

Overall Score:

68 - Weak

Legal Framework Score:

85 - Strong

Actual Implementation Score:

53 - Very Weak

Category 1. Non-Governmental Organizations, Public Information and Media

1.1. ⁶⁵Anti-Corruption Non-Governmental Organizations

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

100

01a. In law, citizens have a right to form NGOs focused on anti-corruption or good governance.

Yes | No

Comments:

Article 36(1) of the Constitution provides that “every person has the freedom of association, which includes the right to form, join or participate in the activities of an association of any kind.”

The registration for the NGO activities focused on anti-corruption and good governance is generally regulated by the NGO Coordination Act, No. 19 of 1990 in Part III (sections 10-22).

References:

Article 36(1) of the Constitution. <http://www.kenyalaw.org/klr/fileadmin/pdfdownloads/Acts/ConstitutionofKenya2010.pdf>

NGO Coordination Act, No 19 of 1990 in Part III (sections 10-22). http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

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. Non-governmental organizations (NGOs) are defined here as any organized group that is separate from the state working on issues of governance, transparency, and/or anti-corruption.

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.

01b. In law, anti-corruption/good governance NGOs are free to accept funding from any foreign or domestic sources.

Yes | No

Comments:

No law prohibits particular funding sources of NGOs.

Section 30 of the NGOs Coordination Act obligates the Board to keep book(s) of account, which are to be submitted to the Auditor of Corporations for auditing (section 31). See http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

References:

No law prohibits particular funding sources of NGOs.

Yes: A YES score is earned if anti-corruption/good governance NGOs 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 NGOs focused on anti-corruption or good governance.

01c. In law, anti-corruption/good governance NGOs are required to disclose their sources of funding.

Yes | No

Comments:

Section 30 of the NGOs Coordination Act requires the Board to keep books of finances. The Auditor of Corporations audits the finance accounting books.

Article 35(1) (a) of the Constitution guarantees every citizen the right to access information held by the state. See http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

References:

Section 30 of the NGOs Coordination Act.

Auditor of Corporations.

Constitution, Article 35(1)(a), Section 31. Freedom of Information. http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

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

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

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

75

02a. In practice, the government does not create barriers to the organization of new anti-corruption/good governance NGOs.

100 | 75 | 50 | 25 | 0

Comments:

Since the NARC government succeeded the KANU government after the 2002 general elections, Kenya has witnessed greater freedom of association, including the freedom to form new anti-corruption/good governance NGOs. The new Constitution on August 27, 2010, marked the zenith of this development. The new constitution has expanded civil liberties such as freedom of association among the citizenry. Print and electronic media regularly report any adverse government reaction to the formation or operation of anti-corruption and good governance institutions; however, sometimes they face negative consequences.

For example, the media provided extensive coverage of police harassment and the arrest of civil society activists pressuring the minister of education to resign after the disappearance of U.S. \$42 million meant for the free primary education program. The activists were consequently charged in court, and judgments are pending.

References:

"Protests Against Ogeri Enter Day Two," by Cyrus Ombati. The Standard, June 23, 2011. <http://www.standardmedia.co.ke/InsidePage.php?id=2000037717&cid=4>

"New Proposal to Tame Ministers' Buck Passing," The Latest Kenyan News, June 27, 2011. <http://kenyaupdate.blogspot.com/2011/06/new-proposal-to-tame-ministers-buck.html>

100: NGOs 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: NGOs 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 NGO. Some unofficial barriers, such as harassment of minority groups, may occur.

25:

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

02b. In practice, anti-corruption/good governance NGOs actively engage in the political and policymaking process.

100 | 75 | 50 | 25 | 0

Comments:

Anticorruption and good governance NGOs have been actively involved in the policy arena, although this has not necessarily translated into substantive policy. For instance, organizations such as the Society for International Development, Institute of Economic Affairs and Centre for Law and Research International (CLARION) undertake extensive policy-focused research. Increasingly, stakeholder reviews are mandated for the finalization of policy papers and strategic plans.

References:

<http://www.marsgroupkenya.org/>

<http://www.ieakenya.or.ke/publications.asp>

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

75:

50: Anti-corruption/good governance NGOs are active, but may not be relevant to political decisions or the policymaking process. Those NGOs 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 NGOs are effectively prohibited from engaging in the political process. Those NGOs are unwilling to take positions on political issues. They are not relevant to changes in public opinion.

02c. In practice, no anti-corruption/good governance NGOs have been shut down by the government for their work on corruption-related issues during the study period.

Yes | No

Comments:

No NGO has been shut down for such activities. Indeed, NGOs have played a growing role in key areas, such as in monitoring the reforms arising from the 2007-08 post-election violence. The proactive role of the NGOs is seen through their engagement of the government on a host of issues ranging from the implementation of the new Constitution to researching for and making new sector policies.

The U.S. state department's wide-ranging review of governance in Kenya also reports no such closure of an NGO. See <http://www.state.gov/j/drl/rls/hrrpt/2010/af/154352.htm>

References:

<http://allafrica.com/stories/201103020614.html>

<http://www.state.gov/j/drl/rls/hrrpt/2010/af/154352.htm>

Yes: A YES score is earned if there were no NGOs 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 NGO 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 NGO's work may not be explicit, however the burden of proof here is low. If it seems likely that the NGO 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 anti-corruption/good governance NGO activists safe when working on corruption issues?

33

03a. In practice, in the past year, no anti-corruption/good governance NGO activists working on corruption issues have been imprisoned.

Yes | **No**

Comments:

There are instances when security and other state agents have harassed civil society activists. Currently, a group of activists have pending court cases over their demonstrating for the resignation of the education minister over the disappearance of U.S. \$42 million designated for the free primary education program.

References:

"Ongeri's problems refuse to go," by Cyrus Ombati and Augustine Oduor. The Standard, June 23, 2011. <http://m.standardmedia.co.ke/headlines.php?id=2000037681>

"Kenya: Activists Arrested for Locking Ongeri's Office," by Lucas Barasa. AllAfrica.com, June 22, 2011, <http://allafrica.com/stories/201106230565.html>

Yes: A YES score is earned if there were no NGO 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.

03b. In practice, in the past year, no anti-corruption/good governance NGO activists working on corruption issues have been physically harmed.

Yes | **No**

Comments:

Security agents have harassed civil society activists, using excessive violence that amounts to physical assault. For example, a group of activists have pending court cases regarding their demonstrations in calling for the resignation of the minister of education over the disappearance of U.S. \$42 million designated for the free primary education program.

References:

"Protests Against Ongeri Enter Day Two," by Cyrus Ombati. The Standard, June 23, 2011. <http://www.standardmedia.co.ke/InsidePage.php?id=2000037717&cid=4&ttl=Protests%20against%20Ongeri%20enter%20day%20two>

"UNCAC Coalition Calls on Kenya to Investigate Attack on Kenyan Anti-Corruption Activists." UNCAC, July 7, 2011. <http://www.uncaccoalition.org/en/home/173-uncac-coalition-calls-on-kenya-to-investigate-attack-on-kenyan-anti-corruption-activists.html>

"Kenya: Activists Arrested for Locking Ogeri's Office," by Lucas Barasa. AllAfrica.com, June 22, 2011. <http://allafrica.com/stories/201106230565.html>

Yes: A YES score is earned if there were no documented cases of NGO 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.

03c. In practice, in the past year, no anti-corruption/good governance NGO activists working on corruption issues have been killed.

Yes | No

Comments:

The media are relatively free to report on corruption and murders related to corruption investigations in Kenya. Over the last year, there are no newspaper reports of any murders of NGO activists who were working on corruption cases.

References:

Daily Nation newspapers, <http://www.nation.co.ke/>

The Standard newspaper, <http://www.standardmedia.co.ke/>

Yes: A YES score is earned if there were no documented cases of NGO 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

04a. In law, citizens have a right to organize into trade unions.

Yes | No

Comments:

Article 36 of the Constitution provides for the right to freedom of association. Article 41(2)(c) of the Constitution entitles "every worker the right to form, join or participate in the activities and programs of a trade union." This is supported by Part II (sections 4-11) and Part III (sections 12-30) of the Labor Relations Act of 2007.

References:

Constitution, Article 36

Constitution, Article 41(2)(c)

Labor Relations Act of 2007, Part II (sections 4-11)

Labor Relations Act of 2007, Part III (sections 12-30)

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.

04b. In practice, citizens are able to organize into trade unions.

100 | 75 | 50 | 25 | 0

Comments:

The parent trade union body is the Central Organization of Trade Unions (COTU), which was established in 1965. COTU is a corporate body whose membership draws from the other trade unions (see <http://www.cotu-kenya.org/>). The country's new Constitution is an extremely potent tool in the enhancement of trade unions in Kenya because it has expanded their requisite civil liberties, such as freedom of expression and association (Articles 33 and 36). The Constitution creates the Employment and Labor Relations Court in Article 162(2)(a). The full effect of this is yet to be seen since the enabling legislation, the Employment and Labor Relations Act of 2011, has only recently been adopted.

However, the greatest obstacle to worker organization is that 80 percent of Kenya's labor force is composed of itinerant workers in the informal sector and in family-based agriculture, 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 obstacles, such as the conflict between labor and technology. See <http://allafrica.com/stories/201010200487.html>.

References:

Central Organization of Trade Unions, <http://www.cotu-kenya.org/>

<http://allafrica.com/view/group/main/main/id/00011912.html>

<http://allafrica.com/stories/201010200487.html>

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.

1.2. Media's Ability to Report on Corruption

5. Are media and free speech protected?

100

05a. In law, freedom of the media is guaranteed.

Yes | No

Comments:

Article 34(1)-(3) of the Constitution guarantees freedom of the media. Article 34(1) provides that "freedom and independence of the electronic, print and all other types of the media is guaranteed." Article 34(2) provides that the state may not exercise any control or interfere with the media or penalize any person for the opinion they offer to the media. Article 34(3) guarantees the freedom of the establishment of the media; the same being only subject to licensing regulations.

References:

Article 34(1)-(3) of the Constitution. http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

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.

05b. In law, freedom of speech is guaranteed.

Yes | No

Comments:

Article 33(1) of the Constitution accords each person the right to freedom of expression. However, free expression does not include propaganda for war, incitement to violence, hate speech or advocacy of hatred (Article 33(2)).

References:

Constitution, Article 33(1)-(2). http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

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

06a. In practice, the government does not create barriers to form a print media entity.

100 | 75 | 50 | 25 | 0

Comments:

It may be argued that the operation of Kenya's "alternative media" (gutter press) is evidence of the freedom with which the print media operates, given that such publications often carry material that is quite embarrassing to the government and its personalities, without any means of effective reprimand — such as defamation and libel suits.

However, it appears that there are serious barriers to their publications. For example, the government requires newspaper printers and publishers to execute a bond for U.S. \$10,000. This amount is prohibitive in a country where 46% of the households live in poverty. Indeed, the inability of budding publishers to execute the bond partially explains the mushrooming gutter press.

References:

"Kenya," <http://www.pressreference.com/Gu-Ku/Kenya.html>

"Newspapers in Kenya." The Standard, May 2011. <http://kenyastandard.net/newspapers-in-kenya.html>

"Kenya: New Media Laws Must Meet International Standards," Article 19, Feb. 17, 2011. <http://www.article19.org/data/files/pdfs/press/kenya-new-media-laws-must-meet-international-standards.pdf>

"The Media We Want: The Kenya Media Vulnerabilities Study," by Peter Oriare, Rosemary Okello-Orlale and Wilson Ugangu. November 2010. <http://www.awcfs.org/dmdocuments/books/MediaVulnerabilitiesStudy.pdf>

"Government Announces Tough New Media Laws." International Freedom of Expression Exchange, Jan. 11, 2010. http://www.ifex.org/kenya/2010/01/11/tough_new_laws/

"Kenyan Paper Alleged that William Ruto is Under the Intensive CIA Surveillance," by Leo Odera Omolo. Jalu, Aug. 28, 2010, <http://blog.jaluo.com/?p=8557>

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.

06b. In law, where a print media license is necessary, there is an appeals mechanism if a license is denied or revoked.

Yes | No

Comments:

The Books and Newspapers Act (Cap 111) of the laws of Kenya implies an automatic registration of print media, subject to the execution of a bond (section 11), which must be registered under the Registration of Documents Act (Cap 285). The latter act provides at Section 34 that: "An appeal shall lie against an order of refusal or of cancellation from any registrar to the Principal Registrar, and the Principal Registrar may reverse or alter such order; and if the order of the Principal Registrar directs the document to be registered the registrar shall register it."

References:

The Books and Newspapers Act (Cap 111) of the Laws of Kenya (section 11). http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

Registration of Documents Act (Cap 285, Section 34), http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

"Media Vulnerabilities Study" by Peter Oriare, Rosemary Okello-Orlale and Wilson Ugangu. November 2010. <http://www.awcfs.org/dmdocuments/books/MediaVulnerabilitiesStudy.pdf>

"Media Legislation in Africa" by Guy Berger. September 2007. http://fesmedia.org/fileadmin/files-fesmedia.org/Berger_Media_Legislation_in_Africa.pdf

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.

06c. In practice, where necessary, citizens can obtain a print media license within a reasonable time period.

100 | 75 | 50 | 25 | 0

Comments:

In practice, the greatest difficulty for a print media entrepreneur is posting the cash bond. Once that is done, the process of acquiring a print media license is straightforward but hampered by the usual public service bureaucracy. Veteran journalist Mike Ngwalla said there is no fixed duration within which this can be accomplished.

References:

Mike Ngwalla, journalist. Telephone interview, Oct. 15, 2011.

Media Status Report: Kenya. http://uonbi.academia.edu/cainonyango/Papers/718999/Media_status_report_Kenya

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.

06d. In practice, where necessary, citizens can obtain a print media license at a reasonable cost.

100 | 75 | 50 | 25 | 0

Comments:

The requirement that a print media entrepreneur post a bond of more than U.S. \$10,000 is a major impediment for a country in which 46 percent of the population lives below the poverty line. However, there are various "gutter press" publications whose official registration status is unclear. Their circulation is modest and their inability to capture advertising contracts means that their operations are financially quite threadbare; thus, they definitely cannot post the required bond.

References:

Mike Ngwalla, journalist. Interview in "Kenya Today," Feb. 11, 2012.

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?

56

07a. In practice, the government does not create barriers to form a broadcast (radio and TV) media entity.

100 | 75 | 50 | 25 | 0

Comments:

The government has always been reluctant to allow a free environment within which the broadcast media can operate. In 2007, when it tried to establish a statutory government-run media regulation, objections prevailed, resulting in the establishment of the Media Council of Kenya, which is essentially a self-regulating entity. The government argument that an entirely free media can pose national security risks appears to have been vindicated by the fact that one of the six Kenyans brought before the International Criminal Court on charges of crimes against humanity is an FM radio station host.

The government's continuing attempts to rein in the media are evident in the ongoing struggles over licensing.

References:

Media Council of Kenya. <http://www.mediacouncil.or.ke/>

"Local Broadcasters Have Only Days to Apply for New Licenses," by Paul Wafula. Daily Nation, Nov.10, 2011. <http://allafrica.com/stories/201111110252.html>

"Reprieve As Media Owners Win Round One," by Carole Maina. Nairobi Star, Nov. 15, 2011. <http://allafrica.com/stories/201111151221.html>

"Licensing: Broadcasting Procedures." Communications Commission of Kenya. <http://www.cck.go.ke/licensing/broadcasting/procedures.html>

"Licensing: Broadcasting Fees." Communications Commission of Kenya. <http://www.cck.go.ke/licensing/broadcasting/fee's.html>

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.

07b. 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:

The Kenya Communications Act grants the Ministry of Information's Communications Commission for Kenya the authority over licensing. The law 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 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 Section 79, the Commission may grant a license or, 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).

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

Kenya Communications Act, Section 79.

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.

07c. In practice, where necessary, citizens can obtain a broadcast (radio and TV) media license within a reasonable time period.

Comments:

Broadcast media licensing requirements are within the domain of the Communications Commission of Kenya, a creation of the Kenya Communications Act of 1998. The management of licensing has improved, as is reflected in the proliferation of localized FM stations, for example. Where the Commission does not grant a license, it shall notify the applicant in writing of the reasons for refusal within 60 days, and the applicant may, if aggrieved, appeal to the Tribunal.

In practice, the usual public service bureaucracy and overt corruption often undermines timeliness. The Kenyan public service has adopted strategic planning, results-based management and performance contracting approaches, which mandate officers to perform specific tasks within specified periods. The Commission's service charter — available at http://www.cck.go.ke/about/service_charter.html — attempts to resolve all licensing issues within 135 working days.

References:

"Service Charter. Communication Commission of Kenya. http://www.cck.go.ke/about/service_charter.html.

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.

07d. In practice, where necessary, citizens can obtain a broadcast (radio and TV) media license at a reasonable cost.

Comments:

A radio license only costs between U.S. \$385 and \$1,668, while a TV license is U.S. \$4,618. However, fees for an amateur station stand at U.S. \$30. Thus, broadcast licenses are cheaper than print media licenses.

Notably, many people cannot afford the operation of such a media entity due to large capital and operating costs. Thus, wherever in Kenya one sees a new entry into the broadcast media, there is definitely a substantive financier.

References:

Communication Commission of Kenya. <http://www.cck.go.ke/>

"Licensing: Broadcasting Fees." Communication Commission of Kenya. <http://www.cck.go.ke/licensing/broadcasting/fees.html>

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

08a. In practice, the government does not prevent citizens from accessing content published on-line.

100 | 75 | 50 | 25 | 0

Comments:

The government does not interfere with access to the Internet, in accordance with the constitutional freedom of access to information. Indeed, the national International Communication and Technology (ICT) policy recognizes the limitations posed by the current poor status of ICT infrastructure and also appreciates ICT's role for rapid economic growth.

According to the Communications Commission of Kenya data, of the country's 40 million people, 4.3 million were Internet subscribers and 12.5 million were users as of June 2011. Freedom House, an international Internet monitor concluded: "The (Kenya) government does not employ technical filtering or any administrative censorship system to restrict access to political or other content. Citizens are able to access a wide range of viewpoints ... Individual Internet users generally seem comfortable expressing themselves freely online, though mainstream media organizations practice some self-censorship."

References:

Communication Commission of Kenya, Publications and Research, Statistics. <http://www.cck.go.ke/resc/statcs.html>

"Kenya Freedom on the Net." Freedom House, 2011. http://www.freedomhouse.org/sites/default/files/inline_images/Kenya_FOTN2011.pdf

"ICT Policy in Kenya and Ways of Improving the Existing ICT Policy," by John M. Kandiri. 2006. www.strathmore.edu/research/ict-policy-in-kenya.pdf

"Schedule of Laws and Regulations on ICT." June 2011. http://michaelmurungi.blogspot.com/2011/06/schedule-of-laws-and-regulations-on-ict_24.html

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.

08b. In practice, the government does not censor citizens creating content on-line.

100 | 75 | 50 | 25 | 0

Comments:

Access to the Internet is quite liberal and growing, while there is no government censorship of content. Regulator Communications Commission of Kenya data show phenomenal growth in use to about one quarter of the national population of 40 million. Talk of reining in the Internet increased as a result of evidence that the Internet had been instrumental in the violence of 2007-08. However, such regulation has not come to pass. Indeed, as Freedom House data show, Kenya's is among the most unfettered Internet operations in sub-Saharan Africa.

References:

Communication Commission of Kenya: Statistics. <http://www.cck.go.ke/resc/statcs.html>

"Freedom of the Net 2011: Kenya." Freedom House. http://www.freedomhouse.org/sites/default/files/inline_images/Kenya_FOTN2011.pdf

"Kenya: Let Us Act Fast to Stave Off Gag Bid on Free Internet," by Kui Kinyanjui. All Africa, April 21, 2011. <http://allafrica.com/stories/201104210270.html>

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?

92

09a. In law, it is legal to report accurate news even if it damages the reputation of a public figure.

Yes | No

Comments:

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

References:

Constitution of Kenya.

Defamation Act (Cap 36). http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

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.

09b. In practice, the government or media owners/distribution groups do not encourage self-censorship of corruption-related stories.

100 | 75 | 50 | 25 | 0

Comments:

The original Media Council of Kenya (MCK) was set up privately in 2003 to undertake self-censorship of the sector. The large private media presence in the 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). The following link illustrates MCK's work on self-censorship: http://www.mediacouncil.or.ke/index.php?option=com_content&view=article&id=26&Itemid=49

References:

Media Council of Kenya (MCK). http://www.mediacouncil.or.ke/index.php?option=com_content&view=article&id=26&Itemid=49

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.

09c. In practice, there is no prior government restraint (pre-publication censoring) on publishing corruption-related stories.

100 | 75 | 50 | 25 | 0

Comments:

The government does not explicitly censor any corruption-related material intended for publication. On the contrary, Kenya has a very vibrant investigative journalism tradition that often exposes matters the government would rather have kept out of the public domain. For example, the government publicly declared it would challenge the extradition of former senior public officials wanted in the UK for money laundering.

However, the government's vibrant Office of Public Communications will invariably undertake some damage limitation initiatives in response to such exposes. Thus, when the scandal broke about corruption over education sector money, the government spokesman responded with a statement entitled "Government Briefing on Ministry of Education Scandal and Other Matters of National Interest," reported on the website of the Office of Public Communications, on June 23, 2011. <http://www.communication.go.ke/media.asp?id=1309>

References:

"Kenya refuses to send corruption suspects to Jersey." BBC News Africa, May 20, 2011. <http://www.bbc.co.uk/news/world-africa-13477636>

"Corruption Puts Kenya's Educational Funding at Risk," by Mike Onyiego. VOA, June 20, 2011. <http://www.voanews.com/english/news/africa/-Corruption-Puts-Kenyas-Educational-Funding-at-Risk-124203949.html>

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

75:

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

25:

0: The government regularly censors material prior to publication, especially politically sensitive or damaging corruption-related material. This score is appropriate even if the government restricts only politically damaging news while allowing favorable coverage.

10. Are the media credible sources of information?

70

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

Yes | No

Comments:

Disclosure of ownership is a condition precedent in the registration of companies under the Companies Act (Cap 486). Section 384 entitles a member of the public to any such information once lodged with the Registrar of Companies, upon payment of a search fee. Further, the requirement of a publisher's bond under section 11 of the Books and Newspapers Act (Cap 111) means that the ownership of the publication is automatically revealed.

However, ownership of the various publications of Kenya's vibrant alternative media ("gutter press") is often vague and the subject of speculation and rumors.

References:

Companies Act (Cap 486). Section 384.

The Books and Newspapers Act, section 11 (Cap 111). http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

"New Media Law is Oppressive and Retrogressive," by Clement Njoroge and Zachary Onyango. News from Africa, June 2002. http://www.newsfromafrica.org/newsfromafrica/articles/art_880.html

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

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

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

Yes | No

Comments:

Ownership disclosure is a condition precedent in the registration of companies under the Companies Act (Cap 486). Section 384 entitles a member of the public to any such information once lodged with the Registrar of Companies, upon payment of the search fee.

References:

Companies Act (Cap 486). Section 384.

Kenya Law Online. 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

Comments:

Kenya's mainstream media are largely professional, which is why they successfully lobbied for self-regulation under the Media Council of Kenya. Established under the Media Act of 2007, MCK's council is composed largely of private sector operators who oversee the industry's "Code of Conduct and Practice of Journalism in Kenya." It also created a procedure for submitting complaints against the media. Moreover, a March 2011 report highlights the industry's professionalism.

The Media Council of Kenya has also reached out to the alternative media ("gutter press"), providing training on media ethics and the law.

References:

Media Council of Kenya. <http://www.mediacouncil.or.ke/>

"Complaints Procedure" in Media Council of Kenya. http://www.mediacouncil.or.ke/index.php?option=com_content&view=article&id=19&Itemid=81

"East African Journalists Urged to Embrace Responsibility," in Media Council of Kenya. March 16, 2011. http://www.mediacouncil.or.ke/index.php?option=com_content&view=article&id=88&catid=1&Itemid=78

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

75:

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

25:

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

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

100 | 75 | 50 | 25 | 0

Comments:

Neither the government-owned nor the privately owned Kenyan media have ever really been neutral in electoral coverage. An analysis of the Kenyan media’s performance during the last general elections (2007) can be found in BBC World Service Trust’s Policy Briefing No. 1 of April 2008, entitled “The Kenyan 2007 elections and their aftermath: The role of media and communication.”

While the public broadcaster is independent of the Presidential Press Unit, there remains an implicit link that ensures the president and his party gets an inordinate share of the coverage. During the 2007 elections, the two main privately owned media houses took sides: The Nation Media Group with the immediate past president and the Standard Group with the challenger.

Since the 2007 general elections, there have been about five by-elections occasioned by successful petitions against the 2007 winners, in Kamukunji, Ikolomani, Starehe, Kitutu Masaba and Kitutu Chache. While these have been hotly contested along party lines, the stakes have not been so high as to reveal brazen media biases. However, the problem of media bias is such that nonstate factors have invested great resources to ensure fair media coverage ahead of the potentially volatile 2012 general elections. The Media Council has its initiatives, such as http://www.mediacouncil.or.ke/index.php?option=com_content&view=article&id=90&catid=1&Itemid=78 See also <http://www.comminit.com/africa/content/kenyan-media-ready-free-and-fair-elections-2012>

References:

“The Kenyan 2007 elections and their aftermath: The role of media and communication.” BBC World Service Trust, Policy Briefing No. 1, April 2008.

“Media Council Trains Editors on Constitution.” Media Council of Kenya, May 2011. http://www.mediacouncil.or.ke/index.php?option=com_content&view=article&id=90&catid=1&Itemid=78

“Is the Kenyan Media Ready for Free and Fair Elections in 2012?” Soul Beat Africa, June 2011. <http://www.comminit.com/africa/content/kenyan-media-ready-free-and-fair-elections-2012>

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

Comments:

The state-owned media, the Kenya Broadcasting Corporation (KBC radio and TV), has never really been able to — or even desirous of — treating politicians and political parties equitably, with the balance invariably swinging in favor of incumbency. Political party use of the media is normally focused around an impending general election or by-election. The most recent comprehensive analysis of state media coverage of political parties was for the 2007 general elections.

Since the incumbent president's party has remained the dominant partner in government, it is reasonable to assume that the pattern of party coverage of 2007 prevails to date, as was determined by the EU's "Monitoring Media Results for the Period Between 22 November and 26 December 2007."

A historical perspective of the state media/political party context is provided by a discussion under the Kenya Media Roundtables program, as cited above.

References:

"European Union Election Observation Mission to the Republic of Kenya." Media Results, 2007. http://www.eueomkenya.org/Main/English/PDF/Media_results.pdf

"Kenya Media Round Tables: Reflections of a Veteran Political Reporter." Media and Political Parties, Jan. 17, 2012. <http://kenyamediaroundtables.org/2012/01/reflections-a-veteran-political-reporter-media-and-political-parties/>

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?

33

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

Yes | **No**

Comments:

In 2010, Andrew Mwangura, a journalist who now works as a civil society activist, was detained for "reporting" on a Ukrainian cargo vessel reportedly carrying a cache of weapons. This vessel, which was detained by Somali pirates, was alleged to be just one among many that have gone through Mombasa Harbor. <http://www.afrol.com/articles/31149>

In earlier years, foreign journalists have also been detained by the police and only have been released after international intervention. <http://eyesonkenya.org/blog/?tag=fleur-van-dissel>

References:

"Kenyan ex-journalist detained for 'spreading false information.'" Afrol News, October 2010. <http://www.afrol.com/articles/31149>

"International Journalists Released." Eyes on Kenya, January 2008. <http://eyesonkenya.org/blog/?tag=fleur-van-dissel>

"In Kenya, hospital staff said to attack journalist," Committee to Protect Journalists, June 20, 2011. <http://www.cpj.org/2011/06/in-kenya-hospital-staff-said-to-attack-journalist.php>

"Kenya." Reporters Without Borders. <http://en.rsf.org/kenya.html>

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

Comments:

In June 2011, journalists were attacked by hospital staff when investigating complaints of mistreatment of patients.

References:

"In Kenya, Hospital Staff Said to Attack Journalist." Committee to Protect Journalists, June 20, 2011. <http://www.cpj.org/2011/06/in-kenya-hospital-staff-said-to-attack-journalist.php>

"Kenya." Reporters Without Borders. <http://en.rsf.org/kenya.html>

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

Comments:

In 2009, a journalist investigating corruption in the construction of police quarters was kidnapped and later found murdered. However, the killing of journalists is a rare occurrence, with the Committee for the Protection of Journalists reporting only one such death since 1992.

References:

"Glimmer of Hope for Justice in Kenyan Journalists." Committee to Protect Journalists, November 2011. <http://cpj.org/blog/2011/11/glimmer-of-hope-for-justice-in-kenyan-journalists.php#more>

Also see: <http://www.internationalpen.org.uk/go/news/kenya-journalist-murdered-following-police-threats>

"Kenya." Committee to Protect Journalists, <http://www.cpj.org/killed/africa/kenya/>

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.

⁷²
1.3. Public Requests for Government Information

12. Do citizens have a legal right to request information?

67

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

Yes | No

Comments:

Kenya's constitution promulgated in August 2010 guarantees access to government documents. Article 35 states: "Every citizen has the right of access to (a) information held by the State; and (b) information held by another person and required for the exercise or protection of any right or fundamental freedom."

Further, much of the government's general information is published and available through the Government Press and its departments. Indeed, the Kenya Gazette Supplement (No. 65, 2005) guarantees such access. A lot of basic department information is available online; see, for example, the government spokesperson's website.

References:

Kenyan Constitution (August 2010), Article 35. http://www.kenyalaw.org/kenyalaw/klr_home/

Government Press Spokesperson's website: <http://www.communication.go.ke/>

Yes: A YES score is earned if there is a formal right to request 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 a request for a basic government record is denied.

Yes | No

Comments:

There is no overarching formal process to appeal 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.

References:

There is no right-of-appeal law related to this.

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

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

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

Yes | No

Comments:

Section 8 of the Commission on Administrative Justice Act (2011) provides that its functions include:

- (i) publish periodic reports on the status of administrative justice in Kenya;
- (j) promote public awareness of policies and administrative procedures on matters relating to administrative justice.

References:

The Commission on Administrative Justice Act, Section 8 (2011). http://www.kituoachakatiba.org/index2.php?option=com_docman&task=doc_view&gid=1351&Itemid=36

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 to information requests effective?

33

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

100 | 75 | 50 | 25 | 0

Comments:

The Constitution (2010) has created a new terrain within which matters such as access to government information will be managed. However, it is still too early to judge the effectiveness of the provisions. Hitherto, government information has been categorized (by security status), meaning some of it can be obtained with relative ease, while other categories take longer, and others may never be accessed.

Government publications (policy documents, legislation, etc.) can be purchased at the government printer and government agencies. However, information that has to be compiled on request can take a long time; sometimes resulting in the applicant bribing and officer. Parliament is the one institution that gets timely responses from cabinet ministers.

References:

Communications Commission of Kenya. http://www.cck.go.ke/about/service_charter.html

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 information request mechanism at a reasonable cost.

100 | 75 | 50 | 25 | 0

Comments:

The introduction of performance contracts, e-management and strategic planning will likely improve access to information. An example is the service charter for Kenyatta National Hospital's Medical Records department. <http://knh.or.ke/downloads/servicecharters/medicalrecords.pdf>, or the hospital's various other departments' commitments listed at http://knh.or.ke/index.php?option=com_content&view=article&id=129&Itemid=104.

Such measures should improve access to information and make it less costly, though not necessarily affordable for the average Kenyan who lives on less than one U.S. dollar a day. Such a person would not have access to the Internet to benefit from e-government driven reforms.

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.

References:

Kenyatta National Hospital, http://knh.or.ke/index.php?option=com_content&view=article&id=129&Itemid=104

"Review of Performance Contracting in the Public Sector." Republic of Kenya, September 2010. <http://www.primeminister.go.ke/DOCS/DRAFT%20REPORT%20POE%20Summary.pdf>

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 NGOs. 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 NGOs trying to access this information.

13c. In practice, responses to information requests are of high quality.

100 | 75 | 50 | 25 | 0

Comments:

Notwithstanding the maintenance of filing systems and increasing use of ICT (see <http://www.e-government.go.ke/>), many government departments have very poor data storage systems, meaning requested information may not be found or it could 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 about information, especially where spending is concerned. This is true even with requests between departments within the same ministry. The vast amounts of spending queried by the auditor general partially explains this sensitivity.

References:

Kenya eGovernment. <http://www.e-government.go.ke/>

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 information requests within a reasonable time period.

100 | 75 | 50 | 25 | 0

Comments:

During the time of this report, there was no official mechanism through which to resolve an appeal for denied information. Response and resolution depended on individual departments and the officers involved.

However, the context should be improved by the newly established (November 2011) Commission on Administrative Justice, which will eventually assume the functions of the largely low-key Public Complaints Standing Committee. Section 33(4)(a) of its statute provides that information should be available within the time frame set by the Commission.

References:

Law on Administrative Justice, Section 33(4)(a). http://www.kituoachakatiba.org/index2.php?option=com_docman&task=doc_view&gid=1351&Itemid=36

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.

100 | 75 | 50 | 25 | 0

Comments:

When information is denied to a person, that is often the end of the road as there has not been a culture of litigation, although the law allows it. The cost of pursuing such a matter depends on the information sought and from which organization. Where people have to travel in search of information, as is the case with the centralized government pension system, costs can be quite high.

In a country where nearly 50 percent of the population lives on less than a U.S. dollar a day, the cost of traveling to the pension office is prohibitive.

The recent introduction of e-government, performance contracts, strategic planning and service charters is expected to improve efficiency and lower costs, especially if the contracts provide an adequate deterrent to bribery. The government established the Public Complaints Standing Committee as a one-stop shop for such complaints, but the committee was never fully operational during the study period (see <http://www.gjlos.go.ke/gjinner.asp?pcat2=agencies&pcat=minjust&cat=complaintstanding>).

References:

"Implementation of Performance Contracting in Kenya," by Sylvester Odhiambo Obong'o, 2009. [http://www1.imp.unisg.ch/org/idx/ipmr.nsf/ac4c1079924cf935c1256c76004ba1a6/6a227866b8946fd5c1257671002b3c8a/\\$FILE/Obong%27o_IPMR](http://www1.imp.unisg.ch/org/idx/ipmr.nsf/ac4c1079924cf935c1256c76004ba1a6/6a227866b8946fd5c1257671002b3c8a/$FILE/Obong%27o_IPMR)

"Application of Performance Contracting in Social Security Administration in Kenya," by the International Social Security Association, 2008. <http://www.issa.int/Observatory/Good-Practices/Application-of-Performance-Contracting-in-Social-Security-Administration-in-Kenya>

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.

100 | 75 | 50 | 25 | 0

Comments:

The Official Secrets Act is often justification for denying information. However, since this Act fostered a pervasive fear of information dissemination, many officers did not even know when their actions were lawful and simply refused to grant the release of any information. A pending Freedom of Information Bill addresses this concern.

Weak responses to citizen requests for information were reflected in government departments' weak cooperation with the Public Complaints Standing Committee (PCSC) and the national ombudsman. For example, 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.

References:

The Official Secrets Act, Section 3 (Cap 187). http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

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

75:

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

25:

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

Category 2. Elections

2.1. Voting and Party Formation

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

100

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

Yes | No

Comments:

Article 38(2) of the Constitution provides that every citizen has the right to free, fair and regular elections based on universal suffrage and free expression of the will of the electors for any office of a public body or political party. Article 81(d) requires that the electoral system comply with universal suffrage based on the aspiration for fair representation and equality, while Article 83(3) puts in place administrative arrangements for the registration of voters and the conduct of elections; which arrangements are to facilitate, and not deny, an eligible citizen the right to vote or the right to stand for election.

References:

Constitution, Article 38(2), Article 81(d) and Article 83(3). http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

Yes: A YES score is earned if the right to vote is guaranteed to all citizens of the country (basic age limitations are allowed). A YES score can still be earned if voting procedures are, in practice, inconvenient or unfair.

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

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

Yes | No

Comments:

Article 136(1) of the Constitution provides that presidential elections are to be held on the same day as the general election for the MPs: the second Tuesday in August, every fifth year. Article 180(1) provides for the direct election of the governor by the county's registered voters on the same day.

References:

Constitution, Article 136(1) and Article 180(1). 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?

67

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

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

Comments:

To vote, one needs a national ID card, which can be acquired at age 18, or a national passport. However, the issuance of these critical documents has been inefficient. Passports are expensive and cumbersome to obtain; people often get them only if they are planning to travel abroad.

There are hundreds of thousands of Kenyans 18 and older who have applied for ID cards but have not received them. In the past year, the government has not been able to issue IDs due to bureaucratic issues.

Registered voters are further disenfranchised by the voting mismanagement. 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 one must be in the country at the time of the balloting to participate.

References:

"IDs at last." NTV. <http://www.ntv.co.ke/News/ID+s+at+last/-/471778/1219618/-/view/printVersion/-/12efnsy/-/index.html>

"Delay in Issuance of National Identity Cards," by S.W. Osombah. IQ4News, June 2, 2011. <http://www.iq4news.com/osombah-sw/kenya-delay-issuance-national-identity-cards>

"An Identity Crisis? A Study on the Issuance of National Identity Cards In Kenya." Kenya National Commission of Human Rights, 2007.

"Designing a New Voter Registration in Kenya: A Recipe for Regaining Voter Confidence in Kenya." Institute for Education in Democracy, 2010. http://www.iedafrica.org/documents/Baseline_Survey_Report_on_Voter_Registration_System.pdf

The Electoral System and Multi-Partyism in Kenya, 2007. <http://www.hss.or.ke/pdf/electoralsystemandmultipartyisminkenya.pdf>

"The Electoral Process in Kenya: A Review of Past Experience and Recommendations for Reform." International Foundation for Electoral System. Final Report, August 2008. http://www.ifes.org/publication/077c11dc773ce6e94745f7ab711cf11e/IFES%20KENYA%20OSIEA_Aug22_FINAL.pdf

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.

Comments:

Provisions exist for secret balloting. However, these are often violated. An important factor undermining the secrecy of the ballot is illiteracy; the presiding officer at a balloting station marks the illiterate voter's ballot paper. All competing candidates' agents should witness the assistance, but some candidates do not have agents at all stations.

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. Candidates from the ruling party often have a head start, since their party controls the resources used to facilitate the election process, such as transportation, police security, etc. However, attempts to establish an independent election management body are taking place.

References:

"The Electoral System and Multi-Partyism in Kenya," 2007. <http://www.hss.or.ke/pdf/electoralsystemandmultipartyisminkenya.pdf>

"The Electoral Process in Kenya: A Review of Past Experience and Recommendations for Reform." International Foundation for Electoral System, Final Report. August 2008. http://www.ifes.org/publication/077c11dc773ce6e94745f7ab711cf11e/IFES%20KENYA%20OSIEA_Aug22_FINAL.pdf

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.

Comments:

General elections have been held in Kenya every fifth year.

Although elections are held regularly, the political space within which elections occur changes greatly. For example, while Kenya remained a constitutional multi-party state from 1963 to 1982, opposition parties were not allowed after the 1969 proscription of Kenya People's Union and detention without trial of the entire national leadership. In 1988, the president unilaterally substituted the secret ballot with voters lining up behind a photograph of their preferred candidate. In the 2007 general elections, the chair of the Electoral Commission of Kenya admitted he did not know who had won the presidential race.

References:

"Multi-Party Politics in Kenya: The Kenyatta and Moi States & the Triumph of the System in the 1992 Election" by D. Throup and C. Hornsby. James Currey Publishers, 1998.

"Tensions and Reversals in Democratic Transitions: The Kenya 2007 General Elections," by K. Kanyinga and D. Okello. Society for International Development, Regional Office for Eastern Africa, University of Nairobi. Institute for Development Studies, 2010.

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.

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

Yes | No

Comments:

Article 38(1) (a) of the Constitution entitles every citizen to make political choices, which includes the right to form or participate in forming a political party. Political parties can be registered under the Political Parties Act, Cap 7A (2009).

The Political Parties Act, Cap 10 (2007) established the office of the Registrar of Political Parties working under the country's Electoral Commission. The Registrar is 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."

References:

Constitution, Article 38(1)(a).

Political Parties Act of 2009, Cap 7A.

Political Parties Act of 2007, Cap 10, Section 12 (2).

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

Comments:

Constitution, Article 38(3)(c) provides that every adult citizen has the right, without any unreasonable restrictions, to be a candidate for a public office or office within a political party of which the citizen is a member and, if elected, to hold office.

References:

Constitution, Article 38(3)(c). 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

Comments:

Anyone 18 or older may form political parties. At one time, there were close to 150 registered parties; however, reforms under the Political Parties Act (2008) brought that number to 38.

Inefficient procedures and bureaucracy deter people from forming parties. The office of the Registrar of Political Parties remains centralized in the national capital, Nairobi. This imposes additional costs on prospective applicants. Illiteracy is a further impediment to such an undertaking, as is gender bias; few of Kenya's registered political parties are headed by women. However, the arena is comparatively open.

References:

"Kenya: Registered Political Parties 2010." Electoral Institute for Sustainability of Democracy in Africa, 2010. <http://www.eisa.org.za/WEP/ken2010parties.htm>

List of Political Parties in Kenya on Wikipedia. http://en.wikipedia.org/wiki/List_of_political_parties_in_Kenya

"Strengthening Political Parties in Kenya." USAID. <http://kenya.usaid.gov/programs/democracy-and-governance/571>

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:

According to the Constitution, anyone 18 or older can run for a political office. However, public servants, including members of the uniformed cadres, may not run for political office. Article 85 of the Constitution allows for independent candidates to run without party affiliation.

In practice, however, poverty prevents this. In a country where 46 percent of the population lives below the poverty line, poor people cannot afford the cost to enter contests for party nominations, to register for the electoral body or to campaign.

For example, in the 2007 general elections, ODM parliamentary contenders in the primary election had to pay U.S. \$2,000 to the party and U.S. \$500 to the defunct Electoral Commission of Kenya. Coupled with the cost of mounting a campaign, running for political office is out of reach to the average person. Only wealthy people actually run for political offices.

References:

"Report on 2007 Election Assistance Program." The Coalition for Accountable Political Financing. <http://capf.or.ke/document/THE%20COALITION%20FOR%20ACCOUNTABLE%20POLITICAL%20FINANCING%20REPORT%20ON%202007>

"Multi-Party Politics in Kenya: The Kenyatta and Moi States & the Triumph of the System in the 1992 Election," (p. 357 on). D. Throup and C. Hornsby, 1998.

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

75:

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

25:

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

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

100 | 75 | 50 | 25 | 0

Comments:

The Kenyan Parliament has no official opposition. The violence following the disputed December 2007 presidential elections was resolved through an internationally mediated truce out of which formed the Grand Coalition Government. The Coalition was composed of the two main presidential contenders, which accounted for 197 of the 210 contested seats. The remaining 12 members are appointed, and two members (the Speaker and the Attorney General) are ex-officio.

As soon as the coalition government was formed, however, "back-benchers" tried to form. Their initiative was defeated, but this shows an opposition existed. More recently, the dominant Orange Democratic Movement party experienced a massive split, again showing that opposing views exist in the legislature.

Besides these factors, the Kenyan Parliament is a very lively environment where even government ministers have been known to vote in opposition to their party's government motions.

References:

"Parliamentary Opposition Formed" by Cbama Cha Mwananchi. Social Democrats, April 22, 2008. <http://chamachamwananchi.wordpress.com/2008/04/22/parliamentary-opposition-formed/>

"Kenya: Current Conditions and the Challenges Ahead," by Ted Dagne. Congressional Research Service, June 8, 2011. <http://www.fas.org/sgp/crs/row/RL34378.pdf>

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.

2.2. Election Integrity

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

100

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

Yes | No

Comments:

The national accord signed in February 2008 established various interim institutions to facilitate reforms where mismanagement was judged to have contributed to the 2007-08 post-election violence. Among the interim institutions were the Interim Independent Boundaries Review Commission and the Interim Independent Electoral Commission of Kenya.

These would be merged in 2010 by the new constitution into the Independent Electoral and Boundaries Commission (Article 88). The Commission (IEBC) may have at least three but not more than nine commissioners (Article 250). The functions of the IEBC include the continuous registration of voters, the regular revision of the voter's roll, delimitation of the constituencies and wards, regulation of political party nominations, settlement of electoral disputes other than election petitions, registration of candidates for elections, voter education, facilitation of the observation, monitoring and evaluation of elections, regulation of campaign funding and spending and the development of an electoral code of conduct (Article 88(4)).

References:

Constitution, Independent Electoral and Boundaries Review Commission (IEBC), Article 88, Article 88(4), Article 250. http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

<http://www.iiec.or.ke/index.php/Home/mission-vision-and-mandate.html>

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.

18. Is the election monitoring agency effective?

80

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

Yes | No

Comments:

Article 249(2) of the Constitution provides that all constitutional commissions, such as the Independent Electoral and Boundaries Commission, and independent offices are only subject to the law and not subject to direction or control by any person or authority.

References:

Article 249(2) of the Constitution. http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

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

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

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

100 | 75 | 50 | 25 | 0

Comments:

The National Accord that resolved the post-2007 election violence created an Interim Independent Electoral Commission (IIEC) whose membership reflected the broad political divide. IIEC credibly oversaw various activities, including by-elections, especially against the backdrop of the bungled 2007 general elections.

The new constitution (2010) created a successor body, the Independent Electoral and Boundaries Commission (IEBC) and further provided for the creation of a committee to advertise and interview candidates for IEBC positions. After a transparent process in which all applicants' names and qualifications were advertised in the local media, the successful nominees have been approved by the president and prime minister, who have forwarded their names to parliament for confirmation.

References:

<http://allafrica.com/stories/201110260056.html> (October 2011)

<http://www.standardmedia.co.ke/InsidePage.php?id=2000043270&cid=159&story=Auko%20team%20defends%20IEBC%20nominees%27%20list> (September 2011)

<http://kenyauptodate.blogspot.com/2011/10/isaack-koki-murshid-lead-race-for-iebc.html> (October 2011)

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

Comments:

Since the Electoral Commission of Kenya (ECK) was disbanded in 2008, the Interim Independent Electoral Commission (IIEC) and Interim Independent Boundaries Review Commission (IIBRC) have overseen election-related issues. During the time of this report, IIEC had a full slate of professionals who are likely to become staff of the newly established Independent Electoral and Boundaries Commission (IEBC).

The appointments of the commissioners of the IEBC were approved by Parliament in November 2011 and were awaiting the president's signature. The chairman-in-waiting and at least three of his commissioners held similar positions. It is fair to assume that IEBC will be fully staffed, as were the now defunct IIEC and the IIBRC.

References:

"Retain Electoral Commission Staff, MP Proposes." AllAfrica, May 30, 2011. <http://allafrica.com/stories/201106010162.html>

Interim Independent Electoral Commission. <http://www.iiec.or.ke/>

"Kenya General Election." The Report of the Commonwealth Observer Group, Dec. 27, 2007. http://www.thecommonwealth.org/shared_asp_files/GFSR.asp?NodeID=174448

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

75:

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

25:

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

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

100 | 75 | 50 | 25 | 0

Comments:

Electoral oversight during the review period was managed by the Interim Independent Electoral Commission (IIEC). In August 2009, the IIEC considered introducing electronic voting. While this has not materialized, other efficiency-enhancing measures have been instituted, as was reported for a mid-2011 by-election where: "Presiding officers in Ikolomani have been equipped with laptops and mobile phones to transmit the results from respective polling stations after completing the tallying process. Commissioner Aden said the officials had been trained on the use of the gadgets and no delays were expected in release of the results."

The Commission has managed about five parliamentary by-elections arising from successful petitions against the 2007 results. IIEC's performance during these by-elections has been exemplary, with outcomes announced soon after balloting closes. It is significant that the former IIEC's chair and some commissioners have been appointed into Independent Electoral and Boundaries Commission (IEBC), which hit the ground running with a by-election in November 2011.

IEBC is likely to speed up the process of ICT use in the electoral process; the country experimented with electronic voter registration in 2010. However, experts believe full ICT use could still be six years away.

References:

"Kenya: Electronic Voting 'Is Still Six Years Away for Country,'" by Okuttah Mark. Sept. 27, 2011, <http://allafrica.com/stories/201109231083.html>

"Re-Match in Ikolomani By-Election Monday Tests Current State of Kenya's Politics." May 22, 2011. <http://africcommons.com/2011/05/22/re-match-in-ikolomani-by-election-monday-will-test-current-state-of-kenyas-politics/>

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

Comments:

While the electoral legislative framework has always provided the scope for disciplining electoral offenses, weak political will has meant that these provisions have never been invoked. The incumbent president treats the electoral oversight body as his extension. The law courts have frequently dissolved elections on grounds of electoral misconduct; yet neither the managing body nor the candidates have been punished in a decisive manner, allowing the by-election to include all interested parties.

The newly established Independent Electoral and Boundaries Commission and the new Elections Act (Part VI, sections 56 to 73) provide frameworks to better manage electoral offenses. Reforms in the management of political parties should also see improvements.

References:

"KACC to Vet 2012 Candidates," by Star Team. May, 16, 2011. <http://kenyaupdate.blogspot.com/2011/05/kacc-to-vet-2012-candidates.html>

"Ocampo Six: End of Impunity" by Katharina Nett and Iris Föllner. ICC summons, April 2011. <http://www.kas.de/kenia/en/publications/22483/>

Kenya Law. http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

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?

83

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

100 | 75 | 50 | 25 | 0

Comments:

While electoral legislation is in place, its management has been fraught with inefficiencies. This was the underlying factor in the election-based violence of 2007-08.

While the law establishes all Kenyans 18 and older as eligible voters, issuance of the national identity card and the national passport is badly managed; elections exclude many eligible voters. On the eve of the 2010 referendum of the proposed Constitution, for example, it was reported that some 6 million eligible voters would be locked out.

References:

"6M Voters Locked Out of Referendum Poll," The Standard, August 2010. www.standardmedia.co.ke/archives/InsidePage.php?id=2000019887&cid=4

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

75:

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

25:

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

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

Yes | No

Comments:

Article 87 of the Constitution provides that:

- (1) Parliament shall enact legislation to establish mechanisms for timely settling of electoral disputes.
- (2) Petitions concerning an election, other than a presidential election, shall be filed within 28 days after the declaration of the election results by the Independent Electoral and Boundaries Commission.
- (3) Service of a petition may be direct or by advertisement in a newspaper with national circulation.

References:

Article 87 of the Constitution. <http://www.kenyalaw.org/klr/fileadmin/pdfdownloads/Acts/ConstitutionofKenya2010.pdf>

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

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

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

100 | 75 | 50 | 25 | 0

Comments:

Election appeals are common (see full list at http://www.kenyalaw.org/election_petitions/cases.php?pageNum_Recordset1=0&totalRows_Recordset1=196).

From the most recent general elections in 2007, successful petitions were filed in three of Nairobi's eight parliamentary constituencies. Another eight results were challenged in constituencies across the country. However, the resolution of the petitions has always been slow, with 10 cases pending before the courts less than a year before the 2007 general elections.

References:

Kenya Law, Election Petitions Cases. http://www.kenyalaw.org/election_petitions/cases.php?pageNum_Recordset1=0&totalRows_Recordset1=196

"Judges' Outrage Over 10 Pending Election Petitions," by Francis Thoya. AllAfrica, Feb. 15, 2007. <http://allafrica.com/stories/200702141134.html>

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

Comments:

Kenyan armed forces have traditionally been considered neutral in the political process. However, the 2007 general elections debunked the myth of political neutrality. The government deployed Administration Police to act as polling agents for the immediate past president's Party of National Unity [PNU].

Kenya has traditionally been an island of peace in the sense that it has neither experienced a civil war nor a military government.

Recent revelations about the soldiers' pay and other perks suggests that the soldiers have been quite partisan in favor of incumbencies that have flowered them with extensive privileges. It is difficult to predict the conduct of the armed forces in anticipated politicking. However, Chapter 14 of the Constitution prescribes the transparent management of the security forces, whose attendant reforms will shape the conduct of the armed forces into the future.

Kenya's new Constitution (2010) is silent on participation of members of the armed forces in the political process. They may — like the police and prison officers — register as voters. However, those joining the armed forces surrender their civilian identification papers, meaning they would have to use their passports or military identification to register. Like all active public servants, soldiers may not hold an elected office.

References:

http://www.thecommonwealth.org/shared_asp_files/GFSR.asp?NodeID=174448

"Turning Pebbles: Evading Accountability for Post-Election Violence in Kenya." Human Rights Watch, Dec. 9, 2011. <http://www.hrw.org/reports/2011/12/09/turning-pebbles>

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

75:

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

25:

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

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

Yes | No

Comments:

For the time period of this report, section 45 of the National Assembly and Presidential Elections Act (2009) provided that:

- (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, consistent with internationally accepted standards for fair elections, which shall be binding on election observers upon accreditation by the Electoral Commission.
- (3) Without prejudice to the generality of paragraph (2) the guidelines issued thereunder may specify the procedures for the accreditation of election observers.
- (4) The Electoral Commission may revoke the accreditation it has granted to any election observers where it is satisfied that an election observer is partisan.

The new Independent Electoral and Boundaries Commission formed in November 2011. It is likely to carry forward some of the obligations of the defunct Electoral Commission of Kenya and Interim Independent Electoral Commission.

References:

Section 45 of the National Assembly and Presidential Elections Act (2009).

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

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

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

100 | 75 | 50 | 25 | 0

Comments:

Kenya has an open-door policy for both domestic and international electoral observers. The only constraints arise from the resource levels required to negotiate the terrain across which electioneering is conducted. Nonetheless, the electoral commission is obliged to facilitate monitoring.

The extent of Kenya's accommodation of electoral observers is illustrated by a Dec. 27, 2007, dispatch from the U.S. embassy: "Kenya will be awash in election observers by the time voters go to the polls on December 27. Roughly 17,500 international and domestic observers will cover about 27,500 polling stations in 210 parliamentary constituencies, in addition to party agents who will monitor the proceedings on behalf of their candidates. The Electoral Commission of Kenya has encouraged both domestic and international observers, maintaining a wide open door policy."

References:

"Kenya Elections: State Of Play On Election Observation Efforts." Wikileaks, December 2007. <http://www.cablegatesearch.net/cable.php?id=07NAIROBI4827>

"Kenya: 2007 Election Observer Missions and Reports." Electoral Institute for the Sustainability of Africa, July 2010. <http://www.eisa.org.za/WEP/ken2007eom.htm>

European Union Election Observation Mission to the Republic of Kenya. General Elections, 2007. <http://www.eueomkenya.org/Main/English/Default.html>

Election Observation Group. <http://www.elog.or.ke/>

"The Diary of an Election Observer" by Barbara Soetan. Jan. 23, 2008. <http://www.thecommonwealth.org/news/152816/152865/174547/220108thediaryofanelectionobserver.htm>

"EU Observers Condemn Election and Call for an Investigation." The Guardian UK, January 2008. <http://www.guardian.co.uk/world/2008/jan/02/eu.kenya>

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

75:

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

25:

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

88

2.3. Political Financing Transparency

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

67

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

Yes | No

Comments:

Section 4 (i) of the Independent Electoral and Boundaries Commission provides for: "The regulation of the amount of money that may be spent by or on behalf of a candidate or party in respect of any election."

References:

Independent Electoral and Boundaries Commission Act, Section 4 (i). 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

Comments:

Section 4 (i) of the Independent Electoral and Boundaries Commission Act provides for "the regulation of the amount of money that may be spent by or on behalf of a candidate or party in respect of any election."

References:

Section 4 (i) of the Independent Electoral and Boundaries Commission Act. http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

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**

Comments:

Section 4 (i) of the Independent Electoral and Boundaries Commission Act provides for its "regulation of the amount of money that may be spent by or on behalf of a candidate or party in respect of any election." However, the exact amounts have yet to be identified.

References:

Section 4 (i) of the Independent Electoral and Boundaries Commission Act.

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

Comments:

Sections 27 and 28 of the Political Parties Act provides for varied funding sources for political parties, which must be published. Sections 29 and 30 provide for declaration of all assets and liabilities and auditing of party funds.

References:

Political Parties Act, Sections 27-30. See http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

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. Systems where only certain donation amounts are required to be made public (above a non-trivial amount) also earn a NO score.

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

Comments:

Section 31 of the Political Parties Act provides as follows:

- (1) A political party shall keep proper books and records of account of the income, expenditure, assets and liabilities of the political party.
- (2) A political party shall, within three months after the end of each financial year submit to the Auditor General the accounts of the political party in respect to that year.
- (3) The accounts of every political party shall be audited annually by the Auditor General and shall be submitted to the Registrar and tabled in the National Assembly.
- (4) The Registrar may at any time request the Auditor General to carry out an audit of the accounts of a political party.
- (5) Any person shall be entitled, to inspect the audited accounts filed by a political party and, upon payment of a fee prescribed by the Registrar be issued copies of the audited accounts.

References:

The Political Parties Act, Section 31. 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

Comments:

Section 29 of the Political Parties Act requires that funding sources be published; section 30 requires the declaration of all assets and liabilities to the Registrar of Political Parties.

Section 31 obliges the Registrar in the following manner:

- (1) A political party shall keep proper books and records of account of the income, expenditure, assets and liabilities of the political party.
- (2) A political party shall, within three months after the end of each financial year submit to the Auditor General the accounts of the political party in respect of that year.
- (3) The accounts of every political party shall be audited annually by the Auditor General and shall be submitted to the Registrar and tabled in the National Assembly.
- (4) The Registrar may at any time request the Auditor General to carry out an audit of the accounts of a political party.
- (5) Any person shall be entitled to inspect the audited accounts filed by a political party and, upon payment of a fee prescribed by the Registrar, be issued copies of the audited accounts.

References:

The Political Parties Act, Sections 29-31.

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 non-governmental organizations.

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

20

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

Yes | No

Comments:

Section 4 of the Independent Electoral and Boundaries Commission (IEBC) Act provides among its functions:

- (i) the regulation of the amount of money that may be spent by or on behalf of a candidate or party in respect to any election;
- (j) the development and enforcement of a code of conduct for candidates and parties contesting elections.

However, no limits have yet to be set by the 2-month-old IEBC. See http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

References:

Independent Electoral and Boundaries Commission (IEBC) Act, Section 4.

IEBC Act (Amended) 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 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**

Comments:

Section 4 of the Independent Electoral and Boundaries Commission (IEBC) Act provides among its functions:

- (i) the regulation of the amount of money that may be spent by or on behalf of a candidate or party in respect of any election;
- (j) the development and enforcement of a code of conduct for candidates and parties contesting elections.

However, no limits have yet to be set by the 2-month-old IEBC. See http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

References:

Independent Electoral and Boundaries Commission (IEBC) Act, Section 4.

IEBC Act (Amended 2011). http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

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**

Comments:

There is no specific law governing contributions to candidates. There is only a law focusing on the status of parties (Section 30 of the Political Parties Act).

References:

There is no specific law governing contributions to candidates.

The Political Parties Act, Section 30.

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

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. Systems where only certain donation amounts are required to be made public (above a non-trivial amount) also earn a NO score.

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

Yes | **No**

Comments:

There is no law governing the independent audit of an individual candidate's finances. However, Section 31 of the Political Parties Act requires audits of political party finances.

References:

There is no law governing the independent audit of an individual candidate's finances.

The Political Parties Act, Section 31. 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 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

Comments:

Section 4 of the Independent Electoral and Boundaries Commission Act provides:

"As provided for by Article 88(4) of the Constitution, the Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by the Constitution, and any other elections as prescribed by an Act of Parliament and, in particular, for —

- (a) the continuous registration of citizens as voters;
- (b) the regular revision of the voters' roll;
- (c) the delimitation of constituencies and wards in accordance with the Constitution;
- (d) the regulation of the process by which parties nominate candidates for elections;
- (e) the settlement of electoral disputes, including disputes relating to or arising from nominations, but excluding election petitions and disputes subsequent to the declaration of election results;
- (f) the registration of candidates for election;
- (g) voter education;
- (h) the facilitation of the observation, monitoring and evaluation of elections;
- (i) the regulation of the amount of money that may be spent by or on behalf of a candidate or party in respect to any election;
- (j) the development and enforcement of a code of conduct for candidates and parties contesting elections;
- (k) the monitoring of compliance with the legislation required by Article 82 (1)(b) of the Constitution relating to nomination of candidates by parties;
- (l) the investigation and prosecution of electoral offenses by candidates, political parties or their agents pursuant to Article 157(12) of the Constitution;
- (m) the use of appropriate technology and approaches in the performance of its functions; and
- (n) such other functions as are provided for by the Constitution or any other written law."

References:

Independent Electoral and Boundaries Commission Act, Section 4.

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 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 non-governmental 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

Comments:

Kenya last controlled electoral spending in the 1980s, when there was a cap at U.S. \$500. However, this was difficult to enforce and was abolished. Consequently, there has been no limit to campaign spending, a matter that has been addressed by new legislation, including the Independent Electoral and Boundaries Act.

References:

"Political Party Finance: Can Corruption Be Contained?" The 10th Anti-Corruption Conference, 2001. <http://www.10iacc.org/content.phtml?documents=119&summ=57>

"Kenya: New Poll Law Seeks to Curb Vote Buying," by Bernard Namunane. AllAfrica, July 19, 2011, <http://allafrica.com/stories/201107200153.html>

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.

100 | 75 | 50 | 25 | 0

Comments:

The lack of limits on corporate donations to electioneering is part of the focus of new legislation and reforms to electoral frameworks, including the Independent Electoral and Boundaries Act and the Political Parties Act.

References:

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

"Political Party Finance: Can Corruption be Contained?," The 10th Anti-Corruption Conference, 2001. <http://www.10iacc.org/content.phtml?documents=119&summ=57>

"Kenya: New Poll Law Seeks to Curb Vote Buying," by Bernard Namunane. AllAfrica, July 19, 2011. <http://allafrica.com/stories/201107200153.html>

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

75:

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

25:

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

22c. In practice, the limits on total party expenditures are effective in regulating a political party's ability to fund campaigns or politically-related activities.

100 | 75 | 50 | 25 | 0

Comments:

The lack of limits on corporate donations to electioneering is part of the focus of new legislation and reforms to electoral frameworks, including the Independent Electoral and Boundaries Act and the Political Parties Act.

References:

Kenya Law, http://www.kenyalaw.org/kenyalaw/klr_home/

10th Anti-Corruption Conference, "Political party finance: Can corruption be contained?," 2001, <http://www.10iacc.org/content.phtml?documents=119&summ=57>

Bernard Namunane, All Africa, "Kenya: New Poll Law Seeks to Curb Vote Buying," July 19, 2011, <http://allafrica.com/stories/201107200153.html>

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

Comments:

The lack of limits on corporate donations to electioneering is part of the focus of new legislation and reforms to electoral frameworks, including the Independent Electoral and Boundaries Act and the Political Parties Act.

References:

Kenya Law, http://www.kenyalaw.org/kenyalaw/klr_home/

"Political Party Finance: Can Corruption be Contained?," The 10th Anti-Corruption Conference, 2001, <http://www.10iacc.org/content.phtml?documents=119&summ=57>

"Kenya: New Poll Law Seeks to Curb Vote Buying," by Bernard Namunane, AllAfrica, July 19, 2011, <http://allafrica.com/stories/201107200153.html>

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

Comments:

The lack of limits on corporate donations to electioneering is part of the focus of new legislation and reforms to electoral frameworks, including the Independent Electoral and Boundaries Act and the Political Parties Act.

References:

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

"Political Party Finance: Can Corruption be Contained?," The 10th Anti-Corruption Conference, 2001. <http://www.10iacc.org/content.phtml?documents=119&summ=57>

"Kenya: New Poll Law Seeks to Curb Vote Buying," by Bernard Namunane. AllAfrica, July 19, 2011. <http://allafrica.com/stories/201107200153.html>

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

Comments:

The lack of limits on corporate donations to electioneering is part of the focus of new legislation and reforms to electoral frameworks, including the Independent Electoral and Boundaries Act and the Political Parties Act.

References:

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

"Political Party Finance: Can Corruption be Contained?," The 10th Anti-Corruption Conference, 2001. <http://www.10iacc.org/content.phtml?documents=119&summ=57>

"Kenya: New Poll Law Seeks to Curb Vote Buying," by Bernard Namunane. AllAfrica, July 19, 2011. <http://allafrica.com/stories/201107200153.html>

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

Comments:

The lack of limits on corporate donations to electioneering is part of the focus of new legislation and reforms to electoral frameworks, including the Independent Electoral and Boundaries Act and the Political Parties Act.

References:

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

"Political Party Finance: Can Corruption be Contained?," The 10th Anti-Corruption Conference, 2001. <http://www.10iacc.org/content.phtml?documents=119&summ=57>

"Kenya: New Poll Law Seeks to Curb Vote Buying," by Bernard Namunane. AllAfrica, July 19, 2011. <http://allafrica.com/stories/201107200153.html>

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

75:

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

25:

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

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

100 | 75 | 50 | 25 | 0

Comments:

The lack of limits on corporate donations to electioneering is part of the focus of new legislation and reforms to electoral frameworks, including the Independent Electoral and Boundaries Act and the Political Parties Act.

References:

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

"Political Party Finance: Can Corruption be Contained?," The 10th Anti-Corruption Conference, 2001. <http://www.10iacc.org/content.phtml?documents=119&summ=57>

"Kenya: New Poll Law Seeks to Curb Vote Buying," by Bernard Namunane. AllAfrica, July 19, 2011. <http://allafrica.com/stories/201107200153.html>

"Kenya: Political Party Finances." Electoral Institute for the Sustainability of Democracy in Africa. July 2010. <http://www.eisa.org.za/WEP/kenparties3.htm>

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

75:

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

25:

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

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

100 | 75 | 50 | 25 | 0

Comments:

The lack of limits on corporate donations to electioneering is part of the focus of new legislation and reforms to electoral frameworks, including the Independent Electoral and Boundaries Act and the Political Parties Act.

References:

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

"Political Party Finance: Can Corruption be Contained?," The 10th Anti-Corruption Conference, 2001. <http://www.10iacc.org/content.phtml?documents=119&summ=57>

"Kenya: New Poll Law Seeks to Curb Vote Buying," by Bernard Namunane. AllAfrica, July 19, 2011. <http://allafrica.com/stories/201107200153.html>

"Kenya: Political Party Finances." Electoral Institute for the Sustainability of Democracy in Africa. July 2010. <http://www.eisa.org.za/WEP/kenparties3.htm>

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.

Comments:

The lack of limits on corporate donations to electioneering is part of the focus of new legislation and reforms to electoral frameworks, including the Independent Electoral and Boundaries Act and the Political Parties Act.

References:

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

"Political Party Finance: Can Corruption be Contained?," The 10th Anti-Corruption Conference, 2001. <http://www.10iacc.org/content.phtml?documents=119&summ=57>

"Kenya: New Poll Law Seeks to Curb Vote Buying," by Bernard Namunane. AllAfrica, July 19, 2011. <http://allafrica.com/stories/201107200153.html>

"Kenya: Political Party Finances." Electoral Institute for the Sustainability of Democracy in Africa. July 2010. <http://www.eisa.org.za/WEP/kenparties3.htm>

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.

Comments:

The lack of limits on corporate donations to electioneering is part of the focus of new legislation and reforms to electoral frameworks, including the Independent Electoral and Boundaries Act and the Political Parties Act.

References:

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

"Political Party Finance: Can Corruption be Contained?," The 10th Anti-Corruption Conference, 2001. <http://www.10iacc.org/content.phtml?documents=119&summ=57>

"Kenya: New Poll Law Seeks to Curb Vote Buying," by Bernard Namunane. AllAfrica, July 19, 2011. <http://allafrica.com/stories/201107200153.html>

"Kenya: Political Party Finances." Electoral Institute for the Sustainability of Democracy in Africa. July 2010. <http://www.eisa.org.za/WEP/kenparties3.htm>

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?

0

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

100 | 75 | 50 | 25 | 0

Comments:

The lack of limits on corporate donations to electioneering is part of the focus of new legislation and reforms to electoral frameworks, including the Independent Electoral and Boundaries Act and the Political Parties Act.

Section 29 of the Political Parties Act requires parties to publish their accounts in prominent newspapers within 90 days of the close of their financial years. How effective this will be remains to be seen.

References:

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

"Political Party Finance: Can Corruption be Contained?," The 10th Anti-Corruption Conference, 2001. <http://www.10iacc.org/content.phtml?documents=119&summ=57>

"Kenya: New Poll Law Seeks to Curb Vote Buying," by Bernard Namunane. AllAfrica, July 19, 2011. <http://allafrica.com/stories/201107200153.html>

"Kenya: Political Party Finances." Electoral Institute for the Sustainability of Democracy in Africa. July 2010. <http://www.eisa.org.za/WEP/kenparties3.htm>

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

Comments:

The lack of limits on corporate donations to electioneering is part of the focus of new legislation and reforms to electoral frameworks, including the Independent Electoral and Boundaries Act and the Political Parties Act.

Section 29 of the Political Parties Act requires parties to publish their accounts in prominent newspapers within 90 days of the close of their financial years. How effective this will be remains to be seen.

References:

http://www.kenyalaw.org/kenyalaw/klr_home/ <http://www.10iacc.org/content.phtml?documents=119&summ=57> <http://allafrica.com/stories/201107200153.html> <http://www.eisa.org.za/WEP/kenparties3.htm>

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

Comments:

The lack of limits on corporate donations to electioneering is part of the focus of new legislation and reforms to electoral frameworks, including the Independent Electoral and Boundaries Act and the Political Parties Act.

Section 29 of the Political Parties Act requires parties to publish their accounts in prominent newspapers within 90 days of the close of their financial years. How effective this will be remains to be seen.

References:

http://www.kenyalaw.org/kenyalaw/klr_home/ <http://www.10iacc.org/content.phtml?documents=119&summ=57><http://allafrica.com/stories/201107200153.html> <http://www.eisa.org.za/WEP/kenparties3.htm>

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 NGOs. 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 NGOs 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

Comments:

The lack of limits on corporate donations to electioneering is part of the focus of new legislation and reforms to electoral frameworks, including the Independent Electoral and Boundaries Act and the Political Parties Act.

Section 29 of the Political Parties Act requires parties to publish their accounts in prominent newspapers within 90 days of the close of their financial years. How effective this will be remains to be seen.

References:

http://www.kenyalaw.org/kenyalaw/klr_home/ <http://www.10iacc.org/content.phtml?documents=119&summ=57><http://allafrica.com/stories/201107200153.html> <http://www.eisa.org.za/WEP/kenparties3.htm>

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

Comments:

The lack of limits on corporate donations to electioneering is part of the focus of new legislation and reforms to electoral frameworks, including the Independent Electoral and Boundaries Act and the Political Parties Act.

Section 29 of the Political Parties Act requires parties to publish their accounts in prominent newspapers within 90 days of the close of their financial years. How effective this will be remains to be seen.

References:

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

"Political Party Finance: Can Corruption be Contained?," The 10th Anti-Corruption Conference, 2001. <http://www.10iacc.org/content.phtml?documents=119&summ=57>

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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

Comments:

The lack of limits on corporate donations to electioneering is part of the focus of new legislation and reforms to electoral frameworks, including the Independent Electoral and Boundaries Act and the Political Parties Act.

Section 29 of the Political Parties Act requires parties to publish their accounts in prominent newspapers within 90 days of the close of their financial years. How effective this will be remains to be seen.

References:

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

"Political Party Finance: Can Corruption be Contained?," The 10th Anti-Corruption Conference, 2001. <http://www.10iacc.org/content.phtml?documents=119&summ=57>

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"Kenya: Political Party Finances." Electoral Institute for the Sustainability of Democracy in Africa. July 2010. <http://www.eisa.org.za/WEP/kenparties3.htm>

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

Comments:

The lack of limits on corporate donations to electioneering is part of the focus of new legislation and reforms to electoral frameworks, including the Independent Electoral and Boundaries Act and the Political Parties Act.

Section 29 of the Political Parties Act requires parties to publish their accounts in prominent newspapers within 90 days of the close of their financial years. How effective this will be remains to be seen.

References:

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

"Political Party Finance: Can Corruption be Contained?," The 10th Anti-Corruption Conference, 2001. <http://www.10iacc.org/content.phtml?documents=119&summ=57>

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"Kenya: Political Party Finances." Electoral Institute for the Sustainability of Democracy in Africa. July 2010. <http://www.eisa.org.za/WEP/kenparties3.htm>

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 NGOs. 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 NGOs 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

Comments:

The lack of limits on corporate donations to electioneering is part of the focus of new legislation and reforms to electoral frameworks, including the Independent Electoral and Boundaries Act and the Political Parties Act.

Section 29 of the Political Parties Act requires parties to publish their accounts in prominent newspapers within 90 days of the close of their financial years. How effective this will be remains to be seen.

References:

The lack of limits on corporate donations to electioneering is part of the focus of new legislation and reforms to electoral frameworks, including the Independent Electoral and Boundaries Act and the Political Parties Act.

Section 29 of the Political Parties Act requires parties to publish their accounts in prominent newspapers within 90 days of the close of their financial years. How effective this will be remains to be seen.

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 3. Government Conflicts of Interest Safeguards & Checks and Balances

3.1. ⁶⁰Conflicts of Interest Safeguards & Checks and Balances:
Executive Branch

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

100

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

Yes | No

Comments:

Article 22(1) of the Constitution provides that every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. Article 23 gives the High Court the jurisdiction to hear and determine the applications for such cases.

References:

Constitution, Article 22(1) and Article 23. 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) 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.

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

88

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

100 | 75 | 50 | 25 | 0

Comments:

Kenya's parliamentary process, which includes sectoral committees, provides opportunity to debate most executive/government decisions. Kenya has a five-year national development plan that broadly outlines the direction of development. These directions arise from or are interpreted through policy papers, sessional papers and the budget. In a multiparty context with regular elections, the chief executive's performance and accountability may be a factor in voters' minds.

However, there are instances where policy is the product of the executive's whims, euphemistically referred to in Kenya as "roadside decrees." These roadside decrees tend to increase during electoral campaigns. One area in Kenya where the executive has utilized roadside decrees is with the creation of districts and other administrative units such as divisions. This was started by retired President Moi but later perfected by President Kibaki during the run up to the 2005 constitutional referendum and later in his 2007 re-election bid.

As a rule, the president does not address the media. When the president's decisions are questioned, he is wont to keep mum and let his political lieutenants and foot soldiers defend controversial issues on his behalf.

Kenya's current coalition government has the president share power with a prime minister who has a weekly question time in Parliament during which parliamentarians can engage him on executive conduct.

References:

<http://www.primeminister.go.ke/DOCS/q%20time.pdf> (2009)

<http://allafrica.com/stories/201111030027.html> (November 2011)

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

75:

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

25:

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

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

Yes | No

Comments:

Article 165(3) (b) of the Constitution gives the High Court the jurisdiction to determine whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened. The procedure for conducting the review is regulated by section 81 of the Civil Procedure Act and Order 53 of the Civil Procedure Rules, 2010.

References:

The Constitution, Article 165(3) (b).

The Civil Procedure Act, Section 81, and the Civil Procedure Rules, Order 53.

2010. http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

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

Comments:

The judicial arm of the government has variously reviewed actions by the executive. This is usually carried out through constitutional or judicial review applications. For instance, J. Musinga of the High Court held in last year that the controversial constitutional appointments by the president in February 2011 were unconstitutional.

References:

"Kenya: Speaker Holds Back, but Judge Rules List Illegal" by Njeri Rugene and Jillo Kadida. Daily Nation, Feb. 3, 2011. <http://allafrica.com/stories/201102031059.html>.

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

Comments:

The use of the executive order by the president has been used, especially during electioneering, as a mechanism for wooing voters. However, the president has been thwarted by a new Constitution designed to specifically curb such executive excesses.

In 2011, the president made unconstitutional appointments, which were rejected by Parliament and the High Court.

References:

"Executive in Row Over Arrest Warrant of Sudanese President." Kenyan Judiciary, Xinhua. Dec 2, 2011. http://news.xinhuanet.com/english2010/world/2011-12/02/c_131285137.htm

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?

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

Yes | No

Comments:

The head of state has immunity from any criminal prosecution during his term of office by virtue of Article 143(1) of the Constitution. The immunity is unavailable for crimes prosecutable under any treaty to which Kenya is a party.

References:

The Constitution, Article 143(1). http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

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

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

28b. In law, ministerial-level officials can be prosecuted for crimes they commit.

Yes | No

Comments:

Article 143(1) only grants immunity from criminal prosecution to the president. No other government officials are immune from criminal liability.

The Public Officers Ethics Act (No. 4 of 2003) was enacted to advance the ethics of public officers by providing for an ethics code and requiring financial declarations from certain public officers. Section 37 of provides: "If, as a result of an investigation under this part, the Commission is of the view that civil or criminal proceedings ought to be considered (against a public officer, including ministers), the Commission shall refer the matter to the Attorney General or other appropriate authority."

References:

The Constitution, Article 143(1).

Public Officers Ethics Act (No. 4 of 2003)
http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

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?

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

Yes | No

Comments:

Section 3(2) (a) and Part IV (sections 26-34) of the Public Officer Ethics Act, Cap 183, requires all public officers to make disclosures of their incomes, assets and liabilities once a year. The legislation was enacted "to advance the ethics of public officers by providing for a Code of Conduct and Ethics for public officers and requiring financial declarations from certain public officers and to provide for connected purposes."

References:

The Public Officer Ethics Act, Cap 183, Section 3(2) (a) and Sections 26-34. 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

Comments:

Section 3(2) (a) and Part IV (sections 26-34) of the Public Officer Ethics Act, Cap 183, requires all public officers to make disclosures of their incomes, assets and liabilities once a year. The legislation was enacted "to advance the ethics of public officers by providing for a Code of Conduct and Ethics for public officers and requiring financial declarations from certain public officers and to provide for connected purposes."

References:

Public Officer Ethics Act, Cap 183, Section 3(2) (a) and Sections 26-34. 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

Comments:

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

References:

Public Officers Ethics Act, Section 10(3). 2003. 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**

Comments:

Part IV of the Public Officers Ethics Act of 2003 (Cap 203) requires officers to declare their assets and those of their spouses and children. This annual declaration is made to the service commission employing such officers. However, the law is not clear on who audits these reports, and the media have yet to report any action arising out of these declarations of wealth.

References:

Public Officers Ethics Act of 2003 (Cap 203), Part IV. http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

Yes: A YES score is earned if there is a legal or regulatory requirement for independent auditing of executive branch asset disclosures. The auditing is performed by an impartial third-party. Figurehead officials (symbolic figures without day-to-day authority) may be exempt.

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

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

Yes | **No**

Comments:

Section 11 of the Public Officers Ethics Act of 2003 (Cap 203) only addresses conflicts of interest during employment. There is no law governing involvement in private business during and after public office. See http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

References:

No law addresses this issue.

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**

Comments:

No laws exist restricting private sector participation by serving or former senior executives of the government. Even for current executives, the Ethics and Anti-Corruption Commission Act, 2011, and the Public Officers Ethics Act only provide restrictions in the event of possible conflicts of interest.

References:

No law addresses this issue.

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

Comments:

There does not seem to be any monitoring of Section 11(3) of the Public Officers Ethics Act, which requires gifts to officers to be surrendered to their respective organizations. However, the conflict-of-interest provisions of the same act and the reaction of society has, in instances, been a deterrent to officers who may otherwise have accepted such gifts.

Concerns have been raised on the effectiveness of the Wealth Declaration in Kenya. In June 2011, UNDP-Kenya advertised for consultancy services for the implementation of a wealth-declaration system.

References:

"Declaration of Wealth for Judicial Officers." Kenya Jurist. March 18, 2011. <http://kenyanjurist.blogspot.com/2011/03/declaration-of-wealth-for-judicial.html>

"Expression of Interest: Consultancy Services for Implementation of Wealth Declaration System." United National Development Program. June 2011. <http://www.ke.undp.org/index.php/procurements/75>

"Kenya: To Crush Official Corruption, Make Wealth Declaration Open to the Public," By Okiya Omatata Okoiti. Jan. 7, 2011. <http://allafrica.com/stories/201101101100.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

Comments:

There does not seem to be any monitoring of Section 11(3) of the Public Officers Ethics Act, which requires gifts to officers to be surrendered to their respective organizations. However, the conflict-of-interest provisions of the same act and the reaction of society has, in instances, been a deterrent to officers who may otherwise have accepted such gifts.

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"Kenya: To Crush Official Corruption, Make Wealth Declaration Open to the Public," by Okiya Omatata Okoit. Jan. 7, 2011. <http://allafrica.com/stories/201101101100.html>

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

75:

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

25:

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

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

0

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

Yes | **No**

Comments:

Part IV, Section 29 of Cap 203 binds 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:

- (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.

References:

Kenya Law, Cap 203 (Part IV, Section 29). http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

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**

Comments:

Citizens cannot access such disclosure forms. Part IV, Section 29 of Cap 203 binds service commissions to confidentiality and may only avail information on a High Court order or to an agent of the person who made the declaration. See http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

References:

N/A

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

Comments:

Citizens cannot access such disclosure forms. Part IV, Section 29 of Cap 203 binds service commissions to confidentiality and may only avail information on a High Court order or to an agent of the person who made the declaration. See http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

References:

N/A

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 NGOs. 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 NGOs 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

Comments:

Part IV, Section 29 of Cap 203 binds service commissions to confidentiality and may only avail information on a High Court order or to an agent of the person who made the declaration. Consequently, it is impossible to verify the forms' quality.

References:

N/A

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.

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

50

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

100 | 75 | 50 | 25 | 0

Comments:

During the single-party KANU era that ended in 2002, there was hardly any distinction between party and state activities/resources. For example, while KANU had no known resources, such as finances, in 2003 it claimed to have built and own the 30-story Kenyatta International Conference Center.

Into the post-2002 NARC party era, use of state resources declined somewhat. However, the incumbent has tended to blur the lines between (his) party and the state. Both sides of the coalition government (since 2008), have also tended to disregard the state/party divide. The president largely travels with his PNU party ministers while the prime minister also largely travels with his ODM party ministers. During by-elections arising from successful petitions against victors in the 2007 general elections, it became necessary for opposition members to warn the government against misuse of state resources, as was done by the NARC-Kenya party chair in the by-elections in Juja, Makadara and Starehe in September 2010.

References:

"Contractor Leaves Road after ODM Lost Ikolomani" by Hilton Otenyo and Nzau Musau. The Star, June 2, 2011. <http://www.nairobistar.com/national/national/26573-contractor-abandons-butere-sigalagala-road-after-odm-loses-ikolomani>

"Government Warned Over Misuse of State Resources." Kass Media Group. <http://www.kassfm.co.ke/news/675-government-warned-over-misuse-of-state-resources>

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.

3.2. Conflicts of Interest Safeguards & Checks and Balances: Legislative Branch

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

Comments:

Article 165(3)(d)(i) of the Constitution gives the High Court jurisdiction to hear any question on the interpretation of the Constitution including determining whether any law is inconsistent with the Constitution.

References:

Article 165(3)(d)(i) of the Constitution. http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

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

Comments:

This is usually carried out through constitutional applications to the High Court. For instance, under the old Constitution, the High Court declared that section 4 of the Kadhis Courts Act (Cap 11) was inconsistent with section 78 of that Constitution. The court also declared that section 66 of the old Constitution was inconsistent with section 65 and 82.

Another example is the case of Jesse Kamau and 25 others vs. the Attorney General (2010). Presently, a case is before the courts to determine the date of the next general election, about which the Constitution (2010) is ambiguous.

References:

<http://allafrica.com/stories/201111160968.html>

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

75:

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

25:

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

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

Yes | No

Comments:

Article 143 of the Constitution only exempts the president from criminal prosecution. Everyone else, including parliamentarians, can be subjected to criminal proceedings. The National Assembly (Powers and Privileges) Act, Cap 6, exempts members from prosecution for anything said in the assembly. Members also may not be arrested within the precincts of the assembly.

References:

The Constitution, Article 143.

National Assembly (Powers and Privileges) Act, Cap 6. http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

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

Comments:

This is by virtue of section 3(2) and Part IV (sections 26-340 of the Public Officer Ethics Act, as read with the Code of Ethics of Members of the National Assembly.

References:

The Public Officers Ethics Act, Section 3(2) and Sections 26-34.

Code of Ethics of Members of the National Assembly.

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

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

Comments:

There is no law restricting sitting or former legislators from the private sector.

References:

There is no law restricting sitting or former legislators from the private sector.

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

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

Comments:

Public servants are required to abide by sections 2, 3(2) and 11(3) of the Public Officer Ethics Act, as read together with the Code of Ethics of Members of the National Assembly. These sections outline the management of gifts and hospitality. See http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

References:

The Public Officer Ethics Act, Sections 2, 3(2) and 11(3).

Code of Ethics of Members of the National Assembly
http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

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

Comments:

Neither the Public Officers Ethics Act nor any other law obligates the Parliamentary Service Commission to conduct audits on the disclosures.

References:

No law obliges audits on the disclosures.

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

Comments:

There are no laws barring legislators from private business during or after their tenure. Many are professionals (engineers, lawyers, etc.), which is what allowed them to negotiate Kenya's expensive political landscape.

References:

N/A

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

Comments:

The provisions of the Public Officers Ethics Act on gifts and hospitality are very difficult to enforce. The typical practice is to thank anyone presiding over a fundraising event by giving a goat or sheep, for example. Such gifts are never reported. When officers receive gifts such as a concessionary hotel stay or air ticket, it only becomes public if someone adversely affected by that consideration decides to raise it in the media. Consequently, legislators often violate the laws on gifts and hospitality until they are caught.

However, even after they are caught, nothing comes of such discoveries other than the bad publicity.

A former legislator, Joe Khamisi, wrote "The Politics of Betrayal." In it, he reveals how parliamentarians are often paid with money and gifts to support particular legislation.

References:

"Kenya: Khamisi's Book a Serious Betrayal of Facts" by Aristotle Omondi. AllAfrica, April 28, 2011. <http://allafrica.com/stories/201104290105.html>

"Perpetrators of Political Corruption in Parliament." Africa Op-Ed, part 3. June 14, 2011, <http://groups.yahoo.com/group/africa-oped/message/46869>

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

Comments:

It is unclear what happens to the disclosure forms once submitted; no one has ever been called out for questionable acquisition of wealth. For example, a case remains before the courts in which a former parliamentarian has challenged the government's right to access details of his wealth.

In June 2011, UNDP-Kenya advertised for a consultancy to improve the framework for the management of wealth declaration data.

References:

"Expression of Interest: Consultancy Services for Implementation of Wealth Declaration System." United Nations Development Program, June 2011. <http://www.ke.undp.org/index.php/procurements/75>

"Kenya: To Crush Official Corruption, Make Wealth Declaration Open to the Public" by Okiya Omatata Okoiti. Jan. 7, 2011. <http://allafrica.com/stories/201101101100.html>

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**

Comments:

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.

References:

The Public Officers Ethics Act (Cap 203), Section 29. http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

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, non-governmental 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**

Comments:

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.

References:

N/A

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

Comments:

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.

References:

N/A

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 NGOs. 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 NGOs 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

Comments:

Because of the protective veil covering the Public Officers Ethics Act, it is not possible to determine the quality of the declarations. The legal costs of accessing such documents to evaluate their quality would be prohibitive for the average citizen. These obstacles exist across the entire public sector.

References:

"To Crush Official Corruption, Make Wealth Declaration Open to the Public" by Okiya Omatata Okioti. Jan. 7, 2011. Available at <http://allafrica.com/stories/201101101100.html>

"Declaration of Wealth of Judicial Officers." Kenya Jurist, March 18, 2011. <http://kenyanjurist.blogspot.com/2011/03/declaration-of-wealth-for-judicial.html>

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?

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

Yes | No

Comments:

The National Assembly has a public gallery open to citizens during most proceedings. Parliament has a Hansard office, which records proceedings, with copies of the records available in the library. Debates for 2006 and 2009 are available on the Assembly's website.

The program of parliamentary business and legislation tracker are available online.

Furthermore, most proceedings 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.

References:

"Parliament" Hansard, 2011. http://www.parliament.go.ke/index.php?option=com_content&view=article&id=184&Itemid=159

http://www.parliament.go.ke/index.php?option=com_content&view=article&id=96:live-broadcast&catid=79:house-broadcast

3. http://www.parliament.go.ke/index.php?option=com_content&view=article&id=99:programme-of-parliamentary-business&catid=46:house-business

4. http://www.parliament.go.ke/index.php?option=com_content&view=article&id=113:bill-tracker&catid=46:house-business

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

Comments:

Besides TV coverage, which has limited reach, records of parliamentary business are accessible during debates, on hard copy, online and through the eKLR. Timely media reports are available, and Hansard records are online.

References:

"Parliament." Hansard, 2011. http://www.parliament.go.ke/index.php?option=com_content&view=article&id=184&Itemid=159

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.

Comments:

The Nairobi seat of the country's Legislature is too far away for the majority of Kenyans to attend Parliament. However, the institution's records are disseminated through its website and the media, including live KBC TV coverage and the Kenya Law Reports.

Though some people have home Internet access, cyber cafes charge an average dollar per hour of browsing, making this a possibility for only the middle class. The majority rural population either doesn't know about such channels, or is not located near them or cannot afford them.

References:

"Parliament." Hansard, 2011. http://www.parliament.go.ke/index.php?option=com_content&view=article&id=184&Itemid=159

<http://www.kenyalaw.org/klr/index.php>

http://www.parliament.go.ke/index.php?option=com_content&view=article&id=113:bill-tracker&catid=46:house-business

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 NGOs. 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 NGOs trying to access this information.

53

3.3. Conflicts of Interest Safeguards & Checks and Balances: Judicial Branch

36. Are judges appointed fairly?

100

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

Yes | No

Comments:

The procedures are provided for through Articles 166(1) and 172(1) (a). The chief justice and deputy chief justice are chosen through a interview process conducted by the Judicial Service Commission. The commission makes recommendations to the president, who forwards the nominees to Parliament for vetting. If the House approves the nominees, the president appoints them to office.

For the rest of the judges, the commission takes applications and conducts interviews. The commission makes a recommendation to the president. The president then appoints the recommended person.

References:

Constitution, Articles 166(1) and 172(1) (a). http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

Yes: A YES score is earned if there is a formal process for selecting national level justices. This process should be public in the debating and confirmation stages. National-level judges are defined as judges who have powers that derive from a

national law or constitution; are nominated/appointed by a national governmental body (head of state/government or national legislature); and/or are elected nationally.

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

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

100 | 75 | 50 | 25 | 0

Comments:

In 2011, presidential appointments to the judiciary were publicly contested for the first time. Public interviews by the Judicial Service Commission for court judges, deputy court judges, Supreme Court judges and High Court judges were conducted according to the Constitution. Also, the parliamentary vetting of the court judge and deputy court judge was covered live. The processes were professional and rewarded merit rather than personal connections.

References:

Aug. 8, 2011. <http://www.standardmedia.co.ke/InsidePage.php?id=2000041384&cid=4&>

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

Comments:

The process of confirmation is provided for the chief justice and his deputy through Articles 166(1) and 172(1) (a). The commission makes recommendations to the president who forwards the nominees to Parliament. If the House approves the nominees, the president appoints them.

References:

Kenya Law, Articles 166(1) and 172(1) (a). See http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

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?

75

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

Yes | No

Comments:

The judiciary is required to make elaborate justifications of its judgments, citing the case law applied or other precedence. However, decisions in the lower courts can be quite peremptory.

The Judicature Act, Section 3, provides:

(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) all other written laws; (c) 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.

References:

Kenya Law. Judicature Act Cap 8, Section 3.

“Judgment Writing in Kenya and the Common Law World” by Gerald Lebovits. 2009. <http://www.kenyalaw.org/klr/index.php?id=839>

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

Comments:

As provided for by Section 3 of the Judicature Act, judicial decisions will always cite the law under which the case is being tried, especially in prosecutions (as opposed to civil disputes). In high-profile cases where litigants have hired lawyers, judges will justify their decisions.

However, in the majority of cases involving the average citizen, often unrepresented by counsel, judgments can be quite dismissive. For example, in petty offenses, such as failing to carry a national identification card or drinking after licensed hours, the accused will appear in groups in anticipation of their joint plea of guilty.

Besides the right of appeal, which is expensive, some outright dubious judgments have been subjected to review by senior judicial officers. In one instance, the Court of Appeal concluded: “How she came to this figure is beyond comprehension. It amounts to what can only be referred to as enigmatic. Before we part from this appeal, we would wish to express our anxiety at the manner in which the learned judge arbitrarily assessed the figures for maintenance totally abdicating the duties cast upon her by the rules.”

References:

“Integrity is Ang’awa’s Strength, Her Judgments the Key Weakness” by George Kegoro. Property Kenya, April 22, 2011. <http://www.propertykenya.com/news/1463420-integrity-is-angawas-strength-her-judgments-the-key-weakness>

“Kenya: Judicial Officers Should Expect Public Scrutiny.” AllAfrica editorial, Feb. 8, 2012. <http://allafrica.com/stories/201202090053.html>

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

Comments:

Article 168 of the Constitution establishes a disciplinary mechanism for judges to be initiated by the Judicial Service Commission and culminate into the appointment of a tribunal. The operation of the tribunal is stipulated in Part V (Sections 30-33) of the Judicial Service Act, 2011.

References:

Constitution, Article 168.

Judicial Service Act, Sections 30-33. 2011.

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

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

Comments:

The Judicial Service Commission and its tribunals were established under Article 168 and supported through acts of Parliament. The JSC Act, Article 249(2) makes members of the Constitutional Commission and independent offices subject only to the Constitution and not to direction or control by any person or authority.

References:

Constitution, Article 168.

The Judicial Service Commission Act, Article 249(2). http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

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:

The judiciary initiated investigations against itself under Chief Justice Chesoni in 1999 (Kwach committee) and Chief Justice Gicheru in 2003 (Ringera report). Little came of the Kwach Report. The Ringera Report prompted a purge that affected several judicial officers. However, it was laden with allegations of witch-hunting, and political considerations took center stage.

Since the promulgation of the new Constitution (2010), prospective members of the judiciary are subjected to a character and professional evaluation. This vetting process is completed after the fact but sets the stage for scrutiny and punishment into the future.

References:

"Corruption in the Judiciary" by Aaron G. Ringera. Kenya Anti-Corruption Commission presentation to the World Bank. April 2007. http://www.kacc.go.ke/archives/Speeches/Justice_Ringera_Presentation200407.pdf

"Kenya: Interviews to Select Chief Justice Begin" by Pamela Chepkemei. The Star newspaper, May 4, 2011. <http://allafrica.com/stories/201105050052.html>

3. "Thoughts on the Chief Justice Interviews" by (Mzalendo contributor) Moreen Majiwa. May 11, 2011. <http://www.mzalendo.com/2011/05/11/thoughts-on-the-chief-justice-interviews/>

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

Comments:

The recommendations of the Disciplinary Committee (DC)'s Kwach Report were never implemented despite promises by the then chief justice. Another report, by the Ringera Committee, popularly known as the Radical Surgery of the Judiciary, had mixed results. Many judges and magistrates (23 and 282, respectively) were suspended based on its recommendations. However, a number of the suspended judges who faced the Tribunal were vindicated. Two judges were recommended for dismissal while five were cleared.

The new Constitution has set up a vetting mechanism for judicial officers. The vetting process has yet to begin. Already, a High Court is considering its constitutionality.

References:

"Judges to Quit, Rather Than Face Graft Probe" by Jilo Kadida. Daily Nation, Aug. 10, 2010. <http://www.nation.co.ke/Kenya%20Referendum/Judges%20to%20quit%20rather%20than%20face%20graft%20probe%20/-/926046/974774/-/view/>

"Vetting of Judges Suit Referred to Mutunga" by Jilo Kadida. The Star, Sept. 3, 2011. <http://www.nairobistar.com/national/national/38812-vetting-judge-refers-vetting-suit-to-chief-justice>.

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?

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

Yes | No

Comments:

The judiciary is bound by the obligations of sections 2(a) and 11 of the Public Officers Ethics Act. The Judicial Service Code of Conduct and Ethics, as well as the Judicial Service Commission Procedures for the Administration of Part IV of the Public Officers Ethics Act, sets specific rules.

References:

Public Officers Ethics Act, Sections 2(a) and 11.

Judicial Service Code of Conduct and Ethics.

Judicial Service Commission Procedures for the Administration of Part IV of the Public Officers Ethics Act. http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

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

No: A NO score is earned if any member of the national-level judiciary is not required to publicly disclose assets.

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

Yes | No

Comments:

These are provided for through section 11(3) of the Public Officer Ethics Act.

References:

Public Officer Ethics Act, Section 11(3). http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

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

Comments:

The Public Officers Ethics Act does not oblige the Judicial Service Commission to conduct any independent audits of the asset disclosure forms of its members.

References:

No applicable law exists.

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**

Comments:

No law restricts former national level judges from the private sector after their public service.

References:

No applicable law exists.

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**

Comments:

There are no such restrictions. Many judicial officers simply return to their old private firms. Some of the officers whose practicing licenses were revoked during the 2003 purge have reportedly established consultancies.

However, the Law Society of Kenya intends to bar former judicial officers from private practice to enhance accountability and transparency. Little progress has been made.

The Advocates Act provides that: "no person shall be qualified to act as an advocate unless (a) he has been admitted as an advocate; (b) his name is for the time being on the Roll; and (c) he has in force a practicing certificate; and for the purpose of this Act a practicing certificate shall be deemed not to be in force at any time while he is suspended by virtue of section 27 or by an order under section 60 (4).

References:

"Independence and Accountability of the Judiciary in Kenya" by Winluck Wahi. P. 34-35. http://www.kituochakatiba.org/index2.php?option=com_docman&task=doc_view&gid=364&Itemid=27

Advocates Act (Cap 16), Section 9.

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

Comments:

There are no 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 the 2003 Ringera Report revealed judicial misconduct.

Judge Samwel Oguk allegedly accepted gifts from a suspect before his court. He was consequently forced to resign and charged with corruption.

References:

"Kenya: Embattled Judge Oguk on Fraud Charge," by Boniface Kaona. The Standard, Jan. 28, 2003. <http://allafrica.com/stories/200301271345.html>

The Ringera Report.

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

Comments:

The Public Officers Ethics Act does not mandate audits of asset disclosure forms.

References:

N/A

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**

Comments:

Section 29 of the Public Officers Ethics Act, Cap 203, makes such information confidential.

References:

The Public Officers Ethics Act (Cap 203), Section 29. http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

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

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

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

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

Comments:

The Public Officers Ethics Act does not provide for this. Rather, Section 30 imposes confidentiality over the declarations.

References:

N/A

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

75:

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

25:

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

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

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

Comments:

The confidentiality provided by the Public Officers Ethics Act means it is impossible to access the declaration forms, unless one obtains a court order. Consequently, the issue of cost does not arise.

References:

N/A

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 NGOs. 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 NGOs 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

Comments:

The veil of confidentiality provided by Section 30 of the Public Officers Ethics Act means it is impossible to access declaration forms. As a result, it is almost impossible to gauge the quality of the forms.

References:

N/A

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.

3.4. Budget Process Oversight & Transparency

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

83

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

Yes | No

Comments:

Chapter 12 of the Constitution addresses budgeting. The Parliament Senate is to ensure the national level does not overlook the sub-national level's concerns, such as in resource allocation.

Article 205 provides that when a bill includes provisions dealing with the sharing of revenue, or any financial matter concerning county governments is published, the Commission on Revenue Allocation shall consider those provisions and may make recommendations to the National Assembly and the Senate (Article 205(1)). Further, it provides that any recommendations made by the commission shall be tabled in Parliament, and each House shall consider the recommendations before voting on the bill (Article 205(2)).

References:

Constitution, Chapter 12, Article 205.

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

"Kenya: International Budget Partnership." Open Budget Index, 2010. <http://internationalbudget.org/wp-content/uploads/2011/04/OBI2010-Kenya.pdf>

"MPs Push Treasury to Tame Rising Public Debt" by Geoffrey Irungu. April 11, 2011. <http://www.businessdailyafrica.com/-/539552/1142104/-/item/1/-/ceehmy/-/index.html>

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

Comments:

Parliament always scrutinizes and approves the bulk of public spending. However, there are often instances when political decisions cause the government to incur unexpected expenditures. Kenyan public spending is audited annually, with reports revealing great irregularities.

References:

"Kenya: International Budget Project." Open Budget Index, 2010. <http://internationalbudget.org/wp-content/uploads/2011/04/OBI2010-Kenya.pdf>

"Free For All? Misuse of Public Funds at the Electoral Commission of Kenya." Africa Center for Open Government. <http://www.africog.org/reports/ECK%20Report%20%28plus%20annexes%29.pdf>

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

Comments:

Parliamentarians have opportunities to study the budget before it is presented, including during district-level planning and through the Medium Term Expenditure Framework (MTEF) process and the parliamentary budget committees.

However, many legislators have a poor understanding of budget matters. The establishment of the Parliamentary Budget Office in 2007 should give legislators an improved capacity to study the process. The Budget Office is mandated to:

- (a) provide budget related information to the Budget committee, the departmental committees and other financial select committees of the National Assembly;
- (b) provide service to the Budget committee, the departmental committees and other financial select committees of the National Assembly 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 is necessary for the efficient and effective discharge of our 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.

The Institute of Economic Affairs also attempts to produce a friendly version of the budget for parliamentarians (see "Budget 2010/2011 – a guide for MPS").

References:

"Parliament of the Republic of Kenya." Parliamentary Budget Office. http://www.parliament.go.ke/index.php?option=com_content&view=article&id=201:parliamentary-budget-office-pbo&catid=77:parliamentary-budget-office-pbo

Parliamentary Strengthening Program. <http://kenya.usaid.gov/programs/democracy-and-governance/570>

"Parliamentary Budgeting Oversight." Institute of Economic Affairs, 2009. <http://www.ieakenya.or.ke/documents/The%20Parliamentary%20Budget%20Oversight%20in%20Kenya.pdf>; see also <http://www.ieakenya.or.ke/documents/Budget%20Guide%202010%2011.pdf>

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

75:

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

25:

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

41. Can citizens access the national budgetary process?

67

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

100 | 75 | 50 | 25 | 0

Comments:

The budget debate is transparent to the extent that all parliamentary debates are open to the public and the media. However, legislators' contributions are limited by a poor understanding of the technical contents of the budget speech and the relatively brief window for debate.

Frequent lack of quorum in the House (due to professional negligence or other commitments) also means that certain debates are held with a parliamentary minority. When the debating window is nearly over, ministerial budgets are often passed without serious scrutiny.

References:

International Budget Project, Open Budget Index 2010. Kenya. <http://internationalbudget.org/wp-content/uploads/2011/04/OBI2010-Kenya.pdf>.

Jeffrey D. Straussman and Ari Renoni, Establishing a Parliamentary Budget Office as an Element of Good Governance, September 2009, <http://www.cid.suny.edu/capnotes1/Straussman-Renoni%20CAP%20Note.pdf>

Parliament of the Republic of Kenya, "Parliamentary Budget Office Releases: Paper on Inflation and Exchange Rates in Kenya," http://www.parliament.go.ke/index.php?option=com_content&view=article&id=209:parliamentary-budget-office-releases-paper-on-inflation-and-exchange-rates-in-kenya&catid=31:breaking-news&Itemid=46.

The Parliamentary Budget Oversight in Kenya, at <http://www.ieakenya.or.ke/documents/The%20Parliamentary%20Budget%20Oversight%20in%20Kenya.pdf>

Kenya: How Government Can Make Budgeting More Transparent
By Jason Lakin And Hussein Khalid, August 19, 2011, <http://allafrica.com/stories/201108191569.html>

The Budget Information Programme, Institute of Economic Affairs, <http://www.ieakenya.or.ke/subsection.asp?ID=6>

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

75:

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

25:

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

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

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

Comments:

Within the finance ministry, the basic means for a citizens' input into the budget is the Medium Term Expenditure Framework (MTEF) process, through its sector working groups. These have been activated during this financial year.

Prior to this initiative, civil society organizations instituted public and sectoral pre-budget hearings. The Institute of Economic Affairs (IEA) compiles feedback into a report submitted to the finance minister. Its Budget Network Initiative, geared toward greater transparency in budgeting, produces an alternative budget.

Other frequent participants in the budget process include the Institute of Certified Public Accountants, Kenya Private Sector Foundation, Kenya Association of Manufacturers and the Institute of Policy Analysis and Research.

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

References:

"Kenya: Citizens to Participate in Budget Process." Social Watch. June 15, 2011. <http://www.socialwatch.org/node/13259>

"Kenya Cracks Open Its Budget." Open Budgets Blog, June 22, 2011. <http://openbudgetsblog.org/2011/06/22/kenya-cracks-open-its-budget/>

100: Citizens, usually acting through NGOs, 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 NGOs can provide input, but this information is often not relevant to budget decisions.

25:

0: Citizens or NGOs 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

Comments:

The budget speech explains the minister's revenue generation and expenditure intentions. However, the Finance Ministry also produces ministerial printed estimates, which break down 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 Printer immediately after the budget speech is delivered. However, Kenya has 40 ministries, meaning the average citizen could never afford to access all the estimates at once.

Kenya launched an Open Data Initiative in July 2011, which should improve access to such information.

References:

"Global Development: Poverty Matters; Kenya Open Data Initiative." The Guardian. July 13, 2011. <http://www.guardian.co.uk/global-development/poverty-matters/2011/jul/13/kenya-open-data-initiative>

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

75:

50: Citizens, journalists and NGOs 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.

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

100

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

Yes | No

Comments:

Kenya's National Assembly Standing Orders establish a Public Accounts Committee (PAC) and a Public Investment Committee (PIC) of Parliament. The controller of budget and the auditor general submit their reports to each House on the implementation of the national and county budgets (Article 228(6) and Article 229 (8)).

Presumably, PAC will review the performance of both the central and county governments' budget, while PIC will examine the performance of state corporations. Parliament also has seven departmental committees that review sectoral policies and their implementation.

References:

Constitution, Articles 228(6) and 229(8).
http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

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).

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

75

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

100 | 75 | 50 | 25 | 0

Comments:

Government department heads do not report regularly to the Public Accounts Committee (PAC) and the Public Investment Committee (PIC) of Parliament. However, they are subject to the constitutionally mandated annual auditor general's reports on ministry spending.

PAC and PIC may summon departmental heads for clarifications to enable them to complete their reporting to Parliament. 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.

References:

"Seventeenth Report of the Public Investment Committee on the State of Accounts of State Corporations," Vol. 1. 2010. Public Investment Committee. http://www.parliament.go.ke/index.php?option=com_content&view=article&id=189:report-of-the-public-investments-committee-2010&catid=52:committee-business

"Submission to the Public Accounts Committee Enquiring Into Matters Arising From The Finance Ministry Purchase And Surrender Vehicle Scheme." Public Accounts Committee, 2009. <http://blog.marsgroupkenya.org/?p=1488>

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

Comments:

The composition of the parliamentary oversight committees is determined by the parliamentary Standing Orders (No. 187 for the Public Accounts Committee and No. 188 for the Public Investment Committee). These may not be chaired by a member from the party of the sitting government. Kenya has a coalition government whose members of Parliament account for 209 of the 210 MPs.

Competition for the committees is often quite lively.

References:

Standing Orders. http://www.parliament.go.ke/index.php?option=com_content&view=article&id=95:the-standing-orders&catid=46:house-business

"Kenya: Kones to Vie for PAC Chairman Position Today" by Isaac Ongiri. Nairobi Star, Feb. 28, 2011. <http://allafrica.com/stories/201103010550.html>

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

Comments:

The independence of the Public Accounts and Public Investment Committees, which review the Auditor General (AG) reports, is

largely confined to their authority to summon relevant government officers to clarify queries. This was the case in mid-2011, when audit reports suggested money for a World Bank-funded youth work program had been misappropriated.

References:

"PAC To Summon Prime Minister Over Kazi Kkwa Vijana." http://www.youtube.com/watch?v=zh3d04sD_mg

"Treasury Officials Summoned Over Collapsed Stockbroker" by Caroline Wafula. Africa News Service, Aug.17, 2009. By Caroline Wafula. <http://business.highbeam.com/3548/article-1G1-206006246/treasury-officials-summoned-over-collapsed-stockbroker>

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

75:

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

25:

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

Category 4. Public Administration and Professionalism

4.1. ⁷⁰Civil Service: Conflicts of Interest Safeguards and Political Independence

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

100

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

Yes | No

Comments:

Chapter 13 of the Constitution is on the public service. Its Article 232(1) stipulates the values and principles of public service as including impartiality and independence. Article 233 creates the Public Service Commission, whose heads are appointed by the president, with the approval of the National Assembly. No one is to be appointed into the commission if they have been a parliamentarian or a member of the governing body of a political party within the past five years (Clause 3a), if they hold any state office, or if they are, or have been, a candidate for parliamentary elections.

References:

Constitution, Chapter 13, Articles 232(1) and 233
http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

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

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

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

Yes | No

Comments:

The Public Officers Ethics Act (Cap 203) addresses efficiency and honesty (Section 7), professionalism (Section 8), conflict of interest (Section 11) and nepotism (Section 16).

References:

The Public Officers Ethics Act (Cap 203), Sections 7, 8, 11 and 16.

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

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

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

Yes | No

Comments:

The Public Service Commission (PSC), established through Article 233 of the Constitution, deals with grievances of middle- and senior-level officers; 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. See http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

References:

Article 233 of the Constitution
http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

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

Comments:

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

References:

Anti-Corruption and Economic Crimes Act, Section 64(1).
http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

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?

67

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

100 | 75 | 50 | 25 | 0

Comments:

In practice, the civil service remains largely under the caprice of the political class, especially with respect to the appointments carried out under the old Constitution. Under the old Constitution, the provisions of Chapter VIII were abused by the political class, making the Civil Service and State Corporations dumping grounds for political failures. Most of the defeated politicians were appointed into civil service jobs or state corporations.

However, it is notable that the spirit of the new Constitution has seen citizens becoming more assertive and demanding that politicians follow the law in such appointments. For instance, the High Court recently nullified the reappointment of the CCK Director by the Minister for Information after the Minister failed to adhere to the due process of the law. Further, the exceedingly powerful head of the public service has also been admonished for similar interference.

References:

"High Court Nullifies CCK Boss's Reappointment" by Cyrus Ombati. The Standard, Aug. 10, 2011. <http://www.standardmedia.co.ke/insidePage.php?id=2000040544&cid=4>

"Kenya: CIC Blames Muthaura" by Mosoku Geoffrey. Nairobi Star, July 12, 2011. <http://allafrica.com/stories/201107130454.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

Comments:

Merit in appointments has never been Kenya's forte, especially since the old Constitution provided that public servants were employed at the pleasure of the president. While the new Constitution provides a framework for objectivity, the National Accord requires that the two partners share public offices. How to effect such power sharing has remained a major problem, and appointment without merit has continued.

References:

"Kibaki Appointments a Replay of the Past" by Stephen Makabila. The Standard, Jan. 1, 2011. <http://www.standardmedia.co.ke/archives/news/insidePage.php?id=2000027822&cid=159&>

"Merit and Tribal Balance Don't Mix." The East African, Nov. 13, 2011. <http://www.theeastafrican.co.ke/OpEd/editorial/Merit+and+tribal+balance+do+not+mix/-/434752/1272402/-/9a49l2z/-/index.html>

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

Comments:

Nepotism, cronyism and other forms of corruption have been the hallmark of public appointments in independent Kenya. The retirement age is 60, but some individuals remain in office past that age because of cronyism. One example is the Public Service head who is also implicated by ICC for planning post-election violence in 2008. A recent survey conducted by the National Cohesion and Integration Commission (NCIC) confirmed that cronyism and nepotism rampant in civil service and state corporation employments.

References:

"Kenya's Civil Service Riddled with Ethnicity" by Collins Anampiu. KBC News, April 6, 2011.

"Merit, Not Tribe, Ought To Guide Appointments" by Ngunjiri Wambugu. Dec. 6, 2011. <http://www.the-star.co.ke/opinions/ngunjiri-wambugu-52659-merit-not-tribe-ought-to-guide-appointments>

"Kenya: Muthaura Finally Goes On Leave." Nairobi Star, May 2, 2011. <http://allafrica.com/stories/201105030102.html>

"Kenya: NCIC Boss Warns Against Tribalism" by Samuel Otieno. Nairobi Star, Sept. 1, 2011. <http://allafrica.com/stories/201109020118.html>

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

75:

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

25:

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

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

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

Comments:

The Kenyan public sector has always worked toward developing service plans for its officers, which specify the steps to performance-based career progression. The government launched performance contracting in 1999 and has implemented this extensively across the public service. A few departments remain outside the reform, notably the Judiciary and the Teachers Service Commission. Performance contracts and results-based management imply clear specification of roles and responsibilities.

References:

http://www.psrpc.go.ke/index.php?option=com_content&view=article&id=86:what-is-a-performance-contract&catid=103:introduction

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

75:

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

25:

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

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

100 | 75 | 50 | 25 | 0

Comments:

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

There is conflicting evidence on the extent to which this provision has been implemented. The Deputy Principal of the Government Training Institute, Embu, reports that public servants regularly get paid a share of the revenue generated by the Institute; but the Ag. Head, City Inspectorate says there is no system regarding such payments. A World Health Organization study shows that nursing staff retention is achieved through the payment of end of contract bonuses.

References:

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

Budget, July 2011 – July 2012. http://www.statehousekenya.go.ke/publications/07-06-2011-12-BudgetSpeech-Distribution%20Final%20_MF.pdf

"The Impact of an Emergency Hiring Plan on the Shortage and Distribution of Nurses in Kenya: The Importance of Information Systems" by J.M. Gross, P.L. Riley, R. Kiriinya, C. Rakuom, R. Willy, A. Kamenju, E. Oywer, D. Wambua, A. Waudu and M.F. Rogers. Bulletin of the World Health Organization. http://www.who.int/bulletin/online_first/09-072678.pdf

Telephone interview with Oduor Ombaka, Deputy Principal, GTI, Embu.

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

Comments:

Almost 30 years ago, the government stopped publishing the list that contained civil servant data, including their background information, dates of recruitment and promotions. Presently, salaries of government staff can be found in each ministry's printed estimates for a specific financial year. State corporations have annual reports or strategic plans.

However, Kenya has had a long problem with “ghost workers,” names on the payroll of people who do not actually. Thus, the lists provided in the printed estimates might underestimate the numbers in office.

References:

http://www.publicservice.go.ke/index.php?option=com_docman&task=cat_view&gid=121&Itemid=386

“4,000 Ghost Workers in Kenyan Capital” by Simon Ndonga. July 17, 2011. <http://www.capitalfm.co.ke/news/2011/07/4000-ghost-workers-in-kenyan-capital/>

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

Comments:

The Public Service Commission is responsible for redressing grievances. It had been a department in the Office of the President, meaning it was likely to be biased. However, Kenya’s Constitution (2010), Part II of Chapter 13, has given it its own status, which should see it act more independently of the central government.

An undated study by Mary Owele found that “most civil servants are not adequately aware of the procedures and view it negatively as only aimed at punishment. This is mainly brought about by lack of sensitization on rules and regulations and the poor way in which disciplinary cases are generally handled. The result is that the mechanism is viewed as encouraging corruption, vindictiveness and used by supervisors to settle personal scores.”

References:

http://www.publicservice.go.ke/index.php?option=com_content&view=category&layout=blog&id=102&Itemid=396

“Employee Perceptions of Disciplinary Procedures in the Kenyan Civil Service: A Case Study of Selected Ministries” by Mary Owele. www.uonbi.ac.ke/faculties/turntopdf.php?...id...

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

Comments:

Since the 2003 accession of the NARC government, national revenue collection has improved greatly, and this has, together with the rationalization and introduction of rights to the public service, improved the timeliness of civil service salary payments.

However, problems persist among local authorities with narrow revenue bases, with workers taking to the streets to protest delayed salary payments. University lecturers also threatened strike action over delayed salaries, as have Kenyatta National Hospital staff over delayed commuter allowances.

Please note that a strike reported in, for example, December 2011, can be over unpaid salaries and/or allowances dating back for quite a period.

References:

"Kenyan Doctors Troop Back to Work" by Simon Ndonga. Dec. 13, 2011. <http://www.capitalfm.co.ke/news/2011/12/kenyan-doctors-troop-back-to-work/>

"35 Kipsigis Councillors/Staff Protest Planned Delayed Pay." Radar in Kericho County. Sept. 21, 2011. <http://www.kenyaradarlive.co.ke/?p=45993>.

3. Kenyatta National Hospital staff on strike, by Standard Reporter. Published on 09/11/2011. Available at <http://www.standardmedia.co.ke/InsidePage.php?id=2000046417&cid=4&ttl=Kenyatta%20National%20Hospital%20staff%20on%20strike>

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

75:

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

25:

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

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

100 | 75 | 50 | 25 | 0

Comments:

Since Section 64 (1) of the Anti-Corruption and Economic Crimes Act (2003) came into force, some officers have been affected. However, the government has appeared to be selectively lenient. For example, two cabinet ministers who were asked to stand down in the wake of the Anglo Leasing scandal were reinstated even before the cases against their alleged co-conspirator civil servants had been finalized.

This suggests the cases against the civil servants are shelved even if they are unlikely to return to work. It would appear that where allegations are against civil servants alone, the cases are dealt with expeditiously; but when their alleged misconduct touches politicians, things become less clear cut. A cabinet minister removed from office during an investigation of the fraudulent purchase of the Kenyan embassy premises in Tokyo was also reinstated despite inconclusive investigations.

References:

"Corruption the Bane of Public Service, Says Raila" by Judith Akolo/PMPS. May 13, 2011. <http://www.kbc.co.ke/news.asp?nid=70183>

"Kenyan President Suspends Minister Facing Major Corruption Charges" by Michael Onyiego. Oct. 20, 2010. <http://www.voanews.com/english/news/Kenyan-President-Suspends-Minister-Facing-Major-Corruption-Charges-105337848.html>

"Kenya: Campaign to Purge Corrupt Police Officers." BBC News, June 6, 2011. <http://www.bbc.co.uk/news/world-africa-13673084>

"Anglo Leasing Fights Back" by Beatrice Obwocha and Alex Ndegwa. June 6, 2011. <http://www.standardmedia.co.ke/InsidePage.php?id=2000037759&cid=4&ttl=Anglo%20Leasing%20fights%20back>

"Kenya: Wamalwa Flayed Over Wetang'ula" by John Nalinya. Nairobi Star, Sept. 1, 2011. <http://allafrica.com/stories/201109020151.html>

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?

47

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

Yes | No

Comments:

Yes, through the requirements of sections 2(a), 3(3) and Part IV (sections 26-34) of the Public Officers Ethics Act.

References:

Public Officers Ethics Act, Sections 2(a), 3(3) and Part IV (sections 26-34). http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

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

No: A NO score is earned if any senior member of the civil service is not required to disclose assets.

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

Yes | No

Comments:

Section 11 (1) of the Public Officers Ethics Act (2003) requires that public officers avoid conflict between personal interests and official duties. Section 11 (3) requires such an officer to declare such a conflict to his or her superior officer or other appropriate body, and to comply with given directions.

Personal interests extend to spouses, relatives and business associates. 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." See http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

References:

Public Officers Ethics Act (2003), Section 11 (1).

Anti-Corruption and Economic Crimes Act, Section 42 (3).

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

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**

Comments:

There are no such legal restrictions for civil servants entering the private sector after leaving the government. Moreover, sitting public officers are allowed to have private sector interests, such as directorships. This freedom arises from the 1971 Ndegwa Report, which argued that the best of newly independent Kenya's educated elite were needed in both sectors. Much of Kenya's rampant corruption is blamed on the report. Many of the original civil servants who benefited from the provision are the main actors in contemporary politics.

References:

Kenya Law, http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

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

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

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

Yes | No

Comments:

The provisions of section 11 of the Public Officer Ethics Act, the Public Service Commission Procedures for the Administration of Part IV of the Public Officers Ethics Act and the Public Service Commission Code of Ethics all address the management of such gifts and hospitality. See http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

References:

Public Officer Ethics Act, Section 11.

Public Service Commission Procedures for the Administration of Part IV of the Public Officers Ethics Act.

Public Service Commission Code of Ethics.

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

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

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

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

Yes | **No**

Comments:

The law does not oblige the Public Service Commission to undertake an independent audit of the asset disclosure forms of the senior members of the civil service.

References:

The law does not oblige the Public Service Commission to undertake an independent audit of the asset disclosure forms of the senior members of the civil service. 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 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

Comments:

There are no regulations against current or former civil servants engaging in private business. Indeed, the private sector often headhunts the cream of the civil service. It is only recently that this potential conflict of interest has been challenged by the new Constitution.

References:

"Civil Servants Warned Over Businesses, Foreign Accounts" by Simon Ndonga. Jan. 18, 2012. <http://www.capitalfm.co.ke/news/2012/01/civil-servants-warned-over-businesses-foreign-accounts/>

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

Comments:

Although Chapter 6 of the Constitution (2010) and the Public Officer Ethics Act (2003) provide the framework for leadership and integrity, there is no mechanism yet for strict enforcement. This has given way to some civil servants violating the legal provisions on gifts and hospitality. For example, the media have occasionally reported cases of politicians and civil servants soliciting contributions toward harambee fundraisers.

References:

"Scrap Harambees for Ocampo Six." The Standard, Dec. 20, 2010. www.standardmedia.co.ke/letters/InsidePage.php?id...cid=17&

"For MPs, the Chickens Have Come Home to Roost" by Joe Kiarie. The Standard, July 22, 2011. <http://www.standardmedia.co.ke/InsidePage.php?id=2000039459&cid=159&story=For%20MPs%20the%20chickens%20have%20come%20home%20to%20roost>

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

Comments:

There are laws and regulations that provide for codes of conduct and ethics for public servants. Such regulations prohibit public servants from participating in activities in which they have interests unless they publicly declare so. In practice, sometimes public servants engage in making decisions that accord with their personal interests rather than the public interest.

References:

The Public Officer Ethics Act, 2009. <http://www.kenyalaw.org/klr/fileadmin/pdfdownloads/Acts/PublicOfficerEthicsAct.pdf>

Kenya National Audit Office, Code of Conduct and Ethics. http://www.kenao.go.ke/Reports_CG/CODE%20OF%20CONDUCT.pdf

"Refreshing Dimensions on Appointments" by Pravin Bowry. The Standard, March 15, 2011. <http://www.standardmedia.co.ke/InsidePage.php?id=2000031220&cid=15&0>.

"When Does Public Interest Override an Individual?" The Standard, May 23, 2011. <http://www.standardmedia.co.ke/InsidePage.php?id=2000035724&cid=503&Page=2>

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

Comments:

The civil servants' asset disclosure forms, like those from the rest of the government departments, do not require auditing by the Public Service Commission or independent auditors. This is because the Public Officers Ethics Act does not make provisions for the forms' auditing. See http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

References:

N/A

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

Comments:

Public servant asset disclosures are accessible to citizens under the Public Officers Ethics Act, Section 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."

References:

Public Officers Ethics Act, Section 30 (1) to (3). http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

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

Comments:

The provisions of section 30 of the Public Officer Ethics Act makes the information from the forms confidential. They are, in fact, out of reach of nearly all citizens.

References:

N/A

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

Comments:

Since the contents of the forms are confidential, the issue of cost does not arise.

References:

N/A

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 NGOs. 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 NGOs 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

Comments:

It is impossible for average citizens to ascertain the forms' quality because they are almost inaccessible to them.

References:

N/A

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.

4.2. Whistle-blowing Protections

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

75

48a. In law, civil servants who report cases of corruption, graft, abuse of power, or abuse of resources are protected from recrimination or other negative consequences.

Yes | No

Comments:

Employees are protected by the provisions of Article 236(a) of the Constitution; section 65 of the Anti-Corruption and Economic Crimes Act; section 3, part 1A (sections 3A-3M) and section 6(1) of the Witness Protection Act; as read with the Witness Protection Regulations, 2011.

References:

Constitution, Article 236(a).

Anti-Corruption and Economic Crimes Act, Section 65.

Witness Protection Act, Section 3, Part 1A (sections 3A-3M) and Section 6(1) and the Witness Protection Regulations, 2011. http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

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

Comments:

In the absence of an operational witness protection law, there are no formal means of protecting whistle blowers. However, the government has not formally punished any whistle blower. People tend to fear the unofficial and informal recrimination for disclosing corruption. Despite this fear, the Kenya Anti-Corruption Commission shows that many Kenyans report corruption cases.

References:

Kenya Anti-Corruption Commission, Annual Report, 2009-10 <http://www.kacc.go.ke/docs/Annual-Report09-10.pdf>

"Reducing Risks of Reporting Corruption: Lessons from an Online Complaints System in Kenya" by Jessica Schultz, Opimbi Osore and Thomas Vennen. Bergen: Chr. Michelsen Institute, U4 Practice Insight No. 2010:4 <http://www.u4.no/publications/reducing-risks-of-reporting-corruption-lessons-from-an-online-complaints-system-in-kenya/>.

3. Michela Wrong, It's Our Turn to Eat: The Story of a Kenyan Whistle-Blower, Harper Collins, 2009.

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

75:

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

25:

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

48c. In law, private sector employees who report cases of corruption, graft, abuse of power, or abuse of resources are protected from recrimination or other negative consequences.

Yes | No

Comments:

Employees are protected by Article 236(a) of the Constitution; section 3, Part 1A (sections 3A-3M) and section 6(1) of the Witness Protection Act; as read with the Witness Protection Regulations 2011. 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. See http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

References:

Constitution, Article 236(a), Section 3, Part 1A (sections 3A-3M).

Witness Protection Act, Section 6(1).

Witness Protection Regulations, 2011.

Anti-Corruption and Economic Crimes Act, Section 65 (1) and (4).

Economic Crimes Act and the Witness Protection Act, 2006. http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

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

Comments:

Most private sector employees are likely to fear reporting corruption due to unofficial and informal recrimination rather than the formal punishment from the employer. The fear of personal safety in light of a weak public safety system hinders private employees from reporting corruption.

References:

Kenya Anti-Corruption Commission, Annual Report, 2009-10. <http://www.kacc.go.ke/docs/Annual-Report09-10.pdf>

"Reducing Risks of Reporting Corruption: Lessons from an Online Complaints System in Kenya" by Jessica Schultz, Opimbi Osoore and Thomas Vennen. Bergen: Chr. Michelsen Institute (U4 Practice Insight no. 2010:4).

"It's Our Turn to Eat: The Story of a Kenyan Whistle-Blower Michela Wrong." Harper Collins, 2009.

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.

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

0

49a. 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

Comments:

This has been made possible by a number of mechanisms rather than a specific law. Since the enactment of the Anti-Corruption and Economic Crimes Act (which has been superceded by the Ethics and Anti-Corruption Commission Act, 2011) many government agencies have declared themselves "corruption-free zones," including such notoriously corrupt ministries as the Lands Office and Immigration Department.

Many departments have set up drop boxes for reporting malfeasance. Others have appointed dedicated anti-corruption staff. The former anti-corruption agency, the Kenya Anti-Corruption Commission, established hotlines and a reporting area on its website. The Kenya Police also have dedicated hotlines.

References:

There is no specific law providing for such services.

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.

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

Comments:

The Kenya Anti-Corruption Commission (KACC) has established anti-corruption committees in all public organizations to monitor and report on corruption, but these committees tend to be ad hoc, and they do not have full-time staff. The KACC has professional and full-time staff, but the staffing is inadequate. With the exception of small offices in Mombasa and Kisumu, the commission does not have offices outside Nairobi.

References:

"Reducing Risks of Reporting Corruption: Lessons from an Online Complaints System in Kenya" by Jessica Schultz, Opimbi Osore and Thomas Vennen. Bergen: Chr. Michelsen Institute, U4 Practice Insight no. 2010:4. <http://www.u4.no/publications/reducing-risks-of-reporting-corruption-lessons-from-an-online-complaints-system-in-kenya/>

Kenya Anti-Corruption Commission, Annual Report of Activities and Financial Statement, 2010-11 (<http://www.eacc.go.ke/Docs/KACC-ANNUAL-REPORT%202010-2011.pdf>)

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

Comments:

The Kenya Anti-Corruption Commission is regularly funded by the government, and it runs its budget independently. However, the funds allocated to the commission may be inadequate to fully carry out its mandate.

References:

"Reducing Risks of Reporting Corruption: Lessons from an Online Complaints System in Kenya" by Jessica Schultz, Opimbi Osore and Thomas Vennen. Bergen: Chr. Michelsen Institute, U4 Practice Insight no. 2010:4. <http://www.u4.no/publications/reducing-risks-of-reporting-corruption-lessons-from-an-online-complaints-system-in-kenya/>

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

Comments:

There is no formal indication of how long it takes to act on a corruption complaint, and there is some evidence that corruption reports elicit hostility from the power elite. The Kenya Anti-Corruption Commission (KACC) has faced varied obstacles in delivering its mandate.

The KACC 2010-11 report says it investigated 423 public institutions. The KACC completed 134 files and submitted them to the Attorney General, with recommendations to prosecute. Another 25 cases were referred to other agencies for investigations after preliminary investigations. An additional 394 cases were investigated but received a recommendation that no further action was needed.

Notably, 67 of the 134 completed files were pending from previous years, and 620 cases were still pending under investigations at the end of the reporting period.

References:

"Kenya Corruption Costs Government Dearly" by Kevin Mwachiro. BBC News, Dec. 3, 2010. <http://www.bbc.co.uk/news/world-africa-11913876>.

"Government Budgets, the Origin of Corruption." Tusijisunde, Kenya News, Aug. 11, 2011. <http://www.tusijisunde.com/2011/government-budgets-the-origin-of-corruption/>

The Kenya Anti-Corruption Commission, Annual Report. 2010-11. <http://www.kacc.go.ke/docs/KACC-ANNUAL-REPORT%202010-2011.pdf>

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

Comments:

The Kenya Anti-Corruption Commission has always initiated investigations into reports of corruption. The major shortcoming of

the commission has been taking action on the completed investigations. It does not have the power to prosecute corruption cases.

References:

"Graft Watchdog Opens Probe on Grabbed Land" by Eunice Machuhi. Daily Nation, Dec. 28, 2010. <http://www.nation.co.ke/News/regional/-/1070/1079996/-/dwmildz/-/index.html>

"Private Sector in Deal to Fight Graft," by Kaburu Mugambi. Daily Nation, Dec. 20, 2010. <http://www.nation.co.ke/Features/smartcompany/Private%20sector%20in%20deal%20to%20fight%20graft%20%20/-/1226/1075598/-/71n18hz/-/index.html>

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.

46

4.3. Government Procurement: Transparency, Fairness, and Conflicts of Interest Safeguards

51. Is the public procurement process effective?

88

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

Yes | No

Comments:

Conflicts of interest are covered by Article 227(1) of the Constitution; section 12 of Public Officers Ethics Act; and section 43 of the Public Procurement and Disposal Act as read together with the Public Procurement and Disposal Regulations, 2006. http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

References:

Constitution, Article 227(1).

Public Officers Ethics Act, Section 12.

Public Procurement and Disposal Act, Section 43..

Public Procurement and Disposal Regulations, 2006. http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

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

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

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

Yes | No

Comments:

Section 9 (c) of the Public Procurement and Disposal Act provides that the Public Procurement Oversight Authority (PPOA) must advise and assist procuring entities. The law further requires PPOA to develop, promote and support training and professional development of procurement staff with written directions.

This is carried out through the broader public servants training objectives within section 4 of the Kenya Institute of Administration Act (No. 2 of 1996). See http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

References:

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

Kenya Institute of Administration Act, Section 4, (No. 2 of 1996). http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

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

Comments:

Despite the existence of the Public Procurement and Disposal Act, 2005; the Public Procurement Regulations, 2006; and the Public Procurement Oversight Authority to enforce these regulations, there are still cases of public servants violating the law. Consequently, sometimes the procurement process is riddled with cases of conflict of interest among procurement officials.

References:

"The Effectiveness of the Procurement Regulations in Kenya" by J. Wanyama. 2010. <http://www.oecd.org>

"Evaluation of the Influence of Public Procurement Regulations on Procurement Practices Among Secondary Schools in Mosocho Division, Kisii County, Kenya." Patrick Kenyanya, Francis Mamati and Johnathan Onyango. 2011. http://www.aibuma.org/proceedings2011/aibuma2011_submission_63%5B1%5D.pdf

100: Regulations regarding conflicts of interest for procurement officials are aggressively enforced.

75:

50: Conflict-of-interest regulations exist, but are flawed. Some violations may not be enforced, or some officials may be exempt from regulations.

25:

0: Conflict-of-interest regulations do not exist, or are consistently ineffective.

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

Yes | No

Comments:

This is done through the requirements of the Public Officer Ethics Act. This is because since they are public officers, procurement officers must declare their assets annually to their service commission (the advisory board) as mandated by Part IV of the Public Officer Ethics Act. See http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

References:

Public Officer Ethics Act, Part IV. http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

Yes: A YES score is earned if there is a formal mandate to some agency to monitor the assets, incomes and spending habits of public procurement officials, such as an inspector general, or ombudsman.

No: A NO score is earned if no such mandate exists.

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

Yes | No

Comments:

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

References:

Public Procurement and Disposal Act, Section 4, Part V; Sections 72A-72C, Part VI. http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

Yes: A YES score is earned if all major procurements (defined as those greater than 0.5% of GDP) require competitive bidding.

No: A NO score is earned if competitive bidding is not required by law or regulation for major procurement (greater than 0.5% OF GDP).

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

Yes | No

Comments:

Public Procurement and Disposal Act, Section 74, allows sole sourcing in very limited circumstances. The said circumstances must not be out of the need to avoid competition.

References:

Public Procurement and Disposal Act, Section 74. See http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

Yes: A YES score is earned if sole sourcing is limited to specific, tightly defined conditions, such as when a supplier is the only source of a skill or technology.

No: A NO score is earned if there are no prohibitions on sole sourcing. A NO score is earned if the prohibitions on sole sourcing are general and unspecific.

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

Yes | No

Comments:

Public Procurement and Disposal Act, Sections 25 and 100, provides that procurement complaints are handled by the Review and Appeals Board, whose decisions are final unless a judicial review of its decision commences within 14 days.

References:

Public Procurement and Disposal Act, Sections 25 and 100. http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

Yes: A YES score is earned if there is a formal appeal process for unsuccessful bidders.

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

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

Yes | No

Comments:

Section 100 of the Public Procurement and Disposal Act provides that:

(1) A decision made by the Review Board shall be final and binding on the parties unless judicial review thereof commences within 14 days from the date of the Review Board's decision.

(2) Any party to the review aggrieved by the decision of the Review Board may appeal to the High Court, and the decision of the High Court shall be final.

(3) A party to the review which disobeys the decision of the Review Board or the High Court shall be in breach of this Act and any action by such party contrary to the decision of the Review Board or the High Court shall be null and void.

(4) If judicial review is not declared by the High Court within 30 days from the date of filing, the decision of the Review Board shall take effect.

References:

Public Procurement and Disposal Act, Section 100.

Yes: A YES score is earned if unsuccessful bidders can use the courts to appeal a procurement decision.

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

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

Yes | No

Comments:

Section 40 of the Public Procurement and Disposal Act provides that:

(1) No person, agent or employee shall be involved in any corrupt practice in any procurement proceeding. (2) If a person or an employee or agent of a person contravenes subsection (1) the following shall apply – (a) the person shall be disqualified from entering into a contract for the procurement; or (b) if a contract has already been entered into with the person, the contract shall be voidable at the option of the procuring entity. (3) The voiding of a contract by the procuring entity under subsection (2)(b) does not limit any other legal remedy the procuring entity may have. (4) A person, employee or agent who contravenes subsection (1) shall be guilty of an offense.

Public Procurement and Disposal Act, Part IX and Sections 115, 117, 122 and 125 provide that companies guilty of violations may be shut out of future bids at the discretion of the director general. After such rulings, affected parties may seek a review of the matter, after which the Review Board can confirm or overturn the director general's debarment. A confirmed debarment can be challenged in the High Court within 14 days. The authority must publish and circulate a list of all debarred persons or entities.

References:

Public Procurement and Disposal Act, Section 40.

Public Procurement and Disposal Act, Part IX and Sections 115, 117, 122 and 125

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

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

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

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

100 | 75 | 50 | 25 | 0

Comments:

It remains unclear the extent to which companies that have previously violated regulations are barred from future activities. There does not seem to be a way of addressing this issue. The practice of naming blacklisted companies has been withdrawn from the PPOA Website. Transparency International has pointed to the Authority's failure to exclude errant companies.

References:

"PPOA Fails to Blacklist Corrupt Contractors, Says TI," by Henry Wanyama. The Star, May 21, 2011. <http://www.the-star.co.ke/national/national/25214-ppoa-fails-to-blacklist-corrupt-contractors-says-ti>

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

75:

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

25:

0: There is no such system, or the system is consistently ineffective in prohibiting future hiring of blacklisted companies.

52. Can citizens access the public procurement process?

88

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

Yes | No

Comments:

The 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.

References:

The Public Procurement and Disposal Act, Section 54. http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

Yes: A YES score is earned if procurement rules are, by law, open to the public. These regulations are defined here as the rules governing the competitive procurement process.

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

52b. In law, the government is required to publicly announce the results of procurement decisions.

Yes | No

Comments:

The government must publish contracts it has awarded, as stipulated by the Public Procurement and Disposal Act, Section 46. See http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

References:

Public Procurement and Disposal Act, Section 46. http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

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

Comments:

The adoption by the government of e-services has been of great help in this regard. For instance, the Public Procurement and Disposal Act is available at various websites, including those of the Public Procurement Oversight Authority, the Finance Ministry and the Kenya Anti-Corruption Commission. Besides, the law also can be purchased at the Government Printer in Nairobi.

Nonetheless, people outside the major urban centers will have difficulty accessing these materials, even if they are also unlikely to want to submit tenders. A procurement publication lamented the "growing need to create awareness on the procurement rules and regulations, and to promote citizen oversight of public procurement."

References:

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

"Citizens Guide To Public Procurement:Public Procurement Procedures for Constituency Development Funds." Centre for Governance and Development/National Taxpayers Association. <http://www.cgd.or.ke/documents/Citizens%20Guide%20to%20Public%20Procurement%20Procedures%20.pdf>

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

Comments:

The Public Procurement and Disposal Act, 2005, and Public Procurement and Disposal Regulations, 2006, have been circulated in most public offices and are also available on many government and private websites for free. However, some people might not have seen these documents for other reasons rather than cost.

References:

Public Procurement and Disposal Act, 2005. http://marsgroupkenya.orgpdfs201009ActsPublic_Procurement_and_Disposal_Act.pdf

Public Procurement and Disposal Regulations. <http://www.kacc.go.ke/docs/legal/PPR.pdf>

"Procurement and Supply in Kenya." Kenya Institute of Supply Management. http://www.fsdkenya.orgpdf_documents07.08.FSD_Procurement_Supply_Kenya.pdf

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 NGOs. 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 NGOs trying to access this information.

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

100 | 75 | 50 | 25 | 0

Comments:

All major government tenders are usually advertised in the daily newspapers and the same advertisements are placed on the websites of the respective ministries and departments. However, beyond the advertisements, the extent of public participation in the procurement is not well-known. It is possible that some citizens' participation ends with seeing the tender advertisements.

References:

Daily newspapers

Government websites

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

Comments:

Interested citizens can view public tender outcomes in the appropriate government website. Contracts awarded are listed at <http://www.tenders.go.ke/view.contracts.php>. However, security-related tenders may be excluded.

References:

Kenya: Public Procurement Oversight Authority, Tenders. <http://www.tenders.go.ke/view.contracts.php>

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.

4.4. Privatization of Public Administrative Functions: Transparency, Fairness, and Conflicts of Interest Safeguards

53. Is the privatization process effective?

75

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

Yes | No

Comments:

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

References:

Privatization Act (2005), Section 29. http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

Yes: A YES score is earned if all businesses are equally eligible to compete for privatized assets. A YES score is still earned if the government did not privatize any state-owned assets during the study period.

No: A NO score is earned if any group of businesses (other than those blacklisted due to corruption charges) is excluded by law.

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

Yes | No

Comments:

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

References:

First Schedule of the Privatization Act, Parts 8 and 9.

Public Procurement and Disposal Act.

Public Officers Ethics Act.

Anti-Corruption and Economic Crimes Act.

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

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

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

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

100 | 75 | 50 | 25 | 0

Comments:

While a framework for greater transparency in privatization management has been put in place in the form of the Privatization Act (2005), this is not necessarily being exploited. Thus, Kenya did not have a Privatization Commission as of November 2011. There is no way of monitoring conflicts of interest among government officers involved in privatization.

References:

"Kenya: Without a Privatization Commission, There Can Be Little Foreign Investment" by Jaiindi Kiseru, Nov. 29, 2011. At <http://allafrica.com/stories/201111300080.html>

"Kibaki Axe Falls on Corrupt Suspects in Kenya: President Interdicts Public Officers Over Cemetery Scandal." African Press International, March 9, 2010. <http://africanpress.me/2010/03/09/kibaki-axe-falls-on-corrupt-suspects-in-kenya-president-interdicts-public-officers-over-cemetery-scandal/>

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?

95

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

Yes | No

Comments:

The Privatisation Regulations are appended to the Privatization Act (Cap 485C).

References:

The privatization regulations are appended to the Privatization Act (Cap 485C) as follows: The Privatization Regulations, 2008. <http://www.kenyalaw.org/klr/fileadmin/pdfdownloads/Acts/PrivatizationAct.pdf>

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

Comments:

Privatization of state corporations receives much publicity, especially because when done formally, the relevant minister must bring the matter to Parliament. Furthermore, the media and civil society organizations have been at the forefront of ensuring that such matters are managed according to the law, especially since the 2010 Constitution.

References:

"Deliberate Loopholes: Transparency Lessons from the Privatization of Telkom and Safaricom." http://www.africog.org/reports/Deliberate_loopholes.pdf

"Kenya's Privatization Plans. April 12, 2011. <http://news.alibaba.com/article/detail/markets/100466107-1-factbox-kenya%2527s-privatisation-plans.html>

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

75:

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

25:

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

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

Yes | No

Comments:

Section 36 of the Act requires the publication of a privatization awards or other agreements in the official Kenya Gazette, after which 14 days are allowed for appeals or objections.

References:

Section 36 of the Act. http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

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

Comments:

The Privatization Act, Revised Edition 2009 (2005) is readily available on many Web sites, where citizens can access it free of charge. Besides the Act, regulations on privatization through Initial public offers are normally publicized widely in the media, making it easily accessible to citizens. Nevertheless, given the limited access to newspapers and electronic media that includes Web sites, some citizens may not have easy access to privatization regulations.

References:

1. Privatization Act, Revised Edition 2009 (2005), Available on many Web sites including <http://www.kenyalawreport.co.ke/Downloads/Acts/Privatization%20Act.pdf>

2. Web sites like: <http://www.kenyalawreport.co.ke/Downloads/Acts/Privatization%20Act.pdf>

3. Daily newspapers

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

Comments:

Whereas the Privatization Act can be accessed from Web sites free of charge, information on privatization of public enterprises through initial public offers is circulated through daily newspapers at affordable cost.

References:

1. Web sites: <http://www.kenyalawreport.co.ke/Downloads/Acts/Privatization%20Act.pdf>

2. Daily newspapers

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 NGOs. 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 NGOs trying to access this information.

Category 5. Government Oversight and Controls

5.1. ⁷⁵National Ombudsman

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

100

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

Yes | No

Comments:

During the reporting period, there was no single agency mandates to perform Ombudsman tasks. The Public Complaints Standing Committee (PCSC) was 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 inquired into allegations of misuse of office, corruption, and unethical conduct, breach of integrity, maladministration, delay, injustice, discourtesy, inattention, incompetence, misbehavior, inefficiency or ineptitude.

After the reporting period, in November, 2011, Parliament passed the Commission on Administrative Justice Act, which restructured the Kenya National Human Rights and Equality Commission and established the Commission on Administrative Justice pursuant to Article 59(4) of the Constitution. It fulfills an ombudsman-like role and aims to provide for the membership, powers and functions of the Commission on administrative justice, and for related purposes.

References:

1. The Public Complaints Standing Committee, Gazette Notice No. 5826 of June 29, 2007 and No. 6327 of July 13, 2007. At <http://www.kenyalaw.org/klr/index.php?id=24>
2. Commission on Administrative Justice Act (2011), at http://www.kenyalaw.org/kenyalaw/klr_home/
3. Article 59(4) of the Constitution – the Commission on Administrative Justice, at http://www.kenyalaw.org/kenyalaw/klr_home/

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.

56. Is the national ombudsman effective?

39

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

Yes | No

Comments:

The Ombudsman is protected from political interference by Chapter 15 of the Constitution. See http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

References:

Chapter 15 of the Constitution. See http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

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

Comments:

The Ombudsman (Commission on Administrative Justice) has yet to become functional. However, its predecessor, the Public Complaints Standing Committee, was given little scope for independence, appointed by and reporting to the President. It was

therefore highly unlikely that it operated independently. In any case, since its creation in August 2008, there is yet no evidence of the fruits of its labor in spite of common knowledge of the indiscretions in the Kenyan public service.

References:

Source 1: New Ombudsman Office Long Overdue, Feb 2nd, 2011, by Pravin Bowry.
At http://www.marsgroupkenya.org/youth/index.php?option=com_mmedia&story=317479

Source 2: Kenya Ombudsman seeks autonomy, by Anthony Kagiri on March 20, 2009.
At <http://www.capitalfm.co.ke/news/2009/03/kenya-ombudsman-seeks-autonomy/>

Source 3: Ombudsman shames govt ministries, by Anthony Kagiri on March 19, 2009.
At <http://www.capitalfm.co.ke/news/2009/03/ombudsman-shames-govt-ministries/>

100: This agency (or set of agencies) operates independently of the political process, without incentive or pressure to render favorable judgments in politically sensitive cases. Investigations can operate without hindrance from the government, including access to politically sensitive information.

75:

50: This agency (or set of agencies) is typically independent, yet is sometimes influenced in its work by negative or positive political incentives. This may include public criticism or praise by the government. The ombudsman may not be provided with some information needed to carry out its investigations.

25:

0: This agency (or set of agencies) is commonly influenced by political or personal incentives. This may include conflicting family relationships, professional partnerships, or other personal loyalties. Negative incentives may include threats, harassment or other abuses of power. The ombudsman cannot compel the government to reveal sensitive information.

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

100 | 75 | 50 | 25 | 0

Comments:

As previously constituted, the head of the ombudsman agency served at the President's pleasure, in line with Chapter VIII of the old Constitution. The head certainly had no security of tenure. This weak status led to the context in which ministries could blatantly ignore demands for information from the Ombudsman.

References:

Source 1: Ombudsman shames govt ministries, by Anthony Kagiri on March 19, 2009.
At <http://www.capitalfm.co.ke/news/2009/03/ombudsman-shames-govt-ministries/>

Source 2: New Ombudsman Office Long Overdue, By Pravin Bowry, East African Standard, February 2, 2011.
At <http://www.marsgroupkenya.org/multimedia/?StoryID=317479>

100: The director of the ombudsman (or directors of multiple agencies) serves a defined term and cannot be removed without a significant justification through a formal process, such as impeachment for abuse of power.

75:

50: The director of the ombudsman (or directors of multiple agencies) serves a defined term, but can in some cases be removed through a combination of official or unofficial pressure.

25:

0: The director of the ombudsman (or directors of multiple agencies) can be removed at the will of political leadership.

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

100 | 75 | 50 | 25 | 0

Comments:

The Public Complaints Standing Committee (PCSC) is acting as the Ombudsman, but is not yet fully operational with full-time professional staff. The PCSC does not have adequate staff to cope with the many complaints flowing from the public. There are plans to establish the Commission on Administrative Justice (or the Office of the Ombudsman) through the Commission on Administrative Justice Act 2011 pursuant to Article 59 (4) of the Constitution of Kenya, 2010.

References:

1. Pravin Bowry, "New Ombudsman Office Long Overdue," East African Standard, February 2, 2011, Page: 15 (Available at <http://www.standardmedia.co.ke/commentariesInsidePage.php?id=2000028021&cid=15&>).

2. The Kenyan Ombudsman, A Bulletin of the Public Complaints Standing Committee, Issue No. 1, June 2010. (see <http://www.ombudsman.go.ke/Newsletter.aspx>).

100: The ombudsman agency (or agencies) has staff sufficient to fulfill its basic mandate.

75:

50: The ombudsman agency (or agencies) has limited staff that hinders its ability to fulfill its basic mandate.

25:

0: The ombudsman agency (or agencies) has no staff, or a limited staff that is clearly unqualified to fulfill its mandate.

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

100 | 75 | 50 | 25 | 0

Comments:

Although the Public Complaints Standing Committee's staff at the head office is competent to enhance its independence, it does not have field officers to receive and handle the ever increasing complaints from the public. Furthermore, the Committee is not yet written in the new Constitution and does not have legal grounding to hire its staff independently.

References:

1. Pravin Bowry, "New Ombudsman Office Long Overdue," East African Standard, February 2, 2011, Page: 15 (Available at <http://www.standardmedia.co.ke/commentariesInsidePage.php?id=2000028021&cid=15&>).

2. The Kenyan Ombudsman, A Bulletin of the Public Complaints Standing Committee, Issue No. 1, June 2010. (see <http://www.ombudsman.go.ke/Newsletter.aspx>).

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

75:

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

25:

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

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

100 | 75 | 50 | 25 | 0

Comments:

As stated in the Kenyan Ombudsman Bulletin, "PCSC's funding has mainly been from the Exchequer, where funds have regularly been allocated through the Ministry of Justice, National, Cohesion and Constitutional Affairs (MOJNCCA). However, given PCSC's nationwide mandate, the allocation remains insufficient for wide and easy access to PCSC's services by all Kenyans all over the country."

The Ombudsman office is facing staffing and funding issues, in addition to uncertain restructuring or changed mandate in a new Constitution.

References:

The Kenyan Ombudsman, A Bulletin of the Public Complaints Standing Committee, Issue No. 1, June 2010. (see <http://www.ombudsman.go.ke/Newsletter.aspx>).

John Ngirachu and Emeka-Mayaka, All Africa, Kenya: Ombudsman's Future Uncertain, January 15, 2011, <http://allafrica.com/stories/201101170147.html>

Pravin Bowry, The Standard, New Ombudsman Office Long Overdue, January 2, 2011, <http://www.standardmedia.co.ke/commentaries/InsidePage.php?id=2000028021&cid=15&>

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

Comments:

In law, the Public Complaints Standing Committee (PCSC) is expected to publish quarterly reports on its activities. Although the Committee has tried to live up to this legal requirement by uploading quarterly reports on its Web site (see <http://www.ombudsman.go.ke/Publications.aspx>), the reports come late and are not detailed enough to enable the public follow its activities.

For example, the most recent – and only – news bulletin was printed in June 2010. Other reports and publications are also minimal: Quarterly reports for 2009-2010 were written only for the first and second quarters of the year. No reports have been published on the Ombudsman's Web site for fiscal year 2010 – 2011.

References:

1. The Kenyan Ombudsman, A Bulletin of the Public Complaints Standing Committee, Issue No. 1, June 2010. (see <http://www.ombudsman.go.ke/Newsletter.aspx>).

2. Consumers Federation of Kenya, "Stakeholders set to discuss Kenya's Ombudsman Commission Bill," April, 2011 (see http://cofek.co.ke/index.php?option=com_content&view=article&id=210:stakeholders-set-to-discuss-kenyas-ombudsman-commission-bill&catid=1:latest-news).

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.

Comments:

Despite the limited capacity, the Public Complaints Standing Committee has initiated investigations on the complaints that it has received from the public. However, the quarterly reports of the PCSC have not been updated since June 2010. Ombudsman staff are building capacity through investigation training but the Ombudsman office is facing staffing and funding issues, in addition to uncertain restructuring or changed mandate in a new Constitution.

References:

1. Consumers Federation of Kenya, "Stakeholders set to discuss Kenya's Ombudsman Commission Bill," April, 2011 (see http://cofek.co.ke/index.php?option=com_content&view=article&id=210:stakeholders-set-to-discuss-kenyas-ombudsman-commission-bill&catid=1:latest-news).
2. The Kenyan Ombudsman, A Bulletin of the Public Complaints Standing Committee, Issue No. 1, June 2010. (see <http://www.ombudsman.go.ke/Newsletter.aspx>).
3. Public Complaints Standing Committee, Quarterly Reports, 2009-2010 (see <http://www.ombudsman.go.ke/Publications.aspx>).
4. In2EastAfrica, Staff Train in Investigation Techniques, April 19, 2011, <http://in2eastfrica.net/ombudsman%E2%80%99s-staff-train-in-investigation-techniques/>
5. John Ngirachu and Emeka-Mayaka, All Africa, Kenya: Ombudsman's Future Uncertain, January 15, 2011, <http://allafrica.com/stories/201101170147.html>
6. Pravin Bowry, The Standard, New Ombudsman Office Long Overdue, January 2, 2011, <http://www.standardmedia.co.ke/commentaries/insidePage.php?id=2000028021&cid=15&>

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.

Comments:

The Public Complaints Standing Committee does not have the power to impose penalties on offenders; it only receives complaints, investigates and communicates its findings to the offenders or refers its findings to the relevant government agencies for action. Indeed, in its quarterly reports (see <http://www.ombudsman.go.ke/Home/Recommendations.aspx>), the Committee laments how its recommendations have always been ignored by the offenders.

References:

1. Consumers Federation of Kenya, "Stakeholders set to discuss Kenya's Ombudsman Commission Bill," April, 2011 (see http://cofek.co.ke/index.php?option=com_content&view=article&id=210:stakeholders-set-to-discuss-kenyas-ombudsman-commission-bill&catid=1:latest-news).
2. Public Complaints Standing Committee, Quarterly Reports, 2010-2011 (see <http://www.ombudsman.go.ke/Publications.aspx>).
3. John Ngirachu and Emeka-Mayaka, All Africa, Kenya: Ombudsman's Future Uncertain, January 15, 2011, <http://allafrica.com/stories/201101170147.html>
4. Pravin Bowry, The Standard, New Ombudsman Office Long Overdue, January 2, 2011, <http://www.standardmedia.co.ke/commentaries/insidePage.php?id=2000028021&cid=15&>

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

Comments:

The quarterly reports of the PCSC shows the Committee lamenting that no response had been received on its recommendations. This implies that the government has rarely acted on the Committee's recommendations on offenders, who happen to be government ministries, departments and parastatal organizations. It is in this regard that the PCSC has been viewed as "a paper tiger" that does not trigger any action from the government.

References:

1. Public Complaints Standing Committee, Quarterly Reports, 2010-2011 (see <http://www.ombudsman.go.ke/Publications.aspx>).
2. Consumers Federation of Kenya, "Stakeholders set to discuss Kenya's Ombudsman Commission Bill," April, 2011 (see http://cofek.co.ke/index.php?option=com_content&view=article&id=210:stakeholders-set-to-discuss-kenyas-ombudsman-commission-bill&catid=1:latest-news).
3. John Ngirachu and Emeka-Mayaka, All Africa, Kenya: Ombudsman's Future Uncertain, January 15, 2011, <http://allafrica.com/stories/201101170147.html>
4. Pravin Bowry, The Standard, New Ombudsman Office Long Overdue, January 2, 2011, <http://www.standardmedia.co.ke/commentaries/InsidePage.php?id=2000028021&cid=15&>

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

Comments:

The Public Complaints Standing Committee (PCSC) – also known as the Ombudsman – does not seem to act on complaints within a reasonable time because of weak institutional capacity. The organizations is believed to be understaffed, poorly funded, and largely ineffective. Due to staff attrition, the department that handles complaints was reported in January 2011 to be comprised of just two employees.

References:

1. Consumers Federation of Kenya, "Stakeholders set to discuss Kenya's Ombudsman Commission Bill," April, 2011 (see http://cofek.co.ke/index.php?option=com_content&view=article&id=210:stakeholders-set-to-discuss-kenyas-ombudsman-commission-bill&catid=1:latest-news).
2. Public Complaints Standing Committee, Quarterly Reports, 2010-2011 (see <http://www.ombudsman.go.ke/Publications.aspx>).

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?

33

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

Yes | **No**

Comments:

There was no legal requirement that the Public Complaints Standing Committee (PCSC) make its reports accessible to citizens. The Gazette notice only required it to report to the President.

References:

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

2. Vol. CIX-No. 42 – 29th June 2007, Gazette Notice No. 5826, The Constitution of Kenya, Public Complaints Standing Committee, Establishment. At http://www.kenyalaw.org/KenyaGazette/view_gazette.php?title=2109

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

Comments:

To the extent that the Public Complaints Standing Committee only had one office in Nairobi, this greatly impeded the public's access to its quarterly reports. While the adoption of e-service should have boosted its exposure, this seems not to have happened. For example, its Web site (www.pcsc.go.ke) is not running.

References:

Public Complaints Standing Committee, www.pcsc.go.ke

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

Comments:

The Public Complaints Standing Committee circulates its quarterly reports through its Web site, but these reports tend to be uploaded late. This late uploading of reports, coupled with the fact that only a small section of the population might have access to the Web site, has left the majority of the people unable to access the reports of the PCSC. However, cost is not the prohibitive factor.

References:

1. Consumers Federation of Kenya, "Stakeholders set to discuss Kenya's Ombudsman Commission Bill", April, 2011 (see http://coftek.co.ke/index.php?option=com_content&view=article&id=210:stakeholders-set-to-discuss-kenyas-ombudsman-commission-bill&catid=1:latest-news).
2. Public Complaints Standing Committee, Quarterly Reports, 2010-2011 (see <http://www.ombudsman.go.ke/Publications.aspx>).
3. The Kenyan Ombudsman, A Bulletin of the Public Complaints Standing Committee, Issue No. 1, June 2010. (see <http://www.ombudsman.go.ke/Newsletter.aspx>).

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 NGOs. 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 NGOs trying to access this information.

5.2. Supreme Audit Institution

58. In law, is there a national supreme audit institution, auditor general or equivalent agency covering the entire public sector?

100

58a. In law, is there a national supreme audit institution, auditor general or equivalent agency covering the entire public sector?

Yes | No

Comments:

Article 229 of the Constitution establishes the Office of the Auditor General; which office is to be occupied by a person with extensive knowledge of public finance or at least 10 years experience in auditing or public finance management. The Auditor General is to audit the accounts of both the central and county governments, among other duties. See http://www.kenyalaw.org/kenyalaw/klir_app/frames.php

References:

Article 229, Constitution. http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

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.

59. Is the supreme audit institution effective?

88

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

Yes | No

Comments:

As provided through Articles 229, 248 and 249 of the Constitution, the holder of the office is independent and is only subject to the Constitution. See http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

References:

Articles 229, 248 and 249 of the Constitution. http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

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

Comments:

As provided by Articles 229, 248 and 249 of the Constitution, the holder of the office is independent and only subject to the Constitution. Indeed, Article 251 of the Constitution lays down the only reasons that may inform the removal of the Auditor General from office. There are adequate safeguards to ensure the holders of the office are not unjustifiably removed from office. There has never been a frivolous attempt to unseat the Auditor, partially because (he) has been a direct appointee of the President.

References:

N/A

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

Comments:

The predecessor to the office of Auditor General, The Controller and Auditor General had a dedicated, professional and full-time staff under the aegis of the Kenya National Audit Office (KENAO). It can only be assumed this is the staff that the newly appointed Auditor General has inherited.

The office has a current staff capacity of 974 staff composed of 716 auditors and examiners and 258 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

References:

Kenya National Audit Office (KENAO), <http://www.kenao.go.ke/about%20us.html>

Institute of Economic Affairs, Budget Guide, June 2011, <http://www.ieakenya.or.ke/documents/Budget%20Guide.pdf>

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

75:

50: The agency has limited staff that hinders its ability to fulfill its basic mandate.

25:

0: The agency has no staff, or a limited staff that is clearly unqualified to fulfill its mandate.

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

100 | 75 | 50 | 25 | 0

Comments:

The appointment of the Auditor General was independent and conformed to the terms of the Constitution. Further, the terms of service include the office's independence. For their staff, appointments will have to conform to the values and principles of the public service, as detailed in Article 232 of the Constitution. Therefore, the operations of this office under the new constitutional dispensation will, by all standards, be devoid of political interference.

References:

Auditor General, http://jobs.nation.co.ke/details/4609/Auditor-General&mode=ct&id=Nairobi_Province

Kenya Broadcasting Corporation, www.kbc.co.ke/news.asp?nid=72104Zilizo kwenye kache

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

Comments:

The Kenya National Audit Office is established by the Constitution of Kenya and, therefore, receives regular funding from the Exchequer. Section 44 of the The Public Audit Act, Revised Edition 2009 (2003) provides for sufficient funding of the Kenya National Audit Office to enable it to carry out its functions, and this has quite often been done.

The National Audit Office received a 0.1 percent share out of Kenya's total budget for 2011-2012. The Approved Gross Expenditure for 2010-2011 was 1,452.3. The Total Gross Estimates for 2011-2012 was 1,547.7. The percent change of total expenditures from 2010-2011 to 2011-2012 was a 6.57 percent increase. All values are in Kshs million.

References:

1. The Public Audit Act, Revised Edition 2009 (2003)
(See <http://www.kenyalawreport.co.ke/Downloads/Acts/Public%20Audit%20Act.pdf>).
2. Institute of Economic Affairs, Budget 2011/2012, Great Intentions but Bumpy Road Ahead, <http://www.ieakenya.or.ke/documents/Budget%20Guide.pdf>

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

Comments:

The predecessor office, the Controller and Auditor General, produced regular annual reports. See http://www.kenao.go.ke/report_cg.html for central government audits up to 2009/10; and http://www.kenao.go.ke/report_state%20-tabled.html for state corporations.

References:

- The Controller and Auditor General, Central Government Audits, http://www.kenao.go.ke/report_cg.html
- Controller and Auditor General, State Corporation Audits, http://www.kenao.go.ke/report_state%20-tabled.html

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.

Comments:

The Office of the Auditor General has always reported many cases of misuse of public resources, with some of them going unreported. But the government, especially the Executive, has rarely taken action on the reports. On its part, the Office of the Auditor General has blamed its perceived inability to take action against malfeasance on its lack of independence from the Executive, the arm of government that finances its operations. Nevertheless, the new Constitution now gives the Office of the Auditor General the requisite independence and constitutional protection.

References:

1. John Njiraini, "Meet Kenya's New Auditor General", The Standard, September 25, 2011 (See <http://www.standardmedia.co.ke/fashion/InsidePage.php?id=2000043431&cid=4&>).
2. John Njiraini and Cyrus Ombati, "Heat Over Missing Billions for Schools," The Standard, June 14, 2011 (See <http://www.standardmedia.co.ke/fashion/InsidePage.php?id=2000037114&cid=4&Page=1>).

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.

Comments:

The Office of the Auditor General has generally lived up to this mandate by initiating its own investigations.

Section 29(i) of the Public Audit Act 2003 gives the Kenya National Audit Office the mandate to carry out audits on economy, efficiency and effectiveness with which the government, a state corporation or a local authority uses its resources. The provisions of Article 229(5) and (6) of the new Constitution will enhance the Auditor General's ability to launch its own investigations, so as to uncover any financial malfeasance within government departments.

References:

1. Mars Group Kenya, "Auditor General Reveals how Kenya Government Paid US\$. 6 million for Vehicles that were never Delivered and that Kenya is still liable to pay more because of Attorney General's negligent advice," November 10, 2010 (see <http://blog.marsgroupkenya.org/?p=2482>).

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?

83

60a. In law, citizens can access reports of the audit agency.

Yes | No

Comments:

Although not explicitly provided for, it is possible that the provisions of Article 35 of the Constitution on the right to access to information held by the state may be used as basis by citizens to the access of reports by the Auditor General. In any case, the reports are available online, and also as hard copies at the Government Printer.

References:

Article 35 of the Constitution, http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

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

Comments:

The reports are very much available publicly, once they have been tabled in Parliament.

References:

www.parliament.go.ke/

http://www.kenao.go.ke/report_cg.html

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

Comments:

The Auditor General provides timely reports each fiscal year. The AG's report is a massive, expensive technical document in several volumes that really only receives interest from government officers and professionals. The full report is available online. Thus, the public has easy access to aspects of the audit reports even if the full report is too expensive.

References:

1. Auditor General, Reports, http://www.kenao.go.ke/report_cg.html

2. Centre for Governance and Democracy (2005), A Decade of Parastatal Waste: A Study of the Audited Accounts of State Corporations over the Period from 1993 to 2002. At <http://www.cgd.or.ke/documents/Parastatal%20Waste.pdf>

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 NGOs. 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 NGOs trying to access this information.

90

5.3. Taxes and Customs: Fairness and Capacity

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

100

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

Yes | No

Comments:

The Kenya Revenue Authority (KRA) was established by Parliament in 1995. The KRA is charged with collecting revenue on behalf of the government. To fulfill its mandates, the KRA administers the following written laws relating to revenue: Kenya Revenue Authority Act (Chapter 469 of the Laws of Kenya, Income Tax Act (Cap. 470), Customs and Excise Act (Cap.472), Value Added Tax Act (Cap.476), Road Maintenance Levy Fund Act 1993 (No.9 of 1993), Air Passenger Service Charge Act (Cap. 475), Entertainment Tax Act (Cap. 479), Traffic Act (Cap. 403), Transport Licensing Act (Cap. 404), Second Hand Motor Vehicle Purchase Tax Act (Cap. 484), Widows and Children's Pensions Act (Cap. 195), Parliamentary Pensions Act (Cap.196), Stamp Duty Act (Cap. 480), Betting, Lotteries and Gaming Act (Cap.131), and the Directorate of Civil Aviation Act (Cap.394) .

References:

For all Kenyan legislation, including all listed below, go to http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

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.

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

Comments:

The Authority has a professional full-time staff. The Kenya Revenue Authority (KRA) is a Semi-Autonomous Government Agency (SAGA) established by a statute (Cap. 469), a body corporate with its own Board of Directors, the power to sue and be sued and to hold property on its own accord. The Board is responsible for approval and review of policies and monitoring the functions of KRA, while day-to-day operations are the responsibility of the Commissioner General. The Commissioner General is assisted by six commissioners, six departmental heads and five regional heads. It has over 4,500 staff, 30 percent of whom are holders of a

first university degree. Twenty-one percent had secondary education, 36 percent had diplomas and certificates, and 11 percent had postgraduate qualifications.

References:

1. Kenya Revenue Authority, Fourth Corporate Plan, 2009/10 – 2011/12 (see http://www.kra.go.ke/publications/Corporate_plan_final_combined.pdf).
2. About the Kenya Revenue Authority (Available at <http://www.kra.go.ke/index.php/about-kra/about-the-authority>).
5. <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.

62b. In practice, the tax agency receives regular funding.

100 | 75 | 50 | 25 | 0

Comments:

The KRA is adequately funded by the government in a manner that enables it to effectively carry out its objectives. Indeed, it receives 2 percent of its annual revenue for its administrative costs. This has made its employees among the best employed within the government.

References:

Jibril Adan, The Standard, "Ethnicity plays key role in public employment in institutions," 02/01/2010, <http://www.standardmedia.co.ke/archives/news/insidePage.php?id=2000000172&cid=159&story=Ethnicity%20plays%20key%20role%20in%20public%20employment%20in%20institutions>

Kenyan Revenue Authority, www.revenue.go.ke/

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.

63. In practice, are tax laws enforced uniformly and without discrimination?

75

63a. In practice, are tax laws enforced uniformly and without discrimination?

100 | 75 | 50 | 25 | 0

Comments:

The exemption rule in the tax laws has sometimes been used to exempt some individuals from paying taxes, such as

constitutional office holders. Article 210(3) of the new Constitution requires every public servant to pay taxes, but this is not being strictly enforced by KRA. Members of Parliament have stuck to the past exemption rule to refuse paying taxes on their dues. Besides the exemption rule, KRA has also failed to apply taxation law in the informal non-licensed sector. Huge incomes in the informal sector go untaxed.

References:

1. Geoffrey Irungu, "Kenya: Tax Exemptions Cost Economy Sh40 Billion, Says IMF," Business Daily, Nairobi, March 18, 2011 (Available at <http://allafrica.com/stories/201103180224.html>).
2. Luke Anami, "Experts Call for equitable Taxation, Wider Net," The Standard, 23rd October 2011 (see <http://www.standardmedia.co.ke/InsidePage.php?id=2000045434&cid=14&j=&m=&d=>).
3. Kenya: Move to Plug Tax Evasion Loophole Commendable September 18, 2011. At <http://allafrica.com/stories/201109190749.html>

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

64a. In law, is there a national customs and excise agency?

Yes | No

Comments:

Several entities are responsible for tax collection. The Kenya Revenue Authority (KRA) is the overarching revenue collecting agency. It was established by an Act of Parliament, Chapter 469 of the laws of Kenya (July 1995). The Authority is charged with the responsibility of collecting revenue on behalf of the Government of Kenya. The Customs and Excise Department, Income Tax Department, Value Added Tax Department and the Registrar of Motor Vehicle Department are branches within the agency.

References:

Kenya Revenue Authority (KRA). http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

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.

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

Comments:

The customs and excise agency staff are fully staffed with professionals.

References:

Kenya Revenue Authority, <http://www.revenue.go.ke/>

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

Comments:

Being a composite part of the Kenya Revenue Authority, the Customs and Excise Department is adequately funded.

References:

Kenya Revenue Authority, <http://www.revenue.go.ke/>

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.

66. In practice, are customs and excise laws enforced uniformly and without discrimination?

50

66a. In practice, are customs and excise laws enforced uniformly and without discrimination?

100 | 75 | 50 | 25 | 0

Comments:

Customs and Excise laws are enforced fairly uniformly without discrimination. However, poor tax collection methods have sometimes led to tax evasion that Kenyan Revenue Authority (KRA) did not anticipate. For instance, current revenue collection methods cannot sufficiently track the origin of some products sneaked into the domestic market.

As reported in the Daily Nation in June 2011, Kenya loses up to Sh42 billion annually in unpaid taxes from international firms involved in the flower industry. Another report by Global Financial Integrity suggested that Kenya loses Sh17 billion annually in uncollected tax revenue. Two unnamed companies were found to have evaded taxes through transfer pricing. One of the companies did telecommunications work and the other was a tobacco business.

In October 2010, the KRA uncovered a tax evasion scam at the Mombasa port. In less than two months, the government lost more than Sh10 million. Imports from China and Dubai were undervalued so that lower taxes were required.

References:

1. Kenneth Kwama, "Treasury losing Revenue due to Tax Leaks," The Standard, November 5, 2011 (<http://www.standardmedia.co.ke/InsidePage.php?id=2000046253&cid=14>).
2. Geoffrey Irungu, "Kenya: Tax Exemptions Cost Economy Sh40 Billion, Says IMF," Business Daily, Nairobi, March 18, 2011 (Available at <http://allafrica.com/stories/201103180224.html>).
3. Kenya: Move to Plug Tax Evasion Loophole Commendable September 18, 2011. At <http://allafrica.com/stories/201109190749.html>
4. Daily Nation, Kenya: Target on Foreign Firms Over Tax Evasion, June 8, 2011, <http://allafrica.com/stories/201106100189.html>
5. Geoffrey Irungu, Business Daily Africa, KRA Probes Multinationals Over Tax Evasion, June 22, 2011, <http://www.businessdailyafrica.com/Corporate+News/KRA+probes+multinationals+over+tax+evasion/-/539550/1186592/-/yukthjz/-/>
6. PMP/KBC Reporter, Kenya Broadcasting Corporation, Kenyan PM pays Kshs.3.3m in tax arrears, June 27, 2011, <http://www.kbc.co.ke/news.asp?nid=71012>
7. Gitonga Marete, Aeromarine, Tax Evasion Scam Unearthed, October 29, 2010, <http://aeromarine.co.ke/news/7/76/Sh10m-tax-evasion-scam-unearthed/>
8. Peter Kiragu, Nairobi Star, Kenya: Uhuru to Go After Tax Evaders to Fund Sh1.1 Trillion Budget, June 9, 2011, <http://allafrica.com/stories/201106091179.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.

5.4. Oversight of State-Owned Enterprises

67. In law, is there an agency, series of agencies, or equivalent mechanism overseeing state-owned companies?

100

67a. In law, is there an agency, series of agencies, or equivalent mechanism overseeing state-owned companies?

Yes | No

Comments:

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 to advise and to report on all matters affecting the effective running of state corporations.

References:

State Corporations Act, Cap 446 of the Laws of Kenya, Section 18(1).

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.

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**

Comments:

There is no protection from political interference for these oversight agencies since the corporations report to a politically appointed minister. Often the executive head of the ministry sits on the board of directors, thereby shaping the agenda.

References:

No law addressing this issue exists. http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

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

Comments:

State corporations report to respective parent ministries. They are, however, audited by the Auditor General. Thus the extent to which their oversight bodies will have fully qualified professional staff will depend on respective ministries' situations. Previously, the CAG increasingly improved its auditing capacity. This is expected to be carried over to the office of the Auditor General.

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

References:

Prime Minister Officer, ww.primeminister.go.ke/govt.cfm

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

Comments:

The Inspectorate of State Corporations, the Controller of Budget, and the Auditor General all receive regular funding through the budget process.

References:

Prime Minister Office, www.primeminister.go.ke/govt.cfm

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

Comments:

The Inspectorate of State Corporations is the overall agency that oversees the management of state companies in Kenya. The Office of the Inspector General (Corporations) is established by Section 18 of the State Corporations Act, Cap. 446. It advises the government on all matters affecting the effective running of state corporations; reports periodically to the relevant arms of government on management practices within any state corporation; reports to the Controller and Auditor General any cases where money appropriated by Parliament is not being applied by state corporations for the purposes for which it was appropriated; conducts special investigations of any state corporation on behalf of the State Corporations Advisory Committee; undertakes surcharge action against any person who through irregular expenditure, negligence or misconduct causes loss of funds to the state corporation; and evaluates actual results of operations and management by state corporations on the basis of the agreed performance targets. Besides this Inspectorate, the Constitution authorizes the Auditor General to independently initiate investigations into the state owned corporations. The other oversight agencies include the Efficiency Monitoring Unit in the Office of the Prime Minister and the Parliamentary Investment Committee.

References:

Inspectorate of State Corporations Web site: http://www.isc.go.ke/index.php?option=com_content&view=category&layout=blog&id=3&Itemid=3

Audit Reports of State Corporations, available at: http://www.kenao.go.ke/report_state%20-tabled.html

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

Comments:

Many reports of misappropriation of funds suggest that the Inspector General (Corporations) has rarely taken action against anyone who incurred or authorized irregular expenditures of state corporation funds, either through neglect or misconduct, and caused loss of funds to the corporation. Similarly, the Auditor General and the Efficiency Monitoring Unit do not have any capacity to impose penalties on offenders. Nevertheless, the parent ministries of respective corporations occasionally take various actions, including interdiction, suspension, dismissal and recommendation for further investigation by the Kenya Anti-Corruption Commission.

References:

Kenya Anti-Corruption Commission, Quarterly Reports, 2010-2011, available at <http://www.kacc.go.ke/default.asp?pageid=45>

http://www.isc.go.ke/index.php?option=com_content&view=article&id=4&Itemid=11

http://www.kenao.go.ke/report_state%20-tabled.html

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?

55

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

Yes | No

Comments:

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.

References:

Section 14 of the State Corporations Act (Cap 446)

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

Audit reports are available at http://www.kenao.go.ke/report_state.html

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

Comments:

Although all corporations comply with these requirements in practice, the financial records of state corporations are not regularly updated. The most recent report on the National Audit Office's Web site is from August 2010.

All state corporations are required by The State Corporations (Performance Contracting) Regulations, 2004 to submit quarterly reports of the performance of the state corporation to the parent Ministry, the Treasury and the Inspector General (Corporations); and also file annual reports to the Inspector General (Corporations). The Auditor General also audits the financial records of all corporations and submits them to Parliament.

References:

Kenyan National Audit Office, State Owned Corporation Reports, http://www.kenao.go.ke/report_state%20-tabled.html

100: State-owned companies always publicly disclose financial data, which is generally accurate and up to date.

75:

50: State-owned companies disclose financial data, but it is flawed. Some companies may misstate financial data, file the information behind schedule, or not publicly disclose certain data.

25:

0: Financial data is not publicly available, or is consistently superficial or otherwise of no value.

69c. In practice, the financial records of state-owned companies are audited according to international accounting standards.

100 | 75 | 50 | 25 | 0

Comments:

The financial records of state corporations are audited by the Office of the Auditor General (Corporations) in the Kenya National Audit Office where the minimum qualification for auditors is a Bachelor's degree from any of the Kenyan universities or other recognized universities or institutions, preferably in fields relevant to the audit function such as Auditing, Accounting, Finance, Economics, Mathematics, Statistics, Computer Science, Law, Business Administration, Public Administration or other relevant disciplines. These auditors use international accounting standards in their professional work.

References:

Kenyan National Audit Office, About, www.kenao.go.ke/about%20us.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

Comments:

The Office of the Auditor General sometimes delays release of the annual audit reports, sometimes for as long as a year. The new Constitution may remedy these delays. Under the new Constitution, the Auditor General will be required to undertake the audits within six months after the end of each financial year.

The Office of the Auditor General (Corporations) audits all state corporations annually and submits the reports to Parliament; which makes them public when the reports are debated publicly. This enables citizens to get access to the financial records of state corporations.

References:

1. John Njiraini, "Meet Kenya's New Auditor General," The Standard, September 25, 2011 (available at: <http://www.standardmedia.co.ke/insidePage.php?id=2000043431&cid=4>).

2. National Audit Office, Reports, <http://www.kenao.go.ke/about%20us.html>

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

Comments:

Once audited by the Auditor General (Corporations), the financial records of all state corporations are usually submitted to the Public Investments Committee of Parliament, which makes them available on the Parliament's Web site. Members of the public can then access them without paying for them. However, the hard copies of these financial records are neither accessible nor affordable to the ordinary citizen.

References:

1. Kenya National Audit Office website: http://www.kenao.go.ke/report_state%20-tabled.html

2. National Assembly, Eighteenth Report of the Public Investments Committee on the Accounts of State Corporations, 2011 (see www.parliament.go.ke/index.php?option=com_docman...).

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 NGOs. 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 NGOs trying to access this information.

70. Are business licenses available to all citizens?

75

70a. In law, anyone may apply for a business license.

Yes | No

Comments:

Section 13 of the Trade Licensing Act, with allowable exceptions, permits anyone to apply and be granted with a business license. Further, Article 43 of the Constitution guarantees economic and social rights. See http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

References:

Section 13 of the Trade Licensing Act
Article 43 of the Constitution
http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

Yes: A YES score is earned if no particular group or category of citizens is excluded from applying for a business license, when required. A YES score is also earned if basic business licenses are not required.

No: A NO score is earned if any group of citizens are categorically excluded from applying for a business license, when required.

70b. In law, a complaint mechanism exists if a business license request is denied.

Yes | No

Comments:

Section 15 of the Trade Licensing Act permits an appeal to the minister by any person who is aggrieved by the action of a licensing officer in refusing to grant a license or conditional license, or revoking a license, as well as imposing conditions in a license or conditional license and other complaints.

References:

Section 15 of the Trade Licensing Act. http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

Yes: A YES score is earned if there is a formal process for appealing a rejected license.

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

70c. In practice, citizens can obtain any necessary business license (i.e. for a small import business) within a reasonable time period.

100 | 75 | 50 | 25 | 0

Comments:

It was estimated that starting a business in Kenya took approximately 33 days in 2011.

References:

World Bank, Doing Business in Kenya 2011, <http://www.doingbusiness.org/data/exploreeconomies/kenya/>

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

Comments:

The maximum fee 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.

References:

World Bank, Doing Business Report, Kenya. <http://www.doingbusiness.org/data/exploreeconomies/kenya/starting-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

Comments:

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. These can be purchased at the Government Printer, but can also be accessed online at http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

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. These can be purchased at the Government Printer, but can also be accessed online at http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

Yes: A YES score is earned if basic regulatory requirements for meeting public health standards are publicly accessible and transparent.

No: A NO score is earned if such requirements are not made public or are otherwise not transparent.

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

Yes | No

Comments:

The National Environment Management Agency's (NEMA) affairs are conducted under the Environmental Management and Coordination Act of 1999. Further, pertinent regulations are the Environmental (Impact Assessment and Audit) Regulations, 2002.

References:

The National Environment Management Agency's (NEMA) affairs are conducted under the Environmental Management and Coordination Act of 1999. Further, pertinent regulations are the Environmental (Impact Assessment and Audit) Regulations, 2002. See http://www.kenyalaw.org/kenyalaw/klr_app/frames.php. Also see the NEMA provisions at http://www.nema.go.ke/index.php?option=com_content&view=article&id=122&Itemid=474

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

Comments:

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. See http://www.kenyalaw.org/kenyalaw/klr_app/frames.php. An application of these laws for small and medium enterprises can be seen at <http://kenya.smetoolkit.org/kenya/en/content/en/953/Sample-Workplace-Safety-Policy>

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. See http://www.kenyalaw.org/kenyalaw/klr_app/frames.php. An application of these laws for small and medium enterprises can be seen at <http://kenya.smetoolkit.org/kenya/en/content/en/953/Sample-Workplace-Safety-Policy>.

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?

33

72a. In practice, business inspections by government officials to ensure public health standards are being met and are carried out in a uniform and even-handed manner.

100 | 75 | 50 | 25 | 0

Comments:

Inspections of businesses to ensure public health standards are carried out by local authorities. However, such inspections tend to be ad hoc and superficial given the possibility of officials being compromised through corruption. Indeed, sometimes local authorities make "impromptu" inspections on businesses with the intention of soliciting for bribes rather than upholding public health standards. There are even variations with regard to the inspection of formal and informal businesses; whereas inspection of the former is more frequent, the latter are hardly inspected.

References:

1. Macharia Kamau, "Minister Scraps Council Inspections," The Standard, August 23, 2011 (available at: <http://www.standardmedia.co.ke/InsidePage.php?id=2000041433&cid=14&Page=10>).

100: Business inspections by the government to ensure that public health standards are being met are designed and carried out in such a way as to ensure comprehensive compliance by all businesses with transparent regulatory requirements.

75:

50: Business inspections by the government to ensure public health standards are met are generally carried out in an even-handed way though exceptions exist. Bribes are occasionally paid to extract favorable treatment or expedited processing.

25:

0: Business inspections to ensure that public health standards are met are routinely carried out by government officials in an ad hoc, arbitrary fashion designed to extract extra payments from businesses in exchange for favorable treatment.

72b. In practice, business inspections by government officials to ensure public environmental standards are being met are carried out in a uniform and even-handed manner.

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

Comments:

The National Environment Management Authority (NEMA) undertakes routine inspection of all facilities and the environment to ensure compliance with environmental requirements. However, inspections for environmental standards seem to focus more on the formal sector than the informal sector, yet over 70 percent of Kenya's business are found in the informal sector. Even in the formal sector, there are vast gaps in coverage of environmental inspection of businesses.

References:

1. Joseph Masha, "NEMA Direct Kilifi Developer to Halt Housing Project," The Standard, March 29, 2011 (see <http://www.standardmedia.co.ke/entertainment/InsidePage.php?id=2000032183&cid=159&>).

2. Karanja Njoroge, "Town Clerk Risks Jail Term over waste disposal," The Standard, October 4, 2011 (see <http://www.standardmedia.co.ke/InsidePage.php?id=2000044116&cid=159&story=Town%20clerk%20risks%20jail%20term%20over%20waste%20disposal>).

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.

Comments:

Most of the working places, especially in the informal sector, are replete with indicators of unsafe working conditions that include noise, heat, vibration, electrical hazards, fumes, exhaust gases, dust, fungi, heights, worn-out material or equipment, and poorly maintained machinery, among others. Furthermore, there have been cases, particularly in the construction and manufacturing sectors, where lives have been lost due to poor public safety standards or not abiding by the set safety standards.

For instance, buildings under construction have reportedly collapsed killing workers who are ill-protected just as some workers have perished in fire accidents while locked in dilapidated work stations that do not meet public safety standards. This may imply that inspections of businesses to ensure that they uphold public safety standards are not regularly and uniformly carried out.

References:

1. Andrew Moran, "Building Collapse in Kenya's Capital leaves 2 dead, 14 missing," Digital Journal, June 11, 2011 (<http://www.digitaljournal.com/article/307949>).

2. Cyrus Ombati, "Nairobi Factory Fire Kills Eight," The Standard, May 25, 2011 (Available at: <http://www.standardmedia.co.ke/health/InsidePage.php?id=2000035830&cid=4&>).

100: Business inspections by the government to ensure that public safety standards are being met are designed and carried out in such a way as to ensure comprehensive compliance by all businesses with transparent regulatory requirements.

75:

50: Business inspections by the government to ensure public safety standards are met are generally carried out in an even-handed way though exceptions exist. Bribes are occasionally paid to extract favorable treatment or expedited processing.

25:

0: Business inspections to ensure that public safety standards are met are routinely carried out by government officials in an ad hoc, arbitrary fashion designed to extract extra payments from businesses in exchange for favorable treatment.

Category 6. Anti-Corruption Legal Framework, Judicial Impartiality, and Law Enforcement Professionalism

6.1. ⁷⁸Anti-Corruption Law

73. Is there legislation criminalizing corruption?

100

73a. In law, attempted corruption is illegal.

Yes | No

Comments:

Corruption is explicitly outlawed by the Anti-Corruption and Economic Crimes Act, Public Officers Ethics Act and the Public Procurement and Disposal Act.

References:

Anti-Corruption and Economic Crimes Act, Public Officers Ethics Act and the Public Procurement and Disposal Act. See http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

Yes: A YES score is earned if corruption laws include attempted acts.

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

73b. In law, extortion is illegal.

Yes | No

Comments:

The illegality of extortion is described implicitly or explicitly in all the legislation on corruption, including relevant sections of the Constitution (Articles 10, 75, 76, 77, 79 and 80), and the Anti-Corruption and Economic Crimes Act, Public Officers Ethics Act and the Public Procurement and Disposal Act. 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. See http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

References:

Constitution (Articles 10, 75, 76, 77, 79 and 80)
Anti-Corruption and Economic Crimes Act
Public Officers Ethics Act
Public Procurement and Disposal Act.
Section 40 (2) of the Anti-Corruption and Economic Crimes Act.
See http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

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

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

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

Yes | No

Comments:

Section 39 (3) (b) of the Anti-Corruption and Economic Crimes Act declares a person guilty of an offense if they corruptly give or offer, or corruptly agree to give or offer a benefit. See http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

References:

Section 39 (3) (b) of the Anti-Corruption and Economic Crimes Act. http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

Yes: A YES score is earned if offering a bribe is illegal.

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

73d. In law, receiving a bribe (i.e. passive corruption) is illegal.

Yes | No

Comments:

Section 39 (3) (a) of the Anti-Corruption and Economic Crimes Act declares a person guilty of an offense if they corruptly receive or solicit, or corruptly agree to receive or solicit benefits.

References:

Section 39 (3) (a) of the Anti-Corruption and Economic Crimes Act. http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

Yes: A YES score is earned if receiving a bribe is illegal.

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

73e. In law, bribing a foreign official is illegal.

Yes | No

Comments:

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

References:

Section 39 of the Anti-Corruption and Economic Crimes Act. http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

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

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

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

Yes | No

Comments:

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

References:

Section 46 of the Anti-Corruption and Economic Crimes Act
Public Officers Ethics Act, Sections 10, 11, 15, 16, 19 and 20
http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

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

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

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

Yes | No

Comments:

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

References:

Public Officers Ethics Act
Anti-Corruption and Economic Crimes Act
Official Secrets Act
http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

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

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

73h. In law, money laundering is illegal.

Yes | No

Comments:

Section 3 of the Proceeds of Crime and Anti-Money Laundering Act, 2009 provides that:

A person who knows or who ought reasonably to have known that property is or forms part of the proceeds of crime and—

(a) enters into any agreement or engages in any arrangement or transaction with anyone in connection with that property, whether that agreement, arrangement or transaction is legally enforceable or not; or

(b) performs any other act in connection with such property, whether it is performed independently or with any other person, whose effect is to—

(i) conceal or disguise the nature, source, location, disposition or movement of the said property or the ownership thereof or any interest which anyone may have in respect thereof; or

(ii) enable or assist any person who has committed or commits an offense, whether in Kenya or elsewhere to avoid prosecution; or

(iii) remove or diminish any property acquired directly, or indirectly, as a result of the commission of an offense,

References:

Section 3 of the Proceeds of Crime and Anti-Money Laundering Act, 2009.

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

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

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

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

Yes | No

Comments:

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.

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

Yes: A YES score is earned if organized crime is illegal.

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

6.2. Anti-Corruption Agency or Equivalent Mechanisms

74. In law, is there an agency (or group of agencies) with a legal mandate to address corruption?

74a. In law, is there an agency (or group of agencies) with a legal mandate to address corruption?

Yes | No

Comments:

The Constitution, through Articles 79 and 248, establishes The Ethics and Anti-Corruption Commission for this purpose. The specific nature of the working of this Commission is provided for in the Ethics and Anti-Corruption Commission Act, 2011.

References:

Constitution, Articles 79 and 248

Ethics and Anti-Corruption Commission Act, 2011. See http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

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.

75. Is the anti-corruption agency effective?

83

75a. In law, the anti-corruption agency (or agencies) is protected from political interference.

Yes | No

Comments:

Section 30 of the Ethics and Anti-Corruption Act, 2011 provides that the Kenya Anti-Corruption Commission (KACC) shall be independent of any external direction or control. This section provides that KACC being a constitutional commission, is only to be subject to the Constitution. Under section 18 of the now repealed predecessor statute, the Director of the Commission had security of tenure meaning he or she could not be removed from office without any justification. In the present Act, the officers are appointed for a single, non-renewable six-year term.

References:

Section 30 of the Ethics and Anti-Corruption Act, 2011.

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

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

Comments:

Although the law (the Ethics and Anti-Corruption Commission 2011, Articles 79, 248 and 249(2) and section 30) establishes the independence of the Kenyan Anti-Corruption Commission (KACC), the immediate past Commission seemed more vulnerable than previous ones. This is evidenced by the recent disbandment of the Commission.

References:

John Ngirachu, "MPs Vote to Send Anti-Graft Team Home," in Daily Nation of August 24, 2011, <http://www.nation.co.ke/News/-/1056/1224730/-/10gjp4uz/-/index.html>.

Isaac Kariuji, "MPs vote to send anti-graft team home," August 25, 2011, http://www.diasporamessenger.com/index.php?option=com_k2&view=item&id=941:mps-vote-to-send-anti-graft-team-home&Itemid=124&lang=en

100: This agency (or agencies) operates independently of the political process, without incentive or pressure to render favorable judgments in politically sensitive cases. Investigations can operate without hindrance from the government, including access to politically sensitive information.

75:

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

25:

0: This agency (or agencies) is commonly influenced by political or personal incentives. These may include conflicting family relationships, professional partnerships, or other personal loyalties. Negative incentives may include threats, harassment or other abuses of power. The agency (or agencies) cannot compel the government to reveal sensitive information.

75c. In practice, the head of the anti-corruption agency (or agencies) is protected from removal without relevant justification.

100 | 75 | 50 | 25 | 0

Comments:

The Anti-Corruption and Economic Crimes Act of 2003 guarantees the Director of the Kenya Anti-Corruption Commission security of tenure, such that the Director can only be removed from office through the recommendations of a tribunal. The Commission is not entrenched in the Constitution, which exposes it to being wound up by the legislature. This danger is addressed by the new Constitution that mandates the establishment of the Ethics and Anti-Corruption Commission through an Act of Parliament.

References:

1. The Anti-Corruption and Economic Crimes Act, 2003 (available at: <http://www.eacc.go.ke/docs/legal/aceca.pdf>).

2. Kenya National Assembly Official Report (Hansard), June 24, 2010 (See http://books.google.co.ke/books?id=agMYg8TVcCQC&pg=PT39&pg=PT39&dq=KACC+Director+Security+of+tenure&source=bl&ots=SE1L_lhQ2z&sig=ujvaCMQ6-N47GMvbeUDKd5mRvSg&hl=en&sa=X&ei=t65XT9HRKYKqrAfMwo2NDA&ved=0CCMQ6AEwATgK#v=onepage&q=KACC%20Director%20Security%20

100: The director(s) cannot be removed without a significant justification through a formal process, such as impeachment for abuse of power.

75:

50: The director(s) can in some cases be removed through a combination of official or unofficial pressure.

25:

0: The director(s) can be removed at the will of political leadership.

75d. In practice, appointments to the anti-corruption agency (or agencies) are based on professional criteria.

100 | 75 | 50 | 25 | 0

Comments:

Under the provisions of the now repealed Anti-Corruption and Economic Crimes Act, appointments were fraught with controversies surrounding the political correctness of candidates. However, the Ethics and Anti-Corruption Commission Act lays down very elaborate mechanisms for the appointment of the members of the new Commission through section 6, backed by the provisions of the new Constitution.

However, in the wake of the 2007/08 post-election violence, Kenya is attempting to ensure ethnic balancing in public offices, alongside attempts to raise gender profiles. Thus, after very transparent application of the recruiting process, the best candidate was not nominated to chair the commission in order to balance ethnic and gender issues.

References:

The Zimbabwean, "Kenya: The hard questions on Ringera," September 4, 2009, <http://www.thezimbabwean.co.uk/articles/24178>

KenyaCitizenTV, MPS Furious Over Ringera Re-Appointment," September 1, 2009, <http://www.youtube.com/watch?v=zkd5WQxy-e0>

V. Kimutai, Principals Pick Matemu to Chair Anti Graft Body, December 1, 2011, <http://www.standardmedia.co.ke/archives/sports/InsidePage.php?id=2000047649&cid=4&>

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

Comments:

The predecessor commission, KACC, had a full time dedicated staff. Part of this staff was seconded to the Commission by other departments of the government. The new commission will most likely inherit this staff and facilities. Its Web site declares there are no vacancies.

References:

Kenyan Anti-Corruption Commission (KACC), <http://www.kacc.go.ke/default.asp?pageid=9>

100: The agency (or agencies) has staff sufficient to fulfill its basic mandate.

75:

50: The agency (or agencies) has limited staff, or staff without necessary qualifications to fulfill its basic mandate.

25:

0: The agency (or agencies) has no staff, or a limited staff, that is clearly unqualified to fulfill its mandate.

75f. In practice, the anti-corruption agency (or agencies) receives regular funding.

100 | 75 | 50 | 25 | 0

Comments:

The employees of the Commission are among the best paid among public officers. In fact, at some point, the director of KACC's pay earned Kshs 2.5 million; a figure that exceeded the President's earnings.

References:

Moses Njagih, The Standard, "Official put to task over KACC achievements in war on graft," July 27,

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

75:

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

25:

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

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

100 | 75 | 50 | 25 | 0

Comments:

The Commission publishes monthly, quarterly and annual reports which are available at <http://www.kacc.go.ke/default.asp?pageid=1#>
Other related publications are also available online.

References:

The Kenyan Anti-Corruption Commission. <http://www.kacc.go.ke/default.asp?pageid=1#>

100: The agency (or agencies) makes regular, publicly available, substantial reports to the legislature and/or to the public directly outlining the full scope of its work.

75:

50: The agency (or agencies) makes publicly available reports to the legislature that are sometimes delayed or incomplete.

25:

0: The agency (or agencies) makes no reports of its activities, or makes reports that are consistently out of date, unavailable to the public, or insubstantial.

75h. In practice, the anti-corruption agency (or agencies) has sufficient powers to carry out its mandate.

100 | 75 | 50 | 25 | 0

Comments:

Notwithstanding its human and financial resources, the greatest challenge to the Commission has been its lack of prosecutorial powers. The Commission merely recommends prosecution – formerly to the Attorney General, but now to the Director of Public Prosecutions, an arrangement which has previously compromised the fight against the scourge. It appears that as long as the Commission lacks prosecutorial powers, the fight against corruption in Kenya will continue being hampered.

References:

David Ohito And Alex Ndegwa, The Standard, "How forces plotted to kill KACC," August 26, 2011, <http://www.standardmedia.co.ke/commentaries/InsidePage.php?id=2000041591&cid=4&>

100: The agency (or agencies) has powers to gather information, including politically sensitive information. The agency (or agencies) can question suspects, order arrests and bring suspects to trial (or rely on related agencies or law enforcement authorities to perform such functions).

75:

50: The agency (or agencies) has most of the powers needed to carry out its mandate with some exceptions.

25:

0: The agency (or agencies) lacks significant powers which limit its effectiveness.

75i. In practice, when necessary, the anti-corruption agency (or agencies) independently initiates investigations.

100 | 75 | 50 | 25 | 0

Comments:

The Commission has been able to conduct various investigations on matters relating to corruption cases. These include the allegations of corruption at the Ministry of Water and Irrigation, the alleged fraudulent sale of Kenyan embassy land at Abuja and the inflation of the cost of building the Tokyo embassy.

References:

Francis Mureithi, The Star, "KACC probe targets Ngilu's Ministry," August 20, 2011, <http://www.nairobistar.com/national/national/36898-kacc-probe-targets-ngilus-ministry->

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?

63

76a. In practice, the anti-corruption agency (or agencies) acts on complaints within a reasonable time period.

100 | 75 | 50 | 25 | 0

Comments:

The Commission is slow in two respects. First, its centralization in Nairobi undermines its efficiency over complaints from other regions. Secondly, complaints that touch the political class – grand corruption – are always very cumbersome to investigate, especially if this requires travel outside the country. For instance, the Commission is yet to complete the corruption investigations against the Ministry of Water which commenced more than two years ago, among many more.

References:

Francis Mureithi, All Africa, "Kenya: KACC Probe Targets Ngilu's Ministry," August 20, 2011, <http://allafrica.com/stories/201108221019.html>

David Ohito and Alex Ndegwa, The Standard, "How Forces Plotted to Kill KACC," August 26, 2011, <http://www.standardmedia.co.ke/InsidePage.php?id=2000041591&cid=4>

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 reprimand.

100 | 75 | 50 | 25 | 0

Comments:

Though reporting of corruption cases to the Kenya Anti-Corruption Commission has improved, there is still some degree of fear of reprimand. It is due to this reality of fear that the Commission has introduced an online portal through which citizens can report corruption anonymously. Besides the online portal, the Commission also has hotline telephone and fax numbers as well as an e-mail address through which citizens can report corruption. Despite the lack of a witness protection mechanism, these measures are increasingly emboldening citizens to report corruption without fear. The number of cases reported to the Commission increased by 62.5 percent in 2010/2011.

References:

1. Kenya Anti-Corruption Commission, Annual Report of Activities and Financial Statement for 2010/2011 (available at: <http://www.eacc.go.ke/default.asp?pageid=16>).

Website: <http://www.eacc.go.ke/default.asp?pageid=16>

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.

82
6.3. Judicial Independence, Fairness, and Citizen Access to Justice

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

67

77a. In law, there is a general right of appeal.

Yes | No

Comments:

This is provided for through Articles 159, 162, 163(3) (b), 163(4), 164(3), 165(3) and 165(3)(e) of the Constitution.

References:

This is provided for through Articles 159, 162, 163(3) (b), 163(4), 164(3), 165(3) and 165(3)(e) of the Constitution. See http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

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

Comments:

The Kenyan judiciary has been bedeviled with a serious backlog in its administration of justice. The problem was exacerbated by the judicial purge of 2003 (Radical Surgery): the Superior Courts are often fully booked for the year by February. As recently as October 2011, the Chief Justice estimated a backlog of one million cases, mainly traffic offenses, and promised the Court of Appeal would only be handling new cases by March 2012.

References:

Tom Maliti, The International Criminal Court: Kenyan Monitor, "Kenyan Chief Justice Outlines Progress in Judicial Transformation," October 2011, <http://www.icckeny.org/2011/10/kenyan-chief-justice-outlines-progress-in-judicial-transformation/>

Peter Mwaura, "Kenya: Seven Ways Judges can use to Clear the Backlog of Court Cases," in The Daily Nation of February 19, 2010, <http://allafrica.com/stories/201002190741.html>.

The Final Report of the Task Force on Judicial Reforms Chaired by the Hon Justice William Ouko at p. 33 and available at <http://www.kenyalaw.org/Downloads/Final%20Report%20of%20the%20Task%20Force%20on%20Judicial%20Reforms.pdf>.

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

Comments:

Except if one's application is to be filed as a pauper suit (Order 33 of CPR 2010), all other court applications must be preceded by court filing fees determined by the Chief Justice in accordance with specific legislation. Section 10 of the Judicature Act (Chapter 3 of the Laws of Kenya) empowers the Chief Justice generally to make rules of procedure and prescribe fees for the High Court and Subordinate Court. See Blogspot Article, "Revenue Collection Courts" available at http://kenyanjurist.blogspot.com/2010_09_01_archive.html. Besides the court filing fees, there may be the need for the payment of security for costs by one party to the suits. Consequently, the court payments are quite high for ordinary citizens.

References:

Blogspot Article, "Revenue Collection Courts," September 1, 2010, http://kenyanjurist.blogspot.com/2010_09_01_archive.html.

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

78a. In practice, do judgments in the criminal system follow written law?

100 | 75 | 50 | 25 | 0

Comments:

Criminal trials are largely founded upon the law and judgments in Kenya are issued in writing.

References:

Gerald Lebovits, Kenya Law Reports, "Judgment Writing in Kenya and the Common-Law World," 2009, <http://www.kenyalaw.org/klr/index.php?id=839>

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

79a. In practice, are judicial decisions enforced by the state?

100 | 75 | 50 | 25 | 0

Comments:

More often than not, court decisions are enforced by the state. Police and prison departments (where they apply) enforce the decisions. However, individuals with political connections might succeed in undermining the implementation of such decisions. Whenever there is an impracticality of such enforcement, the police have always sought direction from the AG. For instance, in 2009, the Industrial Court issued a warrant of arrest for contempt of court charges against a university vice chancellor and its University Council, who successfully applied to the High Court for an injunction.

References:

Evelyn Kwamboka, "KU Vice-Chancellor Faces Jail Term" in The Standard of September 6, 2011 and available at <http://www.standardmedia.co.ke/archives/InsidePage.php?id=1144025844&cid=159&>

100: Judicial decisions are enforced quickly regardless of what is being decided or who is appearing before the court. Failure to comply brings penalties enforced by the state.

75:

50: Judicial decisions are generally enforced by the state, with some exceptions. Certain areas of law may be ignored, or certain parties appearing before the courts may evade or delay enforcement.

25:

0: Judicial decisions are often ignored. The state lacks the will or capacity to consistently enforce these decisions.

80. Is the judiciary able to act independently?

69

80a. In law, the independence of the judiciary is guaranteed.

Yes | No

Comments:

Article 160 of the Constitution provides that the Judiciary is only answerable to the Constitution, and may not be under the control or direction of any person or authority See http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

References:

Article 160 of the Constitution. http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

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

Comments:

Previously, the judges were appointed exclusively by the President and therefore had little or no protection from political interference. Thus, despite the tally of the 2007 presidential votes being incomplete, the Chief Justice was available for a private ceremony at the State House ceremony to swear in the immediate past president, precipitating an outbreak of protest violence that killed 1,500 Kenyans in three months. A unilateral 2011 attempt by the same president to appoint a successor Chief Justice met stiff opposition for violating the Constitution.

The current objective manner of constituting the Judiciary has enabled it to back a judgement widely seen in sections of the government to be against "national interest." Compare the Judiciary's position (The Standard) against the Attorney General's position (All Africa, December 2011).

References:

J. Macharia, "Kenya President Rows Back on Judicial Appointments" in the AlertNet of February 22, 2011, <http://www.trust.org/alertnet/news/kenya-president-rows-back-on-judicial-appointments/>

Peter Opiyo and Peter Orengo, The Standard, "Mutunga Tells Government Off Over Bashir Court Ruling," February 12, 2011, <http://www.standardmedia.co.ke/letters/insidePage.php?id=2000047645&cid=4&>

Laban Wanambisi, All Africa, "Kenya: Bashir Arrest Warrant Judge Erred – AG," December 13, 2011, <http://allafrica.com/stories/201112190856.html>

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**

Comments:

There is no objective way of distributing cases among judges by the Chief Justice. The Constitution creates a President of the Court of Appeal (Article 164(2)) and a Presiding Judge of the High Court (Article 165(2)). It is not clear whether the occupants of these offices will take over the case distribution among the judges within these courts from the Chief Justice to leave the latter with responsibility over the Supreme Court only. Meanwhile, 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.

References:

No law addressing this issue exists.

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

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

Yes: A YES score is earned if there is an objective system that is transparent to the public that equitably or randomly assigns cases to individual judges. The executive branch does not control this process.

No: A NO score is earned if the case assignment system is non-transparent or subjective where judges themselves have influence over which cases they adjudicate. A NO score is also earned if the executive branch controls this process.

80d. In law, national-level judges are protected from removal without relevant justification.

Yes | No

Comments:

Article 167 grants security of tenure to judges. The process for the removal of any serving judge must be predicated on the constitutional stipulations laid down in Article 168.

References:

Article 167, Article 168. http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

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

Comments:

There has been no report of a judge or magistrate being attacked as a result of adjudicating a corruption case. There was a case of a magistrate who was given more security after an incident causing the magistrate to fear for his/her safety, but such fears have not been linked to adjudicating corruption cases.

References:

J. Ochieng', "Kisumu Magistrates Fear After Winam Raid," December 8, 2011, available at <http://allafrica.com/stories/201112081409.html>

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

Comments:

There have not been any reports concerning any killings of judges handling corruption cases.

References:

Media reports.

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?

43

82a. In practice, judicial decisions are not affected by racial or ethnic bias.

100 | 75 | 50 | 25 | 0

Comments:

Over the years, the Kenyan judiciary has been tainted by allegations of mega-corruption, economic sabotage, promotion of ethnic cleansing as a political tool, and crimes against the people to the extent that most people lost confidence in it. This triggered current reforms. Whereas the current judiciary generally may not be making judgments with reference to ethnic and racial biases, the past has not faded from the memory of the citizens.

References:

1: Macharia Gaiitho, "Reformist Chief Justice should expect Vicious Fight from Nyayoism Remnants," Daily Nation, May 17, 2011 (see <http://civilsociety.marsgroupkenya.org?story=329947&=Independent%20judiciary>)

2: Stephen Makabila, "Even with Mutunga, Judicial Reforms May Not be Easy," The East African Standard, June 11, 2011 (Available at: <http://www.marsgroupkenya.org/multimedia/?StoryID=333801>).

100: Judicial decisions are not affected by racial or ethnic bias.

75:

50: Judicial decisions are generally not affected by racial or ethnic bias, with some exceptions. Some groups may be occasionally discriminated against, or some groups may occasionally receive favorable treatment.

25:

0: Judicial decisions are regularly distorted by racial or ethnic bias. Some groups consistently receive favorable or unfavorable treatment by the courts.

82b. In practice, women have full access to the judicial system.

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

Comments:

Several practical issues deny women access to the judicial system, including patriarchy, poverty and continued marginalization.

References:

Ayuko Bonita and Chopra Tanja, "The Illusion of Inclusion-Women's Access to Rights in Northern Kenya," Legal Resources Foundation: Advance Litho Ltd, 2008,

Chopra Tanja, "Building Informal in Northern Kenya," Legal Resources Foundation: Advance Litho Ltd, 2008

Chopra Tanja, "Reconciling the Society and the Judiciary in Northern Kenya," Legal Resources Foundation: Advance Litho Ltd, 2008

Gender Governance Program Kenya, "Enhancing Access to Justice for Women Through Kadhis' Courts," <http://www.gendergovernancekenya.org/component/content/article/50-judiciary/366-enhancing-access-to-justice-for-women-through-kadhis-courts.html>

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

Comments:

Article 50(2)(h) of the Constitution requires that accused persons get an advocate assigned to them where it appears that they may be susceptible to suffering substantial injustice during the trial. However, this is a new provision which hasn't been implemented yet.

References:

Article 50(2)(h) of the Constitution. http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

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

Comments:

The state provision of legal counsel to defendants had been confined to individuals on capital charges under the old constitutional dispensation. The accused would normally remain unrepresented in other criminal trials where they cannot afford an advocate. However, there were a small number of private organizations that offered free legal advice, such as the Federation International De Abogadas (FIDA), known in Kenya as the International Federation of Women Lawyers.

References:

International Federation of Women Lawyers, Frequently Asked Questions, <http://fidakenya.org/frequently-asked-questions/>

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

Comments:

About 46 percent of the Kenyan population lives below the poverty line (less than a dollar a day), yet Kenya is a highly unequal society with a GINI coefficient of 48 percent. Consequently, 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. What it means is most people avoid litigation. Alternative dispute resolution methods are often advised.

References:

Paul Musyimi, Arbitration as an alternative to litigation in Kenya , May 27, 2008, http://lawyer-kenya.blogspot.com/2008/05/arbitration-as-alternative-to_26.html

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

Comments:

Most retail businesses cannot afford legal assistance which the Advocates (Remuneration) (Amendment) Order placed at a minimum of 10,000 shillings. Consequently, such businesses avoid litigation in favor of alternative – even if less satisfactory – dispute resolution approaches.

References:

Paul Musyimi, Lawyer-Kenya, Arbitration as an Alternative to Litigation in Kenya, May 2008, http://lawyer-kenya.blogspot.com/2008/05/arbitration-as-alternative-to_26.html

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

Comments:

There is a very wide disparity in regional access to justice institutions. Whereas law courts are quite few in the arid and semi-arid northern Kenya, they are fairly well-distributed in the other parts of the country. Besides this presence of judicial infrastructure, access to justice is also different depending on gender, socioeconomic status, and legal literacy levels. Several barriers prevent vulnerable groups from accessing judicial services and justice generally. Apart from inadequate court infrastructure in many places, lack of finances, legal and rights awareness and corruption inhibit the large majority of poor people from accessing justice.

References:

1. Republic of Kenya, Draft National Policy on Human Rights, 2010 (Available at: http://www.marsgroupkenya.org/pdfs/2010/08/Draft_National_Policy_on_Human_Rights_2010.pdf).

2. Lucianne Limo, "KNCHR Report says State Ignores the Poor," The Standard, June 16, 2011 (Available at: <http://www.standardmedia.co.ke/entertainment/InsidePage.php?id=2000037248&cid=4&>).

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.

6.4. Law Enforcement: Conflicts of Interest Safeguards and Professionalism

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

Comments:

Previously, appointments to the very top of law enforcement agencies (commissioners of police, prisons, intelligence, etc.) were the political preserve of the President, even if the appointees proved to be professionally qualified. However, this is set to change along the lines provided by Chapter 14 of the Constitution.

For instance, the National Police Service Act 2011 sets out the qualifications that have to be met in order to be appointed a senior official in the police (Sections 9, 11, 12 and 13). With the constitutional requirements of Chapter 6 and Article 245, the provisions ensure that all appointments within the security agencies will be more objective. Also, the police will have its own service commission that removes it from the operation of the Public Service Commission. Recent recruitment has seen several recruits being charged in court for falsifying examination certificates.

References:

Wambugu Kanyi, "Kenya: Nine Police Recruits Deny forging KCSE Papers," in The Nairobi Star of July 6, 2011 and available at <http://allafrica.com/stories/2011070227.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

Comments:

The Kenya Police has been underfunded by the government, compromising its professionalism. Conversely, the politicised Administration Police has appeared to be better funded despite its narrower mandate.

References:

N. Wainaina, 20 October 2011, Police Reforms Are Key to Rule of Law, at <http://allafrica.com/stories/201110210753.html>.

Daily Nation, "Kenya: Police deny They are on a Go-Slow," July 19, 2011, <http://allafrica.com/stories/201107200163.html>

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

Comments:

Previously, the law enforcement agencies were susceptible to political interference (since they, like other public sector agencies, were employed at the President's pleasure). This was best illustrated by the 2007 use of Administration Police as polling agents of the President's party, PNU. This is evident in the Report of the Commission of Investigations into the Post Election Violence (CIPEV).

However, the present constitutional and legal reforms that are being put up will professionalize the force and make it really independent so as to avoid the kinds of unfortunate situations like the 2007 scenario.

References:

Report of the Commission of Investigations into the Post Election Violence (CIPEV), 2008, <http://mujigwithania.com/2008/10/15/waki-report-pdf/>.

Kenya National Commission on Human Rights, On the Brink of the Precipice: A Human Rights Account of Kenya's Post-2007 Election Violence, Final Report, August 15, 2008, <http://www.knchr.org/dmdocuments/KNCHR%20doc.pdf>

The Standard (Kenya) // Commission of Inquiry into Post-Election Violence // Kenya National Commission on Human Rights, October 15, 2008, <http://www.humansecuritygateway.com/showRecord.php?RecordId=27198>

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?

71

84a. In law, there is an independent mechanism for citizens to complain about police action.

Yes | No

Comments:

The Independent Policing Oversight Authority Act, 2011, at section 3, establishes the Independent Oversight Policing Authority which will, among other functions, receive complaints from the members of the public against the police, for investigation and action (section 24).

References:

The Independent Policing Oversight Authority Act, 2011, at section 3, section 24. http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

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

Comments:

There is no formal independent law enforcement complaints reporting agency. Besides the Police Complaints Section, to which many citizens fear reporting complaints, the alternative agency where people can report law enforcement complaints is the Kenya National Human Rights Commission that has a wider mandate than handling law enforcement complaints. The lack of an independent agency for handling law enforcement complaints led to the formation of the Independent Policing Oversight Authority Bill 2011, which was signed in November 2011 and established the Independent Police Oversight Authority.

References:

1. The Independent Police Oversight Bill, 2011 (available at <http://www.kenyalaw.org/>).
2. Peace Net Kenya, 127 Security Ministry Roots for Formation of Police Oversight Authority, <http://www.peacenetkenya.or.ke/component/content/article/3-newsflash/127-security-ministry-roots-for-formation-of-police-oversight-authority>.

100: The agency/entity responds to complaints quickly. While some backlog is expected and inevitable, complaints are acknowledged promptly and investigations into serious abuses move steadily towards resolution. Citizens with simple issues can expect a resolution within a month.

75:

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

25:

0: The agency/entity cannot resolve complaints quickly. Complaints may be unacknowledged for more than a month, and simple issues may take three to six months to resolve. Serious abuses are not investigated with any urgency.

84c. In law, there is an agency/entity to investigate and prosecute corruption committed by law enforcement officials.

Yes | No

Comments:

Investigation of corruption in the police force has traditionally been handled by the Kenya Anti-Corruption Commission while prosecution was in the hands of the Attorney General and more recently, the Director of Public Prosecutions. The Independent Policing Oversight Authority, at section 6, has various statutory functions which include the investigation of complaints against the police. Such complaints may include corruption complaints. The Authority lacks prosecutorial powers and can only recommend the same to the Office of the Director of Public Prosecutions.

References:

- The Independent Policing Oversight Authority, at section 6. See http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

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

Comments:

The Kenya Anti-Corruption Commission (KACC) has always investigated petty corruption complaints against law enforcement officers and the bulk of the investigations completed by KACC involve law enforcement officers. Besides KACC, the Kenya National Commission on Human Rights also investigates complaints against law enforcement officers. The establishment of the Independent Policing Oversight Authority is likely to strengthen investigations on corruption complaints against law enforcement officers.

References:

1. Kenya Anti-Corruption Commission, Annual Report, 2010-2011 (Available at: <http://www.eacc.go.ke/Docs/KACC-ANNUAL-REPORT%202010-2011.pdf>).

2. About the Kenya National Commission on Human Rights at: http://www.knchr.org/index.php?option=com_content&task=blogsection&id=4&Itemid=14.

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

Comments:

Reading Articles 244(a) and (d), together with Article 23 of the Constitution, the only group which is exempt from prosecution is that of diplomats whose protection derives from the Geneva Convention on Diplomatic Immunity. See http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

References:

Articles 244(a) and (d), Article 23 of the Constitution. http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

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

Comments:

Law enforcement officers are not immune to criminal proceedings, even if it is usually hard to get the police to act on their own excesses. For example, three police officers who were caught on camera in January 2011 shooting dead unarmed robbery suspects were suspended from the force. Their fate remains unclear. Elsewhere, a constable caught on camera shooting dead a demonstrator during the 2007/08 post-election violence was acquitted "because the bullet in the body did not fit his gun."

References:

All Africa, "Kenya: Police Officers Charged with Murder of Father and Son," November 24, 2011, <http://allafrica.com/stories/201111250027.html>

NTVKenya, "Police Officers Charged with Daylight Cash Theft," September 28, 2009, <http://www.youtube.com/watch?v=RxeCVhNUeao>

Emeka-Mayaka Gekara and Ashley Lime, "Kenyan Officers Suspended Over Street Executions," on Daily Nation of January 20, 2011, <http://in2eastafrika.net/kenyan-officers-suspended-over-street-execution/>

Rob Jillo, "Kenyan Policeman Acquitted in PEV Case," in Capital FM News of June 21, 2010 and available at <http://www.capitalfm.co.ke/news/2010/06/21/kenyan-policeman-freed-in-pev-case/>

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.
