

GLOBAL INTEGRITY

2006 COUNTRY REPORT

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Corruption Notebook: Kenya

By Mutegi Njau

During this year's World Cup soccer matches, Kenyans - like many other Africans – learned for the first time the names of countries new to the tournament, such as Croatia, Serbia and Montenegro and Trinidad and Tobago. Around the same time, they learned of a country named Armenia for a totally different reason: corruption.

Two alleged brothers from Armenia came to Kenya in mid-2006 purporting to be investors. However, the "Atur brothers" were in fact looting the government of security equipment and documents, such as airport security passes, police identity cards and Kenyan passports. A police raid on their home recovered commando police uniforms, a cache of arms from the presidential guard and stolen vehicles. Knowledgeable sources say their activities could only have been facilitated through high-level connections.

News of the scandal hit media headlines in March after a police raid on Kenya's oldest newspaper, The Standard, and its sister company Kenya Television Network. The raid was condemned locally and internationally as an affront to press freedom, but Internal Security Minister John Michuki defended the raid as necessary "in the interest of state security." President Mwai Kibaki was eventually compelled to establish a commission of inquiry on the matter.

The saga revealed the obstacles the country faces in effectively fighting its war on corruption. It is an uphill battle.

The struggle appeared to gain momentum in early 2006 following the disclosures by former Ethics and Governance Minister John Githongo on the Anglo Leasing affair, in which a fictitious company was given hundreds of millions of dollars in contracts. Three key cabinet ministers were forced to resign, ostensibly paving the way for investigations into the Anglo Leasing scandal, as well as another involving the Goldenberg International export company. However, no charges have thus far been filed against any of the ministers, and prosecution appears to be a distant possibility due to a lack of tangible evidence.

The higher echelons of government are not the only areas susceptible to corruption. Graft also weakened stringent traffic regulations, which lowered road accidents by 40 percent between 2004 and 2005. A study found that public transport vehicles involved in accidents carried loads weighing more than their legal capacities had defective safety belts or did not have effective speed governors. One victim of such a smash-up was retired President Daniel arap Moi, who sustained serious injuries in an accident in July 2006.

The traffic police who are stationed on highways and weighbridges are good examples of petty corruption in Kenya. Police constable Robert Mwangi, barely two years into service as a traffic officer, said his boss in Muranga demands a minimum of 2,000 shillings (US\$30) every evening. "Even if I am given as little as 50 shillings (US\$0.68) by a motorist I take it," he said bitterly.

Last February, authorities discovered that a constable stationed at Mariakani weighbridge in Mombasa had stashed 100,000 shillings (US\$1,380) in his bed. Two colleagues manning a weighbridge at Gilgil, 600 kilometers inland from Mombasa, were later caught with 1.5 million shillings (US\$20,500) in local and foreign currencies by the Kenya Anti-Corruption Commission. The Mariakani weighbridge handles an average of 2,000 vehicles daily, many of which pay upwards of 3,000 shillings (US\$50) to pass through or as a protection fee. That adds up to more than 13.8 million shillings (US\$190,000) a day! Consequently, excessive loads ruin many Kenyan highways.

The tourism industry also suffers from massive corruption. Game reserves around the country continue to shrink as a result of so-called private developers "grabbing" public land. Revenue

from game reserve tourism, which should trickle down to rural communities, actually ends up in the bank accounts of corrupt politicians, tourism officers and administrators.

An April 2006 inter-ministerial task force report on national game reserve management by various county councils revealed monumental corruption in the Narok County Council, home of the fabled Masai Mara. The report said 4,000 acres were illegally shaved from Kenya's world-famous wildlife sanctuary, Masai Mara Game Reserve, and another 4,000 acres from Masai Mau Forest. The land was allocated to a former council treasurer, who is the son of the late Masai paramount chief and brother of an assistant minister in the ruling Narc government. The family is the largest landowner in Narok District. When the allocation was cancelled in October 2000, the assistant minister enlisted the law firm of current director of public prosecutions, Keraiko Tobiko, in his brother's defense.

Corruption also leads to markets near game park entrances, such as the Sekenani, Ololaimutia and Mararianda markets at Masai Mara. Besides being eyesores, these markets pose a security risk to visitors. Still, permission to erect the structures can be obtained through unofficial fees ranging from 75, 000 to 750, 000 shillings (US\$1,000-10,000) depending on size and location, according to Maasai Mara Senior Game Warden Michael ole Koikai. A 2005 audit of Masai Mara Game Reserve tourism fees revealed that millions of shillings were misappropriated or unaccounted for. Another report by the Council's internal auditor unearthed a 22,860,000 shilling (US\$300,0000) embezzlement scam. Such money would go a long way in providing health and educational facilities, as well as livestock husbandry services, to the marginalized Masai community in Narok.

The Masai Mara Game Reserve is not an isolated case: Tourism Minister Morris Dzoro exposed a scandal in 2006, in which staff looted the ministry in excess of 200 million shillings (US\$2.8 million) every year. Nearly 75 ministry staffers and tour drivers were involved in the racket.

But delivering justice in Kenya remains an elusive and expensive exercise in terms of both time and money. The backlog of cases stretches back for more than a decade, while thousands of innocent Kenyans languish in overcrowded prisons. The situation has forced individuals to seek the direct intervention of officials such as Chief Justice Evans Gicheru. One distraught Kenyan, Bahadur Lalji Nurani, wrote to Gicheru in May 2006 demanding hearings on numerous cases that have kept Nurani in judicial limbo for more than a decade. Most rulings were "a rich cocktail of intrigue and judicial improprieties...thanks to the power of money and capricious minds," Nurani wrote. Nurani also gathered the courage to sue the formerly untouchable politician Nicholas Biwott for failing to pay for the family's two farms in Eldoret after 22 years. Progress on the case dragged so slowly that after a year of silence, he also sought intervention from Paul Muite, his lawyer and a member of Parliament.

Corruption Timeline: Kenya

December 1991 – A parliamentary vote reintroduces a multi-party political system. The vote comes a month after the World Bank suspends aid and a week after the Paris Club of donor countries and financial institutions follow suit, complaining of the human- and political-rights policies of Daniel arap Moi, who has been president for 13 years.

December 1992 – President Moi is re-elected in the state's first multi-party election in 26 years after a campaign and election marred by violence and allegations of irregularities.

May 1992 – Kenneth Matiba, a former cabinet minister detained in 1990 for demanding multi-party democracy, returns to Kenya after a year in exile.

May 1993 – Police arrest Joseph Mugalla, secretary general of the Central Organization of Trade Unions (COTU), and two other labor leaders after they threaten a national strike if their demands for a wage increase are not met. They are released a few days later.

June 1993 – The Independent, a British newspaper, publishes allegations by the opposition Ford-Kenya Party that Kenyan firm Goldenberg International was paid billions of shillings by the government for phantom exports of gold and diamonds. The payments were made under a government program that provided exporters with pre-shipment financing and provided importers with enhanced compensation for bringing foreign currency to Kenya. The following year, authorities charge Goldenberg International chairman Kamlesh Pattni with cheating the Central Bank out of 13 billion shillings (US\$226 million) between April and December 1993. Pattni and four senior government officials are ultimately charged with 93 counts of conspiracy for allegedly defrauding the Kenyan government of 25 billion shillings (US\$351 million). The cases, which have yet to yield a conviction, are still pending.

May 1995 – A United Nations Children's Fund (UNICEF) audit reveals that 24 employees in the organization's Kenya office stole or misappropriated 717 million shillings (US\$10 million) over two years. The funds had been channeled into padded expense accounts, funneled to fake organizations and used to pay for nonexistent services.

February 1996 – President Moi suspends 20 senior Kenya Ports Authority and customs officials after 1,200 cars disappear two days before they are to be auctioned. The officials are charged with conspiracy to defraud the government by conspiring with car dealers to sell the cars without charging the required taxes. Moi's action is purportedly motivated by a pending 14 billion shilling (US\$200 million) International Monetary Fund loan.

June 1996 – A parliamentary committee report finds that Kenya annually loses an average of 7.4 billion shilling (US\$104.5 million) due to corruption in the country's 56 state firms. However, the committee is reportedly denied access to documents needed to complete the investigation because officials from the ruling Kenya National African Union (KANU) are accused of corruption in the report.

January 1997 – President Moi re-appoints to his cabinet former minister of industry Nicholas Biwott, a prime suspect in the 1990 murder of foreign minister Robert Ouko. Biwott had been held in police custody for two weeks but was released due to lack of evidence.

July 1997 – Days after the Goldenberg trial is halted by Kenya's High Court, the International Monetary Fund delays a 15 billion shilling (US\$205 million), three-year loan to Kenya, citing concerns that the state is not sufficiently cracking down on corruption.

November 1997 – The government establishes the Kenya Anti-Corruption Authority (KACA) - one of several stipulations from the IMF necessary to reconsider its decision to cut funding. The IMF resumes its lending program in July 2000.

December 1997 – President Moi wins his fifth consecutive five-year term in an election plagued with violence and allegations of vote rigging.

March 1998 – During the trial of former Goldenberg International chairman Kamlesh Pattni and four senior government officials, the court receives testimony that former vice president and current minister for planning and national development George Saitoti had approved of the Goldenberg project. Delaying tactics prevent any major action on the case until February 2003, when newly elected President Mwai Kibaki appoints a judicial commission to investigate the case.

January 1999 – The Danish International Development Agency freezes 74 million kroner (US\$12.8 million) in financial aid to health authorities because of the government's misuse of the money.

July 1999 – President Moi appoints renowned paleoanthropologist Richard Leakey to head the civil service in order to fight inefficiency and corruption. Within weeks, he sets about shaking up the bureaucracy. Leakey resigns less than two years later having largely failed at his task.

November 1999 – An audit of the Coffee Board of Kenya (CBK) reveals widespread mismanagement and misappropriation of state funds. In the following months, eight board officials are fired and three are charged with stealing 12.4 million shillings (US\$170,000) of funds intended for small-scale coffee farmers.

July 2000 – KACA charges the minister for water development, Kipng'eno arap Ng'eny, with fraud and abuse of authority when he headed the Kenya Posts and Telecommunications Corp. in 1993. He is acquitted in April 2001 but is re-arrested on the same charges, this time on behalf of the attorney general. Those charges are dismissed in November 2001 by the High Court.

December 2000 – The Constitutional Court disbands KACA, declaring it violates constitutional provisions that give sole arrest and prosecution authority to the police and attorney general.

September 2001 – President Moi establishes the Anti-Corruption Police Unit within the Kenya police department to replace KACA.

February 2002 – A senior World Bank official pleads guilty in the United States to foreign corrupt practices and conspiracy to commit corruption, admitting that he had received nine million shillings (US\$127,000) in kickbacks and helped arrange a 3.6 million shilling (US\$50,000) bribe to the Kenyan official overseeing the Kenya Urban Transport Infrastructure Project (KUTIP), a project to improve and upgrade Kenya's roads.

May 2002 – Parliament passes the Corruption Control Bill, which proposes the establishment of the Kenya Corruption Control Authority, an independent body empowered to investigate allegations of corruption.

December 2002 – Mwai Kibaki of the National Rainbow Coalition Party is elected president, becoming the first non-KANU candidate to be elected since Kenya's independence in 1963. Kibaki promises to fight corruption and tackle economic issues.

January 2003 – Kibaki names longtime anti-corruption crusader John Githongo permanent secretary for governance and ethics.

February 2003 – Kibaki suspends Chief Justice Bernard Chunga after appointing a tribunal to investigate allegations that he protected corrupt judicial officers, intimidated fellow judges, interfered with judicial procedures, and misappropriated public property. Chunga resigns before the tribunal, the first of its kind in Kenya, is scheduled to meet.

March 2003 – Nahasashon Nyagah, governor of the Central Bank, resigns after being accused of failing to prevent the loss of 1.4 billion shillings (US\$19.2 million) of state-owned company investments when Kenya's Euro Bank collapsed. John Munge, commissioner-general of the Kenya Revenue Authority and co-owner of Euro Bank, also resigns. Professor Julius Meme, permanent secretary in the Ministry of Health, is suspended after being charged with abuse of office in regard to the scandal. A constitutional court is established in January 2004 to handle six of the cases related to Euro Bank.

May 2003 – Kibaki signs two new laws: the Public Officers Ethics Act, which requires government employees to annually disclose their assets, and the Anti-Corruption and Economic Crimes Act, which establishes new rules of transparency and accountability.

October 2003 – Justice Aaron Ringera, chairman of the Integrity and Anti-Corruption Committee of the Judiciary, presents a report documenting corruption and other instances of misconduct among judges in Kenya. Kibaki suspends 23 judges accused of corruption and other offenses; all but eight resign rather than face tribunals that convene to hear their cases in February 2004.

December 2003 – Anti-corruption czar John Githongo announces the government will not prosecute former president Moi for his alleged corruption.

December 2003 – Kenya ratifies the United Nations Convention against Corruption and signs the African Convention on Preventing and Combating Corruption.

May 2004 – The Anglo Leasing affair, a multi-million dollar scandal involving improprieties in the awarding of contracts for a passport printing system, becomes public. In January 2006, the scandal is given new life through the publication of John Githongo's report, in which he claims four top politicians, including the vice president, were involved and that President Kibaki had knowledge of the affair.

November 2005 – In a national referendum, voters reject constitutional amendments that would have ceded more power to the president.

December 2005 – A police recruitment drive is cancelled after the anti-corruption commission reports nearly eight out of every ten candidates either paid bribes or used their connections to get jobs. The police commissioner also suspends about 60 senior police officers involved in the drive.

January 2006 – The local branch of Transparency International and the Kenya National Commission on Human Rights issue a report denouncing the government for spending an extravagant amount on luxury vehicles at a time when the government is seeking international aid for widespread starvation in the north.

March 2006 – Central bank governor Andrew Mullei is arrested and charged with improperly hiring four people, including his son, as consultants to the bank.

March 2006 – Government security forces raid the offices of the Standard newspaper and the Kenya Television Network, confiscating equipment, burning thousands of newspapers and temporarily shutting down the TV station. The newspaper had frequently criticized President Kibaki.

April 2006 – The Dutch government suspends 11 billion shillings (US\$148 million) in aid due to disappointment over the government's progress in its fight against corruption.

July 2006 – Expecting substantial legal fallout from the ongoing investigations into the Goldenberg and Anglo Leasing scandals, the attorney general's office announces it will hire 26 special attorneys to increase the office's prosecutorial capacity.

GLOBAL INTEGRITY

2006 INTEGRITY SCORECARD

KENYA

Category I: Civil Society, Public Information and Media

Category II: Elections

Category III: Government Accountability

Category IV: Administration and Civil Service

Category V: Oversight and Regulation

Category VI: Anti-Corruption and Rule of Law

Global Integrity Scorecard for Kenya

I Civil Society, Public Information and Media

I-1 Civil Society Organizations

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

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

Score: No Yes

Social Scientist's Comments:

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

Social Scientist's References:

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

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

Score: No Yes

Social Scientist's Comments:

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

Social Scientist's References:

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

Peer Reviewer Comment:

It is worth noting that NGO Coordination Regulations (1992), s. 21(1)(b) stipulates that an NGO cannot become a branch of or affiliated with or connected with any organization or group of a political nature established outside Kenya except with prior consent in writing of the Board obtained upon written application addressed to the Board Director.

Peer Reviewer Comment:

Some observers view GJLOS as a positive inter-disciplinary/intersectoral initiative. But it has indeed also been subject to some criticisms.

Peer Reviewer Comment:

I would comment that the suppression of CSOs with Islamic connections is from real fear of connections with terrorism rather than the government using that as a reason to suppress them for being outspoken against the government on governance matters.

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

Score: No Yes

Social Scientist's Comments:

Social Scientist's References:

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

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

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

Score: 0 25 50 100

Social Scientist's Comments:

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

Social Scientist's References:

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

Peer Reviewer Comment:

The government discourages "political" NGOs, especially those affiliated with local political organisations (and certainly restricts affiliation to foreign political organisations), so most anti-corruption/good governance CSOs do not explicitly declare their anti-corruption/good governance objectives or their "political" nature for fear of being denied registration. However, once registered they can take the risk to being "political" as it is relatively more difficult and controversial for the government to de-register an already registered CSO/NGO for whatever reason.

Peer Reviewer Comment:

There are few examples of anti-corruption NGOs not being registered. The example cited above is that of a political party.

Peer Reviewer Comment:

The government does create barriers but this will occur when they feel very threatened as in the case of ODM-Kenya registration. This is not a common practice unless people behind the organization have a political agenda and are using the governance CSO as a vehicle to achieve political ends.

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

Score: 0 25 50 100

Social Scientist's Comments:

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

Social Scientist's References:

Peer Reviewer Comment:

NGO voices, while loud, are not fully integrated into the decision-making process by the authorities. The Kibaki government's decision to maintain executive power in the failed draft constitution is an example of this.

Peer Reviewer Comment:

Also note that many of the CSO officials who went to the government are now the same people fighting the CSOs they helped establish. It is probable that there is a very high level of informal interactions between current government officials who came from CSOs and the current CSOs who they left. The CSO influence informally is likely to be higher than through formal channels.

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

Score: No Yes

Social Scientist's Comments:

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

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

Social Scientist's References:

Peer Reviewer Comment:

The government is sensitive to international image and unlikely to do something like ban an anti-corruption CSOs. The other avenues left are to either frustrate them or co-opt them or discredit them.

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

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

Score: No Yes

Social Scientist's Comments:

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

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

Social Scientist's References:

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

Peer Reviewer Comment:

I am not aware of any activists who have been imprisoned. I have no knowledge of the one incident cited above.

Peer Reviewer Comment:

It is too soon to tell whether the government will imprison any activist for anti-corruption issues. While the activist reported may have been arrested it is probable that the activist overstepped the law in the zeal to expose criminal actions. The people involved in the corruption are most likely the ones that are acting in concert with the local police as opposed to the central government condoning such an act. The government having many of its key members from the civil society knows too well the impact of such an act.

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

Score: No Yes

Social Scientist's Comments:

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

Social Scientist's References:

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

Peer Reviewer Comment:

It is probable that civil society activists will be harmed but it will be because police and law enforcement authorities in Kenya are generally ruthless rather than becuase they have been specifically asked to be more ruthless with civil society activists.

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

Score: No Yes

Social Scientist's Comments:

No deaths have been reported specifically relating to corruption.

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

Social Scientist's References:

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

4 Can citizens organize into trade unions?

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

Score: No Yes

Social Scientist's Comments:

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

Social Scientist's References:

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

Peer Reviewer Comment:

Also note that the trade unions themselves are not paragons of governance. They themselves have entrenched leaders who cannot be removed from power easily. There is corruption within trade unions and it is hard to say whether they are effective in protecting workers' rights.

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

Score: 0 25 50 75 100

Social Scientist's Comments:

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

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

Social Scientist's References:

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

Peer Reviewer Comment:

The Universities Academic Staff Union and the Kenya Union of Post Primary Teachers were initially denied registration at the height of political and labor tensions in the 1990s, although in the case of the latter it was probably more due to rivalry with the Kenya National Union of Teachers. Privatization and retrenchments in government parastatals have seriously weakened trade unionism as union leaders have been co-opted into webs of political relations with forces that infringe worker rights.

Peer Reviewer Comment:

Many of the new firms coming in under export promotion zones (and other government incentives for foreign direct investments) have been able to prevent their workers from unionizing. Most workers in Kenya are not unionized now and may find it very difficult

to unionize as employers have the power now given the tough employment conditions.

I-2 Media

5 Are media and free speech protected?

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

Score: No Yes

Social Scientist's Comments:

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

Social Scientist's References:

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

5b In law, freedom of speech is guaranteed.

Score: No Yes

Social Scientist's Comments:

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

Social Scientist's References:

Section 79 of the constitution provides for this.

6 Are citizens able to form media entities?

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

Score: 0 25 50 75 100

Social Scientist's Comments:

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

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

Social Scientist's References:

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

Peer Reviewer Comment:

It is hard to say whether the attack on the evangelical FM station was motivated by the government or is the result of general insecurity.

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

Score: No Yes

Social Scientist's Comments:

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

Social Scientist's References:

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

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

- (a) refusing to grant a licence or conditional licence or revoking a licence; or
- (b) imposing conditions in a licence or conditional licence; or
- (c) refusing to grant authority in a licence for the purposes of section 5 (2); or
- (d) refusing to amend a licence under section 10, may within fourteen days of receipt by him of written notification of such action, appeal to the Minister, whose decision shall be final.

(2) The Minister shall not dismiss an appeal under subsection (1) unless he has first referred it to an appeals advisory committee and considered the advice of that committee.

(3) The appeals advisory committee provided for in subsection (2) shall consist of not less than:

- (a) three members of the National Assembly;
- (b) two advocates; and
- (c) three persons who have experience in one of the occupations specified in the definition of "business" in section 2(1).

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

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

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

Score: 0 25 50 75 100

Social Scientist's Comments:

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

Social Scientist's References:

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

Peer Reviewer Comment:

Licensing can be a lengthy process for private media initiatives.

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

Score: 0 25 50 75 100

Social Scientist's Comments:

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

Social Scientist's References:

Peer Reviewer Comment:

Most Kenyans would not start up a radio or TV station; the fees are not prohibitive for people in business.

7 Are the media able to report on corruption?

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

Score: No Yes

Social Scientist's Comments:

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

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

Social Scientist's References:

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

Peer Reviewer Comment:

It is hard to understand what motivates the government to act against media as was the case of the standard newspapers. Papers have carried very damaging reports without the government taking action. Rogue (albeit powerful) individuals may take actions if they are affected it seems. But the government as whole has been fairly tolerant.

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

Score: 0 25 50 75 100

Social Scientist's Comments:

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

Social Scientist's References:

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

Peer Reviewer Comment:

The media houses as mentioned above are very active in reporting corruption and one cannot say they are practicing self censorship.

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

Score: 0 25 50 75 100

Social Scientist's Comments:

There is no pre-publication censorship - no "prior government restraint."

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

Social Scientist's References:

Peer Reviewer Comment:

Earlier in 2001, a son of then President Moi and influential cabinet minister Nicholas Biwott obtained court orders preventing The

Daily Nation from publishing excerpts from a book on corruption-related murders, "The Rogue Ambassador" (the memoirs of the former controversial and popular U.S. ambassador to Nairobi, former journalist Smith Hempstone who died in November 2006).

Peer Reviewer Comment:

The case of the first lady is to be understood in the light of African culture. There seems to have been a problem with the first lady, and the press should have been more circumspect in how they aired her. She was a visibly disturbed person and those in the know have claimed that she has suffered from this kind of problem for a long time. It was amusing at first, but as the episode progressed one could see that she was suffering and it was pointless to expose her in this way. Attacks on the TV station and newspaper can be attributed to rogue elements in the government as opposed to being a general policy. Both of these cases cannot be said to be corruption cases.

8 Are the media credible sources of information?

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

Score: No Yes

Social Scientist's Comments:

Social Scientist's References:

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

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

Score: 0 25 50 75 100

Social Scientist's Comments:

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

Social Scientist's References:

Peer Reviewer Comment:

Kenyan media and journalists, like the rest of society, are affected by ethnicity, corruption and the political patron-client system. A former Group Managing Editor at The Standard was partly sacked following allegations that a key Goldenberg scandal suspect bribed him with a house, among other "gifts" that included cash.

Peer Reviewer Comment:

Innuendo and slanted reporting are intertwined. The "gutter press" is quite active.

Peer Reviewer Comment:

Journalists have biases, and one can see them sometimes in the writings, especially in the current ODM-Kenya NARC tussle.

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

Score: 0 25 50 75 100

Social Scientist's Comments:

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

Social Scientist's References:

Peer Reviewer Comment:

See also the European Union Election Observation Mission (EOM) to Kenya (2002) whose report indicates: "Despite shortcomings, the print and the electronic media, both public and private, generally offered extensive and diverse coverage of the political

campaign." (http://ec.europa.eu/comm/external_relations/human_rights/eu_election_ass_observ/kenya/prestat.htm)

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

Score: 0 25 50 75 100

Social Scientist's Comments:

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

Social Scientist's References:

Peer Reviewer Comment:

The EU EOM reporting on the 2002 General Election observed, "interference of state officials into the activities of the public broadcaster KBC". It further explains: "Since November 22, KBC TV and radio gave clear preference to the ruling party KANU and its presidential candidate Uhuru Kenyatta with a 33% of coverage on TV and a further 32% to the presidential duties and campaigning activities of President Daniel arap Moi. Nevertheless, the opposition coalition NARC and its presidential candidate Mwai Kibaki were given a 25% of coverage on KBC TV. In addition, KBC did not stop broadcasting NARC advertisements, contrary to misleading information released by private media."

(http://ec.europa.eu/comm/external_relations/human_rights/eu_election_ass_observ/kenya/prestat.htm)

Peer Reviewer Comment:

The change in leadership at state owned stations seems to be in preparation for the general election as the former could not be trusted to toe the line. It is very likely that the state broadcaster will be very biased in its coverage.

9 Are journalists safe when investigating corruption?

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

Score: No Yes

Social Scientist's Comments:

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

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

Social Scientist's References:

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

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

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

Score: No Yes

Social Scientist's Comments:

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

Social Scientist's References:

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

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

Score: No Yes

Social Scientist's Comments:

There is no report as such.

Social Scientist's References:

I-3 Public Access to Information

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

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

Score: No Yes

Social Scientist's Comments:

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

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

Social Scientist's References:

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

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

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

Score: No Yes

Social Scientist's Comments:

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

Social Scientist's References:

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

Score: No Yes

Social Scientist's Comments:

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

Social Scientist's References:

11 Is the right of access to information effective?

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

Score: 0 25 75 100

Social Scientist's Comments:

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

Social Scientist's References:

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

Score: 0 25 75 100

Social Scientist's Comments:

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

Social Scientist's References:

Peer Reviewer Comment:

All this only applies to a small proportion although this is also the small proportion who may want information from government. The majority of citizens are too poor and too preoccupied with survival matters to care.

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

Score: 0 25 75 100

Social Scientist's Comments:

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

Social Scientist's References:

Peer Reviewer Comment:

It is hard to tell whether the newly instituted performance contracts will bring greater responsiveness. But the fact that the government is trying to do something by itself say something.

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

Score: 0 25 75 100

Social Scientist's Comments:

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

Social Scientist's References:

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

Score: 0 50 75 100

Social Scientist's Comments:

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

Social Scientist's References:

Peer Reviewer Comment:

The officers concerned may themselves not be sure of the consequences of providing information even if not covered by official secrets acts. So as much as possible they will try not to provide any information, especially if it can be traced to the officer. Note that the official name for government in Kiswahili is Serikali which comes from the words Siri Kali (great secret). So traditionally government has viewed itself as a great secret and this culture runs throughout the government to this day.

