



**National Integrity Systems**

**Transparency International**

**Questionnaire**

**Kenya 2003**

**Lead Consultants**

Alan Doig and Stephanie McIvor  
Fraud Management Studies Unit  
Teesside Business School  
Middlesbrough  
TS1 3BA  
UK

This Questionnaire forms part of the National Integrity Systems Country Study Report, 2003, for Kenya.

## Report Authors

Betty Wamalwa Muragori  
Atsango Chesoni

### Note

The NIS study was prepared before a number of changes were proposed by the new NARC government. The overall NIS remains the same because there still has been no constitutional reform as has been promised.

The *National Integrity Systems TI Country Study Report Kenya 2003* was made possible with the funding of the UK Government's Department for International Development.



All material contained in this report was believed to be accurate as of December 2003.

Every effort has been made to verify the information contained herein, including allegations. Nevertheless, Transparency International does not accept responsibility for the consequences of the use of this information for other purposes or in other contexts.

© 2004 Transparency International

Transparency International Secretariat  
Otto-Suhr-Allee 97-99  
10585 Berlin  
Germany  
<http://www.transparency.org>

## Contents

Executive .....	4
Legislature.....	9
Electoral Commission .....	11
Political Parties.....	12
Supreme Audit Institution.....	14
Judiciary.....	17
Civil Service.....	20
Police and Prosecutors .....	22
Public Procurement.....	24
Ombudsman .....	28
Investigative/Watchdog Agencies .....	28
Media.....	29
Civil Society.....	33
Regional and Local Government .....	37
Progress with Government Strategy.....	39
Donor Anti-Corruption Initiatives .....	40
Future Research and Donor Support .....	43

## Kenya

# The National Integrity System Indicators

## Questionnaire

### Executive

#### Can citizens sue Government for infringement of their civil rights?

Yes. The Government Proceedings Act (Chapter 40, laws of Kenya) provides under Section 3 that where any person has a claim against the Government, the claim may be enforced as of right by proceedings taken against the Government for that purpose in accordance with the provisions of the said Act. The Act describes 'civil proceedings' as to include proceedings in the High Court or a subordinate Court for the recovery of fines or penalties.

Section 4(1) of the Act provides that the Government is subject to all those liabilities in tort to which if it were a private person of full age and capacity it would be subject.

Civil proceedings against the Government must be instituted against the Attorney General (Section 12(1) of Chapter 40) and this can only be done after a notice of at least 30 days of intention to institute the proceedings has been served upon the Attorney General (Section 13(1) of Chapter 40).

However, the Constitution provides that no civil or criminal proceedings can be instituted or continued against the President while he holds office.

#### Reality

Yes there are several cases in which citizens have sued the government. One of the most important recent ones is Miscellaneous Civil Appeal 975 of 2001, *Hon. John N. Michuki & Hon. Onesmus Kihara Mwangi - v - Attorney General, The Electoral Commission and the Constitution Review Commission of Kenya*. In this case the first Applicant, John Michuki, succeeded in obtaining a declaration by the court that the Electoral Commission's of Kenya (ECK) criteria for constituencies has not ensured balance in representation. However the court was of the opinion that the remedy sought by the applicant was too "devastating" and instead asked the ECK to "address the issues raised by applicant to avoid future litigation of this nature." In several of these cases, the citizens have won financial compensations awarded by the courts. However one of the complaints was that whereas citizens have won financial compensation they have not been successful in enforcing the same.

Also cases in which the Head of State is in any way a party or can be associated with are impossible to prosecute as Presidential immunity is invoked. The President enjoys immunity whilst in office. This evocation of presidential immunity as a shield occurred in *Miscellaneous Civil Application No. 193 of 1998, Jean Kamau and Cecilia Kimemia - v - the Electoral Commission, H.E. Daniel Toroitich Arap Moi President of the Republic of Kenya and the Honourable Attorney General*. In this matter representatives of the Federation of Women Lawyers Kenya (FIDA (K)) and the League of Kenya Women Voters, sought to enforce section 33 (3) of the Constitution, which requires proportional gender representation in the selection of nominated Members of Parliament. The ruling party

KANU had nominated one woman Member less than they were supposed to – to Parliament. The fact that the Chairman of Kenya African National Union (KANU), President Moi, was also the President was invoked to prevent this suit from going forward.

**Are there procedures for the monitoring of assets, including disclosure provisions, for Cabinet and other Government Ministers?**

No. Part 2 of the Constitution of Kenya (Sections 16-21, of Chapter 40) creates the offices of Ministers and Cabinet Ministers. This part simply provides that the Ministers shall be appointed by the President, subject to any written law, from among Members of the National Assembly. There is no provision for such members to disclose their assets.

The only provision touching on the assets and/or liabilities of a Member is Section 35(1)(d) of the Constitution which provides that a person shall not be qualified to be elected as an elected Member if, at the date of his nomination for election he is an undischarged bankrupt, having been adjudged bankrupt under any law in force in Kenya.

However, a Bill, yet to receive Presidential assent, was passed by Parliament in June 2002, the *Public Officers Ethics Bill, 2000* seeks to establish a disclosure system under which public servants will be required to disclose on annual basis their respective assets and liabilities. The Bill also provides that these disclosures would be maintained in a secret register of interests. The Bill provides for the setting up of Commissions under the various departments of the public sector. For example, the Committee of the National Assembly shall be responsible for the ethics of its Members.

**Reality**

In reality there is no monitoring of assets, including disclosure provisions, for Cabinet ministers and other high-level government officials. Discussions on this issue with respondents sought to understand why this did not exist. The responses from Members of Parliament and others revealed that there has historically been opposition to the introduction of such provisions for Ministers and other officials. There has been public debate over the years. Resistance against such provisions has come from all political quarters, both the incumbent ruling party, Kenya African National Union (KANU) and the opposition. The reason given by some respondents for this situation is that many opposition politicians have had close links to the ruling party or have benefited financially from their previous close association with the ruling party. They gained in the context of the patronage system, which was especially strong during the one party rule era from 1964 to 1992. The ruling party was the source of largesse during this era.

**Are there procedures for the monitoring of assets, including disclosure provisions, for high-level officials?**

No. The provisions are only contained in The Bill above-mentioned that is yet to receive Presidential assent.

**Reality**

See section above on monitoring of assets for Cabinet and other Government Ministers.

**Are there any differences in procedures and disclosure provisions between elected Ministers, appointed Ministers and high-level officials?**

There are no provisions for disclosure of assets for any of the above mentioned under the laws of Kenya.

**Reality**

See section above on monitoring of assets for Cabinet and other Government Ministers.

**Are there conflict of interest rules?**

Yes and no.

**For Ministers?**

There are no direct conflict of interest rules for Ministers. However, there are ad hoc provisions in several statutes. For example, according to the State Corporations Act, Chapter 446 of the Laws of Kenya, every member of a board (include high senior officials and Ministers) who is likely to have an interest, otherwise than as a member of that board or who participates or is or may become entitled to participate directly or indirectly, in the profits from any contract or proposed contract for a state corporation, shall on the matter coming before a meeting of the board for consideration, immediately declare his interest therein and shall, unless the meeting otherwise agrees, retire from the meeting and shall in any case not be entitled to vote on the matter.

Also, a Member of Parliament can be disqualified for elections, if he, subject to such exceptions and limitations as may be prescribed by Parliament, has an interest in a class or description of contract made with the Government of Kenya as may be prescribed by Parliament (Section 35(1) (f) of Chapter 40).

**Reality**

The debate on conflict of interest in the governance system of Kenya has been undermined by those who see its introduction of such a principle as undermining African culture. Writing on this aspect of corruption, W. N. Wamalwa noted (in Kivutha Kibwana, Smokin Wanjala and Oketch-Owiti. (Eds). 1996. *The Anatomy of Corruption in Kenya. Legal, political and Socio-Economic Perspectives*) the following:

“...Some commentators on corruption in Africa have sought to explain its origins and existence by invoking the African tradition of gifts to leaders and elders. However, this approach misses the essence of the African tradition in this regard. The essence of its tradition was its motive: there was no expectation of reward...”

**For high-level officials?**

In some specific ad hoc instances, e.g. for members of the Electoral Commission, members of the Appeals Board under the Exchequer and Audit (Public Procurement) Regulations.

**Are there rules and registers concerning gifts and hospitality? For Ministers? For High level Officials?**

None. There is a Bill pending before Parliament to establish such rules. The Bill awaits presidential assent.

**Reality**

There are no rules and registers concerning gifts and hospitality for Ministers and high-level officials. In reality the debate surrounding this issue exhibits the tendency to evoke the African culture argument that has been discussed. One Member of Parliament noted that gift giving and hospitality was seen as “normal accepted practice”. He opposed the introduction of a register and prohibition of the practice as an attempt to “wipe out our (African) culture totally”.

In the case of gifts and hospitality, the matter is further complicated by the tendency among certain categories of high-level officials who have come to expect gifts and hospitality from the public that they are paid to serve. The community and civil society sector FGD revealed that the worst offenders were Provincial administration officials such as Provincial Commissioners, District Commissioners, District Officers and Chiefs and sub-

Chiefs. Members of the public were required to give these officials gifts, which ranged from goats, chickens, agricultural produce, cash and hospitality for services.

Harambee or community fundraising is a uniquely Kenyan institution, which has been one of Kenya's most potent development tools. It was used to raise additional funds from and by the public to support projects such as construction of educational, water and medical facilities, roads, markets, bursaries and so on. Changes in the public Harambee over the last two decades have contributed to complicating the issue of developing rules and registers concerning gifts and hospitality for public officials. TI-Kenya's study of Harambee has revealed that its importance as a political as opposed to a development tool has risen. TI-Kenya's research on the Harambee movement revealed that an important feature of the transformation of the public Harambee movement is the gradual erosion of ownership and accountability. Corruption has become rife with money raised not being accounted for and often not being used for its intended purposes. TRAG also recommended the abolition of Harambee due to the abuse of it that had occurred.

**If so, are these registers kept up to date? By whom?**

The pending Bill proposes the registers be maintained by various sectoral Commissions. Declarations are to be made annually.

**Have they legal powers to enforce disclosure?**

Not applicable.

**Have they staff to investigate allegations?**

Not applicable.

**What powers of sanction are in place against parliamentarians**

None. There is a Bill pending before Parliament.

**Have they ever been invoked?**

Not applicable.

**What powers of sanction are in place against Ministers who are also parliamentarians?**

There are no legal powers of sanction in place against Ministers.

**Have they been invoked?**

In 2001 a Minister of Health Dr. Amukowa Anangwe was sacked for being implicated in corruption in the Ministry. He was re-appointed as an Assistant-Minister in September 2002, benefiting from the impact of the succession politics.

**What powers of sanction are in place against Ministers who are not parliamentarians?**

All Ministers in Kenya are parliamentarians.

**Have they ever been invoked?**

Not applicable.

**Are there restrictions on post ministerial office employment?**

No. There are no provisions as to post ministerial office employment. Former Ministers are often appointed to state corporations as executive directors or non-executive directors as reward for loyalty.

**Are members of the Executive obliged by law to give reasons for their decisions?**

Order 53 of the Civil Procedure Rules permits Judicial Review of Ministerial discretion. Ministers are also required to answer questions pertaining to their Ministries, raised in Parliament by MPs.

**Do Ministers or equivalent high-level officials have and exercise the power to make the final decision in ordinary contract award and licensing cases?**

Yes and no. The Minister and high-level officials are required to sign any contract made in the name of the government. Section 2 of the *Government Contract Act* (Chapter 25 of the Laws of Kenya) provides that any contract made in Kenya on behalf of the Government shall, if reduced to writing, be made in the name of the Government of Kenya, and shall be signed either by the accounting officer, or by the receiver of Revenue of the Ministry, or for the department of the Government concerned, or by any public officer duly authorised in writing by such accounting officer or receiver of revenue (applies either specifically in any particular case or generally for any contracts below a specified value in his department or otherwise as may be specified in such authorisation). Contracts are also subjected to the Tender Board.

**Is this power limited to special circumstances?**

Yes. Section 8 of the Act provides that no contract in which the Act applies shall bind the Government in respect and to extent of:

- Provisions for exemptions, waiver, remission or refund of any tax or duty payable under the several written laws specified in the second schedule of the Act. (This includes, inter alia, Air Passenger Tax Act, Traditional Liquor Act, The Income Tax Act, Customs and Excise Act).
- Any expenditure specified therein to be made by or on behalf of the Government in excess of the sum of Kshs. 250,000 (US\$ 3,333) or equivalent thereof, unless such contract is signed or countersigned by the Permanent Secretary to the Treasury or person or persons specifically or generally authorised by either of them in writing in that behalf.

However, The Exchequer and Audit (Public Procurement), regulations, 2001 provide under Regulation 6(2) that in procurement decisions of any procuring entity shall be taken in a corporate manner, so that internal units concerned shall have a say in the decisions making process and any decision by the accounting officer, or his representative shall be taken in a structured manner.

Regulation 3(2) of these regulations, however, states that the regulations shall not apply where the Minister in consultation with the head of the procuring entity decides that it is in the interest of national security or national defence to use a procurement procedure other than the one prescribed under the regulations. In this case, the Minister defines the method of procurement to be followed in order to secure the interest of economy and efficiency.

### **Are there administrative checks and balances on decisions of individual members of the Executive?**

All decisions are finalised collectively at the Cabinet level and the Cabinet is answerable to Parliament for its decisions. Section 17(3) of the Constitution states that the Cabinet (the cabinet consists of the President Vice President and the other Ministers. The function of the Cabinet is to aid the President in the government of Kenya) shall be collectively responsible to the National Assembly for all things done by or under the authority of the President or the Vice-President or any other Minister in the execution of his office.

## **Legislature**

### **Is the legislature required to approve the budget?**

Yes. Section 100 (1) of the Constitution requires the Minister to prepare estimates of revenue and expenditure of the Government and lay them before Parliament for approval before the financial year starts.

### **Are there significant categories of public expenditure that do not require legislative approval?**

The printed estimates of expenditure are traditionally laid before Parliament at least two (2) sitting days before the Minister reads his budget speech.

On the budget day the Minister outlines any policy changes that he proposes to implement in the course of the coming financial year, in the budget speech. The speech initiates legislative process and includes a notice that the Minister intends to move revenue or tax measures detailed in the speech before Parliament.

There is a general debate for 7 days on budget proposals in order to move the Vote on Account before moving to discuss estimates of expenditure. (A Vote of Account allows up to 50% of proposed expenditure to proceed before the budget is finally officially approved).

Parliament scrutinises expenditure proposals vote by vote, before approving them. If time runs out before all Ministries are discussed, Parliament approves the remaining in a block without debate.

Standing Order No. 140 restricts Members of Parliament from introducing bills during the period of budget proposals but the Government can.

### **Reality**

In a research report entitled, "Strengthening the Role of Parliament in the Budget Process" (Institute of Economic Affairs (IEA) Occasional Paper Series. May 2001), the Institute of Economic Affairs (IEA) a local NGO noted that the Kenyan Parliament had minimal levels of participation and impact on the budgetary process. This includes budget formulation, monitoring and evaluation. IEA offered several reasons for this situation, which were supported by discussions and interviews conducted by the study. The first reason lies in built-in structural problems common to all Westminster style parliaments, of both developed or developing nations. IEA notes that, "...By common tradition, the budget must be approved or rejected in its entirety, the latter action essentially being a vote of no confidence on the government of the day. This limits the opposition's capacity to engage the government of the day in proposing amendments to given items on the budget." (pp. 11/12)

In 1997 Parliament abolished the Estimates Committee, which was the Committee that the Executive consulted before presenting budget estimates to Parliament. Nothing was put in place to replace it. Since then, the Legislature has denied itself the properly designated instrument, which enabled Parliament to participate in the formulation of the budget.

IEA notes that Parliament has yet to find its proper role in monitoring, and evaluating budget implementation and impact. It notes that the most effective role played by Parliament to date has been through the post audit committees in the form of the Public Accounts Committees, (PAC) and Public Investments Committees (PIC), which base their findings on the Auditor-General's (C&AG) Report.

There is a Parliamentary Finance Committee, which discusses the budget with the Minister of Finance in greater detail before he reads it in Parliament. However, most members of the Finance Committee are predominantly from KANU the ruling party and are unlikely to be overly critical of their own budget.

Political parties often appoint Members to parliamentary committees such as the Finance Committee who do not have the necessary experience or expertise. Further there are few opportunities for training. This limits Member's ability to contribute to budgetary debate.

The time that the law allocates for the legislature to scrutinise the budget, that is 7 days is woefully inadequate. The result is that the legislature does not come close to reviewing or debating most of the documents that constitute the budget. This renders the legislature a mere rubber-stamp vis-à-vis the budget.

NGOs such as the Institute of Economic Affairs (IEA) and the Centre for Governance and Development (CGD) have found that many Members of the legislature do not have the technical expertise to scrutinise the budget with any competence in the first place.

Lack of research facilities undermines MPs ability to contribute to the budgetary process.

The multi-party era has brought with it new challenges for the legislature. Introduction of opposition politics polarised the legislature and brought in opposition Members of Parliament many of who associated parliamentary traditions and staff with the all that was bad about the single party era. Many new opposition parliamentarians were initially reluctant to learn the parliamentary rules and procedures as encoded in the Standing Orders. Some others tried to introduce reforms in the Standing orders without first taking time to understand them in the first place. While other opposition Members were suspicious of the parliamentary staff such as the clerks and others believing them to be unprofessional lackeys of the ruling party KANU. These Members of Parliament then lost or delayed the opportunity to become effective legislators.

### **Are there conflict of interest rules for parliamentarians?**

The Standing Orders of Parliament require a Member of Parliament to declare any interest before speaking in a debate or Committee. There are also specific situations in which conflict of interest rules for parliamentarians become applicable. Section 23 (a) *National Assembly (Powers & Privileges) Act* provides that "any person who offers to any member or officer any bribe, fee, compensation, gift or reward to influence him to promote or oppose any Bill in parliament is guilty of an offence."

Section 24 (1) provides that Members of the National Assembly shall not receive directly or indirectly any fee, compensation, gift or reward for promotion or opposition to Bills.

### **Are there rules and registers concerning gifts and hospitality?**

There is no formal provision for rules and registers concerning gifts and hospitality.

### **If so are these registers kept up to date? By whom?**

This is not applicable.

**Have they legal powers to disclose exposure?**

Not applicable.

**Have they staff to investigate allegations?**

Not applicable.

**What powers of sanction are in place against parliamentarians?**

There are no powers of sanction against parliamentarians.

**Reality**

Many have been implicated in a variety of corruption cases and have even been charged in court. Many Members of Parliament have become associated with corruption activities, which destroy any Ministry they lead as Ministers. Instead of sanctions they are often appointed to a new Ministry, which they proceed to undermine by facilitating corruption.

Sanctions against parliamentarians have tended to be invoked only in the political context at individual party level. Parliamentarians have received sanctions from their party headquarters in cases when they have consistently adopted political positions that have been independent or different from the party line on specific issues. In the last Parliament, these sanctions have rarely gone beyond public sanctions against the MP. Sanctions have not extended to suspending or expelling MPs.

**Have they ever been evoked?**

Sanctions have only been evoked by individual political parties against those MPs who do not abide by the political party line.

**Are there restrictions on post-legislative employment?**

No, there is no restriction on post-legislative employment.

---

## **Electoral Commission**

**Is there an independent Electoral Commission?**

Yes and no. The Constitution of Kenya under section 41(1) creates an Electoral Commission. It provides that there shall be an Electoral Commission consisting of a chairman and not less than 4 and not more than 21 members. It further provides that in the exercise of its functions under the Constitution the Commission shall not be subject to the direction of any other person or authority (section 41(9)).

Further, the Code of Conduct (found in the Second Schedule to the National Assembly and Presidential Elections Act, Chapter 7 of the Laws of Kenya) for members of the Electoral Commission provides for impartiality and independence of its members. Section 1(1) of the code of conduct provides that every member of the Commission shall serve impartially and independently and perform the functions of a member in good faith and without fear, favour or prejudice, and without influence from the government, any public officer, any political party, any candidate participating in an election, or any other person or authority.

**Reality**

However, the head of the Commission being an appointee of the President, is unlikely to be independent. Furthermore the timing of the appointment of the Chairperson is problematic. In the case of the impending December 2002 elections, the tenure of the Chairman had not been renewed until 15<sup>th</sup> November, 2002, this was a cause for much public anxiety given the delicacy of this transition election. (The *Daily Nation*, 16<sup>th</sup> December 2002, reported the incumbent Chairperson of the Electoral Commission to have stated that he "would not beg for a job," when he was asked about the renewal of his contract). The Commission itself also cites its lack of control of its funds as a question of independence.

**Who appoints the head of the Commission?**

The Head of the Electoral Commission is appointed by the President as provided by Section 41(1) of the Constitution of Kenya. The section provides that the chairman shall be a person who has held or is qualified to hold office of judge of the High Court or Judge of Appeal under the Constitution.

**Political Parties****Are there rules on political party funding?**

None. Political parties have their own discretion in raising funds. However, this is one area in which reform is proposed in the ongoing Constitutional review.

**Are substantial donations and their sources made public?**

No. There is no requirement in law for such disclosure.

**Are there rules on political party expenditure?**

There are no rules on political party expenditure. Individual parties act according to what is appropriate to them. The only legislated requirement on expenditure is under section 17(3) of the National Assembly and Presidential Elections Act, which provides that each political party shall bear the expenses relating to the nomination of candidates for contesting parliamentary elections.

**Are political party accounts published?**

There is no requirement for the political party accounts to be published for the benefit of the public.

**Are accounts checked by an independent institution, are they published and are they submitted to Parliament?**

There are no provisions requiring the above.

**Does that institution start investigations on its own initiative?**

No such institution exists.

**Who appoints the head of the institution?**

Not applicable.

**Reality**

Various respondents noted that all political parties, including both the incumbent ruling party KANU and the opposition parties, had been reluctant to introduce legal and policy regimes, which would control and manage political party financing. Some respondents suggested that the prevailing situation with its absence of rules gave free reign to the political class in that they did not have to be accountable. Proposed legislature to control political party funding has been developed and is under review by Parliament.

In Kenya there are currently over 50 political parties. The oldest is the ruling party Kenya African National Union or KANU, which has been in existence for 40 years. The others are relatively new with the oldest being 10 years old. These parties exhibit characteristics, which make them fairly volatile and unstable. These characteristics include a tendency to split and form new parties often with very similar names. Thus the original Forum for the Restoration of Democracy (FORD) split to form, FORD-Kenya, FORD-Asili, and FORD-People. Some others have experienced changes in membership and or have been taken over by splinter groups from other parties while others have disappeared completely as the membership has merged with others. The volatile nature of the political parties in Kenya has created a confusing situation. There is no analysis on how such a situation affects the voter and thus the development of democracy. But we can speculate the volatility of opposition parties can make them appear to be unreliable and inconsistent to the voter.

In a multi-party democratic system, the presence of multiple political systems can be seen as an important building block of such a system. The absence of laws and policies supporting public funding for political parties in Kenya has worked against the development and institutionalisation of parties and thus the consolidation of multi-party democratic system in Kenya.

The Centre of Governance and Development (CGD) a local NGO notes the following reasons to justify public funding for political parties in Kenya:

"...It helps in safeguarding the various political parties against undue influence from private and foreign sponsors, since the interest of such sponsors often threaten the freedom and ability of the political parties to represent the will of the people. The phenomenon of rich people literally buying parties {in Kenya} is well known..." (Centre for Governance and Development Friedrich Ebert Stiftung (FES), 2002. *Public Funding of Political Parties*. Nairobi).

Availability of public finances ensures that diverse parties survive and defeats any moves towards a single party authoritarianism through the use of financial muscle to obliterate parties that do not have rich financiers,

Legal regulations governing public accountability for party funds discourage utilisation of other state resources by the party in power.

Public party financing boosts the capacity of different parties to develop and articulate their policies, thereby promoting competitiveness and the quality of consultations between the power seekers and the electorate". (Friedrich Ebert Stiftung (FES) and Centre for Governance and Development (CGD). 2002. *Public Funding of Political Parties*. p. 3)

---

## Supreme Audit Institution

In Kenya the office of the Controller and Auditor-General is the supreme audit institution. The Exchequer and Audit Act Cap. 412 provides for the control and management of the public finances of Kenya; for the appointment of the office, duties and powers of the Controller and Auditor General (C&AG).

### Reality

A CGD study based on the analysis of the Controller and Auditor General (C&AG) annual reports covering a seven year period from 1990/91 to 1996/97 revealed that the Kenya Government lost in excess of Kshs. 475 billion through corruption, and laxity in revenue collection and wastage.

A breakdown of the lost money suggests growing losses after 1990. between, 1987 and 1990 the losses averaged Kshs. 10 billion (US\$ 135 million) a year. There has been a steady increase, during the seven-year period of the study; the annual losses have risen sharply. The figure ranged from (Kshs. 35 billion (US\$ 472 million) to over Kshs. 100 billion (US\$ 1.3 billion).

### Is the national auditor independent?

Independence of the C&AG comes from the fact that the office is established by the Constitution. The independence and security of tenure of the C&AG is provided for by the Constitution. Under section 105 (5), the C&AG is not subject to the direction or control of any other person or authority in the exercise of his authority.

### Reality

1a. The C&AG is not independently financed. Budgets for its operation are not mandated under the Constitution; rather it operates on budgetary allocations from the same government. This means that the C&AG's office must compete for increasingly scarce funds with other government departments. A situation that undermines its autonomy.

### Is the appointment of the auditor general required to be on professional criteria?

Section 110(1) of the Constitution provides that the Controller and Auditor General is appointed by the President. And the appointee is wholly independent, as he is not under the control of any authority. The law is silent on the professional criteria for the auditor general.

### Is the appointee protected from removal without relevant justification?

Section 110(4) of the Constitution provides that the C&AG may be removed from office only for inability to discharge the functions of his office (whether arising from infirmity of body or mind or other cause) or for mis-behaviour and shall not be so removed except in accordance with this section.

- Section 110(5) of the Constitution provides that the President shall remove the C&AG if the question of his removal from office has been referred to a tribunal appointed under subsection (6) and the tribunal has recommended to the President that he ought to be removed for inability as afore-said or for mis-behaviour.
- Section 110(6) provides for the investigation of the C&AG by a tribunal consisting of a chairman and four other members appointed by the President if

the President considers that the question of removing the C&AG under this section ought to be investigated.

- Section 110(7) provides that if the question of removing the C&AG has been referred to a tribunal under this section, the President may suspend the C&AG and any such suspension may be revoked by the President and shall cease to have effect if the tribunal recommends to the President that the C&AG should not be removed.

#### **Reality**

The current C&AG has been in office for over two decades. It is widely held that the C&AG's security of tenure is guaranteed by the government's fear of donor repercussions rather than respect for legal guarantees.

Section 107 (4) (c.) of the Constitution removes the office of the C&AG and his appointment from the Public Service Commission and vests this responsibility exclusively with the Executive under section 110 of the same Constitution. These institutional guarantees are inadequate. Further other staff in the C&AG's office do not have security of tenure. In 1994, 4 senior officers were removed from the C&AG and deployed to other Ministries. A CGD report noted that, "...this was a deliberate attempt by the Executive to weaken the office of the C&AG due to the serious matters raised in the audit reports..." (Centre for Governance and Development, 2001. Policy Brief: *A Survey of Seven Years of Waste*. Nairobi: Centre for Governance and Development. CGD. p. 20).

#### **Are all public expenditures audited annually?**

The C&AG in Kenya has two functions the first is to audit all collections of state revenues. The Act charges the C&AG to ascertain that all revenue collections comply with the laws as well as government regulations. The C&AG is also charged with auditing government expenditure.

The C&AG also has a control function. In this function, the C&AG is empowered to ascertain that any withdrawal of funds from the Consolidated Fund is legal which means that it must be authorised by Parliament.

Under the Exchequer and Audit Act (EAA) all public expenditures are required to be audited annually.

#### **Reality**

The CGD study found that in spite of the law, there were cases when the C&AG's office was denied access to official records. An example is that on at least two occasions by the accounting officer for the Ministry of Lands and Settlement, during the period under review. In other instances poor record keeping practices by government personnel worked to deny the C&AG access to records necessary for conducting audits.

#### **Is reporting up to date?**

There are set deadlines within which the C&AG's report is supposed to submit his report to the Minister of Finance. The law states the following:

"At least once in every year, to audit and report on the public accounts of the Government of Kenya, the accounts of all offices and authorities of the government, the accounts of all courts in Kenya ...the accounts of every Commission established by the Constitution and the accounts of the Clerk to the National Assembly..." (CGD. February 2001. Policy Brief. p. 18).

#### **Reality**

According to discussions with Members of Parliament and NGOs, Institute of Economic Affairs (IEA) and the Centre for Governance and Democracy the C&AG's audit reports are 3 years in arrears. This is due to understaffing of the C&AG's office. The CGD study found

that the C&AG's office has always been seriously understaffed. At the time the study was undertaken, CGD reported that the office was operating at 60% capacity. The impact is that the government's financial management capability and accountability are severely undermined. Specifically shortage of staff lead to the following:

- The impact of this shortage of staff was that the C&AG was unable to meet the set deadlines for submitting his annual report. Instead, the 1996/7 report was released in 1999.
- Further shortage of staff means that only 30% of payment vouchers in respect to payments made at Ministries headquarters and at the Districts treasuries were being examined in each financial year.
- Audit inspections of the District treasuries are not done on a regular and consistent basis.
- Expenditures incurred on ongoing projects in the field are not monitored and reviewed on a regular basis.

### **Are reports submitted to a Public Accounts Committee and/or debated by the legislature?**

The report of the C&AG on the appropriation accounts, other public accounts and the accounts of the funds is constitutionally mandated by section 105(2) of the Constitution. This report forms the basis for the Public Accounts Committee (PAC) reports to the National Assembly. Section 105(2)(c) of the Constitution requires the PAC to scrutinise the C&AG's report and present it's findings and recommendations to the National Assembly.

Section 19(1) of the EAA provides that on receipt of the accounts prescribed by the section the C&AG shall examine and audit within a period of 7 months (or such longer period as the National Assembly may by resolution appoint) after the end of the financial which the accounts relate certify in respect of each account the result of the examination and audit, prepare and transmit to the Minister a report upon the examination and audit of all such accounts together with the certified copies.

- Section 19(3) of EAA provides that the Minister shall within 14 days of receipt by him of a report under Subsection (1) above lay it before the National Assembly.
- Section 19(4) of EAA provides for submission by the Minister of a report under subsection (2) to the PAC within 7 days of receipt by him.
- Section 19(5) of the EAA provides that 'if the Minister fails to lay/submit any report or document as is required by sub-sections (3) and (4), the C&AG shall forthwith transmit a copy thereof to the Speaker of the National Assembly to be presented by him to the Assembly.

### **Are all public expenditures declared in the official budget?**

Section 100 (1) of the Constitution requires the Minister to prepare estimates of revenue and expenditure of the Government and lay them before Parliament for approval before the financial year starts.

#### **Reality**

The legal requirement that all public expenditures be declared in the official budget is routinely violated. The Office of the President is the major culprit although other Ministries have been known to ignore the law. The basis of the Executive's tendency to violate the law can be found in the excessive powers of the Executive and the constraints imposed on the Legislature in relation to the budget. The Constitution of Kenya establishes the legislature as the guardian of public finances and financial measures. Parliament is designed in this respect to act as a check and balance on the Executive in relation to public

finances. But the Constitution of Kenya effectively hobbles the ability of Parliament to play this role by making its authorisation and amendment roles reactive. Parliament's powers are in fact excised only in response to the initiatives from the Executive. Thus without the President's recommendation, Parliament cannot proceed on or amend any bill that would either impose or alter taxation, unless it is to reduce it (see Institute of Economic Affairs (IEA) Occasional Paper Series. May 2001. *Strengthening the Role of Parliament in the Budget Process*. p. 13).

## Judiciary

### Have the Courts the jurisdiction to review the actions of the Executive?

Not directly. The courts only review actions of the Executive if such a member of the Executive acted or made a decision while sitting as part of tribunal. This is done by way of judicial review. They can provide for the orders of mandamus, prohibition and/certiorari, provided for under the rules of Civil Procedure.(See also question 1 on the Executive). Decisions against the Government are issued on a daily basis particularly against the Attorney-General.

### Are judges/investigative magistrates independent?

Kenya does not have "investigative" magistrates, the magistrates are simply the lowest tier of the Judiciary.

#### Reality

Section 23(1) of the Constitution expressly vests executive power in the President as head of the Executive. Section 30 similarly vests legislative power in Parliament. However, in the Constitution, there is no similar entrenchment of judicial authority in the Judiciary. The Commonwealth Report of May 2002 (*Report of the Advisory Panel of Eminent Commonwealth Judicial Experts* of May 2002, Chaired by The Hon. Justice Dr. George W. Kanyeihamba, Justice of the Supreme Court of Uganda) noted that:

"...This immediately creates a perception of a weak foundation of judicial authority and an imbalance of power between the Judiciary on the one hand, and the other two arms of government on the other. The Judiciary is the body that, in any credible democracy, must have the final authority to protect the fundamental rights of the people and to decide whether impugned legislative enactment or decrees, or actions of the Executive have transgressed the Constitution..." (p. 15).

In the Report there were persistent complaints and charges of corruption. Such charges bring into question the independence of judges and investigative magistrates and the Kenya Judiciary as a whole. These concerns are found echoed in earlier reviews or assessments of the Judiciary such as the Kwach Report of 1998 and the Kotut Report of 1992.

The Commonwealth Report focuses on two forms of corruption as being responsible for undermining the independence of the Judiciary. The first takes the form of bribery in its various manifestations. The Commonwealth Report notes that, "...It hardly needs to be stated that offering or accepting bribes in relation to judges, magistrates or court officials is completely inconsistent with the law and represents an assault on the integrity of the Judicial system..." (p. 10).

The second form of corruption, which undermines the independence of the Judiciary in Kenya, is exertion of political pressure or influence on judges or magistrates such that they decide cases other than in accordance with the law and the evidence before the court. The

Commonwealth Report noted that, "...Regrettably, we must report that we have been told by virtually everyone to whom we have spoken that both forms of corruption are common in the courts of Kenya..." (p. 10).

### **Are appointments required to be based on merit?**

Appointments to the Judiciary are required to be based on merit and for a person to be qualified to be appointed a judge of the High Court, he or she must fulfil the requirements set out under section 61(3) (C) of the Constitution. This includes that the person has been a judge of a court having unlimited jurisdiction in civil and criminal matters in some part of the common wealth or Ireland...or is an advocate of the High Court of Kenya of not less than 7 years standing. Or holds or has held for a period of or, for periods amounting in the aggregate to not less than 7 years one or other of the qualifications specified in Paragraphs a, b, c, d, of Section 12 of the Advocates Act, Chapter 16 of the Laws of Kenya, which provides for the professional and academic qualifications for admission as an advocate of the High Court of Kenya.

However, the President, acting in accordance with the advice of the Judicial Service Commission, appoints the judges.

#### **Reality**

The only requirement for appointment as a judge is that one has served in the legal profession for seven years. Most importantly there is no criteria to hold the office of Chief Justice other than appointment by the President. Unlike judges, the Chief Justice is not even explicitly required to be a lawyer (section 61(1) of the Constitution provides: "The Chief Justice shall be appointed by the President"). On the appointment of judges, the Commonwealth report was direct. It noted that the current approach to appointment of judges was "... a matter of grave concern..." (p. 18). The report notes that vacancies for positions were not advertised the criteria for appointments were unclear. Further, appointment of judges was made without exposing the proposed individuals to the public, which was also not consulted. Even worse, the report notes that "...Lawyers with disciplinary proceedings pending before the Law Society have been appointed to high judicial office. The report suggests that consideration other than integrity, learning, wisdom, merit or competence have been included as criteria when it notes that. "Judges should not be appointed for political, tribal or sectarian reasons..."(p. 18). These perceptions and findings were echoed in the Kwach report of 1998.

Magistrates are appointed by the Judicial Service Commission (JSC), the requirement is that they must be advocates of the High Court of Kenya, however they do not have to have practiced and it is not uncommon for individuals who have just graduated to become magistrates. The post of magistrate is advertised and the JSC simply interviews applicants to assess their merit. Lately the opinion of the Law Society of Kenya has been sought although there is no legal requirement that the JSC do so. Magistrates are always appointed at the entry level, of District Level 2, regardless of experience and/or academic qualification.

### **Are appointees protected from removal without relevant justification?**

Section 62(1) of the Constitution provides that a judge of the High Court may be removed from office only for inability to perform the functions of his office (whether arising from infirmity of body or mind or from any other cause) or for misbehaviour, and shall not be removed except in accordance with the Constitution.

A judge of the High Court shall be removed from office by the President if the question of his removal has been referred to a tribunal appointed by the President and the tribunal has recommended to the President that the judge ought to be removed from office for inability as aforesaid or misbehaviour. The Tribunal consists of a chairman and 4 other members

selected by the President from among persons who hold or have held the office of judge of the High Court or judge of Appeal, or who have qualified to be appointed as judges of the High Court under the Constitution, or persons upon whom the President has conferred the rank of Senior Counsel.

#### **Reality**

As the Judicial Authority is not entrenched in the Constitution, appointees are not protected from removal without relevant justification. There are several cases in which members of the Judiciary were removed or forced to resign. In the late 1980s, several judges resigned for various reasons. In one case a judge in a highly sensitive political case threatened the Police Commissioner with contempt proceedings when the police were unable to produce the body of a person that they had tortured to death. The Chief Justice removed him from the case and transferred him to a rural court. He refused to go and subsequently resigned. During the 1980s, Attorney General Muli also instituted a constitutional amendment stripping both himself and judges of their security of tenure. However section 62 (3) effectively restored the tenure of judges.

#### **Are recruitment and career development based on merit?**

Yes. The Judicial Service Commission Regulations under the Service Commissions Act Cap 185 provide for this. Regulation 10 (1) states that in selecting candidates for appointment, promotion and transfer, the Commission (Judicial Service) shall have regard to the efficiency of the Judiciary and, in considering the claims of public officers for promotion, merit and ability shall be taken into account as well as seniority, experience and official qualifications. As between public officers, qualifications, proved merit and suitability for the vacancy in question will be given greater weight than seniority.

Regulation 10(2) states that when considering candidates for promotion, the Commission shall inquire as to the relative seniority of the candidates.

#### **Reality**

Several Public Service-oriented Committee Reports have identified the need for the presence of adequate institutional mechanisms for selecting and maintaining competent and motivated judicial personnel. The key reports produced on the Judiciary over the last decade, have noted that although these institutional mechanisms exist as indicated in the legal section above, they are not being applied.

The Kwach Report of 1998 discussed inadequate career development arrangements for magistrates. On the promotion of magistrates, the report noted that; "... Promotion procedures are haphazard and appear not to be based on any set criteria or merit."

The Report found that the most qualified lawyers were not encouraged to apply because the current scheme of service for magistrates does not take into consideration the experience gained in other settings such as private practice or the private sector. If a lawyer from such sectors wishes to join the Judiciary, they can only be appointed at the lowest level of the magistracy (see *Report on the Committee on the Administration of Justice*. The Hon. Mr. Justice Richard Otieno Kwach. Chairman. 1998. p. 11).

#### **Have there been instances of successful prosecutions of corrupt senior officials in the past 3 years?**

No. Cases have been filed in court but there have not been any successful prosecutions of high-level officials.

At the time of its demise, KACA (see Investigative/watchdog Agencies) had 14 pending corruption cases in court including those against Cabinet Minister Kipng'eno arap Ng'eny, (for abuse of office), a former Permanent Secretary, Wilfred Kimalat, and a former Nairobi Town Clerk Zipporah Wandera.

In Kipng'eno's case (R v. Kipng'eno arap Ng'eny & Paul Gachanga Ndarua, Nairobi Chief Magistrate's Court Criminal Case No. 808 of 2001), two High Court Judges issued an order of *certiorari* quashing the charge sheet in the case while simultaneously making two orders directed to the Attorney General and the Nairobi Magistrate Court. The first prohibited further prosecution of the counts in the indictment "or any variation thereof or any charge or charges in substitution thereof or any charge or charges akin to the same". The second prohibited the Nairobi Chief Magistrate from hearing or determining the case against Mr. Ng'eny.

The Court found that the prosecution of Mr. Ng'eny was oppressive and did not accord with his constitutional rights under section 77 of the Constitution because there was a lengthy and unexplained nine-year delay between the time of the commission of the offences charged and the initiation of prosecution by the Attorney General in April 2001.

The judges dramatically departed from a century of Kenyan criminal law jurisprudence and precedent, which had always held that, in the absence of an express statutory provision, there can be no limitation period in respect of prosecutions of a criminal offence. Not unpredictably, uproar followed the ruling, which was immediately viewed as yet another example of judicial action running counter to the policy of anti-corruption reform.

### **Reality**

Whilst proceedings have been instituted against corrupt senior officials it is difficult to track them as the law reporting system has collapsed. Kenya stopped law reporting in 1980. The National Council for Law Reporting Act was passed in 1994, it established a Council for Law Reporting, currently under the chairmanship of the Chief Justice. In the last year the Council has resumed its tasks and the law reports for the period of 1981–1983 have been produced. However there is still a huge backlog. The Registrar of the High Court was therefore able to only provide statistics for the prosecution of judicial staff, but not other Government officials. In the period 22<sup>nd</sup> December 2000 – 2002, there have been 39 cases of judicial staff undergoing disciplinary action for various forms of corrupt activity including theft by persons employed in the public service. Two of the thirty-nine people are magistrates. As a consequence of these actions the revenue collection of the Judiciary has been boosted by 18%. The printing of law reports has also been resumed. In addition, two Anti-Corruption Courts have been established since March 2002. It is therefore a matter of time before one will be able to assess the full success or lack thereof of these measures.

## **Civil Service**

### **Are there laws establishing criminal and administrative sanctions for bribery?**

Section G entitled, "*Rules of Conduct*" in the "*Code of Regulations*" G. 2. (1), (c), (d) and (e) prohibits civil servants from undertaking financial and other activities:

"in circumstances where there could be suspicion that his official or official information available to him was being turned to his private gain or that of his association."

### **Reality**

Civil servants have faced both administrative and criminal sanctions for bribery. In the Ng'eny case several civil servants were implicated. They were interdicted and charged in court.

### **Are there rules requiring political independence of the civil service?**

Yes civil servants are required to maintain political independence. This is captured in several Sections of the "*Code of Regulations*". Section G, G. 9 (6) in the "*Code of Regulations*" states that, "An officer should remain aloof from active participation in politics". Civil servants are to avoid public utterances that show their political preference. " They should in no case publicly indicate their support of a particular candidate or policy, either by signing nomination papers or in any other manner."

#### **Reality**

Civil servants are partisan in support of the ruling party KANU. Civil servants are constantly captured by the media supporting the ruling party. This support is perceived as normal. Many senior civil servants have been given their posts as a reward in the context of the patronage system. Indeed if they are revealed as not pro-ruling party they are unlikely to receive the senior position in the first place, or keep it thereafter.

### **Are recruitment/career development rules based on merit?**

Section E, "*Terms and Conditions of Employment*" indicates that recruitment into the civil service will be based on merit.

Section E, "*Terms and Conditions of Employment*" Promotions, E.25. Dates of Promotion, E. 26, E. 27, E. 28, sets out the conditions for career development. These sections indicate clearly that promotions will be based on issues such as efficiency, merit and seniority.

#### **Reality**

Interviews with civil servants indicated that the terms and conditions for recruitment and career development as set out in the Code is not adhered to at all. Employment within the civil service and promotion are sometimes subject to bribery. Seniority has been turned on its head in many cases. The civil service is riddled with political patronage and cronyism. The result is that a junior civil servant may have more power simply because he or she has the "right" or more powerful political godfather. His or her boss may hold the senior position but the junior officer in fact calls the shots.

### **Are there specific rules to prevent nepotism?**

Throughout the "*Code of Regulations*" there are rules that are aimed at preventing nepotism.

#### **Reality**

The reality is that these rules are ignored. Corruption through relatives such as wives, children, siblings etc is one of the methods employed by public officials.

### **Are there rules (including registries) concerning accepting of gifts and hospitality?**

Section G 14. (1-2) of the "*Code of Regulations*" sets out the rules concerning accepting gifts and hospitality:

- An officer is prohibited from receiving valuable presents (other than ordinary gifts of personal friends) whether in the shape of money, goods, free passages or other personal benefits and from giving such presents....
- This regulation applies not only to the officer himself, but also to his family, and the officer will be held responsible for its observance by his family.

**Reality**

Civil Servants receive gifts. Speaking to members of the private sector, some civil servants even solicit for gifts. Civil servants also note that the practice is so established that the individuals and companies will give or offer gifts and express surprise when a civil servant refuses to accept the gift.

**If so, are these registers kept up to date? By whom?**

There are no registers kept.

**Have they legal powers to enforce disclosure?**

Not applicable.

**Have they staff to investigate allegations?**

Not applicable.

---

## **Police and Prosecutors**

**Is the Commissioner of Police independent? Are appointments required to be based on merit?**

Under section 108(1) of the Constitution, the President has power to appoint the Commissioner of Police.

**Reality**

These appointments are not based on merit. The criteria that are discernible suggest that appointment is based on political and ethnic balance considerations.

**Is the appointee protected from removal without relevant justification?**

As the Commissioner of Police has become a political office that is used in the patronage system, the appointee is not protected from removal. The President removes the Police Commissioner. In point of fact the incumbent Police Commissioner is past the statutory age of retirement.

**Are public prosecutors independent?**

Public prosecution is fully vested in the office of the Attorney General and anybody to whom he delegates his powers and is independent, as he shall not be subject to the control of any person or authority. (Section 26(8) of the Constitution). He is a member of the Cabinet thus limiting the full extent of his independence. Using his powers under section 26(5) the Attorney General has also delegated prosecutorial powers to the Police. This is problematic as the roles of investigator and prosecutor are fused in the Kenyan legal system nullifying one of the important checks that exists in other Commonwealth jurisdictions. Under section 26 (3(c)) the Attorney-General also has unfettered powers to "discontinue at any stage before judgment is delivered any criminal proceedings instituted or undertaken by himself or another person or authority." The existence of such powers is

vulnerable to abuse within a context of weak anti-corruption mechanisms and should be qualified.

**Are there special units for investigating and prosecuting corruption cases?**

The Anti Corruption Police Unit has the responsibility of investigating and prosecuting corruption crimes. (See Investigative and Watchdog Agencies)

**Is there an independent mechanism to handle complaints of corruption against the police?**

No there is no provision under the law for an independent mechanism to handle complaints of corruption against the police.

**Does civil society have a role in such a mechanism?**

Not applicable.

**In the last five years, have police officers suspected of corruption been prosecuted (or seriously disciplined or dismissed)?**

It is difficult to make an accurate statement as to how many police officers have been charged with corruption over the last five years as no accurate figures have been kept. However, currently there is a case before the Anti-Corruption courts in which 2 police officers have been charged with corruption.

**Are there any cases of corruption within the prosecuting agencies?**

Between October 2001 and 30<sup>th</sup> June 2002, the ACPU has received 1313 complaints of which it has taken up and is investigating 146. 16 complaints have been investigated to completion and are before the courts. 24 cases are under active investigation, 56 cases in the process of allocation to Investigating officers and the remaining 50 are pending at the Report Centre awaiting forwarding to the Investigation Section. 512 complaints have been referred to other investigative agencies such as the Banking Fraud Investigation Unit, 229 to relevant Government departments and seven complaints which were against lawyers have been referred to the Advocates Complaints Commission. 140 complaints were civil in nature complainants were advised to seek civil remedy. 8 complaints had scanty information and complainants have been contacted to give more details. Finally 269 complaints were found to have no material facts to support them and were primarily from anonymous complainants hindering follow up.

**Which legislative instrument can be used by the police and public prosecutors for the investigation and prosecution of cases of corruption/bribery?**

Section 10(1) of the *Prevention of Corruption Act Cap. 65* provides for the investigative powers of the police above the rank of Assistant Superintendent. However he needs authorisation from the Director. The police and prosecutors also invoke the ordinary clauses of the *Penal Code Cap 63* dealing with the issue of theft, etc.

**Is the law applied?**

Yes it is being applied especially after formation of the Anti Police Corruption Unit.

### Is private-to-private corruption punishable by law?

Section 4(1) of Cap 65 provides for private-to-private corruption to be punishable by law. It makes provision for any agent accepting or obtaining or agreeing to accept any gift, loan, fee, reward, etc as an inducement for doing or not doing any act in relation to his principals affairs. Also any person who corruptly gives or agrees to give a gift, bribe, loan, etc fee, and any person who knowingly gives to any agent or any agent who knowingly uses with intent to deceive his principal.

### Is the law applied?

Yes the law is applied.

### How many cases of prosecution have been undertaken in the past year? How many have been successful? If the number is low, are there other effective measures or other good reasons why the number is low?

It is difficult to determine the number of cases of private-to-private corruption which have been undertaken over the last year because of the poor state of records. What can be defined as private-to-private corruption appears in TI-Kenya's Urban Bribery Index (KUBI) for 2002 in the following categories:

Rank	Sector/Organisation
35	Non-Governmental Organisation
38	Embassies and International Organisations
43	Insurance Sector
49	Religious Organisation
50	Banks

Many cases of private-to-private corruption do not reach the courts. Those involving private companies or Civil Society Organisations, are addressed and concluded at the level of the organisation. The services of the person/s involved may be terminated with as little public fuss as possible. Very often these organisations are concerned with protecting their public image by preventing the case to become well known.

---

## Public Procurement

### Do rules for public procurement require competitive bidding for all major procurements with limited exceptions?

Yes. The rules require competitive bidding. Regulation 17(1) of The Exchequer and Audit (Public Procurement) Regulations 2001 states that, except as otherwise provided in this part, the procuring entity (described under the Regulations as a public entity undertaking a procurement) shall use open tendering as the preferred procedure of procurement. Regulation 22(1) provides that an invitation to tender for goods, works and services the value of which is in excess of Kshs. 10,000,000 (Ten Million Kenya Shillings) shall be by open national tendering.

Regulation 17(2) provides that where any other procurement method is used, the procuring entity shall give and record its reasons for the choice of the other procedure, and shall prior to the choice of that other procurement method, obtain the approval in writing of the respective tender committee.

### **Are the rules laid down in documents publicly accessible?**

Yes. Part III of the Exchequer and Audit (Public Procurement) Regulations 2001 lays down the basic procurement rules and this piece of subsidiary legislation is accessible to the public. Regulation 9, Public accessibility of legal texts, states, "these Regulations, and all accompanying instructions of the Minister shall be promptly made accessible to the public and systematically maintained.

However, the documents are not publicised in any formal way. They are public documents and are available to the general public.

#### **Reality**

The secretive nature of the government and government officials make it difficult for ordinary members of the public to access these documents. Public procurement is the one area reputed to have been mired in corruption allegations. Tenders are routinely awarded to uncompetitive firms in which government officials have significant interests. Many large government contracts have been awarded in secret. Examples include a contract of US\$ 83 million in 1994 which was to construct The Moi International airport and a government contract of US\$ 50 million for the purchase of a presidential jet in 1995.

### **Are there strict formal requirements that limit the extent of sole sourcing?**

Yes. The method of Direct Procurement, according to Regulation 19, is to be used in accordance with Regulation 35 (under which the procuring entity prepares a description of its needs and any special requirements as to quality, quantity etc and is free to negotiate with the sole candidate and any agreement reached for procurement shall be confirmed by a contract signed by both parties) if this method is not resorted to with a view to avoiding possible competition or in a manner, which would constitute a means of discrimination among candidates:

- When in the absence of competition for technical reasons the good, works or services can be supplied or provided by only one candidate
- For the purchase of goods, works or services in times of national emergency or disaster.

Direct procurement may also be used for purchases where the contract price does not exceed Kshs. 200,000.00 (US\$ 2666).

#### **Reality**

Despite the rules, sole sourcing does occur and is cited as one of the channels of government corruption.

### **Are all major public procurements widely advertised to the private sector?**

Yes. Regulation 22(1) provides that an invitation to tender for goods, works and services the value of which is in excess of Kshs. 10,000,000.00 shall be advertised in at least 3 daily newspapers of nation-wide circulation. Further, Regulation 24(2) provides that the tender documents shall contain sufficient information to enable competition among the tenderers to take place on the basis of complete, neutral and objective terms.

**Reality**

It has become the accepted practice for government tenders to be advertised in one Newspaper called the "Kenya Times" which is owned by KANU interests. Indeed the advertising of government tenders is credited with ensuring the survival of this newspaper. It is widely believed that the "Kenya Times" owes its existence and its circulation beyond government offices (who have to purchase it) to the presence of government tenders. It is otherwise known for its appalling journalism and pro-ruling party editorial position.

**Are procurement decisions made public?**

There exists no provision to make such decisions public. However, the decisions are also not a secret and one can verify them if interested.

Regulation 33(1) only provides that the procuring entity shall notify the successful tenderer that its tender has been accepted and shall simultaneously notify the other tenderers of the fact.

**Is there a procedure to request review of procurement decisions?**

Yes. Part VIII of the Regulations provides for this.

Regulation 40(1) provides that any candidate who claims to have suffered, or to risk suffering, loss or damage due to a breach of a duty imposed on the procuring entity by these Regulations may seek administrative review. However, there are limitations. Regulation 40(2) provides that the choice of a procurement procedure and a decision by the procuring entity under Regulation 15 to reject all tenders, proposals or quotations shall not be subject to the review provided by Regulation 40 (1). However, once the procuring entity has concluded and signed a contract with the successful tenderer, a complaint against an act or omission in the process leading up to that stage shall not be entertained through administrative review.

Complaints by candidates are dealt with by an administrative review board known as the 'Public Procurement Complaints, Review and Appeals Board' created by Regulation 41(1) of the Regulations.

**Can an unfavourable decision be reviewed in a court of law?**

Regulation 42(7) states that the decision of the Appeals Board shall be final unless judicial review action is commenced within 30 days under any existing written law concerning judicial review of administrative decisions.

**Are there provisions for blacklisting of companies proved to have bribed in procurement process?**

Yes. Regulation 16 provides that it is a breach of the regulations for a candidate to bribe with respect to an act or decision of or procedure followed by the procuring entity in connection with the procurement proceedings. The Procuring entity must reject a tender, proposal or quotation from such a candidate and such rejection of an offer and the reasons therefore must be recorded in the procurement proceedings and promptly communicated to the candidate concerned.

Further Regulation 46(2) states that a candidate in any procurement process who breaches any of the provisions of the regulations commits an offence and is liable to punishment. Regulation 46(3) states that a procuring entity shall with the approval of the Public Procurement Directorate debar from participating in public procurement, *inter alia*, any person convicted of an offence under the regulation.

In reality blacklisted companies are still allowed to participate in tenders even when they have bribed in the tender process. The most notorious ones in each sector are well known but there are no official records on this issue.

### **Are there rules and procedures to prevent nepotism/conflict of interest in public procurement?**

There are no clear and precise rules to prevent nepotism in public procurement. However, the 4th schedule to the Regulations concerning the Public Procurement Complaint, Review and Appeals Board provides for disclosure of interest. It provides that if any member of the Appeals Board has any interest in any particular proceedings before the Appeals Board, he shall inform the Minister who may after considering the interest; appoint another person in his place for the purpose of that particular appeal.

The State Corporations Act, Chapter 446 of the Laws of Kenya, also provides that every member of a board (including high senior officials and Ministers) who is likely to be interested, otherwise than as a member of that board or who participates or may become entitled to participate directly or indirectly, in the profits from any contract or proposed contract for a state corporation, shall on the matter coming before a meeting of the board for consideration, immediately declare his interest therein and shall, unless the meeting otherwise agrees, retire from the meeting and shall in any case not be entitled to vote on the matter.

The Local Government Act (Chapter 265 of the Laws of Kenya) provides for disclosure of interest in contracts by officers. Section 137 of the Act provides that if it comes to the knowledge of an officer employed whether under the Local Government Act or under any other written law, or by a local authority that a bargain, contract or arrangement in which he has any pecuniary interest, whether direct or indirect has been or is being proposed to be made or entered into by the local authority or any committee thereof, he shall as soon as practicable give notice in writing to the local authority of the fact that he is interested.

#### **Reality**

These rules are not adhered to in reality. Nepotism and cronyism are the basis of many of the tenders awarded. The Mbogua Report serialized by the *Daily Nation* in October 2000, catalogued in detail, the appalling extent of corruption and mismanagement at the Nairobi City Council. Quoting parts of the report, a *Daily Nation* reporter noted that:

“...Present and former employees at City Hall have been deliberately frustrated by their seniors, the Mbogua Report says. There are also cases of people promoted or stagnated because of their ethnic background, forthrightness and competence compared to their thieving bosses...” (Source: [www.nationaudio.com/News/DailyNation](http://www.nationaudio.com/News/DailyNation) Kipkoech Tanui. “City Council payroll rot is exposed” in *Daily Nation*. Monday, October 30, 2000)

No case has been brought to court so far but there have been numerous allegations of Procurement irregularities. The Government through the Roads, Housing and Public Works Minister on 23/1/2003 suspended payment of pending bills and contractor claims pending further notice. The Minister confirming the irregularities estimated that the Government might have lost up to Kshs. 2 Billion on 12 road-building projects. The irregularities relate to cases where contractors colluded with government officials to alter and inflate contract prices. The Contractors under investigations include a company with links to the former President.

### **Are assets, incomes and lifestyles of public procurement officers monitored?**

No.

---

## Ombudsman

There is no office of ombudsman in Kenya.

---

## Investigative/Watchdog Agencies

### Are there special investigative or watchdog agencies?

Yes. After the demise of the Kenya Anti-corruption Agency (KACA -- see introduction), the President, in August 2001, set up the Anti Corruption Police Unit in the Kenya Police by executive orders to take possession of all the Kenya Anti corruption Authority files held by the Attorney General and continue the fight against corruption. The ACPU is a division of the Criminal Investigation Department (CID) of the Kenya Police. The ACPU inherited KACA's Advisory Board.

It is important to note that the *Prevention of Corruption Act* has not been amended or repealed to reflect the changes that have occurred. The Anti Corruption Police Unit continues the investigations and prosecutions under the Act.

The legislative framework under which the ACPU operates is as follows:

- The Prevention of Corruption Act;
- The Penal Code; and
- The Evidence Act.

A Bill was published but never completely debated by Parliament that sought to establish an independent anti corruption body with powers of investigation and prosecution. This is the Corruption Control Bill 2002 which was to replace KACA. The Bill died upon the dissolution of Parliament on 25<sup>th</sup> October 2002. The KACA and the ACPU enforced the same law. They were both guided by the same Acts of Parliament being The Prevention of Corruption Act, The Penal Code and the Evidence Act.

### What are their main responsibilities?

The responsibilities of the Anti-Corruption Police Unit (ACPU) are to:

- Investigate corruption and corruption related matters;
- Take necessary measures to prevent corruption;
- Advise the Government, parastatals and other public bodies on ways and means of preventing corruption;
- Create public awareness; and
- Enlist and facilitate the participation of members of the public and other agencies in fighting corruption.

ACPU's approach is three pronged: enforcement, prevention and education.

**Is the agency independent? Are appointments based on merit?**

The ACPU is a division of the Kenya Police's Criminal Investigation Department. Therefore the conditions that obtain in respect of the appointment of police officers apply to them. The executive body in respect of the ACPU is the Anti-Corruption Steering Committee under whose auspices KACA originally worked. This Committee includes representatives from various sectors including the business sector, media sector, religious sector (Christians, Muslims, Hindu), Non Governmental Organisations, The Federation of Kenyan Employers, The secretariat is at the Anti Corruption Police Unit.

The ACPU's structure is simple with the Head of the Unit reporting directly to the Director of Criminal Investigation.

**Are the appointees protected from removal without relevant justification?**

At the moment the Anti Corruption Police Unit is in charge of fighting corruption and the members are those of the Police thus protected from removal.

**Are their reports published (other than when criminal charges are pending)?**

Yes their reports are published annually in the form of an annual report and periodically to inform the public of the progress that they are making in fighting corruption.

**Do they report publicly to the Legislature on the general scope of their work?**

No. The ACPU has no legal requirement to report to the Legislature

**Can people complain to the agency without fear of recrimination?**

The ACPU has not received complaints of recrimination or intimidation from individuals who have complained to them. However they observe that one of the major flaws in the laws establishing the Unit is the absence of legal protection of whistle blowers.

---

## **Media**

**Is there a law guaranteeing freedom of speech and of the press?**

Section 79 (1) of the Constitution guarantees freedom of speech, to the individual both to receive and to communicate to the general public or not. The right to freedom of speech is qualified under section 79 (1), which provides:

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

**Is there censorship of the media?**

Yes there is censorship of the media. Sections 79 (2 (a), (b), (c) of the Constitution outlines many exceptions to this right, which allow for the enactment of laws which would

supersede the right to freedom of information. They serve the purpose of qualifying these freedoms.

The Official Secrets Act Cap 187 was enacted to provide for the preservation of state secrets and state security. Section 3 (1) (c) of Official Secrets Act provides:

“Any person who for any purpose prejudicial to safety or interests of the Republic ... detains, collects, records, publishes or communicates in whatever manner to any other persons any code, word, plan, article document or information which is calculated intended to be directly or indirectly useful to a foreign power or disaffected person shall be guilty of an offence.”

The offence is also committed by any person who has in his possession or under:

- 5.3 (3) his control.
- 5.3 (4) who communicates.
- 5.3 (5) who receives such data knowing it to contravene the Act.

This section favours secrecy as opposed to openness.

The Penal Code Cap 63 Section 52 gives the Minister power to prohibit any publication against the interest of public order, health, moral grounds and security. He does this by order in the Gazette. However, this has to be reasonably, justifiable in a democratic society (*is relative but open-ended*).

Section 52 (3) provides for the establishment of a Prohibited Publications Review Board to review all publications previously prohibited under section 52 and advise the Minister generally on the exercise of his power.

The Board consists of:

- AG or his representative to be chairman.
- Commission of Police or his representative.
- Director of Medical Service.
- Two persons from religious community to be appointed by the Minister.
- Two other persons of integrity, good character and good standing to be appointed by the Minister.

The Executive appoints all the appointees and therefore their impartiality is questionable.

Section 53 criminalises any publishing, handling or distributing of any prohibited publication and places the duty on the person caught doing so to prove they did not know the contacts of the publication.

Section 54 authorises police or administrative officer to seize and detain any prohibited publication which he finds in circumstances which raise a reasonable presumption that an offence under this Act has been committed thereto.

The Books and Newspapers Act Cap 111 Section 11 (1) provides that ‘no person shall print any newspaper printed in Kenya unless there is in force, executed, registered and delivered to the Registrar a bond in sum of 1 million Kenya shillings...’

The Preservation of Public Security Act Cap 57 Section 4 (1) provides:

“Where an order under Section 85 of the Constitution (which relates to the bringing into operation of this part) has been made by the President, and so long as the order is in force, it shall be lawful for the President, to the extent to which this part is brought into operation and subject to the Constitution, to make regulations for the preservation of public security.”

Section 4 (2) of the Regulations for the Preservation of Public Security may make provision for:

“... the censorship, control or prohibitions of the communication of any information, of any means of communicating or of recording ideas or

information including any publication or document and the prevention of the dissemination of false reports.”

### **Is there widespread media ownership?**

Since the introduction of multi-party democracy, there has been exponential growth of the media in all of its forms, print and electronic. Despite this growth, ownership is revealed to be limited. According to the Media Institute, an independent media civil society organisation, the media is either owned or controlled by limited interests. The ruling party KANU and a clique of business interests associated with it have either bought existing media or started their own private media.

### **Does any publicly-owned media regularly cover the views of government critics?**

The Inter Party Parliamentary Group (IPPG) of 1997 represented the most important challenge to State monopoly of information in recent times. The IPPG legislated measures aimed at compelling the State to relinquish its monopoly of all-important Kenya Broadcasting Corporation (KBC). The KBC constitutes national radio and television public services. Radio in particular reaches 66% of the total population in Kenya. In a subsequent survey of the KBC’s treatment of government and opposition in 1997, an NGO, the Kenya Human Rights Commission together with the international media watchdog group, Article 19, found that KBC continued to give the ruling party KANU the lion’s share of coverage. KANU received 90% of the coverage and the joint opposition received 4%. Furthermore, the reporting tended to popularise KANU and demonise the opposition presenting the latter as being inherently disruptive by nature and having no capacity to govern.

### **Have journalists investigating cases of corruption been physically harmed in the last five years.**

Information on journalists and how they have been affected by covering corruption stories has not been collected or compiled by any organisation. During interviews with the media, senior officials of all media stated categorically that journalists were free to cover stories on corruption and that they did not experience any threats to their well being. The only consequences that the senior media officials reported was some harassment and legal repercussions, which were, addressed by the media houses at a high level.

However, discussions with The Media Institute an independent media think tank in Kenya, revealed an all-together different picture. The Media Institute could not provide figures for journalists who had been physically harmed in the last five years for covering corruption stories, as these were not being collected and compiled by any organisation. However they did have cases of individual journalists who had been harmed physically for covering corruption stories.

### **Does the media carry articles on corruption?**

Yes the media covers stories on corruption on almost a daily basis.

### **Do media licensing authorities use transparent, independent and competitive criteria and procedures?**

Under the Kenya Broadcasting Act Cap. 221, section 21 provides that the Kenya Broadcasting Corporation shall have power for the control of receiving sets for wireless and television broadcast and for licensing of dealers in repairers of sets.

The Kenya Communications Act Cap 411 provides for licensing requirements. It provides that no person shall establish or use any radio communication station or apparatus except in accordance with the terms of a license granted in section 36.

Section 36 (1) provides:

“The Commission may, on application in the prescribed manner, grant a license authorising any person or persons of a specified class to establish or to use any radio communication station or apparatus or to install or use any apparatus for radio communication.”

Section 36 (2) provides that a license granted under this section may be issued subject to such terms, conditions and limitations as the Commission may think fit including:

- In the case of a license to establish a station, limitations as to the position and nature of the station.
- Purposes for which, circumstances in which and the persons by whom the station may be used.
- Apparatus which may be imported, installed or used therein.
- In the case of any other license, limitations as to:
  - o the apparatus which may be installed or used
  - o the places where,
  - o purposes for which
  - o circumstances in which, and
  - o persons by whom the apparatus may be used

### **Reality**

The 1990s and new millennium have witnessed an era in which the very technology of communication has become a patronage perk. The right to modern technology of communication, telecommunications equipment and frequencies for electronic media – access to information – is the ultimate acquisition in patronage stakes. Until the 1990s the electronic media was state controlled, with the only radio and television broadcasting stations in the country being owned by the State owned Kenya Broadcasting Corporation (KBC, former Voice of Kenya (VOK)). Radio is the most widespread form of media in Kenya with 66% Kenyans being said to have access to a receiver, whilst only 6% of the population is said to have access to a television (*Steadman & Associates Advertiser's Guide 2001* suggests that 60% of the Kenyan population have access to television, with over half of this percentage being daily TV viewers).

Liberalisation of the electronic media began in the 1990s. By December 17<sup>th</sup> 2002 the Communications Commission of Kenya website listed 8 private television broadcasters. Of these four were on air. The website also indicates that there were 17 radio broadcasters with a total of 10 being operational. Most of the TV and radio broadcasters beamed their broadcasts to Nairobi and a few of the major cities, namely Mombasa and Kisumu. In the case of the African Broadcasting Ltd. (Nation Media Group) these limitations were imposed by the KANU government, which denied the Nation Media Group country-wide access for political reasons. Financial considerations were cited as a major constraint that limited geographic reach for many of the other TV and radio broadcasters.

### **Are libel laws or other sanctions (e.g. withdrawing of state advertising) used to restrict reporting of corruption?**

Over the last year successful libel cases in favour of establishment figures have seriously affected the media's ability to cover corruption cases. Interviews with the media revealed that in the case of the Nation media house, the impact has been that they have closed their investigative desk. The *East African Standard* reported that they now work with fear of damaging libel litigation as a consequence of covering corruption cases. These changes

are attributed to the Biwott libel ruling in which he was awarded Kshs. 30 million (about US \$ 379, 746). The fallout of this ruling has been that many other people have seen libel as a possibility and media houses report a constant barrage of attempted cases from people who feel wronged by the stories in which they may be implicated on corruption and others who may simply be speculating. The impact on the media houses is that their legal costs even in the absence of successful libel cases have gone up significantly. In the case of the Nation Media House, a full time legal department has had to be established.

While the government has expanded media freedoms it has occasionally taken them away. Some publications have been banned. In 2001, government action forced the private Citizen Radio and television station off-air in an apparent response to programmes that allowed the public to discuss issues of corruption. The Citizen radio programme entitled, "Wembe ya Citizen" (Blade of the Citizen) was implicated as being the cause of government action.

The newly enacted *Statute Law Miscellaneous (Amendment) Act* (2002) has had negative impact on the media. The Act increased the bond for a publication from Kshs. 10,000 to Kshs. 1 million among other changes. Discussions with one of the leading publishers in Kenya Foto Form revealed the impact of this new Act on undermining the printing and publishing industries. Foto Form reports that before the introduction of the Act, they printed about 100 publications annually in the form of newspapers, magazines, books etc. Print runs ranged from a few hundred to the largest, which is about 30, 000 to 70, 000. Under the new Act Foto Form is obligated to provide a bond of Kshs. 1 million for each publication. This amounts to Kshs. 100 million. Foto Form has responded by turning down the smaller publications. They do not accept publications below 5,000 print runs, a figure, which is large for the Kenyan market. The implications are that censorship has been introduced through this new law.

## Civil Society

### Does the public have access to information and documents from public authorities?

Discussions with civil society organisations and community groups revealed that there are barriers to accessing information from public authorities. The barriers encountered can be put in the following categories:

- Physical,
- Legal/policy,
- Bureaucratic,
- And cultural.

#### Physical Barriers

The researchers encountered physical barriers when they went to meet with the government officials during the course of the research. This came in the form of guards manning government buildings who required documents such as National Identity Cards to allow access into the building. In some cases the senior official was not aware that this was required and informed the researchers that there was no such authorised requirement for access.

During interviews, another problem hindering access to information and public documents was identified as the scattered nature of this information. Public information and documents are located in different Ministries and departments. Kenya Revenue Authority (KRA) documents, the Kenya Gazette and documents from the Central Bureau of Statistics for example are available at the Government Printers. However, their charges make them

out of reach of most people. Further, the government prints very few copies and they are only available at the Government Printers in Nairobi. Currently the Constitution of Kenya Review Commission (CKRC) is the first Government institution, which is availing information independently. The Act that created the Commission contains the requirement that the Commission report will be as widely distributed as possible. This is a major departure from other government Commissions, which have not released their reports to the public sometimes years after they were concluded.

Poor record keeping was also cited as an issue. Many government departments did not collect and collate basic statistics such as number of cases of corrupt government officials prosecuted for corruption per year.

#### **Bureaucratic Barriers**

The barriers in this category include procedures in which appointments are booked in writing. Written permission must be sought with the head of the institution if an interview is sought with his or her junior. Some government officials cannot meet with the public without being given permission by heads of their institutions. This varies from department to department and institution to institution. The researchers found that there was no standard approach. Some officials were easy to reach requiring only a request by telephone.

In some cases, letters with the questions to be asked were required and the appointment was then made three or more weeks later.

#### **Legal/Policy Barriers**

The legislative and policy barriers have been captured in the section on the Media. The civil society FGD indicated that one of the main pieces of legislation that inhibits access to information and documents from public officials is the Official Secrets Act. It creates a culture of secrecy in the government. This tendency towards secrecy has undermined the concept of public service among public servants.

#### **Cultural Barriers**

In a recent study entitled, "*The State of Freedom of Information in Kenya*", an NGO International Commission of Jurists (Kenya Section) noted that interviews had stated that Kenya is a secretive society. Most ethnic communities have sayings that promote the importance of protecting family and clan secrets from strangers. The ICJ study noted that this tendency towards secrecy was transported into government. Further, the public itself expected government to be secretive and did not relate this poor information flow from public institutions with issues of accountability. The first President of Kenya, Jomo Kenyatta is credited with coining the Swahili word "sirikali" or "secret government" and so establish a secretive mode of governance which has greatly facilitated corruption over the years.

### **Do the public authorities generally co-operate with civil society groups?**

Co-operation between civil society organisations and public authorities varies from sector to sector and from time to time. On the whole co-operation with civil society organisations providing development and relief services such as water, education, health and nutrition remains high and positive.

There tends to be less co-operation between public authorities and civil society organisations addressing governance issues. However, there is also great variation here. Over the last 5 years in particular governance related civil society organisations have gained growing credibility resulting in greater co-operation with public officials. These organisations gained much of their credibility over the last decade because of their ability to mobilise the public and public opinion in support of governance related initiatives and campaigns. The government simply can no longer afford to ignore them.

Initial activism has also given way to constructive engagement of government on the part of CSOs. Government and thus public officials are actively seeking co-operation between some governance CSO organisations in various projects and activities. An example is the

Centre for Governance and Development (CGD) and the Institute of Economic Affairs (IEA), which are routinely co-opted into government initiatives.

NGOs working at the local level as opposed to those addressing policy issues, presented a different experience. They noted that there was some difficulty in getting co-operation from senior public officials at these levels. In their experience they had noted that many such officials expected to be bribed before they can offer any services. Those most likely to seek inducement for co-operation were identified as the following; the police, doctors in public health institutions, officials at the Traffic Headquarters and the Provincial administration such as the Provincial Commissioners, District Commissioners, District Officers and local Chiefs.

### **Are there citizens groups or business groups campaigning against corruption?**

There are citizens groups and business groups campaigning against corruption within their own sectors. However, the presence of those campaigning against corruption within government or larger society are sporadic at best.

Research conducted by the Centre for Law and Research International (CLARION) identified several business groups who have begun to address corruption in various ways:

- The East African Association has been conducting surveys on corruption among other issues for the last 18 years. The EAA brings together 170 foreign companies operating in the Eastern African region. The EAA's objective is to facilitate participation in the economic development of Eastern Africa and Indian Ocean region.
- Individuals within the business community have started to speak out against corruption as well.
- Professional institutions have also started to speak out against corruption. Some of these include, Institute of Certified Public secretaries (ICPS), Private Sector Corporate Governance Trust (PSCGT).

The civil society FGD noted that self-regulation of professional bodies has had mixed results. Certain sectors have failed. Information from many sectors is also not easily available, making it difficult to assess the effectiveness of many others. The civil society organisations identified this area as an important aspect as it is a form of accountability.

The civil society organisation noted the following on the self-regulation of the NGO sector:

- NGOs have a regulatory board within the NGO Council where wayward NGOs are taken.
- How does it work? It applies only to NGOs which are registered in Kenya. However it does not have an investigative arm. There is a public perception that NGOs have access to free and easy money and create dependency among the communities that they serve. Some respondents believe that this contributes to corruption within the sector and among the target communities.

### **Does corruption thrive within the environment?**

Yes there is corruption and there are few studies on corruption in this area. The basis of corruption in the CSO sector in Kenya includes the following:

- The sector has not been used to being accountable to anyone except the donors.
- The sector is known for having low bureaucratic procedures from which it derives its strength and its weakness. Low bureaucracy allow CSOs to be flexible, to respond quickly and to get close to communities. However, the weakness is that many CSOs may not have systems in place that allow them to

undertake rigorous financial accounting. This creates the perception of easy access to funds.

### **Do NGOs handle a lot of money?**

The NGO sector handles large amounts of funds collectively and individually. Between 2000 and 2002 NGOs focusing on civic education had access to US\$ 1 billion which was made available by the Donor Steering Group in the form of basket funding. Individual NGOs such as AMREF have budgets of several million dollars.

### **Are there citizens groups monitoring the government's performance in areas of service delivery, etc?**

There are very few such institutions. The ones which do, do so indirectly; this capability has not yet evolved. A few civil society organisations are beginning to develop this function.

- The Kenya Human Rights Commission is an NGO which indirectly monitors the prison system of Kenya.
- Gender Sensitive Initiatives, which works at the local level, achieves this function by developing the capacity of community members to raise issues and make demands of their local government officials.
- In the context of national and civic elections, several organisations undertake election monitoring. These organisations include faith based and secular organisations.

### **Do citizens groups regularly make submissions to the Legislature on proposed legislation?**

For legislation to be changed or proposed there is a legal requirement that consultations be held with concerned sectors of society. The Law Reform Commission is a permanent body established to do so. However the Attorney General has discretion as to whether he brings proposed legislation before Parliament. In the 1990s the Attorney General's offices also set up several taskforces to review the law in various areas. These taskforces within their terms of reference have sought citizens' opinions. The best example of a Government Commission though remains the CKRC, which set a unique precedent.

#### **Reality**

Citizen groups do make submissions to the legislature on proposed legislation. They do this through various organisational forms that bring together citizens with common interests and from specific sectors. However, there are many cases when specific legislation is changed without public participation or even awareness.

Examples of Civil Society Impact On legislative Change:

- Institute of Economic Affairs (IEA) has been able to contribute to the proposed Parliamentary Budget Office Legislation. IEA's contribution was received positively and Parliament took on board IEA's amendments resulting in a stronger legislation.
- The Kenya Human Rights Commission (KHRC) made submissions on various proposed legislation with a measure of success. Several Children's rights organisations have also contributed to the new *Children's Act* and this was cited as an example of active civil society participation.

**Does the education system pay attention to integrity issues and corruption/bribery? Is it expected to?**

The education system does pay attention to corruption in various ways.

Subjects such as ethics and religious education are taught from primary school and throughout secondary school. One of the functions of these subjects is to address the ethical and moral basis of the individual students.

**Reality**

In reality, the school environment and how schools are run undermine the anti-corruption messages that ethics and religious education classes aim to transmit. Over the last ten years or so schools in Kenya have been riddled with severe problems. The Kenyan school is an environment which is prone to severe problems, including widespread violence. Corruption within the management structures of the schools is often cited as one of the causes of this tragic situation. Students within these institutions are therefore being inculcated in a culture that promotes corruption and other anti-social values.

## **Regional and Local Government**

The Local Government Act Cap 265 of the laws of Kenya, governs the local government. This Act was passed to provide for the establishment of authorities for the local government and to define their functions and to provide for matters connected therewith and incidental to.

**Are there at regional and local level, rules and disclosure provisions similar to those operating at national level on nepotism, conflict of interest, gifts and hospitality, and post public office employment?**

Section 89 LGA provides for the *disability of members from voting on account of interest in contracts*. It provides that if a member of a local authority has any pecuniary interest, *direct or indirect* in any contract or proposed contract or any other matter, and is present at a meeting of the local authority at which the contract, proposed contract or other matter is the subject of consideration, he shall at the meeting as soon as practicable after the commencement thereof, disclose the fact and shall not take any part in the consideration or discussion of, or vote on any question with respect to the contract or other matter.

This does not apply to the interest which a member has as a ratepayer or inhabitant of the area under the jurisdiction of the local authority or as an ordinary consumer of water or to an interest in any matter relating to the terms on which the right to participate in any service including the supply of goods is offered to the public.

Subsections (2) and (3) define an indirect pecuniary interest. This section provides that a person employed under the LGA has an indirect pecuniary interest if he:

- Or any nominee of his is a member of a company or other body with which the contract is made or proposed to be made
- Is a partner, or is in the employment, of a person with whom the contract is made or is proposed to be made or is proposed to be made or who has a direct pecuniary interest in the other matter under consideration

Subsection 3 provides that in the case of married persons *living together* the interest of one spouse, if known to the other shall be deemed to be an interest of that spouse.

Section 137(1) of the Local Government Act (LGA) provides for *disclosure by officers of interest in contracts*. It provides as follows:

"If it comes to the knowledge of an officer employed whether by the LGA or any other written law, or by a local authority that a bargain, contract or arrangement in which he has any pecuniary interest, whether direct or indirect has been or is proposed to be made or entered into by the local authority or any committee thereof, he shall as soon as practicable give notice in writing to the local authority of the fact that he is interested."

### **Reality**

Despite these elaborate rules and regulations local authorities are among the most corrupt institutions in Kenya. An ad hoc committee was appointed by the government to investigate corruption and gross failure by Nairobi City Council to deliver services to residents of the city in 1999. The report known as the Mbogua Report was finalised in 2000 and revealed details of corruption, appalling levels of looting, waste and inefficiency. The culprits were exposed as council officials, Councillors and Cabinet Ministers. The report has never been officially released although *The Daily Nation* newspaper serialised from 26<sup>th</sup> October 2000.

### **What public offices at regional and local level are appointed by the national government?**

Section 16(2) of the Constitution provides for the appointment of the Minister from among the Members of the National Assembly by the President.

Section 107 of the LGA provides for the appointment of municipal officers by the Public Service Commission unless the Minister otherwise directs. These appointments are on a full time basis unless the Minister concerned directs that it be on a part-time basis or consulting basis. The offices of town clerk and town treasurer shall not be held by the same person or by persons in relation to each other as partners or as employer and employee.

Section 108 of the LGA provides for the appointment of deputies to the town clerk, town treasurer, town engineer, and medical officer of health or public health on the direction of the Minister to be appointed by the Public Service Commission.

Section 109 provides for the appointment of county and town council officers. The procedure and requirements is the same as in section 108 above.

Section 111 provides for appointment of urban council officers of a county division by the urban council with approval by the Minister and consent of the council in which its division is situated subject to such conditions as to the manner of carrying out the duties of the office as that county council may specify.

### **Is there a legal requirement that meetings of city/town councils be open to the press and public?**

Part 5 of the LGA provides for the Meetings and Procedures.

Section 84(1) of LGA provides that every meeting of a council shall, *within the limits of available accommodation*, be open to the public and to duly accredited representatives of any newspaper.

### **Reality**

In reality the public rarely participates in city or town meetings. Meetings are rarely announced to the public.

**Are there clear criteria restricting the circumstances in that city/town councils can exclude the press and public?**

Section 84(2) LGA provides that 'the proceedings of any committee including a committee of the whole council, or a joint committee *shall not be open* to the public or the press unless the council or councils appointing the committee or joint committee or the council in the case of a committee of the whole house resolve to admit the public and the press or one or other of them.'

This section has the effect of making the legal requirement of admission of the public and press to the meeting conditional. Further section 84(1) use of the words *within the limits of available accommodation*.

**Reality**

The media does have access to some of the meetings. Journalists routinely cover reports of these meetings in attendance. There are occasions when journalists are not permitted to these meetings but very often the proceedings are "leaked" to the press.

**Do national agencies with a remit to deal with corruption (anti-corruption agencies, ombudsman, supreme audit institutions, and so on) work at regional or local levels and are there specific agencies with regional and local responsibilities?**

Yes they do, currently the Anti Corruption Police Unit is investigating the Nairobi City Council books, records etc.

Section 86A of the LGA prevents the elected officials from running the affairs of local authorities. At the time it was enacted there was a countrywide governance crisis in local government, characterised by massive irregularities and arbitrary actions by elected authorities. The central government explained that it was stepping in to save them from bankruptcy and collapse. The law was intended to control and avoid arbitrary dismissals of city officers and corruption on the part of elected councillors. It has however, had the effect of emasculating the ability of elected councillors to implement policy and administer their local authority.

**Reality**

Research conducted by the Centre for Governance and Development noted that the county councils do not make their books available to the Auditor general who cannot then audit their books as required by law.

## **Progress with Government Strategy**

**Has the Government announced an anti-corruption strategy and a timetable for implementation?**

The Government has announced an anti-corruption strategy which is called the National Anti-corruption Plan. The vision of the Plan is "attainment of a society with zero tolerance for corruption" (see National Anti-Corruption Plan (Final Draft) 2002. National Anti-Corruption Steering Committee). The Plan aims to co-ordinate anti-corruption initiatives in all governance institutions in Kenya. The list of institutions identified by the Plan and referred to as the Key Stakeholders are identified as the following:

- The Legislature.
- The Executive.

- The Judiciary.
- Kenya Anti-Corruption Authority (now defunct).
- Enforcement agencies.
- Watchdog agencies
- The private sector.
- The media.
- Religious organisations.
- Civil society.
- Trade unions.

### **How much of the government strategy has been implemented?**

Not much of the strategy has been implemented. Even that which has been implemented is not taken very seriously. Most people interviewed during the course of the research for the NISA indicated that they did not believe that the government had the political will to fight corruption.

### **Is the strategy at national level or regional/local level?**

The strategy is at all levels, national, local and individual level. The Plan identifies problem or nature of corruption in each sector as identified in question one. It identifies who benefits and who bears the cost of this corruption. It identifies action already taken and the proposed additional action. Responsibility for future action is assigned at institutional level.

### **Is the government meeting its own timetable?**

The Plan sets out a timetable for each area of focus. The timetable varies depending on the nature of the proposed action from one year for enacting anti-corruption legislation, to on going for activities such as public education. Some action has been initiated in some sectors towards the government's timetable. In the example of the efforts of the Judiciary, there is some action. Even in this area, the government has not met its own timetable. In most others it has not achieved its own timetable. Many of the proposed anti-corruption legislation for example have not been enacted. The 8<sup>th</sup> Parliament was dissolved before they were passed.

## **Donor Anti-Corruption Initiatives**

### **Which bilateral and multi-lateral donor agencies are based in the country?**

#### **Bilateral Donor Agencies**

- Royal Danish Embassy.
- United States Agency for International Development/US Embassy.
- Royal Netherlands Embassy.
- CIDA/Canadian High Commission.

- DFID/British High Commission.
- German Embassy.
- KfW.
- Italian Embassy.
- French Embassy.
- JICA/Japanese Embassy.
- Swedish Embassy.
- Belgian Embassy.

#### **Multi-lateral Donor Agencies**

- International Monetary Fund (IMF).
- World Bank.
- European Union.
- United Nation Development Programme (UNDP).
- IFC.
- GTZ.
- AFD.
- JBIC.
- African Development Fund.

#### **What types of anti-corruption initiatives have they supported?**

Donors have supported a broad range of anti-corruption initiatives over the years.

#### **Research studies**

Donors have supported research conducted by academic institutions and civil society organizations. The objective of this research has been to build up a body of knowledge on the nature of corruption within Kenya. This research has served the purpose of revealing how corruption manifests itself at all levels of society in Kenya and has addressed issues such as cost of corruption. Much of this research has been conducted over the last 10 years. Some of the most important research on corruption has been done by, NGOs such as Centre for Law and Research International (CLARION), Social Development Network (SODNET), Centre for Governance and Development (CGD) and Transparency International-Kenya.

#### **Support to Government Anti-Corruption Initiatives**

The donor community has supported a range of government anti-corruption initiatives. Over the last 10 years this support has come in various ways:

- Support in the development of anti-corruption legislation, policies and procedures, e.g. procurement legislation and procedures. The result was the Public Procurement Act, (2001).
- Making fighting corruption a conditionality for funding and aid.
- Making prosecution of those involved in grand corruption a conditionality for resumption of aid.
- Since 1992 to present, various donors such as the World Bank have cut off various forms of Aid and budgetary support as a means of putting pressure on government to address grand corruption in government.

- A team of technocrats led by Richard Leakey was installed in key government positions as an anti-corruption measure. These technocrats who were jointly picked by the World Bank and the government, were reputed to have been people of high integrity who also had the skill and technical knowledge to manage their portfolios. They were installed in 2000 and became known as the "Dream Team".
- The Kenya Anti-Corruption Authority (KACA). KACA was established in 1997. It was formed as a condition for resumption of Kenya's Enhanced Structural Adjustment Facility (ESAF).

### **Reality**

These two approaches captured in this point, represent a trend in which anti-corruption measures have been developed as add-on initiatives or institutions outside of the National Integrity System. The NIS is left untouched. The result is that these new add-on institutions are seen as alien. Further the main body and the source and cause of much of the corruption is left untouched. The result of this internal inconsistency is that these initiatives and institutions have not survived.

During the course of the research both donor and Kenyan respondents noted that lack of response from the NIS has led those interested in fighting corruption to develop new institutions. The NIS represents the system of government, which is typically out of reach of donors and other outsiders. These outsiders cannot realistically call on the NIS to reform itself without taking the risk of being accused of attempting to interfere in running of the government of Kenya. These new institutions offer donors and others a measure of control.

### **Are there any examples of donors cooperating or coordinating their programmes?**

Yes, there are several examples of donor cooperation. Some of these are organized according to thematic groups. The economic governance group addresses issues of economic governance and corruption as a sub-set. The examples of donor collaboration that affect issues of governance, economics and corruption include the following:

#### **Economic Governance Group**

This includes the list presented in question one.

#### **Donor Steering Group**

Brings together the Governments of following donors:

- The Netherlands.
- The United Kingdom/DFID.
- Canada.
- Denmark.
- Sweden.
- Finland.
- Austria.
- Norway.

#### **Like Minded Donor (LiMiD)**

Membership includes the Governments of:

- USAID.
- UNDP.
- Economic Commission.
- The Netherlands.

- The United Kingdom/DIFID.
- Canada.
- Denmark.
- Sweden.
- Finland.
- Austria.
- Norway.

Kenya Anti-Corruption Authority (KACA) (now defunct) had the following donors working together in support:

- Finland.
- The Royal Netherlands Embassy.
- Britain.
- Italy.
- USAID.
- France and GTZ.

## Future Research and Donor Support

**Can key issues be identified in terms of corrupt activity that the research for the report has demonstrated as requiring immediate attention, and which are they?**

The key issues include the following:

- Corruption and impunity are closely aligned in Kenya. Impunity has become a feature fuelling corruption at all levels. People caught in corrupt activities at all levels do not face the full extent of the law. Research on the impact of impunity on the fight against corruption would be illuminating.
- An emerging trend in Kenya is one of a growing link between corruption, crime and politics. This trend allows students of corruption to examine the impact of extreme levels of corruption in a society. This study suggests that one of the consequences is that a strong link develops between corruption and crime whose ill effects are felt in every sphere of society.
- The nature of corruption and civil society organisations that would contribute towards an effective self-regulatory framework.

**Is there a particular aspect of corrupt activity either particular to the country concerned, or significant in terms of effect or impact, that would require more in-depth research?**

There are all forms of corruption within Kenya. The following are aspects of corrupt activity that require more in-depth research.

Since the new government NARC took office, revelations of many cases of grand corruption involving billions of dollars, have come to the fore and have been published in the media. There is research required to capture, track and analyse this emerging information, to

make a strong link to the effects and impact of this form of corruption on specific sectors and on the economy as a whole.

**Is there a particular approach or initiative to combating corruption that may be considered for further research or study as an example of best practice?**

- The new anti-corruption courts with women judges could be examined as an example of possible best practice.
- The previous regime did not encourage successful anti-corruption initiatives. There are thus few examples that are well known.

**Can key areas or issues relating to possible anti-corruption initiatives be identified as requiring donor support?**

With the change in government, there is a new mood for reform and optimism in Kenya supported by political will. Opportunities for anti-corruption work requiring donor support will become plentiful especially after the constitutional reform process is over. Key areas include support for new legislation and new anti-corruption institutions.

**Can key areas or issues relating to anti-corruption initiatives be identified in terms of forming the basis for donor prioritisation, sequencing, cooperation and coordination?**

At this time in Kenya these opportunities are being developed. Donor support can come in the form of providing support for the development and prioritisation of anti-corruption initiatives. As there is now a weak opposition, the CSO sector will have to play the role of watchdog in the fight against corruption. Donor support towards this role would be important.