NewsID=3508>.

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:

Journalists handling corruption-related issues have been detained by the police.

See <http://www.internationalpen.org.uk/index.cfm?objectid=AD0B8776-3048-676E-26B0CA129DA0015C>. Also see <http://www.religiousintelligence.co.uk/news/?NewsID=3508>.

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:

A journalist who had been warned off by the police for writing about corruption in the forces ranks was found dead.

See <http://www.internationalpen.org.uk/go/news/kenya-journalist-murdered-following-police-threats>. See also <http://cpj.org/2009/09/cpj-urges-pms-intervention-in-kenyan-murder-case.php#more>.

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.

68

I-3. Public Access to Information

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

33

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

YES | NO

References:

As in all governments, information is classified as "general" or "restricted." In the latter category, subdivisions include "confidential," "secret" and "top secret."

Much of the government's general information is published and available through the Government Press 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, the Government spokesperson's website at <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, whether such officers are in the service or have retired.

Other legislation that hamper 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.

However, civil society activists have championed the legislation of freedom of information. Consequently, a bill has been in the pipeline since 2007 when it had its first and only reading. See its current status at <http://www.kenyalaw.org/Bills/>.

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**

References:

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 the office maintains a relatively low profile, probably due to poor resourcing. See an evaluation of its performance at <http://allafrica.com/stories/200806040123.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**

References:

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 Freedom of Information Bill which proposes to give citizens the right of access to government information currently curtailed by the Official Secrets Act. (See <http://www.kenyalaw.org/Bills/>.) 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.

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?

42

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

100 | 75 | 50 | 25 | 0

References:

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.

Parliament is the one institution that gets timely responses to questions put to cabinet ministers by members. However, the recent introduction of performance contracts, strategic planning, service charters and e-government should greatly improve the management of requests for information. Typical of most government departments and state corporations in this era of strategic planning, 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.

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, responses to information requests are of high quality.

100 | 75 | 50 | 25 | 0

References:

Notwithstanding the maintenance of filing systems and increasing use of ICT, many government departments have very poor data storage systems, meaning requested information may not be found or it will be patchy. Where it exists and is not sensitive, the information will often (eventually) be given as is. However, the Kenyan government continues to be very sensitive over information, especially where expenditure is concerned. This is true even between departments within the same ministry. The vast amounts of spending queried by the Auditor General partially explains this sensitivity.

100: Responses to information requests typically address the requestor's questions in full and are not redacted or edited to remove sensitive information.

75:

50: Information requests are sometimes met with sufficient responses, but responses to information requests may be vague or overly general when sensitive information is sought.

25:

0: The government rarely or never replies to information requests with meaningful responses. If and when responses are issued, they are so overly general or heavily redacted as to render them useless.

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

100 | 75 | 50 | 25 | 0

References:

There is no official mechanism through which to appeal against denied information. While the low-keyed Public Complaints Standing Committee might help, its processes are slow. Within individual departments, the speed with which one can resolve such an appeal depends very much on the officers involved. Parliament is the single institution that obtains timely government information when members put questions to ministers.

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.

13e. 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 e-government, performance contracts, strategic planning 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.

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

References:

When information is denied, the Official Secrets Act is often the 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. These are some of the concerns the Freedom of Information Bill addresses.

This weak response to public demand for information is reflected in government departments' weak cooperation with the Public Complaints Standing Committee (PCSC), the national ombudsman. PCSC's quarterly report for June to September 2009 shows that government agencies failed to respond to more than 400 of its queries within 90 days.

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.

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

References:

The 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.

The now-defunct Electoral Commission of Kenya [ECK] had previously clarified 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 there from by Act of Parliament on the grounds of his/her having been convicted of an offense connected with elections or on the grounds of his/her having been reported guilty of the offense by the court trying an election petition."

Electoral matters are currently handled by the Interim Independent Electoral Commission (see <http://www.eck.or.ke/>).

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

References:

The 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. See http://www.kenyalaw.org/kenyalaw/klr_app/frames.php.

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. For example, during the last days of the most recent voter registration exercise (July 2007), 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

References:

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.

See <http://www.marskenya.org/pages/uraia/index.php>.

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

References:

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. For example, the eve of the December 2007 elections saw about 10 petitions unresolved from the December 2002 elections, meaning that affected constituencies might have been represented by the wrong person for the intervening five years. This situation has improved somewhat. Of the 39 petitions arising from the December 2007 elections, 20 had been resolved by January 2009. However, the pending ones two years after the vote reflect gross injustice. See http://www.kenyalaw.org/election_petitions/cases.php?pageNum_Recordset1=6&totalRows_Recordset1=196.

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?

80

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

YES | NO

References:

The Constitution of Kenya (Chapter V) provides for freedom of assembly, which enables people to register political parties, previously under the Societies Act (Cap 108 of the Laws of Kenya), but under the Political Parties Act since January 2009. The Political Parties Act (Cap 10 of 2007) 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. Section 12 (2) of the Act provides that: A citizen of Kenya who has attained the age of 18 years has, subject to the provisions of this Act, the right to form a political party." See http://www.kenyalaw.org/kenyalaw/klr_app/frames.php.

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

References:

The Constitution of Kenya (Sections 70, 78, 79, 80 and 81) guarantees 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. This legislation can be seen at http://www.kenyalaw.org/kenyalaw/klr_app/frames.php.

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. The Political Parties Act (2007) specifically blocks formation of factional parties based on any form of discrimination (gender, ethnicity, faith, etc.) and also bars certain categories of public officers from party activity, such as members of the armed forces.

This freedom to form political parties has resulted in Kenya having more than 150 registered parties many of which are 'briefcase' parties that only come into the fore on the eve of an election. See http://en.wikipedia.org/wiki/List_of_political_parties_in_Kenya.

However, inefficient procedures may deter people from forming parties. For one, party registration remains centralized in the national capital, Nairobi, imposing 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.

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 a country with 46% of the population living on less than a dollar a day, the poor cannot run for elections. In the 2007 general elections, for example, ODM parliamentary contenders in the primary election paid Ksh 200,000 (USD 2,700) to the party. The fee to the Electoral Commission of Kenya stood at Ksh 50,000 (USD 670). The fees for presidential contenders is placed (anecdotally) at USD 6,700.

References:

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. Section 32 of the Political parties Act requires parties to account for their electioneering spending, but this is not the case for individuals.

See http://www.kenyalaw.org/kenyalaw/klr_app/frames.php.

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

References:

The Kenyan parliament has no official opposition. Following the violence that attended the disputed results of the December 2007 presidential elections, international mediators led by former U.N. Secretary General Kofi Annan negotiated a settlement in which the leading presidential contenders formed a Grand Coalition Government. This coalition government accounted for 196 of the 207 contested seats. The law provides that the remaining 13 seats to be filled through nomination be shared out according to party strength, meaning that only 11 seats in Kenya's 210-strong parliament do not belong to the coalition. For the results, see http://en.wikipedia.org/wiki/Results_of_Kenyan_parliamentary_election,_2007.

Since the formation of the coalition government, some individual members of the coalition who were not appointed to the cabinet have joined hands with the non-coalition members to demand to be allowed to take up the role of an official opposition. Their National Assembly (Parliamentary Opposition) Bill, 2008 has had one reading in October 2008.

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

75:

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

25:

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

II-2. Election Integrity

18. Is the election monitoring agency effective?

65

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

YES | NO

References:

Section 41 (10) 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."

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

References:

The provisions stated hereafter came into force after the disputed 2007 elections. While they have been employed to appoint the new Interim Independent Electoral Commission, and while this body has overseen two by-elections during 2009, it is early yet to see how impartially it manages general elections, as there were some complaints over procedures during the by-elections. On the face of it, however, the provisions look sound.

Section 41 (3) of the Constitution provides that: The chairman and other members of the Commission shall be nominated through a competitive process by the Parliamentary Select Committee and upon approval by the National Assembly by appointed by the President in consultation with the Prime Minister."

Section 41 (4) provides for the professional qualifications of prospective candidates while sub-section (5) disqualifies members of the National Assembly, local authorities, party executive, armed forces and public service.

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 (ECK) was disbanded in 2008 after the fiasco of the 2007 presidential elections. Until its disbandment, ECK had a full complement of 580 staff of varied cadres (see <http://www.marsgroupkenya.org/multimedia/?StoryID=240923&p=Mandera+Central&page=4>). ECK's successor, the Interim Independent Electoral Commission, is headed by professionals with extensive experience (see http://www.eck.or.ke/executive_profiles). The Commission is also gradually re-recruiting to bring its staff complement to that of ECK (see <http://www.eck.or.ke/jobs-and-careers>). 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.

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

References:

The Interim Independent Electoral Commission (IIEC), which replaced the Electoral Commission of Kenya (ECK) in mid-2008 remains largely untested as the two by-elections held in 2009 are inadequate to evaluate reforms in the management of elections that should be part and parcel of IIEC. Such reforms are imperative because the post-election violence of 2007/2008 was largely due to ECK's indiscretion with the management of data flows. For one, it is hoped that IIEC will accept the computerization of data management (which ECK had declined) with hindsight, because its management knew they would need to rig the counting of ballots to secure desirable outcomes.

However, IIEC was able to publish the results of the two by-elections within two days (see <http://allafrica.com/stories/200908280686.html>; also see <http://www.eck.or.ke/downloads>).

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 old Electoral Commission of Kenya was largely powerless to impose penalties on electoral offenders even when they were identified. For one, it did not have an adequate legal framework for doing so. A major problem in this regard concerned where to draw the line between the (outgoing) president's executive functions and his political functions as a candidate. This difficulty stretched to the whole out-going cabinet, which remains in office until a new one is sworn in, meaning ministers take advantage of the gray area, continuing to employ state resources even as they campaign as politicians. In the run up to the December 2007 elections, a minister's vehicle with a cargo of machetes bound for his constituency was detained by the police.

See <http://www1.voanews.com/english/news/a-13-2007-12-19-voa59-66702212.html?moddate=2007-12-19>. The minister took part in and lost the 2007 elections. To date, no action has been taken against the suspect. Thus, while ECK could disqualify a candidate, it never did so.

Section 41 (A) provides some very specific functions for the Interim Independent Electoral Commission, exhorting it to ensure the conduct of free and fair elections. There were visible electoral offenses during the two 2009 y-elections; yet the nascent IIEC did not punish anyone.

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?

75

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

100 | 75 | 50 | 25 | 0

References:

Section 43 of the Constitution provides that the basic requirement for eligibility to vote is attainment of age 18 and ordinary residence in Kenya.

While all Kenyans over 18 may acquire voting cards, this has not worked smoothly across the whole country. For example, the straddling into war-torn Somali of various ethnic groups complicates identification of bona fide Kenyans. School drop-outs and youths in general attaining age 18 also have problems obtaining national IDs, meaning they might be barred from voting. A further problem has been the inequitable distribution of constituencies and voter registration stations.

Various reforms undertaken in the wake of the 2007/2008 post-election violence present an opportunity to rationalize some of these bottlenecks to objectively managed elections. For example, the replacement of the old, subjectively constituted Electoral

Commission of Kenya by the more objectively established Interim Independent Electoral Commission (IIEC), the scrapping of the old voter register and the new body's mandate should see a more efficient voter registration system. A new proposal, for example, is that all Kenyans attaining age 18 will get a voter's card when they go for the statutorily mandated national identification card.

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

References:

The Election Offences Act (Cap 66 of the Laws of Kenya) is established to prevent election offenses and corrupt and illegal practices at elections and to challenge such misconduct through the judicial system. The National Assembly and Presidential Elections Act (Cap 7) also has provisions for approaching the courts. The Criminal Procedure Code and the Penal Code, as well as other laws, also provide grounds for contesting electoral outcomes.

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

References:

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

Further, while 39 petitions were filed against 2007 parliamentary electoral outcomes, about 15 cases remain unresolved two years along with about 20 being thrown out because of mistakes in delivering summons rather than the cases not having substantive grounds for petitioning. See <http://www.kenyalaw.org/CaseSearch/>.

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, meaning they cannot register as voters or indeed as candidates. Consequently, Kenyan soldiers have largely remained neutral during elections. See <http://politics.nationmedia.com/inner.asp?sid=1076>.

As for the police, the situation is somewhat different. Since the holding of public political rallies must be cleared with the police, 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 for example, page 3 of http://www.khrc.or.ke/documents/GENERAL%20ELECTIONS%2007_PRELIMINARY%20ASSESSMENT.pdf.

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

References:

The Presidential and Parliamentary Elections (Amendment) Regulation 2002 provides, as follows: (1) Regulation 45(1). The Electoral Commission may, at any election, accredit any individual, association, organization, or institution who or which is manifestly non-partisan to act as election observers. (2) The Electoral Commission shall issue guidelines for election observers, which shall be binding on election observers upon accreditation by the Electoral Commission.

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.

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

References:

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.

For one observer's preliminary assessment of the 2007 elections, see http://www.khrc.or.ke/documents/GENERAL%20ELECTIONS%202007_PRELIMINARY%20ASSESSMENT.pdf.

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. In law, 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

References:

The Constitution of Kenya (Sections 41 and 41A) provides for the establishment (since mid 2008) and functions of the Interim Independent Electoral Commission with a chair and not more than eight commissioners. Its functions include:

- (a) reform of the electoral process and the management of elections in order to institutionalize free and fair elections;
- (b) establishment of an efficient and effective secretariat;
- (c) promotion of free and fair elections;
- (d) fresh registration of voters and the creation of a new voter register;
- (e) efficient conduct and supervision of elections and referenda;

- (f) development of a modern system for the collection, collation, transmission and tallying of electoral data;
- (g) facilitation of the observation, monitoring and evaluation of elections and referenda;
- (h) promotion of voter education and culture of democracy;
- (i) settlement of minor electoral disputes during an election as may be provided by law; and
- (j) performance of such other functions as may be prescribed by law.

See http://www.kenyalaw.org/kenyalaw/klr_app/frames.php.

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.

80
II-3. Political Financing

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

83

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

YES | NO

References:

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."

See http://www.kenyalaw.org/kenyalaw/klr_app/frames.php.

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.

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

YES | NO

References:

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."

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.

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

YES | NO

References:

The Political Parties Act (2007) places no limits on party spending during the year or even during election campaigns. Section 28 of the Act establishes the Political Parties Fund (PPF) to be administered by the Registrar of Political Parties, from which public resources will be drawn to fund party activities. Fifteen percent of PPF resources will be shared equally among all registered parties, while 80 percent of its resources will be shared according to elector support. The section allows parties other funding sources, which must subsequently be declared within three months of the close of the financial year (Section 33).

YES: A YES score is earned if there are any limits in size on political party expenditures during the course of an election.

NO: A NO score is earned if there are no limits on political party expenditures during an election. 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 requirements for the disclosure of donations to political parties.

YES | NO

References:

Section 33 of the Political Parties Act requires parties to disclose their funding sources within three months of the close of their financial year. The disclosure should distinguish resources obtained from the government-sponsored Political Parties Fund, party members and supporters, and any other donations.

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.

20e. In law, there are requirements for the independent auditing of the finances and expenditures of political parties when financial irregularities are uncovered.

YES | NO

References:

Section 34 of the Political Parties Act requires that each party's accounts be audited by the government's Auditor General, who subsequently submits findings to the Registrar Political Parties. As with all public audit findings, these audits are available for public examination. See http://www.kenyalaw.org/kenyalaw/klr_app/frames.php.

YES: A YES score is earned if there is a legal or regulatory requirement for the independent auditing of party finances and expenditures when irregularities are uncovered. 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 when financial irregularities are uncovered. A NO score is also earned if such requirements exist but allow for parties to self-audit.

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

YES | NO

References:

There is no agency established exclusively for the monitoring of parties. However, Section 34 of the Political Parties Act places the monitoring of party finances (and by implication, the funded activities) on the government's Controller and Auditor General. The findings of such audit are submitted to the Registrar of Political Parties who is empowered by Section 3 (4) to deregister any party that violates declaration standards.

See http://www.kenyalaw.org/kenyalaw/klr_app/frames.php.

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. A NO score is also earned if this monitoring is solely carried out by the media and civil society organizations.

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

0

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

YES | NO

References:

There is no law governing contributions to individual political candidates. Section 31 of the Political Parties Act (2007) only addresses 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 nongovernmental organizations.

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.

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

YES | NO

References:

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

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.

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

YES | NO

References:

The Political Parties Act does not provide for such disclosure in the case of individual candidates. The Act only focuses on political parties.

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.

21d. In law, there are requirements for the independent auditing of the campaign finances of individual political candidates when irregularities are uncovered.

YES | NO

References:

There is no such law. The Political Parties Act focusing exclusively on parties. Since the removal of the ceiling on individuals' campaign spending, there is no scope for adjudging some spending to be irregular and to therefore require auditing. In theory, all Kenyans submit annual tax returns, which is where one could look to see extents of campaign spending. However, that would be a futile exercise as the returns do not specifically demand such a submission, meaning candidates could hide their spending under all sorts of other categories.

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 when financial irregularities are uncovered. 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 when financial irregularities are uncovered. A NO score is also earned if such requirements exist but allow for candidates to self-audit.

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

YES | **NO**

References:

There is no such agency. The various legislation governing electoral activities, the Political Parties Act, the National Assembly and Presidential Elections Act, etc. – do not address this issue.

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. A NO score is also earned if this monitoring is solely carried out by the media and civil society organizations.

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

0

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.

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

References:

The Political Parties Act (2007), which provides such limits, only came into effect in January 2009. The intervening 10 months might have seen the close of financial years (FY) of many parties, especially if parties lock their FYs to the government's, which ends on June 30. However, to the extent that the Political Parties Fund, which is provided for by the same Act, has not even been operationalized, it is unlikely the Registrar of Political parties has demanded any accounts from political parties. It is therefore not possible to determine the extent to which such limits have been adhered to or violated.

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:

Firstly, there are no limits to corporate financing of parties. Further, the Political Parties Act (2007), which provides any limits, only came into effect in January 2009. The intervening 10 months might have seen the close of financial years (FY) of many parties, especially if parties lock their FYs to the government's, which ends on June 30. However, to the extent that the Political Parties Fund, which is provided for by the same Act, has not even been operationalized, it is unlikely the Registrar of Political parties has demanded any accounts from political parties. It is therefore not possible to determine the extent to which such limits have been adhered to or violated.

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.

References:

There are no such limits. Further, the Political Parties Act (2007), which provides any limits, only came into effect in January 2009. The intervening 10 months might have seen the close of financial years (FY) of many parties, especially if parties lock their FYs to the government's, which ends on June 30. However, to the extent that the Political Parties Fund, which is provided for by the same Act, has not even been operationalized, it is unlikely the Registrar of Political parties has demanded any accounts from political parties. It is therefore not possible to determine the extent to which such limits have been adhered to or violated.

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:

The Political Parties Act does not provide for such an agency even though it provides for auditing by the government's Controller and Auditor General. Further, the Political Parties Act (2007), which provides any limits, only came into effect in January 2009. The intervening 10 months might have seen the close of financial years (FY) of many parties, especially if parties lock their FYs to the government's, which ends on June 30. However, to the extent that the Political Parties Fund, which is provided for by the same Act, has not even been operationalized, it is unlikely the Registrar of Political parties has demanded any accounts from political parties. It is therefore not possible to determine the extent to which such limits have been adhered to or violated.

100: The agency or entity aggressively starts investigations into allegations of wrong doing with respect to the financing of political parties, or cooperates well with other agencies that do. 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, has limited effectiveness when investigating, or is reluctant to cooperate with other agencies in politically sensitive cases. 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, is uncooperative with other agencies, 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:

Since no such monitoring is provided for, no such penalties have ever been contemplated.

100: When rules violations are discovered, the agency or entity is aggressive in penalizing offenders or cooperates well with other agencies that impose penalties.

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, reluctant to cooperate with other agencies, 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 and may refuse cooperation with other agencies.

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

100 | 75 | 50 | 25 | 0

References:

While the Political Parties Act (2007) only came into effect in January 2009, the intervening 10 months might have seen the close of financial years (FY) of many parties, especially if parties lock their FYs to the government's, which ends on June 30. However, to the extent that the Political Parties Fund, which is provided for by the same Act, has not even been operationalized, it is unlikely the Registrar of Political parties has demanded any accounts from political parties. It is therefore not possible to determine the extent to which such limits have been adhered to or violated.

100: Political party finances are regularly audited using generally accepted auditing practices. The auditing may be regular and comprehensive or only initiated after an initial review reveals irregularities. Auditing 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:

The Political Parties Act (2007) does not impose any ceilings on donations to an individual candidate's campaign. Consequently, even though Kenya has had two by-elections during 2009, no attention was paid to what candidates spent.

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.

References:

Neither the Political Parties Act nor any other legislation concerning elections, places any limit on corporate contributions to individual campaigns. Consequently, this area has not been monitored.

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.

References:

Neither the Political Parties Act nor any other legislation concerning elections places any limit on corporate contributions to individual campaigns. Further, the statutes do not provide for any independent agency to monitor such issues. Consequently, this area has not been monitored.

100: The agency or entity aggressively starts investigations into allegations of wrong doing with respect to the financing of individual candidates' campaigns, or cooperates well with other agencies that do. 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. It may be reluctant to cooperate with other investigatory agencies.

25:

0: The agency or entity rarely investigates on its own, or the agency or entity is partisan in its application of this power. It does not cooperate well with other investigatory agencies.

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

References:

Neither the Political Parties Act nor any other legislation concerning elections, places any limit on corporate contributions to individual campaigns. Further, legislation does not provide for independent agencies to monitor such spending. Consequently, this area has not been monitored.

100: When rules violations are discovered, the agency or entity is aggressive in penalizing offenders or in cooperating with other agencies that do.

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, reluctant to cooperate with other agencies, 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 or may refuse to cooperate with other agencies.

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

References:

Neither the Political Parties Act nor any other legislation concerning elections, provides for the auditing of individual campaign spending. Consequently, this area has not been monitored.

100: The finances of individual candidates' campaigns are regularly audited using generally accepted auditing practices. The auditing may be regular and comprehensive or only initiated after an initial review reveals irregularities.

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?

19

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

100 | 75 | 50 | 25 | 0

References:

Section 32 of the Political Parties Act requires parties to declare their assets, liabilities and electoral spending. Indeed, subsection states as follows: A political party which has participated in an election shall, within ninety days after that election, submit to the Registrar a detailed statement, in the prescribed form, of all expenditure incurred in respect of each candidate supported by that political party specifying the manner in which any money was spent.”

While the mainstream parties took part in the two June 2009 by-elections, there is no evidence that such financial reporting has taken place. Partly, this is due to the fact that the Political Parties Fund has yet to be activated, meaning the Registrar of Political Parties is unlikely to ask for accounting for independently generated funds.

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:

Section 33 of the Political parties Act requires parties to publish all sources of funding within three months of the end of its financial year. Section 34 provides for auditing to be conducted by the government’s Contoller and Auditor General, whose findings are accessible to the public. Section 35 also provides that parties publish all their records including membership, finances, spending, etc. However, since the transition from party registration under the Societies Act (Cap 208) to the Political Parties Act has not been completed, it is yet difficult to enforce the new statutes provisions.

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:

When political parties fell under the Registrar of Societies (Cap 108), the search fee was a modest 200 shillings (US\$3). However, the search fee under the new statute is unclear, as Section 34 only refers to a fee prescribed by the Commission.” Section 35 (2) requires all parties to maintain records at its district headquarters of matters relating to the constituencies in that district. Consequently, party members desiring to access the national party picture would still have to incur great expenses traveling to the national headquarters of the party.

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.

24d. In practice, the publicly available records of political parties’ finances are of high quality.

100 | 75 | 50 | 25 | 0

References:

Traditionally, such party records were non-existent or largely useless due to gaps. Indeed, during the KANU era, there was little distinction between KANU and the Office of the President spending. The rot was such that when KANU was defeated in 2002, it claimed ownership in an unsuccessful court battle of the Kenyatta International Conference Center, which had been built on government land with government funds.

Since coming on board, the Political Parties Act has provided a framework for improved transparency in the management of party funds. However, these year-old provisions remain untested.

100: Publicly available records of political parties’ finances are complete and detailed, itemizing all significant sources of income and expenditures.

75:

50: Publicly available records of political parties’ finances are available but are often lacking in important details, are overly general, or are otherwise incomplete.

25:

0: Publicly available records of political parties’ finances, when available, are so incomplete or overly general as to render them useless in understanding a party’s sources of income and its expenditures.

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 are no legal constraints to individual campaign spending and no requirements of disclosure. Consequently, this indicator has not been monitored.

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:

Neither the Political Parties Act nor other legislation governing electioneering place any constraints on individual spending, reporting or accounting. Consequently, this indicator has not been monitored.

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:

Neither the Political Parties Act nor other legislation governing electioneering place any constraints on individual spending, reporting or accounting. Consequently, this indicator has not been monitored.

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.

25d. In practice, the publicly available records of political candidates' campaign finances are of high quality.

100 | 75 | 50 | 25 | 0

References:

Neither the Political Parties Act nor other legislation governing electioneering place any constraints on individual spending, reporting or accounting. Consequently, this indicator has not been monitored.

100: Publicly available records of political candidates' campaign finances are complete and detailed, itemizing all significant sources of income and expenditures.

75:

50: Publicly available records of political candidates' campaign finances are available but are often lacking in important details, are overly general, or are otherwise incomplete.

25:

0: Publicly available records of political candidates' campaign finances, when available, are so incomplete or overly general as to render them useless in understanding a candidate's sources of income and expenditures.

Category III. Government Accountability

III-1. ⁵⁴Executive 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, which includes sectoral committees, provides opportunity to debate most executive/government 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” by the chief executive, the president, even if this practice has diminished since the 2002 ouster of the 40-year KANU regime. Such decrees increase in frequency during electoral campaigns, where the president wishes to influence voters in a particular direction. This was evident in the run up to the November 2005 referendum on a draft constitution, and during the 2007 electioneering when, for example, the outgoing president decreed some 30-odd administrative districts into existence.

As a rule, the incumbent president does not address the media. Indeed, when his decisions are questioned, he is wont to literally hide in State House, as was the case with his illegal August 2009 re-appointment of the anti-corruption commission head who was eventually ‘sacked’ by Parliament.

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

References:

Chapter Five of the Constitution provides for fundamental rights. Section 84 provides that any allegation of the violation of 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.

Further, in providing for the right to sue the government, Section 3 of the government Proceedings Act provides that: Where any person has a claim against the Government after the commencement of this Act and, if this Act had not been enacted, the claim might have been enforced in accordance with the provisions of the Petitions of Right Ordinance (now repealed), or might have been enforced by a proceeding provided by any statutory provisions repealed by this Act then, subject to the provisions of this Act, the claim may be enforced as of right by proceedings taken against the Government for that purpose in accordance with the provisions of this Act.” See http://www.kenyalaw.org/kenyalaw/klr_app/frames.php.

Meanwhile, the Public Complaints Standing Committee 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 the Kenya Gazette notice at http://www.kenyalaw.org/KenyaGazette/view_gazette.php?title=2109.

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. It regularly issues orders of mandamus, certiorari and prohibition against executive actions. Indeed, the Constitution and Administrative Review Division of the High Court of Kenya has grown to be one of the most vibrant divisions of the High Court with a rich jurisprudence.

However, events connected to the 2007 general elections 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 the 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.

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 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.

Most recently, the president mischievously overlooked legislation in re-appointing the anti-corruption boss in what amounted to an executive order. Parliament reacted by refusing to go to recess as well as to vote in budgeted expenditure, eventually easing the anti-corruption boss out of office.

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

References:

Section 14 of the Constitution states as follows:

(1) No criminal proceedings whatsoever shall be instituted or continued against the President while he holds office, or against any person while he is exercising the functions of the office of President.

(2) No civil proceedings in which relief is claimed in respect of anything done or omitted to be done shall be instituted or continued against the President while he holds office or against any person while he is exercising the functions of the office of President.

(3) Where provision is made by law limiting the time within which proceedings of any description may be brought against any person, a period of time during which a person holds or exercises the functions of the office of President shall not be taken into account in calculating any period of time prescribed by that law which determines whether any such proceedings as are mentioned in subsection (1) or (2) may be brought against that person."

After the debacle of the 2007 presidential elections and the ensuing violence, a coalition government was formed between the two main political parties, ODM and PNU. The Constitution was duly reviewed to facilitate this coalition, splitting power between the president as head of state and a prime minister as head of government. In that haste, however, nothing was stated concerning immunity of the head of government, the prime minister.

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

References:

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."

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?

44

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

YES | NO

References:

The head of state is required to file a regular asset disclosure form by the Public Officer Ethics Act of 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.”

See http://www.kenyalaw.org/kenyalaw/klr_app/frames.php.

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

References:

Ministers are required to file a regular asset disclosure form by the Public Officer Ethics Act of 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.”

See http://www.kenyalaw.org/kenyalaw/klr_app/frames.php.

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

References:

Section 10 (3) of the Public Officers Ethics Act of 2003 provides that, A public officer may accept a gift given to him in his official capacity but, unless the gift is a souvenir or ornament that does not exceed the value prescribed by regulation, such a gift shall be deemed to be a gift to the public officer’s organization.” See http://www.kenyalaw.org/kenyalaw/klr_app/frames.php.

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**

References:

Part IV of the Public Officers Ethics Act of 2003 (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. See http://www.kenyalaw.org/kenyalaw/klr_app/frames.php and www.kacc.go.ke/archives/speeches/mombasa-beach.pdf.

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**

References:

Section 11 of the Public Officers Ethics Act of 2003 (Cap 203) only addresses conflicts of interest during employment. There is no law governing involvement in private business during and after tenure of public office. Indeed, the Kenyan political elite is the cream of the private sector.

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. Even for current executives, the Anti Corruption and Economic Crimes Act and the Public Officers Ethics Act only provide restrictions in the event of possible conflicts of interest.

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. A zero score is also earned if heads of state and government or minister are allowed to hold private sector jobs while in office.

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 does not seem to be any effort to monitor the provisions of Section 11 (3) of the Public Officers Ethic Act, which requires gifts given to officers to be surrendered to their respective organizations. However, the conflict of interest provisions of the same act and the moral crusade of civil society has, in instances, been a deterrent to officers who would otherwise have gladly accepted and retained such gifts for themselves. For example, see the concern raised over the veracity of wealth declaration form contents at <http://www.nation.co.ke/News/-/1056/605648/-/ujqm1x/-/index.html>.

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 faces 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**

References:

Part IV, Section 29 of Cap 203 binds the employing 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. The law states as follows:

- (1) A Commission shall keep information collected under this Part confidential;
- (2) No person shall disclose, allow access to or acquire information collected under this Part and held by a Commission except in accordance with this section.
- (3) No person shall disclose information that was disclosed or acquired in contravention of this section if the person knows, or has reasonable grounds to believe, that the information was disclosed or acquired in contravention of this section.
- (4) Information collected under this Part and held by a Commission may be disclosed to and accessed or acquired by –
 - (a) authorized staff of the Commission;
 - (b) a person authorized by an order of a judge of the High Court; or
 - (c) the person who provided the information or his representative.
- (5) A person who contravenes subsection (2) or (3) is guilty of an offense and is liable, on conviction, to a fine not exceeding two million shillings or to imprisonment for a term not exceeding two years or to both.

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.

30d. In practice, the asset disclosure records of the heads of state and government are of high quality.

100 | 75 | 50 | 25 | 0

References:

To the extent that the law (Section 29 of the Public Officers Ethics Act (Part IV)) requires such disclosures to remain confidential, it is not possible to evaluate their quality.

100: The asset disclosure records of the heads of state and government are complete and detailed, providing the public with an accurate and updated accounting of the individuals' sources of income, investments, and other financial interests.

75:

50: The asset disclosure records of the heads of state and government contain some useful information but may be lacking important details, including politically sensitive investment or other financial arrangements in which the individual has an interest.

25:

0: The asset disclosure records of the heads of state and government are overly general, lack any meaningful detail, and do not provide a clear accounting of the individuals' sources of income, investments, and other financial assets.

26. In law, 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

References:

Chapter Five of the Constitution provides for fundamental rights. Section 84 provides that any allegation of the violation of 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.

Further, Section 3 of the Government Proceedings Act (CAP 40) provides for the right to sue the government, stating that Where any person has a claim against the Government after the commencement of this Act and, if this Act had not been enacted, the claim might have been enforced in accordance with the provisions of the Petitions of Right Ordinance (now repealed), or might have been enforced by a proceeding provided by any statutory provisions repealed by this Act then, subject to the provisions of this Act, the claim may be enforced as of right by proceedings taken against the Government for that purpose in accordance with the provisions of this Act." See http://www.kenyalaw.org/kenyalaw/klr_app/frames.php.

Meanwhile, the Public Complaints Standing Committee (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." See <http://www.gjlos.go.ke/gjinner.asp?pcat2=agencies&pcat=minjust&cat=complaintstanding>.

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. In practice, 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. See <http://www.kbc.co.ke/story.asp?ID=53719>.

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.

Since the 2008 creation of the Grand Coalition government, the situation has been somewhat farcical with the President largely traveling with his PNU party ministers while the prime Minister also largely travels with his ODM party ministers.

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

References:

Members of the legislature are subject to investigation and prosecution like all other citizens. However, the Laws of Kenya Ch 6 National Assembly (Powers and Privileges) Act exempts members from prosecution for anything said in the assembly. Members may also not be arrested within the precincts of the assembly. Indeed, the Naivasha Member of Parliament is currently before the courts on a fraud charge. See <http://www.nation.co.ke/News/politics/-/1064/678232/-/xtmcu5z/-/index.html>.

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:

As with all other public servants, this is provided for by the 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:

As with other public officers, this is covered under the Public Officers Ethics Act (Cap 203). However, it would be even more difficult to monitor the provisions in the case of legislators.

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 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. A zero score is also earned if legislators are allowed to hold private sector positions while in office.

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

100 | 75 | 50 | 25 | 0

References:

The provisions of the Public Officers Ethics Act on gifts are very difficult to enforce. For example, the typical practice is to thank anyone presiding over a fund-raising event by giving a goat or sheep, for example. Such a gift is never reported anywhere vis-a-vis the act. When such officers receive monetary gifts for considerations, such as a concessionary hotel stay or air ticket, this only becomes public if someone adversely affected by that consideration decides to raise it in the media. Otherwise, it never becomes public knowledge. Consequently, legislators violate them until caught. The 2004 incident where the then Labor Minister was reported to have accepted a concessionary weekend stay at a beach hotel embroiled in a labor dispute is the most recent high-profile one along such lines. However, nothing ever came of the discovery other than the bad publicity.

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 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.

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: 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.

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

References:

Asset disclosure records are protected by Section 29 of the Public Officers Ethics Act (Cap 203) and can only be accessed through a court order.

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 the average citizen 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. Going to court for an order would be both time consuming and expensive for the average citizen. So, effectively, there is no access to such records.

The pertinent Section of the Act provides as follows:

30. (1) The contents of a declaration or clarification under this Act shall be accessible to any person upon application to the responsible Commission in the prescribed manner if the applicant shows to the satisfaction of the responsible Commission that he or she has a legitimate interest and good cause in furtherance of the objectives of this Act, in such declaration or clarification:

Provided that prior to the responsible Commission making an affirmative decision under this section, it shall grant the opportunity to the affected party to make representations on the matter.

(2) No information obtained pursuant to subsection (1) shall be published or in any way made public except with prior written authority of the responsible Commission.

(3) Any person who-

(a) publishes or in any way makes public any information obtained under the foregoing sections without prior permission of the responsible Commission;

(b) knowingly republishes or otherwise disseminates or discloses to another person information to which this section relates where-

(i) such information was disclosed to himself or to some other person; or

(ii) such information was obtained in contravention of this Act,

shall be guilty of an offense and liable on conviction to imprisonment for five years or to a fine not exceeding five hundred thousand shillings, or both.

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:

Given the provisions of the protective canopy thrown around the declarations by the Public Officers Ethic Act, the costs of accessing the documents would be prohibitive for the average citizen.

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

75:

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

25:

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

34d. In practice, the asset disclosure records of members of the national legislature are of high quality.

100 | 75 | 50 | 25 | 0

References:

To the extent the law generally bars access to these records, it is not possible to evaluate their quality.

100: The asset disclosure records of members of the national legislature are complete and detailed, providing the public with an accurate and updated accounting of the individuals' sources of income, investments, and other financial interests.

75:

50: The asset disclosure records of the members of the national legislature contain some useful information but may be lacking important details, including politically sensitive investment or other financial arrangements in which the individual has an interest.

25:

0: The asset disclosure records of the members of the national legislature are overly general, lack any meaningful detail, and do not provide clear accounting of the individuals' sources of income, investments, and other financial assets.

35. Can citizens access legislative processes and documents?

100

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

YES | NO

References:

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 availed in the library. Debates for 2006 and 2009 are available on the Assembly's Web site at http://www.parliament.go.ke/parliament/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 have also been live broadcasts of some debates on TV since March 2008.

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 are 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:

Besides watching the live TV coverage, which is not available for most Kenyans without a TV or electricity, records of parliamentary business are accessible during the debates and also in hard copy and online, while prompt media reports are also available. See for example, Hansard at http://www.parliament.go.ke/parliament/hansard_2009.php.

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:

While Parliament sits in the national capital, dissemination of its records through the media, including the Internet, enables a large share of the population to access material at reasonable cost and in good time.

See http://www.parliament.go.ke/parliament/hansard_2009.php. The greatest impediment to access is likely illiteracy, rather than just poverty.

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.

References:

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.

Recently, the Kenya Law Society has acquired concessions allowing it to nominate candidates for the position of judge; but 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.”

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

References:

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.

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

“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.

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.

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

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."

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. Hopefully, these seeming anomalies have been addressed by the draft constitution of 2009, which is presently being finalized.

Meanwhile, Parliament recently flexed its muscle in successfully instigating the withdrawal of the president's re-appointment of the head of the anti-corruption commission. In the event the new constitution does not provide for greater transparency in judicial appointments, Parliament is now aware of the clout it can wield and is likely to act over such issues.

YES: A YES score is earned if there is a formal process establishing a review of national-level judicial nominees by an agency or entity 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 the same body that appoints the judges (such as the Prime Minister approving judicial nominees put forward by the Minister of Justice, both of whom are part of the executive).

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

83

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.

The Judicature Act provides that:

3. (1) The jurisdiction of the High Court, the Court of Appeal and of all subordinate courts shall be exercised in conformity with –
(a) the Constitution;
(b) subject thereto, all other written laws, including the Acts of Parliament of the United Kingdom cited in Part I of the Schedule to this Act, modified in accordance with Part II of that Schedule;
(c) subject thereto and so far as those written laws do not extend or apply, the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August, 1897, and the procedure and practice observed in courts of justice in England at that date; but the common law, doctrines of equity and statutes of general application shall apply so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary.

(2) The High Court, the Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.

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.

An example of justification of judgments can be seen at http://www.kenyalaw.org/Articles/show_latest.php?cat=20.

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:

Section 62 (7) of the Constitution empowers the president to appoint a tribunal to investigate the conduct of the chief justice. Section 62 (5) empowers the president (on the recommendation of the chief justice) to appoint a tribunal to investigate any judge's conduct. Further, Judiciary 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 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. A YES score can still be earned if the judicial disciplinary agency (or mechanism) is internal to 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

References:

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."

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 executive ministry or legislative committee.

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

100 | 75 | 50 | 25 | 0

Comments:

For some reference to the Kwach Report, got to: <http://www.gjlos.go.ke/gjinner.asp?cat=aboutus> For the Ringera Report, go to http://www.marskenya.org/Reports/Government/Ringera_Report.pdf

References:

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 effective running of the Public Complaints Standing Committee will translate into some positive actions against judicial inefficiency.

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.

100 | 75 | 50 | 25 | 0

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. For the report, see http://www.marskenya.org/Reports/Government/Ringera_Report.pdf.

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. For example, see <http://multimedia.marsgroupkenya.org/?StoryID=247598&p=Migori&page=2>.

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

References:

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

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

References:

As public officers, judicial officers are also governed by the Public Officers Ethics Act (Cap 203), which prescribes how to manage gifts and hospitality.

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. A zero score is also earned if judges are allowed to hold private sector jobs while serving on the bench.

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. Indeed, the public only becomes aware of such goings on in extenuating circumstances, as was the case with the Ringera Report (http://www.marskenya.org/Reports/Government/Ringera_Report.pdf).

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 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.

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

100 | 75 | 50 | 25 | 0

References:

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

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: 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.

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

References:

The law (Public Officers Ethics Act) does not provide for this. Instead, the act imposes great confidentiality over the declarations.

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

References:

The law (Public Officers Ethics Act) does not provide for this. Instead, the act imposes great confidentiality over the declarations.

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

References:

The confidentiality provided by the Public Officers Ethics Act means it is impossible to access the declaration forms.

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.

39d. In practice, the asset disclosure records of the national-level judiciary are of high quality.

100 | 75 | 50 | 25 | 0

References:

The confidentiality provided by the Public Officers Ethics Act means it is impossible to access the declaration forms.

100: The asset disclosure records of the national-level judiciary are complete and detailed, providing the public with an accurate and updated accounting of the individuals' sources of income, investments, and other financial interests.

75:

50: The asset disclosure records of the national-level judiciary contain some useful information but may be lacking important details, including politically sensitive investment or other financial arrangements in which the individual has an interest.

25:

0: The asset disclosure records of the national-level judiciary are overly general, lack any meaningful detail, and do not provide a clear accounting of the individuals' sources of income, investments, and other financial assets.

III-4. Budget Processes

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

75

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

YES | NO

References:

The 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. Meanwhile, the Fiscal Management Act (No 5 of 2009) has revolutionized Parliament's participation in the budget process. Section 3 establishes the Parliamentary Budget Office whose functions are listed as follows in Section 4:

- (1) The functions of the Budget Office shall be to provide the National Assembly with timely and objective information and analysis in connection with the national budget and economy.
- (2) Without prejudice to the generality of subsection (1), the Budget Office shall
 - (a) provide budget related information to the relevant committee, the departmental committees and other financial select committees of the National Assembly;
 - (b) provide service the committees referred to in paragraph (a) within their budgetary jurisdictions;
 - (c) prepare reports on budgetary projections and economic forecasts and options to reduce the budget deficit;
 - (d) prepare analytic studies of specific subjects such as financial risks posed by Government sponsored enterprises and financial policies;
 - (e) sponsor such national and international forums as it may consider necessary.
 - (f) study budget proposals and trends and where appropriate, suggest changes in the content or format of such proposals or trends;
 - (g) propose, where necessary, alternative scenarios for various macro economic variables in respect of any financial year;
 - (h) establish and foster such relationships with the Treasury and with other national and international organizations, with interest in budgetary and economic matters, as it deems fit for the efficient and effective discharge of its mandate;
 - (i) undertake, independently or in collaboration with any appropriate person or institution, any other study or activity likely to assist in carrying out the functions specified in this subsection.
- (3) The Budget Office shall ensure that its researches, studies, evaluations, findings, recommendations and other relevant literature are presented in a readily intelligible and user-friendly form.

During the June 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.

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 (that money may only be withdrawn from the Consolidated Fund with parliamentary approval), 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. In October, for example, Parliament refused to debate the Finance and Appropriation Bills in order to pressure the president to withdraw his illegal reappointment of the anti-corruption commission head. See <http://www.kbc.co.ke/story.asp?ID=60023> and <http://multimedia.marsgroupkenya.org/?StoryID=236905&p=Maalim+Farah&page=5>.

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 establishment by the Fiscal Management Act of the Parliamentary Budget Office should improve parliamentarians' capacity to digest and respond to budget proposals.

For budget participation, see <http://multimedia.marsgroupkenya.org/?StoryID=271232&p=State+House&page=2>. For the provisions of the act, go to http://www.kenyalaw.org/kenyalaw/klr_home/.

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?

75

41a. In practice, the national budgetary process is conducted in a transparent manner in the debating stage (i.e. before final approval).

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.

See <http://multimedia.marsgroupkenya.org/?StoryID=271232&p=State+House&page=2>.

For the budget speech that preceded the debate on this financial year's budget, go to http://www.parliament.go.ke/parliament/national_budget.php.

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.

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.

For community level participation, see also <http://www.internationalbudget.org/resources/library/HearingKenya.pdf> and <http://www.internationalbudget.org/resources/briefs/eng3.pdf>.

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.

100 | 75 | 50 | 25 | 0

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 dis-aggregate expenditure proposals to the district level. The printed estimates are circulated to the media ahead of the budget speech and are subsequently available from the government press 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.

100 | 75 | 50 | 25 | 0

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. See the provisions of Standing Order 187 and 188 at http://www.parliament.go.ke/parliament/downloads/tenth_third_sess/new_standing_orders..pdf.

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. See http://www.parliament.go.ke/parliament/downloads/tenth_third_sess/new_standing_orders..pdf.

In 2008, there was a standoff between coalition partners, ODM and PNU, over appointments to the HBC, including identification of the Leader of Government Business. Consequently, the Speaker assumed the chair and has been running HBC since.

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 (HBC) caused this important body to be politicized in a way that undermined the objectivity of its functioning. Year 2008 saw a stand off between coalition partners ODM and PNU over the appointment of the Leader of Government Business in the House. Thus, HBC is in the interim headed by the Speaker instead of a government minister. Ironically, this might instill some objectivity because of the Speaker's integrity, despite being an ODM member.

As for the Public Accounts and Public Investment Committees, which review the Controller and Auditor General (CAG) reports, the extent of their independent investigation is to summon relevant government officers to come and clarify queries arising. See <http://multimedia.marsgroupkenya.org/?StoryID=271092&p=Ikolomani>.

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. In law, 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

References:

Chapter VIII of the Constitution provides for the establishment of the Public Service. Section 106 of the chapter establishes a Public Service Commission (PSC) whose 17 commissioners appointed exclusively by the president, 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."

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

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

References:

Besides the constitutional provisions for an objective public service, Part III (Guiding Provisions for Codes of Conduct and Ethics) of the Public Officers Ethics Act (Cap 203) addresses efficiency and honesty (Section 7), professionalism (Section 8), legality (Section 9), improper enrichment (Section 10), conflict of interest (Section 11), improper 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."

Meanwhile, the main public employer, the Public Service Commission's vision is "To be a world class constitutional body in the provision of a globally competitive human resource that serves the needs of Kenyans." Among its core values are: meritocracy, reliability, integrity, fairness, transparency and accountability and equity and diversity.

See http://www.publicservice.go.ke/index.php?option=com_content&task=view&id=18&Itemid=42.

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

References:

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.

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, or if the only recourse civil servants have is directly through the courts.

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

YES | NO

References:

Section 64(1) of the Anti-Corruption and Economic Crimes Act provides that conviction disqualifies an ex-officer from holding an appointed or elected office for 10 years with Subsection 4 providing for names of disqualified persons to be gazetted once a year.

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

NO: A NO score is earned if no such rules exist or if the ban is not a lifetime ban.

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

61

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

100 | 75 | 50 | 25 | 0

References:

The constitutional provisions of Chapter VIII giving the exclusive powers to the president 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 retired High Court judge who has been heading the national anti-corruption agency accepted an illegal re-appointment to the position knowing fully the president had erred in law. See <http://allafrica.com/stories/200909170793.html>.

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 key word 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 was 55, this was changed to 60 to enable key cronies of the president to remain in public office. Ironically, several of these, including the head of the civil service and the executive head of the national airports authority are well into their mid-60s with seemingly no intention to retire. See <http://africanpress.wordpress.com/2008/04/22/kenya-muthaura-survived-from-being-dropped-as-ps-despite-his-age/> and see <http://africanpress.wordpress.com/2009/06/29/g/>.

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. In an April re-appointment of the chief executive of the Kenya Airports Authority, a brother-in-law of the founding president and political crony of the current president, the minister ignored advice from both the authority's boards and an HR firm hired over the matter (see <http://www.eastandard.net/InsidePage.php?id=1144010722&cid=4&>).

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

References:

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. Performance contracts and results-based management imply very clear specification of roles and responsibilities. The debate over the last year has been on whether the judiciary and teaching professions should sign on to such contracts.

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

References:

Section 3.8/71 (iii) of Pay Policy for the Public Service" (January 2006) provides that "the performance related component of the compensation package will be paid in the form of a performance bonus (based on) well thought out and objectively identified performance indicators." 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.

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. Currently (November 2009), Mombasa City Council is undertaking an employee census because of concerns over ghost workers.

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 the Public Service Commission (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/commissioners are largely political appointees, officer cases with political under/overtones are unlikely to get an objective hearing. For the junior officers, departmental hearings are largely kangaroo courts without ceremony.

In an on-going dispute, two public university lecturers won an industrial court case for their reinstatement and payment of all benefits, which the vice chancellor has refused to comply with. Instead, the university has sought alternative relief from the High Court, meaning the lecturers remain in abeyance in a judicial system that could take years to resolve the dispute.

See <http://allafrica.com/stories/200910010160.html> and <http://www.nation.co.ke/News/-/1056/673650/-/uo10og/-/index.html>.

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 three months overdue. However, problems persist among local authorities with narrow revenue bases. Nairobi City Council workers often take to the streets in protest despite theirs 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.

See <http://allafrica.com/stories/200809280102.html> and <http://www.marsgroupkenya.org/multimedia/?StoryID=219196&page=3>. See also a story on 10 years arrears at <http://www.capitalfm.co.ke/news/Kenyanews/Nairobi-City-Council-pays-retirees-6544.html>.

Timeliness of payments should improve 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

References:

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

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 wake of the Anglo Leasing scandal were subsequently reinstated even before the cases against their alleged co-conspirator civil servants had 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. See <http://multimedia.marsgroupkenya.org/?StoryID=161530&p=Wario+Ali&page=3>.

Currently, there is growing international pressure for the Kenyan government to fight impunity. Hopefully, this will translate into a firmer stance against all that are accused of corruption, raise the rate at which such cases are resolved, and ensure due punishment within the law.

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

References:

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."

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

References:

Section 11 (1) of the Public Officers Ethics Act (2003) requires that public officers avoid conflict between personal interests and official duties. Section 11 (3) requires such an officer to declare such a conflict to his or her superior officer or other appropriate body, and to comply with given directions. Personal interests extend to spouses, relatives, business associates and an body in which the officer has an interest. Section 42 (3) of the Anti-Corruption and Economic Crimes Act also adjudges a public agent guilty of an offense if he or she knowingly acquires or holds, directly or indirectly, a private interest in any contract, agreement or investment emanating from or connected with the public body."

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

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

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

References:

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

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

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

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

YES | NO

References:

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.

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 headhunts 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 ineffective. They are difficult to uphold or even monitor 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. Officers presiding over public functions, such as a fund raising event, will be typically rewarded with a goat or sheep, or simply a sumptuous meal.

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 African extended family system: pushing for a relative's benefit could reduce one's burden of family responsibilities.

For a recent experience, see <http://www.marsgroupkenya.org/multimedia/?StoryID=261081&p=Eldoret+South&page=1>. For an old example, see <http://www.marsgroupkenya.org/multimedia/?StoryID=139831&page=4&p=Mohamed+Hussein+Ali>.

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. Their contents remain confidential to the commission to which the declaration was made, which might be the full extent of their auditing. To date, a former cabinet minister remains before the courts four 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?

47a. In law, citizens can access the asset disclosure records of senior civil servants.

YES | **NO**

References:

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 and company registry.

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:

To the extent that access to asset declaration details is illegal except under a court order, this is not an undertaking within the space of the average citizen. Obviously, resort to the courts would be both expensive and time consuming for the average Kenyan.

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.

47d. In practice, the asset disclosure records of senior civil servants are of high quality.

100 | 75 | 50 | 25 | 0

References:

To the extent that asset declaration details are generally inaccessible, nothing is available in the public domain to enable an evaluation of their quality.

100: The asset disclosure records of senior civil servants are complete and detailed, providing the public with an accurate and updated accounting of the individuals' sources of income, investments, and other financial interests.

75:

50: The asset disclosure records of senior civil servants contain some useful information but may be lacking important details, including politically sensitive investment or other financial arrangements in which the individual has an interest.

25:

0: The asset disclosure records of senior civil servants are overly general, lack any meaningful detail, and do not provide a clear accounting of the individuals' sources of income, investments, and other financial assets.

IV-2. Whistle-blowing Measures

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

63

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

References:

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.

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. Further, during the tallying of the 2007 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 to exile in Europe. After the February 2008 formation of the Grand Coalition government, he has since returned and joined the staff of the prime minister's office, literally under the protection of the presidential candidate whose votes he had reported to be being stolen.

In the case of former Central Bank deputy governor who blew the whistle on irregular procurement awards, she declined a transfer to become the permanent secretary of an obscure ministry and opted to resign from public service.
See <http://www.kbc.co.ke/story.asp?ID=52552>.

Finally, a police officer who became a whistle-blower at the Kenya National Commission of Human Rights lost his life.
See http://www.facebook.com/note.php?note_id=65107219576.

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

References:

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.

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:

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. However, whistle-blowers remain at great risk of losing their lives or experiencing other adversity. See http://www.facebook.com/note.php?note_id=65107219576.

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?

63

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

100 | 75 | 50 | 25 | 0

References:

Different agencies have different capacities to monitor internal reporting mechanisms. The Kenya Anti Corruption Commission (KACC) for example, 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 even if its vice chairman reports that the government has been reducing its resources over the last three years (see http://www.facebook.com/note.php?note_id=65107219576.) In most of the other government agencies, however, there does not seem to be any special provisions for full-time officers deployed to anti-corruption desks, meaning they might still be amenable to shady deals.

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. Indeed, the KACC advisory board has recently advertised the top jobs in the agency, announcing a cut in the salaries of the top officers.

The Kenya National Commission on Human Rights also continues to be well funded even if it has continued to rub the government the wrong way because of its single-minded pursuit of its mandate. Its vice chair complains of a punitive cut on its financial resources over the last three years (see http://www.facebook.com/note.php?note_id=65107219576).

As for other public agencies initiatives along these lines, their funding is not specific and largely depends on what the head puts aside for these activities.

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.

100 | 75 | 50 | 25 | 0

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. Thus, 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 completed 498 investigations that have been handed to the attorney general for prosecution. This list includes eight ministers, eight former permanent secretaries, three members of Parliament, 56 chief executives of state corporations and 89 senior public servants. For its other achievements, go to <http://www.kacc.go.ke/archives/pressreleases/achievements%20by%20kacc.pdf>.

However, given KACC's overabundant technical expertise in developing a case against the accused, it is surprising that so many of its cases are rejected for prosecution by the attorney general or rejected by the courts.

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.

100 | 75 | 50 | 25 | 0

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. In law, 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:

There is no law/legislation per se providing for such services. However, since the enactment of the Anti-Corruption and Economic Crimes Act, many government agencies have declared themselves corruption-free zones," including such notoriously corrupt 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.

75
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

References:

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.

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

References:

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.

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.

Currently (November 2009), the finance minister has been before the Public Accounts Committee to explain his seemingly unilateral decision to centrally procure one model of car (VW Passat) for all cabinet ministers and their assistants. See <http://www.kbc.co.ke/story.asp?ID=60851>.

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

References:

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.

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

References:

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.

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

References:

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.

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

References:

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.

The following site illustrates such reviews over the years: http://www.ppoa.go.ke/index.php?option=com_content&task=view&id=58&Itemid=93.

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

References:

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.

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

References:

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.

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

References:

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.

The original practice of naming blacklisted companies has been withdrawn from the PPOA website. However, some useful information is available at http://www.ppoa.go.ke/index.php?option=com_jdownloads&Itemid=117.

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.

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

YES | NO

References:

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.” The law stipulates the frequency with which different tenders must be advertised in the media.

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

References:

The government must publish contracts it has awarded, as stipulated by the 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. See http://www.ppoa.go.ke/index.php?option=com_wrapper&Itemid=47.

The fact that the finance minister has in November 2009 appeared before the parliamentary Public Accounts Committee to explain the allegedly irregular procurement of VW Passats for ministers also suggests that not all tenders are 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?

92

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

YES | NO

References:

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.

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

References:

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.

Other legislation that also address issues of conflict of interest include the Public Procurement and Disposal Act, the Public Officers Ethics Act and the Anti-Corruption and Economic Crimes Act.

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

References:

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.

In an ongoing debate concerning the sacking of the chief executive of the government's Youth Enterprise Fund (YEF), it has been reported that his mistake was to object to the loaning of YEF funds to a Canadian agency two of whose members sit on the YEF board. See <http://multimedia.marsgroupkenya.org/?StoryID=271758&p=State&page=5> See alternative angle at <http://yipe.wordpress.com/2009/10/24/hon-sambili%E2%80%99s-move-to-reinstate-umuro-wario-at-kenya%E2%80%99s-youth-fund-should-be-lauded/>.

See also debates concerning the purchase of VW Passat cars to replace the Mercedes Benz, which has been symbolic of the Kenyan elite, at <http://kenyapolitical.blogspot.com/2009/11/david-makali-why-uhurus-passat.html>.

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?

90

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

YES | NO

References:

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.

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:

Arising from the previous 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. During 2009, the finance minister proposed privatizing two very profitable institutions, including Kenya Commercial Bank. This provoked parliamentary questions over the minister's intentions.

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

References:

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.

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.

56. Is the national ombudsman effective?

43

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

YES | NO

References:

Gazette Notice No. 5826 of June 29, 2007 that established the Public Complaints Standing Committee provides at Section 3 that it shall be responsible to the president to whom it shall provide quarterly reports. This is the height of executive interference.

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) operates independently. In any case, since its operationalization in August 2008, there is yet no evidence of the fruits of its labor in spite of common knowledge of the rot in the Kenyan public service. See <http://www.gjlos.go.ke/gjinner.asp?pcat2=agencies&pcat=minjust&cat=complaintstanding>.

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.

References:

The chair and members of the Public Complaints Standing Committee (PCSC) are appointed by the president under Section 23 (1) of the Constitution to three-year terms. The gazette notice does not specify whether or how they can be removed or whether their tenures are renewable. However, the Constitution provides that all public servants hold office at the pleasure of the president.

Meanwhile, the complaints commission reports it is at an advanced stage in drafting a bill to be tabled in Parliament seeking to give the body a status in law. This is likely to be accompanied by more secure and objective terms of employment for the commissioners.

Also see <http://www.gjlos.go.ke/gjinner.asp?pcat2=agencies&pcat=minjust&cat=complaintstanding>.

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.

References:

Four of the five commissioners of the Public Complaints Standing Committee (PCSC) are qualified lawyers, meaning the agency is headed by people who are quite conversant with Kenyan law. The agency also has an executive head and a complement of full-time secretariat staff. The executive director reports that the agency's budget resources have been increasing over the years; but much still remains to be done. For example, one of the reasons why the agency only cleared 22 percent of the 1,720 complaints received since its June 2007 inception is because of capacity constraints. The Chairman reports they are weighing the relative costs/benefits of decentralization to provinces and districts and the alternative of a dedicated ICT expansion scheme.

See PCSC's fourth quarterly report for 2008/2009 covering the period April 1, 2009 to June 30, 2009.

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).

References:

The agency's staffing appointments to date have enhanced its capacity to deliver. However, much remains to be done, which is why it has only been able to resolve 22 percent of the 1,720 complaints received in its two years of existence. The agency's legal framework also undermines its capacity to act independently as it has to always rely on the Office of the President and the Ministry of Justice and Constitutional Affairs. Once the agency is given its exclusive statutory identity, it will be in a better position to act independently, says the chairman.

See 14/11/2009 report at <http://www.nation.co.ke/News/-/1056/686036/-/uoohrx/-/index.html>.

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.

References:

The Public Complaints Standing Committee (PCSC) or the Office of the Ombudsman Kenya was established under a basket-funding program in the Ministry of Justice and Constitutional Affairs, dubbed the Governance, Justice Law Order and Service (GJLOS). Consequently, its funding has been quite regular. However, as an enterprise breaking into new ground, and notwithstanding the examples to be gleaned from other country experiences, funding has not kept pace with need. The executive director express(es) appreciation to government for the increase in its budget..."; yet, much more financial resources are required if the agency is to fulfill its ambitious intention to migrate "all its operations and processes from a manual to an IT platform in the next quarter."

See PCSC's 'The fourth Quarterly Report 2008/09...':

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 Public Complaints Standing Committee (PCSC) publishes regular quarterly reports as required by its terms of reference. However, the reports are a mere summation of workloads rather than an in-depth analysis of the contents of complaints, debates arising and the manner in which the cases were resolved. An approach that exposes details of specific cases might be educational for other managers of public institutions who might be faced with similar circumstances.

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 public Complaints Standing Committee is essentially an investigative body. On receipt of a complaint, it evaluates its relevance to PCSC's mandate. If positive, it interviews the complainant to establish details of the matter. Thereafter, PCSC approaches the relevant government agency with the complaint to establish the agency's response to the allegations received.

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:

The Public Complaints Standing Committee (PCSC) was established by a mere Gazette Notice, meaning its authority is minimal.

It merely receives complaints, refers these to the relevant government agency and hopes the agency will respond. It has no capacity at all to mete out punishment or penalties. However, this concern is being addressed by the bill that is being drafted to make the agency a statutory one.

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:

The distribution of complaints against government departments varies greatly; so does the efficiency of their reactions to issues raised by the Public Complaints Standing Committee (PCSC). PCSC's 'The Fourth Quarterly Report 2008/2009' does not indicate how many complaints were received against each department. However, it notes that Ministry of Lands and Kenya Police accounted respectively for 20 percent and 15 percent of all the 20 cases for which there was no response for over one year.

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.

100 | 75 | 50 | 25 | 0

References:

The Public Complaints Standing Committee (PCSC) tries to act on complaints promptly, only being constrained by its weak capacity. For example, during the April 1 to June 30 quarter, PCSC dealt with 909 complaints. Of the 270 which were new, inquiries were initiated in 43 with the balance being carried forward to the next quarter.

See PCSC's 'The Fourth Quarterly Report 2008/09.'

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?

58

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

YES | NO

References:

While the Gazette Notice establishing the Public Complaints Standing Committee (PCSC) stated that the agency submits quarterly reports to the president, the agency has actually taken it upon itself to publish the same reports. It is developing its website at <http://www.ombudsmankenya.go.ke>, which will contain such reports once operational.

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:

To the extent that the Public Complaints Standing Committee only has one office in Nairobi, this encumbers the public's access to its quarterly reports. However, the proposal is to publish these online, meaning they will be quite easily accessible to the public with ICT access, even if those without such access will continue to be inconvenienced.

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:

To the extent that the Public Complaints Standing Committee only has one office in Nairobi, this encumbers the public's access to its quarterly reports. However, the proposal is to publish these online, meaning they will be quite easily accessible to the public with ICT access, even if those without such access will continue to be inconvenienced.

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. In law, 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 Public Complaints Standing Committee (PCSC) was established 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.

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.

59. Is the supreme audit institution effective?

81

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

YES | NO

References:

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:

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

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. Further, the Public Audit Act has diversified representation on the Kenya National Audit Office board, raising the independence of the agency.

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.

See <http://www.kenao.go.ke/about%20us.html>.

100: The agency has staff sufficient to fulfill its basic mandate.

75:

50: The agency has limited staff that hinders it 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 has constitutionally guaranteed security of tenure and is a professional, as is his staff. 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. See KENAO's very open criticism of the Finance ministry

at <http://www.ipar.or.ke/Documents/PR/Integrity%20mechanisms%20indoubt%20in%20the%20Ministry%20of%20Finance%20DP%20106%20%2>

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 (KENAO) 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. Since the establishment of KENAO, the government has pumped substantial resources into the agency, modernizing its facilities while also increasing its staffing strength to have its officers embedded in the various government departments and agencies to be audited.

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 press. However, the CAG's report is handed over to the parliamentary Public Accounts and Public Investment Committees, which revisit any queries raised by CAG, summoning respective accounting officers to explain any anomalies. These parliamentary reports are in areas, the most recent ones being for financial year 2005/2006.

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 malfeasance that eat into ministry budgets.

However, 2009 saw the passage of the Fiscal Management Act, which empowers Parliament at section 16 to withhold the budget resources of any department that has not complied with the CAG's recommendations, and indeed, to withhold the emoluments of an officer guilty of the same failure to comply.

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

References:

The Controller and Auditor General's (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.

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

References:

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.

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 that 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. In law, 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

References:

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>.

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 most highly paid public officials in Kenya. Notwithstanding these factors, there is often a sense of some parochialism in managerial appointments to such strategic state agencies.

For example, when the present KRA chief's term expired in January, and with the country anticipating a replacement, his term was quietly extended by three years.

See <http://www.nation.co.ke/business/news/-/1006/526112/-/view/printVersion/-/i7713xz/-/index.html>.

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

References:

The Kenya Revenue Authority (KRA) Act provides that the corporation retain 1 percent of the revenues it collects to finance its operations. Furthermore, the agency has benefited from extensive technical assistance for reform projects.

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. The government continues to improve the level of expertise, such as by introducing ICT systems. The revenue agency's website says there are no vacancies: see <http://www.kra.go.ke/notices/kraadvertslink2007.html>.

Recently, the agency has been adjudged to be understaffed due to a backlog in the processing of vehicle log books. However, this arose from a very sharp rise in the demand for motorbikes which are being used as taxis.

See <http://allafrica.com/stories/200909180545.html>.

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, which retains 1 percent of all revenues it collects.

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. In law, is there a national tax collection agency?

100

61. In law, is there a national tax collection agency?

YES | NO

References:

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)

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. In practice, 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, and there are individuals who are exempted by the law from paying income taxes, such as constitutional office holders. During the last year, there has also been extensive debate over whether parliamentarians should pay taxes against all their parliamentary emoluments, or only a portion as is presently the case.

That aside, politically connected people have managed to evade paying taxes. However, revenue collection has improved greatly since the end of the KANU regime in 2003, suggesting that various tax evasion loopholes have been plugged. See graphic at <http://www.nation.co.ke/business/news/-/1006/526112/-/view/printVersion/-/17713xz/-/index.html>.

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. In law, 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. In practice, 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://www.nation.co.ke/business/news/-/1006/526112/-/view/printVersion/-/i7713xz/-/index.html>.

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?

55

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 (KENAO) 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. KENAO's website indicates it has no current vacancies: see <http://www.kenao.go.ke/careers.html>.

The Inspectorate of State Corporations is also well resourced, even if it is embedded in the Prime Minister's office.

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:

Oversight agencies like the Inspectorate of State Corporations and the Comptroller and Auditor General receive their funding through the regular budget process. Thus shortfalls in their resources, or even delays in getting them, will be a function of the regular budget processes.

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:

As provided by the State Corporations Act, the work of the Inspector General is to investigate so that he or she can advise the minister on the goings on in a relevant corporation. The State Corporations Advisory Board is similarly empowered to investigate. 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.

See <http://www.standardmedia.co.ke/InsidePage.php?id=1144023857&cid=4&>.

The most recent high-profile case has been that of the managing director of Kenya Bureau of Standards who was dismissed for mishandling the inspection of a consignment of maize imported from South Africa. For details, see <http://www.eastandard.net/mag/InsidePage.php?id=1144023946&cid=457&>.

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:

The Inspector General (corporations) and the State Corporations Advisory Committee do not have any capacity to impose penalties on offenders. This role is left to the parent ministry, which can take various actions, including interdiction, suspension and delivery to the Kenya Anti Corruption Commission (KACC) for further investigation. Where appropriate, KACC can then forward its recommendations to the Attorney General for prosecution and dismissal. For example, see <http://www.standardmedia.co.ke/InsidePage.php?id=1144017518&cid=16&>.

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's Public Investment

Committee. The newly instituted Fiscal Management Act now empowers Parliament to punish errant officers by withholding resources and personal emoluments equivalent to those for which responsible officers have failed to provide adequate explanations to audit queries.

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?

75

69a. In law, citizens can access the financial records of state-owned companies.

YES | NO

References:

Section 14 of the State Corporations Act (Cap 446) provides that such accounts be audited and reported annually according to the provisions of the Public Audit Act (2003). When these are published by the Controller and Auditor General, they become accessible to the public.

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 state corporations are 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). See http://www.kenao.go.ke/stru_state_corps.html. Also see a report on the financial status of the national broadcaster, the Kenya Broadcasting Corporation, at <http://blogs.rnw.nl/medianetwork/kenya-broadcasting-corporation-faces-massive-debt>.

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

References:

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.

See <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. However, delays in finalizing the audit for a particular year denies citizens access to that financial year's audit report.

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. However, completed audit reports are tabled in Parliament, meaning citizens and the media have access to them. State corporations with websites may also post summarized versions 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. In law, 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.

State-owned companies 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.

Further, the State Corporations Act, Cap 446 of the Laws of Kenya, establishes under Section 18(1), the office of the Inspector General (corporations) whose office is in the public service and whose duties are – (a) to advise the government on all matters affecting the effective running of state corporations; (b) to report periodically to the Minister on management practices within any state corporation; (c) to report to the Controller and Auditor General any cases where moneys appropriated by Parliament are not being applied by state corporations for the purposes for which they were appropriated.

(2) For the purposes of carrying out his duties under subsection (1) the Inspector General (corporations) shall have the following powers – (a) to call for and inspect all books, records, returns and documents which in his opinion relate to the accounts of, or to execution of the functions of any state corporation; (b) to enter and inspect the premises, including any plant and installation thereon, of any state corporation; (c) to attend meetings of any state corporation or of a board or committee thereof if in his opinion it is necessary to do so for the effective carrying out of his duties under this section.

(3) The committee, or the Controller and Auditor General may, if they consider it desirable, require the Inspector General (corporations) to conduct special investigations of any state corporation on their behalf and to report the findings to them.

(4) There may be appointed such staff whose offices shall be offices in the public service as are necessary to assist the Inspector General (corporations) in the performance of his duties under this act.

There is also established the State Corporations Advisory Committee, which has power to do the following:

(a) with the assistance of experts where necessary, review and investigate the affairs of state corporations and make such recommendations to the president as it may deem necessary;

(b) in consultation with the Attorney General and the Treasury, advise the president on the establishment, reorganization or dissolution of state corporations;

(c) where necessary, advise on the appointment, removal or transfer of officers and staff of state corporations, the secondment of public officers to state corporations and the terms and conditions of any appointment, removal, transfer or secondment;

(d) examine any management or consultancy agreement made or proposed to be made by a state corporation with any other party or person and advise thereon;

(e) examine proposals by state corporations to acquire interests in any business or to enter into joint ventures with other bodies or persons or to undertake new business or otherwise expand the scope of the activities and advise thereon.

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.

77
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

References:

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.

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

References:

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.

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

References:

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.

See http://www.trade.go.ke/index.php?option=com_content&task=view&id=18&Itemid=39.

Also see <http://www.businesslicense.go.ke/>.

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?

100

71a. In law, basic business regulatory requirements for meeting public health standards are transparent and publicly available.

YES | NO

References:

The relevant statutes include Act No. 11 of 2007; Employment Act Act No. 12 of 2007; Labor Institutions Act, Act No. 13 of 2007 ; Work Injury Benefits Act, Act No. 14 of 2007; Labor Relations Act.

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

References:

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.kenyalaw.org/kenyalaw/klr_home/.

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:

The pertinent legislation are Act No. 11 of 2007; Employment Act Act No. 12 of 2007; Labor Institutions Act, Act No. 13 of 2007; Work Injury Benefits Act, Act No. 14 of 2007; Labor Relations Act. These are available at http://www.kenyalaw.org/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 even where adequate frameworks exist and personnel is adequately trained. Inspection can often be superficial, especially as officials are easily compromised through bribery. 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.

See <http://multimedia.marsgroupkenya.org/?StoryID=271352>.

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.

References:

The National Environment Management Authority is a formidable institution with an extensive array of services offered (see <http://www.nema.go.ke/>). However, 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.

That environmental inspection is not universal, can be gleaned from the National Environment Management Agency's (NEMA) response to the question: Which projects are exempted from conducting a full EIA study? NEMA states that: "Projects whose likely environmental impacts are minimal and can be adequately mitigated." See http://www.nema.go.ke/index.php?option=com_content&task=view&id=27&Itemid=50.

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.

References:

The formal/informal sector divide is pertinent. Further, inspectors are often easily compromised by entrepreneurs. During September 2009, for example, a building under construction collapsed killing at least 11 people. This was due to the poor adherence to and supervision of existing building standards. This is not a one-off incident. Further, many residential estates carry more than three or four times the populations originally provided for since house owners randomly build extensions that house more people than the main residential house. This strains amenities, such as water supplies and sewage systems, causing serious environmental hazards. See <http://news.bbc.co.uk/2/hi/8315225.stm>.

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.

VI-1. ⁸¹Anti-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. All these statutes are available at 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

References:

The corruption laws all address the issue of extortion in some way or other. For example, Section 40 (2) of the Anti Corruption and Economic Crimes Act declares a person guilty of an offense if they receive, solicit, or agree to receive or solicit a benefit.

YES: A YES score is earned if corruption laws include extortion. Extortion is defined as demanding favorable treatment (such as a bribe) to withhold a punishment.

NO: A NO score is earned if this is not illegal.

73c. In law, offering a bribe (i.e. active corruption) is illegal.

YES | NO

References:

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.

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

References:

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.

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

References:

Section 39 of the Anti Corruption and Economic Crimes Act provides that bribing anyone, including foreign officials, is illegal.

YES: A YES score is earned if bribing a foreign official is illegal.

NO: A NO score is earned if this is not illegal.

73f. In law, using public resources for private gain is illegal.

YES | NO

References:

Section 46 of the Anti Corruption and Economic Crimes Act addresses abuse of public office. It declares a person guilty if they use their office to improperly confer benefits on themselves or anyone else. Various sections of the Public Officers Ethics Act also address this issue, including Sections 10, 11, 15, 16, 19 and 20.

YES: A YES score is earned if using public resources for private gain is illegal.

NO: A NO score is earned if this is not illegal.

73g. In law, using confidential state information for private gain is illegal.

YES | NO

References:

Various sections of the Public Officers Ethics Act and the Anti Corruption and Economic Crimes Act imply that selling state secrets is an offense. Furthermore, the Official Secrets Act categorizes government information (confidential, secret, and top secret) and defines what category of officer may release such information.

YES: A YES score is earned if using confidential state information for private gain is illegal.

NO: A NO score is earned if this is not illegal.

73h. In law, money laundering is illegal.

YES | NO

References:

The substantive law to eventually handle money-laundering will be the Proceeds of Crime and Money Laundering Bill (2009), which had its first parliamentary reading in August 2009. In the meantime, money laundering is treated as a crime, with Section 49 of the Narcotic Drugs and Psychotropic Substances (Control) Act (1994) providing against the concealment or transfer of the proceeds of drug trafficking.

YES: A YES score is earned if money laundering is illegal. Money laundering is defined as concealing the origin of funds to hide wrongdoing or avoid confiscation.

NO: A NO score is earned if this is not illegal.

73i. In law, conspiracy to commit a crime (i.e. organized crime) is illegal.

YES | NO

References:

Sections 393, 394 and 395 of the Penal Code, Cap 63 of the Laws of Kenya declare conspiracies to be criminal offenses. Meanwhile, Section 22 of the Narcotic Drugs and Psychotropic Substances (Control) Act addresses conspiracy to commit drug-related crimes.

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

References:

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 he or she cannot be threatened into particular actions against the threat of dismissal.

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:

It is not entirely the case that the anti-corruption agency is protected from political interference. 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. Read Michaela Wrong (2009), *Its Our Turn to Eat*.

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

References:

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 who appoints the Chief Justice and Judicial Service Commission, it is conceivably that a desirable bench could be established to remove the KACC director.

Ironically, the immediate past head of KACC was in October shunted out of office in what amounted to a comedy of errors. On the eve of the expiry of his five year tenure, the president violated the law in unilaterally reappointing him when he had just previously followed the law in having the KACC Advisory Board and Parliament nominate a candidate for reappointment as Assistant Director. Consequently, Parliament voted to extinguish the Gazette Notice carrying the reappointment, the outgoing director thereby being thrown out. See <http://www.nation.co.ke/News/-/1056/665740/-/unfv72/-/index.html>.

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

References:

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.

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 full professional staff cohort, among the best-paid public officers in Kenya. Its director has been receiving a higher salary than the national president. However, perceptions that the agency was not pulling its weight have led the KACC advisory board to impose a 30 percent pay cut on the next substantive director of the agency for whom the recruitment process is currently underway.

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

References:

Section 13 of the Anti-Corruption and Economic Crimes Act (2003) provides that the expenditures of the commission be charged to the Consolidated Fund, meaning it is free of ministerial controls that many other agencies are subjected to. The KACC advisory board may approve grants, gifts, donations and bequests that might be offered to the commission. Consequently, the commission has reliable income sources.

100: The agency (or agencies) has a predictable source of funding that is fairly consistent from year to year. Political considerations are not a major factor in determining agency funding.

75:

50: The agency (or agencies) has a regular source of funding, but may be pressured by cuts, or threats of cuts to the agency budget. Political considerations have an effect on agency funding.

25:

0: The agency's funding sources are unreliable. Funding may be removed arbitrarily or as retaliation for agency actions.

75g. In practice, the anti-corruption agency (or agencies) makes regular public reports.

100 | 75 | 50 | 25 | 0

References:

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>.

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

References:

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. Further, the former director obviously succumbed to political intrigues, undermining the commission's work.

A major problem for KACC is that it does not have prosecuting powers, meaning it must hand over its investigative findings to the Attorney General who decides whether or not to prosecute.

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

References:

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 allegedly suffered enough. See M. Wrong (209), Its Our Turn to Eat.

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. For progress reports since its inception, go to <http://www.kacc.go.ke/default.asp?pageid=45#>.

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

References:

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. However, 2009 has seen the killing of various people involved in activities under police investigation, some of whom have been thought to have been killed either by their former co-conspirators or by the police, who are thought might have wanted to silence them. See for example, <http://www.kbc.co.ke/story.asp?ID=60918>.

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. In law, 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

References:

Section 6 of the Anti-Corruption and Economic Crimes Act of 2003 establishes the Kenya Anti-Corruption Commission, which has the exclusive mandate of investigating allegations of corruption.

YES: A YES score is earned if an agency is specifically mandated to address corruption. A YES score is earned if there are several agencies or entities with specific roles in fighting corruption, including special prosecutorial entities.

NO: A NO score is earned if no agency (or group of agencies/entities) is specifically mandated to prevent or prosecute corruption.

88
VI-3. Rule of Law

77. Is there an appeals mechanism for challenging criminal judgments?

50

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:

There is no time limit within which an appeal must be resolved. A 2003 inquiry into judicial integrity found more than half of the Court of Appeal and High Court judges to be of unsatisfactory conduct. One High Court judge had reportedly not written a judgment three years later. 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 in 2009 demanded that the judiciary espouse performance contracting on service delivery. However, the judiciary adjudged this to be executive interference in judiciary matters, which is barred by the Constitution.

As an illustration of dissatisfaction with the Kenyan judiciary, some parties to business contracts apparently prefer these to be under foreign laws meaning disputes are resolved in foreign dispute settlement forums. Whereas many of these reasons are purely commercial and practical reasons that may apply regardless of the jurisdiction that the parties are dealing with, ... certain factors peculiar to Kenya ... include uncertainty and discrepancies in various laws, allegations of corruption, lack of capacity in relation particularly to highly technical contracts and significant delays in judicial decision-making."

See <http://multimedia.marsgroupkenya.org/?StoryID=262094&page=5&p=Mutula+Kilonzo>.

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:

Legal representation is rather expensive for Kenyans, 46 percent of whom live below the dollar-a-day poverty line. Section 3 of

the Advocates (Remuneration) (Amendment) Order provides that: No advocate may agree or accept his remuneration at less than that provided by this Order (i.e. 10,000 shillings, or US\$130).”

Consequently, 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. Attorney 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. Attorney 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. Attorney fees greatly discourage the use of the appeals process.

78. In practice, 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 a trial is undertaken, and 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 petty offenses by average Kenyans 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.

Once the recently established Public Complaints Standing Committee gets going, it is likely to provide a forum through which individuals aggrieved in the judicial system might seek redress. Further, there are reforms underway in the judiciary which should also improve service delivery, including proposals to have the current Chief Justice and all judges resign and re-apply, meaning they will be vetted for integrity. See http://www.icj-kenya.org/dmdocuments/newsletters/newsletter_1.pdf.

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. In practice, 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 in hospital (albeit under prison guards).

Politically connected individuals are also able to ignore judicial decisions with impunity. An Industrial Court order to a public university Vice Chancellor (VC) to reinstate two lecturers was ignored, occasioning the court to commit the VC to civil jail for contempt. However, the VC subsequently got a High Court order restraining her imprisonment. The matter generated a clash over the relative authorities of the parallel courts and is now due for constitutional interpretation.

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

References:

Section 68 of the Constitution provides for a Judicial Service Commission (JSC), which shall not be subject to the direction of control of any other person or authority in the performance of its duties. Among the JSC's duties is the appointment of judges from among whom the president appoints the Chief Justice. All judges have security of tenure, meaning they can only be removed before their due retirement date on the findings of a tribunal inquiry into their conduct.

YES: A YES score is earned if there are formal rules establishing that the judiciary is independent from political interference by the executive and legislative branches. Independence includes 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 appointments are highly politicized, a factor which can, and has been perceived, to influence judgments. Historically, the International Commission of Jurists-Kenya Chapter has argued, the Executive arm of the government has dominated the Judiciary in Kenya and this “has deeply damaged the separation of powers and the role of the Judiciary as a democratic check and balance on Executive action. It has also gravely undermined the integrity of the Judiciary itself.”

Indeed, the Chief Justice’s presence at State House on Dec. 30, 2007 to swear in the immediate past president 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 alleged victory.

See for example, <http://www.icj.org/IMG/pdf/kenyareport.pdf>.

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; and certainly, there is no blind lottery system. The Chief Justice allocates cases among High Court judges while the Registrar of the High Court 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

References:

Once judges are appointed, their removal before reaching retirement age can only be on the decision of a tribunal as provided by Section 62 (4-8) of the Constitution. However, during the 2003 judicial purge, the Chief Justice offered the option of voluntary retirement to judges against whom adverse allegations had been made. That some of the eight instances where judges

challenged allegations against them remain unresolved is an indictment on the inefficiency within the judiciary. One judge was actually re-instated without her case being heard; but her husband won his case.

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. In the one reported instance where a magistrate was killed by a mob, it was a case of mistaken identity. The drunken magistrate mistakenly tried to open the car of an army officer outside a bar at midnight; whereupon the guard raised the alarm and the revelers set upon the unfortunate magistrate, killing him.

See <http://www.marshgroupkenya.org/multimedia/?StoryID=253095>.

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?

36

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, 2005 saw a white farmer/rancher of the original British settler stock shot an African (black) game ranger on duty; and the case was terminated by the Attorney General. Less than a year later, he shot dead a farm worker, and was this year (2009) sentenced to eight months of which he served five. See <http://www.csmonitor.com/2009/0514/p06s09-woaf.html>.

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. See http://www.islamkenya.com/html/statement_12_08.html.

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 presidential 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

References:

Besides women being the majority in Kenya, they are also the majority of poor, less-educated Kenyans. Besides their greater likelihood of not knowing their rights, judicial inefficiency means greater sacrifices of their home-making time in pursuing litigation, which might deter such action.

Little has changed of what is described in a 2002 Amnesty International report: The (Kenyan) judicial system is perceived to be inefficient, expensive, inaccessible and discriminatory towards women. Female judges constitute only around 18 percent of the judiciary, and training on gender issues and international standards in relation to women's rights is limited in scope and not as readily available to judges in rural areas as those based in major urban areas. Access to justice for women victims of marital rape is extremely difficult. It is rare for a case of marital rape to reach the courts, and the perpetrator is more commonly charged with assault than rape. Often courts take the view that there was some provocation by the woman and treat cases of domestic violence lightly. In August 2000 a High Court ... set free (a man) who had admitted stabbing to death his wife ... because of her alleged infidelity. The court reasoned that the accused had been highly provoked by his wife's infidelity."

The Sexual Offenses Act (2006) should for instance, reduce the extent to which judgments (such as cited above) can be made. However, persisting incidents of violence against women suggest the Act is still a long way from becoming an effective deterrent on crimes against women. In other areas too, such as in land ownership cases, women continue to suffer discrimination.

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 alleged 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. ANPPCAN provides legal aid for children and those handling their issues, but is likely to be highly urban in its coverage. See http://www.anppcankenya.co.ke/index.php?id=40&option=com_content&task=view.

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.justice.go.ke/index.php?id=102&option=com_content&task=view.

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:

Until recently (2008), the state only provided legal aid to people on capital charges. However, a three-year pilot legal aid scheme was launched in September 2008 to eventually extend the service across the whole country. Located in the Ministry of Justice and National Constitutional Affairs, the National Legal Aid and Awareness Program that will enable poor and vulnerable people to access justice without going to the courts or incurring lawyers' fees. Citizens can use this service to solve private, communal and national disputes. The program will, however, work for the first three years on a pilot basis in Nairobi, Mombasa, Nakuru, Eldoret and Kisumu. See http://www.justice.go.ke/index.php?id=102&option=com_content&task=view.

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\$1,000. Coupled with the burdens arising from the extended family system, persons on or near the median income cannot afford legal assistance which the Advocates (Remuneration) (Amendment) Order places at a minimum of 10,000 shillings. The growing number of organizations offering pro bono services are overwhelmed by demand while the justice ministry initiative is yet a pilot project at only eight sites across the country. See http://www.justice.go.ke/index.php?id=102&option=com_content&task=view.

100: In most cases, the legal system is an affordable option to middle class citizens seeking to redress a grievance. Attorney 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. Attorney 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. Attorney 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 such as 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. Attorney 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. Attorney 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 in most district headquarters. However, the distribution is highly skewed vis-a-vis population spread or distances to the facilities. Consequently, 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. Northern Kenyan and Other Arid Lands for instance, accounts for 70 percent of the country, but for only 10 percent of the magistrates. Further, North Eastern Province has more than 2.5 times the people per court compared to Central Province.

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 immediate past police commissioner was a career soldier, brought into the force despite their being several senior career police officers who 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 commentary at <http://allafrica.com/stories/200909070817.html>.

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.

Very substantive reforms have been in the pipeline since the formation of the February 2008 Grand Coalition Government, including reforms to security organs. Hopefully, the reforms will be accompanied by a review of budget resources.

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.

100 | 75 | 50 | 25 | 0

References:

There are security agency activities that are highly politicized, and others that are not. 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, 2007 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. The immediate past police commissioner had the support of the PNU side of the coalition while the ODM side persistently demanded and eventually succeeded in having sidelined.

See <http://humanrightshouse.org/Articles/11383.html> and <http://allafrica.com/stories/200909111016.html>.

100: The agency (or agencies) operates independently of the political process and has operational independence from the government. All laws can be enforced regardless of the status of suspects or the sensitivity of the investigation.

75:

50: The agency (or agencies) is typically independent, yet is sometimes influenced in its investigations or enforcement actions by negative or positive political incentives. This may include favorable or unfavorable public criticism by the government or other forms of influence. The agency (or agencies) may not be provided with some information needed to carry out its investigations.

25:

0: The investigative and enforcement work of the agency (or agencies) is commonly influenced by political actors or the government. These may include conflicting family relationships, professional partnerships, or other personal loyalties. Negative incentives may include threats, harassment or other abuses of power by the government.

84. Can law enforcement officials be held accountable for their actions?

83

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 also be handled by the Public Complaints Standing Committee, even if people continue going to the former, with which they might have developed some rapport. The security forces also have their own internal complaints and suggestion boxes, but these cannot deliver any radical decisions.

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 Public Complaints Standing Committee (PCSC) reports that the Kenya Police are the least responsive government agency with respect to complaints from the public directed through PCSC. Of the 489 complaints that had not been responded to within 90 days, 22 percent were over the conduct of the Kenya Police. (See PCSC's 'The Fourth Quarterly Report 2008/09...'). However, it is difficult to gauge the speed and quality of responses the public gets over complaints taken to the Police directly. However, the Kenya Police have established an impressive website which holds some hope that reforms might improve service delivery. See http://www.kenyapolice.go.ke/site_search.asp.

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

References:

Section 7 of the Anti-Corruption and Economic Crimes 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.

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 Act (KACC) mandate given by Section 7 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. The Kenya National Commission of Human Rights has also been very active in this respect. However, the police can often be quite difficult in accepting independent findings. See <http://humanrightshouse.org/Articles/11383.html>.

The Public Complaints Standing Committee also initiates investigations based on reports from members of the public.

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.

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

References:

Whether law enforcement officials are prosecuted or not depends on the nature of the alleged crime and the prevailing circumstances. The Kenya Anti-Corruption Commission (KACC) returns reveal many instances in which police officers have been prosecuted for criminal offenses such as corruption. Arising from the post-election violence of 2007/2008, a police officer continues to be on trial for killing an unarmed citizen (see <http://www.cbsnews.com/stories/2008/01/17/world/main3722850.shtml>). Another officer who killed a female colleague and her member of Parliament lover has recently been jailed for 10 years. See <http://allafrica.com/stories/200910290723.html>.

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. There are many other police officers who killed during the post-election violence, but have never ever been arrested or charged.

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.