

Kenya Governance Draft Report/Note – in very brief

At the request of the Government of Kenya (GoK) for an empirical evaluation of the current situation as well as assistance in developing a diagnostic framework for the future, the World Bank's governance assessment mission, led by Daniel Kaufmann, took place end June-early July. A draft of the full governance assessment, including a governance note and annotated matrix of actions, were delivered to the Government on October 19th. The Government has promised comments, and it is already utilizing the findings and recommendations of the governance assessment as an input to its own plans. Salient findings include:

-- Progress on governance in 2003-04, stagnation (and even some deterioration) thereafter.

Corruption, which was rife under the previous regimes, declined somewhat during 2003-2004, following the NARC government assumption of power. Yet subsequently the data suggest stagnation on corruption control and then even deterioration in press freedoms and in bribery in the judiciary and in procurement (although by early 2006 overall corruption had not become as rife again as in the previous regime). Poor governance and corruption are viewed by citizens and firms as the *major deterrent to development*.

-- The Governance Action Plan (GAP): promising framework.

The GoK's action plan identifies many required actions. ***But such Plan also lacked a sense of prioritization and implementation.*** Generally, Kenya's underperformance is not due to a capacity constraint, but often the result of entrenched vested interests, distorted incentives, and leadership constraints. The Governance assessment gives recommendations on priorities. The revised program now submitted by the Government (including to the IMF) draws from the Governance Assessment (and the governance mission work). This revised Plan reflects serious intent by some reformists in government to establish milestones for the next 12 months. At the same time, given the recent political and governance developments, a realistic assessment is needed at present on the likelihood of concrete implementation progress on priority reforms (and even on potential backtracking) over the next 12 months.

Broad Areas of Suggested Reform Priorities highlighted in the Governance Assessment:

--Procurement reforms – it is noted that an important Procurement Act has been adopted, yet crucial implementation and related actions are pending.

--Reforming the full 'judiciary chain'. Reform is needed across the entire judiciary chain – in carrying out, finalizing and turning over high level investigations, in opening the prosecutorial process once an investigation has been finalized, in duly completing the prosecutorial process, and in the integrity and capacity of institutions such as the courts to adjudicate the cases in a fair and timely manner.

--Transparency-related reforms, such as adoption and implementation of a Freedom of Information Act, greater public disclosure on assets by public officials and legislators, enhanced transparency in the forthcoming budget cycle, and others.

--Ensuring the full **independence of some key institutions** such as various important Commissions (Human Rights, electoral commission, etc), and the Central Bank, and also ensuring independence and protection of the media.

--Key reforms are also pending in the financial sector, privatization, restructuring of the public sector and regulatory reforms, including removal of licenses and of administrative barriers to trade, have also been identified.

The governance assessment also covers some strategic implications for the Bank's work.

Draft Kenya Governance Assessment: Materials Submitted by the WB to GoK

Item I. Kenya Governance Overview Note (including annexes)

Item II. Draft Kenya Governance Assessment

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Note: The Governance Note (Item I) is based on a series of draft background chapters of a more detailed governance assessment report (Item II, draft) under preparation. The Governance Note (item I) is also linked to the GoK's government action plan (GAP), namely the matrix which presents the GoK's action plans for the next 15 months. At the request of the GoK, and as part of the overall governance assessment work, the governance mission prepared detailed comments on the GAP matrix (Item III).

Kenya: A Governance Overview Note

The World Bank

October 19th, 2006

Based on a World Bank Governance Mission

Submitted to the Government of Kenya for discussion

This Governance Note is based on a series of draft background chapters of a more detailed Governance Assessment Report that is under preparation. This Governance Note is also linked to the GoK's Government Action Plan (GAP), namely the matrix which presents the GoK's action plans for the next 15 months. At the request of the GoK, the Governance Mission has prepared detailed initial comments on the GAP matrix. The background draft chapters as well as the annotated GAP matrix are also being provided to the authorities at the same time as this Governance Overview Note, so that the authorities have available the full set of the Bank's materials contributing to the findings and recommendations set out in this Note.

Kenya: A Governance Overview Note

Main Governance Mission Findings and Recommendations

Background

At the request of the Government of Kenya (GoK) for an empirical evaluation of the current situation as well as assistance in developing a diagnostic framework for the future, the World Bank's governance assessment mission took place end June-early July 2006. The work of the mission benefited from full cooperation with the authorities, as well as from the support from the World Bank's Kenya country office, the IMF, local and international expertise, and from engagement with multiple stakeholders, including civil society, parliament, the media, academics, the private sector, and development partners.

This governance assessment work involves the following contributions: i) an empirical assessment of governance in Kenya, based on multiple existing data sources (as explicitly requested by the authorities); ii) analysis of the multifaceted components of governance, utilizing expert qualitative information complementing measurements and some lessons from international experience; iii) suggested recommendations and areas of priority as well as an annotated matrix of the Government Action Plan (GAP), where Bank experts have prepared specific suggestions within the Government's own plan of action, as specifically requested by the Kenyan authorities.

Specifically, a number of salient issues of this process are highlighted upfront:

1. Objective: towards a broad-based engagement on governance issues with Kenya.

The governance mission, and this governance assessment, as well as its discussions, are aimed at having straightforward and broad-based engagement with Kenya, striving towards a deeper focus on concrete governance and anticorruption. The deeper engagement with the authorities on governance issues was complemented by involvement with a wider spectrum of stakeholders outside of the government as well, focusing in a straightforward manner on the serious challenges that Governance and Anti-Corruption have posed for Kenya's sustained development, challenges which continue nowadays. An important objective of this initiative is also for the Bank to learn more about governance issues in Kenya, so to be better informed as an input to closer engagement with Kenya on these issues, and to inform Bank strategy on the country. Indeed, an aim was to obtain an improved understanding of the reality on the ground, so to carry on a dialogue on these issues, prepare a governance assessment, and to respond to the government's request to provide feedback and advice on the GoK's own plan of action.

2. A perspective. This assessment intends to provide an analysis of the governance situation in Kenya, from the perspective of some experts on the topic, and drawing from multiple interviews, writings and insights from Kenyans. The team also benefited from

other governance-related reviews for Kenya, such as the report by the African Peer Review Mechanism (APRM) of NEPAD. This governance note issued by the World Bank ought not to be interpreted to be either a definitive or and all-encompassing treatment of the subject. It is hoped instead that it is a contribution to the discussion about moving forward on governance reforms, offering a fresh perspective on particular aspects that may spur further discussion with and within the government, other key stakeholders in Kenya, as well as with the development partners. It is also important to note that much coordinated work with development partners has already been underway for some time (with an effective role played by the World Bank in Nairobi, and the governance mission while in the field benefited from the insights and inputs from these partners). Thus, the recommendations provided in this report should not be regarded as cast in stone, but rather intended for broad-based discussions that would include the close involvement of development partners. Finally, while the focus here is on governance, and its importance for development, this does not imply that there are no other important determinants of economic development. Obviously dimensions such as macro-economic stability – where Kenya has been making strides, trade and sectoral policies matter as well, yet these are not given in-depth treatment here given the scope of this study.

3. Learning. The mission gained an improved understanding of: i) the historical, political and institutional legacy inherited by the new (NARC) regime that assumed power in 2002; ii) the high expectations with the onset of the new regime, as well the early reforms implemented by the new government; and, iii) factors explaining the eventual entrenchment and reform stagnation on governance and anticorruption measures in recent times. The longer term reality of entrenched interests that have opposed reforms is complicated further by the incipient political electoral cycle that is de facto underway already. Nonetheless, history and experience of many countries tell us that even if a particular historical legacy or polity makes reform today more difficult, it is always possible to make progress even in the face of such historical and political factors, particularly when strong and dynamic leadership is present.

4. Consultations and Extensive Listening. Consistent with the objective of engaging on a broad dialogue on governance, we held substantive and productive meetings with many factions of the government, as well as with heads of donor agencies, with the heads of parliamentary committees, the judiciary, civil society, NGOs, the media and the private sector. It was clear to everybody that to make progress on governance and anticorruption, collective action was needed, with the leadership and involvement of a multiplicity of domestic stakeholders, supported by the international community.

5. Status of Empirical Analysis. Given the country's size and importance, there are multiple internationally comparative data sources available that include Kenya. Further, civil society oversight and development partners accountability have resulted in a myriad of Kenya-specific survey efforts. These serve as important inputs to the empirical analysis in this governance assessment. At the same time, these different survey inputs do not cover some specific institutional aspects or some areas of governance, and thus do not fully match the needs for monitoring implementation actions and results as envisaged in the Government's Action Plan. For that reason, it is also envisaged that over the next

few months a set of in-depth governance and corruption diagnostic surveys will be carried out.

Preparatory work towards such set of diagnostic surveys took place during the governance assessment mission. Both the empirical analysis associated with existing data sources that feeds this assessment, as well as the envisaged diagnostic surveys to be carried out in the near future are part of the collaborative framework with the authorities and experts in Kenya in designing a mutually agreed framework to empirically monitor implementation results on governance. This was in direct response to the request by the authorities, and consistent with the importance of evidence-based policy-making, advise and assessment of progress. Thus, additional empirical survey work is intended to *complement parallel action and reform implementation* by the government (as per their own Government Action Plan [the GAP]), and the recommendations for action in this report, which are broadly consistent with the GAP). Thus, any further empirical work at this juncture is not because it is a prerequisite to resolute action on priority areas; instead there is ample evidence backstopping the need for priority reforms at present.

6. A broad governance perspective and engagement. This perspective on governance is anchored within a broad development perspective where mutual accountability is of paramount importance. Specifically, this implies that:

i) good governance and anticorruption are not ultimate goals per se, but, as backstopped by global evidence and research, are very important – although not exclusive - drivers of robust growth and poverty alleviation;

ii) to combat corruption in projects, it is important to implement specific preventive and transparency measures at the project level, yet in addition, broader systemic governance reforms are also needed;

iii) across-the-board governance reforms cannot be implemented overnight or according to a ‘one-size-fits-all’ template; which, coupled with institutional realities, means that it is critical to prioritize and tailor such reforms to specific country features, and,

iv) mutual accountability and responsibility implies that there are initiatives and actions beyond what the executive branch of government needs to implement. Thus, the role and responsibility of the domestic private sector is also of importance, as well as that of the World Bank Group and other development partners. The judiciary, parliament, civil society and the media all play a key role as well. This provides a rationale for a governance assessment which also reviews the institutions of accountability outside of the public sector. It has implications for options regarding the country’s own development strategy, and it also points towards moving beyond the traditional mode of strategic engagement between the Bank and the country with respect to the Bank’s country strategy. This assessment provides a background for considering a Bank strategy with Kenya where governance has a central core.

6. Key findings in this Governance Note on Kenya include:

- ***Stagnating governance in recent years, at best.*** The available empirical evidence suggests that corruption, which was rife under the previous regimes, declined somewhat during 2003-2004, following the NARC government assumption of power. Yet subsequent to such initial improvement, the evidence indicates that the extent of corruption control appears to have experienced stagnation, or worse. The data in fact suggests some deterioration in bribery in the judiciary and in procurement. Even in such areas of a deteriorating situation in corruption in recent years, however, there has not been a full reversal to the extremely high levels of corruption prevailing in previous regimes. Yet, compared with the high expectations at the time of regime change, overall progress in controlling corruption has been limited, at best. This does not mean that in Kenya there have not been some initiatives, plans, and support to institutions to fight corruption. Yet the absence of consistent results on the ground point to serious weaknesses in execution. Similarly, the evidence suggests less progress than envisaged, and even stagnation or reversals, on other important dimensions of governance, such as rule of law and media freedoms. Significant empirical detail is provided in background Chapter 3, backstopping these findings.¹
- ***The GAP: promising framework, serious intent.*** The recently formulated and publicly launched action plan by the government, the GAP, does identify many of the key areas where actions are needed. The GAP includes multiple intended actions, which are largely appropriate – even if not prioritized - and some of these actions have been underway. At the same time, many priority areas remain as intentions in plans with slow or no progress in terms of concrete actions. It is clear that the Government has been engaged in much preparatory work of various plans containing many intended actions, and many committees have been formed. Implementation in some areas has also taken place.
- ***But the twin challenges of prioritization and implementation are evident.*** While detailed plans illustrate the high technical capability in the public sector, often ***prioritization*** is lacking; there is little distinction between ‘first-order’ measures and the rest. Related, decisive action program ***implementation*** in priority areas is often subpar. Generally, Kenya’s underperformance is not due to a capacity constraint, but often the result of entrenched vested interests, distorted incentives, and leadership constraints.
- ***The challenges of leadership, transparency and accountability.*** In focusing on prioritizing actions for concrete implementation, and based on international experience, the following three general areas are of particular importance for making concerted progress in governance and anti-corruption: ***leadership, transparency and accountability***. Kenya faces deficiencies nowadays on each one of these dimensions.

¹ There is a preponderance of evidence, from multiple sources, pointing to rather similar empirical patterns in terms of developments, trends, and current governance challenges for Kenya. Nonetheless, as is the case when there are multiple sources, not in every case (or for every variable of governance) there is complete congruence; in fact there are a few exceptions. These are addressed in background Chapter 3.

Reforms in the institutions of accountability, such as the judiciary, are particularly difficult when vested interests are entrenched. This does not imply that reforms are not possible. Reforms are merely more difficult, requiring dedicated focus, a clear strategy, and leadership by champions of change.

- ***Transparency reforms have been neglected, yet progress that can have impact is feasible.*** A set of concrete **transparency** reforms, which would not be subject to the same political constraints (as in the case of constitutional reform), offer promise in the shorter term, in spite of the prevailing political realities. These transparency-related reforms are discussed in some detail in this overview and in the specific background Chapters, both within the public sector, and also enabling institutions of accountability outside of the public sector to play an effective role in providing checks and balances to the functioning of the public sector.

Broad Areas of Suggested Reform Priorities. More specifically, urgent challenges remain in a number of broad areas of governance. This necessitates identification of specific and concrete actions deserving priority in the short term – particularly in the coming 15 months up to the next elections, and then beyond.

We focus here on some of the general areas warranting reform, while in later sections we suggest a more detailed prioritization particularly focused on the very short term. This focus on prioritization for areas of implementation in this overview is consistent with the mission’s identification of the pending challenges of *prioritization* and *implementation*, and also is driven by the specific request from GoK to suggest priorities based on their plan of action (GAP).

In terms of general reform areas deserving focus in the short-to-medium in the near future, the following are included:

a. Procurement reforms – it is noted that an important Procurement Act has been adopted, yet crucial implementation is pending in this highly vulnerable area from the standpoint of corruption, where there are major gains that can be expected from transparency reforms.

b. Reforming the full ‘judiciary chain’. The challenge is beyond merely the weakness in one particular office or institution; instead the major vulnerabilities are of a more systemic nature, affecting the whole judiciary chain – in carrying out, finalizing and turning over high level investigations, in opening the prosecutorial process once an investigation has been finalized (and turned over to the Attorney General), in duly completing the prosecutorial process, and in the integrity and capacity of institutions such as the courts to adjudicate the cases in a fair and timely manner.

c. As a key pillar in the next set of actions and reforms, implementation of ambitious **transparency-related reforms**, such as adoption and implementation of a Freedom of Information Act, greater public disclosure on assets by public officials and legislators, etc.

d. Ensuring the full **independence of some key institutions** (a number of which have been constitutionally independent since the 1990s), such as various commissions (Human

Rights, electoral, etc), and the Central Bank, and also ensuring independence and protection of the media.

e. Further, accelerated progress is recommended in **regulatory reforms on the enterprise sector**, given the still prevalent very large extent of red tape and a myriad of licenses and regulations, as well as engaging in renewed efforts to **privatize state enterprises**.

f. Priority governance reforms in particular sectors, such as in addressing corruption in the health and transport sectors, for instance, where also concrete focus is needed in order to improve safeguards for projects and investments in these some key sectors. And addressing governance in the financial sector is also important, as is engaging more closely with the private sector.

Box 1. General considerations in a governance assessment framework

There are a number of crucial determinants of sustained economic development, among which governance and anti-corruption are included. Research and experience have shown that the quality of governance, including control of corruption, has a significant impact on growth and poverty reduction: on average, countries with better governance grow faster than countries with poor governance. Further, the effectiveness of Bank-funded projects is significantly impaired in countries with weak governance and high corruption. Unchecked corruption undermines the legitimacy of state institutions, strangles the private sector, increases inequality, and damages civil society. Governance work by the World Bank is aimed at helping countries lead in developing capable, transparent and accountable states and institutions, which can reduce poverty, promote growth, and contain corruption.

While often conflated, governance and corruption are not synonymous. Governance refers to the manner in which public officials and institutions acquire and exercise the authority to shape public policy and provide public goods and services. Corruption is one aspect of poor governance, involving the abuse of public office for private gain. Public office is abused when an official accepts, solicits, or extorts a bribe and when private agents give or offer bribes to circumvent public policies and processes for competitive advantage and profit. It is also abused through patronage and nepotism, the theft of state assets, or the diversion of state revenues. Corruption can also take place among private sector parties, and affect public sector performance, as when bidders may collude in a public procurement with intent to defraud the state.

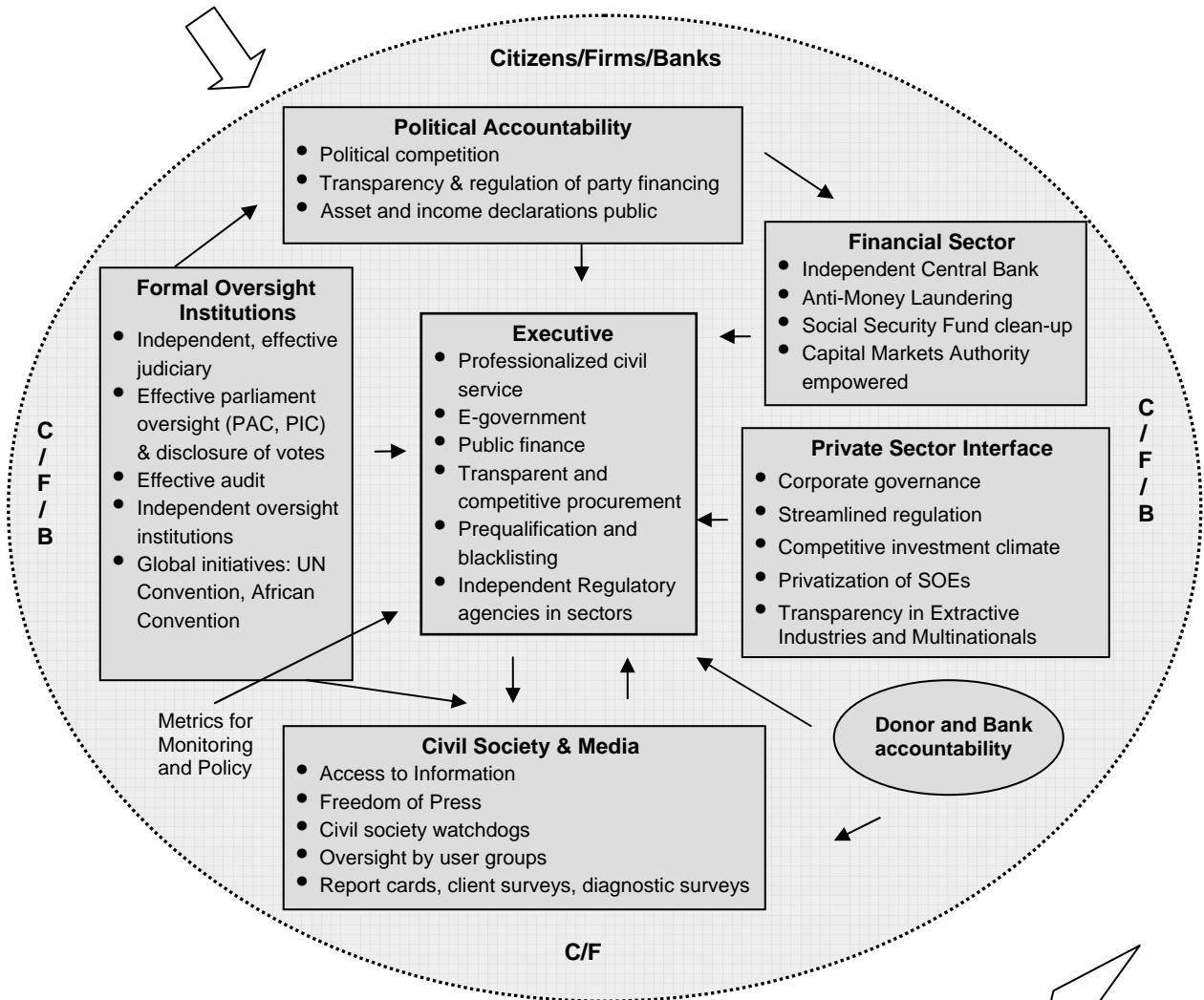
Corruption and governance are also intertwined, as corruption is often a symptom of poor governance, and grand corruption can fundamentally undermine governance, as for instance when corruption in security services or in the judiciary results in harassment or censorship to the media or tampers with the administration of fair justice. At the same time, it is evident that one cannot fight corruption merely by ‘fighting corruption’, such as through more and more legal drafting refinements, measures by fiat, anticorruption campaigns, creation of numerous new commissions and committees, and the like. These do not address the more fundamental determinants of corruption. For that, a broader governance framework is required.

Similarly, in order to address corruption concerns at the project level it is appropriate to improve project design and tighten safeguards during project procurement and execution through a variety of means, yet these alone that may not suffice in providing sufficient protection against corruption at the project investment level. Instead, such project-specific safeguards need to be complemented by system-wide reforms in key governance dimensions, such as in public financial management and procurement, transparency systems, and the like. Consequently, even from the narrower (than governance) objective of anticorruption, it is imperative to take a broader governance approach. Yet the specifics in terms of which governance areas require particular priority will vary from one setting to another and thus in-depth country study and tailoring is required. Further, governance cannot be understood ahistorically; the evolution of polity and institutions over time matters, as analyzed in background Chapter 2. Yet historical factors are far from deterministic. Worldwide experience shows that countries with similar historical antecedents can end up traversing contrasting development paths, the result of vastly differences in the quality of leadership and the implementation of far reaching reforms

A broad governance approach. This governance assessment note takes a broad governance approach, one which is multi-pronged, and attuned to the realities and suggested priorities for implementable action in Kenya. This is depicted in summary fashion in the schematic chart 1.1 below. Within a multi-prong approach to governance, there are a number of particular dimensions to be highlighted as high priority for focusing on implementation of reforms in the next stage, such as in procurement, in the financial and some other sectors, and in the judiciary. At the same time, there is a cross-cutting theme which could enable significant reform progress across many dimensions of governance and anticorruption, and which may be more consistent with the prevailing political realities (which for instance preclude constitutional change in the short term, or bold reforms in rule of law institutions), namely *transparency reforms*. Thus, there is a focus on transparency reforms as well in this governance assessment note.

Figure 1 A simple schematic Governance Framework

Transparency as one cross-cutting theme



**Multi-dimensional Reforms in Governance and Transparency
Matter significantly for Anticorruption, and Controlling
Corruption also matters for good governance**

Recommendations on specific priority actions: the near-term focus.

A number of reforms have been adopted in recent years, new laws have been enacted, and institutions to fight corruption have been created. Yet institutional and structural changes are still incomplete and the major challenge regards implementation. The annotated GAP matrix with specific staff comments that has been prepared in conjunction with this document not only suggests the many governance areas where the Government intends to take action, but it also points out overdue planned actions.

The current political context is rather sobering regarding prospects for any imminent bold or comprehensive sets of reforms, and even the resolve to implement partial or particular pending reforms, such as in the judiciary, are called into question. The long-standing inability to move forward with high profile prosecutions is symptomatic of serious resistance to reforms, at least in that sector. Such failures to move forward appear to be largely the result of an absence of political resolve rather than due to capacity constraints.²

The presence of some reformists in government presents potential windows of opportunity in some areas. Reform progress will not be easy, but by supporting agents of change it may be attainable. And the skill set in many Kenyan institutions, as well as their capacity to formulate plans of action as exemplified by the GAP, are assets.

For the next 15 months, a specific strategic path ought to be charted where the authorities, supported by other key Kenyan stakeholders as well as development partners, would focus on implementing a core package of well identified high payoff actions, which may require stewardship and leadership yet may still prove feasible within the current political realities.

The GoK, supported by Kenyan stakeholders outside the executive, the Bank and development partners, would all be encouraged to build up on ongoing efforts and implementing priority actions in their existing plans, focusing on attaining concrete results in the near term. At the same time, work would start on identifying the strategic approach towards a more comprehensive plan for the medium term, beyond the next elections. The Bank could help through the preparation of a country assistance strategy anchored on governance.

Towards criteria for prioritizing. In identifying a set of priority actions it is important to consider a combination of factors. First, the evidence on severity of the challenge in the area where the action is being considered (see background Chapter 3 containing the analysis of the metrics); second, an assessment of the realistic prospects for implementation in the short-term; third, the expected impact of the measure (or policy

² The fact that political factors and vested interests appear to be important drivers in blocking reforms in many areas ought not always imply an absence of capacity constraints. Prosecutorial capacity is wanting in Kenya, with the number of prosecutors, at less than 60 for all types of cases and crimes, being merely about one-half of just the number of investigators for corruption issues alone. But the decisions on maintaining such low prosecutorial capacity may also be partly political in nature. Further, overnight recruitment of a sleuth of additional prosecutors may not make a difference, as illustrated by the rejection by the Attorney General office of the investigative files turned over by the Kenya Anti-Corruption Commission (KACC) that implicated former Cabinet Ministers in the Anglo-Leasing scandal.

action ‘payoff’), and fourth, whether the proposed reform is ‘institutionally-demanding’ or ‘institutionally-saving’ in nature. Other factors constant, it is more effective to opt for ‘institutionally-saving’ reform areas and actions. Transparency-related reforms fall under this rubric –since it enables the citizenry to perform the ‘auditing’ function as also does a major reduction of licenses and red tape on enterprise. Some transparent and competitive modalities of privatization (e.g. transparent auctions) are also in this category. A priori it also makes sense to consider whether the priority was explicitly included within the GAP as a criterion. Yet since one of the strengths of the GAP lies in its breadth of coverage, and thus it does not prioritize, the fact that a particular reform initiative is listed in the GAP (which is highly prevalent) does not de facto serve well as a defining criteria for priority.

The priority list identified here, although constituting a very small fraction of all the measures listed in the GAP, still errs on the inclusive and somewhat longer side than optimal. This is deliberate, prior to discussions of these proposals in Kenya. For instance, a few measures included here below require parliamentary approval, which in some cases may be unrealistic (see discussion of anticorruption reforms in next section, and in background Chapter 4), yet in some other cases it may still be feasible, with some leadership around issue-based alliances, for legislative measures to be adopted.

For example, while divisions generated by the referendum in 2005, the dissolution of the original NARC alliance from the 2003 election, disclosures about past or more recent scandals, and the attacks on the media, have reduced the political authority of the government, they have also brought new issues to the fore (such as freedom of information) and generated new momentum and potential coalitions for reform. Yet at the same time a consequence of the above mentioned problems is that support for government in parliament is generally not strong, and therefore new governance and anti-corruption measures proposed by government may face opposition in parliament. In sum, there is a sobering current political reality to reckon with, although these complex and evolving realities do not necessarily mean that no measure will be adopted, but they do have implications for the appropriate balance and realism of priority actions being proposed in Table 1 below, for being strategic and selective, and for the specific suggestions on anticorruption discussed in the section that follows below.

Table 1: Priority Governance reforms for the next 15 months

<u>Responsibility/ Area</u>	<u>Short-term Action to be taken</u>
By the Executive	
Code of Conduct Transparency	Update the public on the status of wealth declarations by ministers, assistant ministers and senior civil servants, and of the verification process by the KACC, and complete and submit KACC report on the findings of the verification process about these with recommendations for appropriate action by the Cabinet Office.

<p>Procurement</p>	<p>‘Sunshine Principles’: All Ministries, Departments and Agencies to publish the information on contracts required by law on a Government website, including names of contractors, decisions of the Procurement Appeals Board on concluded cases, and information regarding bidders’ and contractors’ performance, and publication of tender outcomes</p> <p>Blacklisting companies: implementing current provisions in the law.</p> <p>Fast-track operationalization of the Public Procurement Oversight Authority with a Director on board, and ensuring independence and objectivity.</p> <p>Introduce a Vetting System (conducted by international firm, possibly with involvement of civil society) to pre-qualify Companies interested in bidding for Government contracts to address conflict of interests and fraudulent companies</p>
<p>Access to Information and Media</p>	<p>Engage stakeholders to finalize draft Freedom of Information Bill, with provisions for whistleblower protection, and fast-track submission to Parliament.</p> <p>Engage stakeholders to finalize draft Media Council Bill and submit to Parliament.</p> <p>Review results of an independent media review for media freedom and media development to be carried out outside of the executive, with view to implement an action program.</p>
<p>Transparency in Public Administration and in Statistics</p>	<p>Public institutions to publish salary structure, HR policies, procurement plan, performance contracts (including monitoring indicators).</p> <p>Enactment of the Miscellaneous Amendments Bill for public disclosure of wealth declarations.</p> <p>Operationalize financial management information systems.</p> <p>Implement recommendations of the IMF Report on the Observance of Standards and Codes on Data Dissemination</p>
<p>Independent oversight institutions</p>	<p>Ensure the full autonomy, independence and adequate funding of key oversight institutions (Human Rights, Electoral, KACC, the Law Reform Commission, etc.) as well as of the Central Bank, and safeguard the full independence of media institutions.</p>
<p>National Social Security Fund, and Financial Sector Institutions</p>	<p>Carry out a diagnostic audit of NSSF as input to the implementation plan of NSSF financial restructuring. If findings so warrant, forensic audit would follow.</p> <p>The NSSF to comply with the Retirement Benefits Act (RBA) and also comply with supervision by the RBA, including providing frequent and accurate financial reports to its members.</p> <p>NSSF to be required to employ professional and independent investment managers</p> <p>A time-bound reform program for Development Finance Institutions.</p>

	<p>State-owned shares in National Bank of Kenya and Consolidated Bank brought to point of sale.</p> <p>State employees prohibited from service on the board of directors of banks</p> <p>Table an Anti-Money Laundering Bill to Parliament</p> <p>Adoption by the Cabinet of a market-oriented financial sector reform strategy</p>
Budget	<p>Enhanced transparency and broader stakeholder participation in the forthcoming budget cycle (formulation, legislation, execution and audit), and address issues of tax concessions and exemptions, including transparent publication of list with all exceptions to remove discretion</p> <p>Monitor implementation of IFMIS to ensure clear sequencing of activities, better communication infrastructure and focus on capacity building, to ensure full operationalization. .</p> <p>Complete review of financial position of key parastatals, and start addressing contingent liabilities, and advance privatizations of parastatals.</p>
Competitive framework	<p>Implement major reduction in licenses on the enterprise sector, to end with an essential minimum</p> <p>Setting up the Privatization Commission and an effective competition authority.</p> <p>Complete the liberalization of fixed line telephony, and the privatization / concessioning of container handling at the Mombasa port.</p>
Real Sectors	<p>Service Charters and Performance contracts developed and published on the web with monitoring indicators, some of them from citizen scorecards.</p> <p>Reduce regulatory burden on trade and agriculture companies</p> <p>Establish and operationalize risk management functions and independent procurement review systems in key ministries (e.g., education, health, public works).</p> <p>Develop service delivery charters in all public service agencies, with particular emphasis on ethics and accountability, and using citizen reports cards to assess performance.</p>
By the Parliament	<p>Approve the Statute Law (Miscellaneous Amendments) Bill, 2006, which contains proposals to amend various laws pertaining to governance detailed in the attached Annex II, including legislation to increase the number of judges to hear corruption cases.</p> <p>Approve pending legislative reforms: Companies Act (which would do away with the concealment of wealth by public officials and politicians through ‘nominees’), Witness Protection Bill (with whistleblower protection) and the Political Parties Bill which would make political finance more transparent</p>

	<p>Finalize and approve new legislation: Freedom of Information (FOI) Bill (which would then make null and void the Official Secrecy's Act), as well as approval of the Media Bill.</p> <p>Approve an Anti-Money Laundering Bill.</p> <p>Bring all audit reports to date, in compliance with The Public Audit Act, and amend the Act to strengthen the Public Account's Committee (PAC) ability to impose sanctions and penalties in financial misconduct and non-compliance cases.</p> <p>Develop audit's post-implementation reviews by the National Audit Office, communicate the results to the PAC, and publish them. The Ministerial Audit Office to be empowered and provided mandate for ensuring implementation of audit recommendations.</p> <p>Publish parliamentary votes in a timely manner.</p>
By the Judiciary	<p>Complete automation of the recording of court proceedings, publication of judgments and courts statements, record management systems and case management systems.</p> <p>Establish open hearings</p> <p>Significantly increased rate of opening prosecution cases where investigations have been turned to the AG's office.</p> <p>Incorporation of Alternative Dispute Resolution (ADR) mechanism, and provision of legal aid schemes</p> <p>Publication of Service Charter for the Judiciary and the Police and establish and operationalize independent complaint reporting mechanisms that can also follow up on implementation of reform programs.</p>

On Anti-Corruption Priorities in the very near term.

Governance reforms are highly important to attain progress on corruption control. In that context, the priorities identified in Table 1 above are not only of high value to advance governance generally, and thus development, but also as a means to fight corruption. Nonetheless, given the serious corruption challenges that the country faces, it is also useful to complement the above governance actions priority list table with a brief discussion of priorities focused on the objective of addressing corruption, mindful of the significant overlap between the set of specific actions.

In the previous discussion on the criteria for prioritizing actions, we mentioned how important it was to focus, among others, on whether realistically the priority action has a high likelihood of being implemented over the next 15 months. From that perspective, it would follow that generally preference ought to be given to actions or reforms that require new legislation or policy documents that need legislative approval.

This implies that particular consideration may be given to:

- Measures that implement laws that have already been enacted, such as the Anti-Corruption and Economic Crimes Act, the Public Officer Ethics Act, and the Procurement Act. For instance, consideration of concrete actions regarding: i) the implementation by the KACC of the provisions related to compensation and recovery of improper/corrupt benefits under Part VI of the Anti-Corruption and Economic Crimes Act; ii) systematic reporting and monitoring of the corruption cases that have been investigated; iii) identifying and reporting on actions taken by the Attorney General to prosecute these cases; iv) identifying the stages at which each of the prosecutions is and specifying what is holding back conclusion of the cases currently pending before the courts, and what the AG's office is doing about each case, and, v) more transparent approach to procurement including but not limited to electronic placement of government contracts and other relevant procurement information.
- Measures that could be implemented through subsidiary legislation that may be made through ministerial discretion. For instance, the drafting of the financial regulations needed to complete the process of financial reforms already undertaken under the public financial management act, procurement act and the audit act.
- Measures that involve bureaucratic and administrative re-organization such as digitizing and making government forms available in electronic form; electronic recording of court proceedings, computerization of registries-Land and courts most prominently.

Unfortunately the legislative is not the only institution that is often a bottleneck for implementing more decisive reforms in the near term. The judiciary poses at least as much of a constraint. In fact, just as this governance note is being transmitted to the Kenyan authorities for their review and discussion, the Attorney General has sent the investigative files of 12 prominent people, (including former Cabinet members), that have been recommended for prosecution by the Kenya Anti-Corruption Commission, back to the KACC. Similar episodes have taken place in other high profile cases in recent months (and years), with no progress on the prosecutorial due process, exemplifying the serious weaknesses in the judiciary chain. And this latest episode may further fuel the crisis of public confidence in the ability of the judicial chain to deal with allegations in any high level corruption cases. As the electoral cycle evolves, the prospects for serious reforms in the judiciary institutions in the next 15 months is less likely, due to the absence of a critical mass of reform champions and the charged political atmosphere ahead of the elections. But any meaningful and lasting improvement in Kenya's governance system must involve effective championing of judicial reforms. In the short term, it is important for measures to be undertaken to try and restore citizen's confidence. Yet at the same time, starting to focus on the medium term is also of particular importance. The discussion in this and the previous section, focused on short-term prospects and practical priorities for action, did not address broader strategic

considerations of a governance strategy for the medium term. We turn to some of these medium-term considerations immediately after the next ‘bridging’ section.

Bridging the Short Term with the Medium Term: A Thematic List of proposed governance reforms

The GAP matrix developed by the GoK is an important document containing governance measures in many areas. At the request of the authorities, we have reviewed and commented extensively within the GAP matrix, in a companion document as input for further discussions with the Government. Here we review and present some of the key recommendations included in the background chapters. This complements the much briefer Table 1 in the text above indicating some priority short-term actions, as well as complementing the much longer GAP matrix.³

i) Rule of Law, Judiciary and Legal Reforms-

The main weaknesses of the judiciary in Kenya are well known, as are some of the options available for judicial and police reform. However, reforms are taking long to be implemented and serious deficiencies threaten this sector. Moreover, there seems to be a concern regarding the implementation of the rule of law in all the aspects covered in this report, where the Judiciary is pointed out as one of the main constraints for reform.

Strengthening the legal and institutional framework to fight corruption.

- Steps to enable an effective Attorney General's Office which will follow up on prosecutions in well investigated cases of high profile corruption
- Increasing the rate of opening up prosecution cases where investigations have been completed and turned over to the AG office
- Eliminating legal challenges arising against corruption prosecutions
- Medium and long-term program to rationalize the multiple anti-corruption institutions either by 1) creating an anti-corruption focal point to provide overall political leadership to reforms or 2) clarifying mandates and smoothing out inter-agency conflicts through further legislative and administrative reforms-including salaries and terms of service.

Enhancing independence, transparency and efficiency of the Judiciary:

- To facilitate Access to Justice: 1) the establishment of small claims courts; 2) the provision of a legal aid scheme; 3) the incorporation of Alternative Dispute Resolution mechanisms in the court proceedings, and 4) a national legal literacy campaign targeting schools and colleges.
- To secure the autonomy and professionalism of the bar: 1) restructure the office of the Attorney General; 2) involve the Law Society of Kenya in Judicial Reforms; 3)

³ In fact the detailed list of recommended reforms provided in this section is a subset of the longer list in the Government Action Program.

professionalize prosecutions in the country by increasing the number of law trained prosecutors and phasing out the police as prosecutors, 4) Set up and operationalize transparent mechanisms to review controversial judgments by Judges and Magistrates

- To improve the efficiency of the court, automate recordings of court proceedings, and registries to improve record management.
- Review of the Governance, Judiciary, Law & Order Sector (GJLOS) program, where development partners are involved, in order to systematically work through the recommendations of the three reviews that have been conducted thus far. These point to a rather sobering picture in terms of the serious bottlenecks plaguing this sector-wide program. This would have lessons for government institutions as well as development partners.

To fight graft and improve accountability of the police, it is recommended:

- Follow up on the announcement made by the Minister of Justice this week at the workshop on Human Rights and establish an independent police complaints commission that can also follow up on the implementation of the reform program.
- To advance in the implementation of current reforms to improve the performance of the police and especially fight graft within the force.

To enhance transparency of Judiciary and Police

- Publication of Service Charter for the Judiciary and the Police and establish transparent complaint mechanism
- To enhance transparency of the Judiciary: i) Open hearings; iii) publication of judgments and courts statements and iii) use of information and communications technology for case management and monitor progress.

To enhance transparency of Political Finance. The draft Political Parties Bill of 2006, which is pending cabinet approval before submission to parliament, contemplates state financing of political parties through a “Political Parties Fund”, publishing party funding sources (including from private contributions) and an annual audit of party accounts. It is recommended that the draft is reviewed to address concerns expressed by stakeholders and that the passing of the Bill is fast-tracked so it can be approved before the elections.

ii) Transparency of the Public Administration

The e-Government strategy paper encompasses a state modernization and transparency program launched in March 2004. This system will house the digitized documents and data mining applications that will be required under the Freedom of Information Act. We encourage the GoK to continue integrating implementation of the e-government program with process reforms, streamlining and consolidation.

To improve collaboration between government agencies:

- Update web information more regularly and publish on the website reporting requirements/timetables and evaluation/audits on implementation progress. Develop specialized publications for rural communities and in the local language.

- Build on the UNDP-supported district connectivity pilot program in eight districts. Districts to collect and send information to the Ministry of Planning.

To improve competitiveness and reduce transaction costs

- Decisive implementation of the de-licensing reform program, moving rapidly towards a regime devoid of excessive and burdensome regulations on enterprise
- In coordination with the administrative simplification process, roll-out business registration, license and permit application online, and data warehousing.
- Engage in partnership with stakeholders and the private sector in the implementation of the e-government program.
- Privatization of State-owned Enterprises

To provide a forum for citizens' participation in government activities

- In the absence of data and privacy protection laws, develop high standards and internal guidelines for privacy and personal data security against piracy and hacking.

Enabling public access to the declarations of assets of Public Officers. The GoK has committed in the GAP and in other public pronouncements that they are keen on making the declaration of assets accessible to the public. The GoK could frame this important commitment within the broader framework of increased transparency, closely linked with the FOI Bill and the abolition of the Officials Secrets Act. It is also important to let the public understand the procedures of accessing such information and strengthen capacity within the KACC to verify its content and monitor them.

Public Service Pay Policy. Public institutions to publish the salary structure and HR policies on official website.

Monitoring and publication of performance contracts. To increase transparency and results-based management, performance contracts of Ministers, permanent secretaries, heads of departments and senior officers in local governments be published on the official website and results reporting institutionalized and disseminated widely.

iii) Public Financial Management and Fiscal Transparency-

The accomplishments of PFM reforms thus far, though encouraging, are not enough to assure sustained sound fiscal management, improve governance, and improve the delivery of public services. The MTEF process and other sound budget practices that have evolved over the past three years need to be codified and included in the legal framework. The planning and provisioning for contingencies is still weak partly due to poor information. Effectiveness of external scrutiny and audit is poor.

To increase effectiveness of public expenditure

- Complete the review of financial position of key parastatals and start monitoring and planning for contingent liabilities, and also advance privatizations of parastatals.

- Carry out an audit review for the low absorption of public funds in the Ministry of Roads and Public Works and Ministry of Health. Implement recommendations within the ongoing fiscal year to ensure that at least 75 percent of the released funds are utilized. Develop a policy for regularly conducting Public Expenditure Tracking Surveys and evaluation of selected programs.
- Closely monitor the recent implementation of the IFMIS to ensure its smooth operation and realize its full potential. Ensure full operationalization of the payroll database and its integration with the IFMIS.

To enhance effectiveness of external scrutiny and audit

- Bring all the audit reports to date in compliance with The Public Audit Act 2003 and amend the Audit Act to strengthen PAC's ability to impose sanctions and penalties in financial misconduct and non-compliance with financial rules cases.
- The National Audit Office should develop audit issues' post-implementation review process and results of such reviews communicated to the PAC and published. The Ministerial Audit Committees be empowered and provided mandate for ensuring implementation of audit recommendations.
- Ensuring the full independence of key institutions (Human Rights, electoral, etc), as well as the crucial institution of the Central Bank, and also safeguarding the full independence of media institutions.

To increase fiscal and revenue transparency

- Expand fiscal data to cover general government, including extra-budgetary funds and operations of Fund Accounts and Semi-autonomous government agencies. Publication of fiscal data mandatory, within specified timeframes/ modalities.
- Budget documentation, reports from Parliamentarian Committees (PAC and PIC) and audit reports should be published and posted on the official website together with a tracking system to monitor implementation of recommendations.
- Establish a consultation process on policy formulation, planning and budgeting to engage external stakeholders more actively in the budget process early on.
- Prepare an annual tax expenditure budget listing tax concessions and the estimated revenue loss from each concession. Incorporate remaining exemptions and publish a list with all exceptions to remove administrative discretion.

iv) Procurement-⁴

A milestone in Public Procurement Reforms in Kenya was attained with the enactment of the Public Procurement and Disposal Act, 2005. It is recommended that as a priority the GoK takes the following steps to show its commitment to procurement reform:

Inject sunshine principles in bidding and procurement contracts, including:

- Ensuring all Ministries, Departments and Agencies publish the information on contracts required by law on a Government website. This includes the amount of contracts, winning bidders, procurement opportunities, as well as decisions of the Procurement Appeals Board on concluded cases and information regarding bidders' and contractors' performance. Treasury in the Ministry of Finance should monitor compliance and enforcement of the law.
- Ensuring the website is working effectively and is accessible to the public. A communication campaign should be carried out, including infomercials with the website address and encouraging people to visit the website.

Introduce a Vetting System to pre-qualify Companies interested in bidding for Government contracts to address the issue of conflict of interest and fraudulent companies who win contracts but unable to perform the work.

Blacklisting Companies: The Government should implement the current provision of the law on "Blacklisting" companies. The mechanisms and/or procedures to take such an action must be clear. Although such a provision exists in the current procurement law, the mechanism to report and enforce it has not been established by Government.

Fast-track operationalization of the Public Procurement Oversight Authority with a Director on board to ensure planned reforms are institutionally anchored.

v) Private Sector Climate, Regulatory Environment, and Privatization-

To scale down the role of the public sector and bureaucracy and improve investment climate it is suggested:

- *Scaling down role of public sector.* Set up the Privatization Commission under the Privatization Act. It is recommended that the GoK demonstrates a strong commitment by publishing a program for privatization.
- *Licenses.* Establish a time bound plan for implementing the key recommendations of the report reviewing the licenses required by businesses. Instead of simplifying 700

⁴ The World Bank's Department of Institutional Integrity (INT), its project investigative arm, recently concluded a Detailed Implementation Review (D.I.R.) of the World Bank's portfolio in Kenya. The D.I.R. reviews cases of corruption in some Bank projects, and presents recommendations, some of which may have relevance in terms of procurement and related issues in general. The findings and recommendations are not addressed in this Governance Note at this stage, but instead are contained in the D.I.R. itself, which GoK is currently reviewing.

licenses more, a better approach would be doing away with them all and re-introducing only those that can be justified and reviewed by an independent panel.

- *Land issue.* It is recommended that the various land laws be consolidated and updated, and land institutions be overhauled with a view to improving paper management and computerization of registry records. Supplementary measures such as title insurance and the use of arbitration clauses and alternative dispute resolution (ADR) mechanisms could be pursued to improve the confidence of lenders.
- *Contract enforcement.* The reform of court procedures is also important, with an initial focus on *ex parte* injunctions and listing requirements. Active case management techniques, linked to alternative dispute resolution (ADR) are worth introducing as a mechanism to ease the pressure on courts. Contract enforcement will also be supported by the expeditious completion of the ongoing computerization of the companies register, including registration of pledges/debentures.
- *Customs reform.* The modernization program prepared by Customs is reviewed so automation takes place as part of a wider set of comprehensive reforms, aimed at introducing modern customs concepts inline with the principles embodied in the WCO revised Kyoto Convention on simplification and harmonization of customs procedures.
- *Corporate governance.* The revised Companies Act is passed and enacted expeditiously by Parliament, including provision for: a) Safeguarding the effective practice of good corporate behavior; b) Protection of minority shareholders' rights; c) Training and education of shareholders and the public, especially on the benefits of transparency and ensuring effective performance; and d) Proper assessment of directors and the boards.

vi) Financial Sector Governance-

Privatization of the Government's remaining stakes in the banking sector. State involvement in the Kenyan banking sector has a long history of producing poor governance resulting in the misallocation of resources and the accumulation of losses due to state directed and/or corrupt lending practices. It is our view that:

- Effective and long term reform of this governance problem is only possible through exit of the state from the banking sector of all Government-controlled stakes in KCB, NBK (prior to recapitalization), and consolidated by means of transparent tenders.
- State employees or contractors should be prohibited from accepting service on the board of directors of banks.
- Complete the review of the DFI sector and implement the restructuring of the sector with a view to providing narrowly targeted subsidized services only to selected disadvantaged sectors.

Strengthening the governance of the National Social Security Fund (NSSF). This requires immediate attention. The following actions are recommended to pave the way for NSSF restructuring:

- A diagnostic audit of NSSF is urgently needed to provide a strong factual basis upon which to base a plan to implement a financial restructuring of the NSSF. A forensic audit may be needed depending on the findings;
- Governance of the NSSF should be reformed prior to any financial restructuring. Trustees of the NSSF are to be elected by its members and it should (post-financial restructuring) cease to be a state corporation under the control of the MoL;
- The NSSF should be required to employ professional and independent investment managers, with trustees and NSSF management's role restricted to selection and evaluation of investment managers' performance as per objective benchmarks; and,
- The NSSF should be made to comply with the Retirement Benefits Act and supervision by the RBA, including providing frequent and accurate financial reports to its members.

Strengthening the legal and regulatory framework for Anti-Money Laundering (AML). The CBK has taken a few steps towards implementation of its AML. However, without completely clear and specific legal authority, and in the face of a corrupt court system, the ability of the CBK to act expeditiously and effectively in cases of financial crime is severely curtailed. It is therefore recommended that:

- The authorities make a concerted effort to ensure the passage of the AML Bill as soon as possible given concerns raised with the Charterhouse Bank. The Bill was scheduled for presentation to Parliament in June but this has not yet been tabled.
- To re-enforce the provisions of the proposed AML Bill, it would be important to incorporate as amendments of the Banking Act relevant enforcement powers relating to AML. The authorities are urged to move ahead with the recommended amendments to the Banking Act as expeditiously as possible.
- There is an urgent need to strengthen the capacity of the judiciary to enforce financial sector related laws and regulations.

Strengthening the autonomy and accountability of financial sector supervisors. By vesting most of the responsibility for the stability and solidity of the financial system with the Minister of Finance the current legal framework undermines the responsibility of financial market regulators and weakens confidence in the financial system and its potential contribution to economic growth. It is recommended that:

- Full independence and accountability of the CBK in line with international best practice with full and exclusive jurisdiction over banking sector activities.
- Similar authority to be vested in the CMA by re-instating the CMA's exemption for the state corporations Act.
- The Minister of Finance to follow through on his proposal to provide the Insurance Commission with greater autonomy and responsibility.

- The NSSF should be obliged to fully comply with the RBA legislation and the responsibility for supervising NSSF should be fully vested in the RBA.

Financial Sector Transparency. Recommendations of the IMF Report on the Observance of Standards and Codes on Data Dissemination of Kenya, 2005:

- Delineate and assign clearly the statistical responsibilities of the CBS, the MOF, and the CBK and allocate sufficient resources to data-producing agencies to support implementation of their work program.
- Make more effective use of the Internet to disseminate data and metadata and seek feedback from users regularly to better meet their needs.
- Carry out regular revision studies to improve the statistical process and publicize the results, along with the underlying revision policies.

vii) Governance & Anti-Corruption in the Real Sectors

Corruption and weak governance have different manifestations depending on the structure of the sector. Available surveys capture better some type of corruption than others and therefore it is difficult to establish comparisons across sectors. We welcome the initiative of the GoK to carry out targeted risk assessments and develop Service Charters for each sector. In this sense the anti-corruption campaign at NWSC and AWSB could serve as an example for other sectors to follow, with results such as: dismissal of corrupt staff; improvement in hiring and terms of service; billing back log fixed and billing timeliness improved; 30,000 meters installed to identify illegal connections; customer charter developed, transparent procurement process, and performance contracts signed by directors, management and staff, Codes of Ethics / Codes of Conducts and citizen report cards to assess the performance and level of services by water providers. The “Governance and Accountability Action Plan 2005-2010” developed by Ministry of Education is also encouraging.

Although, specific recommendations have been made in the working papers for the Education, Health, Transport and Communications, and Water sectors, common weaknesses have been observed mainly related to weak governance structures, inadequate technical capacity in the areas of financial management and procurement, lack of enforcement of some anticorruption measures and implementation of sectoral reforms.

To enhance transparency and accountability in the sectors, it is recommended to:

- *Review governance structures of sectors.* For example, it is extremely crucial that procurement roles and responsibilities at the various levels in MOH and KEMSA be clearly set out in a clear policy document. It is essential that MOH enter into a formal relationship with KEMSA, which sets out obligations of the parties with clear performance targets. To consolidate gains in sector governance through the ongoing water sector reform, there should be full transfer for service provision responsibility and accountability to Water Services Boards (WSBs).
- *Integrity Divisions* in each sector should be strengthened, Code of Conducts developed and published and a communication campaign carried out.

- Develop *disclosure policy* and implementing arrangements to manage the flow of information, for instance in the Health sector.

To improve service delivery and performance based management

- *Sector-wide service delivery charters* have been developed for some sectors such as Transport and Water. Service delivery charters should be completed for all sectors, published and monitor compliance and customer satisfaction across the different sub-sector agencies.
- Use *Citizen Report Cards* to assess the performance and quality of services and monitor progress. Publish progress reports periodically following up on implementation results with performance indicators such as improving customer perception in annual surveys, including the Kenya Bribery Index and timely financial audits.
- *Advance professionalization of civil service.* The Ministry of Education (MOE) and the Teachers Service Commission (TSC) must develop and implement new staffing norms to guide the appointment of teachers. There is a need to establish field agents with delegated functions, together with a national Appeals Tribunal to adjudicate on recruitment issues. Professional committees are also needed to deal with misconduct cases involving employees.

To enhance efficiency and transparency in procurement and controls

- Preparing a procurement manual and improve procurement planning are a priority to reduce delays in awarding contracts and pay suppliers of goods on time. The Procurement Manual will be consistent with the Public Procurement and Assets Disposal Act and should include service standards for processing procurement. Procurement plans should be published on the official website and used as a management tool.
- Pre-qualifying suppliers and sectorial Ministries to have more control of the procurement of works. Currently works procurement is carried out by the Ministry of Transport and Public Works on behalf of Sectorial Ministries. In the case of the health sector, MOH should prequalify suppliers every two years to bid for a 2-year supply of health sector goods
- Procurement and financial management staff need training, coaching, and mentoring
- Effective internal audit function is also very weak in the sectors. There is a need for a fully staffed internal audit unit at each Ministry with regular reports to its management. Audit reports should be published on the website.

viii) External institutions of accountability – Parliament, Media, Civil Society and Access to Information

Mobilize all Kenyan stakeholders in the fight against corruption. It is our recommendation that a Public Complaints Unit handling mechanism is put in place to

report anti-corruption cases and a communication campaign to raise awareness and sensitize the public on the use of complaint channels.

Support to Parliament for effective oversight of public financial management. To enable the Parliament to play its oversight role in the area of economic management more effectively, it is recommended to:

- *Extend the role of Parliament in the budget process and provide capacity building for relevant Committees:* i) Provide technical and logistical support for effective oversight by the Public Accounts and Public Investment Committees to improve their responsiveness to audit findings and follow up of their recommendations as well as addressing the backlog of reports; and ii) support to an Independent Budget Office to ensure that Parliament has access to independent budget information and analyses.
- *Provide specialized training:* capacity building at the individual level (Member of Parliament and parliamentary staff) and institutional level, specialized training in macro-economic and financial management, with a particular focus on budget process (budget preparation, budget execution, and expenditure control) and provide objective, timely and non-partisan analysis necessary to inform economic, budget and other policy decisions that may be made by Parliament.
- *Provide technical and logistic support* to strengthen the relationship between the PAC and the Office of the Controller and Auditor General to ensure the recommendations of the PAC are implemented by Government.
- *Enhance transparency of Parliament.* Publish recommendations of PAC and PIC and other Commissions on the official website. Carry out follow up reports on implementation of recommendations and publish them on the website. Publish voting results and other relevant information about performance of Parliament. Engage different stakeholders in discussions about important reforms.

Access to Information and Media. The initiative of the GoK of preparing access to information legislation is a crucial step towards improving transparency in all areas of public administration. We encourage the GoK to:

- Fast-track development and passage of the FOI Bill, with provisions on whistleblower protection, as a priority issue to be accomplished this calendar year;
- Develop a policy on records management so public servants and the citizenry are clear about which records are to be digitized and what the public can have access to. As part of the e-government program, digitization of application forms and other documents to be available on official websites;
- With close involvement of relevant stakeholders, review Draft Media Council Bill and adopt it. It would be better if the FOI Law is enacted before the Media Bill to access information before regulating its use and dissemination;
- Provide training and capacity building programs for journalists in investigatory techniques and in coverage of technical policy issues such as the budgets and government's financial processes generally; legal reform; court-proceedings; environment and science issues.

ix) Measure Results and Assess Overall Progress-

The Government is to be commended for their commitment to undertake various governance and consumer surveys – report cards, score cards, diagnostic surveys on corruption. At the same time, it is recommended that this process be an inclusive one of all stakeholders and the Government commits to publish the data so it can be accessible by the citizenry, including time bound action plans that can be monitored for progress. This issue is addressed in the empirical Chapter 3 and its annex in this report.

Towards the medium-term: what would a governance-anchored development strategy entail in a country setting?

Given the historical as well as current political and institutional realities discussed previously, in addition to identifying priority actions for the short term, it may be as pertinent to devote the upcoming period to help identify a *coherent medium term governance and anti-corruption strategy and reform program*.⁵ Worldwide experience suggests that in the immediate aftermath of elections –during the ‘honeymoon’ period— often (but not always) there are opportunities to get serious and more broad-based reforms underway.

Anticipating such a potential window of opportunity, the next 6-to-12 months could also be dedicated by Kenyan stakeholders and development partners to formulating some clear ideas on the nature, depth and scope of the measures needed to effectively deal with governance challenges and corruption in the post-election period. This endeavor should also benefit from an assessment of what has not worked well in the reform strategies and donor assistance approaches of recent times. In this section, we suggest a few preliminary thoughts for further discussion focusing on a few selected points. And in the spirit of mutual accountability, the following section below suggests some discussion options for the manner by which an institution like the World Bank can engage with a country within a governance-anchored strategy.

Generally speaking, a country facing the challenges that Kenya faces – as in the case of dozens of other countries – may benefit from considering a governance-anchored development strategy. Such a strategy would imply placing center stage the challenge of governance in a setting where the institutional context is highly vulnerable. Placing governance increasingly center stage would be an important mean to attaining the multiple developmental objectives of robust and sustained income growth, poverty alleviation, service delivery, as well as addressing socio-economic inequalities. It would also enhance the country’s global competitiveness and to foreign and domestic investors.

A governance-anchored strategy would put significant emphasis on enhancing the performance, transparency and integrity of public sector institutions, and would provide an enabling environment for institutions of accountability outside of the executive to

⁵ This should obviously also include the refinement and integration of various strategies that have been launched in recent months, and addressing issues that go beyond the central government to subnational bodies, the private sector, and others.

exercise their key accountability functions, strengthening the checks and balances in society and on government performance. The state's focus and ability to provide such an enabling environment for such external institutions of accountability to flourish and effectively perform their checks and balance accountability functions would be a key feature of a pro-governance country strategy for development. The external institutions of accountability include civil society, NGOs, faith-based organizations, associations of women, youth, and villagers, as well as the legislative –parliament–, and, of course, the media.

Further, a rigorous approach to implementing a governance strategy implies much more focus on the private and financial sectors than is commonly the case. Historically public governance has been associated almost exclusively with institutions within the executive and with traditional Public Sector Management approaches. Yet in reality matters of governance in the financial sector for instance can have a major impact on public governance (e.g. where independence of the Central Bank is not fully safeguarded, or there is lax banking supervision and insider dealing).

One key instrument at the disposal of the state to provide such enabling environment is obviously the democratic transition process itself, where Kenya has made progress in recent times. Another key instrument is the pro-active and effective provision of information to the citizenry—and facilitating full access to information in urban and rural areas through readily accessible channels, as well as implementing pro-transparency reforms in the economic, institutional and political arenas. These are all areas where significant progress is still ahead for Kenya. The fair and effective functioning of the rule of law institutions is also paramount, and an enormous challenge at present for the country.

Governance and anti-corruption are not additional 'sectors', as in the case of education, health or transport. Consequently, applying an enhanced 'governance and anti-corruption lens' to public expenditure programs within a developmental framework would not entail having to divert much needed resources from, say, social sectors to 'governance'. Instead, governance and anticorruption become an 'umbrella' concern, or lens, through which development decisions are made. In fact, a governance lens effectively applied to a public expenditures program is likely to typically imply some reallocation of expenditures away from the defense towards the development sectors, and, within development sectors, is likely to result in a more pro-poor expenditure profile – more expenditures on low cost basic rural clinics, rather than the lion share of expenditures being swallowed by a few expensive hospitals in the capital city. It also implies focusing on opportunities for generating cost savings, and not just on raising revenues.

Similarly, a governance concern would entail providing less support to some highly inefficient industrial state owned enterprises, which are a burden to the average Kenyan and an obstacle to private sector development. The financial hemorrhage in some prominent Banks where the State still keeps control is also a tax on the average citizen and on the poor, since it can entail misuse of public funds. For these governance as well

as efficiency reasons financial sector privatization is desirable, and consistent with a governance-anchored development strategy.

Further, a heightened focus on governance, rather than implying major additional expenditure outlays to support governance, has the potential to prove a net ‘saver’ for the Treasury. First, such savings would be the result of less budgetary and public investment leakages and financial and asset theft, which still appears to be significant, at least in some sectors. Second, savings would be generated through less cost over-runs in programs and projects, and through the use of more appropriate technology of choice in project design as well as through lesser collusion among firms competing for procurement awards with the intent of defrauding the state. Such governance lens would also enhance revenue mobilization, through increased economic buoyancy (thanks to improved governance) and less evasion in taxes and customs.

An enhanced focus on a governance-anchored strategy of development would also have substantial implications for the World Bank’s strategy in particular, and possibly for the development partners more generally – the latter particularly given the importance of development partner alignment.

Subscribing to the notion of supporting a country’s own development programs and reforms, a development institution such as the World Bank would want to focus on a governance-anchored country assistance strategy where the country chose to take such development path.

Mutual Accountability: what options may such a strategic development path entail for the World Bank?

Reports by many donor agencies have tended to focus almost exclusively on what the aid recipient government ought to do. Relatively little attention is often given by some agencies to the roles and responsibilities of institutions outside of the executive, and frequently there is scant treatment of what the aid provider can or ought to do differently. At present there is significant discussion within the World Bank as to the implications of engaging more deeply with countries on matters of governance and anticorruption, and in particular about the desirability of operating differently in the front lines supporting governance reform efforts in countries where governance has been identified as a priority. Thus, these ten tenets below ought to be viewed as considerations for discussions, and may still evolve and benefit from further adaptation to the realities of operating in Kenya. Yet for the same reason that some thoughts were suggested above on the desirability of initiating work on strategic options for Kenya’s medium term, it is also timely to initiate the process of elaboration of possible strategic options for how the Bank responds, and to discuss possible options with the authorities and with the development partners.⁶ Some of the specific suggestions in Annex 1 below may resonate, others may not be fully applicable in this setting.

⁶ In fact some of the ten points suggested below may be found of relevance by development partners to also consider.

Annex 1: Potential Elements of Implications of a Governance Strategy for the World Bank⁷

First, governance as the integrating theme. The main approach of a governance-anchored strategy may entail marshaling much of the Bank's resources and instruments -- lending, research, technical assistance, policy dialogue, convening power and external communications -- for the purpose of enhancing good governance as the primary strategy for poverty reduction. Within such governance focus, reducing corruption would be a very important component.

Second, deployment of skills and related resources to deepen the engagement on governance with the country in the front lines. Among others, this would mean structuring and decentralizing Bank staff organizationally to promote governance reform. The work of a field office would be structured to bring governance and anticorruption to the forefront of the Bank's agenda. This would imply attracting experienced governance experts/advisers in the field, with expertise in governance broadly defined, and not merely in Public Sector Management. One of the field-based Governance Advisers could be part of the senior management team, responsible (in liaison with the Country Director) for integrating governance and anti-corruption into all aspects of the Bank's program, seeking entry points for governance reform through close client relationships, and bringing greater attention to on-the-ground political economy analysis into the Bank's country strategy.

Third, designing a portfolio of program and project assistance where a governance lens is applied to each operation and to the overall portfolio, strategically. For instance, if a sectoral operation in education is being prepared, the question would be posed at the time of project preparation inception: how does the program support sector-wide governance and integrity enhancement measures such as institutionalizing the further adoption of integrity into the curricula? Or the adoption of an anti-corruption program to ameliorate the high levels of bribery prevalent for teacher certification or for recruitment, which exist within institutions such as Teacher Associations, or in exam grading? Or in health, how to mount an effective program to address theft of funds, or the lopsided expenditure pattern between major hospitals in the capital vs. rural clinics, for instance? A governance lens applied by the Bank's strategy would not imply redeploying resources away from funding investments in the traditional development sectors. Instead it implies refocusing the lens through which the objectives of such sectoral programs are viewed. This, in turn, implies a different way of vetting projects and programs (even when the way one compares alternative projects *within* a sector), and in designing them (e.g. safeguards, capital intensity), and in executing such programs and projects (e.g. e-procurement).

Fourth, lending composition linked to governance progress. The nature and volume of Bank's assistance would be in part determined by the Government's demonstrated

⁷ Note that some of the treatment in this section is somewhat detailed for external discussions in terms of internal World Bank issues, and therefore can be reviewed very quickly or followed through its main headings – which convey the sense that a governance strategy has mutual accountability implications.

commitment and concrete actions to improve governance and address corruption. Calibration between the nature of governance challenge, and direction of the trend, would also take place vis-a-vis the type of instruments of Bank assistance (investment project, sectoral operation, budgetary support), and also with respect to the identification of the key sectors to focus on supporting.

Fifth, strengthening the demand side of institutions of good governance. This could take place through trust and other grant funds, helping strengthen institutions dedicated to improving governance, and to enhance the demand side for good governance through supporting public participation and facilitation, as for instance at the community level. A possible initiative would be to provide grants to establish a 'Partnership for Governance Reforms', which would be a joint effort by Kenyans and development partners to create a "center of excellence" for governance reform in Kenya. Other ongoing initiatives in some countries include spearheading a dialogue to protect the legal rights of the media (see for instance reference to the Media sector review among the priority actions proposed in Table 1), providing funding for the implementation of the Freedom of Information laws, training civil society groups such as NGOs involved in procurement or in Bank project monitoring. In this context, it would be important to consider developing even closer relations with parliament, faith-based organizations, and business associations, both at the national and the local levels.

Sixth, organizing World Bank's upstream work around special "breakthrough" themes that further governance-related objectives in country work. The Bank's research, technical assistance and policy dialogue efforts can be organized around "breakthrough" themes, i.e., key areas of governance reform in which a decisive breakthrough is necessary to change mindsets, as a prelude to action.

Seventh, considering the creation of a field-based Anti-Corruption Committee that screens all proposed Bank projects, and also provides inputs to sectoral teams on safeguards for design and implementation.

Eighth, Anti-Corruption reviews for all operations. Each lending operation would develop an anti-corruption action plan that details how the project is designed to enhance governance in its particular sector, the benchmarks for achieving these results, and the mechanisms within the project to ensure the integrity of the use of the funds.

Ninth, full transparency and public oversight in Bank-funded projects and their anti-corruption plans. All anti-corruption plans would be posted on the Bank's external website, as well as all financial information regarding the project (including procurement, disbursement, unit costs, etc.). Transparency initiatives by the field office, such as the Public Information Center in the Nairobi office, are also important. Further, partnership with civil society can be envisaged for independent monitoring of the implementation of those anti-corruption plans.

Tenth, specifically safeguarding development projects against corruption. The previous suggestions to create a field-based Anticorruption committee and performing

anti-corruption reviews of all operations would be two prongs in a strategy to proactively safeguard development projects against corruption. In this context, the specific recommendations of the Detailed Implementation Review (D.I.R.) for Kenya, as well as the Bank's Management Team Response and the Government of Kenya's response, provide more specialized and pertinent detail than what is covered here, and would warrant particular consideration.

The specific initiatives to safeguard the integrity of Bank operations are obviously of high priority. This is not only due to the fiduciary and reputational risk entailed in corruption in donor-funded projects. At least as important is the developmental cost of expending loan resources where corruption takes place. Lessons from research and experience indicate that where there is poor governance and corruption, projects – which implies additional country indebtedness - tend to be much less effective. At the same time, it is important to keep the systemic perspective: project-specific anti-corruption interventions need to be supplemented by broader institutional reforms in the sectors and country systems and institutions, especially in situations like Kenya where overall donor funding covers only about 5 percent of government spending.

We conclude this overview note with the recognition that governance and anti-corruption are fields where the state of the arts is evolving, where much is still uncertain or being debated, and where many proposed solutions need to be country and setting-specific. Some circumspection is in order, and warrants a consultative process. At least as important is to provide an environment for experimentation and innovation in terms of programs and projects, since one-size-fits-all solutions do not work in this subject. At the same time, learning from successes and innovations in other countries can be valuable, with appropriate adaptation to the country realities. For that reason, the background draft chapters also presents innovative cases from other countries in various areas of reforms from other countries.

**Annex 2: Kenya: Laws Passed and Other Legislative Initiatives on Governance
from 2003-2006**

<u>LEGISLATION/BILL</u>	<u>SIGNIFICANCE</u>	<u>STATUS/OTHER COMMENTS</u>
The Public Officers Ethic Act No. 4 2003	The Act provides for a Code of Conduct and Ethics for public officers and requires financial declarations from certain public officers.	See proposed amendment under The Statute Law (Miscellaneous) Amendment Bill, 2006
Government Financial Management Act 2004	Provides for the prudent and transparent management of the government’s financial affairs. Therefore, Accounting Officers are to ensure that resources are used in “a lawful, authorized, effective, efficient and transparent manner.”	Assented to in December 2004 and a Task Force is working on making it operational.
The Banking (Amendment) Bill 2004	Provides that prior to any person being appointed as a Director or Chief executive officer, that person has to be certified as “ <u>a fit and proper person.</u> ”	Still being drafted by the Ministry for Finance.
The Statute Law (Miscellaneous) Amendment Bill, 2006	<p>The Bill proposes to amend a number of laws, however key to governance are:</p> <p>(a) The Judicature Act (Cap 8) in which the Bill proposes to increase the number of judges in both the High Court and Court of Appeals thereby promoting the efficiency and effectiveness of the judiciary.</p> <p>(b) The Penal code (Cap 63) in which the Bill proposed to harmonize the punishment for offences of corruption under the Kenya Anti-corruption and Economic Crimes Act 2003 and the economic crimes under the Penal Code. The harmonization will eliminate the judges’ arbitrary application of the more lenient penalties under the Penal Code</p> <p>(c) The Anti Corruption and Economic Crimes Act (Act no 3 of 2003) in which the Bill proposes to amongst others, disallow applications for stay of proceedings in cases involving corruption and economic crimes; to apply the provisions of the Penal Code to attempts and conspiracies under the Act; to make the Chief Justice the appointing authority</p>	Still in Parliament awaiting final reading.

	<p>for special magistrates, and to remove ambiguities and harmonize the offences of corruption and economic crimes under the Penal Code and this Act.</p> <p>(c) The Public Officer Ethics Act, 2003 (Act no. 4 of 2003) in which the Bill proposes to place members of the KACC under the Committee of the National Assembly responsible for the ethics of members as a responsible commission; that the wealth declaration forms be submitted by those officials required to do so once every two years. It proposes that the Act be amended to enable the public have access to the declarations of assets made by public officers under the Act and to empower KACC to make investigations to determine whether a public officer has contravened the Code of Conduct and Ethics established under the Act.</p>	
The Witness Protection Bill, 2005	<p>Proposes to provide for the protection of witnesses in criminal cases and other proceedings. It gives the Attorney General the authority (based on agreed assessment criteria) to determine whether a particular person and his family deserve to be protected under the program and lays out a procedure for doing so. The Bill also outlines the circumstances under which the protection accorded to a witness may be terminated.</p>	<p>Still in Parliament awaiting final reading.</p>
The Fiscal Management Bill, 2006 (draft)	<p>The objectives of this Bill are to: (a) provide for the effective regulation and oversight of the national budget process (b) establish Fiscal Analysis and (c) revitalize the involvement and participation of the National Assembly in the budget process. The Bill alludes to the principles of prudent fiscal management and provides authority to the Permanent Secretary of the Ministry of Finance to obtain information from a public institution for purposes of carrying out his/her obligations under the Act.</p>	<p>First reading completed in Parliament in April 2006.</p>

<p>The Public Audit Act, 2003</p>	<p>This is an Act of Parliament which provides for the audit of government, state corporations and local authorities, to provide for economy efficiency and effectiveness examinations, to provide for certain matters relating to the Controller and Auditor-General and the Kenya National Audit Office, to establish the Kenya National Audit Commission and to provide for other related matters</p>	
<p>Anti-Corruption and Economic Crimes Act. Act No. 3 of 2003</p>	<p>This is an Act of Parliament to provide for the prevention, investigation and punishment of corruption, economic crime and related offences and for matters incidental thereto.</p>	<p>See proposed amendment under The Statute Law (Miscellaneous) Amendment Bill, 2006</p>
<p>Privatization Act. Act No 2 of 2005</p>	<p>An Act of Parliament to provide for the privatization of public assets and operations, including state corporations, by requiring the formulation and implementation of a privatization programme by a Privatization Commission established by this Act. The privatization programme shall be formulated by the Commission and approved by the Cabinet.</p>	
<p>The Finance Bill, 2006</p>	<p>A bill to amend the law relating to various taxes and duties and for matters incidental thereto in accordance with the budget presented before Parliament in June 2006.</p>	<p>First reading completed in Parliament in July 2006.</p>
<p>The Kenya National Commission on Human rights Act. Act No. 9 2003</p>	<p>An Act of Parliament to provide for the establishment of the Kenya National Commission on Human Rights for the better promotion and protection of human rights and for connected purposes.</p>	
<p>Public Procurement and Disposal Act. Act No 3 of 2005</p>	<p>An Act of Parliament to establish procedures for efficient public procurement and for the disposal of unserviceable, obsolete or surplus stores, assets and equipment by public entities and to provide for other related matters. The purpose of this Act is to establish procedures for procurement and the disposal of unserviceable, obsolete or surplus stores and equipment by public entities to achieve the following objectives - (a) to maximise economy and efficiency; (b) to promote competition and ensure</p>	<p>Its implementing regulations are currently under preparation.</p>

	that competitors are treated fairly; (c) to promote the integrity and fairness of those procedures; (d) to increase transparency and accountability in those procedures; and (e) to increase public confidence in those procedures. (f) to facilitate the promotion of local industry and economic development.	
The Licensing Laws (Repeals and Amendments) Bill, 2006	The bill proposes to repeal certain statutes and to make minor amendments to the law relating to business licences.	First reading completed in Parliament in July 2006.

Annex 3:
On the Initial Governance Assessment for Kenya

[Listing of the Background Draft Chapters that were used as inputs for the Governance Note presented in the text above. These draft chapters listed below, once updated and finalized, will constitute the Governance Assessment Report]

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The List of Boxes (a number of which give illustrations of international experience) and of Figures is not included here, but instead at the outset of the draft Chapters of the Governance Assessment.

The draft background chapters listed above are being transmitted in a separate document, and are preliminary in nature, for discussion and updating. Chapter 1 in such submission is fully pending, as will draw from the Governance Note itself, as will the concluding Chapter 12.

Annex 4: Credits, with significant appreciation, in brief.

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An Initial Governance Assessment for Kenya

[Background Chapters for Overview]

October 19th, 2006

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List of Acronyms

AC	Anti-Corruption
ADR	Alternative Dispute Resolution
AFR	Africa Region
AG	Auditor General
AML	Anti-Money Laundering
APR	Annual Progress Report
APRM	African Peer Review Mechanism
AWSB	Athi Water Services Board
BSP	Budget Strategy Paper
CAG	Controller and Auditor General
CBK	Central Bank of Kenya
CBS	Central Bureau of Statistics
CD	Country Director
CDD	Center for Democracy and Development, Ghana
CDF	Constituency Development Fund
CIFA	Country Integrated Fiduciary Assessment
CIRI	Cingarelli-Richards (Human Rights Dataset)
CMA	Capital Markets Authority
CPAR	Country Procurement Assessment Report
CPC	Corruption Prevention Committee
CPIA	Country Policy and Institutional Assessment
CRC	Citizen Report Card
CRR	Country Review Report
CSO	Civil Society Organizations
D.I.R	Detailed Implementation Review
DBM	Department of Budget and Management (Philippines)
DFI	Development Finance institution
DfID	Department for International Development (UK)
DGE	Department of Governance and Ethics
DQAF	Data Quality Assessment Framework
EATTFP	East Africa Trade and Transportation Facilitation Project
ECK	Electoral Commission of Kenya
EITI	Extractive Industries Initiative
EMU	Evaluation Monitoring Unit
EOS	Global Competitiveness Survey
FA's	Fund Accounts
FATF	Financial Action Task Force
FIAS	Foreign Investment Advisory Service
FLEG	Forest Law Enforcement and Governance
FOI	Freedom of Information (Bill)
FORD	Forum for Restoration of Democracy
FPE	Free Primary Education
G2B	Government to Business
G2C	Government to Citizen
G2G	Government to Government

List of Acronyms

GAP	Government Action Plan or Government Action Program
GCI	Competitiveness Index
GDDS	General Data Disseminating System
GER	Gross Enrollment Ratio
GFS	Government Finance Statistics
GJLOS	Governance, Justice, Law and Order Sector
GMR	Global Monitoring Report
GoK	Government of Kenya
IAO's	Integrity Assurance Officers
IAS	International Accountant Standards
ICB	International Competitive Bidding
ICT	Information Communications and Technology
IDASA	Institute for Democracy in South Africa
IFMIS	Integrated Financial Management Information System
IMF	International Monetary Fund
INT	World Bank Department of Institutional Integrity
IP-ERS	Investment Program for Economic recovery Strategy and Employment Creation
IPPD	Integrated Product and Process Development
IRCB	Institutional Reforms and Capacity building (WB)
ISA	International Standard of Auditing
ISO	International Standards Organization
KACC	Kenya Anti-Corruption Commission
KANU	Kenya African National Union (Political Party)
KASNEB	Kenya Accounts and Secretaries National Examinations Board
KBS	Kenya Bureau of Standards
KCB	Kenya Commercial Bank
KEMSA	Kenya Medical Supplies Agency
KESSP	Kenya Education Sector Support Program
KHADREP	Kenya HIV/AIDS Disaster Response Project
KLRC	Kenya Law Reform Commission
KNCHR	Kenya National Commission on Human Rights
KRA	Kenya Revenue Authority
KUTIP	Kenya Urban Transport Infrastructure Programme
LA	Local Authorities
LDP	Liberal Democratic Party (Political Party)
MOE	Ministry of Education
MoF	Ministry of Finance
MOH	Ministry of Health
MoL	Ministry of Labor
MoTC	Ministry of Transport and Communications
MOU	Memorandum of Understanding
MoW	Ministry of Water
MTEF	Medium Term Expenditure Framework
MTS	Medium Term Strategy
MWI	Ministry of Water and Irrigation
NACC	National AIDS Control Council
NAK	National Alliance of Kenya (Political Party)
NARC	National Rainbow Coalition (Political Party)
NASCOP	National AIDS and STD Control Programme (Kenya)
NBK	National Bank of Kenya

List of Acronyms

NDCL	National Drug Testing Laboratory
NEPAD	New Partnership for Africa's Development
NPL's	Non Performing Loans
NSSF	National Social Security Fund
NWSC	Nairobi Water & Sewage Company
PAC	Public Accounts Commission
PAWC	Price Waterhouse Coopers
PEFA	Public Expenditure and Financial Accountability
PEM-AAP	Public Expenditure Management Assessment and Action Plan
PEPFAR	President's Emergency Plan for AIDS Relief
PETS	Public Expenditure Tracking Survey
PFM	Public Financial Management
PIC	Public Investments Committee
POEA	Public Officer Ethics Act
PPB	Procurement Policy Board
PPOA	Public Procurement Oversight Authority
PRSD	Public Service Reform and Development (Kenya Government)
PSGT	Private Sector Governance Trust
PSMTAP	Public Sector Management Technical Assistance Project (WB)
PSR	Public Sector Reform
PWI	Procurement Watch Inc (Philippines)
RAB	Registration of Accounts Board
RBA	Retirement Benefits Act, Retirement Benefit Authority
RBM	Results-Based Management
ROSC	Report On The Observance of Standards and Codes
SAGA's	Semi-Autonomous Government Agencies
SIMBA	Computerized Customs Clearing System (Kenya 2005)
SPEC	Social, Political Economic Cultural (Survey)
STTP	Short Term Priorities Programme
STTP	Short Term Priorities Program
SWAP	Sector Wide Approach
TOWA	Total War on HIV/AIDS
TSC	Teachers Service Commission
UNDP	United Nations Development Programme
UNECA	United Nations Economic Commission for Africa
VAT	Value Added taxes
VERS	Voluntary Early Retirement Scheme
WCO	World Customs Organization
WSB'a	Water Service Boards
WSP's	Water Services Providers
WSRB	Water Services Regulatory Board
WSS	Water Supply and Sanitation

CHAPTER 1. OVERVIEW AND MAIN RECOMMENDATIONS

[THIS CHAPTER WILL BE A SUMMARY AND UPDATE OF THE GOVERNANCE NOTE
THAT IS AVAILABLE SEPARATELY]

CHAPTER 2. Brief History and Polity within a Governance Framework

History matters in assessing a country's governance. Kenya is no exception; an ahistorical one-time governance snapshot today would mislead. Political factors, and their evolution over time, explain much of the institutional stagnation, and at times even institutional decay, that has afflicted Kenya over the past decades. While these intertwined historical and political factors are not deterministic –leadership and bold reforms can break such cycles where conditions permit--, they do help explain recent developments and the current situation in Kenya.

Against these political and institutional factors that had evolved over time, and the vested interests that formed over decades, the fact that the regime change in 2002 brought into government some reformists in itself ought not have been interpreted as necessarily pointing to a certain new era of major and sustained improvement in governance and anticorruption. Understanding the historical and political perspective could offer some insights into the structural underlying dynamics that are behind the governance challenges identified all along the background chapters included in this report and assess the opportunities that might be opening up for reform.¹

From a promising institutional start to decay: the historical evolution of constitutional principles and their impact on Kenya's governance.

Kenya gained independence from Britain on a constitution of detailed checks and balances. On the vertical axis, government authority was shared between national and regional governments on a loose federal scheme; on the horizontal axis, powers were split and balanced out between the judiciary, the executive and the legislature. The Police and the Public Service were insulated from political interference through special constitutional provisions, and executive authority was vested in a cabinet with a prime-minister as head of government, in an arrangement like Canada's. Parliament was bicameral, consisting of a House of Representatives and a Senate, and elections to both houses were managed by an Independent Electoral Commission. To secure the Constitution from changes driven by expedience, high amendment thresholds were required, as high as 90% on certain entrenched clauses. The exemplary bill of rights, the first chapter of the Constitution, was well protected -- no derogation of these rights was allowed except in severely circumscribed state of emergency, which was severely circumscribed.

Over forty years and nearly thirty constitutional amendments later, much of the ensemble of institutions set up by the independence Constitution has been virtually dismantled. Regional government was first weakened, and then abolished, as the authority of central government burgeoned;² the high thresholds - 90% and 75%- required to amend the Constitution were lowered to 65%; checks on emergency powers were relaxed³; the powers of the President over the Public Service were enhanced; the two chamber Parliament was dismantled; Kenya became a one-party state by law⁴; security of tenure provisions for the constitutionally independent

¹ See article by S. Ndegwa, and also by W. Maina. See also Barkan, Foreign Affairs 2004 and DFID Political Drivers of Change, 2004.

² The Constitution of Kenya (Amendment) Act, No. 38 of 1964.

³ The Constitution of Kenya (Amendment) Act, No. 14 of 1965.

⁴ The Constitution of Kenya (Amendment) Act No. 7 of 1982.

offices of the Attorney General, the Controller and Auditor General, and judges of the High Court and Court of Appeal were scrapped.

This tinkering eroded the principles of constitutionalism embedded in the independence constitution and resulted in progressive decay of institutions. Specifically, what evolved over time was an ineffectual, weak and corrupt judiciary; an unaccountable provincial prefecture neither accountable nor transparent to citizens, coupled with the growing unchecked power in the Presidency that supplanted other institutions. By the 1990s, years of amendments had converted the constitutional system into an unsuccessful “trans-Atlantic marriage between the Westminster parliamentary system and the American presidential system”⁵ and the President, described by one scholar as “imperial” could dissolve Parliament and precipitate a general election at any time, and effectively appoint, judges of the High Court and Court of Appeal. Independent constitutional bodies retained formal but not real powers.

Up to the 1990s, successive Presidents routinely detained critics without trial; banned or refused to register other political parties, and occasionally railroaded Parliament into making changes to the Constitution;⁶ the judiciary became more executive-minded than the executive as well as famously corrupt.⁷ Government raiding of public resources and impunity became commonplace. Audit reports by the controller and auditor general (CAG) codified theft⁸, procurement fraud and illegal payments; judicial oversight was weakened, and corrupt judges were able to shield themselves from criticism and scrutiny by use of the courts powers to punish critics for contempt. Since the early nineties until today contempt of court powers have been deployed to silence critics of the judiciary (e.g. numerous gag orders and injunctions prohibiting coverage of certain issues), with deleterious impact on the accountability and performance of the judiciary, and on how its effectiveness and fairness is seen by the citizenry.

Political process

Patronage politics. The first two Presidents of Kenya developed and presided over a patrimonial state. In this system the structures of a modern nation state, encompassing the executive, legislature and judiciary, increasingly existed mostly in the formal sense, with power heavily concentrated in the hands of the head of state. Power has operated through a web of informal, clientelist networks based on personal ties between leaders and supporters at all levels of the political hierarchy. These informal networks permeated public institutions and subverted formal rules and decision making. They undermined systems of public accountability and created conditions where corruption could flourish.

These patronage networks have a strong ethnic and gender element in their composition and operation. President Kenyatta ensured that most of the commanding heights of the economy

⁵ See Wachira Maina, *Kenya's Institutions: Evaluating their Character and Potential* in Kenya at the Cross-Roads: Scenarios for our Future at p 9.

⁶ The now defunct *Weekly Review* aptly described the constitutional amendment abrogating the provisions on security of tenure for judges [DATE/ISSUE # PENDING].

⁷ Reports by Human Rights Groups- such as Africa Watch's 1990 report Taking Liberties – and by internal committees of the judiciary itself, such as the 1998 Justice Kwach Report on the Administration of Justice, identified incompetence and corruption as the two most serious problems facing the judiciary in Kenya.

⁸ The independence and performance of CAG was both a function of the leadership as well as the constitutionally protected tenure. Yet leadership was in fact key, since tenure provisions do not of themselves guarantee independence of an office if the office holder is not professionally independent.

including parastatals, financial institutions, the provincial administration and governmental departments were manned by members of the Kikuyu ethnic community. With President Moi, power shifted towards the Kalenjin ethnic group. Under the NARC government the media have been quick to point to the influence of a supposed 'Mount Kenya Mafia', referring to powerful individuals close to President Kibaki. A key feature of patronage politics is that the poor remain at the bottom end of patron-client networks, with little incentive for Kenyan leaders to listen to the voice of the poor. Yet at times, when Kenyatta or Moi felt threatened or needed to gain electoral support, occasionally resort to populist policies ensued.

At the time of the election of the NARC government there were high expectations about the high prospects for reducing the role of patronage in politics. While in retrospect the extent of such heightened expectations may have been unrealistically optimistic, the direction of the trend was not. The electoral result was itself an important sign of growing political competition, and a rejection of President Moi's style of government. Yet at the same time there was much expectation about expected success in important processes that would fundamentally change the nature of the political process soon after the elections. Paramount was in fact the constitutional review which was proposing measures to limit executive powers and to devolve some authorities to the local level, as well as dealing with corruption in the judiciary (and in past high profile scandals such as Goldenberg of the early 1990s), and the like.

Soon into the NARC regime it became increasingly clear that the reform momentum was to be hampered by the historical legacy of patronage and clientelistic networks, one which obviously does not disappear merely due a change in government. And these weaknesses became particularly clear in context of fragile coalition politics. Even prior to the ill-fated constitutional plebiscite, the all-important constitutional review became an arena for intense political struggle and ended inconclusively following a government walkout. Indeed, the democratic change in government in 2002 was an historical break given Kenya's past, and initial reform efforts undertaken were significant, yet they were not to suffice in addressing the underlying fundamental governance challenges, within which the role of patronage in politics was an important feature.

Political parties. Parties, as they currently function, offer only limited potential as a source of pressure for change. Since multi-party politics was restored in 1992, numerous political parties have been established, and a total of fifty are currently registered. Most are personalized enterprises lacking in an organizing vision and coherent policy program. Political parties have principally been formed along ethnic lines and have served as an instrument for ethnic elites to compete for power. Consequently, most parties only have regional (i.e. ethnic-based) representation, and no party commands a large national following. Because of their ethnic preoccupations political parties are largely absent from policy debates on how to bring about economic growth or pro-poor change. Instead, the agenda of most political parties is simply to gain power in order to allocate public positions to political supporters and distribute public resources amongst ethnic power bases. This is evident even today. In the present clamor for political dominance, not a single economic/development policy issue features in public debates except occasional references to constitutional reforms.

Political parties are generally poorly organized, lack a strong membership base, and are dependent on a single or few patrons for their funding and survival. Internal democracy and governance is typically very weak, and power is concentrated in the hands of party leaders.

Political parties have commonly resorted to intimidation and violence in their struggle for power. Intense ethnic competition for a long time hindered opposition parties from uniting behind a common candidate. The situation briefly changed in 2002 when a broad coalition of political parties defeated the ruling KANU party. However, once the common purpose of removing President Moi from power has receded, ethnic rivalries re-emerged and threatened the NARC coalition. There are also serious challenges revolving around political campaign finance, which are discussed elsewhere in this report.

Electoral processes. Kenya has maintained civilian rule throughout independence and has held elections every five years, within an increasingly democratic process, yet there are major flaws with electoral processes. With perennial crises during both voter registration and voting, the weakness of the Electoral Commission remains a potential source of electoral abuse unless its capacity, integrity and neutrality are adequately addressed. Physical conflicts were avoided in the 2002 elections, but according to experts this was mainly because the opposition had won by a wide margin. The legislature, in the form of Kenya's parliament, has been seriously weakened by executive control. Section 59 of the still prevailing Constitution provides the president with the power to recall or dissolve parliament, and constitutional amendments have strengthened the power of executive, for example by limiting parliament's control over the passage of 'emergency legislation'. In recent years, parliament has started to recover some of its power, yet there are serious challenges in its effectiveness and capacity, which are discussed below.

Sobering political and institutional reality: recent past and present.

This historical institutional and political context, even if partial, suggests the relevance of the legacy that the new regime inherited in 2002. Against such background of institutional decline, it would not suffice to have a change in regime merely towards a more benevolent President and a government that refrain from significant abuses in exercising constitutional powers. Their moderation in exercising powers would be inadequate in guarding against the adverse impact of unaccountable institutions, the legacy of distorted incentives, and of personalized ethnic politics.

The Constitutional debate and its rejection. This institutional context was, then, the legal and political fore-grounding for a 10 year constitutional reform debate that begun in 1992 and culminated in a National Constitutional Conference in 2003 and a Draft Constitution in 2005. But both the Conference and the referendum on the Draft Constitution were negatively affected by inter-factional disputes within the ruling coalition, the National Rainbow Coalition (NARC). The seeds of this dispute were partly sowed in a 2002 pre-election arrangement between the Liberal Democratic Party, LDP, and the National Alliance of Kenya, NAK, which had been defeated in 1992 and 1997 (LDP and NAK). This time around the alliance swept into power with a 62% majority vote against Kenya African National Union, Kanu.

The coalition, fragile from the start, soon splintered over the power sharing deal, the results of disputes between LDP and the President over the power sharing agreement. The dissolution of such pre-election alliance shook the faith of party leaders in such arrangements and has adversely influenced how leaders negotiate and understand alliances and coalitions. Further, the political fallout from the coalition's collapse in 2004 drove LDP into opposition, affecting the coherence of the cabinet on governance and anti-corruption reforms; eroding the President's parliamentary majority and resulted in opportunistic alliances with select members of Kanu and other smaller parties. The political divisions led into divisions over the course of the constitution, and affected the government's showing in the referendum. At the same time, the draft Constitution also

exhibited serious technical challenges such as the special interest provisions regarding the electoral system; the opposition to many aspects in parliament, and the problematic provisions in the bill of rights and also on devolution.

The draft constitution also contained many valuable components. Yet given the bundled package that a constitution entails, voters obviously could not just ‘cherry pick’ the progressive elements from the proposed Constitution. Thus, many progressive elements in key areas of institutional reforms that such constitution contained were left in paper, such as the full fledged protection of: 1) an independent Central Bank; 2) a fully autonomous National Revenue Authority; 3) an independent Judiciary; 4) a constitutionally secure Ethics and Integrity Commission; 5) an independent and accountable Public Service; 6) better protection of basic rights through judicial and non-judicial mechanisms, and 7) parliamentary vetting of holders of high public offices.

From a longer term perspective, the rejection of the Draft Constitution by voters in 2005 implied that the fractious debate over the nature and scope of broad-based institutional and governance reforms will continue. Experts in Kenya suggest that until constitutional reforms are implemented this may result in increasingly –or at least continuing-- opportunistic and fractious politics.

Now that constitutional reform is somewhat on the back-burner, changes to these key institutions - so vital to constitutionalism and proper governance - are a major pending challenge. Reforming these institutions is crucial to secure sustainable, accountable and transparent long-term governance in Kenya. Some progress may be possible, however. While second best to the constitutional change, it is possible to envisage having more modest operational and administrative reforms to key oversight institutions even without such constitutional reforms, and also identifying and envisaging realistic policy initiatives to improve governance.

Politics and corruption. In addition to the weaknesses in coalition politics, slow progress may also take place due to the incentives for maintaining political power. This, in turn implies pressures on political coffers, as well as responding to the imperatives of ethnic balancing considerations. One pernicious consequence is that even egregious graft by some powerful individuals tends to be ignored, conspiring against anticorruption efforts. And so does the fact that, as is common in these fluid transitional coalition politics, some old elites interests tend to circulate again and again, rather than fall into the background and cease to capture government-generated rents.

This, coupled with the still-maturing democratic setting, implies that it has been difficult to focus on comprehensive implementation results; often the emphasis has been on isolated legal drafting initiatives, or setting up of commissions and committees, not necessarily lead to concrete outcomes. The preferred path by powerful politicians is often to try and conveniently redo the rules rather than focusing on end results. These rules often have limited effectiveness since they are a substitute for immediate actions that would threaten a web of malfeasance, and thus are politically unpalatable to some quarters.⁹

⁹ A recent illustration is how in recent times the executive resisted a Parliamentary review of the activities in the Armenian brothers’ case. A different example refers to the plea by the President to Parliament to approve making wealth declarations public, when it would have been possible to concretely move to implementation by the head of the executive by simply administratively demanding to all in the cabinet and under to disclose such wealth declarations as a condition of employment.

Hybridity of the state conspiring against implementation results. Such hybridity features at various key levels. First, there is internal factionalism at the Cabinet level: a progressive faction intent in reforming the system, yet are against those that aim at maintaining the system in place and acquire rents. Second, at the level of the bureaucracy, through continued politicization of an important segment of the civil service, especially in a coalition government. And further, the ongoing challenges within the permanent state structures, such as with the ‘securocrats’, which have spawned diverse centers of power linked to political factions. Such diverse center of powers has been characterized as the "weak chief executive" problem within a strong executive system: power disperses to *personalized*_centers rather than institutionalized within the responsible branch of government.

In this institutional context, even well-intentioned government action gets degraded by these diverse vested interests, contending factions, and perverse incentives: short term considerations of maintaining positions of power tend to dominate and counter long term goals of establishing institutional integrity and strength.

Thus, Kenya’s one of the government’s main challenge as one of implementation, not one of capacity; one of results, not intent. Capable and well trained staff have amply demonstrated high capabilities to produce plans and agendas, yet follow-through is often wanting. Some is due to lack of incentives to implement, the results of political drivers and constraints, and the continued partial capture of the state enforcement machinery.

Comparative systems also provide a reality check. Further to understanding Kenya’s historical evolution and its own polity, it is also important to place Kenya not just within an historical perspective but also in a comparative perspective. From such a comparative standpoint, the Kenyan situation is not unfamiliar, even if its prominence at times looms larger given the size of its economy, the energetic media, and the multitude of contending politicians. In fact, in terms of the process of ongoing political maturation, Kenya exhibits some advantages over countries such as Uganda, for instance. Other comparator countries relevant to draw lessons of political and governance trajectories include Zambia, Malawi, Nigeria, and to some extent Senegal and Ghana, for example. In some of these settings there has been partial self correction by the political process, although mounting effective and sustained anti-corruption efforts remains a challenge.

Peering into the near future: strategic Implications taking history and politics into account.

Now that constitutional reform is delayed, changes to these key institutions - so vital to constitutionalism and proper governance - are a major pending challenge, yet they are currently not a priority in the reform agenda. Reforming these institutions is, however, crucial to secure sustainable, accountable and transparent long-term governance in Kenya. Still, the difficulty in reforming the Constitution does not mean that progress in governance is not possible. The operational and administrative reforms to key oversight institutions suggested in the background chapters of this report do not require constitutional amendments and would constitute a significant step forward in the fight against corruption in Kenya.

In sum, from this historical and constitutional perspective, decades of amendments to the document and tinkering with institutions has led to the very challenging state of the polity and institutions nowadays in Kenya. The country nowadays faces a number of inter-linked and deep-

seated governance challenges, namely: i) constitutional reform to arrest institutional decay and revitalize checks and balances; ii) judiciary reforms; iii) transparency reforms; iv) implementation of an effective anti-corruption strategy, anchored on governance reforms (see next section)--partly to restore public trust and confidence in government, and, v) regulatory reforms to widen and deepen the transition to a market economy, and, vi) re-establishing and strengthening the relationship between state and civil society.

The likelihood of bold and comprehensive reforms over the next couple of years is low giving the proximity of the elections. At the same time, a major pending challenge is one of implementation, and many pending measures are in areas where the legal or administrative framework is already present, and for which constitutional or major legal reforms are not a prerequisite. Governmental focus on actions and results would suffice. This suggests a more realistic path forward, focusing on the possible and doable in the short-term to gain confidence from the Kenyan people that a change is indeed possible, but without losing the medium-term perspective. A path where within numerous identified priorities for action, the authorities, supported by other key Kenyan stakeholders as well as development partners, could focus on identifying and implementing core packages of high payoff actions which are feasible within the current political realities, but without losing the medium term perspective. Achieving results in the short term and initiating processes that will yield results in few years is of the utmost importance.

In parallel, it would be important to promote initiatives and actions to enhance the appeal of longer term decision-making, partly by aligning shorter-term considerations with such longer-term objectives. Often the emergence of a new and younger generation of high officials and politicians bodes well in this respect, to counter continuing reliance on particular personalities that have been politically connected or in official position straddling various regimes.

CHAPTER 3. The Empirical Evidence on Governance and Corruption for Kenya: the Perspective by Kenyans, Recent Trends, and International Comparisons

Main Empirical Findings

Historically, Kenya exhibited very poor levels of governance and corruption control. Governance challenges have hampered Kenya's public sector institutions and its efforts to create a more stable socio-political and economic environment. It has increased the cost of doing business in the country, discouraged private investment, and proved an obstacle to addressing widespread poverty and improving the quality of life of its citizens. Its poor governance record has also been associated with low growth rates. Indeed, Kenya recorded negative per capita income growth rates over the past 15 years.

With the regime change in 2002 and a new determination to address governance challenges and undertake key policy and institutional reforms, the country experienced improvement in every governance dimension at the time and in some cases significantly so. However, shortly thereafter **governance has stagnated and in some cases slightly deteriorated over the past two years**, even though not to the extremely high corruption and poor governance situation of past regimes. Overall, despite recent improvements under the new Government, major challenges remain for the country and further progress is needed in the coming years to consolidate and institutionalize reforms and progress in governance.

A review of recent household and firm surveys reveals that governance is still perceived as the major deterrent to growth. According too the Steadman's 2006 Social, Political, Economic and Cultural (SPEC) Survey, for instance, **governance is viewed as the major threat to Kenya's stability and development**. At the same time, during 2004-05 the country has experienced a reversal in its democratic record, with satisfactory rates in media freedom, transparency and democracy dropping significantly from previous year. Given the fact that transparency is found to be associated with better socio-economic and human development indicators, as well as with higher competitiveness and lower corruption, further progress in this area is needed. And reforms in vulnerable sectors such as Rule of Law and Regulatory framework seem to have stalled.

High levels of corruption, red tape and regulatory burden can have a disruptive influence upon economic growth and incomes per capita in the long run and are indeed viewed as major deterrents to doing business by local firms. According to various recent firm and citizen surveys, **corruption is still viewed as the main constraint to growth**, in spite of recent improvements in perceptions and incidence regarding bribery between 2002 and 2003, especially because of a general agency-wide deterioration in perceptions and incidence rates in 2005 relative to 2004. According to the 2005 Global Competitiveness Survey (EOS) for instance, over 57% of respondents listed corruption among the top 3 constraints. Moreover, the same survey suggests that the percentage of people reporting high frequency of bribery in sectors such as procurement, judiciary, utility, taxation and trade permits has increased over the past two years.

In particular, according to a number of sources, **police remains one of the most vulnerable institutions**. According to the Governance, Justice, Law and Order Sector (GJLOS) household survey for instance, police services account for over a third of overall bribery occurrences in the country. The Kenya Police force – with a long history of corruption - is perceived as the most

corrupt institution by 86.3% of the respondents to the Kenya Anti-Corruption Commission's National Corruption Perception Survey (KACC), and in that survey it is also ranked lowest (21.3%) among 33 institutions in public confidence of institutions fighting corruption, while ranking highest (38.8%) in terms of impunity. The police force also retained the worst corruption rating across the 33 institutions surveyed by Transparency International's 2005 Kenya Bribery Survey. While there is consensus among these surveys that some progress has been achieved over the past year in this area, major challenges clearly remain.

The current perception in Kenya is that **anti-corruption reforms have stalled and in some cases reversed although not to pre-2003 levels**. Both the Kenyan public and the international community have become skeptical about their Government's determination in fighting corruption following new procurement scandals, the resignation of key senior civil servants involved in anti-corruption programs and the general atmosphere of impunity that seems to prevail. Citizens are getting frustrated with the number of institutions that has been created to fight corruption. According to the 2006 GJLOS survey, when looking at the perceived efficacy of various anti-corruption reform efforts, none of the institutions earned an overall positive evaluation, suggesting perhaps that more is required in the area of enforcement rather than enactment. According to another recent household survey (KACC 2005), however the majority of Kenyans still view their government committed and succeeding in the fight against corruption. In particular, more than 68% of respondents think that "enforcement of anticorruption laws", "enhancing accountability and transparency", and "establishing reporting mechanisms" are very effective measures to combat corruption.

In contrast with corruption, there has been a steady improvement for a number of years in **Voice and Accountability**. The Kenyan constitution provides for freedom of speech and a free press and according to Freedom House 2006, these rights are generally respected in practice. Yet, at the same time, **media freedom** seems to have been somewhat compromised recently, according to recent Global Competitiveness Surveys by the World Economic Forum and corroborated by ratings from Reporters Without Borders and disapproval from the Kenya Union of Journalists, which has often criticized the government for failing to expand media freedom in the country.

The deterioration in media freedom seems to be part of a larger trend of **deterioration in government transparency** and civil liberties over the past two years. Recent empirical studies have shown that transparency is often associated with better socio-economic and human development indicators, and that civil and political liberties are not "luxury goods" goods that can be acquired solely through economic development. Instead, leaders, policymakers, and civil society need to work hard and continuously at improving these civil rights and governance within their countries. In the case of Kenya, deterioration over the past two years in these areas point to existing challenges as well as opportunities for stronger focus on reforms to address these trends.

Despite the government's stated intention of promoting investment-friendly policies, much progress is also still needed in this area to encourage private sector development. There are indeed mixed signals concerning the government's success in implementing a **business-friendly regulatory framework**. The country seems to have done progress since 2000, however shorter-term trends are uncertain. The burden of administrative regulations remains overwhelming and inefficiency of bureaucracy is perceived as a major obstacle to business growth, while the cost of starting and closing a business remains high.

Rule of Law represents another major challenge for the country. To a large extent, the Kibaki Government's reform efforts in this area have failed to address the issues of judicial transparency and independence, which remains challenged by executive and legislative interference. Access to mechanisms to report instances of crime is not always open to people, due to lack of institutional responsiveness, fear, lack of knowledge about where to go for help, and inability to afford the cost of obtaining assistance. Furthermore, the courts are understaffed and underfinanced, and only 15% of Kenyans interviewed by the 2006 GJLOS survey reported satisfactory rates about court fairness. These issues will be dealt in more detail in Chapter 5.

It should be noted that all efforts to measure corruption using any kind of data involve an irreducible element of uncertainty, which should be taken into consideration when making comparisons across countries or over time. Reliance on perception-based data does not make these efforts less reliable and in fact can be very useful in identifying broad priorities within the country's governance framework (see also Box 3.1). For this reason, it is important to look at a variety of different sources and focus primarily on those instances where there appears to be broad consensus about the current status or direction of change. The next section explores these areas by first looking at a variety of household (Section I.A) and firm (Section I.B) surveys, and complementing these findings with macro-indicators drawn aggregation of multiple sources, discussed in Section II.

The Empirical Evidence on Governance and Corruption for Kenya: the Perspective by Kenyans, Recent Trends, and International Comparisons

I. Recent Surveys of Kenya

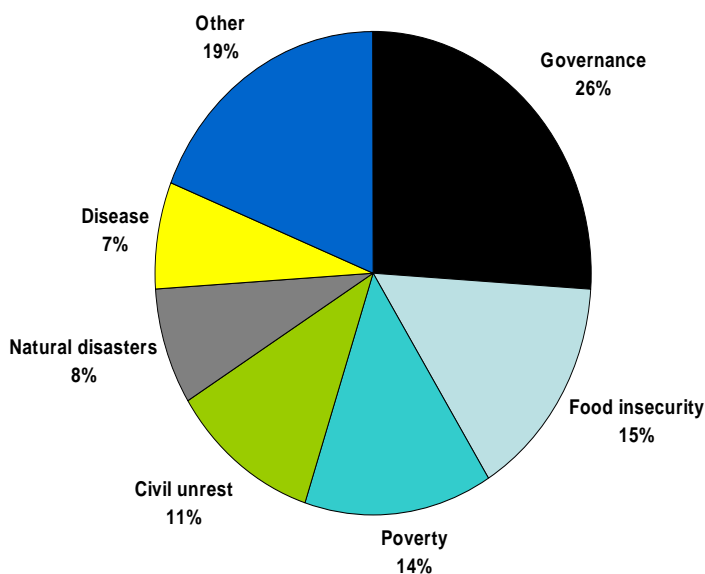
The objective of this section is to provide an empirically-based assessment of Kenya’s current status in governance as well as recent trends and development. Data collected from several surveys of firms and citizens carried out in Kenya by various organizations over the past year provide a useful insight on de-facto realities as perceived by Kenyan citizens and firms. The present section revisits findings from four household surveys: the Steadman SPEC (Social, Political, Economic and Cultural) Survey, the Governance, Justice, Law and Order Sector (GJLOS) Survey, the Kenya Anti-Corruption Commission’s National Corruption Perception Survey (KACC), and Transparency International’s Kenya Bribery Index, as well as results from the World Economic Forum’s Global Competitiveness (firm) Survey, complementing such “de-facto” findings with “de-jure” results drawn from the World Bank’s Doing Business Report.

A. Survey of citizens

A1. Steadman SPEC (Social, Political, Economic and Cultural) Survey, July 2006

The citizen survey is part of the Social Political Economic and Cultural Barometer (SPEC) administered by the Steadman group in July 2006. The target population for this survey was all Kenyan adults aged 18 and above. A sample size of 2,001 respondents was drawn with a 35:65 urban to rural ratio.

Figure 3.1 Biggest Threat Facing Kenya, View of Citizens, SPEC 2006



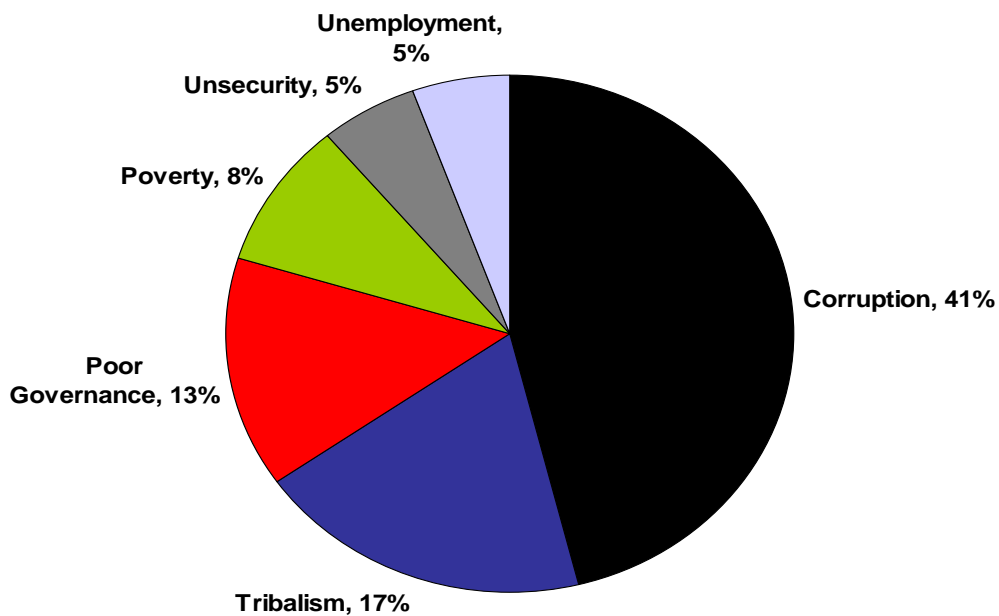
Source: Steadman SPEC (Social, Political, Economic and Cultural) Survey, 2006

One of the main messages of the survey is that poor governance is regarded as the main threat to their country (Figure 1). Corruption is still perceived to be the most dominant issue that affects Kenyans. Over 41% of respondents indeed reported failures in governance, beginning with corruption, as the factor they most dislike (Figure 2). The fact that the public has increasingly been encouraged to see the link between systemic corruption and their own economic plight suggests the close connection between these ills.

In assessing the country’s reputation for 14 key attributes, or performance-indicators, that encompass governance,

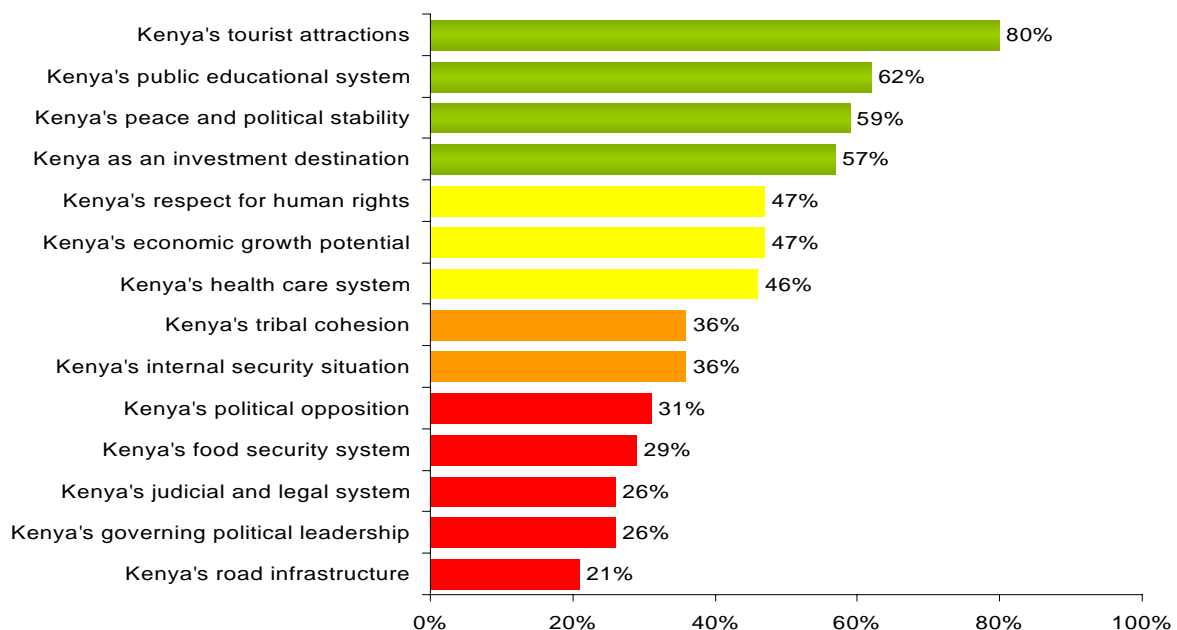
economic performance, and essential service delivery, respondents provide quite a contrasting picture of the country. Evaluations of the country in terms of these various attributes indeed ranged from one that was highly positive for the country's tourist attractions, followed by its educational system and political stability, to extremely low ones for its road system, as well as for several governance attributes: the governing leadership, the opposition leadership, ethnic cohesion, and in particular the justice/legal system (Figure 3).

Figure 3.2 What do you dislike most about Kenya? View of Citizens



Source: 2006 Steadman SPEC (Social, Political, Economic and Cultural) Survey

Figure 3.3 How do you rate Kenya on each of the following?



Source: 2006 Steadman SPEC (Social, Political, Economic and Cultural) Survey

A2. National Corruption Perception Citizen Survey– Kenya Anti-Corruption Commission (KACC)

The survey was conducted nation-wide between October 20th and November 8th 2005 covering a sample of 3,312 household heads from all of Kenya's 8 regions.

Corruption

The survey shows that besides poverty and unemployment, **corruption is one of the major problems facing the country**: 45.3% of respondents indeed reported corruption, 63.3 and 54.9 report poverty/famine and unemployment respectively. 62% of respondents also rated the level of corruption in Kenya as very high, while 81% say that their family has been very or moderately affected by corruption.

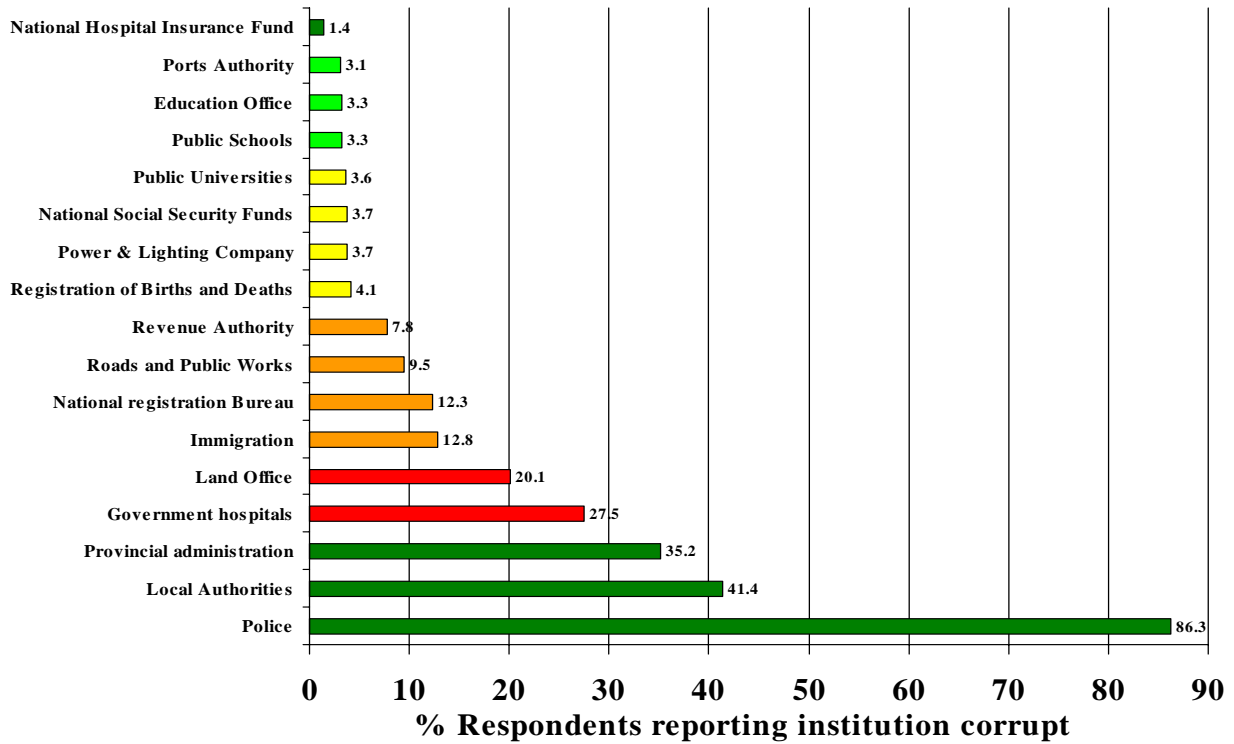
Questioned about the **most corrupt ministries**, 58% of respondents mentioned the Internal Security and Provincial Administration at the Office of the President among the top 3 most corrupted government *ministries*, followed by Health and Local government (Figure 4b). Questioned instead about the **most corrupt institution**, 86% picked the police among the top 3 most corrupted *institutions*, followed by the local authorities with 41%, and the provincial administration with 35% (Figure 4a). The police also ranked lowest in public confidence of institutions fighting corruption, with 51% of the respondents saying they had no confidence in the police fighting corruption, while 60% of respondents (the highest) said they believed corruption in the police force had worsened in the recent past, despite implementation of anti-corruption strategies. In general, education services, universities, schools, and the education ministry appear to be among the least picked upon ministries in terms of corruption perceptions.

With regards to the **fight against corruption**, 73% of respondents believe that anticorruption efforts can succeed, with 72% of respondents think the government is very or moderately committed in fighting corruption. Some 69% or rural respondents think the government is handling the fight against corruption very or moderately well, vs. 58% of urban respondents. More than 68% of respondents think that “enforcement of anticorruption laws”, “enhancing accountability and transparency”, and “establishing reporting mechanisms” are very effective measures to combat corruption, whereas less than 25% and 33% rate “external assistance” and “change leadership” as very effective measures, respectively.

Bribe paying

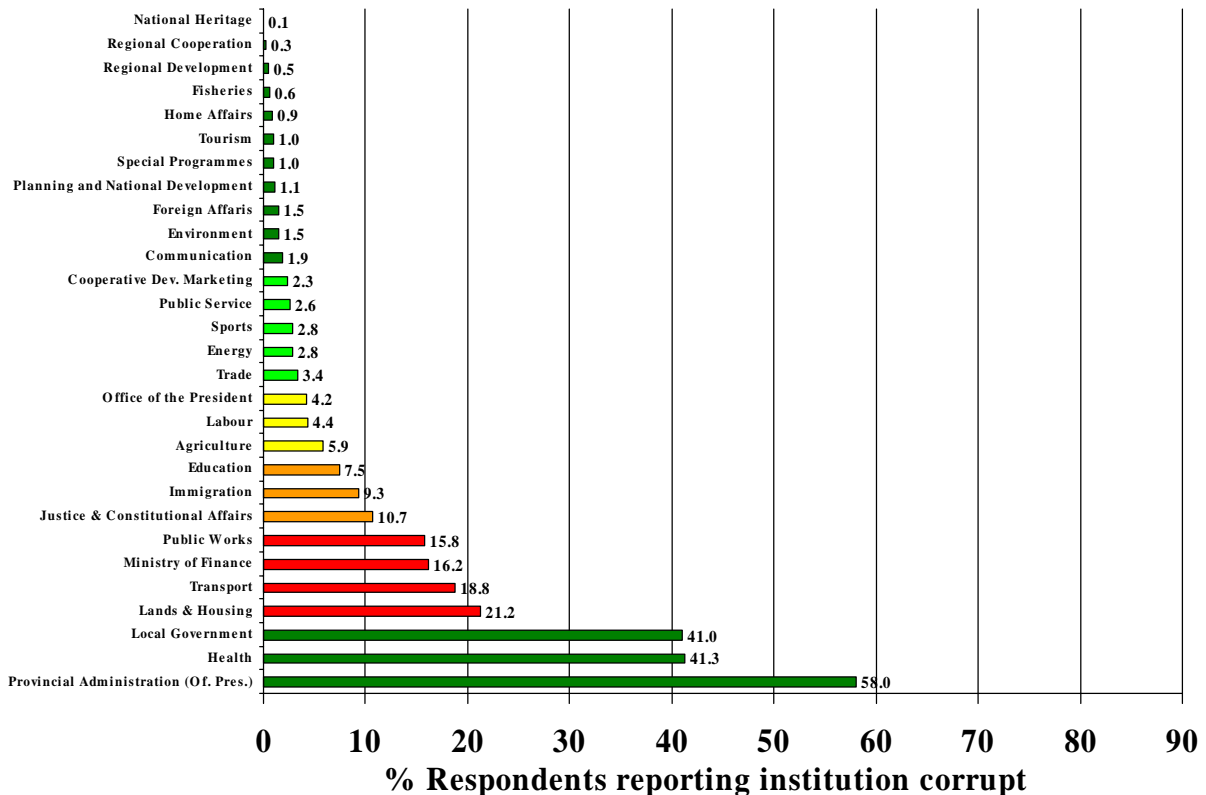
Based on the survey's experiential questions, it turned out that 30.5% (29.4% urban vs. 31.2% rural) of those that sought public services gave bribes; 75% of respondents sought public services and 54% were satisfied or very satisfied. The average bribe size is 3,185Kshs. Urban respondents on average pay 2,357 vs. 1,367 for rural ones. Poorer households pay less, from just above 1,500 for those making less than 1,000Khs; to more than 8,500 for those making more than 75,000Kshs. In terms of their income, poorest households pay on average more than 300% of their monthly income per bribe for public service, whereas the richest households pay less than 10% of their monthly income. 19% of people report voluntarily offering the bribe or giving it to obtain service.

Figure 3.4a Most Corrupt Institutions, 2005 KACC



Source: 2005 National Corruption Perception Citizen Survey – Kenya Anti-Corruption Commission (KACC)

Figure 3.4b Most Corrupt Ministries, 2005 KACC



Source: 2005 National Corruption Perception Citizen Survey – Kenya Anti-Corruption Commission (KACC)

A3. Transparency International Kenya Bribery Index

The Kenya Bribery Index is based on a survey conducted by Transparency International (TI) Kenya in November/December 2005 on a random sample of 2,405 ordinary citizens. The survey is part of a larger effort to enhance the fight against corruption with rigorous and objective research and analysis.

Main findings

The 2006 report shows that even though there are variations depending on the sector, **corruption is on the rise in Kenya**. After a generalized and significant improvement in perceptions and incidence of bribery between 2002 and 2003 – during which the average number of bribes fell from 11% to less than 3% - between 2004 and 2005 corruption has taken a turn for the worst. The aggregate bribery index deteriorated from 14.9 in 2004 to 19.2 in 2005; only 5 out of the 28 agencies saw an improvement in perceptions in 2005. At the time of the survey, people encountered bribery in close to half of their interactions with officials, indicating a decline in the public's perception of anti-corruption efforts. This is partly because the government needs to do more to communicate its anticorruption initiatives and achievements to the people.

Paying Bribes

According to the 2006 Report, corruption experienced by the Kenyan public increased in 2005. The survey respondents encountered bribery in close to half (47%) of their interactions with officials, both public and private, as compared to 34% in 2004. The number of bribes paid doubled from 0.54 bribes per person (one bribe for every two people) in 2004, to 1.2 bribes per person. However, the cost of bribes declined from 2,660 to 2,006 Ksh as well as average size of bribe (from 4,958 to 1,703)¹⁰.

A brush with the law remains the most fertile ground for bribery, accounting for 46% of all bribes reported, up from 41% percent in 2004. The police ranked indeed highest (38.8%) in terms of impunity, even though this indicator showed an improvement from 44.87% in 2004. The frequency of bribes for police, still ranked highest, doubled to an average of 5.10 bribes in 2005. However, the average size of bribes paid to the police decreased significantly, from over KShs 10,831 to KShs 1,465. Obtaining services such as healthcare, school places and utilities comes second, accounting for 26% of bribes reported followed by regulatory compliance, such as obtaining licenses with 20%. Business related activities account for 4.3% and employment for 3% of bribes reported.

In terms of cost, law enforcement remains the most lucrative accounting for close to just under 40% of the bribery expenditure. Obtaining services generated 32% of the expenditure, regulatory compliance generated 12% while business and employment generated 9% and 8% respectively.

¹⁰ Cost of bribe is the average expenditure on bribery per person. This is indicative of the bribery "tax burden". Average size of bribe is the average size of bribes paid. this is indicative of the premium that citizens put on a particular service or cost

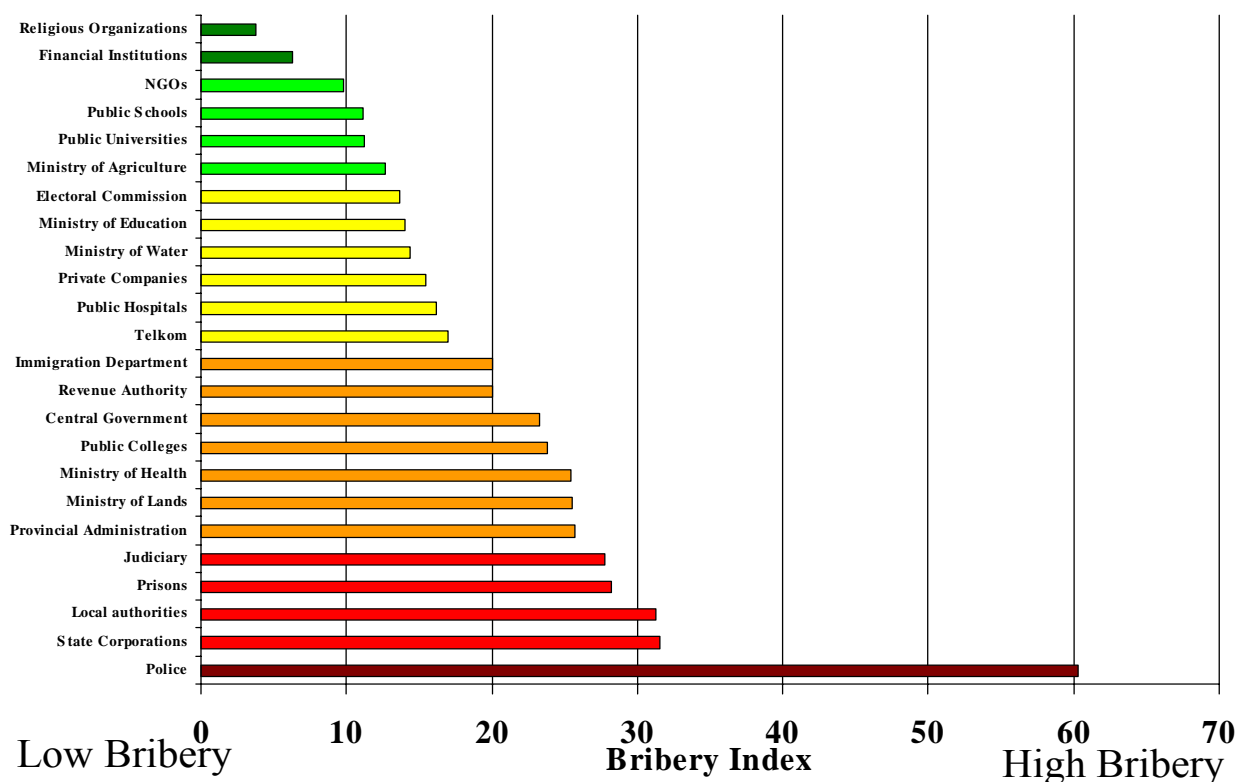
Bribery Reporting

Although it remains low, willingness to report bribery is increasing consistently. The number of respondents reporting corruption to the authorities increased to 9% from 7% in 2004 and those complaining to others, e.g. the media, increased from 25 to 27%. Of those who took action (i.e. reported or complained to someone), complaints to the media registered the largest increase from 2.4% to 8.6% of complainants. Reporting to law enforcement also increased, from 8 to 10%, while reporting or complaining to management and to other public officials such as MPs and councilors declined. The increased frequency of reporting to the media may be as a result of increased access to and ease of communication by cellular phones. The willingness to report to authorities by people who paid bribes declined, perhaps because of fear of legal culpability or avoiding the inconveniences of involvement in court proceedings.

Overall Organizational Rankings of Bribery

The Police force retained the worst ranking with an aggregate score of 60.3 (Figure 5), even though it marked a significant improvement from 72.4 in 2004. State corporations emerged with the second worst ranking with a score of 31.5 up from a score of 12.7; Local Authorities, excluding Nairobi and Mombasa, rank third, same position as 2004; the Teachers Service Commission improved to fourth from second in 2004; the Prisons service had the fifth worst ranking, and the dubious distinction of the organization with the highest likelihood of encountering bribery at 91%. The Judiciary is ranked sixth and the Provincial Administration and the Ministry of Lands rank as seventh and eighth. The Ministry of Health ranks the ninth worst offender, and the Mombasa City Council is the tenth worst offender.

Figure 3.5 2005 Aggregate Bribery Index, Kenya

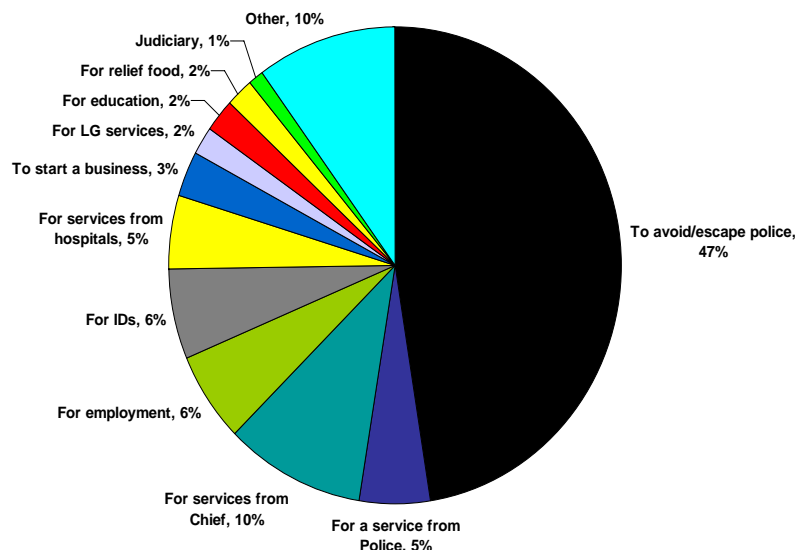


Source: Transparency International's Kenya Bribery Survey, End-2005

A4. Governance, Justice, Law and Order Sector (GJLOS) Survey of Citizens

The GJLOS survey was implemented between April and June of 2006 by the Steadman Group, interviewing 12,422 households from all provinces, focusing on the incidence and nature of corruption, access to justice, and issues of crime and security.

Figure 3.6. Most Common Bribery Situations

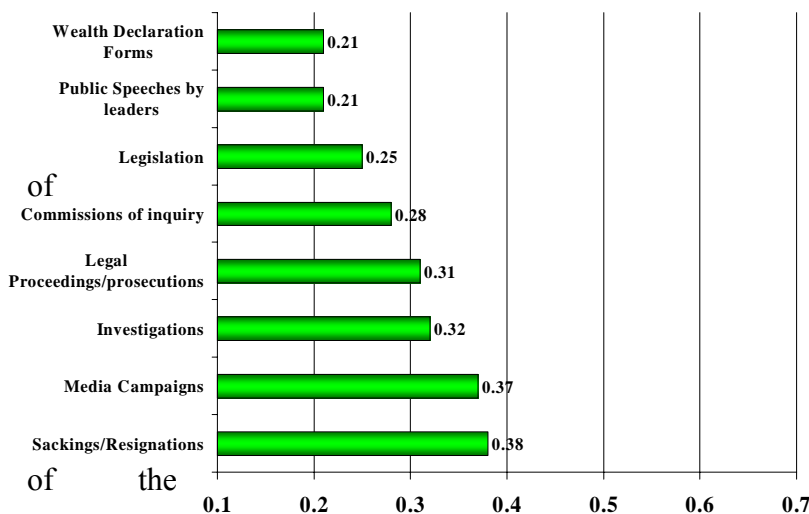


Source: 2006 Governance, Justice, Law and Order Sector (GJLOS) Survey

common situation typically giving rise to bribes in their locality, over 50% reported situations in which bribes were paid to avoid arrest other form of penalty from the police or other services (Figure 6).

Overall, the findings point towards major governance challenges for the country, ranging from high corruption and crime to limited access to justice. Corruption remains a high concern, especially with regards to police, and current anti-corruption efforts are viewed as ineffective. In the first place, police were portrayed as the most corrupt institution within the country, accounting for about a third of all occurrences of bribes being demanded for services. Even when respondents were asked about the most

Figure 3.7 Perceived Efficiency of Various Strategies in Corruption Reduction



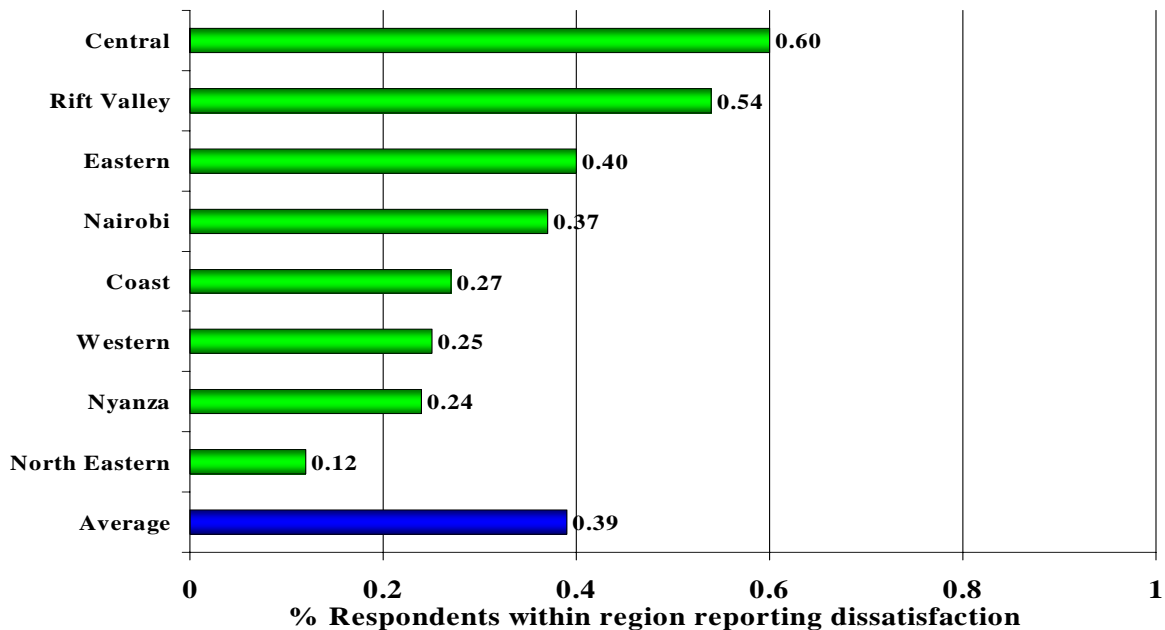
Source: 2006 Governance, Justice, Law and Order Sector (GJLOS) Survey of citizens

39% of respondents indicated that the government

Secondly, when questioned about various specific efforts recently taken to reduce corruption, respondents were rather negative. Looking at the perceived efficacy various reform efforts, none of the suggested institutions earned an overall positive evaluation; even in the case of sackings/resignations - that earned the highest confidence vote - only 38% of respondents provided a satisfactory rating (Figure 7). Overall, a macro-view overall impact of anti-corruption efforts suggests that the balance is decidedly negative; in fact only

completely/somewhat, even though these results are subject to wide variance across regions, with the North Eastern region being the most negative with 12% and the Central region being the most positive with 60% (Figure 8).

Figure 3.8 Rating of Government Efforts in Reducing Corruption – Main Regions



Source: 2006 Governance, Justice, Law and Order Sector (GJLOS) Survey of Citizens

A5. Afro-barometer Survey

The Afro-barometer project is a joint enterprise of Michigan State University (MSU), the Institute for Democracy in South Africa (IDASA) and the Centre for Democracy and Development (CDD, Ghana), reporting the results of national sample surveys on the attitudes of citizens in selected African countries towards democracy, markets and other aspects of development.

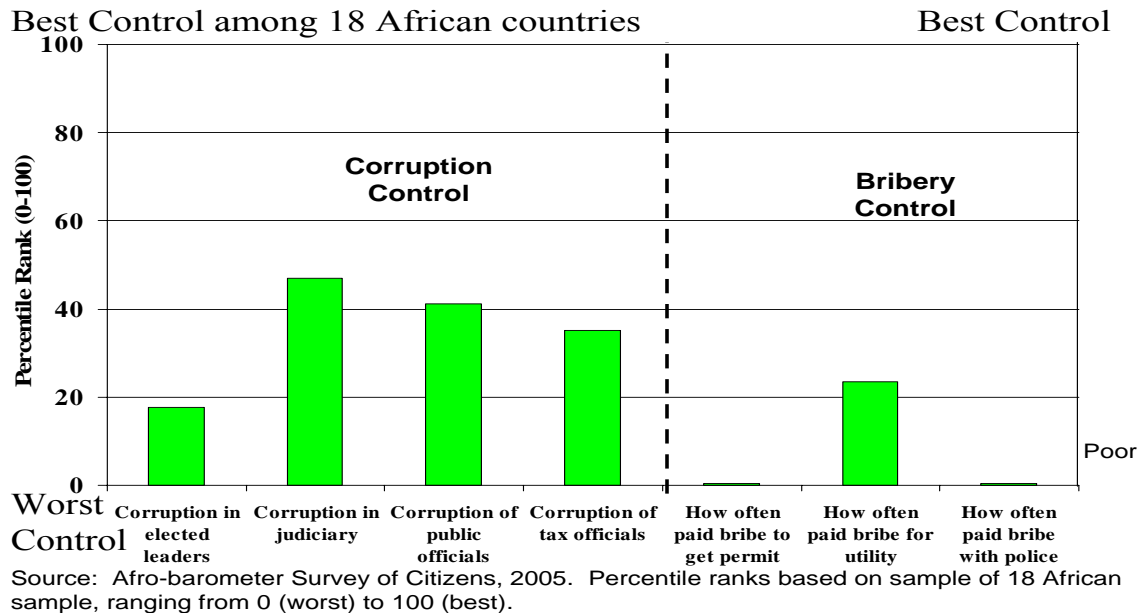
The results of the 2005 Afro-barometer survey in Kenya show rising disillusionment with the government tackling of governance and economic issues. Compared to 2003, a substantial percentage of respondents have reported much lower satisfaction rates with government handling of the economy, anti-corruption efforts and even democracy. Overall, Kenyans' optimism has eroded significantly since the positive assessments of 2003.

Corruption

The government's ratings for handling of corruption have plummeted. In 2003, 85% were pleased with their government handling of corruption; by 2005, the figure had dwindled to just 40%, less than half the proportion of two years ago. Despite some piecemeal improvements, for the most part they have witnessed a persistent culture of impunity for political elites and government officials, and they continue to face unprecedented levels of corruption in their daily lives.

On corruption, the country ranks below the median among the 18 African countries covered by the survey in cases of institutions like the judiciary, tax and public officials. And when it comes to frequency of bribery to get permits, to get connected to utility and to escape police the country ranks among the very worst.

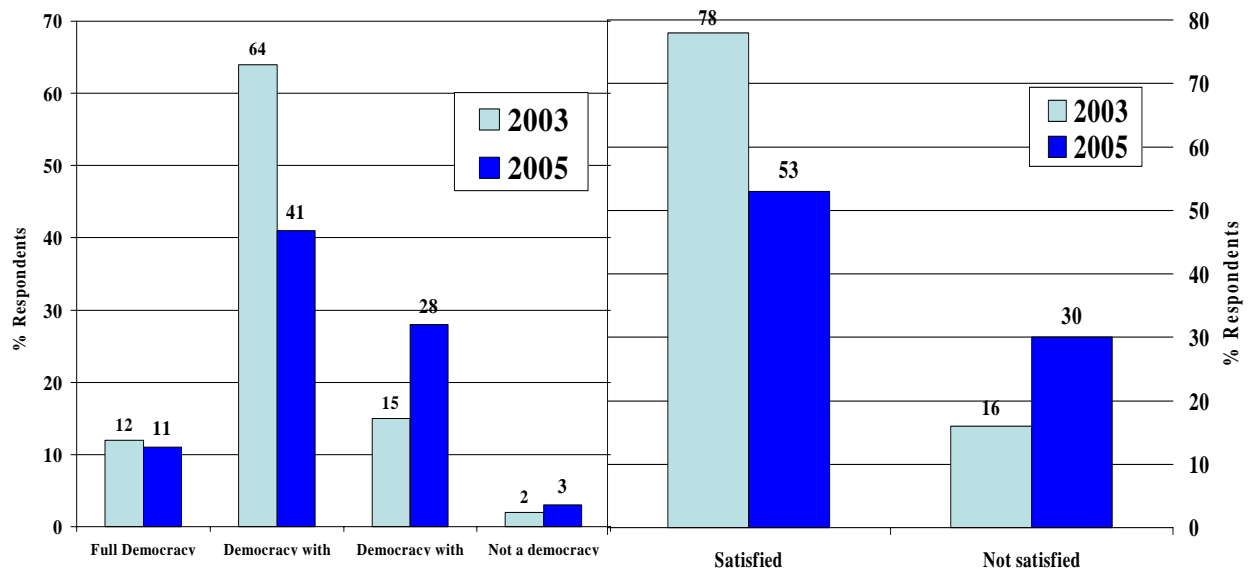
Figure 3.9 Corruption Control in Kenya, 2005



Views of Democracy

The 2005 survey also revealed that about 80% of Kenyans still believe elections to be free and fair in their country. However, while in 2003, Kenya was rated at or near the top among all countries surveyed with respect to the supply of democracy, with over 73% Kenyans rating the country as either a full democracy or a democracy with only minor problems, in 2005 only a slim majority of 53% did. Furthermore, satisfaction rates about democracy have also considerably waned, from 78% in 2003 to just 53% in 2005 (Figure 10).

Figure 3.10 Democracy in Kenya, 2003-5



Box 3.1 Misperceptions about perceptions

A common criticism about perception-based data is that they reflect vague and generic perceptions of governance, rumors or “hearsay”, often based on third-hand information, rather than specific objective realities, making them too unreliable to measure governance. In fact, at times they might be the only indicator available, and at other times they are more reliable than any objective indicator.

There should be no presumption that objective data are necessarily more informative than reports from experts, citizens or firms with "on the ground" experience. First, since corruption usually leaves no paper trail, perceptions of corruption based on individuals' actual experiences are sometimes the best, and the only, informative source. And even when objective measures are available, they can be only imperfect proxies. One can document for example the constitutional limits on executive authority in a country, or the laws governing judicial independence, or the regulations governing business entry. While such description of "de-jure" laws and regulations is useful, they can only be imperfect proxies for governance, not least because the "de-facto" application of these rules and procedures might be very different.

For this reason, perceptions data are often better at capturing realities "on the ground" rather than objective indicators measuring “de-jure” conditions, particularly in emerging economies. For example, when formal rules governing business entry in developing countries are compared with surveys of firms' perceptions of the ease of business entry, the correlation between the "de-jure" rules and the "de-facto" reality described by firms is not very high -- and much of the difference is due to corruption which leads to a subversion of official rules, suggesting that not only do formal rules matter, but also the institutional environment in which these rules are applied and enforced.

The benefit of measuring perceptions or analyzing responses from citizens and firms also finds its justification from the fact that most stakeholders' decisions and actions are often based on such perceptions. If for example citizens believe the courts and police to be corrupt, they will not want to use their services regardless of what the objective reality is. While social norms might affect what people view as corruption, in practice such cultural bias in perceptions does not seem to be very important.

Survey-based questions of corruption have also become increasingly specific, focused, experiential, and quantitative, asking detailed and disaggregated questions about governance. For example, the Global Competitiveness Survey coordinated by the World Economic Forum asks very specific questions like “*When firms like yours do business with the government, how much of the contract value must they offer in additional payments to secure the contract?*” While such detail does not always point to specific reforms, it is very useful in identifying broad priorities within the country's governance framework.

Finally, it should also be noted that no measure of governance can be 100% reliable in the sense of giving perfectly accurate measures. While perception-based data can be vulnerable to issues such as ideological biases, independence of data sources, and “halo effects”, these concerns are often exaggerated. In fact recent studies (Kaufmann et al. 2004) have shown that objective data are potentially susceptible to higher measurement errors than subjective data.

B. Surveys of Firms

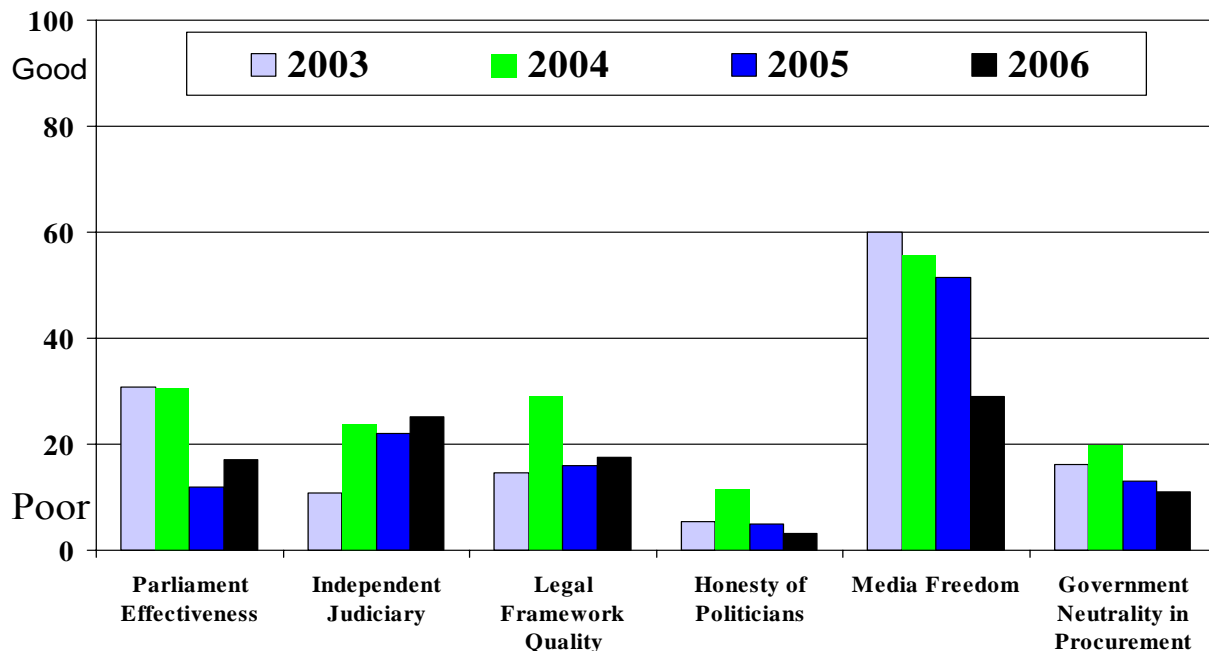
B1. World Economic Forum's Global Competitiveness Survey

The Global Competitiveness Survey is administered on an annual basis by the World Economic Forum, capturing the expert opinions of over 10,000 business leaders and entrepreneurs in 125 countries on topics such as macroeconomic, technology, governance, environment, infrastructure, competition and environment. Given its large country coverage, the instrument is an excellent tool for cross-country as well as over time comparisons.

Quality of Institutions

A review of the responses given by Kenyan firms in the 2006 Global Competitiveness Survey reveals some critical points as well as some encouraging signs. On one hand, some progress has been achieved in areas of judiciary independence, legal framework and parliamentary effectiveness - although in the latter two cases the satisfaction rates were considerably lower than in 2004 (Figure 11). It should also be noted however that the country remains in the bottom quintile of the Sub-Saharan region in these categories.

Figure 3.11 Quality of Institutions, Kenya 2003-06

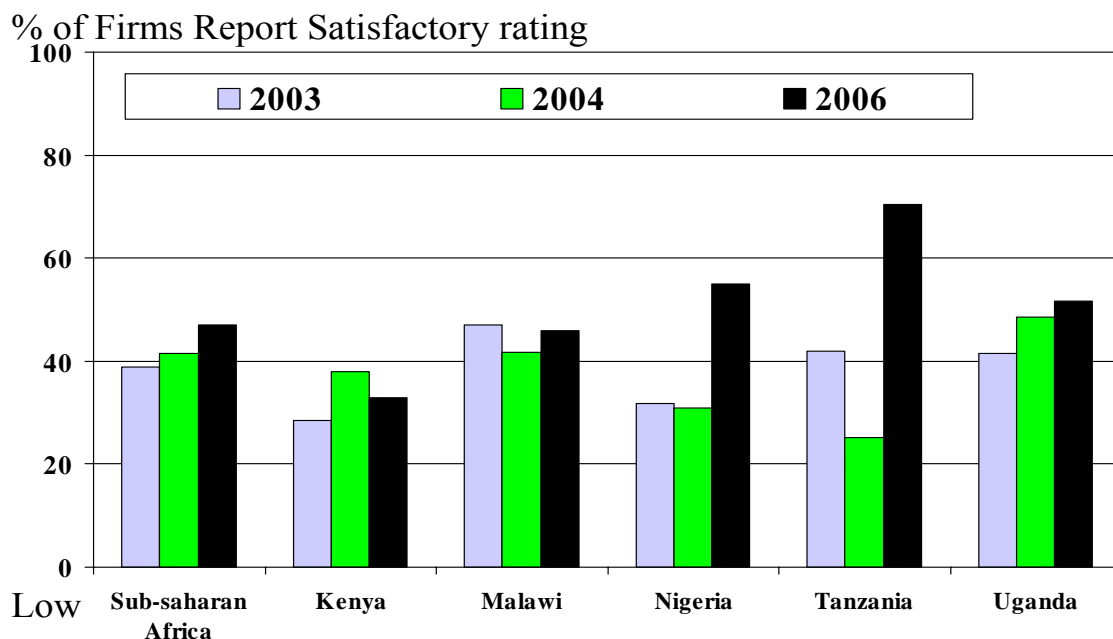


Source: EOS firm survey, WEF2003-06. Respondents give a rating between 1 (worse) to 7 (best). The column height in this graph depicts the share of firms that gave a rating of 5 or above.

On the other hand, in 2006 Kenya experienced a considerable deterioration in media freedom. The Kenyan constitution provides for freedom of speech and a free press and according to Freedom House 2006, these rights are generally respected in practice. Yet, at the same time, findings from the survey point out how media freedom has been somewhat compromised, with satisfaction rates dropping dramatically over the past few years, ranging from a 60% satisfaction rate in 2003 to just 29% in 2006. These findings were also corroborated by lower ratings from Reporters without Borders in 2005, as well as disapproval by the Kenya Union of Journalists, which has often criticized the government for failing to expand media freedom in the country.

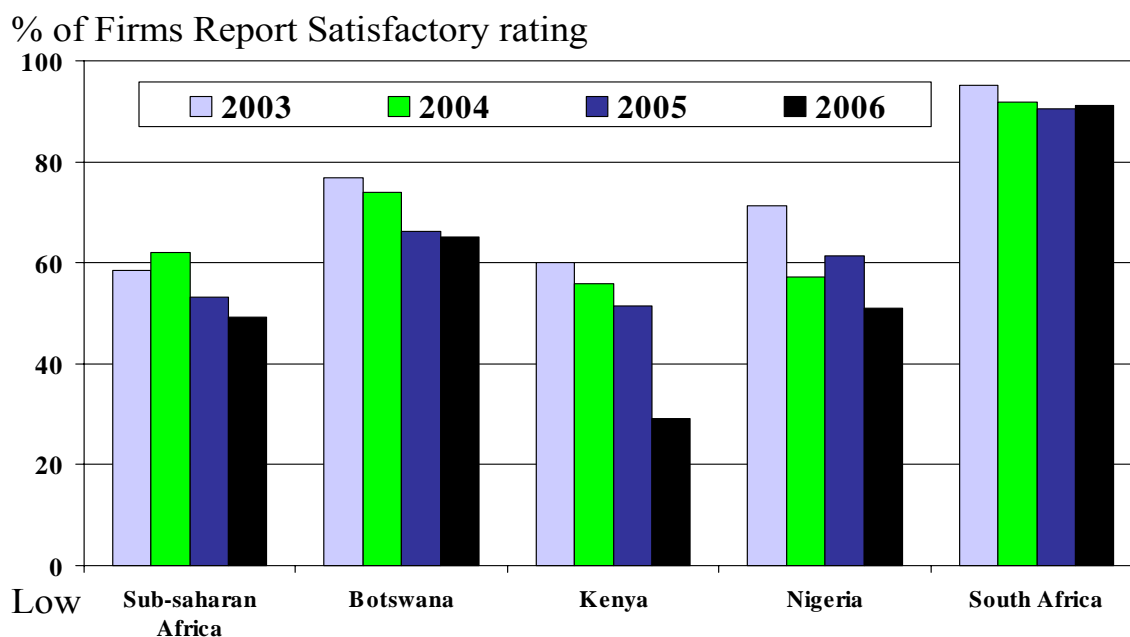
This drop in media freedom seems to be part of a bigger trend in that overall government transparency has also deteriorated in 2006 vis-à-vis 2004 levels and remains well below the Sub-Saharan regional average (Figures 12 through 14).

Figure 3.12 Kenya Comparative: Government Transparency, 2003-2006



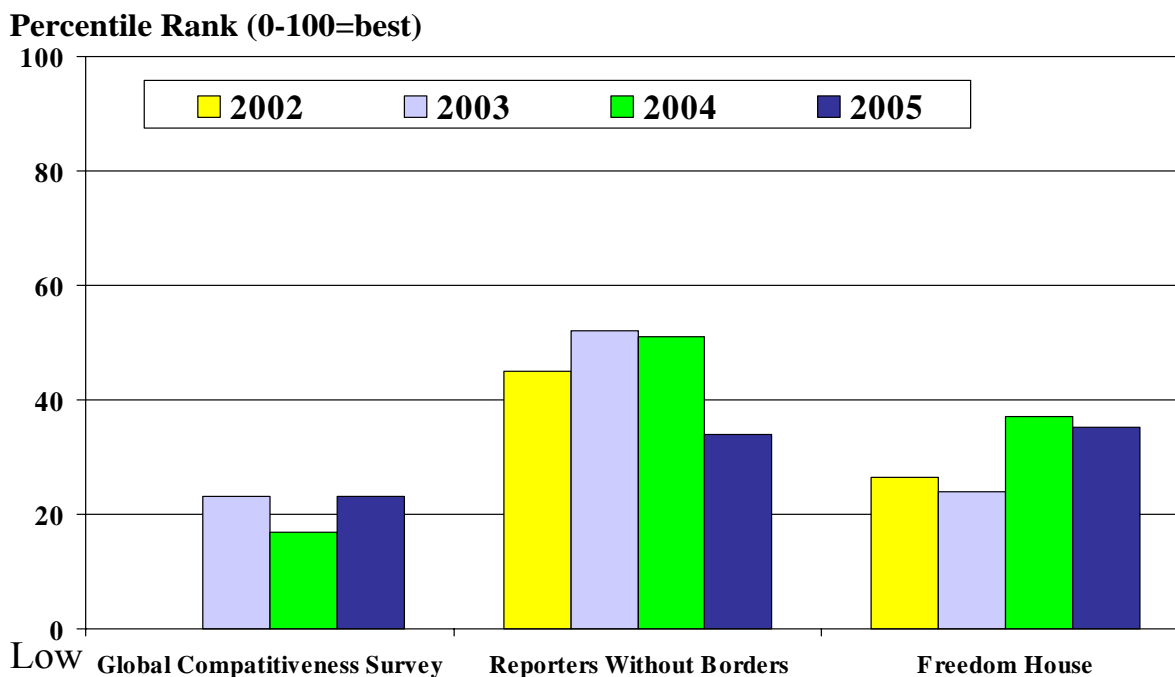
Source: EOS firm survey, WEF2003-06. Y-axis displays percentage of firms which responded to the question with a 5-7 rating. Data not available for 2005. Question: Are firms in your country usually informed clearly by the government on changes in policies and regulations affecting your industry?

Figure 3.13 Press Freedom in Selected Countries



Source: EOS firm survey, WEF2003-06. Y-axis displays percentage of firms which responded to the question with a 5-7 rating. Question: In your country, can the media publish/broadcast stories of their choosing without fear of censorship or retaliation?

Figure 3.14 Press Freedom in Selected Sources, 2002-2005



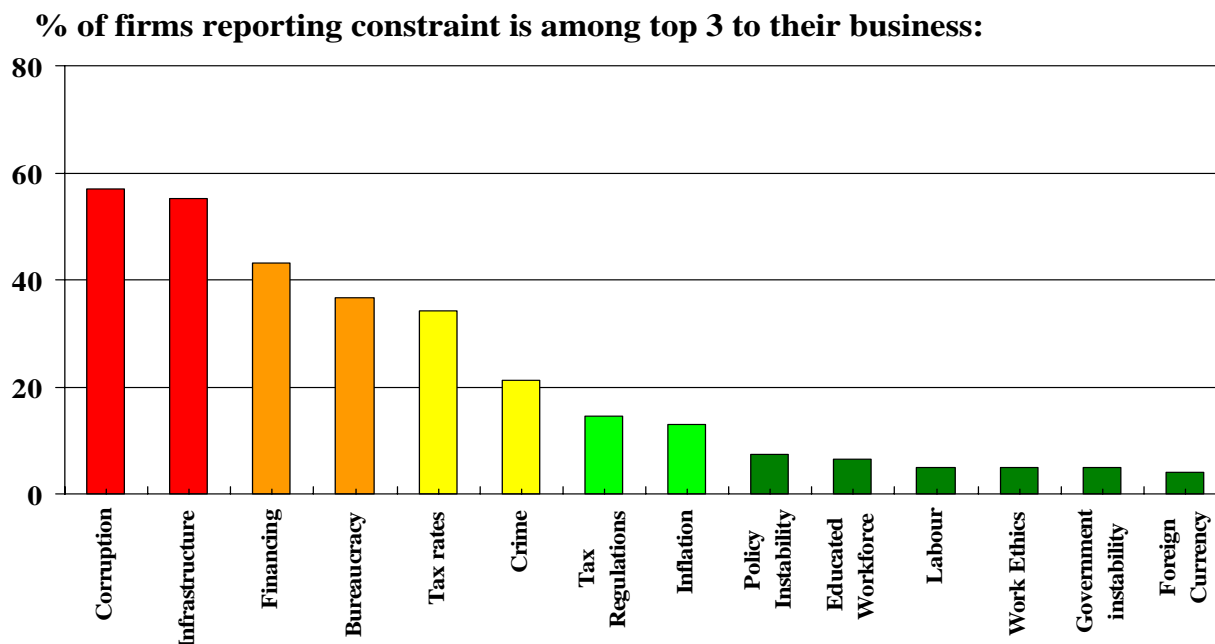
Sources: EOS firm survey, WEF2003-05, Reporters Without Borders' Press Freedom Index (2002-2005), and Freedom House's Press Freedom Index, 2002-2005.

Corruption

Kenya's performance in key corruption variables continues to be a challenge, rating significantly worse than Sub-Saharan regional averages. In most categories, the country ranks consistently in the bottom quartile of the world, and when it comes to bribery in procurement and diversion of public funds the country ranks among the very worst (92nd and 89th percentile rank, respectively).

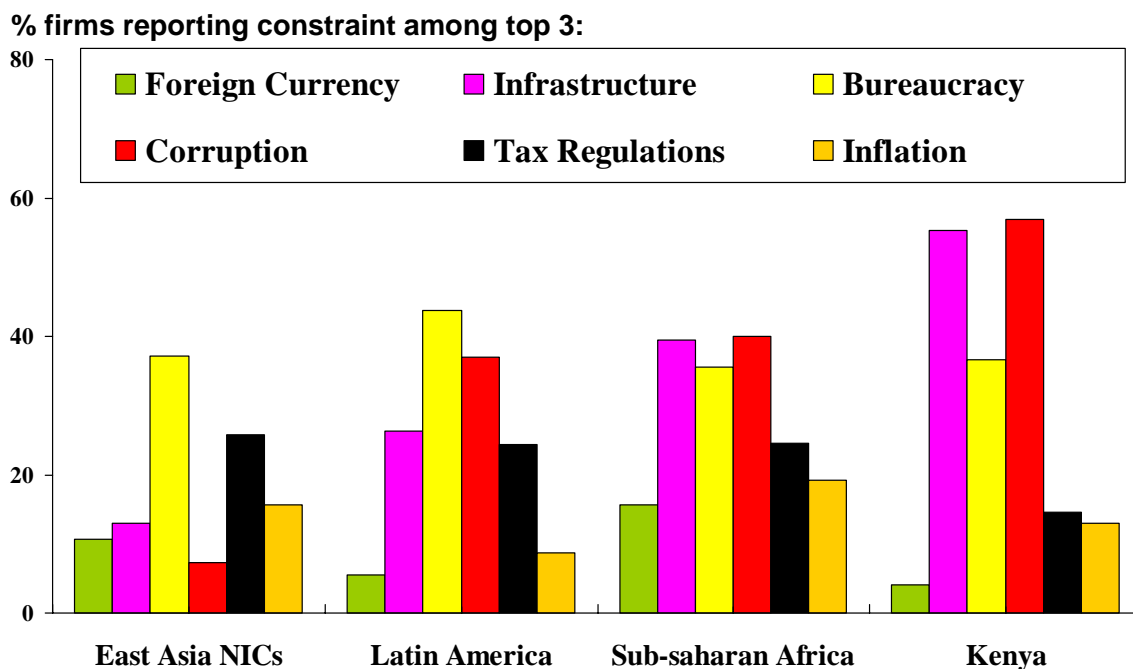
Moreover, there is mixed evidence over the progress made in the fight against corruption. From the same 2006 survey, it emerged that the percentage of people reporting high frequency of bribery in sectors such as procurement, judiciary, utility, taxation and trade permits has in fact increased over the past two years even though it remains well below 2003 levels. Last but not least, corruption is still perceived as the biggest obstacle to growth, followed closely only by quality of infrastructure and bureaucracy. Over 57% of respondents indeed listed corruption among the top 3 constraints, although the figure is considerable lower than a year ago when 77% of respondents reported corruption among the top 3 constraints (Figures 15 and 16).

Figure 3.15 Constraints to Business, Kenya 2006



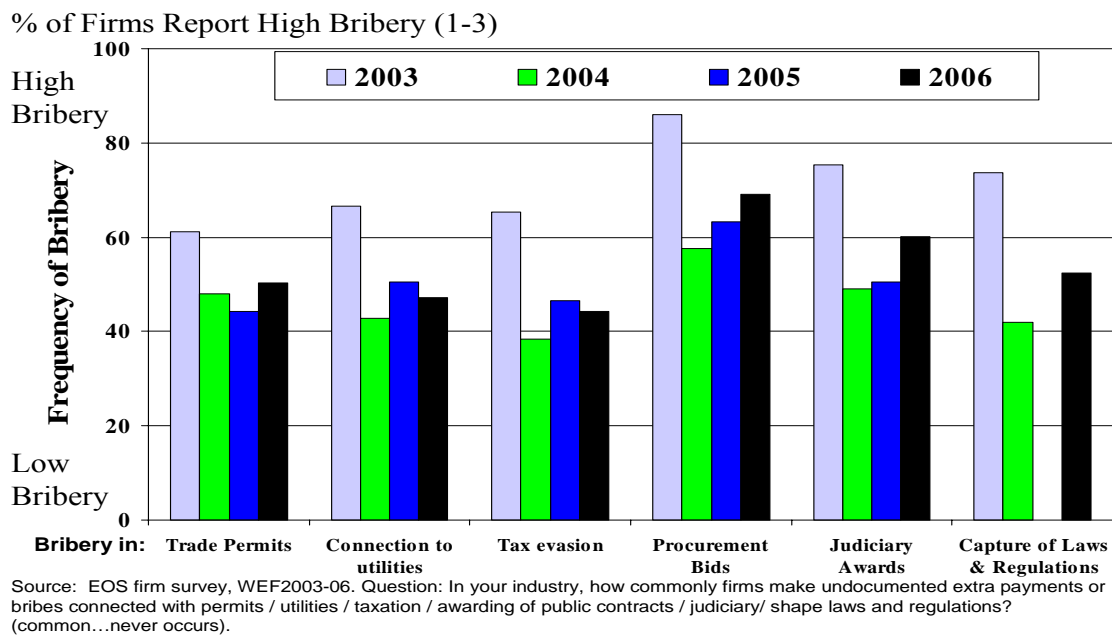
Source: EOS 2006. Question: Select among the above 14 constraints the most problematic factors for doing business in your country. 130 Firms in Kenya participated in this survey.

Figure 3.16 Kenya and Regional Comparisons: Top Constraints to Business, EOS 2006



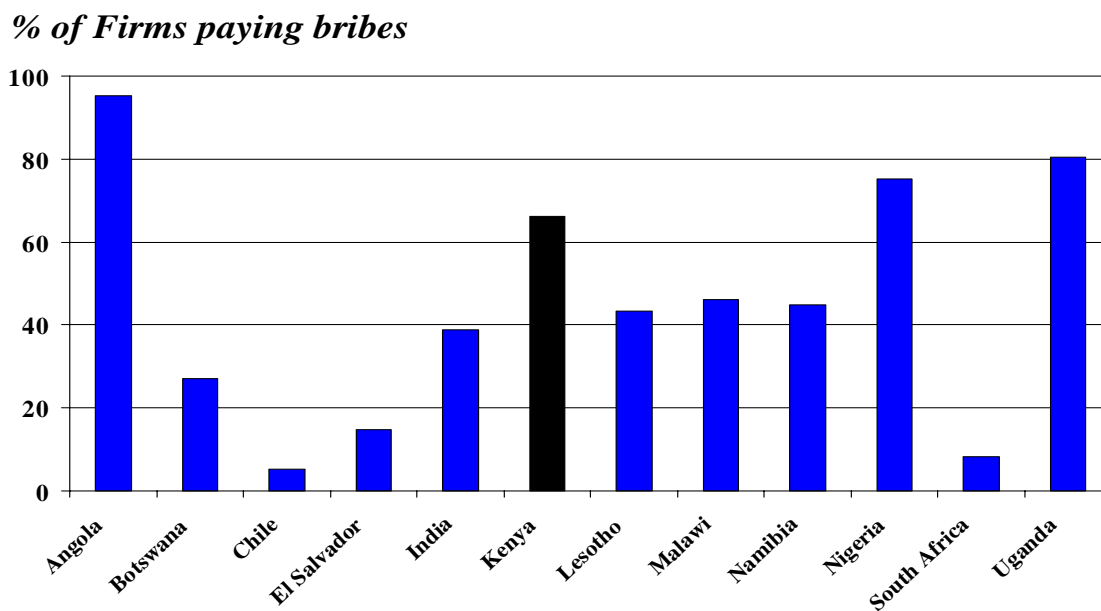
Source: EOS 2006. The question posed to the firm was: Select among the above 14 constraints the five most problematic factors for doing business in your country. Note that the overall EOS sample covers 125 countries, and in some regions—particularly in the Middle East, Africa and the FSU, many countries are not surveyed. Thus, regional averages need to be interpreted with caution, since typically countries not surveyed tend to rate lower in governance than those surveyed.

Figure 3.17 Unbundling Different Manifestations of Bribery, Recent Trends in Kenya, 2003-06



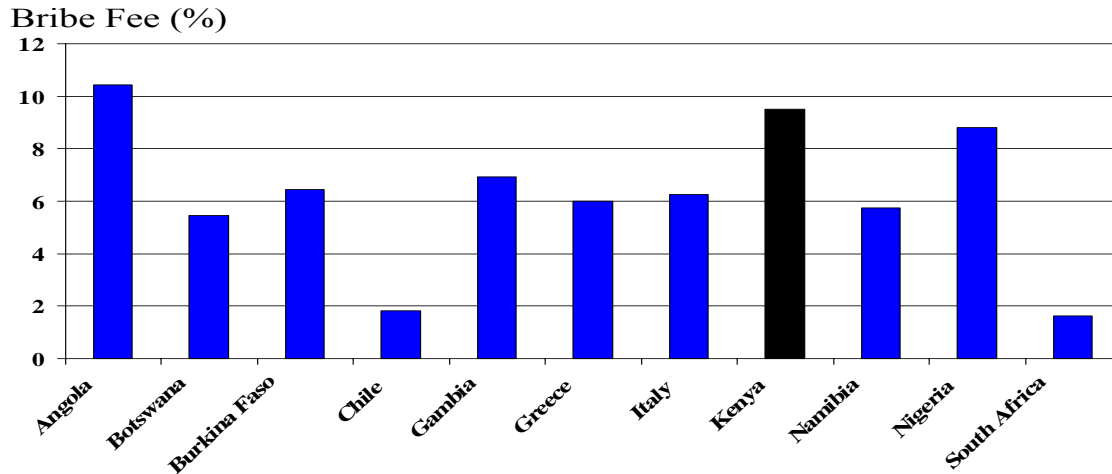
Corruption in procurement appears to be particularly relevant, since the country ranks only in the 8th percentile worldwide and in the bottom quartile within the Sub-Saharan region (Figure 17). Similarly, the country exhibits a high percentage of tainted procurement bids as well as a high bribe fee percentage (Figures 18 and 19). Overall, the country ranks consistently in the bottom tercile among Sub-Saharan countries and the worst quintile worldwide. To make matters worst, the country has recorded deterioration in both categories since 2004.

Figure 3.18 Percentage of Firms reporting that bribes are paid for public procurement



Source: EOS 2006. Question: When firms like yours do business with the government, how much of the contract value are they expected to pay in additional payments for the bid to succeed? Calculations of procurement shares were based on midpoint conversion.

Figure 3.19 What is the 'Bribe Fee%' paid by Firms to public officials to obtain public procurement bids?

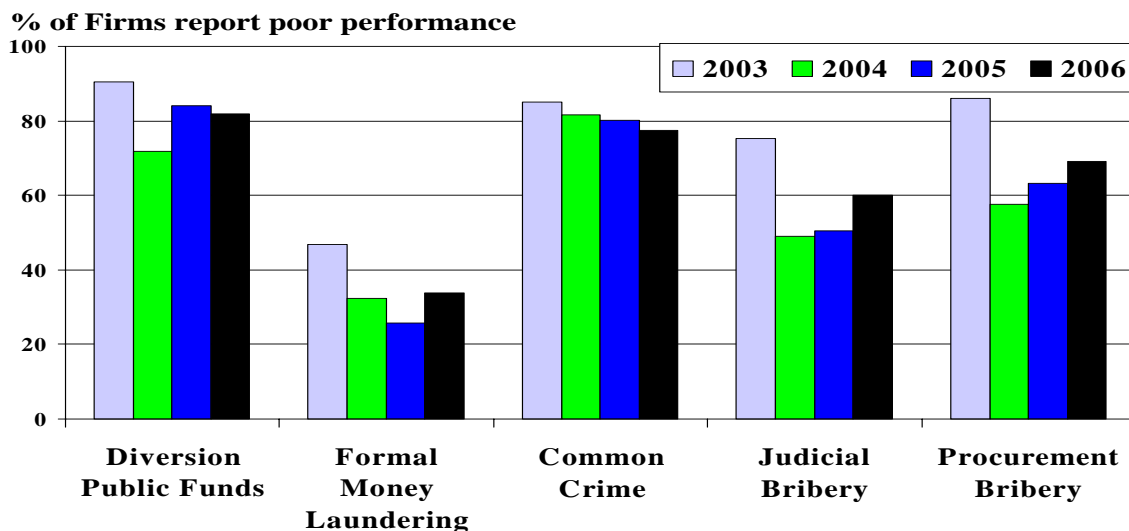


Source: EOS 2006. Question: When firms like yours do business with the government, how much of the contract value are they expected to pay in additional payments for the bid to succeed? Calculations of procurement shares were based on midpoint conversion among firms who reported bribery.

Recent trends

In few areas, the country seems indeed to be heading towards the right direction. For instance during the past four years, the incidence and cost of common crime has constantly improved, moving from 85% dissatisfaction rate in 2003 to 77% in 2006 (although the country remains one of the worst in this category). Similarly, the percentage of people reporting high bribery in judiciary dropped from 75% in 2003 to 60% in 2006, while bribery in procurement has witnessed a modest improvement - decreasing from 86% in 2003 to 69% in 2006. In both cases, however, the Kenya has deteriorated over the past two years and overall levels of bribery remain among the highest in the world. Progress has also been achieved in the area of formal money laundering where the percentage of unsatisfied respondents dropped from 47% in 2003 to 34% in 2006 and budgetary leakages where the percentage of unsatisfied respondents dropped from 90% in 2003 to 82% in 2006. In both cases, however 2006 levels were a deterioration vis-à-vis 2004 levels (Figure 20).

Figure 3.20 Trends in Selected Governance Dimensions, Kenya 2003-6



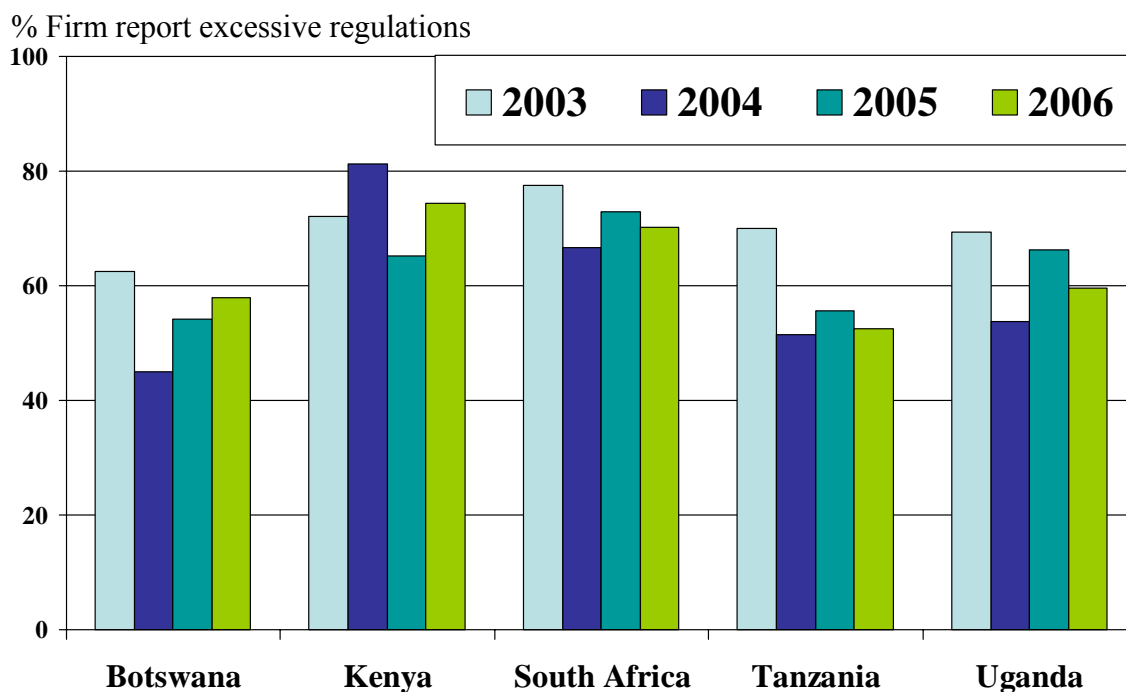
Source: EOS firm survey, WEF2003-6.

B1.1 A Special Focus on Kenya's Regulatory Framework

“De-Facto” findings

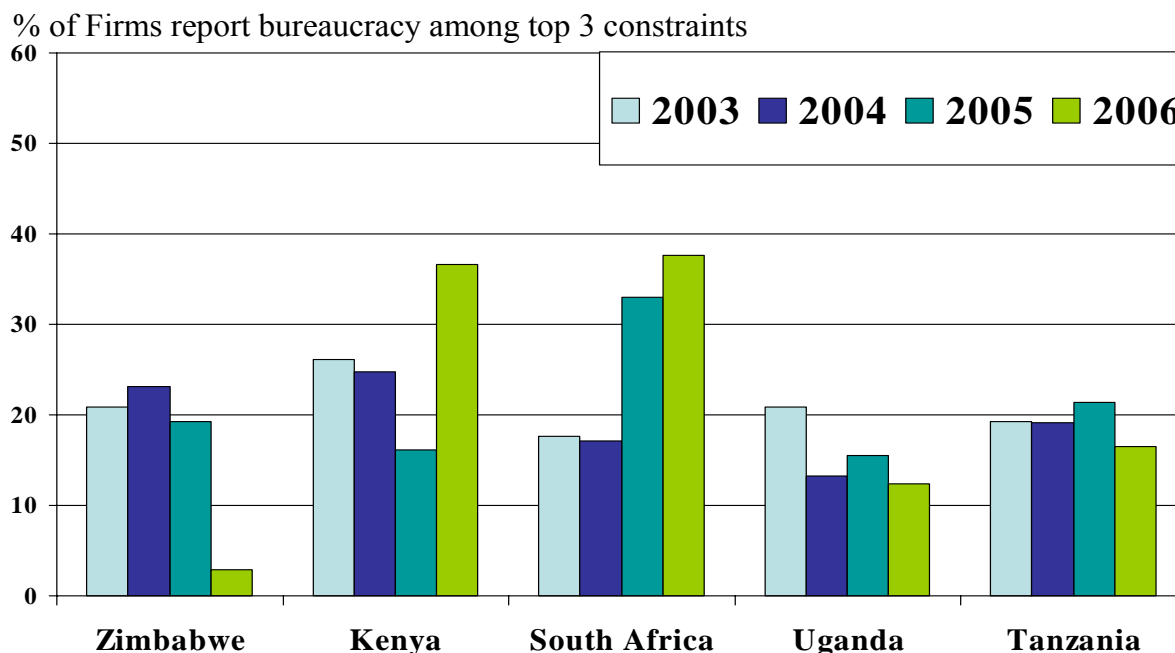
Despite the government's stated intention of promoting investment-friendly policies, there are mixed signals concerning the government's success in implementing a pro-business regulatory framework according to the EOS. Overall, in 2006 firms reported a lower red tape when measured by the percentage of time that senior management must spend dealing and negotiating with government officials – but a higher red tape when it comes to overall burden of administrative regulations, vis-à-vis 2005 levels. Indeed, an estimated 14% of the time was reported by firms in 2006, down from 18% in 2005, while an estimated 75% reported heavy burden of regulations in 2006, compared to 65% in 2005. Moreover, bureaucracy is increasingly being viewed as a major constraint to business growth in the country, moving from 26% of firms in 2003 to 37% in 2006 (Figures 21 and 22). On the other hand, firms in Kenya have increasingly improved their views on the ease of starting a business in the country over the past 4 years, countering the gradual deterioration occurred on average across the African continent over the past 4 years.

Figure 3.21 Excessive Regulations, 2003-6 Change



Source: EOS firm survey, WEF2003-6.

Figure 3.22 Bureaucracy as Constraint to Business, 2003-2006 Change



Source: EOS firm survey, WEF2003-6. Question: Select among 14 constraints the three most problematic factors for doing business in your country.

The Doing Business Report: “De-Jure” findings

A look at Kenya’s regulatory framework from a “de-jure” point of view reveals overall consistency with findings from the EOS survey. According to the World Bank’s Doing Business Report for instance the number of days needed to start a business decreased from 61 in 2003 to 54 in 2006 – consistent with views of the firms that cost of starting a business has diminished since 2003 – even though it deteriorated from 2004 levels when the number of days was 47. Within the African region, Kenya ranks in the 40th percentile in this category and even lower (30th) for the overall number of procedures needed to start a business. Worldwide, the country ranks in the lower median according to both “de-facto” and “de-jure” data (Figure 23), suggesting that there is still room for improvement in the regulatory framework in Kenya has still room for improvement, especially in the areas of starting and closing a business, taxation, and improving efficiency of bureaucracy.

set of traditions and institutions by which authority in a country is exercised and subsequently divided into six dimensions:

Voice and Accountability includes in it a number of indicators measuring various aspects of the political process, civil liberties and political rights, measuring the extent to which citizens of a country are able to participate in the selection of governments.

Political Stability and Absence of Violence combines several indicators which measure perceptions of the likelihood that the government in power will be destabilized or overthrown by possibly unconstitutional and/or violent means, including domestic violence and terrorism.

Government Effectiveness combines responses on the quality of public service provision, the quality of the bureaucracy, the competence of civil servants, the independence of the civil service from political pressures, and the credibility of the government's commitment to policies.

Regulatory Quality instead focuses more on the policies themselves, including measures of the incidence of market-unfriendly policies such as price controls or inadequate bank supervision, as well as perceptions of the burdens imposed by excessive regulation in areas such as foreign trade and business development.

Rule of Law includes several indicators which measure the extent to which agents have confidence in and abide by the rules of society. These include perceptions of the incidence of crime, the effectiveness and predictability of the judiciary, and the enforceability of contracts.

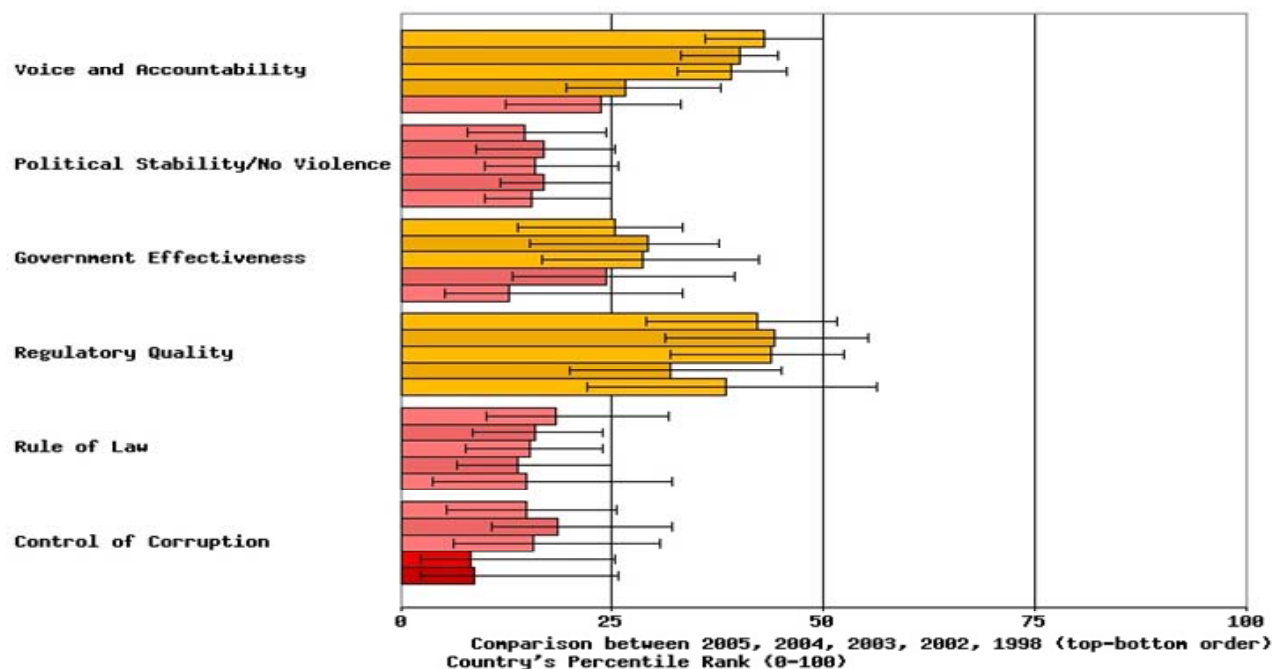
Finally, **Control of Corruption** measures perceptions of corruption, conventionally defined as the exercise of public power for private gain.

A look at Kenya's aggregate governance indicators between 1996 and 2005 reveals some evidence of progress, alongside a still sobering picture. Over the past nine years, the country has made improvements in virtually every governance dimension. Consistently with most individual surveys, between 2002 and 2003 the country recorded a significant improvement in virtually all governance dimensions even though it has remained stagnant over the past two years and in some cases exhibited a small reversal (Figures 24 and 25 and Table 1). In 2005 the country still recorded minimal improvements from the previous year only in Rule of Law and Voice and Accountability. In spite of recent improvements, however, the country still ranks in the last quartile in four of the six dimensions. It should also be noted that given the presence of substantial margins of error, none of the recent changes were statistically significant.

According to the latest worldwide governance indicators, Voice and Accountability remains the strongest performance by the country and the only dimensions in which the country has improved continuously since 1998. In 2005, the country ranked in the 42nd percentile in 2005 (down from 43rd in 2004), and in the 74th percentile within the Sub-Saharan region.

This implies that virtually all scores lie between -2.5 and 2.5, with higher scores corresponding to better outcomes. Inherent to all Governance Indicators is a margin of error, which might vary from country to country, normally attributable to two factors: (i) cross-country differences in the number of sources in which a country appears, and (ii) differences in the precision of the sources in which each country appears. This implies among other things that it is difficult to assign many countries to a definitive performance category according to their estimated level of governance, and even more difficult to compile precise rankings. More details can be found at: www.govindicators.org.

Figure 3.24 Governance Indicators for Kenya, 1998-2005



Top bar represents 2005. Source for data: 'Governance Matters V: Governance Indicators for 1996-2005', D. Kaufmann, A. Kraay and M. Mastruzzi, (www.govindicators.org); Colors are assigned according to the following criteria: Dark Red, bottom 10th percentile rank; Light Red between 10th and 25th; Orange, between 25th and 50th; Yellow, between 50th and 75th; Light Green between 75th and 90th; Dark Green above 90th. Percentile rank reports the percentage of countries rating worse than Kenya. Country coverage ranges from a minimum of 166 in 1998 to 213 in 2005.

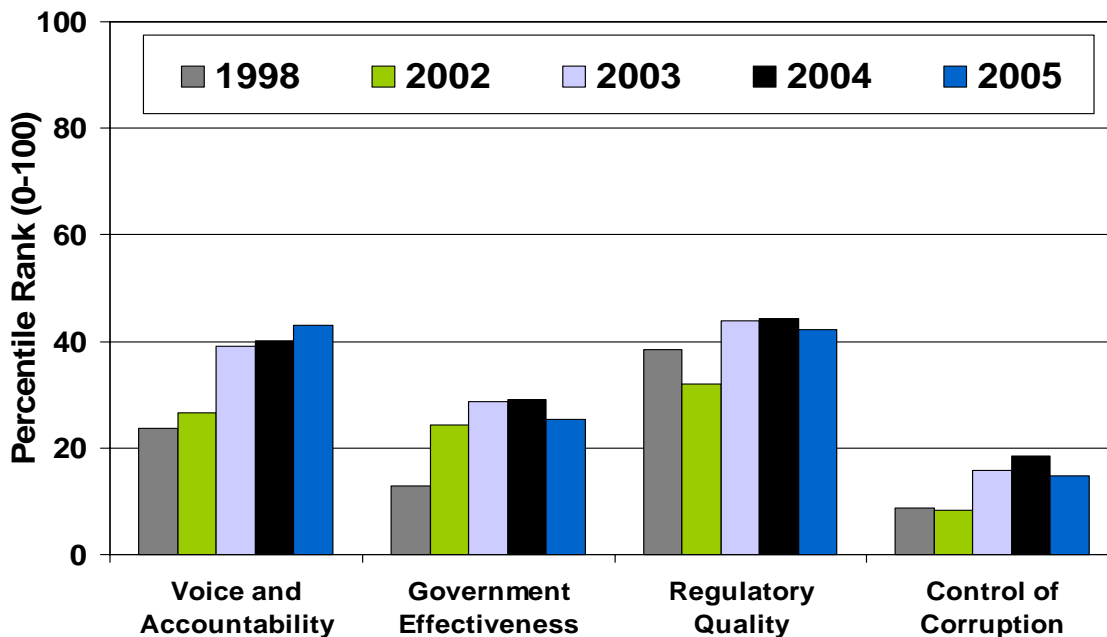
Table 3.1 Governance Indicators for Kenya, 1998-2005

Governance Indicator	Year	Percentile Rank (0-100)	Estimate (-2.5 to + 2.5)	Standard Error	Number of surveys/polls
Voice and Accountability	2005	43	-0.12	0.14	10
	2004	40	-0.31	0.14	12
	2003	39	-0.29	0.16	10
	2002	27	-0.69	0.18	8
	1998	24	-0.89	0.24	5
Political Stability/No Violence	2005	15	-1.16	0.22	8
	2004	17	-1.07	0.21	10
	2003	16	-1.1	0.23	8
	2002	17	-1.11	0.22	7
	1998	16	-1.03	0.26	6
Government Effectiveness	2005	25	-0.78	0.15	11
	2004	29	-0.72	0.15	12
	2003	29	-0.65	0.16	11
	2002	24	-0.71	0.16	10
	1998	13	-0.98	0.27	6
Regulatory Quality	2005	42	-0.32	0.16	10
	2004	44	-0.25	0.17	10
	2003	44	-0.27	0.18	9
	2002	32	-0.55	0.19	8
	1998	38	-0.17	0.31	6
Rule of Law	2005	18	-0.94	0.14	14
	2004	16	-1.01	0.13	16
	2003	15	-1.06	0.13	14
	2002	14	-1.08	0.14	13
	1998	15	-1.02	0.2	9
Control of Corruption	2005	15	-1.01	0.15	11
	2004	19	-0.88	0.15	13
	2003	16	-0.94	0.15	11
	2002	8	-1.09	0.17	10
	1998	9	-1.03	0.21	7

Political stability has remained virtually unchanged across the years, placing the country in just the 15th percentile rank in 2005, among the lowest (30th percentile) even within the Sub-Saharan

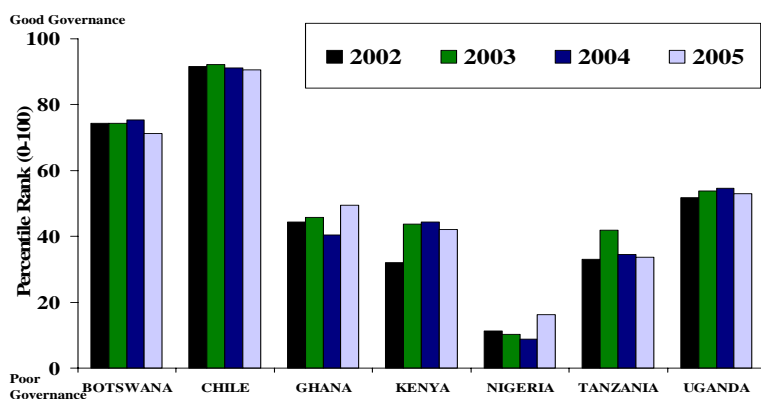
region. On the other hand, the country has recorded considerable improvement in Government Effectiveness since 1998, however experiencing a mild reversal in 2005. Overall, the country ranked in the 25th percentile in 2005 (down from 29th in 2004), and in the 54th percentile within the Sub-Saharan region.

Figure 3.25 Kenya: Selected Governance Indicators: 1998 - 2005



Source for data: 'Governance Matters V: Governance Indicators for 1996-2005', D. Kaufmann, A. Kraay and M. Mastruzzi, (www.govindicators.org); Colors are assigned according to the following criteria: Dark Red, bottom 10th percentile rank; Light Red between 10th and 25th; Orange, between 25th and 50th; Yellow, between 50th and 75th; Light Green between 75th and 90th; Dark Green above 90th. Percentile rank reports the percentage of countries rating worse than Kenya. Country coverage ranges from a minimum of 166 in 1998 to 213 in 2005.

Figure 3.26 Regulatory Quality over Time, KK 2002-2005



Source for data: 'Governance Matters V: Governance Indicators for 1996-2005', D. Kaufmann, A. Kraay and M. Mastruzzi, (www.govindicators.org); Colors are assigned according to the following criteria: Dark Red, bottom 10th percentile rank; Light Red between 10th and 25th; Orange, between 25th and 50th; Yellow, between 50th and 75th; Light Green between 75th and 90th; Dark Green above 90th. Percentile rank reports the percentage of countries rating worse than Kenya. Country coverage ranges from a minimum of 166 in 1998 to 213 in 2005.

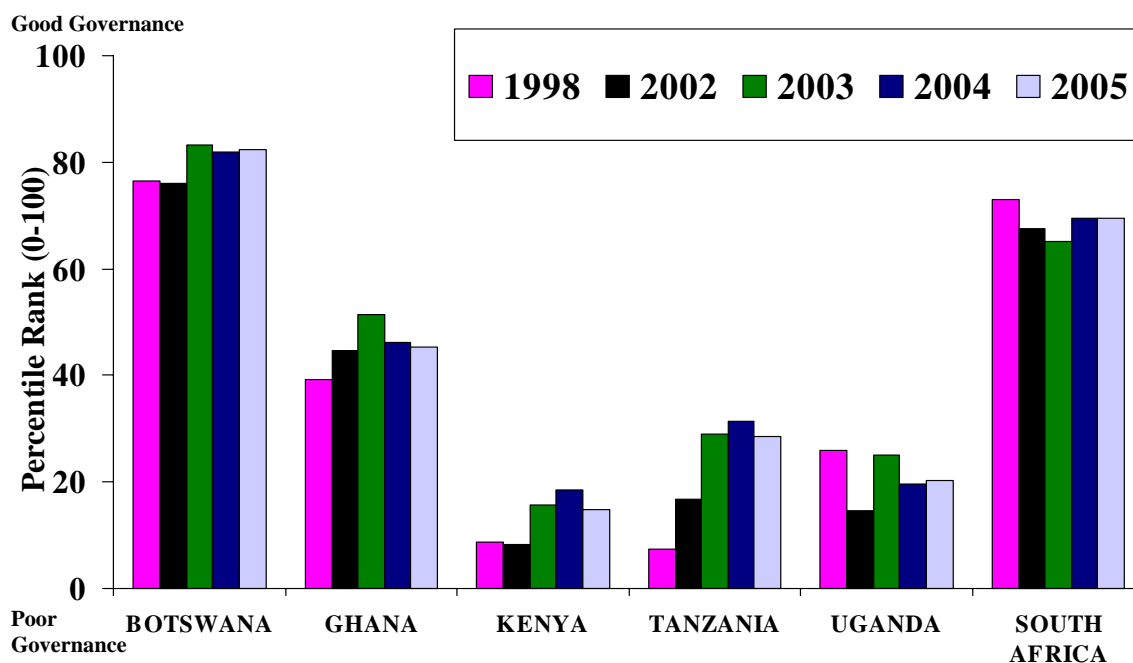
In Regulatory Quality, Kenya ranked in the 42nd percentile in 2005 (down from 43rd in 2004), and in the 74th percentile within the Sub-Saharan region. The country improved markedly between 2002 and 2003 but stagnated afterwards. Indeed, according to 2006 figures the country is statistically significantly better than its regional and income category counterparts. However, it still lags significantly behind other African countries, such as Botswana, Uganda

and Ghana (Figure 26) and as documented in previous section progress is still needed in such areas as red tape, bureaucratic efficiency and administrative burden (licensing) to start a business.

In Rule of Law, Kenya has shown minor improvement since 2000 – however these changes were not statistically significant. The country ranks in the 18th percentile in 2005 (up marginally from 16th in 2004), and in the 43rd percentile within the Sub-Saharan region, i.e. below the median.

Finally, in Control of Corruption, the country recorded a discrete improvement between 2002 and 2003 but again stagnated and even reversed its course between 2004 and 2005. Moreover, in spite of recent improvements, the country still ranks only in the 16th percentile in 2005 (down from 19th in 2004), and in the 37th percentile within the Sub-Saharan region, lagging behind considerably vis-à-vis countries like Botswana, Ghana, Tanzania, Uganda and South Africa (Figure 27) as well as faring well below the average in Sub-Saharan Africa. These results are consistent with Transparency International’s Corruption Perception Index where the country recorded a small improvement in its overall score between 2002 and 2004 moving from the 4th percentile rank to the 10th and then stagnated in 2005. Meanwhile, Kenya’s score of 3.0 (of a possible 6) on the question on “Transparency, Accountability and Corruption in the Public Sector” in the most recent (2005) Country Policy and Institutional Assessment (CPIA) conducted globally by the World Bank and released at end-May 2006 places Kenya at roughly the mid-point among the 79 low income developing countries covered in the exercise.

Figure 3.27 Control of Corruption over Time, KK 1998-2005



Source for data: 'Governance Matters V: Governance Indicators for 1996-2005', D. Kaufmann, A. Kraay and M. Mastruzzi, (www.govindicators.org); Colors are assigned according to the following criteria: Dark Red, bottom 10th percentile rank; Light Red between 10th and 25th; Orange, between 25th and 50th; Yellow, between 50th and 75th; Light Green between 75th and 90th; Dark Green above 90th. Percentile rank reports the percentage of countries rating worse than Kenya. Country coverage ranges from a minimum of 166 in 1998 to 213 in 2005.

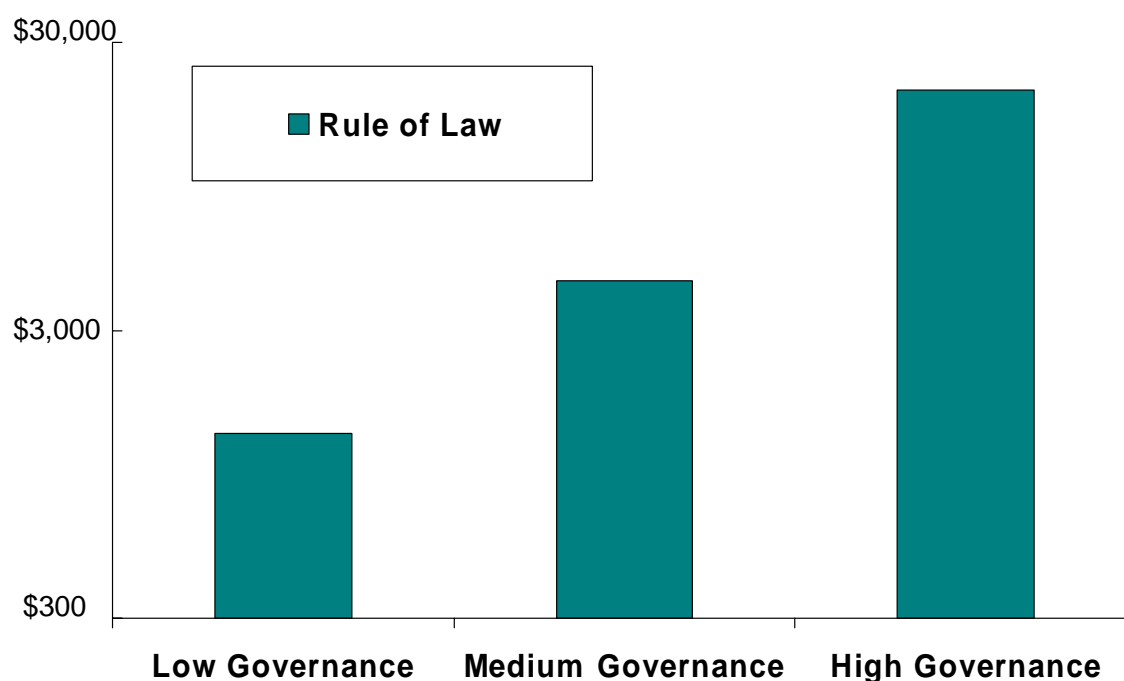
II.a Does Governance really matter?

There is by now a strong consensus among both academics and policymakers that good governance provides the fundamental basis for economic development. Academic research has focused on the effects of institutional quality on growth in the very long run, noting that there is

a strong causal impact of institutional quality on per capita incomes worldwide. Estimates of this “development dividend” of good governance suggest that a realistic one-standard-deviation improvement in governance would raise incomes in the long run by about three-fold (Figures 28 and 29).¹²

Governance also matters significantly for a country’s competitiveness. High levels of corruption, red tape and regulatory burden can have a disruptive influence upon economic growth and incomes per capita in the long run and are indeed viewed as major deterrents to doing business by local firms. Not surprisingly, Kenya’s current low performance in corruption is also associated with a low competitiveness Index (GCI), measured by the EOS Survey (Figure 30). Empirical studies have estimated that on average an improvement in control of corruption by only one standard deviation (which is realistic) for instance is associated with a jump in the GCI for a country by up to 30 rank positions, even after controlling for the income level of the country.

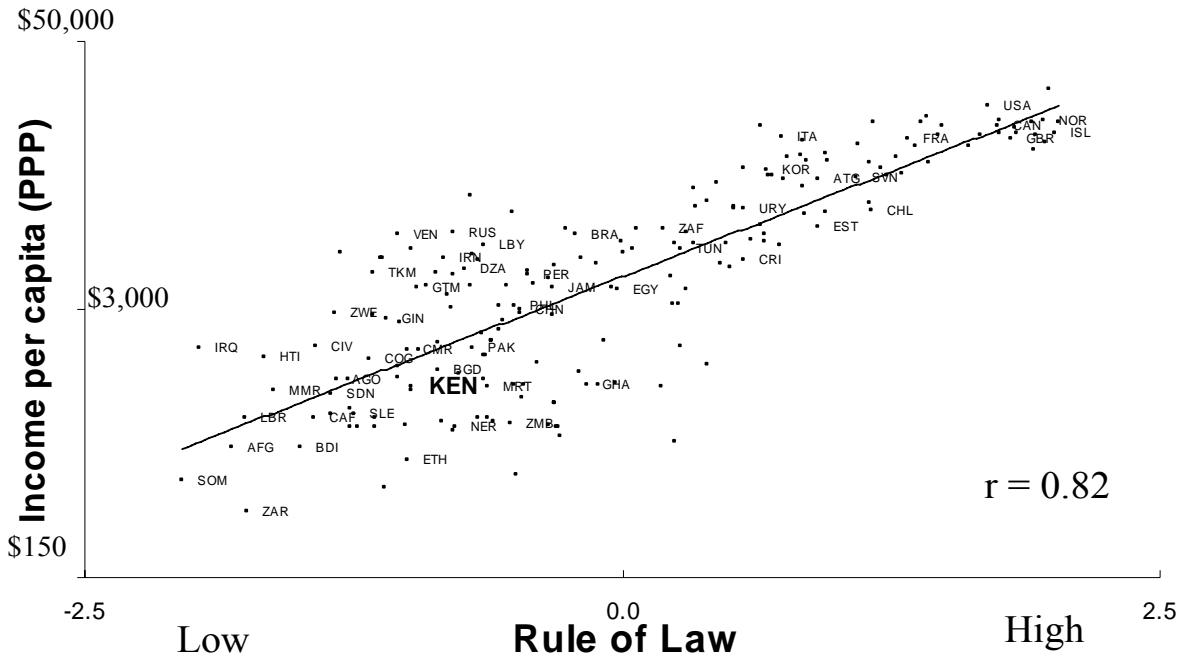
Figure 3.28 Development Dividend from Good Governance



Data Source for calculations: KK 2004. Y-axis measures predicted GDP per capita on the basis of Instrumental Variable (IV) results for each of the 3 categories. Estimations based on various authors’ studies, including Kaufmann and Kraay.

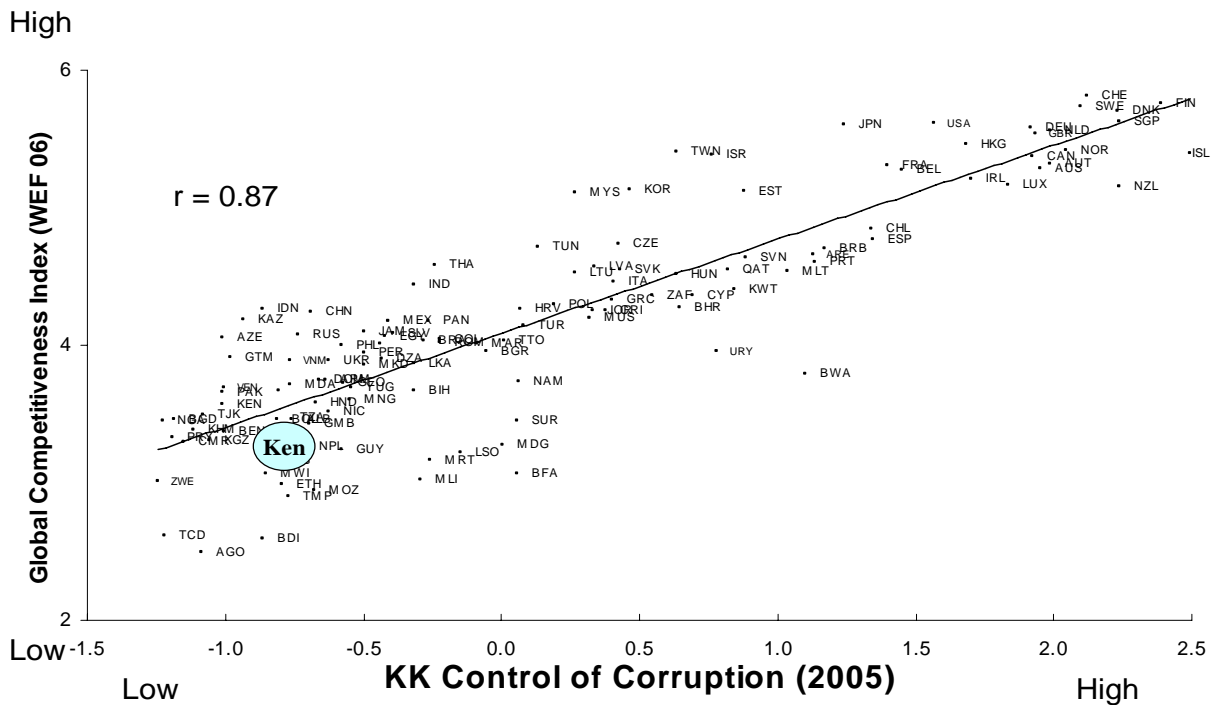
¹² The estimates come from Alcalá and Ciccone (2004), Acemoglu, Johnson and Robinson (2001), Kaufmann and Kraay (2002), and Rodrik, Subramanian and Trebbi (2004).

Figure 3.29 Income per Capita vs. Rule of Law, 2004



Source: KK 2004, Heston-Summers & CIA World Factbook

Figure 3.30 Good Governance Associated with Country's Competitiveness



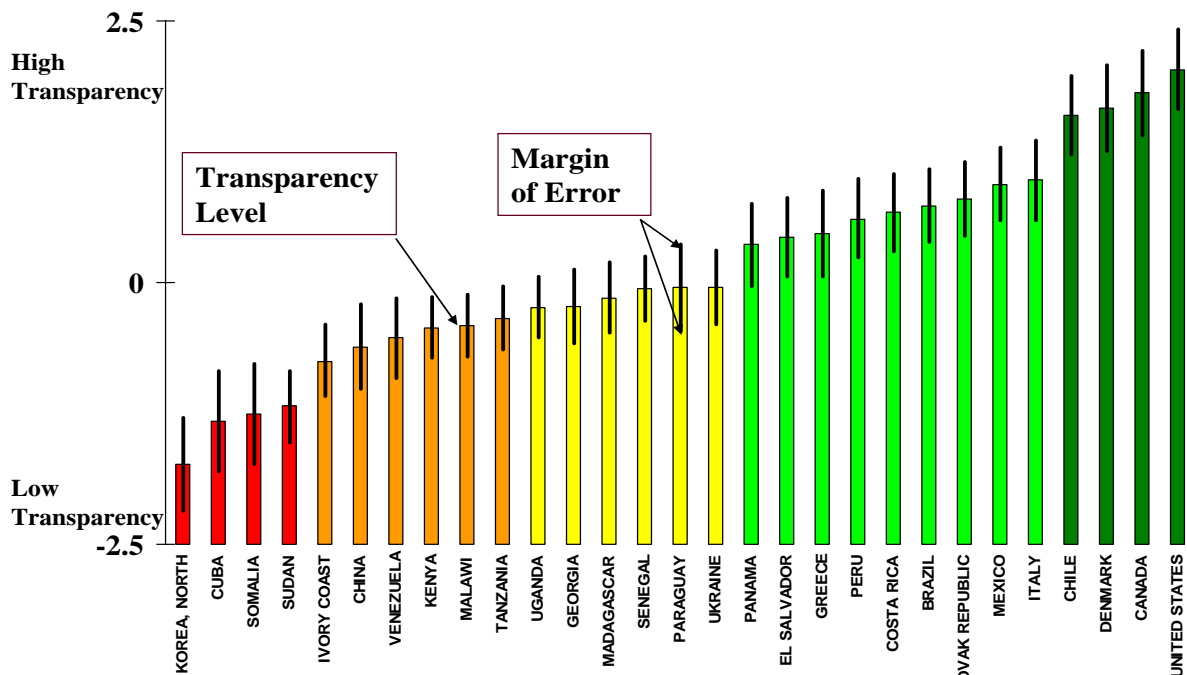
Sources: GCI drawn from 2006/7 Global Competitiveness Report, WEF – 125 countries; Control of Corruption from Kaufmann, Kraay and Mastruzzi, 'Governance Matters V: Governance Indicators for 1996-2005'.

II.b Transparency Matters

Recent empirical studies have found that transparency is associated with better socio-economic and human development indicators, as well as with higher competitiveness and lower corruption¹³. Transparency can improve investment climate and performance in financial markets, reinforce the independence and integrity of financial institutions, promote the public debate and facilitate early identification of the weaknesses and strengths of policies. Rightly implemented, it can provide an important guard against abuses, mismanagement and corruption. Legislatures, the media and civil society are better able to hold the executive to account when they have information on its policies, practices and expenditures. Transparency is important not only because it increases the efficiency in the allocation of resources, but also because it may help in ensuring that the benefits of growth are redistributed and not captured by the elite.

Not surprisingly there is a high correlation between transparency and corruption levels (Figure 32) as well as transparency and competitiveness (Figure 33). As documented by these figures, Kenya lies in the bottom medians of each of these dimensions. Kenya also ranks in the bottom according to UNECA's African Governance Report (Figures 31 and 34). Recent deteriorations by the country in media freedom and government transparency – as documented by various firm (EOS) and household (AFR) surveys - suggest that strong challenges remain in this area.

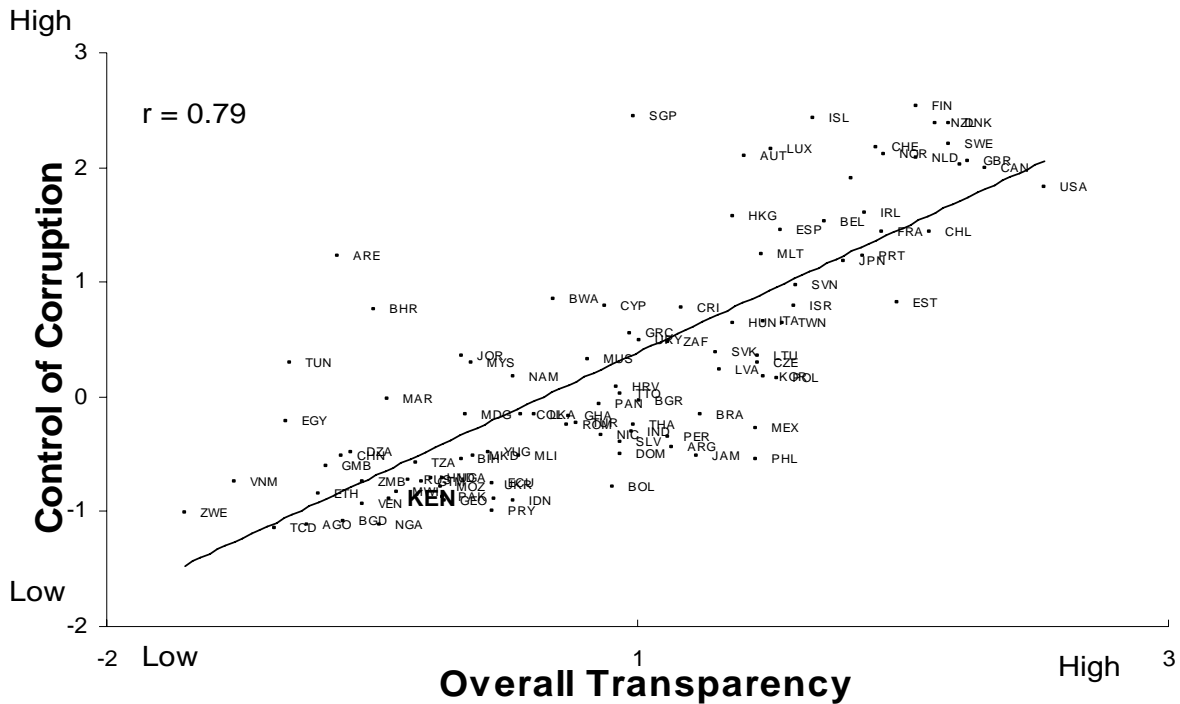
Figure 3.31 Overall Transparency Index, Selected Countries 2004



Source for data: Transparency by BK (2005). Colors are assigned according to the following criteria: Dark Red, bottom 10th percentile rank; Light Red between 10th and 25th; Orange, between 25th and 50th; Yellow, between 50th and 75th; Light Green between 75th and 90th; Dark Green above 90th. Margins of error apply and should be taken into consideration when making cross-country comparisons.

¹³ Transparency: Initial Empirics and Policy Applications, by A. Bellver and D. Kaufmann (2005) • World Bank Policy Research Working Paper

Figure 3.32 Overall Transparency and Controlling Corruption



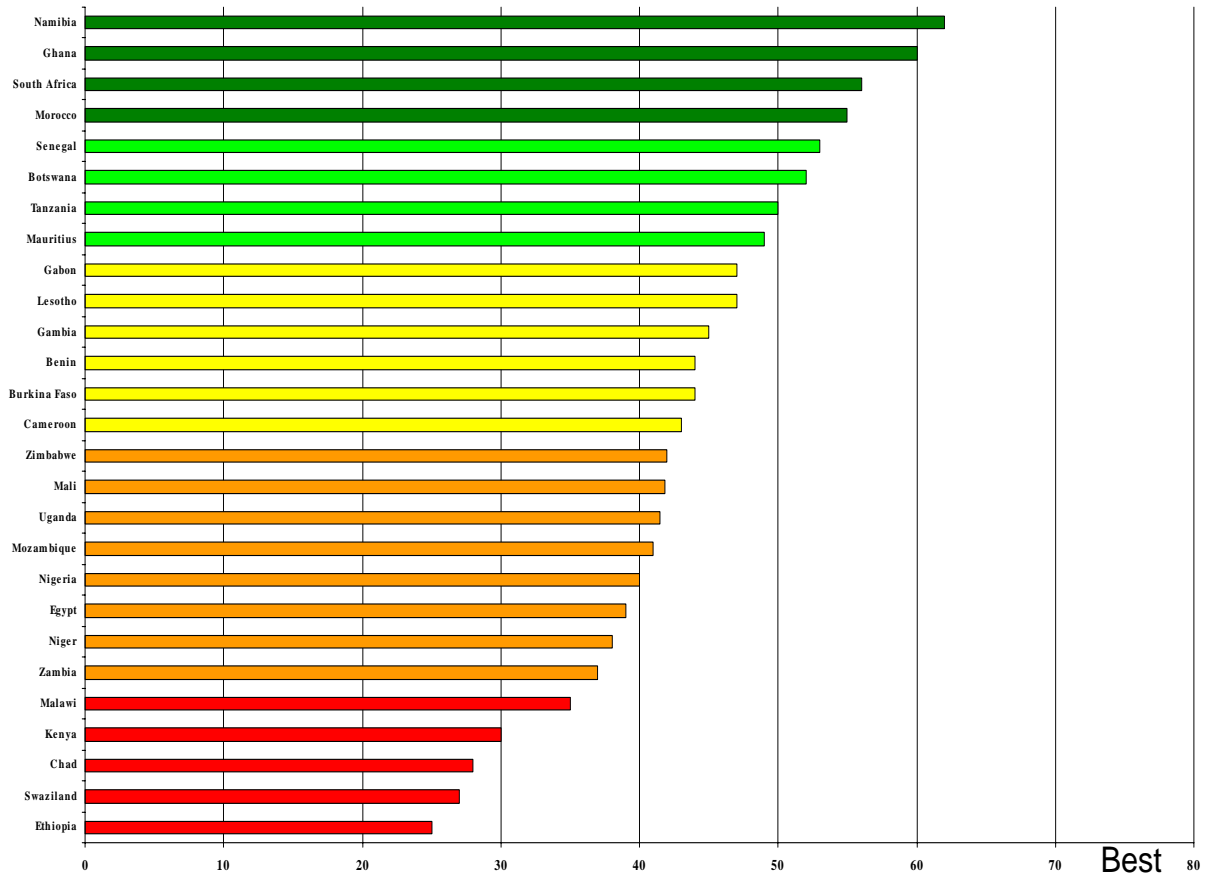
Source: World Bank Institute.

Figure 3.33 Institutional Transparency is associated with Global Competitiveness



Sources: Global Competitiveness Index from the World Economic Forum 2004; Overall Transparency Index from World Bank Institute.

Figure 3.34 Governance Index on Civil Service Transparency and Accountability



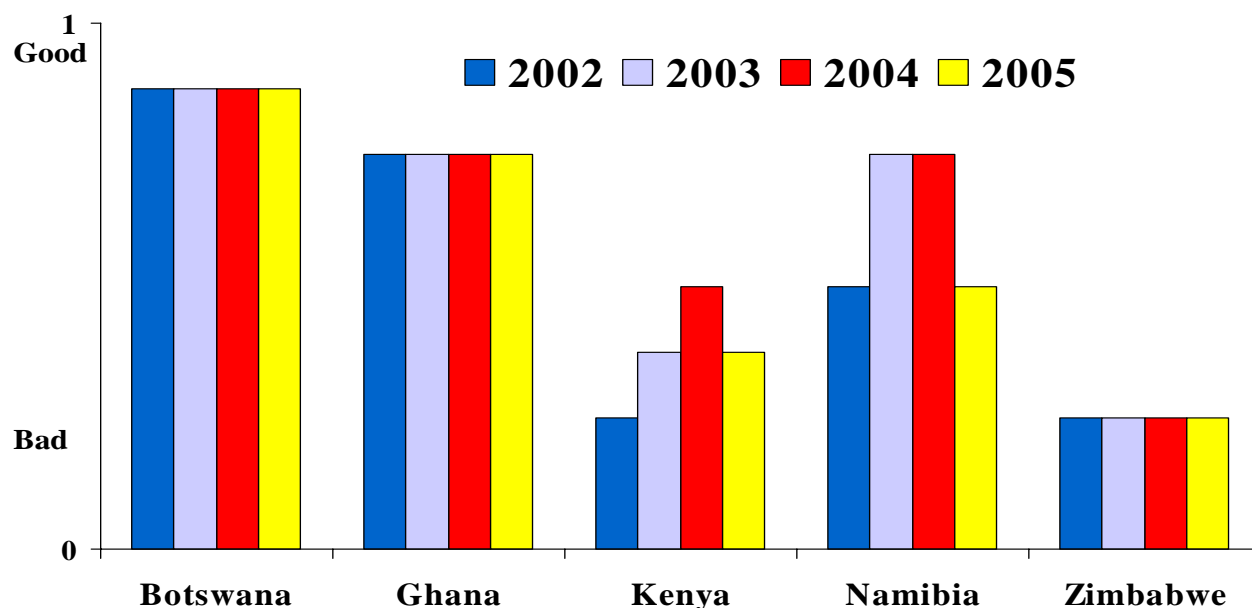
Source: UNECA governance survey of experts

II.c A Brief Empirical Focus on Human Rights

Political participation, civil liberties, and good government are not ‘luxury goods’ that can be acquired solely through economic development. Instead, leaders, policymakers, and civil society need to work hard and continuously at improving these civil rights and governance within their countries. Recent studies have indeed shown that the causality direction goes from improved governance (including civil and political liberties) to economic development, and not vice versa. This implies that specific interventions and policies on governance and civil liberties are required at every stage, rather than expecting an automatic virtuous circle whereby income growth per se will result in improved governance.

In the case of Kenya, deterioration over the past two years in areas of transparency, corruption and media freedom – as documented by various surveys of firms and citizens - point to existing challenges as well as opportunities for stronger focus on reforms to address these trends. Life protection indices constructed out of the Cingranelli-Richards (CIRI) human right dataset¹⁴ similarly point to deterioration in Kenya over the past year (Figure 35) while the country seems to have made some progress in addressing gender inequality (Figure 36). Success in socio-economic development is dependent in great measure on an environment where there is control of corruption, transparency, accountability, rule of law and respect for civil liberties. Hence, in Kenya, the focus of efforts to improve governance ought to shift to a much broader agenda of greater political accountability, meaningful voice mechanisms, transparency, and press freedom.

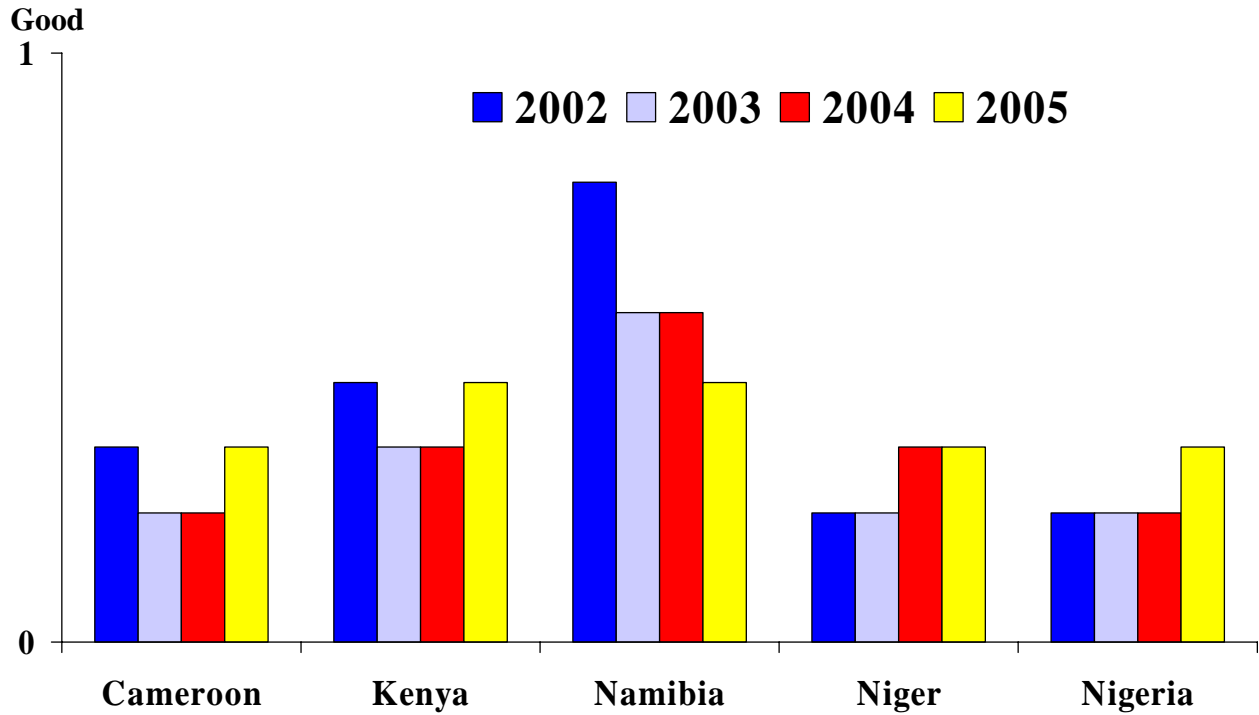
Figure 3.35 Human Rights – Life Protection (Composite of Killings, Disappearances, Torture, & Imprisonments)



Source: Cingranelli / Richards (CIRI) human rights dataset – <http://www.humanrightsdata.com>. A high value reflects respect for human rights.

¹⁴ The Cingranelli-Richards (CIRI) Human Rights Dataset contains standards-based quantitative information on government respect for 13 internationally recognized human rights for 192 countries, drawn from the State Department's and Amnesty International's Human Rights Reports.

Figure 3.36 Human Rights – Women’s Rights
(Composite of Economic, Social, and Political Rights)



Source: Cingranelli / Richards (CIRI) human rights dataset – <http://www.humanrightsdata.com>. A high value reflects respect for human rights.

ANNEX 3.1 On the country empirical diagnostic on governance and anticorruption, and institutionalizing a framework for monitoring governance

Kenyan National Governance Assessment Survey Initiative

In 2004, the Kenyan government, having acknowledged a need to analyze and address significant governance and corruption challenges, yet at the same time noting a mushrooming of uncoordinated governance and corruption survey activity within the country, initiated an effort to execute a single comprehensive national level diagnostic to provide input into the national governance reform program. This initiative is intended to support the specific monitoring of governance trends and policy efforts.

In the context of the Governance Assessment Mission preparation and visit to Nairobi in late June 2006, as per request of the authorities, preparation were initiated towards an-depth country diagnostic on governance and anti-corruption for Kenya, to be executed through various specialized survey instruments. This initiative was labeled as the Kenyan National Governance Assessment Survey Initiative. The diagnostic preparatory work has advanced through its primary stages and the team is finalizing the instruments, sample frame and TOR's for the survey firm(s).

As of October 2006 the Kenyan government, in conjunction with a broad representation of local civil society partners and the international donor community has made significant strides toward executing the National Governance Assessment Survey. They have formed a broadly representative steering committee and technical committee to oversee the diagnostic activity and received expressions of interest from local statistical firms for the data collection activity. Thanks to a generous grant from DfID, the Kenyan government has also been able to assign a member of the state statistical agency CBS to be a full time supervisor and contact point for the project. Currently, the team is in the process of finalizing the instruments, sample frame, budget and Terms of Reference for the data collection and analysis and has plans to complete the data collection by early December of 2006.

Despite a strong level of commitment from the government and other members of the team, and initial preparatory steps already undertaken, challenges remain in terms of: i) time delays; ii) ensuring coordination and effectiveness of survey implementation, as well as uniform standards of quality control and cost effectiveness; iii) independent oversight of the project; and iv) involvement of independent consultants in the preparation of instruments, review of the sample frame and other technical issues has not yet been executed.

Towards a Conceptual Framework for Monitoring Governance Reform in Kenya

A full fledged detailed note on a framework to monitor governance reform in Kenya will be prepared separately, in the context of the preparation of the in-depth country diagnostic assessment on Governance and Corruption indicated above. The aim would be to utilize such governance and anticorruption diagnostic assessment as one important component of a broader framework for monitoring governance reform in Kenya. Such broader framework would also encompass other data sources, such as some of those analyzed in this empirical chapter. The framework will build on the work of experts within and outside the World Bank and outputs such as the Worldwide Governance Indicators and the Global Monitoring Report (GMR). The

objective is to develop a more institutionalized mechanism for monitoring progress of the reform program. Some specific suggestions for monitorable indicators, illustrating this point, are contained in the annotated matrix of the Government's Action Plan on Governance (GAP) at the end of this report.

As initially proposed in this chapter, the framework would both place Kenya in an international comparative perspective, and as importantly, in an over-time (within Kenya) perspective and in as comparative (across institutions, regions, etc) perspective. As done here, the focus will be on governance broadly understood, and not merely on corruption, given that to address the latter it, is key to understand the actual evolution of the former. Significant emphasis is to be placed in gathering in-depth country specific knowledge, obtaining variables which are important for policy monitoring and action, as well as variables that assess actual outcomes on the ground. Inter alia, Kenya specific in-depth governance and anticorruption surveys and monitoring mechanisms will be of use for these. The richness of detail available in these sources will afford the reader a keen analysis of Kenya's governance challenges and opportunities for reform.

From a practical perspective, it is useful to distinguish among at least the following four categories of governance issues: 1) Executive capabilities and bureaucratic excellence, 2) Institutional respect and the rule of law, 3) Checks and balances outside of the executive, 4) Business climate and regulatory regime. Within each of these categories one can distinguish input and output measures. For example, measures of "Executive capabilities and bureaucratic excellence" will encompass indicators of professionalism within the bureaucracy and measures of public service quality based on satisfaction surveys of public service users.

ANNEX 3.2 LEGEND OF SOURCES

Afro-Barometer surveys, various years

Bellver A., and D. Kaufmann “Transparenting Transparency: Initial Empirics and Policy Applications”, World Bank Policy Research Working Paper, 2005

Cingranelli-Richards human rights dataset, various years, www.humanrightsdata.com

Freedom House, Press Freedom Index, 200

Kaufmann, D., A. Kraay and M. Mastruzzi, “Governance Matters V: Governance Indicators for 1996-2005”, World Bank Policy Research Working Paper, 2006 - www.govindicators.org

Kenya Anti-Corruption Commission, “National Corruption Perception Survey“, November 2005

Reporters without Borders, Press Freedom Index, 2006

Steadman Group, “Social, Political, Economic and Cultural Survey“, July 2006

Steadman Group, “Governance, Justice, Law and Order Sector Survey“, June 2006

Transparency International, “Kenya Bribery Index“, December 2005

UN Economic Commission for Africa, “African Governance Report“, 2005

World Bank, “Country Policy and Institutional Assessments“, 2005

World Bank, “Doing Business Report“, 2005-2006, Oxford University Press

World Bank, “Public Financial Management Performance Indicators“, 2006

World Economic Forum, “Global Competitiveness Surveys“, various years

CHAPTER 4. Anti-Corruption Efforts

An Assessment of the recent half a decade of Anti-Corruption Reforms

When it came to power at the beginning of 2003, the new government made a number of bold moves in fulfillment of its campaign pledge to put a halt to corruption. However, notwithstanding important legislative and institutional developments and the beginnings of political accountability, Kenya remains an underperformer on anti-corruption, especially given the expectations of Kenyans and the promises of the Government. At its core, such underperformance is an indication that the fight has too few champions and in all probability, too many enemies, some of whom are fighting back successfully. However, because of the efforts already made and the ones that are planned, there is considerable room for these initiatives to produce tangible and measurable results. But this would require yet further steps and strong leadership at all levels, with an almost single-minded focus on reversing behaviors that have been sanctioned politically, socially and culturally for decades.

Several recent documents and events (including Stakeholder Fora on Governance and Anti-corruption sponsored by the Government in April, May and June this year, along with the Minister of Finance recent budget speech on June 15, 2006) offer glimpses of the further steps that are already planned or being contemplated in the fight against corruption. This assessment seeks to provide an input to the GoK initiatives, so we learn what is likely to be more effective within the Kenyan context and what opportunities may arise in the near future.

Kenya's efforts since 2003 to fight corruption

Legislative Actions. In 2003, Parliament passed the Public Officer Ethics Act, requiring civil servants to file annual declarations of income, assets and liabilities, and the Anti-Corruption and Economic Crimes Act, which set up the Kenya Anti-Corruption Commission (KACC). The Government also enacted key legislation aimed at improving governance and public service delivery which include the Government Financial Management Act (2004) and the Public Audit Office Act (2004). In fulfillment of the Anti-Corruption Action Plan for April 2005-June 2006, a landmark Procurement Bill received Presidential assent in November 2005, establishing an autonomous Public Procurement Oversight Authority responsible for the regulation of procurement in the public sector, including procurement of security related contracts—transactions which were shrouded in secrecy in the past and associated with high level graft. In addition, the Privatization Act received Presidential assent in October 2005 setting the stage for the privatization of public assets and operations including state corporations, as part of the privatization program under a new privatization commission.

Capacity Building and Administrative Actions. Under the Anti-Corruption Action Plan, there was also a four-fold increase in the professional staff of the KACC, recruitment of 23 magistrates and other legal staff, and the launch of public education campaigns. The Attorney General's Office had 126 new state attorneys in January 2006, significantly increasing its capacity. To speed up trials, the Chief Justice changed the rules of the court in January 2006 to set rigorous time limits for disposing of Constitutional references which tend to add years to the disposal of cases. Responding to criticism that it relied too heavily on legislative measures, the Government

began to take administrative steps more regularly. For example, in December 2005, the Government annulled the recruitment of 3,000 police officers and suspended senior officers involved in the recruitment exercise, pending further investigation. The Kenya Revenue Authority also announced that it was suspending several senior officers that work at the Port pending investigation into why they were not achieving performance targets for customs revenues. In addition, the Government fired the Managing Trustee of the National Social Security Fund following investigation by the KACC, although months later he was appointed to head another parastatal. The Governor of the Central Bank was also suspended pending investigations of wrongdoing. Such suspensions and firings have become somewhat more frequent in recent months. Previously, in 2003, the Government has removed 16 judges and 73 magistrates and replaced all senior civil service procurement officers.

Results-based Management and Performance Contracts. Consistent with the focus on the effective and accountable use of public resources, the Government has introduced a Results-Based Management (RBM) system as a tool for helping public sector institutions to focus their work, plan strategically and demonstrate the difference that each organization is making to development. This focus on ‘practical results for Kenyans’ is based on international best practice in countries such as Canada, Sweden and the United Kingdom. The Government has also introduced performance contracts for all its senior officials including those in parastatals. The contracts are meant to create incentives for public sector managers and their staff to improve performance and accountability by undertaking to deliver specific outputs in line with their mandates. The availability of these contracts is not widely known, and is therefore a missed opportunity for public monitoring, assessment and pressure for enforcement. There is also room to improve the focus of the contracts themselves on issues of corruption.

Ministerial Accountability. Following the constitutional referendum of November 2005, the President reshuffled his Cabinet, removing the Minister most widely alleged to have been involved in large-scale corruption and appointing a new and respected Minister of justice and constitutional affairs. During February 2006, two of the Ministers named in the Anglo Leasing scandal report prepared by the former Permanent Secretary for Governance and Ethics resigned from office to allow for investigations to proceed. KACC began to investigate these and all others mentioned as possibly involved in corrupt activities. A third Minister, the Minister of Education who had been the Minister of Finance at the time of the Goldenberg affair occurred in the early 1990s, resigned following his implication in the Goldenberg Commission report which was also released at this time (in July 2006, however, Kenya’s High Court ruled that he had acted appropriately in his role as Minister of Finance, and that because Kenya’s Attorney General of a decade ago had cleared him of wrong-doing in a statement to Parliament at the time he could not be prosecuted – this High Court ruling is being appealed). This was followed by Government seizure of passports and firearms of several individuals associated with Goldenberg. Prosecutions in the Goldenberg scandals began in mid-June 2006 but prosecutions in the Anglo-leasing have been awaiting the completion of investigations by the KACC (the latest developments are provided later below). Separately, the President has also required that members of the new cabinet sign a code of conduct, and that the KACC verify their declaration of assets. These declarations are now being vetted by the KACC.

Other Measures. In October 2005, the Government established independent audit committees in all ministries, departments, state corporations and local authorities. This step is part of a new risk-based internal audit approach, supported by the World Bank and other donors, that involves

identifying the potential for fraud in advance and building the necessary risk mitigation processes into the design of government systems and processes. The prospects for reducing rent seeking were further enhanced in November 2005 through additional measures such as the liberalization of coffee marketing (after over a decade of policy debate about it), and a request to Parliament to eliminate 35 licenses previously required for setting up a business. In June 2006, through the Finance Minister's budget speech, the Kenyan Government committed itself to eliminating 118 licenses, and to simplify another 700 of the 1,347 licenses reviewed by the Ministry of Finance Working Committee. Of the 118 licenses, 8 licenses were eliminated effective from June 8, 2005 and 21 licenses from June 15, 2006. Additional license eliminations are likely to follow as the review process continues throughout 2006, among others to the review of the 436 licenses issued by local governments. These reforms are scheduled to be fully implemented by December 31, 2006.

Scratching the surface- many reforms have been implemented but institutional and structural changes remain incomplete.

Despite the range of actions on legislative, administrative, political and other fronts discussed above, both the Kenyan public and international observers have seriously questioned the Government's determination to carry them forward towards sustainable change. The peer review by the New Partnership for Africa's Development (NEPAD) indicates that 60 percent of Kenyans feel that the government has not gone far enough in the fight against corruption and over 90 percent believe that there is still corruption in government. At a National Stakeholder Conference convened in late May 2006 by the Government to discuss future plans for fighting corruption, the Minister of Justice and Constitutional Affairs noted that efforts so far 'have only scratched the surface'.

Since 2003, the government has implemented a raft of measures-considered below- but its conception of reform has been rather managerialist: fresh faces have been appointed to key oversight bodies and anti-corruption agencies such as the Kenya Anti-Corruption Commission but the institutional relationship between anti-corruption institutions remains unsolved; new laws have been enacted, many more are planned but the implementation of such laws has been uneven; the bureaucracy is unreformed; inquiries and probes have been launched into past graft but recommendations resulting from these investigations have neither been properly debated nor fully implemented.

The result is an incomplete transition and a precipitous loss of public confidence - so says surveys and opinion polls- in the government's ability to steer reform¹⁵. Though many positive measures have been undertaken, the overall approach has not been integrated and not accompanied by continuity in leadership. What follows is an assessment of some of the pillars of anti-corruption reforms to date.

Leadership. The government's anti-corruption campaign kicked off in January 2003 with the appointment of a team of individuals, many of whom had advocated governance and economic

¹⁵ In the latest opinion poll 64% of Kenyans say that the government is not committed to fighting corruption; 71% believe that it will not deal conclusively with Anglo-Leasing; another 68% believe that the Goldenberg scandal will not be resolved and yet another 65% say that the report and recommendations of the Commission of Inquiry into Irregular and Illegal Allocation of Public Land will not be implemented. See news story reporting the results of an International Republic Institute, IRI, sponsored opinion poll in the *Daily Nation*, Tuesday July 11th 2006.

reforms as members of civil society or opposition parties.¹⁶ Many reforms were launched: the appointment of commissions of inquiry into past corruption irregular land allocation and Goldenberg; enactment of new laws; establishment of ad hoc anti-graft committees happened during the first year. However, the reform spirit started waning in 2004 as corruption networks started regrouping and fighting back, including playing a key role in the Constitutional Review process and infiltrating the new administration. In February, 2005, John Githongo, former Executive Director of Transparency International, Kenya Chapter and then Permanent Secretary for Governance and Ethics resigned, citing lack of sufficient support for anti-corruption efforts and frustrations by new and aggressive corruption networks. A Recent World Bank study¹⁷ indicates that Kenya's multiple anticorruption agencies and administrative bodies were never well coordinated. But with the resignation of an enthusiastic campaigner whose office was directly under the presidency and his subsequent revelations, it became clear that vibrant new leadership would be needed with an almost singular focus of challenging the status quo, dismantling corruption networks and translating good governance into improved welfare for ordinary people.

Investigation of corruption. Investigations into past corruption have cost much but yielded little: tools such as Commissions of Inquiry, Task Forces and other ad hoc probes have spotlighted past corruption but have not resolved such corruption or led to robust or lasting changes. Since 2003, the government has launched a series of investigations into past corruption: an inquiry into the Goldenberg scandal; another into the illegal and irregular allotment of public lands; a probe into *harambee*, a system of public fund-raising that under-writes Kenyan politics; a Commission on Truth, Justice and Reconciliation; a Task Force into Public Housing and only this June, a Commission of Inquiry into the criminal activities of the Artur Brothers. Except this last inquiry, the other Task Forces, Probes and Commissions have reported back to the President. However, their recommendations which generally have been tough in the case of the Commission of Inquiry into Irregular and Illegal allotment of Land and the Task Force on Public Collections have been muted or captured¹⁸ and most of the recommendations have either not been implemented or only partially so. Two examples are provided below.

Example 1: Investigation on Political Fund-Raising. The Task Force on Public Collections was mandated to look into political fund-raising and propose reforms to check its abuse. In theory, fund-raising is regulated by the Public Collections Act. But two studies by Transparency International, Kenya, show that fund-raising is intimately linked to politics. A 2001 study showed that President Moi was the largest fund-raiser, contributing a total of 155 million shillings (US\$2 million) in 635 fundraising events surveyed over a 10 year period. Tellingly, the

¹⁶ This team included Cabinet Ministers Kiraitu Murungi, Mukhisa Kituyi, Amos Kimunya, Raila Odinga and Peter Anyang Nyong'o, John Githongo, Permanent Secretary for Governance and Ethics (formerly Executive Director, Transparency International Kenya Chapter), Maina Kiai, Chairman of Kenya National Commission on Human Rights, Chief Justice Evans Gicheru and a few others. Other reformers were appointed later including Michael Waweru, Director General of Kenya Revenue Authority, and Justice Aaron Ringera, Director, KACC.

¹⁷ See, A Review of the Laws, Institutions and Judicial Processes for Dealing with Corruption in Kenya, October 2006

¹⁸ Such as those of the Commission of Inquiry into the Goldenberg Scandal. The Commission did not fully cover its mandate- it was also meant to have investigated a) the impact of the Goldenberg scandal on the judiciary –bad decisions which may have been corruptly procured for instance and b) also identify the beneficiaries of Goldenberg monies-, nor call some critical witnesses- Neither of the two ministers for finance under whose watch Goldenberg happened George Saitoti and Musalia Mudavadi were called as witness even though the Commission had power under the enabling legislation to compel their attendance.

top 20 fund-raisers were cabinet ministers and top civil servants. Two questions arise relevant to anti-corruption reform: Where did ministers and civil servants get the money from? And why did contributions escalate just before elections? The study covered the campaign period from October to December 2002. 140 fundraisers were held. The top contributor in these events was Uhuru Kenyatta, KANU's presidential candidate. He contributed Kshs 5.3 million in the 26 events he attended. President Daniel arap Moi, was second, paying out Kshs 3.35 million in the 22 events he attended. Against this background, the Task Force was asked to suggest measures to reform fund-raising and minimize corruption in politics. After hearings, it recommended that *harambee* be banned and the soliciting of money in public office be criminalized. The Public Officer Ethics Act barred public officers from fund-raising events and criminalized the use of public offices for solicitation. However, after an initial dip in activities, there was - with a wink to the law and the wise- a new surge in political fund-raising. There is no assurance that in the pre-election period 2006-2007, we won't see a dramatic rise in political fund-raising as we saw in 2000-2002. Table 1 below compares fund-raising events in the pre-election period to 2002 and in the immediate post-election period 2003-04. Even on a very superficial analysis the results are truly dramatic.

Table 4.1 Political Fund-Raising in the Pre-(2000-02) and Post-(2003-04) Election Period, Harambees, per Province

Province	Kshs amount to rounded to the nearest (1,000,000)		Number of Fundraising Events (harambees)		Provincial events as % age of total	
	2000-02	2003-04	2000-02	2003-04	2000-02	2003-04
Rift Valley	427	18	406	61	27%	18%
Eastern	305	8	207	21	20%	8
Nairobi	183	22	193	22	12%	23
Central	178	17	154	38	12%	18
Nyanza	161	23	153	33	10%	24
Western	155	7	95	19	10%	7
Coast	102	0.5	93	7	7%	0.5
North Eastern	29	0	13	2	2%	0
Total	1,540	96	1,314	203	100%	

Source: Compiled from Transparency International's Harambee Studies

Approximately a total of Kshs. 1.54 billion (US\$21 million at current exchange rates) was raised during the pre-election period from January 2000 to September 2002 with a total of 1,314 reported events being held throughout the provinces. This is an average of Kshs.1.17 million (US\$16,000) per Harambee. Two provinces, Rift Valley and Eastern account for 47% of all the funds raised in Harambees for the period. Politically speaking, these were also among the most hotly contested provinces in the country. Rift Valley Province received 27% of all the funds raised, a total of Kshs. 427 million.(US\$5.8 million) Eastern province was second with Kshs 305 million (US\$4.2 million) raised, or 20% of total amounts raised in the period. The North Eastern Province had the fewest fund-raising events as well as the least amounts of money raised, only Kshs. 28.6 million.(US\$397,000) This is consistent with the marginal nature of the province in Kenya's electoral politics.

Over the period 2003-2004 a total of 203 fund-raising events, Harambees, were reported in the between beginning of January 2003 and the end of September 2004. Unfortunately, the total amount raised in 103 of these Harambees was not reported. But the total amount raised for the remaining 100 Harambees was about Kshs. 96 million.(US\$1.3 million) The average for each harambee being Kshs 0.96 million (US\$13,000).

Comparing the two periods the following conclusions may be tentatively drawn:

- Although the overall amounts contributed cannot be determined for the period 2003-2004, the average amounts raised per event for which data is available is roughly comparable to the amounts raised per event in the period 2000-2003. The post-election average (US\$13,000) was only US\$ 3000 less than the pre-election average (US\$16,000). This might suggest that during election periods it is the *intensity of fund-raising* that goes up rather than the *overall contribution*. This is consistent with the intuition that we may expect politicians to hold events in more places as opposed to spending more money in fewer places.
- On the face of it, there is an overwhelming drop, 93.7%, in the amounts of money raised in the period 2000-2002 (a pre-election period) as compared to the period 2003-2004, the immediate post-election period. However, there is no data for amounts raised in 103 events. But assuming that the average of 0.96 million is rational, the drop is still remarkable. Without further study one may surmise either of two things: i) the salience of electioneering on political spending; ii) the impact of the enactment of the *Public Officer Ethics Act*. All things considered-including past *harambee* spending in election years, 1992 and 1997- it is the fact of elections that explains the incidence of fund-raising in 2000-2003 rather than the enactment of the POEA in the post election period, 2003-2004.

Given the opacity that surrounds the sources of funds donated in *harambees*, there is reason to worry that without a long-term, open and transparent mechanism for funding politics in Kenya, political fund-raising will continue to be a concern for anti-corruption initiatives in Kenya.

Example 2: Investigation into Past Corruption- Goldenberg & Land Grabbing. In the run-up to the 2003, the government saw resolution of past corruption as an essential ethical line-drawing for its future attack on the vice. But by the time the two commissions of inquiry reported to the President, the government was mired in new corruption and its ability to deal with old corruption was now ruinously eroded. The result was that though the government promised that recommendations of both Commissions would be implemented, they have in fact not been or have been only been very patchily implemented. This weak implementation has been further weakened by pressure on government to find coalitional partners for the 2007 elections has made government less fussy about who it cuts deals with.

Recent Developments on Anglo Leasing- On October 2, 2006, KACC announced completion of investigation on five of the eighteen Anglo Leasing projects. The Director, KACC, Justice Aaron Ringera, explained that the investigations took long because they were "complex, protracted and multi-jurisdictional". Justice Ringera, also made public his recommendation to the Attorney General to prosecute twelve officials associated with the five projects. These include four former Cabinet Ministers, three former Permanent Secretaries and five senior government officials (including a Financial Secretary). Also recommended for prosecution on corruption is a Cabinet Minister accused of fraudulent mileage claims and three counts of economic crimes. Despite enormous pressure for speedy investigations and deadlines, the

Director has always maintained that he would not be drawn to the public's, donors' or the political opposition parties' calendars because his key focus is to ensure thorough investigations for Anglo Leasing (which has included over 270 witnesses from home plus another 70 individuals from abroad). The Attorney-general has just sent the files of the cases recommended for prosecution by the Kenya Anti-Corruption Commission back to the KACC for further investigations.

Two general conclusions can be obtained: 1) The Anglo Leasing case is likely to buttress the crisis of public confidence in the ability of the institutions in the judicial chain to deal expeditiously and credibly with allegations of big graft, and indeed, any major corruption cases. It is therefore crucial to restore citizen's confidence and be able to deliver results that the current government can offer at the end of its administration; and 2) The judiciary is a key component in the fight against corruption and any meaningful and lasting improvement in Kenya's governance system must involve effective championing of judicial reforms.

Legal framework. Many new laws have been enacted, but 1) there is insufficient political will to fully implement them; 2) some, such as asset disclosures rules in the Public Officer Ethics Act, have serious gaps and 3) others - such as asset seizures under the Anti-Corruption and Economic Crimes Act- are open to constitutional challenge.

The government's anti-corruption agenda has been busiest on the legislative front. Over four years the government has enacted the *Public Officer Ethics Act in 2003*; the *Anti-Corruption and Economic Crimes Act* in May 2003; in December, 2003 Kenya became the first country to ratify the *UN Convention against Corruption*; in 2005 Parliament enacted the *Public Audit Act*, the *Procurement Act* and the *Privatization Act*. Other proposed laws include: *The Proceeds of Crime Act* and the *Fiscal Management Act*. The former is a government proposal, the latter a private member's bill¹⁹. The Anti-Corruption and Economic Crimes Act establishes special magistrates' courts to try corruption cases -but these are few, less than 10 magistrates nationwide, and so far, no anti-corruption judges have been appointed; establishes and then authorizes KACC to seize assets-on application to the High Court- traceable to corruption. The Public Officer Ethics Act mandates disclosure of assets by public officers but makes those disclosures confidential; it requires ministers and other public officers to eschew conflict of interest but where such conflict has been reported no action has been taken. Though financial acts have been changed the regulations that implement these acts have not been amended since the late 1970s and early 1980s. Unfortunately, these new laws, though necessary, have led mainly to juridical inflation, not to less corruption²⁰ and the real challenge regards to implementation.

Judicial reforms to fight corruption were initiated in 2003 but these reforms have 1) been bogged down in law suits filed by judges who were dismissed for corruption and incompetence

¹⁹ A private member's bill is usually an initiative of an ordinary member of the house brought in his own name rather than that of his or her party.

²⁰ The problem has been two-fold: lack of implementation capacities and absence of change leaders with sufficient political clout to unlock the bureaucracy. The first problem stems from the NARC government's mistaken reliance on a civil service inherited from an antecedent regime characterized by secretiveness, opacity and acculturated to a single party mindset. The second problem arises from the Government's failure to bring change leaders into the Public Service Commission, PSC, the body that has the remit, under the constitution, to hire, fire and discipline public servants. Without changes to the PSC, most bureaucratic reforms that could lead to staff retrenchment – such as those now overseen by Office of the President – are vulnerable to legal challenge.

in 2003; 2) been shallow- see below, sacking corrupt judges is a necessary but not sufficient condition for judicial reform and too narrowly focused on administrative and judicial welfare issues; and 3) hardly begun to address the more serious institutional issues relating to independence and competence of the judges, autonomy of the Judicial Service Commission; deepening access to justice and widening the geographical spread of the courts and rationalizing the court system.

Having collected views from around the Country in 2002, the Constitution of Kenya Review Commission concluded that “the judiciary rivals politicians and the police for the most criticized sector of Kenyan public society today. For ordinary Kenyans, the issues of delay, expense and corruption are the most worrying. For lawyers there is concern about competence and lack of independence from government.” The Commission lamented that there is “overwhelming evidence that judges have been appointed for the wrong reasons”; that “many have demonstrated neither competence nor integrity.” The Commission said that it had, reluctantly, ‘decided not to go as far as recommending the dismissal of the existing judiciary.’ This decision was taken not on the basis that it was not desirable, but on the prudential ground that to dismiss the entire judiciary “would be viewed internationally as a grave interference with the independence of the judiciary” and “it might be thought to weaken the taboo against dismissing judges.”

Given the context, judicial reform was seen as a key plank of the government’s anti-corruption strategy. In September 2003, President Kibaki suspended 23 Court of Appeal and High Court judges as well as 83 magistrates after a probe by the current Chief Justice concluded that there was credible evidence that they were either corrupt or incompetent. However, the process of reform has now stalled. Of the dismissed judges one has been cleared of wrong-doing; about a dozen opted for retirement but the rest have filed cases in court challenging various aspects of their dismissal. The resulting law suits have brought the question of judicial appointments and removals: Is the current process appropriate? How should be redesigned in the new Constitution? What should be the role of the Judicial Service Commission in the discipline and removal of judges? Is a judge entitled to an administrative hearing before suspension?

There are three problems that arise:

- First, there are way too many committees that are set up to look into judicial matters even though the key reform elements are well known. Since 1960 there have been over eleven committees²¹ appointed with a mandate to make recommendations on different aspects judicial reform. Over 70%, by length, of the reports of such of these committees that focused on the judiciary were dedicated to administrative and operational reforms.
- Secondly, the slow-down in judicial reforms since 2003 seems to suggest that the government has mistaken what is merely a *necessary condition* for judicial reform- the dismissal of corrupt judges- for a *sufficient* one.²²

²¹ The resulting reports include 1) the Fleming Commission Report, 1960; 2) the Pratt Commission Report, 1963; 3) the Miller Craig Commission Report, 1967; 4) the Ndegwa Commission Report, 1971; 5) the Waruhiu Committee Report, 1979/80; 6) the Ramtu Committee Report, 1985; 7) the Mbithi Committee Report, 1990/1991; 8) Report of the Committee to Inquire into the Terms and Conditions of Service of the Judiciary, 1991-1992; 9) the Report of the Committee on the Administration of Justice, 1998; 10) the Report of Integrity and Anti-Corruption, 2003 and 11) the Report of the Sub-Committee on Ethics and Governance of the Judiciary, 2005.

²² See the extensive study by the International Commission of Jurists on Judicial Reform in Kenya.

- Thirdly, there cannot be an effective policy to prosecute corruption without an effective judiciary. This sad fact has been most dramatically illustrated in the last fortnight by the decision of the High Court to stop the indictment of George Saitoti for Goldenberg related crimes on the argument that what he did as Minister for Finance was pursuant to a cabinet decision and supported, ex post facto, by a resolution of parliament. In the past indictments and prosecutions have been slow-punctured by preliminary constitutional applications that block or prohibit filing and prosecution of charges.

The conclusion then is that judicial reforms so far undertaken are inconclusive. Even when reforms appear to start in earnest, they focus too much on capacity and administrative issues and not sufficiently on the institutional and structural aspects- security of tenure for magistrates, institutionalization of a public complaints mechanism, clarification of the procedure for removal etc- needed to secure judicial independence. In the medium term, judicial reforms - including many measures that are constitutional and procedural-must stay firmly on the anti-corruption agenda first in order to strengthen the judiciary as such and second, in order to ensure better prosecution of corruption cases.

Though public procurement and administrative and financial reforms have been undertaken, the payoffs are uneven, some sectors such as revenue collection and tax-compliance have surpassed expectations, others - such as procurement of defense and security equipment - have been both marked with lack of transparency and controversy. Public service reform has moved apace but overall performance has varied from department to department. Revenue performance at the Kenya Revenue Authority, KRA, has been dramatic, surpassing expectations, mainly attributed to leadership of KRA, greater compliance and institutional reforms in the organization. Public Sector Financial Management including strengthening of the Office of the Controller and Auditor General remains uneven-procurement is weak; the office of the CAG is stronger and conducting timely audits; parliamentary oversight over budget and audit is still very weak and technology uptake between government departments has been asymmetrical, some much further than others. In terms of the legal framework, the Public Audit Act has been enacted but the subsidiary financial regulations need to lay out the specific details of government financial management have not been.

Overall, in the medium-term program possibilities lie in 1) drafting the detailed financial regulations needed to replace the old rules; 2) revising and enacting the proposed Fiscal Management Bill to enhance budget transparency. However, the key problem seems to rely, not so much on the legal framework but on the weakness of Parliament to exercise its oversight role over budget formulation and execution. Although, it should be noted that there has been a shift in the balance of power between the Legislature and the President and increasingly the executive will have to bargain with the National Assembly on anti-corruption reforms. Strengthening the Parliament and its technical capacity to scrutinize the public accounts will be critical to the success of anti-corruption and governance reform over the medium and long-term.

Developing a short - medium term anti-corruption reform program. The following are some criteria to guide the process of identifying the key elements of an effective anti-corruption approach over the next 2 years given the current political context.

Focus on reform measures that do not need new legislation or policy documents that need legislative approval. The divisions generated by the referendum in 2005; President Kibaki's

decision to abandon his previous allies from the 2003 election; the growing public concern about new corruption and about attacks on the media have undermined the political authority of the government. One consequence is that support for government in parliament is at best weak. Any new anti-corruption measures proposed by government are likely to face opposition in parliament. Given that the government does not have a working majority in parliament, in the short-term, the anti-corruption reforms likely to yield results will be:-

- Measures that implement of laws that have already been enacted such as the Anti-Corruption and Economic Crimes Act, the Public Officer Ethics Act and the Procurement Act. For instance, implementation by the KACC of the provisions related to compensation and recovery of improper/corrupt benefits under Part VI of the Anti-Corruption and Economic Crimes Act; systematic reporting and monitoring of the corruption cases that have been investigated; identifying and reporting on actions taken by the Attorney General to indict prosecute these case; identifying the stages at which each of the prosecutions is and specifying what is holding back conclusion of the cases currently pending before the courts and what the AG's office is doing about each; More transparent approach to procurement including but not limited to electronic placement of government contracts and other relevant procurement information.
- Measures that could be implemented through subsidiary legislation that may be made through ministerial discretion. For instance, the drafting of the financial regulations needed to complete the process of financial reforms already undertaken under both the procurement act and the audit act.
- Measures that involve bureaucratic and administrative re-organization such as digitizing and making government forms available in electronic form; electronic recording of court proceedings, computerization of registries-Land and courts most prominently.
- If new anti-corruption legislation is to be prepared, it would probably have to be initiated through private members bills. However, such bills rank low on the parliamentary order paper, so prospects for such legislative reforms are low²³. This means that support for such private member initiatives should be strategic and be typically focused on those bills that have very high anti-corruption pay-offs such as the freedom of information bill.

This being the eve of an election, - the general election is 18 months- away, structural reforms and major investigations that entail prosecution of big fish (a la Goldenberg and Anglo-leasing) are unlikely to succeed. There are two reasons for this.

- During election time no government is likely to embark upon reform unless it brings electoral payoffs - such as funding for political parties; re-drawing constituency boundaries; increase of MPs salaries and so on. This means that reforms without such electoral pay-offs are not likely to command either the attention of the government or of the opposition in Parliament.
- Kenya's demography-some tribes are large but none is dominant- means that no party can win an election except in alliance with one or more competitors. This will undermine anti-corruption reform and standstill corruption prosecutions till after the elections given the need for form coalitions within a political class that is rather narrow.

²³ Kenyan Parliament holds the worst legislative record among neighbor countries. No more than 2 laws are likely to pass in a year-note, outside budget-related legislation it rarely passes more than 12 new laws each year.

Use the period between now and the election in 2007 to identify a coherent, internally consistent anti-corruption reform program. In the immediate post-election period, one could exploit the post-election honeymoon effect to get reforms underway. Anticipating such a window of opportunity, the period between now and early 2007 should be dedicated to developing some clear ideas on the nature, depth and scope of the measures needed to effectively deal with corruption in the post election period. These activities should profit from an assessment of what has not worked in the current reform approach

CHAPTER 5. Rule of Law, Judiciary and Legal Reforms

Over the past few decades Kenya has witnessed the decline of key public institutions, such as the police, the judiciary, the Office of the Attorney General and the Prison Department, that are essential for the administration of the rule of law, upholding contracts, and ensuring security. The latest developments on the Anglo Leasing case are likely to buttress the crisis of public confidence in the ability of the institutions in the judicial chain to deal expeditiously and credibly with allegations of big graft, and indeed, any major corruption cases. It is therefore crucial to restore citizen's confidence. The judiciary is a key component in the fight against corruption and any meaningful and lasting improvement in Kenya's governance system must involve effective championing of judicial reforms.

Laws and Institutions to Fight Corruption

In order to better understand the factors which impede the expeditious disposal of corruption cases, the World Bank's Country office in Kenya, Nairobi commissioned a study on the laws, institutions and judicial processes for addressing corruption in Kenya. The main objective of the study was to understand the factors that hamper the expeditious disposal of corruption cases in the courts. As a result, 54 corruption cases were selected 42 of which were randomly selected, partly based on ability to access information on the files and discussions with the judicial officers (magistrates and court clerks) and 12 purposively selected as a result of the high profile nature of the cases and the public debate on the cases in the country. The Report prepared by the National Council for Law Reporting is in its preliminary stage and is still undergoing review. However, these are the preliminary key findings.

(a) Corruption Laws

There are major weaknesses in the legal framework to fight corruption. For example, the Anti-Corruption Economic Crimes Act (ACEC Act), 2003 includes provisions that are subject to constitutional challenge; an inadequate definition of offences to be prosecuted; unregulated discretion; lack of adequate provisions on asset recovery and lack of guidelines on the time within which agencies have to respond to corruption complaints. The Public Officers Ethics Act, 2003, establishes confidentiality of declarations; lack of clear guidelines on what needs to be declared or investigations on initial declarations which may be suspect; lack of an effective system for administrative review and inspection of declaration; and no requirement to provide declarations after officer leaves office. Moreover, there are no requirements that Public Officers disclose assets invested on their behalf by nominees or nominee companies. Nor is there a corresponding requirement that the nominees themselves do disclose beneficial owners of the shares that they hold in trust. Several weaknesses relating to cumbersome procedures and potential delays were identified in the Public Procurement and Disposal Act, 2005. However, this may be remedied with the passing of the new implementing regulation. With regard to legislation for prosecuting corruption, there is an overlap between the Anti-Corruption and Economic Crimes Act and the Penal Code in respect of some of the offences creating a parallelism/overlaps which may be abused especially given the fact that Penal Code prescribes less stiff sentences than the ACEC Act. Some of the provisions such as the authority of the Kenya Anti-Corruption Commission (KACC) to require suspect to provide a statement on property has been challenged

as violative of the right against self-incrimination, power to enter and search premises, surrender to travel documents etc all expose these laws to legal and constitutional challenges thereby delaying the process;

Although not mentioned in the study, it is important to note that with regard to money laundering, there is a need to operationalize the Proceeds of Crime Act 2005. A draft Anti-Money Laundering and Proceeds of Crime Bill is in the process of being finalized. The Financial Action Task Force (FATF) on money laundering issued 40 recommendations regarding the Kenya National System (institutions, organizations and operational procedures) for combating money laundering and terrorist financing that should be implemented as soon as possible.

With regard to international legislation to foster recovery of assets abroad and the cooperation of the signatory states, the study found that it is evident that Kenya has signed but not ratified the African Union Convention on the prevention of corruption and was the first to ratify the United Nations Convention Against Corruption. In order to meet its international obligations and enjoy the cooperation from other signatory states, Kenya will have to ensure that these obligations are translated into national legislation in order to be enforced.

(b) Institutions to fight corruption²⁴. The main weaknesses are: i) vesting prosecutorial powers solely in the Attorney-General and failure to regulate his discretion not to prosecute; ii) lack of human resource capacity both at the Attorney-General's Office and the Anti-Corruption Commission to effectively investigate and prosecute corruption cases; and iii) lack of coordination between the institutions (e.g. no coordination between what KACC and the Efficiency Monitoring Unit in the Office of the President do). The study found that there are several secondary institutions that deal with governance and anti-corruption matters. Examples include the Presidential Commissions of Inquiry, the Efficiency Monitoring Unit, Public Complaints Unit, Cabinet Committee on Corruption, Government Properties Investigations Committee, Judiciary, Ethics and Integrity Committee which are uncoordinated in their work and in some cases they are not set up in accordance with the law. However, it is also true that within the current legal framework, there is still room for anticorruption initiatives to flourish and some institutions have been more effective in pursuing their mandate than others. For example, the Children's Department (under the Children's Act); the Kenya Revenue Authority; the Immigration Department; the Public Health Department as well as the Kenya Bureau of Standards all have prosecutorial powers under statute and do in fact regularly prosecute offences under statute. This issue was not addressed in the Gachiengo case-the decision that said that only the AG could prosecute. Instructively, the AG did not appeal the decision notwithstanding its glaring inconsistency with other laws and practices in Kenya)

c) Judicial processes for addressing corruption

Cases in the study were analyzed and a tabular analysis carried out: Specific findings on these cases are as follow: 75% of the cases involved soliciting and receiving bribes from the police or security guards, over 50% resulted in acquittals due to, delays on hearing cases on merit, one case filed in 2002 was "mentioned" 11 times to assess whether it was ready to proceed. It was scheduled to be heard 47 times, 8 were adjournments by the Prosecution, 16 by the defense and 4

²⁴ The main AC institutions considered are Kenya Anti-Corruption Commission (KACC), Attorney-General's Chambers, The Police Department and The Judiciary (Anti Corruption Courts).

by the court. To date, the case has been heard 19 times and has not yet been disposed of. There were also delays between date of charge and hearing dates and adjournments: At least 57% of the cases were adjourned and out of these cases, the prosecution was responsible for more than half of the adjournments.

With regard to the defense, the defense occasioned at least 46% of the total number of the adjournments, which is close to 50% of the number of adjournment. The arguments advanced by the defense were mainly the accused person was sick or not available for the hearing. The remaining adjournments were occasioned by the courts on the grounds that the trial magistrates had been de-gazetted as a Special Magistrate or transferred to other cases. At least 25% of the cases experienced challenges on the grounds of constitutional rights infringement e.g. due process violations etc. In February 2006, the new constitutional rules, (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006 were promulgated. One of the objectives of the new rules is to provide for the possible continuation of trial proceedings in a subordinate court even where a constitutional case has been filed in relation to the proceedings. These rules have been challenged by practitioners on the ground that proceedings in the lower courts should not proceed because the accused would be prejudiced if the High Court found the proceedings to be unconstitutional. The Court of Appeal has upheld this position.

Preliminary Lessons Learned & Recommendations

- Political and institutional commitment to prosecuting of corruption cases is key. Need to change attitude of judicial officers so they are not too restrictive or legalistic in their interpretation of the corruption legislation to the detriment of the objectives of the legislation.
- Review, strengthen and harmonize the applicable legislative framework including introduction of sentencing guidelines to avoid arbitrary applications of laws and arbitrary sentencing as well as introducing unreasonable adjournments.
- Curb unlimited discretion of the institutions in handling corruption cases especially AG's office.
- Build the technical, material and human resource capacity of the institutions involved; premier anti-corruption institutions such as the establishment of KACC are not sufficient to address corruption. Comprehensive reforms in other institutions involved in curbing corruption e.g. strengthening AG's office in its investigative powers as well as the judiciary in handling its judicial functions are necessary.
- Review and simplify the procedural laws relating to the criminal justice system; effective anti-corruption legislation should be developed along efforts to make the necessary changes in the criminal procedures.
- The effectiveness of KACC and other institutions involved in addressing corruption in Kenya should not be based on the number of cases investigated and filed but on the efficient and fair disposal of the cases. At the moment, there is no monitoring of this outcome.
- Poor records and case management and other ICT limitations.

The Judiciary

Although Kenya's judicial system is based on the British model, for much of the independence period its actions reflected the primacy of the executive branch. In 2002, a panel of Commonwealth judicial experts from Africa and Canada examined the court system. It concluded that Kenya's court system was among the weakest and inefficient judicial systems in Africa, with judges subject to political pressure and often accepting bribes to influence their decisions. A 2005 report by the International Commission of Jurists concluded that corruption in the administration of justice as well as in the judiciary remains a serious impediment to the rule of law in Kenya. Against this background, the main weaknesses of the judiciary in Kenya are well known thanks to the multiple diagnostics carried out by specialized institutions²⁵ and so are the proposed options for judicial reforms²⁶. What follows is a brief overview.

Institutional Independence

The Kenyan constitution provides the president with extensive powers in judicial appointments, and promotions. Executive influence extends from the highest levels, which are directly appointed by the President, to the magistrates' courts, which are controlled by Judicial Service Commission, itself comprised of presidential appointees. Several reports such as the 1999 Kwach Report and the 2002 Report by Commonwealth Judges, point to the dubious nature of appointment processes, political and ethnic bias in appointments. Appointed judges have often been unable to resist executive pressures to intervene in the legal process. Executive powers have been used to lean on noncompliant judges and force resignations. Consequently, the independence of the judiciary has been compromised. Manipulation of the judiciary has often been used to settle political scores, to formalize unconstitutional behavior by the executive and to expand the scope of executive powers.

Decisional and Personal Independence

Institutional independence of the judiciary must be reinforced and guaranteed that individual judges will not be interfered with at a personal level. These guarantees include depoliticizing the process of appointing judges; ensuring that judges are secure in their jobs and income; protecting judges from interference by the executive and the legislature; granting budgetary and administrative autonomy to the judiciary and ensuring that the internal mechanisms of the judiciary support independence and autonomy. In addition there is a need to establish a career path for the Judiciary. Magistrates have no security of tenure; they have no career path to the high court. For a magistrate to rise to the High Court he or she must await presidential

²⁵ Many reports have been carried out of the Judiciary to date, among them: the Fleming Commission Report, 1960; the Pratt Commission Report, 1963; the Miller Craig Commission Report, 1967; the Ndegwa Commission Report, 1971; the Waruhiu Committee Report, 1979/80; the Ramtu Committee Report, 1985; the Mbithi Committee Report, 1990/1991; Report of the Committee to Inquire into the Terms and Conditions of Service of the Judiciary, 1991-1992; the Report of the Committee on the Administration of Justice, 1998; the Report of Integrity and Anti-Corruption, 2003 and the Report of the Sub-Committee on Ethics and Governance of the Judiciary, 2005.

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appointment. This means that the structural incentives are actually against a magistrate who wants to act independently.

Speedy Settlement of Cases and Elimination of Back-Log

The efficient operation of the courts has been hampered by limited capacity in the judiciary, in particular insufficient resources, staff shortages, lack of skills, inadequate legal records and poor facilities. There is a huge backlog of cases in the courts, and the waiting time to bring a case to conclusion typically exceeds three years. For a long time (1981-2002), inadequacy of the court reporting system undermined the principle of legal precedence which ensures consistency in decision-making on cases with similar issues, which is the basis of the case law system in Kenya. Of the 160 anticorruption cases that have been completed in the past five years in the Nairobi courts, 117 or almost 3/4ths resulted in a decision for the defendant or defendants. Similar numbers in OECD countries would be 2 or 3 percent. This points to severe weaknesses in the preparation of the case, its prosecution, or with the judicial decision-making process. 134 cases have been filed within the last five years in Nairobi that are still in litigation, many of them being delayed through interim appeals [i.e., the trial is stopped while the defendant goes to a higher court to make some claim about the constitutionality of the law or the process]. Some of these cases are several years old (like the KUTIP case) while others are of recent vintage. One recent change made by the Chief Justice was that the filing of an interim appeal does not automatically stop the trial. The defendant must separately show why the trial should be stopped.

There are workload related delays and others contrived as gate-keeping barriers to extort bribes. Statistics collected by the 1998 Committee on the Administration of Justice reported that the High Court in Nairobi, with a full strength of 15 judges had 117,386 civil and 1,944 criminal cases pending. Although the Kenyan ACC has 118 investigators, there are only 52 prosecutors for crimes of all kinds in Kenya.

Enhancing Citizen Access to Justice

Among the duties Kenya is obliged by *Basic Principles and Guidelines on the Right to a Remedy for Victims of Violations of International Human Rights Law and Humanitarian Law* States include: 1) making provision for legal aid and information; 2) setting up or promoting, where they already exist inexpensive alternatives to the court process such as mediation and Alternative Dispute Resolution Mechanisms; 3) developing small claims courts to provide quick and efficient justice for petty disputes and 4) transferring non-contentious matters, such as the probate of uncontested wills and letters of administration to administrative agencies instead of taking these to the courts. However, in practice Kenya falls short of international best practice. Proposals for legal aid include legislation have long been advocated but these have never been enacted; commercial arbitration exists as alternative dispute resolution mechanism but this primarily benefits large commercial enterprises that feel frustrated by Kenya's ponderous, backlog blighted judicial process; as with legal aid small claims courts have been mooted but not created and many uncontentious matters, such as uncontested will and letters of administration, are still tied up in court, hostage to lack of judicial time and personnel.

Many Kenyan communities still rely on traditional or informal systems of justice for arbitration on matters such as inheritance, marriage, divorce, grazing and watering rights, and land disputes. The informal justice system is particularly important in rural areas, notably in parts of northern Kenya where the formal system is largely absent. Long delays in the courts and the failings of the police are other reasons why people resort to informal justice. For many poor people, the

informal system, flawed as it is (e.g. in relation to women's land rights), constitutes the only real avenue for conflict resolution and management, and protection of property. However, the system is itself coming under stress as traditional social control mechanisms weaken.

Progress to date

The Kibaki government came into power promising that the rule of law would be upheld, and judicial independence strengthened. Kibaki has criticized the extent of corruption in the judiciary and instructed the minister in charge of the Ministry of Justice and Constitutional Affairs to establish a process to identify corrupt judges. In late 2003, Kibaki appointed new judges to replace those tainted by corruption. These actions, however, raised concerns about the criteria used and the lack of transparency in the appointment process. As part of its ongoing reform, the Chief Justice has set up an Ethics and Governance Committee which is a bi-annual adhoc committee of selected Judges responsible for entrenching integrity in the Judiciary and ensuring effective administration of Justice in the country. The outgoing committee completed at the end of last year a report on the intermediary measures and process of disciplining judges for breaches of ethical judicial conduct which do not warrant removal from judicial office, an ultimate penalty prescribed under the Constitution of Kenya. The courts are understaffed and underfinanced, and Kenyans awaiting trial face long delays that violate their right to due process. The country has officially recognized Kadhi courts, which administer Sharia (Islamic law) for such issues as marriage and inheritance disputes, located in areas with a predominantly Muslim population.

As mentioned earlier, when the coalition government came into office in early 2003, it embarked on radical reforms in the judiciary that led to the retirement in the public interest of 4 Appellate court judges, 12 High Court Judges and 73 magistrates. A number of measures have been taken to address corruption in the judiciary. The Judiciary in its Strategic Action Plan of 2005-2008 proposed and embarked on a number of measures to address corruption, these include:

- Setting up of a Governance and Ethics Sub-Committee of the Judiciary.
- Setting up of the Rules Committee with the responsibility for reviewing hurdles in its procedural legislation that hamper effective implementation of justice and recommend ways of introducing Alternative Dispute Resolution in the courts' Civil Procedure Rules..
- Use of ICT to improve its effectiveness and efficiency, case management, publication of court reports and a bench hotline which is essentially a legal research assisted hotline to enable judges to receive information in order to expeditiously conclude their judgments.
- Provision of training and education related to judicial ethics.
- Proposing a Judicial Services Bill, 2005 to establish its own financial and administrative autonomy. But bill has some serious constitutional infirmities and may face opposition from both members of the Departmental Committee on law and administration of justice, the committee that oversees the judiciary.

National Council for Law Reporting

The National Council of Law Reporting was set up in 2002 and has improved law reporting. It has published the backlog of cases from 1981-1991 and 2001-2006. Therefore it still has about 10 years number of cases to publish but the contradictions in the earlier reported cases is being

addressed. Since it is funded by the tax-payers, it should, like the High Court of Zambia and the Constitutional Court of South Africa make cases available for free on the internet. This is part of making justice more accessible and also opening cases and courts to more media scrutiny.

Governance, Justice Law and Order (GJLOS) Program

In November 2003, as part of the donor coordination and harmonization in the justice sector, the government introduced the Governance Justice Law and Order Sector (GJLOS) Reform Program. The GJLOS is a cross institutional public sector reform program with the objectives of reforming and strengthening GJLOS institutions for enhancing protection of human rights, efficient, accountable and transparent, governance and accessible justice. The GJLOS is designed to be a Sector Wide Approach since it aims at supporting a single Government sector policy and expenditure program, adopt common approach and increasingly rely on government systems for accounting and disbursement. There are ongoing discussions on whether it is a SWAP or not. Through the GJLOS program, the government has articulated its vision for the justice and governance sector, defined its business plan and ensured that donor funding is appropriately channeled to activities in the program.

The GJLOS program brings together 32 government agencies and several semi-autonomous government agencies, non-governmental organizations and 17 development partners. It was initially launched as a five-year program and it was subsequently broken into:- A one-year Short Term Priorities Program (STPP) of “quick wins” to run from July 2004 to September 2005; and a four-year Medium Term Strategy (MTS) of deep seated reform running from October 2005 to June 2009. The Development Partners financing the GJLOS either have their funding in a pooled funding arrangement (basket) or direct funding. Progress in each of the 7 thematic groups is summarized under Annex 2.

During the STPP, the GJLOS made several accomplishments in strengthening institutional capacity, however, progress on the program as a whole has been slow and uneven across agencies. The recent consultancy review of the GJLOS program pointed out that only 54% of the activities included in the Short Term Priorities Program (STPP) have been implemented (see table below). This disguises a range from 88% of activities implemented by Provincial Administration dropping to just 25% in the office of the Solicitor General. It is worrying to find the Solicitor General being joined by prisons, the police, ethics and governance and the judiciary – all critical and large players in GJLOS – all have implemented less than half their STPP activities.

Table 5.1 STPP workplan activities implemented (MDA survey)

Department	Average % of activities implemented
Provincial Administration	88%
Kenya Anti-Corruption Commission	79%
Public Trustees	75%
National Agency for the Campaign Against Drug Abuse	75%
Kenya National Commission on Human Rights	70%
National Council on Law Reporting	66%
Probation and Aftercare Services	65%
Administration Police	63%
Registrar General	59%
Legislative Drafting	58%
Children's Department	57%
Treaties and Agreements	52%
Public Prosecutions	52%
Kenya School of Law	51%
Kenya Law Reform Commission	50%
Civil Registration /OP	50%
National Youth Service	50%
Judiciary	49%
Community Service Orders	43%
Ethics & Governance/OP	43%
Prisons	42%
Civil Litigation	42%
Police	39%
Advocate Complaints Commission	33%
Immigration	26%
Solicitor General	26%
ALL ACTIVITIES STPP WORKPLAN	54%

Challenges ahead

- Government Leadership and ownership of reforms in the justice and governance sector is improving although some initiatives are still mainly donor driven and would require more commitment on the part of the Government to move ahead. There is no cabinet paper on GJLOS; it receives no more than a passing paragraph in all of government's approved policy documents, including incidentally, the policy documents of the ministry responsible for implementing the Program, the Ministry of Justice and Constitutional Affairs.
- Attitudinal change: need to change's people's attitudes to embrace and appreciate the values and ethics that underlie public service.
- Ministry of Justice and Constitution Affairs' leadership of the GJLOS Program should not compromise independence of the institutions which depend on the program and are critical of government e.g. the Kenya National Commission on Human Rights.

- *GJLOS is on shaky legal-cum-political Foundations..* The Public Sector Law and Order (PSLO) is broader than the GJLOS and easily accesses government resources because it is anchored in the MTEF. In order for the GJLOS thematic groups to access government funds, they would have to do so through PSLO or –together with the MTS obtain a firm foundation via Cabinet approval. This should be preceded by a GJLOS policy paper providing guidelines on the role and operation of GJLOS, including linkage with other public sector institutions and other public sector programs, processes and milestones for mainstreaming GJLOS into the MTEF budgeting cycle.
- Civil Society and Private sector engagement in the reforms still a challenge and the modalities for financing the non-state actors equally a challenge.
- Inadequate capacity in the institutions responsible for investigating and prosecuting corruption practices/cases.
- Predictability in program financing (largely dependent on governance climate). The former Department of Governance and Ethics was the most adversely affected during Githongo departure because funds been earmarked for program activities were withdrawn.
- Finalization and adoption of the Constitution (some needed legislative changes are dependent on the new draft Constitution coming into force.)
- Reviewing of laws and streamlining of the prosecution process. There are proposed legislative reforms to streamline prosecutions to ensure that the sentencing for corruption crimes which can be prosecuted under both the Economic Crimes Act and the Penal Code are the same.
- Keeping up the momentum for reform in the current political environment when focus is on the upcoming elections.
- Strengthening capacity within the Attorney General’s office’s to investigate cases: The judicial finalization of cases is dependent on how well prosecution cases have been prepared in terms of investigations. The capacity to investigate and prepare corruption cases within the Attorney General’s office need to strengthen. Otherwise, there is little the Chief of Justice can to but to dismiss poorly prepared cases which if had been properly investigated and prepared would have resulted into the prosecution of the accused.
- Perceived rise of corruption in the judiciary: The perception is coupled with the concentration of excessive decision-making and discretionary authority inherent in the multiple roles of judges which creates opportunity for corrupt behavior. Strengthening capacity within the Court Administration
- Lack of autonomy by the benefiting government departments and reliance on the Ministry of Justice and Constitutional Affairs to handle administrative aspects of projects.
- Lack of decentralization of authority in the management of the courts. The Registrar of the High Court is the focal person in charge of the management of the court system and effective court management may require decentralization of some responsibilities.

Recommendations

Some of the recommendations for strengthening the legal and regulatory framework include,

- signing and ratifying the outstanding international instruments relating to governance and ensure that they are implemented through national legislation;
- training and sensitizing Parliament to support the necessary reforms by voting adequate funds to agencies such as the Kenya Anti-Corruption Commission, Law Reform Commission, the Kenyan Human Rights Commission, among others.
- developing of mechanisms to eliminate procedures that allow for legal challenges that unduly delay the process for prosecuting corruption cases;
- providing specialized training on adjudicating corruption cases to judges.

In addition to these recommendations, specific judicial reforms have been mentioned in the diagnosis above. As a preliminary matter, a number of tactical and process issues must be highlighted. They include:

- i. The need to prioritize and sequence reforms: Reforms need to be properly sequenced. There is a temptation to start reforms with computerization, training, and other forms of technical assistance. But if there is no strong commitment to reform these ‘improvements’ are not productive. In Latin America, judges have questioned the value of training in the absence of more fundamental reforms in the judicial system. Fundamental reforms should be tackled first.
- ii. Developing consensus on a reform programme: Judicial reform creates winners and losers. People with a stake in the status quo such as lawyers, judges and administrators are likely to be resistant to change. Understanding these interests and planning to overcome resistance is imperative. Studies from Latin America and Eastern Europe have shown that widespread consultations are as important to effective judicial reforms as sequencing of reform measures.

Based on these two principles (prioritization and consensus), it is recommended to develop a reform program that combines constitutional, statutory and administrative elements and de-links judicial reform from wider constitutional changes. The proposed changes to the constitution can be implemented under the constitutional amendment powers which are vested in Parliament. The program would have the following components:

a. *Institutional Independence*. Securing the Independence of Judicial Service Commission: The composition, powers and independence of the Judicial Service Commission be changed in line with international best practice.²⁷ For instance, the absence of a constitutional clause vesting judicial powers in the Judiciary diminishes the constitutional stature of the courts and violates internationally recognized principles. We recommend this clause be introduced, as recommended by many panels and bolstered with a foundational non-interference principle that bars others from interfering with judicial officers in the performance of their functions. Section 23 and

²⁷ Security of tenure of magistrates raises performance related questions because magistrates have to perform and only become judges with security of tenure based on merit. Also, note that security of tenure is guaranteed to high constitutional officials in order to ensure that they perform without fear of favor. This recommendation has to take into consideration this fact some judges in the lower cadre need to prove their professional competency and integrity.

Section 30 of the Constitution expressly vest power in the executive and in parliament. These sections are, in full:

23. (1) *The executive authority of the Government of Kenya shall vest in the President* and, subject to this Constitution, may be exercised by him either directly or through officers subordinate to him.

30. *The legislative power of the Republic shall vest in the Parliament of Kenya, which shall consist of the President and the National Assembly.*

b. *Decisional and personal independence.* Constitutional provisions on matters of Appointments, Promotions, Discipline, Tenure and Removal should be changed to ensure 1) transparency in appointment, promotion and discipline; 2) specification of a criteria for qualification 3) clarity regarding the roles of the different players in the appointments, promotion and removal process, that is, the Judicial Service Commission and the Chief Justice and the President; 4) provide for a vetting process to ensure the integrity of all these processes, 5) Eliminate Executive and legislative interference with courts and 6) Ensure Budgetary and Administrative Autonomy.

c. *Accountability of the Judiciary,* including: i) Reforms related to publicity, that is, open hearings; criticisms of judges, judgments and courts; ii) Speedy settlement of cases and elimination of backlogs. Members of the bench could work under service standards that they are held accountable to in order to improve efficiency, accountability and monitoring of judicial functions.

To enhance the capacity of the Judiciary it is recommended that a judicial training institute is established and should focus on training of judges based on a training needs and capacity gap assessment. Additional measures include provision of research facilities, improvement of information and communications technology.

d. *Access to Justice:* Access to justice and the right to effective remedy are protected principles; obligatory and foundational. There are measures that would realize these rights. As indicated some of these are already being undertaken under the GJLOS program and they include: 1) the establishment of small claims courts; 2) the provision of a legal aid scheme; 3) the incorporation of Alternative Dispute Resolution into the civil procedures and, 4) the establishment of a national legal literacy campaign targeting schools and colleges.

e. *An Independent and Professional Bar:* Changes needed to secure the autonomy and professionalism of the bar are: 1) restructure the office of the Attorney General; 2) strengthen the Law Society of Kenya's involvement in Judicial Reforms; 3) professionalize prosecutions in the country to ensure that lawyers and not policemen prosecute cases; 4) upgrade curriculum for continuing legal education and integrate it in the requirements for continued practice; and 5) ensure uniform application of ethical standards to all lawyers whether they work in the public sector or the private sector.

Regarding the GJLOS program, it is recommended that the Reference Group appoint a small Working Group to systematically work through the recommendations of all 3 Reviews that have been conducted thus far on the program; and ensure that every recommendation deserving debate is submitted to the appropriate forum, that it is debated and accepted, rejected or modified. The recent recommendations of the Advisory Team Report and government report on the review were subjected to discussions and agreement on implementation at technical and policy level and this is already a positive development.

The Police

Security is an essential public good, and its absence not only goes against basic human rights but also deters investment and imposes severe costs on businesses. The Kenya Private Sector Alliance estimates that Kenyan firms spend 4% of their operating income on security measures.

The Kenya Police force has a long history of corruption, and lack of institutional capacity, resources and equipment to address the high crime rates that experience Kenya. The police were rated the most corrupt public institution in the Kenya Bribery Index 2005. Low levels of police pay and inadequate housing provision have undermined police motivation, and make it difficult to address corruption. Reforms to the police will be therefore essential to improving security in Kenya. Previous attempts to reform the police force have not made significant impact. In 2003, the public and the government joined forces to subdue police corruption, brutality and intimidation, but in a year's time or so, it was back to business as usual with the police sometimes taking bribes openly from public service vehicle operators. A second attempt to instill discipline in the force was in 2004, when a military brigadier, was appointed police commissioner contrary to the tradition of having the commissioner appointed from the ranks of the police force.

Besides the traffic and highway patrols, the other police units notorious for corruption and bribery are night patrols and special units such as the flying squad, which is supposed to deal with carjackers and armed robberies. The police force is also blamed for perpetrating corruption in the judiciary in cases where the police are involved in investigation and prosecution. Magistrates and judges often admonish the police for doing shoddy investigations, hence, taking evidence to court that cannot sustain conviction.

The government has initiated measures to increase the police-to-population ratio, which had dropped over the years from 1 police officer for every 711 Kenyans in 1991 to the current 1 for every 1,150 persons. The government announced plans in 2005 to double the number of police officers recruited annually and to increase the number of female recruits from 13 percent to 20 percent. While prisons are congested, the government has taken steps to try to reduce this problem. Police still use force to extract information from suspects and deny them an opportunity to get legal representation. In 2005, Amnesty International reported violations, including police torture, use of violence against public demonstrations, and harsh prison conditions resulting in as many as 45 prisoner deaths under suspicious conditions at a prison in Meru (Eastern province of Kenya) in 2004. Under the Kenya Police reform program already adopted by the Government, police will be trained in greater human rights awareness. There will also be an independent Police Oversight Board to which aggrieved parties can appeal for any transgressions against their rights by law enforcement agencies.

Recommendations to fight graft and improve accountability of the police

- There are reports about reforms being considered or implemented to improve the performance of the police and especially fight graft within the force. However, these are not implemented on a wide scale.²⁸
- The police claim one of their problems is lack of funds but they are not particularly keen to engage in programs that would assist in better equipping them, especially if such programs involve a high degree of transparency and accountability e.g the GJLOS program.
- An important starting point could be the establishment of an independent police complaints commission that can also follow up on the implementation of the reform program.

ANNEX 5.1 Justice Law and Order (GJLOS) Program – Progress of thematic groups

A. Ethics, Integrity & Governance

- Setting of the Kenya Anti-Corruption Commission and the Specialized Courts to prosecute corruption: In addition, the national campaign on corruption was launched in July 2003 and has been a continuous process.
- Specific officers charged with the responsibility and analysis of the asset declaration returns in Ministry of Justice and Constitutional Affairs and in the department of Governance and Ethics to deal with enforcement of compliance with the Public Officer Ethics Act. They also received some training.
- Three specialized sections were created at the Department of Public Prosecution to improve on effective handling of corruption and fraud cases. The sections are the Anti-corruption Economic Crime section, Organised crime section and General Prosecutions & Appeals section. At meetings officials indicate that the creation of the specialized sections has contributed to better provision of quality services to Government.
- Tribunal to hear appeals of judges purged out of the judiciary set up. Corrupt Judicial officials purged out of the Judiciary continued appearing before the disciplinary tribunals. In total Eighty two (82) Magistrates, Seventeen (17) Judges of High Court and Six (6) Judges of Appeal were implicated in alleged corruption, unethical conduct and judicial mis-behaviour. Thirteen Magistrates (13), five (5) Judges of High Court and two (2) Judges of Appeal contested the report of the Integrity and Anti-corruption Committee of the Judiciary hence, the setting up of tribunals. One of the judges was absolved.
- Review of existing legislation on receivership, bankruptcies and insolvency started under the Kenya Law Reform Commission.

B. Democracy, Human Rights and the Rule of Law. The Kenya National Council Human Rights capacity improved to respond to human rights violations such as the death of prisoners under inhumane jail conditions. Discourse on Human rights norms has also taken a centre stage with a focus on human rights based approach to development.

C. Justice, Law and Order

²⁸ Police reforms entail culture changes, improving working conditions, conducting salaries review, improvement of the recruitment process which is said to be riddled with corruption. We should not generalize on the reforms but be specific. There have also been some progress in fostering a cultural change. This effort has been led by the Kenya Human Rights Commission and other human rights organizations.

- Efforts made in decongestion of prisons received wide appreciation and impacted positively on the wide prison reforms e.g. increased use of Community Service Orders as a non-custodial sentencing alternative.
- Access to justice for the poor and marginalized registered some achievements after Prison paralegal and liaison officers were trained, and magistrates sensitized on Community Service Orders.
- Setting up of the Ethics and Governance Committee in the Judiciary to entrench integrity and effective administration of justice in the country. It has a released report on its work which includes recommendations on how judicial officers should be disciplined.

D. Public Safety and Security. The appreciation of the community policing concept improved partnerships between the Police and the public thereby contributing to better public safety and security. There was also aggressive radio campaign against drug and substance abuse mostly seen as having serious threat to people's security. The street youth training program got a boost after tool kits for training were obtained. Officers in the Provincial Administration were trained on improved performance and customer satisfaction responsiveness culminating into better service to the public as confirmed through external training evaluation.

E. Constitutional Development. Stalemate in the constitution development process prompted concerted efforts on consensus building around the new constitution's content. Finally, majority of the Kenyans voted against the proposed new constitution through a referendum.

F. Quality Legal Services to the Government and the Public. Provision of quality legal services got a boost through training of state counsels on Alternative Dispute Resolution, centralization of the criminal prosecution function, identification and ratification of treaties, drafting of local and international instruments, and review of the structure of the Council of Legal Education as well as the Kenya School of Law.

G. Capacity for Effective Leadership and Change Management. Leadership and material support was provided to sector institutions and various commissions to effectively carry out their work. Institutions like the Judiciary and Office of the Attorney General received support to develop strategic plans while several workshops were facilitated for key stakeholders to discuss strategic program issues.

CHAPTER 6. Civil Service and Public Administration

As Figure 1 and 2 reflect, one of the main challenges for the Public Administration in Kenya relates to the professionalization of the civil service and the transparency and accountability of the Public Administration. From the countries included in the African Governance Assessment; Kenya is the second worst in terms of how much merit-based principles govern appointment, promotions and career development in the civil service with severe consequences for the efficiency of the Public Administration and the fight against corruption. Understanding this constitutes quite a challenging reform given the nature of the political process in Kenya, as explained in background chapter 2, some international examples are provided of successful gradual reforms to professionalize civil service (see Box 6.2).

Figure 6.1 Appointments, promotions and career development of civil or public servants as strictly or largely governed by merit-based principles



Source: African Governance Review, 2005

Challenges of the Past Public Service Reform Initiatives.

Retrenchment Program. In the 1990s, restructuring of the role of civil service and functions of the Government were the main public sector reforms (PSR) included in the government reform program that was initiated in 1992. The aim of the civil service reform was to restructure the government's role and functions selectively to achieve smaller and more efficient system of public administration and a manageable wage bill, which would help to sustain basic services in a stable and sustainable fiscal environment. The original program succeeded in reducing the size of the civil service, but had no fiscal impact. The total government staff number, including civil

servants and teachers, declined from 462,000 in 1997 to 430,000 in 2005²⁹. Despite this decline, there are still too many people on the public pay roll. As a percentage of the total government's wage bill the increased from 32% in 1995 to 47% in 2005 – and is arguably the fourth highest in the World³⁰. Thus progress has been very disappointing in this areas and the Government has not yet achieved the original objective of reducing the civil service wage bill.

Figure 6.2 Civil service transparency and accountability

Index (0 = worst, 100 = best)



Source: African Governance Review, 2005

Ministerial Rationalization. Another area that has seen little reform is the ministerial rationalization program. During the above mentioned reform program, a number of ministries were, in 2000, reduced from 27 to 15, resulting in duplication and redundancies that needed to be phased out. During this period, the Government also completed a review of the functions of ministries and their staff. This review was expected to assist the government in further restructuring. However, this program was not fully implemented by the previous government. The current (NARC) Government did not also implement the review program; it instead increased the number of ministries and Departments to 33.

In 2003, the new Government noted that past PSR strategies and program implementation could not achieve their intended objectives because of the four major challenges:

- Lack of local ownership;

²⁹ Source of these figures is the Economic Survey, 2005 and the Statistics Abstract, 2001.

³⁰ According to the Bank's *World Development Indicators - 2006*, Kenya's wage bill - as measured by compensation of employees – accounts for 47 percent of the total government expenses. This is the fourth highest, only exceeded by Namibia (49%), Paraguay (52%) and Kazakhstan (58%). The proportion is much lower Kenya's competitors such as South Africa (14%), Uganda (11%), and Indonesia (13%).

- Poor PSR delivery mechanism; and
- Poor public image and lack of confidence in the public service by the general public.
- Lack of political commitment.

The new Government took into account above mentioned challenges in formulating its PSR strategy and program outlined in the IP-ERS (see details below).

A Paradigm Shift.

In April 2004, the Government launched the Investment Program for Economic Recovery Strategy for Wealth and Employment Creation (IP-ERS) for the period 2003-2007. The IP-ERS underscores the key role that the public sector plays in promoting shared economic growth and reducing poverty. IP-ERS recommends that the public sector reforms (PSR) continue to be undertaken with the objective of refocusing public resources to improve access to basic economic and social services. Thus the PSR are meant to assist the Government to establish a lean, efficient and ethnically functioning public sector which assist the government to reach a higher and more sustainable growth, and give the poor a chance to share that growth. The reforms are also expected to focus on promoting good governance, especially within the public service provision.

Box 6.1. Public Administration Reform in Vietnam

The Asian Development Bank is helping Vietnam reform its public administration through better training of its civil servants and modernization of administrative procedures. Training institutions at all levels are using training needs assessment (TNA), and shifting from top-down to a competency-based training for targeted officials. In the area of modernization, the Government recently implemented an information portal (<http://www.egov.gov.vn>), including a legal database with more than 22,000 legal documents that is updated daily. In addition, an executive information unit was established to manage and run 115 data centers set up under the reforms. About 9,000 information technology officers have been trained as of June 2005.

In the recent past, the Government has taken two actions that were meant to create a paradigm shift and improve its approach to public management and service delivery. In November 2004, the Government established the Public Service Reform and Development (PSRD) Secretariat in the Cabinet Office, Office of the President; this was followed by the adoption of the Results Based Management (RBM) approach in April 2005. PSRD Secretariat was established to institutionalize RBM and coordinate all PSR. The challenges mentioned above are now being addressed through the operating principles of PSRD Secretariat, which taking the reform process through a structured involvement of stakeholders and civil society.

The institutionalization of the RBM, the establishments of PSRD Secretariat, as well as the overall paradigm shift are meant to transform the public service's focus way from focusing on processes to a results-oriented approach to service delivery. Thus the renewed PSR aims to transform public service from a culture of:

- Controlling to creating an enabling environment;
- Providing to facilitating service delivery;
- Lack of performance accountability to an institutionalized Management Accountability framework; and

- A closed, selective environment to an open and facilitating environment where stakeholders are continuously engaged.

Current Progress Status of the Public Service Reform.

Performance Contracts. The Government has adopted as a policy, the application of Performance Contracts in the management of the Public Service. The process of performance contracting commenced with the establishment of a Performance Contracts Steering Committee in August 2003 and the issue of Legal Notice No. 93, The State Corporations (Performance Contracting) Regulations in August 2004. Under this framework, performance contracts have been introduced in all state corporations and Central Government Ministries and Departments since July 2005. All Ministers, permanent secretaries, heads of departments signed performance contracts in July 2006. Performance contracts for Heads of state enterprises have all been placed on the website. The program was extended to cover local government authorities in September 2006, when senior officers in the local governments were instructed to sign performance contracts with the Ministry of Local Government. Several challenges need to be addressed including the following: monitoring and evaluating the implementation of these contracts and giving civil society some scope to play a role, taking steps to ensure sustainability and/or institutionalization of the process, linkages with broader civil service incentive structures and more importantly, linking these incentives to the budget and MTEF projections.

Results Measurement and Performance Management. Government is deepening the focus on results as an integral part of good governance, and is making progress in rolling out the RBM system in the public sector. A Results office has been established within the Public Sector Reform and Development Secretariat, additional steps related to the RBM's implementation include integrated performance appraisal, performance audits and monitoring and evaluation. Service charters and score cards for selected Government ministries and departments including the Office of the President (Police, Migration, provincial and district administration offices, National Security, Cabinet Office, Government Press and Defense. These are certainly good initiatives but as with all others, the challenge remains in linking this with the broader monitoring role performed by the Ministry of Planning on IP-ERS targets, including the Annual Progress Report (APR). The current system, though been rolled out in Government needs to be linked to a sustainable monitoring system.

1. **Public Service Pay Policy.** GOK has formulated a Pay Policy. The policy is expected to eradicate the current wage differences across the entire civil service and to provide harmonized and unified framework. The Policy was launched in March 2006 (when its Board was appointed and started working on strategy). The new pay harmonization policy (popularly referred to as equal pay for equal work) is being implemented in phases within the civil service (i.e. Central Government, public universities, and Teachers Service Commission for public primary and secondary school teachers). About 80% of the pay harmonization for senior civil servants (including Permanent Secretaries) has already been completed. Harmonization for lower levels of civil service began in July 2006 (Job Group N and below) with staff in this category getting increase between 14%-20%. A similar increase will be implemented in July 2007. Several state owned agencies have adopted the banding policy, including the Kenya National Commission on Human Rights, staff of the Teachers Service Commission, Kenya National Audit Office, public universities academic staff, State Law Office and the Judiciary. However, further

implementation of the Policy beyond the civil service has not yet started because of the delay in passing the Pay Policy Bill.

2. **Retrenchment Program.** This is the current program and it differs from the previous one mentioned above. It was expected to be undertaken through Voluntary Early Retirement Scheme (VERS). About 21,300 civil servants were to be retired under VERS during 2006/07. The Government has set aside some KES 1.4 billion to meet the retrenchment costs. Approximately 3,800 people have been retrenched to-date. Implementation of the scheme has been slow due to lack of political support. However, a large number of civil servants are leaving the Government due to natural attrition (mainly deaths and retired after reaching 55 years (official age for compulsory retirement for civil servants) – Government estimates that about 10,000 people have left through natural attrition in FY2005/07.

Several issues come to mind here for both the pay policy and retrenchment program in Government. First and most important is affordability issues. The GoK is dealing with a huge wage bill as indicated in the introductory paragraph. Second, there are major questions of commitment considering the fact that this is still an on-going problem within Government and under the previous Bank-supported public sector project, the performance indicator was that an affordable pay and benefits policy, one that is built into the MTEF, was going to be implemented by June 2004. The challenge still remains for Government to demonstrate a strong top-down action to implement the restructuring and retrenchment targets required to bring the wage bill under control and at the same time improve incentives for technical and professional staff. The Voluntary Early Retirement Scheme has not given the Government the numbers they need to reduce the size of the civil service because of pending litigation.

Box 6.2 Civil Service Reform - Lessons from Latvia, Tanzania and Albania

Comprehensive civil reform IS feasible—but the process is slow, and can succeed only in settings with strong and sustained political commitment. Between 2000 and 2003, Latvia promulgated an ambitious agenda of administrative reform, including a civil service law that guaranteed meritocracy; though implementation certainly has not been perfect, the effort transformed the environment for civil service recruitment. Over a 15-year period, Tanzania brought civil service employment and the wage bill under control, clarified roles, and right-sized across a wide range of government ministries, departments, and agencies; today, its performance improvement program gives agencies incentives to clarify their results targets, make public commitments to service standards, and address capacity shortfalls.

In weaker governance settings, carefully designed incremental approaches can achieve significant results. Albania's administrative reform focused narrowly on introducing meritocracy and market-competitive pay for the country's top 1,300 civil servants. Such a narrow target is not enough for system-wide improvements, but it can yield important gains in the quality of policymaking and the management of public resources, establish a precedent of new ways of doing business, and open the way to broaden the scope of application over time. The reforms were widely publicized and enjoyed both the support of donors and broad approval among Albania's citizens; therefore, in 2002 when the reformist prime minister was replaced, the senior civil servants constituted a powerful constituency for continuing the reforms, and the meritocracy arrangements have largely been sustained. During 1999-2004, the Albania Public Administration Reform introduced reforms that resulted in an increase in merit-based competitive recruitment of senior civil servants (from one-half in 2000 to two-thirds in 2004), an increase in the number of qualified applicants per advertised position (from 5.9 in 2003 to 9.3 in 2004), and the creation of an independent appeals body (Civil Service Commission).

Bank's Involvement in the PSR Program. The Bank has supported the Government's PSR program in several ways. Its Public Sector Management Technical Assistance Project (PSM TAP), which ended in June 2005, provided support for the civil service reform and capacity building in the areas of public finance management (establishment of the National Audit Office, MTEF adoption, implementation of financial management system, and development of the new procurement Act, New Pay and Benefits Policy, Establishment Control and Harmonizing Payroll and Personnel Database, Ministerial Rationalization, etc.). The project also supported reforms in key judiciary areas. The current project (Institutional Reforms and Capacity Building – IRCB) is meant to build upon progress made under PSM-TAP. However, donors in general (including the Bank) have not been keen on providing full support to the civil service retrenchment and rationalization of government functions and restructuring of ministries due to lack government commitment and political leadership to take the necessary steps to institute an affordable pay and benefits policy. As can be seen in Box 6.1, civil service reform is feasible but requires strong leadership and commitment on the part of the government.

e-Government Strategy of Kenya

The e-Government strategy paper encompasses a state modernization and transparency program launched in March 2004. Its overarching goal is to make the government more accountable, results oriented, efficient and citizen centered. It has three specific goals: (i) to improve collaboration between government agencies (Government to Government – G2G); (ii) to improve competitiveness and reduce transaction costs (Government to Business – G2B); and (iii) to provide a forum for citizens' participation in government activities (Government to Citizen – G2C). A Cabinet Committee on Information, Communications and Technology (ICT) oversees the implementation of the strategy; a PS committee coordinates implementation; and the head of the public service hosts the e-Government Directorate. Table XX summarizes the status of implementation and outlines the medium-term strategy in detail.

Status of Implementation. Basic elements of the strategy are taking root as the institutional set-up begins to function and the network infrastructure is unbundled, albeit on a much slower pace than envisioned and hampered by disorganization and lack of clear operational priorities at the coordinating units. This is because coordination between the head of the public service and the ministry of information and communications on issues of ICT and e-government has not been effectively harmonized. At this stage, the strategy just provides for an emerging government web presence where ministries and departments post specific but static one-way information and forms. There are little public services available in e-government today and a forum for public participation is yet to be developed. The short-term implementation status (2004-06) follows:

- **G2G.** Basic LAN networks have been put in place in 29 ministries, system standards have been developed; and a government portal is running with links to all ministries. The integration and simplification of internal government procedures and capacity building efforts are ongoing. The implementation of the integrated financial management information system (IFMIS) and payroll systems continue to be delayed, mainly because of connectivity, reconfiguration to incorporate GFS classification, and training of accounting officers on the role and expected results from implementation of IFMIS. The IFMIS system is now configured and piloted in 14 government buildings and wireless connectivity has been installed in 200 buildings covering 27 Ministries/Departments. Some 300 computers have been acquired for implementation of the system. It is recommended that the system be operational soon. See annex 2 for a detailed review of actions taken to date regarding IFMIS.

- **G2B.** The e-government website does not provide explicit linkages or substantive content to key policies under discussion nor to publications or bulletins. In addition, there is no direct linkage to the Kenya gazette in the e-government portal; there is one managed by the National Council for Law Reporting (<http://www.kenyalaw.org/nclrinnkg.asp>). Budget related documents are available online (<http://www.treasury.go.ke/keydocs.html>). The expected e-auction application is not yet available, possibly because the physical asset registry has not been automated yet. E-procurement was not envisioned in the short-run implementation of the e-government strategy and as such was not covered by the initial phase of implementation. See next section on challenges for a discussion of procurement issues and annex 3 for a detailed review of actions that have been taken to operationalize the Public Procurement Law.
- **G2C.** The largest set of delayed actions corresponds to the G2C component. While the application forms for driving license, passport, visa, immigration, and tax returns submissions are online, there is no system application to make the electronic filling possible. This has to do with the lack of clear policies, legislative framework, and regulations governing electronic filing, electronic signature, and computer security and cyber crimes. The police department website contains e-policing and e-security information and emergency hotlinks and contacts. Civil service employment information is found online but there is no interactive capability to help prospective candidates file and application as envisioned in the original strategy. Information about education in general is available in the e-government website, but there is no way to apply for school admissions as claimed to be done by this time. Family information about parks and recreational services is also missing. Voter information is provided online and was found to be very useful. The key question therefore is why all the electronic systems in Government are separate systems seeking support from multiple partners without much progress towards integration. The fragmentation within the systems has led to incredible delays in getting them fully operational

Key Challenges

The overall challenges are: (i) to get clarity on roles and responsibility for a coordinated approach to e-Government; (ii) to work on the enabling legislative agenda; (iii) to streamline and prioritize the strategy on realistic outputs; and (iv) to enhance the interactivity of the e-government portal in general. Specific challenges follow:

- **G2G.** The governance anti-corruption strategy called for a more prioritized e-government strategy focusing on e-procurement as a near term priority. [Draft procurement regulations](#) have been completed, signed by the Minister and submitted for Gazetting. The challenge would be to develop this interactive procurement system in time for the planned June 2007 roll-out, only 6 months after the procurement regulations are in place. See annex 3 for a detailed review of actions that have been taken to operationalize the Public Procurement Law.
- **G2B.** The process of identifying and preparing the required enabling policies, legislative framework, regulations and ICT standards needed to unveil the potential of e-government (e.g., electronic transactions, electronic signature, computer security and cyber crimes) has not yet taken shape and are poised to further delay the implementation of the program.
- **G2C.** In the absence of freedom of information legislation, populating the government portal with digitized public records will remain a challenge. It is recommended that the GoK engage stakeholders and fast tracks completion of the draft Freedom of Information Bill. In the meantime, efforts to provide accountability enhancing material in the e-government website, such as legislative deliberations, campaign finance information in the wake of the 2007

elections and ethics reports online would provide important signals of transparency and accountability to the public. Integrating and using the diverse registries of personal data (driver's license visa, immigration, birth/death certificates, etc.) will also be a challenge in the absence of connectivity and clear and transparent privacy policies in place.

Recommended Short Term Actions:

(i) *to improve collaboration between government agencies* (Government to Government – G2G)

- Update web information more regularly. For instance, the information and text about primary education in the e-government portal is for 1990!). Appoint focal points on each institution to this regard. Provide newsletters and tips on managing information in a G2G environment, and develop specialized publications for rural communities and in the local language.
- Continue to integrate e-government with process reforms, streamlining and consolidation.
- Operationalize the delayed financial management information systems (e.g., IFMIS, IPPD).
- Provide email address to all civil servants, although civil servants need to be computerized first. Roll out a training program for civil servants and carry out an assessment of the related infrastructure cost, which need to be tracked systematically with an eye to prevent abuse. This action will be important for the initial stages of G2G communications.
- Increase the pace of connectivity (internet point of entry) at the central and decentralized level. Ministerial websites are extremely slow to populate mainly due to the webserver connection via satellite rather than the much faster fiber optic cables. Build on the UNDP-supported district connectivity pilot program in eight districts. Districts collect and send information to the Ministry of Planning.
- Publish on the website reporting requirements/timetables and evaluation/audits on implementation progress, and include this issue in the training program for civil servants.

(ii) *to improve competitiveness and reduce transaction costs* (Government to Business – G2B);

- Roll-out business registration, license and permit application online, and data warehousing applications as soon as possible—these are the applications with immediate use to businesses.
- Engage in partnership with stakeholders and the private sector in the implementation of e-government program.
- Also, the following list of sample laws could provide the enabling legislative framework needed in Kenya, such as *Electronic Transactions Law*, *Electronic Signatures Law for recognition of digital forms (signatures, electronic funds, Electronic Fund Transfers Law, Computer Crimes Law for controls over certain ICTs (e.g. hackers, online gambling), Data Protection Law, National Information Infrastructure Law, Business Enterprise Law for licensing/registration for particular uses (e.g. telemedicine etc), Tax laws, Foreign and Domestic Investment Laws, Intellectual Property Laws and Competition Laws* .

(iii) *to provide a forum for citizens' participation in government activities* (Government to Citizen – G2C):

- In the absence of data and privacy protection laws, develop high standards and internal guidelines for privacy and personal data security against piracy and hacking—this is about developing trust in electronic government interaction.

- Post comments received and activate a two-way communication where the government is responsive to the concerns expressed by the people in the portal. We also need to keep in mind that the telephone is still the preferred link to local officials. Emails may get dismissed. In rural sectors, fax may still be the more appropriate technology in reaching authorities. Digitalizing fax and other communication (through PDF scanning) would be a ideal.
- Seek stakeholder inputs and partnerships in the roll-out of e-Government and its monitoring and evaluation. Also, there are numerous e-government and ICT initiatives in the public sector (central and decentralized) which may add complexity to harmonizing the sector. See annex 4 for more.
- Redefine the implementation timetables and provide for transparent report of progress and lessons learned; a publicity strategy is still insipient and much needed to inform the public in general and local officials of expectations.

Table 6.1 e-Government Strategy of Kenya - Implementation status (as of June 2006)

<p>Objectives: The Kenya e-government strategy paper was launched in March 2004 encompasses a 3-year state modernization and transparency program. Its overarching goal is to make the government more accountable, results oriented, efficient and citizen centered. It has four specific goals: (i) to improve collaboration between government agencies; (ii) to improved competitiveness; (iii) to reduce transaction costs; and (iv) to provide a forum to citizens' participation in government activities. A Cabinet Committee on ICT oversees the implementation of the strategy; a PS committee coordinates implementation; and the head of the public service hosts the e-Government Directorate.</p>		
Implementation Status, Challenges and Issues		
Government to Government (G2G)	Government to Business (G2B)	Government to Citizen (G2C)
<p style="text-align: center;"><u>Short-term Actions by June 2004 (status)</u></p> <ul style="list-style-type: none"> • Develop ICT standards (done). • e-Government Strategy in place (done). • Install information infrastructure (partly done). • Integrate internal gov't procedures (ongoing). • Implement IFMIS, IPPD (not done). • Host websites for ministries (done). • Start capacity building (ongoing). 	<p style="text-align: center;"><u>Short-term Actions by June 2004 (status)</u></p> <ul style="list-style-type: none"> • Single gov't portal on services offered (done). • Information on key policies (to check). • Make available publications/bulletins (to check). • Link to Kenya gazette (also an action for G2C) (done). • Link to budget, finance bill, tariffs (done). • Establish e-Government auctions (not done). 	<p style="text-align: center;"><u>Short-term Actions by June 2004 (status)</u></p> <ul style="list-style-type: none"> • e-services: apply for driving license, passport, visa, and submit tax returns (no filling possible, not done) • e-policing and e-security (done in police website) • File an employment application (info on vacancies and HR policies, no filling possible) • Provide information on public sector services (no school application filling, no family info not done) • Provide voter information (done).
<p style="text-align: center;"><u>Medium-term Actions by June 2007</u></p> <ul style="list-style-type: none"> • Complete network infrastructure and cabling for data sharing, including with district offices. • Automation of citizen records (birth, death, citizen registration, immigration, civil registrations, driving license, voter registration) • Automation of taxation database and property and assets registration system (land and motor vehicles) • Implement messaging and collaboration services, allowing mail exchange among discussion groups. • <u>Operationalize the following information systems:</u> <ul style="list-style-type: none"> - Popular Registration Services, which integrates civil, immigration, visas, voter, PIN registration systems. - Disaster and emergency management, and security and law enforcement MIS. - Physical assets record (from acquisition to disposal). - Integrated records management system to provide directories of legislative documents. - Agriculture, trade, industry and tourism MIS. - Education (policy) and health (hospital management) - Prisoner experience and organization MIS. - Court registry and library information systems. - Land and environment (geographical info. systems). - Strategic tracking systems to monitor progress of major projects and economy-wide reforms. - Executive networking technology (executive forum). 	<p style="text-align: center;"><u>Medium-term Actions by June 2007</u></p> <ul style="list-style-type: none"> • e-business registration, license and permit application. • e-tax filling, claims and VAT returns. • Data warehousing and access to analytic reports online. • e-procurement – to provide the framework for ordering systems for government; shipment and invoicing system for business; and linkages with the internal systems within government ministries and departments. • e-forums for discussion and feedback on topical issues through bulleting boards. • <u>Long-term Actions (no timeframe)</u> <ul style="list-style-type: none"> • e-payment – to provide links to banks for payments of government services, salaries, etc. • e-trading of government securities – to tender information on government securities; allow for payment of securities; and manage the securities portfolio. • e-government services management – to automatize the government's services appointment bookings (e.g., appointments for motor vehicle inspection services). 	<p style="text-align: center;"><u>Medium-term Actions by June 2007</u></p> <ul style="list-style-type: none"> • Conducting public opinion polls on key policies. • Opening e-suggestion boxes. • Interactive property search for buying and selling of properties. • Legal aid and advice. • Family wills and estates. • Free legal clinics on family law. • Services and information on family court. • Court related information (vaguely stated). • <u>Long-term Actions (no timeframe)</u> <ul style="list-style-type: none"> • e-policing using the internet to administer police operations (police to access details of a car and driver when the driver commits an offence). • e-voting. • e-utility bill payment (system linked to water payment systems).

CHAPTER 7. Public Financial Management, Fiscal Transparency, and Procurement Reforms

Kenya's legal and institutional framework for public financial management (PFM) is generally sound. But, as in other governance areas, the framework is not put to effective use in practice. In an assessment carried out in 2003, the PFM system met only three of the 14 internationally comparable benchmarks, compared with 7-9 in the neighboring Uganda and Tanzania around that time.³¹ The NARC government has given considerable attention to PFM reforms in the past three years and some progress is evident; by the end of budget year 2004/05, six (out of 16 – two more were added in the interim) benchmarks had been achieved. Recently, in 2006, a fresh assessment of PFM system and performance has been carried out jointly by the government and donors using a much expanded Public Expenditure and Financial Accountability (PEFA) performance measurement framework.³² Table 7.1 provides a summary of the draft assessment. The assessment indicates that while the performance is satisfactory or better in many areas (12 A/Bs out of 28), there is still significant scope for improvement (9 Cs and 7 Ds).

This section draws upon the findings of the Country Integrated Fiduciary Assessment (CIFA, World Bank 2006), the PEFA assessment, the recently launched Strategy to Revitalize PFM and other available evidence to highlight key accomplishments as well as areas posing significant challenge towards strengthening PFM. It also makes selective recommendations for further improvement that have potentially high payoff. The note is organized in two sub-sections: the first one selectively discusses issues related to PFM framework, budgetary processes, and external audit. The second section gets into detailed discussion on the theme of fiscal transparency that cuts across the government financial management.

Budgetary Processes and External Audit

Key accomplishments

Legal framework has been strengthened further. In the past three years three new laws related to PFM have been enacted. These include the Financial Management Act, 2004, the Public Audit Act, 2003, and the Public Procurement & Disposal Act, 2005. The objective of these legislations was to codify and modernize the existing practice and regulations in the government in respective areas (financial management, audit and

³¹ The assessment – Public Expenditure Management Assessment and Action Plan (PEM-AAP) - was conducted using the HIPC indicators at the government request to set up a baseline for performance measurement. Kenya was not 'required' to undertake the assessment because it was not a HIPC country. Uganda and Tanzania had initiated their PFM reform programs earlier in the context of HIPC monitoring.

³² The PEFA framework, developed by a multi-donor program and finalized in June 2005, uses 31 high-level indicators including three for assessing performance of donor practices. It assesses performance on a four-point scale using letter grades A through D for each indicator; however, it does not specify what grade would constitute meeting a benchmark. Therefore PEFA grades cannot be strictly related to PEM-AAP benchmarks.

procurement). These laws are being implemented and their full impact will be visible only in the medium-term.

Box 7.1. Fiscal Management Bill 2006

The Fiscal management Bill 2006, under consideration in parliament is basically a budget law. It has received consensus in parliament and is set to be passed along with Finance bill (the 2006/07 budget) sometimes towards late October or early November 2006. It entrenches MTEF in the legal framework and expands the budget calendar for discussion and scrutiny both in Parliament and to other stakeholders. The principal objective of the Fiscal Management bill, 2006 is to provide for effective regulation and oversight of the national budget process and the establishment of the office of Fiscal Analysis and a concomitant Fiscal Analysis and Appropriation Committee to revitalize the involvement and participation of Parliament, its committees and its members in the formulation and regulation of the national budget.

The office will comprise qualified budgeters and economist while the Committee will ideally be composed of members of parliament who have demonstrated competence or interest in the subject. Thus the two institutions will not only be reservoirs of expertise and continuity but also the fulcrum of the budgetary mechanism in the National assembly.

It is noteworthy that the bill endeavors to achieve its objectives within the existing constitutional arrangements which vests budget making initiative solely in the executive. Among other things the bill intends to achieve. It: (i) requires the national budget to adhere to the principles of prudent fiscal management (ii) provides for the laying of the budget statement of intent and objectives before the national assembly and sets the time limits (iii) provides for the laying of annual and supplementary estimates of revenue and expenditure before the national assembly and fixes time limits for that purpose (iv) requires the Minister of finance to take into consideration the comments and recommendations of the committees on the provisional estimates in formulating the final estimates (v) requires the Minister to consider and possibly adopt comments and recommendations of parliament and the budget office in his formulation of budgetary and economic policies. He is required to report to Parliament what action he has taken on those comments and recommendations (vi) provides for the preparation, publication and laying in Permanent of the various economic and fiscal policy reports (vii) provides for the conferment of authority on the Permanent secretary in charge of Finance to obtain information necessary for the preparation of the reports and other publication required under the act and imposes criminal penalties for failure to provide such information (viii) provides for the application of the Government Financial Management act to the proposed act

Budget formulation is more streamlined and strategic. From the 2004/05 budget onwards, annual budget preparation and Medium Term expenditure Framework (MTEF) processes have been integrated and budget cycle expanded, providing more time for budget planning, consultations and political engagement. Two pre-budget papers of good quality have been produced in each of the past two budget years that have enabled wider consultations within and outside the government and have improved transparency of budget formulation to some extent. Strategic orientation of the budget has improved and the past two budgets have made visible attempts at re-orienting expenditure towards priorities stated in the government's Economic Recovery Strategy.

Budget execution has improved in some limited aspects. The predictability of cash at the level of ministries has improved as a result of a new cash management system. The administrative control on mid-year budget adjustments has become tighter. The government is implementing a plan to resolve incomplete capital projects by making special budget allocations.

Office of the Comptroller and Auditor General (CAG) was reorganized and strengthened. Following the enactment of the Public Audit Act 2003, the capacity of the Kenya National Audit Office, (the renamed CAG office) has been enhanced. This has enabled an accelerated clearing of arrears of audits of accounts of the central government, parastatals and local authorities. The audit of 2004/05 central government accounts was completed in April 2006. Audits of public corporations have also been completed up till 2004/05. The CAG is working on clearing the arrears of local authority audits.

The accomplishments of PFM reforms thus far, though encouraging, are not enough to promote sound fiscal management, improve governance, and improve the delivery of public services. The government is quite conscious of the need for deeper reforms. The following paragraphs highlight some key challenges identified by the recently conducted analytical work mentioned earlier. If effectively met, these are expected to provide significant governance dividend.

Key challenges

Legal framework. There's a need to strengthen the legal framework further. The existing framework does not incorporate MTEF process. The MTEF process and other healthy budget practices that have evolved over the past three years may thus need to be codified. It is important that the framework addresses the issues of apparent fiscal decentralization through the Constituency Development Funds and Local Authority Transfer Fund. The legal framework could also add clarity to important aspects of fiscal transparency including: (i) the role of the fund accounts, (ii) the reporting on off-budget activities and guarantees and other contingent liabilities, and (iii) the mandatory publication of fiscal data within specified timeframes and modalities. Most importantly, under the current framework, the scope for legislative scrutiny of the annual budget law is very limited, procedures for legislature's review are not properly established or supportive of an appropriate budget review, and time allowed for the legislative review is insufficient for a meaningful debate.

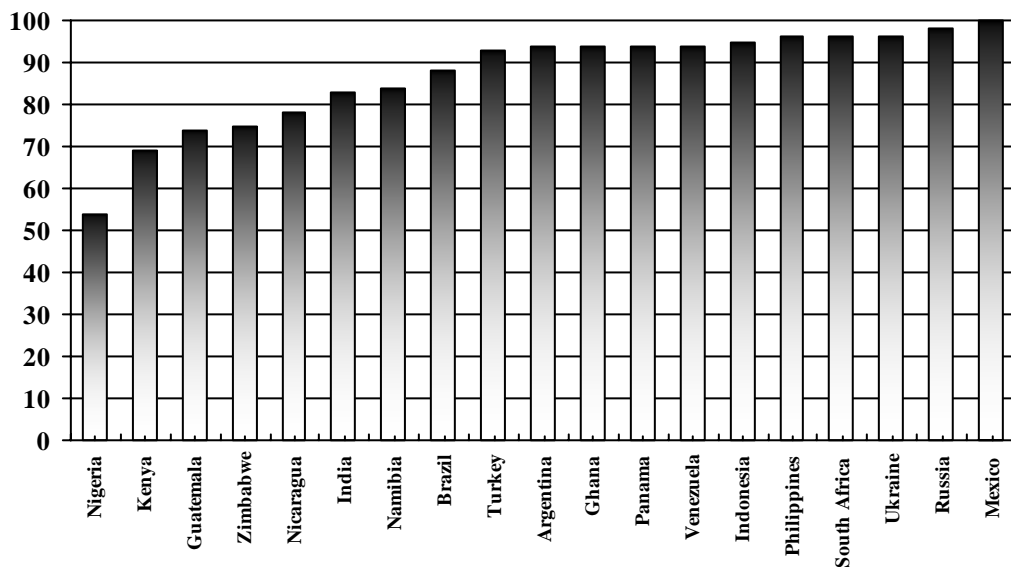
Budget formulation. The planning and provisioning for contingencies and lumpy public sector fiscal liabilities is weak. As discussed in the fiscal transparency section, part of the reason is that the Treasury does not have good information on public sector liabilities that are likely to fall upon the exchequer. Where information exists, there is uncertainty about how these liabilities will be met in the medium-term. Planning for public sector fiscal liabilities should obviously be an important component of the MTEF and included in budget strategy papers.

Budget execution. Despite some limited improvements, budget execution remains very weak. There appear to be severe constraints to absorption of development funds allocated

to ministries. For example, in 2003/04 only 26% of development budget allocated to the Ministry of Health was actually spent. Absorption in the Ministry of Roads and Works has also been traditionally below 50%.

Payroll management. Despite long standing attempts to reform, payroll is still characterized by weak controls. All employees of the civil service are now covered under the integrated payroll and personnel database, the database does not cover teachers and is not yet fully operational. In 2004, the Ministry of Health carried out a human resource mapping and verification exercise as a first step in developing a human resource strategy. The exercise estimated that the Ministry was paying over Ksh. 500 million more than it should on the payroll.

Figure 7.1 Supreme Audit Institutions, 2004



Source: Center of Public Integrity, 2004. The Supreme Audit Institution Index includes assessments in three sub-indicators: 1) *In law, is there a national supreme audit institution, auditor general or equivalent agency covering the entire public sector?* 2) *Is the supreme audit institution effective?* and 3) *Can citizens access reports of the supreme audit institution?* Best = 100.

Effectiveness of internal audit. The establishment of an internal audit function is now provided in The Government Financial Management Act, 2004. The Act does not, however, set out specific provisions relating to the functioning of Internal Audit, including its charter, reporting arrangements and relationship with Ministerial Audit Committees. Owing to lack of clarity regarding its purpose, internal audit has previously been involved in routine transaction processing functions within ministries and departments, thereby undermining its intended purpose of providing independent oversight of accounting and internal control processes.

Effectiveness of external scrutiny and audit. There appears to be very little impact of the CAG reports on the quality of PFM. Audit reports are not examined timely by legislature

and there is a seemingly permanent backlog of 2-3 years. The backlogs at the Public Accounts Committee (PAC) are seriously hampering an important link in accountability chain. Even after PAC consideration, there is little follow up on PAC's observations. Most of the recent PAC and Public Investment Committee (which is supposed to oversee parastatals) reports that have been presented to parliament, include findings showing the enormity of the public financial mismanagement together with recommendations that would improve the government's financial probity and accountability. However, the Committees' findings are not legally binding, and they are generally ignored by the executive. As a result compliance with the financial rules and regulations remains generally weak. Sanctions and penalties are not typically imposed in cases of financial misconduct.

There is therefore a need to amend the Audit Act to provide for an enhanced oversight by the PAC and strengthen this Committee's ability to impose sanctions and penalties in cases of financial misconduct and non-compliance with financial rules. The National Audit Office should develop audit issues' post-implementation review process and results of such reviews communicated to the PAC and published. It is important that the government acts in a planned and concerted manner to resolve all cases of egregious financial misconduct identified by the National Audit Office in a time-bound manner. We recommend that Ministerial Audit Committees are empowered and provided mandate for ensuring implementation of audit recommendations.

Limited external stakeholder engagement in policy, planning and budgeting: Although the views of the stakeholders are sought in the MTEF process at the sector hearings, their engagement has so far not been structured and fatigue and lethargy are slowly setting in. There are no clear procedures of engaging civil society and even development partners in policy formulation, planning and budgeting. To ensure effective consultation, the consultative process could be entrenched in law.

Key suggestions

The government has recently launched a 'Strategy to Revitalize PFM'. The strategy while appropriately ambitious and comprehensive, needs better prioritization. To get full benefits of reform, selected key actions from those detailed in the Strategy need to be carried out in a time-bound sequence. Below are some actions that are significant for the overall health of PFM system or could be fast-tracked in the interest of results.

- Undertake a review of legal framework, identify areas and issues that need codification, and prepare legislative changes in the next four months.
- Complete the review of financial position of key parastatals and start monitoring and planning for contingent liabilities.
- Carry out a review of the reasons for low absorption of public funds in the Ministry of Roads and Public Works. Implement recommendations within the ongoing fiscal year to ensure that at least 75 percent of the released funds are utilized. A similar exercise may be needed for the Ministry of Health. The government could consider developing a policy for regularly conducting Public Expenditure Tracking Surveys and evaluation of selected programs.

- Closely monitor the ongoing implementation of the Integrated Financial Management Information System (IFMIS) to ensure its smooth operation and realize its full potential. Ensure full operationalization of the payroll database and its integration with the IFMIS.
- Strengthen effectiveness of the internal audit function by ensuring its independence of accounting responsibilities and adopting a risk based methodology. Internal audit performance should be monitored by Ministerial Audit Committees.
- Strengthen effectiveness of Ministerial Audit Committees by developing operational charters that set out their independence, mandate, membership and operational relationships with Accounting Officers and auditors.
- Bring all the audit reports to date in compliance with the Public Audit Act 2003 and amend the Audit Act to provide for an enhanced oversight by the PAC and strengthen this Committee's ability to impose sanctions and penalties in cases of financial misconduct and non-compliance with financial rules. Ministerial Audit Committees should be empowered and provided mandate for ensuring implementation of audit recommendations.

Governance in Revenue Mobilization.

The Kenya Revenue Authority (KRA) has made inroads managerially and in terms of revenue mobilization, which partly due to economic buoyancy it has been increasing. Such gains do not necessarily imply an absence of governance challenges nowadays. Even if governance may have improved from the lower levels prevailing in the past, serious bottlenecks related to governance may still remain. The empirical evidence in Chapter 3 does suggest, for instance, that bribery to evade taxes continues to be highly prevalent, for instance. More broadly, currently KRA in fact may lack a formal governance framework for tax administration. The absence of governance structure in place leads to opportunities or incentives to abuse the system. In particular, there are three dimensions of such governance framework which would require strengthening:

- Governance of the Board of Directors (the policy organ of KRA). There is a need to review the laws, function, appointment, composition, procedures of appointment and the skills required to discharge duties as a member of the board which currently does not exist.
- Clarity of the policy architecture of Tax administration. Does it have a rich menu to guide KRA management in the day to day running the tax authority, are these rules known to all and are these policies widely disseminated to members of staff and other stakeholders?
- What are the implications of the two issues above on the actual administration of taxes? For example, are there problems arising in day to day administration of

taxes? If there are, what are the causes, is it lack of clear policy, is it procedures? What are the sanctions in place to deal with people who abuse the system?

The discussion below falls under this framework.

1. Weak KRA Board of Directors. The selection, composition and independence of the board of directors warrants a great deal of attention. There is no set of clear criteria on the selection process i.e. who qualifies to be a board member. The lack of clear criteria in place raises concerns because the politically connected cronies get appointed (the Minister of Finance does the appointments). In addition to this there is real and perceived conflict of interest issues at play. Most of the board members especially the ones from the private sectors run businesses and are large tax payers and some still engage in business transaction with KRA despite the fact that they are board members.

There is a lack of clearly stipulated policies by the board on Tax administration on critical issues such as promotion and transfers of staff, general procurement, and financing process policies. No clearly laid out procedure or policy on promotion exists in KRA and also there are no clearly laid out procedures on how to commit finances committed across various activities in terms of priority. Hence reallocation takes place at expense of core priorities such as travel foreign training. These create opportunities for corruption and challenges within the tax system in the Customs department, VAT refunds and debt write-off etc. system.

Audit enforcement: There are claims that there are no proper audit procedures in place to track whether big companies are paying what they owe. Since the audit system is weak, there is no follow up system in place to verify whether taxpayers (both corporations and individual) pay their correct tax obligations. Presently the CAG only looks at how the funds allocated to KRA are utilized and the office has no mandate on tax collection or the process of collecting it.

2. Customs Taxes. There are allegations of manifest manipulation leading to massive revenue leakage. This is especially evident in the release procedures of containers. The allegation is that since the computerization of customs department, there has not been a reconciliation between the shippers manifest and the KRA SIMBA system. For example, when clearing goods at the port, a customer can use one manifest designed for one goods container from SIMBA system to clear more than one container (Pay customs duty for one container and get 5 or more containers out for customs duty free). This is because the electronic systems are being used to declare the goods but after paying the duty, they use the manual release system to release the goods. This happens because there is collusion between shipping agents and KRA officials at the port to defraud GOK of funds. The value for under declaration is hard to tell but the estimate is about 15% of imports involving highly connected people to customs officials and the administration.

To highlight the problems in customs, KRA tax target for 2005/06 fiscal year which it usually surpasses was Kshs 309 billion but the actual realized revenue was kshs. 297 billion. Customs department collected Kshs 111 billion against the target of Kshs

121billion. A shortfall of Kshs 10b. In comparison, the shortfall in Domestic taxation and road transport was 767million and 455 million. Despite of this massive shortfall, no heads have rolled despite the top management having performance contracts.

Risk profiling databank: KRA does not have a risk profiling databank or intelligence. Therefore anything could be input in the computer system without it detecting red flags. A good case in point happened last year when hundreds of luxurious cars underpaid customs duty. For example owners of top of the range Mercedes Benz paid duty as low as US\$ 10000 for new vehicles imported. If the Risk profiling databank was in place, when one makes an entry of certain kinds of goods in the system, a red flag should go up if tax payable is below a certain figure.

VAT Refunds: In 2005/06 total VAT refund stood at Kshs 13b with an estimate of 30-40% being fictitious. Fictitious claims are to companies whose registrations do not exist. VAT refunds should be independently audited by third parties.

Debt (tax) write-off: The weak IT system presents opportunities for easy manipulation in domestic taxes. There are claims that KRA officials can fraudulently write off tax obligations and penalties from the KRA systems by simply deleting the files in the system and thereby leaving no trail for kick-backs in exchange. KRA officials also manipulate tax payment owed and amount of refund. The weak ICT in KRA makes it vulnerable to corruption.

3. Institutional Challenges. There is no clear framework for out of court settlement of tax liabilities. In cases where the taxpayer takes KRA to court over dispute, it is claimed that behind the scene negotiations take place to settle.

4. KRA's achievements to date. The electronic SIMBA system has done a lot to curb corruption in the long room and KRA is given credit for this achievement. However, the earlier identified weakness that the electronic manifest are not linked to shipper's manifest and that there is manual release leading to revenue leakages still holds. VAT, Income tax and excise tax even though computerized, the databases are not interconnected and as such not helpful. There is a lot of manipulation, theft and collusion between staff and taxpayers on VAT and Income tax for businesses and self employed.

Granting of discretionary exemption is not that prevalent nowadays. Exemptions are done by MOF not KRA under the law. Since they are not published, one cannot know the magnitude of discretionary exemption. However in 2004, there was hue and cry when the then Minister of Finance granted the Minister of Cooperatives a tax exemption.

KRA is much better today than it was before NARC administration. There are no openly tax evading companies like there used to be and there is no evidence of individuals and corporations who are not complying. KRA have managed to carry-out reforms which have managed to increase revenues and more people have come into the tax bracket. Staff are professionally hired. There are no firms which are known to be politically connected who enjoy tax advantages over others. However, comparing KRA now with the previous

corrupt regime would not be fair. Those in the know estimate that, closing corruption loopholes in the current system would generate KRA about Ksh 60b - about 15-20% more revenue.

5. Conclusions. In summary, the weakness observed above are as a result of a weak Board of Directors who are not providing proper oversight and are not properly functioning as well as KRA staff who exploit the weak systems in place give incentives for majority of staff to be involved the vice. The KRA governance infrastructure is weak. The delays in reforming the systems in KRA is in the interest of the politically connected, corrupt customs department officials, clearing and forwarding agents etc. Clearing and forwarding agents, shipping agents and customs agents collude to defraud KRA. It is said that most of the clearing and forwarding firms are owned by current and retired Customs agents as well as Kenya Bureau of Standards officials.

6. Recommendations

- The grey areas with regards to promotion procedures, staff transfers, procurement, financing processes etc. should be looked at in depth and proper procedures put in place.
- KRA ought to develop an internal audit system or clear audit strategy since at the moment there is nothing in place.
- Clear audit procedures needs to be put in place. An independent operational audit needs to be in place to check whether KRA does things correctly, whether KRA applies its laws fairly across board and lastly whether its needs modernization.
- There needs to be a code of ethics for KRA officers, clearing and forwarding agents and shipping agents so that the conflict of interest is removed.
- KRA officials' wealth and lifestyles should be clearly monitored to root out corrupt employees.
- An external body needs to be commissioned to evaluate systems procedures, internal controls to ensure that only legitimate VAT refunds are paid. An independent body not KRA needs to do a random check on the validity and legitimacy of companies who have been paid taxes in the last 3-4 years to determine whether a randomly picked company does exist? what do they do? how long have there companies existed? who are their directors? and whether the directors have relations with KRA officials or do they have political connection?
- Improve security features of IT system by providing different security levels to members of staff depending on their rank and work
- An organizational audit is needed to clearly define what department does what, clear policy and guidance from the Board as part of strengthening the governance at KRA so that roles can be clearly designed.
- KRA may wish to be ISO (International Standards Organization) compliant (i.e. the Quality Management system i.e. ISO 9001:2000) which deals with control of documents and records resource management; management responsibility; authority and effective communication; customer monitoring and feedback and database

decision; work environment; and continuity and succession planning. The Retirement Benefits Authority, a body which like KRA reports to MOF is already at the final stages of ISO certification.

- KRA should develop an institutional risk management policy framework to guide and monitor the continuing efficacy of fiduciary safeguards.
- The effectiveness of the KRA board's audit and finance committees should be enhanced through appointment of appropriately experienced and independent members and establishment of operational mandates.

Fiscal Transparency

Kenya's performance on fiscal transparency has improved in the past three years but still remains weak. The 2006 PEFA assessment provides an objective assessment of the transparency in expenditure. It assessed fiscal transparency and comprehensiveness along six indicators: (i) classification of the budget, (ii) comprehensiveness of the budget documentation, (iii) the extent of unreported government operations, (iv) transparency of inter-governmental fiscal operations, (v) oversight of aggregate fiscal risk from other public sector entities, and (vi) access of public to fiscal information. A ROSC on Fiscal Transparency, which also covers revenue transparency has not been prepared for Kenya in the recent past. The discussion below draws upon the PEFA assessment as well as the mission's findings on transparency in revenue.

Transparency in expenditure

Comprehensiveness of the budget documentation. Comprehensiveness of the budget documentation has improved with the addition of Budget Strategy Paper (BSP) but remains weak. The BSP provides necessary information on macroeconomic assumptions of the budget, new policy initiatives, and strategic basis of the budget. Budget and accompanying tables are published and made available to the public on the Ministry of Finance website. But Budget documentation does not include extra budgetary activities and these are an important element of fiscal operations. Statements describing the nature and fiscal significance of central government contingent liabilities and tax expenditures, and of quasi fiscal activities are also not provided. It is recommended that the central government publishes full information on the level and composition of its debt and financial assets which is not done.

Table 7.1 Summary of 2006 PFM Performance Scores

PFM Performance Indicator	Score
A. Credibility of the Budget	
1. Aggregate expenditure out-turn compared to original approved budget	C
2. Composition of expenditure out-turn compared to original approved budget	A
3. Aggregate revenue out-turn compared to original approved budget	C
4. Stock and monitoring of expenditure payment arrears	B
B. Comprehensiveness and Transparency	
5. Classification of the budget	C
6. Comprehensiveness of information included in budget documentation	B
7. Extent of unreported government operations	C
8. Transparency of Inter-Governmental Fiscal Relations	B
	C+
10. Public Access to key fiscal information	B
C(i) Policy-Based Budgeting	
11. Orderliness and participation in the annual budget process	B
12. Multi-year perspective in fiscal planning, expenditure policy and budgeting	C
C (ii) Predictability and Control in Budget Execution	
13. Transparency of taxpayer obligations and liabilities	B
14. Effectiveness of measures for taxpayer registration and tax assessment	C+
15. Effectiveness in collection of tax payments	D+
16. Predictability in the availability of funds for commitment of expenditures	B+
17. Recording and management of cash balances, debt and guarantees	B
18. Effectiveness of payroll controls	D+
19. Competition, value for money and controls in procurement	B
20. Effectiveness of internal controls for non-salary expenditure	C
21. Effectiveness of internal audit	C
C (iii) Accounting, Recording and Reporting	
22. Timeliness and regularity of accounts reconciliation	C
23. Availability of information on resources received by service delivery units	B
24. Quality and timeliness of in-year budget reports	C+
25. Quality and timeliness of annual financial statements	D+
C (iv) External Scrutiny and Audit	
26. Scope, nature and follow-up of external audit	D+
27. Legislative scrutiny of the annual budget law	D+
28. Legislative scrutiny of external audit reports	D+
D. Donor Practices	
D-1 Predictability of Direct Budget Support	D
D-2 Financial information provided by donors for budgeting and reporting on project and programme aid	C
D-3 Proportion of aid that is managed by use of national procedures	D

Source: PEFA Assessment 2006

Extent of Unreported Government Operations. Performance on this indicator is weak. The level of extra-budgetary expenditure (other than donor-funded projects) which is unreported i.e. not included in fiscal reports is estimated at 5-10 per cent of government expenditure. Transactions of the Semi-Autonomous Government Agencies (SAGAs) and Fund Accounts (FAs), which constitute general government operations are not properly reported.

Transparency of Inter-governmental Fiscal Relations. The only sub-national entities in Kenya are Local Authorities (LA). Central government's fiscal relations with LA are

quite transparent. The PEFA assessment found the allocation of transfers from central government to local authorities (LA) fully transparent, and rule-based. LA are provided reliable information on the allocations to be transferred to them before the start of their detailed budgeting process. But LA accounts are not consolidated with the central government's account into a general government fiscal report.

Oversight of Aggregate Fiscal Risk from Other Public Sector entities. Other public sector entities include 75 SAGAs, about 35 main public enterprises, and LA. While SAGAs and LA do not pose fiscal risk, public enterprises are a source of fiscal risk because of their large scale commercial activities. Government-owned financial institutions also pose fiscal risk because of their possible quasi-fiscal operations, including possible directed lending, interest rate subsidy and the like. The central government's monitoring of public enterprises that pose significant fiscal risks is very weak and incomplete. Apparently the government is now hiring consultants to collect financial information on 25 identified public enterprises that pose high fiscal risks.

Public Access to Fiscal Information. The performance on this indicator is mixed. Fiscal information including budget documents, in-year budget execution reports, year-end financial statements and external audit reports are available to the public in a timely fashion, through the Government Printer for purchase and/or from the Government's website. But information on procurement awards is not routinely published. Also no information is made available to public on resources to primary service units for any sector (such as primary schools, health clinics etc.)

Revenue transparency

Tax expenditures. Tax exemptions, allowances deducted from gross income, tax credits deducted from tax liability and tax deferrals (such as accelerated depreciation) are part of fiscal policy in many countries. Transparency requires that budget documentation include a statement of the main central government tax expenditures. Such statements could include the public policy purpose of each provision, its duration, and the intended beneficiaries.

Kenya provides a variety of tax incentives and allowances as part of their program of investment incentives and to non-governmental organizations and charities. Most of these incentives are provided by legislation. The following exemptions are provided: Import duty and VAT Exemptions, Warehouse rent, Stamp Duty on transfer of land, and Exemptions to NGOs and Charities. Despite the exemptions being legislation based and not entirely discretionary there has been abuse of the system. The government since 2003 has taken steps to improve the transparency of the exemptions regime but there remain concerns that the criteria for granting exemptions remains vague and can permit a whole host of activities, hence permitting discretion on the approval process. For example, the granting of stamp duty exemption on land is to promote development and this seems extremely vague criteria. Therefore, an important challenge is to rationalize the exemptions regime and implement simple, transparent administrative arrangements.

Reporting. No reports are prepared as part of budget reporting on the operations of neither the exemptions regime nor the revenue foregone as result of granting exemptions.

Key Suggestions to improve fiscal and revenue transparency

- Expand fiscal data to cover the general government. In particular, there needs to be regular coverage of extra-budgetary funds and operations of Fund Accounts (FAs) and Semi-autonomous government agencies (SAGAs). The publication of fiscal data needs to be made mandatory and an obligation of the Government, within specified timeframes and modalities.
- Engage external stakeholders more actively in the budget process early on. The Government could encourage outside scrutiny of the macroeconomic and fiscal projections included in budget documents, by explaining the methods and assumptions underlying these projections more clearly and soliciting more input. A consultation process on policy formulation, planning and budgeting with civil society and other stakeholders could be established and include it in the law.
- Budget documentation, reports from Parliamentary Committees (PAC and PIC) and audit reports to be made publicly available together with a tracking system to monitor implementation of recommendations.
- Prepare an annual tax expenditure budget listing tax concessions and the estimated revenue loss from each concession.
- If not already completed, incorporate remaining exemptions in the revenue laws and make them available to all enterprises on the same terms to remove administrative discretion.
- Allocate more income tax department resources to monitor and audit the financial records of companies registered under various tax incentive schemes in order to combat abuse.
- Strengthen post-release audit programs in customs to minimize leakages from suspension regimes

Procurement

A milestone in Public Procurement Reforms in Kenya was attained last year with the enactment of the Public Procurement and Disposal Act, 2005. The Procurement Act provides for the establishment of a procurement oversight authority, the Public Procurement Oversight Authority (PPOA) whose principal function is to provide oversight of the procurement regulations. However, it should be recognized that the PPD would take quite some time to be fully operational to provide the kind of oversight needed to address the current problems in procurement.

It must be emphasized that in an area such as procurement which has been fraught with systemic problems such as massive abuse of contract variations, abuse of low value procurement, lack of evidence of goods purchased, delays in evaluations, lack of effective checks and balances, etc., ***an incrementalist approach to reforms does not work***. Instead, one would suggest bold actions and/or reforms which can have high impact on the way things are done to send a clear message that it is not “business as usual”. Such bold actions would include the following:

What needs to be done in the short term?

(i) ***Inject sunshine principles in bidding and procurement contracts***, including the following:

- Publishing the information mandatory by law regarding the awards of contracts. The Public Procurement and Disposal Act Regulations, 2006 which have been prepared signed by the Minister of Finance and submitted to Parliament for approval and to be Gazetted thereafter obliges the publication of information on contracts such as the amount of contracts, winning bidders, procurement opportunities, as well as decisions of the Procurement Appeals Board on concluded cases. All Ministries, Departments and Agencies should be required to publish that information on a Government website and information regarding bidders’ and contractors’ performance. This would assure confidence about the commitment of Government to transparency
- Ensure the website is working effectively and is accessible to the public. The Government should invest in having a state-of-the art website that does not regularly breakdown.
- The Government should publish information about the website including infomercials on Television and Radio with the website address and encouraging people to visit the website.
- The PS Treasury in the Ministry of Finance should exercise his authority in the Exchequer Act forcing all PS’s or procuring entities in Government to provide information to be put on the website regarding in a stipulated time (bi-weekly perhaps).
- Approval of budgetary allocations should be on the basis work plans and procurement plan. All public entities should produce annual a workplan plan and procurement plan. Both the current Public Procurement Regulations 2001, amended in 2002, and The Public Procurement and Disposal Act 2005 require production of these plans.

(ii) ***Procurement monitoring system***. PPD should set up a system for monitoring and reporting on compliance to the Public Procurement Regulations by procuring entities. Based on the findings of the monitoring and reporting system, the Government should take stringent measures against reported incidents of non-compliance to the procurement procedures.

(iii) **Blacklisting Companies:** The Government should implement the current provision in the law on “Blacklisting” companies. The mechanisms and/or procedures to take such an action must be clear. Although such a provision exists in the current procurement law, the mechanism to report and enforce it has not been established by Government.

(ii) **Introduce a Vetting System to pre-qualify Companies** interested in bidding for Government contracts. The significance of this is the following: information on companies would be reviewed by an outside company contracted by Government to review pertinent information such as the names of the Company Board, registration of companies and its history, pending court cases, financial information such as bankruptcies, and compliance with the procurement regulations. Such a system of veto would address the issue of conflict of interest and fraudulent companies who win contracts but unable to perform the work.

Box 7.2 Civil society participation in procurement reforms

Supporting systemic reforms- Procurement Watch

In the Philippines, Procurement Watch Inc (PWI) was born in part out of the need to harness citizens’ collective anger and frustration about widespread corruption. It was organized as a nonprofit institution with encouragement from the government Department of Budget and Management (DBM). With technical assistance from donors and advocacy support coordinated and managed by PWI, DBM secured the enactment of the Government Procurement Reform Act of 2002. The President signed the bill into law on January 10, 2003, almost four years after the effort was initiated. Currently, Procurement Watch trains civil society organizations on the intricacies of procurement. It deploys observers, armed with checklists, to official bidding sessions. When anomalies are discovered, they are brought up to the superiors of erring agencies. Those who persist are reported to civil society watchdogs

Monitoring procurement awards- Veedurías for Citizen oversight

During the last 13 years citizen participation in Colombia has been institutionalized as mechanism of social control in Colombia. *Veedurías* were established by law to allow social monitoring of public administration as well as of judicial, legislative and electoral bodies, control organizations, and all kinds of public or private organizations in charge of implementing projects funded from the public purse, mainly at the local level. In 2002, the national government promoted the adoption of the campaign *colombiemos* which means ‘*Colombians are working for Colombia*’. The aim of this program was to create a citizen network for controlling the public sector. Four important *veedurías* were adopted for controlling contracts worth about US\$278 million. With the adoption of this network, accusations of corruption rose by 40% in 2002. Additionally, the national government promoted the training of *veedores*. As a result, 2000 *veedores* received training and 70 new citizen control groups were formed.

Short to Medium Term

The recently enacted procurement legislation needs to be further supported by regulations and procedures aligned to the Act. The old procurement system has been characterized by slow processes, unclear mandates, a lack of transparency and wasteful or unclear procurements. There is need to build capacity in the application of the new regulations and to establish the new oversight authority. Some of the reform measures would include the following:

1. **Ensuring that the Public Procurement Oversight Authority (PPOA) is a strong and effective institution:** GOK should provide adequate budgetary allocation to the PPOA to cover start up costs such as rent for new premises, salaries and emoluments and other operational costs. The current provision in the budget for this authority is quite small, but we were informed that the Government has committed to improve on their current budget during the revised budget. The proposed date of operation of this new authority is January 1, 2007. The team has already developed a draft organizational Chart, code of regulations, and HR policies for this Authority.

In addition, the PPOA should be supported so that (i) its enforcement mechanisms and its capacity building activities bear fruit in the immediate to short term (ii) it effectively communicates that there is a paradigm shift in public procurement in Kenya, (iii) make the work program of the Authority public with monitorable indicators and (iv) interact with stakeholders including civil society. The IRCB project which is now effective and ready for disbursement will provide support in a number of these areas.

Box 7.3. Quick Gains in procurement reform

Procurement underpins the work of governments--the delivery of quality public goods and services on a timely basis at a reasonable cost. Hence it is at the center of efforts to increase administrative efficiency and combat corruption. Estimates based upon country experience are running at 10-15% of the total national procurement bill for only the first 4 priority categories identified for QG rationalization. Therefore, applying basic tools and good practices to rationalize procurement of goods and services on these priority categories can yield considerable benefits in the short-term.

Quick Gains is a procurement diagnostic tool implemented first experimented by the Bank in Ceara (Brazil) over three years ago to improve efficiency and control of procurement expenditures. The rationalization of procurement of goods and services by category applying the Quick Gains approach has resulted in **actual annual savings of roughly US\$50 m/year** for partial implementation in 7 procurement categories and e-procurement and a one time investment of less than \$1 million. Preparatory work to replicate the experience in other Latin American countries such as Peru, Guatemala, Panama and Ecuador is ongoing. In Peru a preliminary QG diagnostic produced estimated savings from basic reforms (not requiring difficult legislative, procedural or other reforms) of \$87-540m/year depending upon how aggressively the Government wishes to follow-up. In Guatemala and Panama the estimates are \$64/103m and \$44/68m respectively

2. In the Governance action plan and in other such documents, ***procurement needs to be highlighted as an area where quick wins and significant impacts on the governance side can be realized.*** The impact will be felt system-wide and can greatly influence how the public perceives how public money is being utilized and bring about significant cost savings (see Box 7.3). For example, the impact of the planned e-procurement system that will commence electronic advertising in some Ministries and ensure tenders are done electronically from January is not fully recognized.

3. ***Support from Development Partners is crucial in a couple of areas.*** These would include but not limited to the following: (a) assistance in setting the Authority (provision of IT and other equipment); (b) financing of urgently needed consultancies (for capacity development in the procurement sector and for the preparation and implementation of an e-procurement strategy); (c) establishment of a baseline and indicators against which progress can be measured over time, and (d) support for empirical studies particularly on reference and unit prices and stakeholder surveys.

4. ***The PPOA should play a key role in ensuring compliance with the new regulatory framework*** (i) using all the tools provided by the Public Procurement and Disposal Act to ensure that entities are complying with the law and the regulations (these include close monitoring of the activities and institutional set up of the public entities, taking remedial and punitive action where necessary including debarment of firms); (ii) putting a strong framework in place to support the work of those involved in procurement which includes comprehensive capacity building programs, provision of all the tools and advice they need, making sure management takes responsibility for their role in procurement and (iii) work collaboratively with the Internal Audit Department, and the Comptroller and Auditor General.

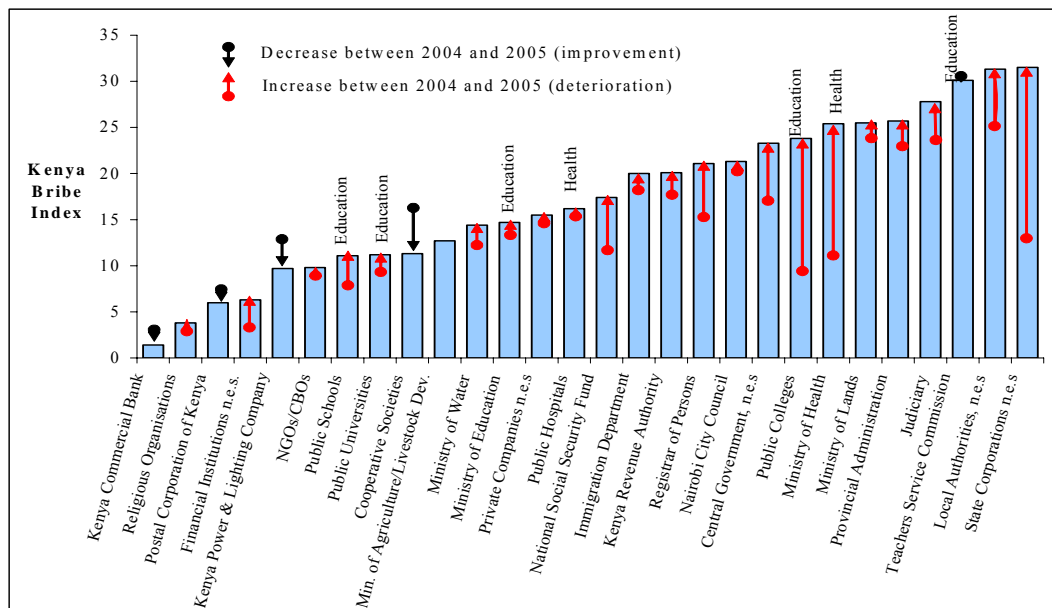
5. ***Independent Observers to play an active role in monitoring implementation of the new procurement framework.*** The Authority has expressed support for building an additional layer of credibility and independent monitoring by non-state actors of the entire procurement process, including the operations of the new body, its institutional arrangements, and the promised results. However, under the new procurement regulations, civil society bodies are only allowed to observe the procurement process such as the opening of bids, only for contracts within the threshold of 50 million Kenyan shillings and above. Allowing civil society to observe contracts below this threshold would be important to provide guarantees in the use of public funds to a larger number of contracts. One of the effectiveness conditions of the Education SWAP agreed by GOK and the development partners involved is the hiring of an independent body to monitor procurement processes of 10 million shillings and above. This threshold seems to capture better the bulk of the procurement process and could be included in the new procurement regulation.

CHAPTER 8. Governance & Anti-Corruption in the Real Sectors

Kenya is at a critical juncture in its fight against corruption. Initial efforts of the Kibaki administration to develop and strengthen the legal and institutional framework dealing with governance and corruption issues has placed Kenya's anti-corruption program among the very early examples of integrity programs in Africa. It is expected that efforts to measure program performance and managerial/worker accountability will develop as the new institutions mature and behaviors change. The current perception in Kenya is that anti-corruption reforms have stalled and in some cases reversed. However, at the sectoral level, localized anti-corruption and governance reforms are taking place and are beginning to yield important results

Figure 8.1 Changes in Corruption Perception between 2004 and 2005 (Kenya Bribery Index)

This section takes stock of progress in governance reforms in selected sectors and agencies: the Ministry of Education (including the Teacher Services Commission (TSC)), the Ministry of Health (MoH), the National AIDS Control Council (NACC), the Ministry of Transport and Communications (MoTC), including the Ministry of Roads and Public Works, and the Ministry of Water (MoW) together with the Athi Water Services Board (AWSB) and Nairobi City Water and Sewerage Company (NWSC). The presence of a report by Transparency International in one of the World Bank's (Bank) areas of operation was the main justification for the selection of these sectors in this study. Its main purpose is to provide some recommendations that could strengthen the sectoral



Source: Kenya Bribe Index, 2004 and 2005. Transparency International.

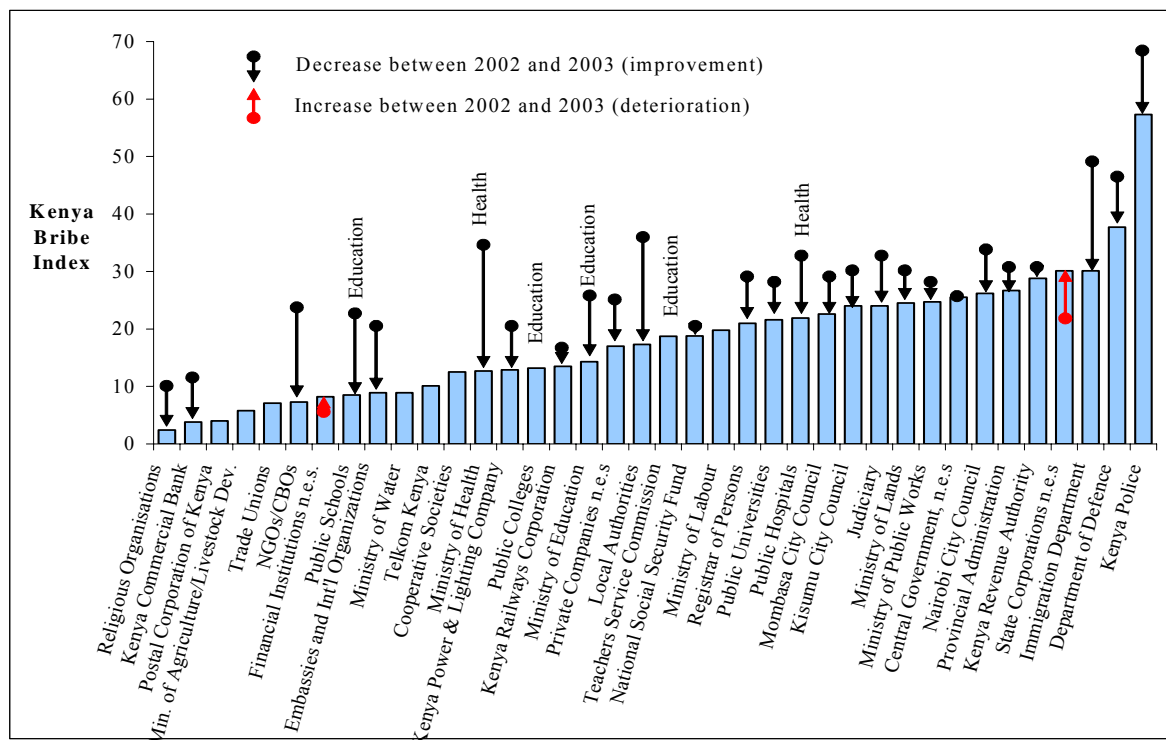
coverage of Kenya’s Governance Anti-Corruption Plan (latest version of June 2006).

Recent trends in perceptions of bribery

Recent surveys carried out by Transparency International (TI Kenya Bribery Index 2006) and by the Kenya Anti-Corruption Commission (KACC National Corruption Perception Survey, 2006), revealed:

i) **Significant improvement between 2002 and 2003.** There was a generalized and significant improvement in perceptions and incidence regarding bribery between 2002 and 2003. On average, perceptions of bribery in the public sector improved by 33 percent over the 2002-2003 periods, and the average number of bribes paid per person per year fell from 11 to less than 3 between 2002 and 2003. Every agency saw an improvement in this incidence indicator, with the greatest seen in public schools (from 7 bribes to less than 1) and the largest deterioration or reversal seen at the Teachers Services Commission (an increase from 1.4 bribes to 3.4 bribes). But the real change occurred at the police and the Ministry of Health, where the bribes came down from 53 and 46 bribes per person per year to 13 and 2 bribes, respectively.

Figure 8.2 Changes in Corruption Perception between 2002 & 2003

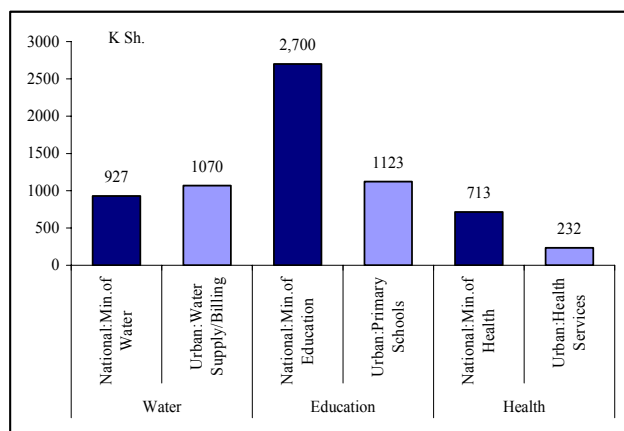


Source: Kenya Bribe Index, 2004 and 2005. Transparency International.

ii) **Some deterioration between 2004 and 2005.** However, between 2004 and 2005, there was a slight, but general agency-wide deterioration in perceptions and incidence rates (Figure 1). The TI aggregate bribe index increased to 19.2 in 2005 from 14.9 in 2004 (it was 18.2 in 2003). Only 5 out of the 28 agencies saw an improvement in perceptions

between 2004 and 2005. However, this deterioration looks minor relative to the large decline in corruption levels seen between 2002 and 2003 (see Figure 8.2), and incidence has increased somewhat across the board. The Police is not shown for scaling purposes (it improved from an index of 73 in 2004 to 60 in 2005)—still very high compared the next institution in line which scored less than 40 in the TI’s Kenya Bribery Index. Between 2004 and 2005, people experienced the largest increases in corruption in state enterprises, the Ministry of Health and public colleges.

Figure 8.3 Avg. Size of Bribes, 2004



Source: Kenya Bribery Index and Corruption in Services in Urban Kenya, both from Transparency International, 2004.

iii) ***The average size of bribes is largest in education.*** Bribes at the point of service delivery are not the only manifestation of corruption but could be regarded as the one that affects poor people and citizens the most. Frequency is important but also the size of the bribe. Figure 8.3 shows that largest bribes are paid at the Ministry of Education and Primary schools, when compared with water and health services at the national and urban levels.

iv) ***Anti-corruption reforms have resulted in mixed improvement in the fight against corruption—more in education but less so***

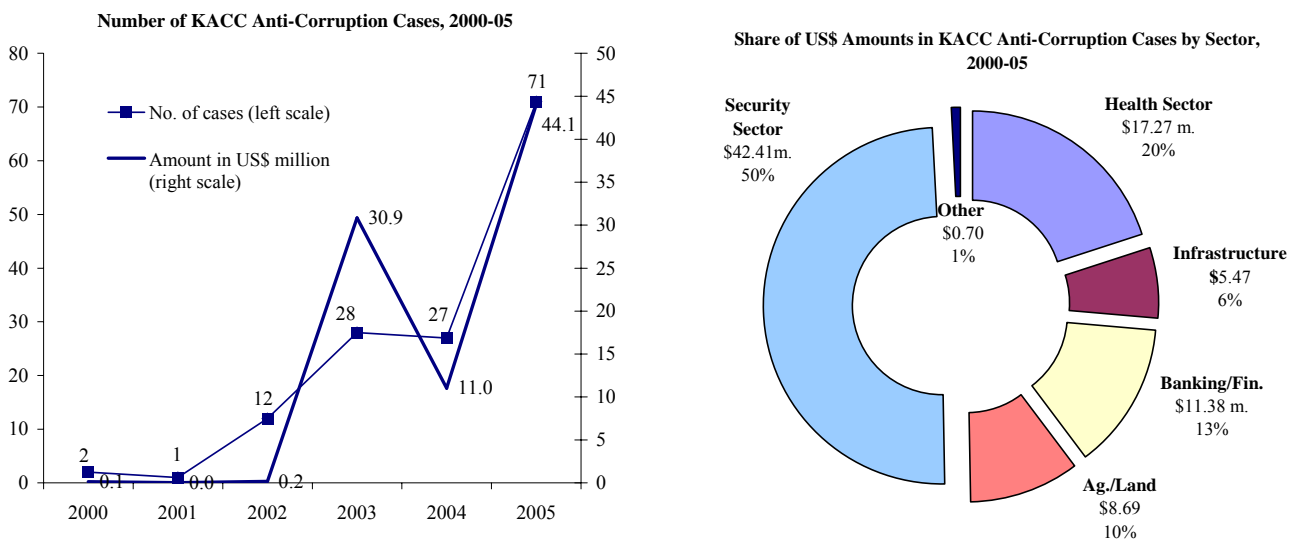
in the police and roads and public works. Sectoral anti-corruption reform measures, including corruption risk assessments and re-definition of processes and procedures, implemented in key ministries have had positive impact on the perceived levels of corruption in Kenya. For instance, over half of KACC’s National Corruption Survey respondents believed that corruption levels improved over the last year in education offices (77 percent), public schools (75 percent) and public hospitals (56 percent). The Ministry of Education improved from third position in 2003 to tenth position in 2005. However, corruption levels did not improve or worsened despite implementation of anti-corruption strategies in the police (60 percent), local authorities (60 percent), Roads and Public Works (40 percent), lands (46 percent) and provincial administration (51 percent).

v) ***Corruption in line agencies is correlated with corruption in their parent ministries*** (e.g., the police and Internal Security (OP), and public hospitals with the Health Ministry) and therefore there is a need for comprehensive sectorial approaches that address corruption along the value added chain within the sector. The case of the police force demonstrates this case (see Figure 8.4). Similar to what the TI survey has shown (Kenya Bribery Index), the KACC survey showed that the police is the most corrupt public institution in Kenya (86 percent of respondents), while its parent ministry, the Provincial Administration and Internal Security (Office of the President) is also shown to be the most corrupt ministry (58 percent of respondent) among 30 ministries. The same case applies to the Ministry of Health and public hospitals and Local Government and the Ministry of Lands and the land office (20 percent).

vi) **Infrastructure accounts for the largest share of KACC cases, but health takes the largest share of money.** KACC has investigated 141 corruption cases between 2000 and 2005, representing some US\$86.3 million (Figure 8.5). It started with two cases in 2000, growing to 71 cases by the year 2005. Of the 141 cases investigated, 22 cases are of the grand corruption type (loosely defined as those representing above US\$100,000 each), representing 99.5 percent of the total amounts, and implying a large number of petty corruption cases (119 cases representing less than US\$100,000 each). There were 13 of such grand corruption cases in 2003, 4 in 2004 and again in 2005 (one case in 2000). The sector with the largest number of grand corruption cases was the infrastructure sector, with 6 cases, and the smallest was the security sector with 2 cases. However, the cases in the infrastructure sector represented around 6 percent of the total amounts of grand corruption cases, while the security sector accounted for half of all amounts in such cases—implying a disproportionately higher capture in the security sector. In addition, around 20 percent of the amounts of grand corruption cases were related to four cases in the health sector, 13 percent to 4 cases in banking and finance cases, and 10 percent to agriculture and land issues.

Figure 8.4 Magnitude of KACC Investigations, 2000-05

(in US\$ million and in shares by sectors)



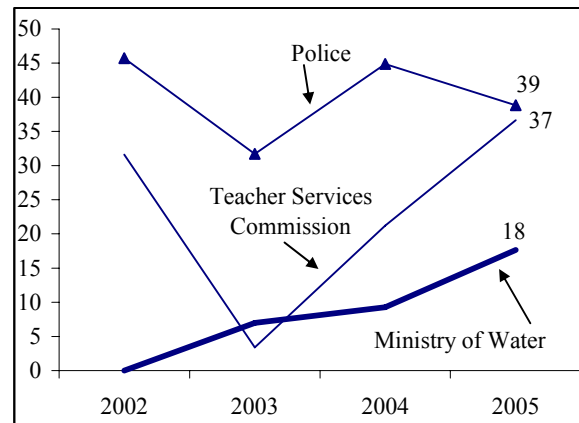
Source: KACC. Various yearly reports, 2000-2005.

vii) **Indicators of Corruption in Ministries Indicate a Leveling of Impact.** While the TI Kenya Bribery Index appears to have reached a plateau in 2004 and on a slight upswing in 2005, the number of agencies reported to have been engaged in corrupt practices by the Kenya Bribery Index appears to have stabilized at around 33 agencies, coming down from 49 agencies in 2002. This may indicate that anti-corruption initiatives

may have stopped having an effect in reducing the number of agencies with reported corruption incidences.

Figure 8.5 Impunity: Citizens denied service for declining to bribe 2002-2005 (in percent)

viii) **There has been an increase in the level of impunity in some agencies** (e.g., share of clients denied service for declining to bribe). In the case of the Ministry of Water, 18 percent of the clients who declined to bribe were denied service in 2005, compare to less than 10 percent in 2004 and 7 percent in 2003 (see Figure 8.5). The figure also shows the trends for the police, which is the worst performer in this indicator, with close to 40 percent of clients denied service for not bribing, although it shows small improvement. The largest deterioration is observed at the Teacher Services Commission, with impunity levels of 36.7%, compared to less than 5 percent in 2003. Similarly, 34.7% of clients were denied service for decling to bribe by Mombasa City Council, 31.7% by the Judiciary, 25.6% by Local Authorities, 24.3% by Provincial Administration, 22.81% by the National Social Security Fund (compared to 4.4% in 2004), 22% by the Electoral Commission, 21% by the Ministry of Lands and Settlement (compared to 36.3% in 2004) .



Source: Kenya TI Bribe Index. An increase is a deterioration.

Main conclusions of the review across sectors

The review assessed three institutional pillars that support integrity in each of the sectors—the ethical and leadership framework, the legal framework, and the implementing framework. Below are the main findings across-sectors:

- **Leadership.** Sectors with committed leaders take rapid and direct action to foolproof their organizations against corruption (MoE and NWSC), others have strong leaders but weak institutional mandate (NACC), which affects the initial set up of institutional reforms. Agencies perceived to not be taking into account the public’s concerns or have weak disclosure policies (MoH and MoTC-ports) are also perceived to be the most corrupt and less organized about their ethical and corporate responsibilities.
- **Transparency:** Sectoral initiatives and processes that guarantee access to information, or transparency measures, vary from sector and agency. Asset disclosure is not observed at this point, but those sectoral agencies (education, NWSC, and NACC) with greater adherence to performance review or audit, community oversight, and administrative simplification are more advanced in implementing effective integrity systems than the others (TSC, health and transport).

- **Control and Legal Framework.** As expected, the legal framework for addressing sector specific issues varies from agency to agency. Those agencies with weak regulatory framework and weak fiduciary controls (TSC, MoH, MoTC) are also perceived to be the most corrupt and the least likely to punish misconduct. On the flipside, comprehensive risk management policies and expenditure tracking tools are in place in the agencies with most advanced control frameworks (MoE, NACC, NWSC). Legal action against those involved in corruption (MoH and NACC) would demonstrate the relevance of legal measures already in place to deal with corruption. Sectors with greater understanding of the nature, manifestation and consequences of corruption as observed in the level of fiduciary training (MoE, NWSC) had comparatively better performing and effective anti-corruption programs.
- **Implementation of anticorruption initiatives.** Agencies with integrity systems that which do not form part of the day to day operations of the agency and where coordination at a higher level with stakeholders is weak (TSC and MoTC) have poor records of implementing governance and ethics programs. In implementing programs, the SWAp approach is very much advanced in the MoE (including the use of commercial banking for resource transfers) and promises to improve coordination and implementation at the MoH, but strong fiduciary controls must be in place before program initiation. The water sector, for instance, has set up strong anti-corruption framework outside the SWAp approach by focusing on HR reforms, fiduciary training and simplification of billing, collection and payment procedures. At the MoE, a restructurings helped anchor the anti-corruption strategy. Supportive human resources conditions (e.g., transparent recruitment, career growth, promotions) should be addressed in every integrity program. In the case of transport, lack of capacity and shortage of human resources undermines the capability for good governance, resulting in corruption (ports) and deterioration of safety and the road/airport security record. In addition, there is a need to ensure each sector develops a communications strategy that includes issuance of ethic related documents, posting in the workplace, references to code of conduct in speeches and day-to-day operations, and press conferences to update the public of governance reforms at the sector level.
- **Citizen Score or Report Cards.** Report cards provide much needed checks about the state of public services. The water sector, with support from the Bank, is implementing the concept of a report card in three municipalities. A report card could measure every public service provided at the local level and this should be encourage across agencies. However, the report card must include ethics and integrity questions addressing the service or customer charters, which in turn assess the rights of customers and obligations by the agency (NWSC has a service charter in place).
- **Code of Conduct.** Measuring the success of a code of conduct is difficult. Sectors with more established integrity program show greater knowledge and use of the code of conduct (MoE, NWSC), and in the case of the water institutions in Nairobi, all staff, including Board of Directors signed a code of conduct. The lack of a code of conduct regulating the medical profession, for instance in the MoH, makes it difficult to assess expectations about their commitment to reform. The application of a code of conduct is made easier when service standards are already in place in the agency.

- **Whistle-blower Hotlines and Help Lines.** Whistle-blowing hotlines for reporting misconduct and help lines to get ethics advice needs to be institutionalized across sectoral ministries. NACC is ahead of all agencies, where this feature is provided in its Risk Management Policy and efforts are underway to institutionalize it at the Ministry of Health. The challenge is to get people to use them and to see that cases reported are dealt with efficiently and in a timely manner.
- **Procurement and Financial Management Reform.** These are cross-cutting issues across the sectors where implementation of reforms and capacity building programs are required. In the case of procurement, the outmost challenge is to make the process transparent and open to anyone who is interested to participate in government procurement. A secured internet website could provide for the announcement, processing, and awarding of all government contracts in all sectors. This will reassure citizens of its fairness and equality of standards. As in the Chilean experience, the public could also be involved and provide a unique community driven evaluation aspect in the review and awarding process.
- **Coordination sector and national level interventions and need for more systematic and prioritized actions.** Across all sectors, it was hard to assess the feasibility, relevance, effectiveness and interaction of control measures and implementing frameworks with those at the national level. Further work to find coherence among sectoral anti-corruption initiatives with the national anti-corruption initiatives is urgently needed. The Kenya Anti-Corruption Plan launched in July 2006 adds to the numerous initiatives the government and the different ministries have put in place to fight corruption, albeit with mixed results thus far. In addition to making disclosure of wealth by public service officials a reality and dealing with the lack of prosecutorial powers at the KACC and the ill-equipped Attorney-General's office, there is a need to continue strengthening the capacity of line ministries and institutions which are on the frontline in the war against corruption and synchronize activities of the various agencies involved. There are five main bodies investigating corruption, not counting special inquiries such as Goldenberg and the Ndung'u Commission. In addition, institutions also involved are the Kenya Anti-Corruption Commission, the Efficiency Monitoring Unit, a department on economic crimes within the Criminal Investigations Department, the Auditor and Controller-General, and the Public Accounts Committee. Thus, orchestrating a prioritized action plan that coordinates interventions at the sector and the national level will be the main challenge ahead.

Sector Reviews

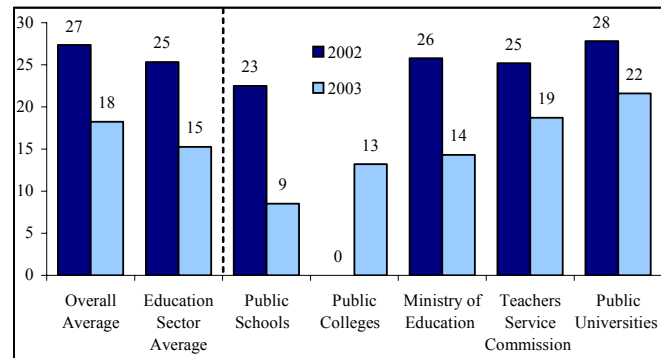
Tables 1, 2 and 3 of the Annex provide a snapshot of the main findings of the review for each sector (Education, Health, Transport, Water and Sanitation). For each of these pillars, the review focused on five criteria: (i) existence of measures; (ii) feasibility of measures; (iii) effectiveness of measures; (iv) relevance of measures; and (v) coherence of measures. A summary of sectorial reviews follow.

I. Education

Primary and secondary school gross enrollment rates both dropped significantly through the 1990s, largely due to the increasing costs of education to parents and the stalling of economic growth. By 2000, the primary school Gross Enrollment Ratio (GER) dropped to an around 88 percent after reaching 105 percent ten years earlier. In 2005, primary school GER was up again to 107.2 due to important education reforms set in motion during the first year of the Kibaki administration—particularly with the introduction of the Free Primary Education program. There was an end to the monopoly of parastatal publishers in school textbooks and greater focus on simplified and electronic means of fund disbursement directly to schools; greater emphasis on dissemination of information and transparency; stronger social accountability; and production of clear guidelines and associated capacity building.

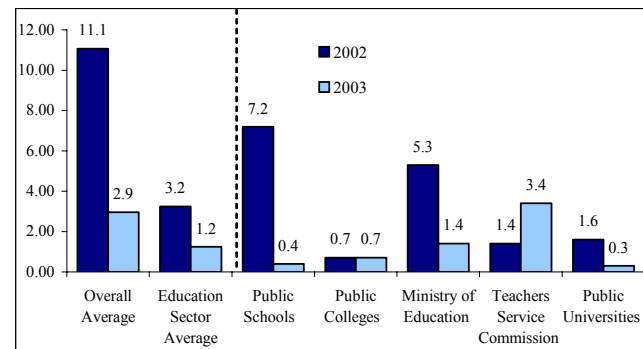
However, in recent years, perceptions about corruption at the Teachers Services Commission (TSC) has showed some signs of initial concerns: corruption increased significantly at the TSC mostly involving the abuse in the redeployment, hiring and upgrading of teachers. Parents also experienced large bribes in public universities and colleges.

Figure 8.6 Overall Bribery in the Education Sector Perceptions in 2002 and 2003 (Index)



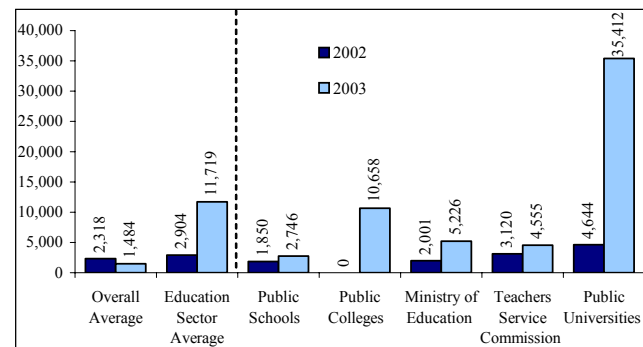
Source: Kenya TI Bribe Index, 2002 and 2003. An increase is a deterioration.

Figure 8.7 Incidence of Bribery in the Education Sector in 2002 and 2003 (number per person per year)



Source: Kenya TI Bribe Index, 2002 and 2003. An increase is a deterioration.

Figure 8.8 Avg. Size of Bribes in the Education Sector in 2002 and 2003 (in current Ksh.)



Source: Kenya TI Bribe Index, 2002 and 2003. An increase is a deterioration.

Progress with Primary Education Reform. The introduction of the Free Primary Education program in 2003 relieved parents of the financial burden of paying for their children's schools. This resulted in a phenomenal increase in primary school enrolments. At the same time, challenges in pupil to teacher ratios, teacher deployment, and flow of funds issues emerged. As part of the government's Free Primary Education program, some anti-corruption measures were implemented related to the liberalization of the publishing business; cutting the middle men from the flow of transfers at the district level and the initial focus on capacity building in fiduciary areas.

Progress at the Teacher Services Commission: A recent Transparency International Integrity Study³³ commissioned by the TSC, found substantial corruption in the teacher recruitment process. The single largest employer south of the Sahara, the TSC, has over 235,000 teachers spread over 22,000 public learning institutions in Kenya. The TSC has been among the top 4 worst performers in the country for the last two years. The study found that the staffing department was widely felt to be the biggest "hot spot" of corruption but there are also concerns about the integrity department of the Commission. Nevertheless, perceptions of corruption have decreased recently, signaling a possible improvement and a basis to build upon. The maturing of this process will take time.

The following were the main findings of the TI report:

- The teacher recruitment process is complex and information about corruption is not sufficiently publicized.
- A strong anti-corruption legal framework governing teachers was absent before the passing of the Public Officer Ethics Act in 2003
- Even when the legal framework is in place, there are institutional weaknesses that difficult the implementation of anticorruption measures.
- The integrity division is not seen as the provider of anti-corruption policies.

The findings of the **Education Public Expenditure Tracking Survey (PETS)** Report finalized on March 2006 were in general positive. Funds were used for the intended purposes and financial records were maintained to show funds received and showed how they were used. However, some gaps related to financial management and teacher management were found, namely: i) schools should acknowledge receipt of FPE funds by issuing a receipt to MoEST HQ, ii) Head Teachers should record payments in the cashbook daily, iii) maintenance of a contracts register will be critical in the proposed School Infrastructure Improvement Programme, iv) finances and records are not officially handed over to new Head Teacher thereby compromising accountability, v) efficient use of funds compromised as budgeting procedures are not followed in all the schools, vi) Head Teachers should involve Deputy Head Teachers and Senior Teachers more in the management of FPE funds and vii) whenever School Auditors and Quality Assurance and Standards Officers carry out audit/inspection of schools, the

³³ Transparency International Kenya. May 2006. "Integrity Study: Teachers Service Commission". Nairobi, Kenya.

audit/inspection findings and report should be made available to the schools on a timely basis.

To address concerns about corruption in the Ministry of Education, a “**Governance and Accountability Action Plan**” was developed and it is under its first year of implementation. The plan underpins the implementation and resource use of the Kenya Education Sector Support Program (KESSP) of 2005-2010. Stakeholder participation, transparency and accountability pillars drive the action plan. Progress thus far has been satisfactory. Community involvement through decentralized financing and procurement is taking root. Consultation and social accountability have improved. A communications strategy is being implemented and the management of public expenditures has improved. Moreover, the MoE was re-organized and the following measures were implemented: competitive recruitment of top managers; redistribution of staff away from the headquarters to the lower levels of government and introduction of result based management through capacity building and training.

Challenges and recommendations

However, there are important challenges ahead, mainly related to the inadequate technical capacity within the Ministry of Education in the areas of financial management and procurement. It is recommended that:

- The future challenges in the education sector relate particularly to extending the governance strengthening measures to the secondary and tertiary levels of education using the experiences from the primary education sub-sector. Commitment at the the top leadership of the MOE is there but capacity constraints and the challenge of prioritization are important constraints. Governance strengthening issues must be at the center of the sectoral reform agenda and of any new strategy for the development of secondary education.
- We understand the Public Universities Inspection Board is preparing a major report on the state of public universities (including governance strengthening measures). Some of the issues that should be addressed include concerns about exam cheating, the need for merit-based selection of University Governing Council members, and knowledge for development (using the universities to research and articulate the problems of corruption). This report should be used as a basis for the development of a governance strengthening and anti-corruption program for all of the universities and colleges.
- The Ministry of Education (MOE) and the Teachers Service Commission (TSC) must develop and implement new staffing norms to guide the appointment of teachers.
- The TSC has no specific anti-corruption policy (one is presumably under preparation) and its integrity program, although in place, was ill implemented—there is a need of a well-defined and publicized anti-corruption strategy at the TSC. In addition, there is a need for strong anti-corruption commitment,

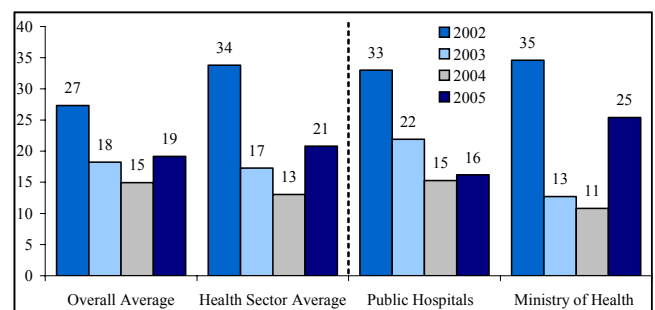
leadership and enforcement at the TSC. Prosecution of the corrupt at the TSC has been insufficient and ill publicized—there is a need TSC to publicize its actions about prosecution of perpetrators

- Under the new Governance Action Plan, there is a need to show commitment to: develop and implement a more detailed plan for the prevention of corruption; there is a need for further sensitization of all TSC structures and staff on corruption issues and to ensure that the new procedures for teacher recruitment are working effectively; conduct a comprehensive audit and review of the TSC Staffing Department.
- The TSC must work with KACC to revamp its Integrity Division; and carry out enhanced publicity campaigns especially on teachers’ governance issues, through monthly magazines and posters. TSC senior officials are already subject to wealth declarations, but TSC must show commitment to having continued independent monitoring of the progress being made in strengthening the transparency and efficiency of teacher hiring.
- Integrity program realistic at the center but needs further anchoring at the local level (e.g., local codes of conducts and code of ethics for employees)
- Anticorruption measures need to be framed within the broad reform in the sector to improve productivity and quality of service delivery. Conditions of job security and career growth still need to be addressed to improve performance and expectations of ethical behavior

II. Health

The improvement seen in corruption levels in the health sector since 2002 reversed in 2005. Despite the initial sharp improvement in corruption perceptions, which almost every ministry experienced between 2002 and 2004, corruption levels at the Ministry of Health increased in 2005 above average levels and even above those of public hospitals. The reasons are not related to larger bribes but to a significant increase in the incidence of bribes at the Ministry of Health—from 0.5 bribes in 2004 to 2.7 bribes in 2005 compared with the average for all ministries of 1.6 bribes (see Figure 8.10). There is a significantly higher

Figure 8.9 Overall Bribery in the Health Sector Perceptions 2002-2005 (Index)



Source: Kenya TI Bribe Index, 2002-2005. An increase is a deterioration

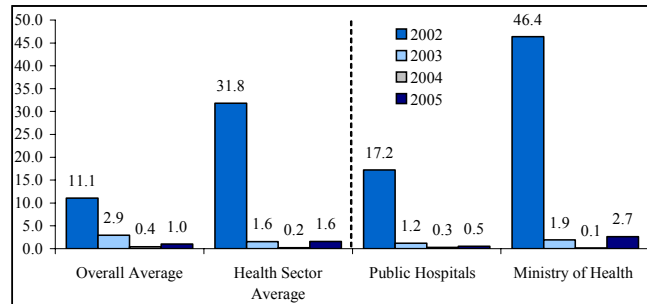
perception that people are likely to encountering bribes in the Health Ministry—three out of four respondents encountered bribes at the Ministry of Health. This result almost reverses the improvement attained over the past three years.

Progress to date

The Ministry of Health is now moving forward with the finalization of a SWAp for the sector. Fiduciary reform at the Ministry of Health is also now taking place, albeit at a slower pace than in other sectors of government. These developments present a major

opportunity for the Government to address the governance, corruption and management problems in the sector. Although the reform process is still at an early stage, it could be taken forward with harmonized support from the partners, if there is committed and firm leadership by the MOH. This would require the identification of clear benchmarks (fully owned by the MOH) for addressing corruption and governance; the adoption of useful lessons from other sectors (eg, from education and even from the NACC); reforms in key areas such as procurement and the disbursement of funds directly down to the local level (with strong social accountability, transparency and information dissemination etc).

Figure 8.10 Incidence of Bribery in the Health Sector, 2002-2005 (#persons per year)



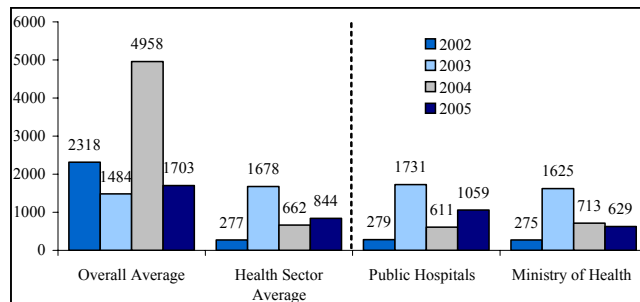
Source: Kenya TI Bribe Index, 2002-2005. An increase is a deterioration.

Source: Kenya TI Bribe Index, 2002-2005. An increase is a deterioration.

Figure 8.11 Avg. Size of Bribes in the Health Sector in 2002-2005 (current Ksh.)

i) Procurement reforms

As noted earlier, Kenya is now in the process of implementing procurement reforms. Once the implementing regulations and oversight authority are operational, the Public Procurement and Disposal Act, 2005, will provide for economy, efficiency, competition and fair treatment of bidders; promote integrity; increase transparency and accountability, and increase public confidence in procurement procedures. The draft regulations were discussed in a stakeholder’s forum in March 2006 and it is expected that Act will become operational in January 2007.



Specifically in the health sector in Kenya, there has recently been a procurement assessment by the World Bank, and it concluded that: (i) the procurement system is inefficient and does not achieve value for money; (ii) it is not adequately transparent; (iii) there are sound public procurement regulations, but often they are not complied with, and there is poor enforcement; (iv) there is corruption in contracting; (v) procurement tasks and decisions are diffused into several departments (no clear roles of User Departments, Finance and accounting, Stores, Procurement Unit/Procurement Officer, and Tender/Procurement Committees); (vi) on the procurement of pharmaceuticals, there is a long list of what is not working well; (vii) standards for equipment is a major issue in MOH (preference by senior medical personnel of specific brands); (viii) the MOH still not in control of works contracts; (ix) there is need for clarity regarding the procurement arrangements through KEMSA; (x) the MOH Procurement Unit is weak (staffing numbers, proficiency, tools, etc); and (xi) there is lack of adequate procurement guidance manuals.

The MOH has started to move forward with some reforms in these areas, including through an agreement with the Millennium Challenge Corporation. One of the key issues relates to the respective roles of the MOH and KEMSA. Since March 2004, management consultants have been assisting KEMSA in supply chain management. KEMSA is also working with the MOH to improve its Logistics Management Information System. It is essential to set up a reliable system for quantifying quantities of drugs distributed and dispensed to patients. KEMSA plans to set up a computerized system to assist with supply chain management, but substantial input would be required from MOH, if the system is to be effective. KEMSA has a procurement manual but it needs to be updated.

There has been an important review conducted of KEMSA in mid-2005. The conclusions are as follows: over the past two years, and particularly during the past year, as the Kenya Medical Supplies Agency (KEMSA) was able to fill many of its planned key staff positions for the first time and allowed to take over much (but not all) of the procurement from the Ministry of Health (MOH), it has made significant progress in transforming itself from an Agency that was little more than a name change from the MOH Medical Supplies Coordinating Unit (MSCU) that preceded. Nevertheless, it is crucial that the procurement roles and responsibilities at the various levels in MOH and KEMSA be clearly set out in a clear policy document.

Although the MoH prepared a medium term procurement plan for procurement for 2004-05 to 2006-07, the plan is not consistent with the budget. The plan is also deficient in that it does not show the packaging of the individual contracts, the methods of procurement and the processing steps until completion. Moreover, the plan is not monitored and is not used as a management tool.

Preparing a procurement manual is another priority. This would help reduce delays in awarding contracts and paying suppliers of goods on time. The Procurement Manual needs to be consistent with the Public Procurement and Assets Disposal Act, and should include service standards for processing procurement. Pre-qualifying suppliers would also help to reduce the risk of bid cancellations. In addition, the procurement records management in MOH is inadequate, as the Procurement Unit in MOH does not maintain a complete record of the procurement process.

Another issue relates to control of the procurement of works. At present, there are frequent cancellations of the bidding process by outside parties. Currently works procurement is carried out by the Ministry of Transport and Public Works on behalf of the Ministry of Health.

Finally, procurement staff in the MOH need training, coaching, and mentoring. As a matter of urgency, a massive training effort is required to provide basic procurement training to the Tender Committees, the Accounting Officer, and all finance, internal audit and procurement staff in the MOH. In the interim, MOH needs to hire additional procurement advisors to assist in preparing procurement plans, bidding documents, procurement notices, request for proposals, bidding/proposal evaluation reports, procurement-monitoring reports, contract expenditure and progress reports.

ii) Financial Management Reforms:

There has been little progress with institutional fiduciary arrangements. Committees may exist but they do not function efficiently. A lot of work has been done recently in planning a new system for getting funds to flow directly to local health facilities, using the approach of the Free Primary Education program. However, the approval of a risk management policy is still pending. Internal audit is also a challenge. An effective internal audit function is not yet in place, despite the explicit requirement by the Ministry of Finance. Capacity to monitor and address potential governance problems continues to be weak, and reporting to MoH management is sporadic

iii) Transparency Reforms:

Institutional and disclosure arrangements, communication strategies, and partnership arrangements are all under development in the Ministry of Health. However, a disclosure policy is still missing. A code of conduct is under development with development partners to help in the sector planning and monitoring of budget and expenditure framework, and a communications strategy is under discussion. The Ministerial Committee for Prevention of Corruption is not functioning efficiently. Reporting on the implementation of performance contracts is also weak.

Challenges and Recommendations:

i) Procurement

Procurement roles and responsibilities at the various levels in MOH and KEMSA should be clearly set out in a clear policy document, and the MOH should enter into a formal relationship with KEMSA, setting out obligations of the parties with clear performance targets. If targets are not met, MOH should appoint private sector procurement agents on a competitive basis for the procurement health commodities. The medium term procurement plan for procurement needs to be revised and updated, after which it should be monitored and used as a management tool. There is also need for the preparation of a procurement manual, consistent with the Public Procurement and Assets Disposal Act and procurement regulations. Consideration should be given to pre-qualifying suppliers to reduce the risk of bid cancellations. There is also an urgent need to improve

procurement records management in the MOH, and to embark upon a major capacity building program for procurement staff.

ii) Financial Management Arrangement

The key priority areas for action include the following: the establishment of effective audit, finance and facilities management committees at the MOH; the institution of new systems for the flow of funds arrangements directly to peripheral health facilities; and the development of an effective internal audit function.

iii) Accountability and Transparency Mechanisms

There is no public disclosure policy in the health sector and the flow of information is limited. A public disclosure policy and implementing arrangements for the health sector needs to be prepared and agreed by all stakeholders. It will be important to disseminate and make publicly available the policy, and also its implementing and communication arrangements. The Ministerial Committee on Prevention of Corruption is not functioning efficiently, and there is need for a review and reactivation of its mandate and membership.

iv) The National AIDS Control Council (NACC)

A key institution that has been associated with past incidences of corruption in Kenya is the National AIDS Control Council (NACC). Its parent ministry is not the Ministry of Health but the Office of the President. A Presidential Order under Legal Notice 170 established the NACC in 1999 with a mandate to provide leadership and co-ordinate efforts to fight HIV/AIDS in the country. In 2003-2004, the Evaluation Monitoring Unit (EMU) of the Office of the President of Kenya conducted an investigative review of the NACC in the context of the Bank's Kenya HIV/AIDS Disaster Response Project (KHADREP). The EMU report noted serious irregularities, including instances of fraudulent practices in financial management and procurement in the award of grants. The EMU review resulted in investigations and the replacement of NACC staff. In 2005, the Bank requested that the GOK review internal controls systems and identify any instances of fraud and corruption under KHADREP. In April 2005, the GOK hired Deloitte & Touche-South Africa to conduct the review. Deloitte's report identified evidence of malfeasance and serious shortcomings in the governance and control environment in the KHADREP project under NACC.

In response to the forensic audit, the NACC drafted an Action Plan in mid 2005 and has been systematically carrying it out since then. This Action Plan includes: (i) suspension of the NACC Director (who was in charge from 2003 to 2006) in March 2006; (ii) ongoing investigation of 116 non-government organizations implicated in fraudulent activities, with 5 cases currently in court, another 28 now being investigated by the KACC, 15 presently being investigated for grants received under that program by the police, and 42 having been found to be baseless; (iii) discussions with the Attorney General to take legal action against the first NACC Chairman and Director (from 2001 to 2003); (iv) the re-defining of responsibilities and establishing clear mandates for the Audit Committee and the Finance and Administration Committee; (v) the signing, public disclosure, monitoring and satisfactory implementation of performance contracts; (vi)

strengthened financial management expertise in the NACC headquarters (with a senior secondee from the MOF); (vii) the development of a communications strategy to ensure increased social accountability (with specific measures relating to the flow of information to all stakeholders, especially at the local level); and (viii) institution of independent and effective internal audit capacity with the Unit staffed by a Senior Internal Auditor and another Internal Auditor; a risk strengthened M&E system, with emphasis on results-based performance.

The NACC Council with international technical assistance has also developed a comprehensive Risk Management Policy to manage fraud and corruption risks that was adopted by NACC at a Full Council meeting held on November 2005. This policy stipulates among others: (i) the strengthening of the internal audit unit with the hiring of staff; (ii) the establishment of the Anti-corruption hotlines; and (iii) the institutionalization of whistle blowers for suspected corruption cases. It also emphasizes increased transparency of the procurement system and improved social accountability. The implementation process for the Risk Management Policy is being supported by Pricewaterhouse Coopers (PWC), and is now being rolled out.

The Action Plan has recently been augmented by the following measures: (i) the Operational Manual for the "Total War on AIDS" (TOWA) Project is being updated with specific measures such as a new grant award mechanism (which would be results oriented and performance based), limit CBO/NGO participation to those with established track records of delivery and performance, introduce clearly defined budgets for grantees and transparent decision-making processes that involve the full dissemination of information, and exclude and/or black-list non-performing previous grantees; (ii) all vacancies in the NACC Procurement Unit would be filled, following a competitive recruitment process, enabling the Unit to execute the NACC procurement plan efficiently (end December, 2006); (iii) the tender for a new, independent, externally-recruited Financial Management Agent, with TORs acceptable to the World Bank, would be issued (end November, 2006); (iv) the tender for an independent agent to monitor compliance, with TORs acceptable to the World Bank, would be issued (end December); and (v) a progress report on the implementation of the newly adopted Risk Management Plan would be drafted and shared with the World Bank (end October, 2006)

It is now recommended that:

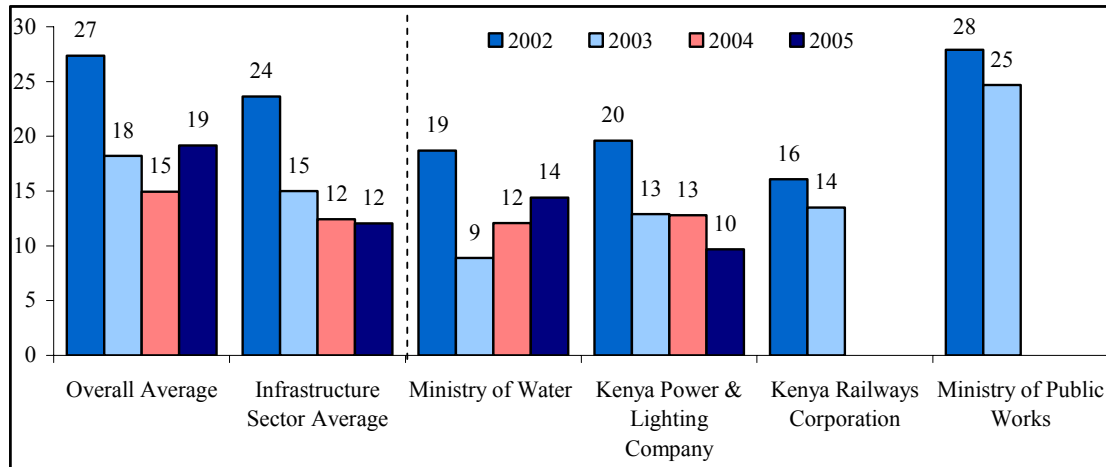
- The NACC should aggressively implement its risk management policy, with the completion of training of NACC Council members and staff on risk management policies and procedures.
- The Internal Audit Unit in the NACC should issue quarterly reports and publish the NACC audited report for FY06 by December 31, 2006.
- A service charter for NACC should be introduced.
- Information on all workplans, proposals of organizations applying for funding, approved grants, procurement and audits should be published in the NACC website. Comprehensive quarterly M&E reports should also be issued.
- Public awareness campaigns should be conducted about the "hotline" to report any suspected cases of corruption and implement a communications strategy.

- A MOU should be agreed between NACC and NASCOP, and between NACC and PEPFAR, for collaboration on M&E activities and systems
- Ongoing prosecutions (incorporating feedback from KACC and CID) should be followed up.
- There should be competitive recruitment for the following positions: (i) all remaining professional staff, including for procurement and financial management (Level IV & V); and (ii) senior staff (Deputy Director Finance & Administration, Head Internal Audit).
- The Operational Manual should be updated to include details of: (i) roles and responsibilities, structure and functions, (ii) grant award system, (iii) mechanism for public sector mainstreaming, (iv) procurement, financial management and administration systems, and governance mechanisms, by end November.
- A new financial management agent should be recruited.

III. Transport

The Ministry of Transport and Communications (MOTC) completed an Integrated National Transport Policy on February 2004. The policy covered all modes of transport currently available in Kenya including Road, Rail, Maritime, Air, and Pipeline Transport. This transport policy paper focused on a rather limited set of general principles to address issues of corporate governance and corruption. Perception surveys do not capture a clear picture of corruption in the transport sector given the limited person-to-person service provided by this sector, in comparison with health or education services for instance, which are much more personalized, broad-based and easier for people to relate. Corruption in the transport sector is seen as a government to business (G2B) arrangement related to procurement processes, which are not always transparent, rather than a government-to-citizen (G2C) arrangement which the Kenya Bribery Index captures quite well and transparently. These factors, thus, require focusing the attention to financial management and procurement arrangements in the sector, together with ensuring the regulatory framework promotes competition and efficiency within the sector and is enforced by an independent regulatory agencies.

**Figure 8.12 Overall Bribery in the Infrastructure Sector
Perceptions in 2002-2005 (Index)**



Source: Kenya TI Bribe Index, 2002 and 2003. An increase is a deterioration.

As described by the Kenya Integrated National Transport Policy of February 2004, institutions in the transport sector, in general, have weak and ineffective governance structures. Lack of capacity and shortage of resources seriously undermines their capability for good corporate governance, sound policymaking and public management. This results in loss-making state enterprises, lack of adequate and appropriate investments in transport infrastructure, corruption, deterioration in the institutions of law and order, a poor safety and security record, amongst others. Some of the weaknesses in each sub-sector are:

- Roads: weak institutions lead to Corruption
- Railways: the Legal Environment is not Conducive to Proper Corporate Governance.
- Ports Lack Policy Making, Regulatory and Service Provision Functions.
- Air Transport: After liberalization of the air transport sub-sector in the 1990s, a need has emerged for the GoK to focus its energy on creating a conducive environment for efficient transport of passengers, freight and mail at minimal costs.

The main objective of the new Government in the transport sector is to spur private sector led economic growth by reducing the cost of doing business in Kenya and increasing its competitiveness in the domestic, regional and international markets. However, the sector is constrained by lack of adequate financing; institutional inefficiencies; weaknesses in the policy, legal and regulatory environment; poor safety and security standards at the airports and Mombasa port; and inadequate institutional capacity and human resource skills. As a result, the transport costs and travel times are high and reliability is low. To address these issues, the Government took a number of steps, but did not elaborate on a specific anti-corruption strategy. Instead, it presented the following set of measures

contained in the 2004 Transport Policy paper to address general issues of corporate governance and corruption in the sector:

- The GoK will establish an appropriate institutional arrangement with adequate stakeholder participation, which will define clearly the implementation and oversight roles of the institutions involved in the development and maintenance of roads and make deliberate efforts to solve governance problems in the sub-sector. The Kenya Roads Board (KRB) is one such institution with relatively high autonomy that can perform that function, particularly for road maintenance programs.
- The GoK will ensure an institutional framework that separates the policy making, regulatory and services provision roles in the maritime, ports industry, and ensure adherence to modern corporate governance principles. Although studies have been concluded and the framework discussed and agreed by key stakeholders, the Government is yet to move on the establishment of a transport (or multi-sector) regulatory body.

Challenges and recommendations:

A sector-wide service delivery charter has been developed for the sector. The challenges now are to implement and monitor compliance and customer satisfaction across the different sub-sector agencies.

In addition the following recommendations are made to specific sub-sectors:

i) Roads:

- In improving governance in the Road sector, the government will establish three autonomous road authorities to streamline ownership, management, accountability and financing of all road network activities in the country: the Highway Roads Authority, the Rural Roads Authority and the Urban Roads Authority.
- The Kenya Roads Board will be strengthened to better channel the road maintenance fuel levy on the basis of well planned and published road maintenance programs, with adequate oversight mechanisms that will hold implementing agencies accountable for the proper use of the funds and delivery of quality results
- Strengthen oversight and streamline payments procedures, from 23 approvals to six signatures.
- Prepare a study on the absorptive capacity of the Ministry of Roads and Public works.
- Establish indicators of road sector performance, such as: (i) reduce the backlog in rehabilitation and reconstruction from 11 years to 7 years (provided resources are available US\$1.0 billion); and (ii) reduce the average freight and passenger travel times along the Northern Corridor from 24 hrs to 18 hrs between Mombasa and Uganda border (provided all the road sections currently in poor conditions are rehabilitated).
- To reduce compliance cost incurred by motorists under the Traffic Act, the Minister of Finance proposed in his 2006/07 Budget speech to remove requirements for road license and transfer this charge to Road Maintenance Levy on motor fuel at additional

rate of Kshs.3.20 per litre, with immediate effect after the Budget speech. It is not clear if public transport operators raised fares because of this proposal. Improvement in the road network should ultimately reduce costs to the private sector.

- Promote greater participation of the private sector in the provision, financing, maintenance and operation of road infrastructure services by concessioning viable public road assets.

ii) Railways:

- Satisfactory implementation of the Bank's regional operation; East Africa Trade and Transport Facilitation Project (EATTFP), including joint concessioning of the Kenya and Uganda Railways to the private sector.

iii) Ports (included in the TI integrity report):

- Open integrity meetings to stakeholders, including the Kenya Police, the Kenya Customs Departments, and the Kenya Bureau of Standards (KBS).
- Develop a agency wide communications campaign to inform staff and stakeholders of the integrity program and its implementation details;
- Conduct a risk assessment exercise at the Customs Room and the Ports Accounts Department to identify, investigate, and discharge bribe-seeking officers (1st Order Priority).
- Provide capacity to Integrity Assurance Officers (IAOs) with monitoring and investigative capacity.
- Develop the one-stop shop, but make sure there is monitoring system independent of all the participating agencies.
- Modernize the Mombasa Port and reduce corruption by enhancing private sector participation, particularly in container operations.

iv) Air Transport:

- Modernize the Jomo Kenyatta International Airport and improve security so as to obtain the TSA Category 1 clearance from USA that will allow direct flights to USA and code sharing with US airlines.
- • Increase private sector participation in the operation and management of airport operations and services.

IV. Water and sanitation

Amidst a fragmented institutional framework which lacked accountability, a comprehensive sector reform was initiated by the Government in 2003 following the enactment of a new sector legislation - the Water Act (2002) – aimed at harmonizing the management of water resources and water supply and sanitation (WSS). A central tenet of the new service delivery framework is the separation of functions between each aspect of service delivery - policy making, regulation, asset ownership / control and service delivery operations. The consequent formalization of relationships between these

functions is expected to reduce conflicts of interest, increase transparency and enforce accountability. The GOK (i) is reorganizing the Ministry of Water and Irrigation (MWI) into a body focused on policy issues, (ii) has established a Water Services Regulatory Board (WSRB), and (iii) has established seven Water Services Boards (WSBs). Each WSB is mandated to appoint Water Services Providers (WSPs), which are legal entities contracted by WSBs to be responsible for service delivery operations. The steps towards sector reform have been formalized in a Transfer Plan (a gazetted legal document). The transition towards the full implementation ends in 2008.

In this regard, it is important to note at this point that the reform of the water supply sector is in a state of transition - there was a complete change of responsible institutions starting from early 2003 and from then on new institutions began, and is still, taking over responsibilities and operations from the Ministry of Water, local governments, etc. Thus, surveys over this period are probably subject to this transition, which makes it difficult in comparing periods, e.g., the same Ministry of Water had different functions in 2003 compared to 2005, and public understanding of the exact responsibility structure as they shift at the time of each survey may be an issue.

As part of this transition, the WSBs are in various states of operationalization and strengthening. Governance strengthening and anti-corruption efforts are in practice being spearheaded by the Athi Water Services Board (AWSB) and its WSP in Nairobi City – the Nairobi Water & Sewerage Services Company (NWSC). Upon its start-up, NWSC requested Transparency International to prepare a report on corruption in water services delivery of its predecessor, the Nairobi City Council Water Department. After 90 interviews of officials and consumers alike during April-May 2005, the report highlighted the following issues:

- Nearly 2/3 of respondents had a corruption experience within the last 5 years in relation to the water services. Most respondents were of the view that the incidences of corruption had declined considerably since the assumption by the NWSC of the services. Although, at least 63 % indicated that they had witnessed or been party to a corrupt act relating to an officer of NWSC in the year preceding the study. The category of Officers involved in this kind of corruption was mostly junior officers e.g. water disconnection technicians and clerks at counters.
- The staff of the NWSC was clear that the management of NWSC was intolerant of corruption within the organization, a radical change from the hitherto ambivalent indifference by the previous manager, the Nairobi City Council of water services.
- The most common form of corruption in relation to water service delivery was the persistent demand for bribes from the consumers (mainly the domestic ones).
- The department within NWSC most prone to corruption is the commercial department although a significant number of the respondents indicated that corruption on the whole was practiced at every level of the Company.
- The study detected a perception among the most of the consumers that the bills sent to them were just estimates not justified by consumption at all.

Progress to Date

The anti-corruption campaign and activities at NWSC and AWSB has produced important reforms, which should be encouraged in the rest of the country. Several actions have been taken that would address issues brought up in the International Transparency Report, e.g.,: (i) dismissal of corrupt staff, including a review of all staff's qualifications and credentials; (ii) improvement in hiring and terms of service; (iii) fixing the billing back log and improved billing timeliness; (iv) audit on the authenticity of adjustments made to customer's accounts; (v) installation of 30,000 meters to identify illegal connections; (vi) development of a customer charter; (vii) decentralization to area business units to be closer and more accountable to consumers; (viii) institution of a transparent procurement process is transparent, (ix) a review, development and documentation of internal control structures for the company; and (x) having directors, management and staff have signed performance contracts with GOK, Codes of Ethics / Codes of Conducts.

Since its inception, NWSC has implemented management and institutional frameworks to mitigate against corruption. The GOK has instituted a representative Board of Directors from a diverse background including the city council, user groups, non-governmental organizations and professional associations / bodies. None of these groups have a majority on the board. Various board oversight committees are in operation. A governance training regime for board members has been instituted in conjunction with AWSB. An Integrity Assurance Officers (IAO) Committee has been established and Terms of Reference for the IAO Committee as well as the Ethics and Integrity Committee are being finalized. Various operations manual have been developed. NWSC is pursuing the ISO 9000 series certification which would introduce strict documentation and transparency of its operations. Certification is targeted by 2008.

AWSB has likewise implemented similar frameworks. Its Board of Directors is representative of its areas of jurisdiction and includes government, user and professional representation. Its directors, management and staff have also signed performance contracts and/or Code of Ethics. Various board oversight committees (tender, staff & welfare, technical, finance, audit) and operational manuals (HR, Finance, Procurement, technical, IT) are in place. AWSB is pursuing the ISO 9001:2000 targeted by 2008. A Corruption Prevention Committee (CPC) was formed in May 2006 with the mandate to prioritize and coordinate corruption prevention strategies in AWSB and to initiate reports on corruption. The committee's terms of reference has been approved. AWSB's Corruption Prevention Plan is being drawn up. Integrity Officers are being appointed in each district under AWSB's jurisdiction.

AWSB has carried out, and will continue to carry out (i) technical and financial audits of its operational contract with NWSC, and (ii) periodic consultations with stakeholders to increase public oversight.

The World Bank is piloting an innovative approach for users of public services in Nairobi, Mombassa, and Kisumu to assess the performance and level of services by water providers. Target beneficiaries of water and sanitation services in these three towns will use the Citizen Report Card (CRC) to score the quality and adequacy of the service delivered. Such feedback is useful in providing a proactive agenda for communities,

service providers and local governments to engage in a dialogue to improve the delivery of public services.

Challenges and recommendations:

- The GOK faces the challenge of implementing the sector reform in full and meeting the timetable as set out in its own plans, i.e., the Transfer Plan. An immediate recommendation to consolidate gains in sector governance is the completion of full transfer for service provision responsibility and accountability to Water Services Boards (WSBs). Similar to the operating contracts between WSBs and WSPs, a clear contractual and relationship structure also needs to be instituted between the WSBs, the WRSB and the Government, to provide for clarity of mandates, responsibilities and accountability between the different sector actors.
- The anti-corruption campaign and efforts in Nairobi should now be scaled up to include the rest of the country. The seven WSBs in Kenya should form a mechanism to share experiences and scale up anti-corruption successes.
- NWSC and AWSB should monitor progress on mitigating issues put forward by the latest water perception survey for Nairobi, e.g., completion of fully traceable billing and collection system. Progress should be reported periodically.
- The Citizen Report Cards for Nairobi, Mombasa, and Kisumu provide a feedback avenue and as a means to encourage public oversight should inform the prioritization of sector reform activities. A useful indicator could be: improving customer perception in annual surveys, including the Kenya Bribery Index and timely financial audits.
- While the anti-corruption efforts has focused on investigative surveys and setting up accountability structures in the institutions, more could be done to encourage bottom-up accountability structures e.g., public access to information (including expenditure information), complaints mechanisms (including third party complaints channel) and overall public oversight of institutions and operations.

Table 8.1. Summary of Findings: Ethical/Leadership Principles Framework

Focus of the Review	Education	Health	NACC	Transport	Water & Sanitation
Existence of measures (measures in place)	Strong leadership at the MoE, but not at the TSC.	The lack of public disclosure about issues of corruption reflects on the lack of leadership and commitment.	The lack of clarity about NACC's existence, which can be revoked at any time by the President, affects commitment and sustainability.	The lack of stakeholder participation reflects on the lack of commitment to make corruption everybody's business.	MWI leadership shown by its restructuring efforts. NWSC took direct action towards fool proofing the Company.
Feasibility of measures (realistic expectations, resources, conditions)	Integrity program realistic at the center but needs further anchoring at the local level (e.g., local codes of conducts); TSC integrity program need revamping.	The lack of a code of conduct regulating the medical profession makes it difficult to meet expectations about their commitment.	To deliver on its mandate, NACC needs to provide leadership and coordinate diverse stakeholders who influence the context of NACC activities.	Integrity offices not trained nor equipped with leaders to deal with corruption in the sub-sectors of transport.	All staff, including Board of Directors of NWSC have signed a code of conduct.
Effectiveness of measures (achievement of specific objectives)	Greater understanding of the nature, manifestation and consequences of corruption at the MoE made the program more effective—this did not happen at the TSC.	Information about resource use, prices, and consumer rights is lacking for the sector. There is a need for a more comprehensive communications strategy.	NACC is dependent on development partners for financial support, threatening its effectiveness. A service charter is also needed to make reforms effective.	Incomplete assignment of responsibilities as well as governance problems at both the micro and macro levels within the subsector negatively affects performance.	Specific tools to aid in anti-corruption activities - customer charter, board oversight, and clear operational procedures have been set up at NWSC
Relevance of measures (extent it has been meeting expectations)	Strong and bold measures helped improve perceptions about MoE, while the lack thereof plagued TSC.	Unannounced visits to health facilities and client surveys would help define relevant measures for the future.	The risk of absenteeism from meetings by Council members poses significant risks to the relevance of the leadership group.	A service delivery charter must be devised and implemented through a comprehensive M&E framework.	Improvement in operational practices and institution of clear operating procedures show the commitment to transparency and professionalization of the practice.
Coherence of measures (interaction with other governance policies)	Across all sectors, it was hard to assess the feasibility, relevance, effectiveness and interaction of control measures and implementing frameworks with those at the national level and to the national anti-corruption agency (e.g., KACC). Further work to find coherence among sectoral anti-corruption initiatives and with initiatives at the national level is urgently needed. For instance, a survey could be carried out of all senior government officials to capture the ethical climate in government agencies, including compliance and pressures not to comply with code of conduct.				

Table 8.2. Summary of Findings: Legal Framework

Focus of the Review	Education	Health	NACC	Transport	Water & Sanitation
Existence of measures (measures in place)	The MoE has the anti-corruption institutional setup, but it is still developing at the TSC.	The regulatory framework is weak. Past fiduciary arrangements failed.	A comprehensive risk management policy is just starting implementation.	A poor legal environment is not conducive to proper corporate governance. A Road Strategy is under preparation.	Internal regulations on anti-corruption exists, underpinned by the Companies and Water Acts
Feasibility of measures (realistic expectations, resources, conditions)	The MoE is re-focusing on auditing functions to improve feasibility, while the TSC is just starting to focus on publicizing anti-corruption actions to meet expectations.	Fiduciary controls are weak. A risk management policy and internal audit reforms are being put in place to help make anti-corruption reforms feasible.	Fiduciary controls are weak, particularly internal audit.	The establishment of autonomous road authorities should improve management of the road network and ensure accountability.	The audits and traceable operating and financial systems being put in place should facilitate the identification of cases.
Effectiveness of measures (achievement of specific objectives)	There is strong evidence of good fiduciary controls at the MoE, but the TSC suffers from weak M&E systems.	A Public Expenditure Tracking survey is needed to establish weaknesses in resource flows.	NACC should publish in the web all workplans and funding proposals for grants.	Risk assessment exercises across the subsectors, particularly the Mombasa Port is urgently needed.	Fiduciary controls have been reinforced and improved.
Relevance of measures (extent it has been meeting expectations)	The control instruments set in motion at the MoE have teeth, but not those of the TSC.	Prosecuting officials alleged to have been involved in corruption should improve the relevance of measures already in place.	Legal action against those involved in corruption in the Bank's KHADREP project would improve the relevance of measures in place to deal with NGO corruption.	Weak fiduciary controls increase the risk of corruption.	Strong signals have been sent with the dismissal of corrupt staff. But the audits and traceable systems may take some time to identify further cases
Coherence of measures	Across all sectors, it was hard to assess the feasibility, relevance, effectiveness and interaction of control measures and implementing frameworks with those at the national level and to the national anti-corruption agency (e.g., KACC). Further work to find coherence among sectoral anti-corruption initiatives and with the national anti-corruption initiatives is urgently needed. For instance, a survey could be carried out of all senior government officials to capture the ethical climate in government agencies, including compliance and pressures not to comply with code of conduct.				

CHAPTER 9. Financial Sector Governance

Privatization of the Government's remaining stakes in the banking sector

Historically, the Kenyan state has used the control of two large banks (Kenya Commercial Bank [KCB] and National Bank of Kenya [NBK]) as a means to influence financial flows, particularly within the non-agricultural economy³⁴. In practice, this has meant that a substantial amount of deposits have been diverted to provide off-budget funding³⁵ for parastatals and provide “no repayment” loans to politically-connected individuals and private sector firms.

Kenya Commercial Bank. KCB is the largest bank in Kenya and has now been financially restructured. The bank is profitable and well capitalized. The state retains control via its 26 percent shareholding, which is sufficient for it to determine the election of members of the board of directors, as the remaining shareholding is widely dispersed. While not harboring any misgivings about the current Government's track record or intentions, unless KCB is privatized there is the danger that control of KCB could enable a resumption of state-directed lending and/or a return to corrupt lending practices, particularly given the tempting scale of KCB's financial resources. While the Bank has been working with the Central Bank of Kenya (CBK) to mitigate this danger by setting up a continuous supervision program for KCB's lending activities, this is a relatively fragile approach and the CBK's own lack of independence could undermine this effort, see further discussion of the independence of supervisory agencies below.

National Bank of Kenya. NBK is 70 percent controlled by the state, with approximately 48 percent of this stake held by the National Social Security Fund (NSSF) and the remainder directly by the MoF. The remaining 30 percent of NBK's shares are publicly traded. Under the previous Government the NBK was the primary banking vehicle for “no repayment” loans to private individuals and private firms. Its portfolio presently consists of about 90 percent nonperforming loans (NPLs), of which about KES 17 billion are to parastatals and KES 5 billion to private individuals and firms.

Following a thorough financial analysis of NBK in 2003 the Bank advised that privatization would be an option – even despite the considerable capital injection required by Government to make this possible. At the time this made sense mainly due to the significant commitments on NBK's balance sheet to household depositors (which would have to be honored in any case) and loans to parastatals (which were regarded as unrecoverable). Since that time the financing required to prepare NBK for privatization has increased significantly due to the accumulation of accrued, but *unpaid* interest on loans which is registered as income in the bank's accounts. Thus, *as things stand today*

³⁴ This excludes the agricultural sector, where the member-owned Co-operative Bank and some development finance institutions have formed conduits for subsidies and grant programs for farmers.

³⁵ Governments were able to avoid disclosing the contingent liability for directed loans to parastatals by using letters of comfort issued by the Ministry of Finance rather than formal state guarantees (which would have had to have been approved by Parliament).

liquidation would be considerably less financially burdensome for the Government than privatization. Nonetheless, the Government recently decided that NBK should be recapitalized with about KES 20 billion of bonds, but deleted language from its decision (previously agreed with the Bank) regarding NBK's privatization. Importantly this also runs counter to the Bank's prior advice that NBK only be recapitalized *simultaneously* with its privatization. At this juncture – running up to the December 2007 elections – any recapitalization of NBK could result in NBK again becoming a significant source of politically-directed finance.

Consolidated Bank. Consolidated was formed from a number of insolvent banks, including one in which a senior political figure held a major personal stake. State control is indirect, with 100 percent of the bank's voting shares held by the Deposit Protection Fund (DPF), which is in turn controlled by the CBK. Non-voting shares are held by about 20 parastatals which were forced to convert deposits in the insolvent banks merged to form Consolidated into equity. The bank is adequately capitalized but only marginally profitable.

The Bank had advised the immediate privatization of Consolidated by transparent international tender. The recent Cabinet decision on bank restructuring excluded Consolidated responding to mounting political pressure to have the shares of Consolidated transferred back without payment to the original owners of the failed banks which were merged to form Consolidated (it should be noted that the original owners have signed agreements releasing all claims against Consolidated). Executing this "restitution" transaction would constitute a direct and uncompensated transfer of a public asset to private individuals.

Development Finance Institutions.

Recognized that funding previously provided to Kenya's five DFIs was largely unrecoverable (average level of NPL's of over 90 percent), the current Government has been judicious in providing further funding – restricting new funding to a commitment to the Agriculture Finance Corporation – and embarked on a full review of the sector with a view to preparing its restructuring. While there may be gaps in the provision of financial services (inflicting certain sectors or geographic areas), the activities of the Kenyan DFIs have generally been the source of patronage servicing certain favored client groups rather than targeted at filling these gaps. In some areas – such as tourism and small-scale industry – the justification for subsidized finance goes back many years to before the liberalization of Kenya's financial markets in the 1980's and early 1990's.

In stalling on privatization of NBK and KCB the Government has argued that the branch network of these two state-influence institutions provide outreach which it would be difficult to maintain were they to be sold to private parties. While recognizing that there may be underserved segments of the population, this reasoning runs counter to the experience in Tanzania and Uganda, where the privatization process has been accompanied by increased outreach and significant financial deepening, and the observation that the outreach of the Kenyan financial system has increased considerably in recent years – an effort is being driven by privately-owned institutions (such as Equity

Bank) which happen to be among the domestic institutions which have shown an interest in acquiring NBK's branch network. Thus, seen from a developmental perspective this argument for caution in proceeding with bank privatizations appears ill-founded, especially if targeted subsidies to selected groups could be effectively provided through a restructured DFI sector.

Recommendations

State involvement in the Kenyan banking sector has a long history of producing poor governance resulting in the misallocation of resources and the accumulation of losses due to state directed and/or corrupt lending practices.

1. Effective and long term reform of this governance problem is only possible through exit of the state from the banking sector of all Government-controlled stakes in KCB, NBK (prior to recapitalization), and Consolidated by means of transparent tenders.
2. State employees or contractors should be prohibited from accepting service on the board of directors of banks.
3. Complete the review of the DFI sector and implement the restructuring of the sector with a view to providing narrowly targeted subsidized services to selected disadvantaged sectors.

Strengthening the governance of the National Social Security Fund

The NSSF is a state-sponsored trust providing retirement, death, survivor and disability benefits to members. Membership is compulsory for all formally-employed persons. Civil servants and some parastatal employees are covered by different schemes³⁶. Contributions up to a maximum of KES 400 per month are mandatory, and paid half by the employer and half by the employee. Trustees, with one exception, are appointed by the Minister of Labor, the exception being the head of the Kenyan trade union movement. As of June 2006 the NSSF's exemption from the retirement benefits Act expires and it became subject to regulation by the Retirement Benefit Authority (RBA). The legal structure of the NSSF is a member-owned trust, while its governance is provided by a board of trustees, which is considered to be a state corporation.

The NSSF controls approximately KES 75 billion of assets, a large proportion (37.8%) of which is lodged in self-occupied real estate purchased or constructed at above-market rates (according to the RBA). Recent work by the Bank indicates that the NSSF has a capital deficit of about KES 17 billion, which the RBA, believes may be a significant understatement due to the lack of recent valuations of its investments. Administrative expenses are very high, exceeding investment income and requiring the NSSF to use member contributions to finance its operations. Based on the NSSF's liquidation of positions in the securities markets, it appears that the NSSF may also be experiencing cash flow problems.

³⁶ Public sector governance issues relating to civil service pensions also need to be addressed, as they threaten to allocate an ever-increasing proportion of the Government's tax revenues to a narrow segment of the population.

Causes of the NSSF's Distressed Position

The NSSF has for years been used as a source of funds for off-budget financing (for example, providing loans and equity to parastatals) and, according to a recent RBA report, corruption and mismanagement may have played an important role in the dissipation of the NSSF's assets. The NSSF's investment portfolio has generated very poor returns (about half the rate of inflation in the past 10 years) and its asset base is being eroded by high administrative costs. The governance of the NSSF is deeply flawed:

- Members' input is restricted to "complaint boxes" (no records are kept as to the handling of such complaints) and members have no role in the selection of trustees. Trustees are political appointees and the public regards the NSSF as "state guaranteed" whereas it is a member-owned trust which should have no recourse to the public purse;
- The NSSF's regulators are controlled by the same ministry which appoints its trustees (the MoL) and the NSSF actively resists attempts to regulate it. The quality of the RBA appears to be high, but without political support it cannot effectively regulate the NSSF. In addition, the NSSF continues to seek exemption from the Retirement Benefits Act to avoid compliance with RBA regulations;
- The true financial condition of the NSSF has not been disclosed to its members or the public and the RBA itself has difficulty in obtaining financial information. Auditing is carried out by the Auditor General's Office and not by a qualified independent auditor. It appears that the trustees themselves have little understanding of the NSSF's condition and the NSSF provides a convenient source of funds for politically-directed investments and activities conducted out of the public eye; and,
- A substantial contingent liability for the state has arisen, and is constantly growing, as a result of NSSF's mismanagement. It is likely that the solution to this will be an increase in contribution rates, discouraging employment in the formal sector and imposing an additional burden on legitimate businesses.

Recommendations

- A diagnostic audit of NSSF is urgently needed to provide a strong factual basis upon which to base a plan to implement a financial restructuring of the NSSF.
- A forensic audit may be needed, depending on the findings, to uncover instances of corruption and malfeasance;
- Governance of the NSSF should be reformed prior any financial restructuring. The trustees of the NSSF should be elected by its members and it should (post-financial restructuring) cease to be a state corporation under the control of the MoL;
- The NSSF should be required to employ professional and independent investment managers, with the role of the trustees and NSSF management restricted to the selection and evaluation of investment managers' performance according to objective benchmarks; and,

- The NSSF should be made to comply with the Retirement Benefits Act and supervision by the RBA, including providing frequent and accurate financial reports to its members.

Strengthening the legal and regulatory framework for Anti-Money Laundering (AML)

The CBK has made progress towards implementation of its AML: guidelines for AML have been issued; consultation with the banking industry has occurred; the draft AML Law has been submitted to the Attorney General (AG); the AG is completing work to identify amendments to other Acts required to implement the AML Law.

As vividly illustrated by the on-going Charterhouse Bank money laundering case the current legal framework seriously hampers the CBK in referring money laundering misdemeanors to the relevant prosecuting authority. The management and customers of Charterhouse Bank have successfully in securing *ex parte* injunctions (from 2002) blocking even the most routine of supervisory acts (e.g. the examination of customer accounts by CBK inspectors) which are clearly authorized by the relevant Acts. The CBK has also been blocked from lifting these injunctions as a result of the “disappearance” of the court files of the cases, which prevents hearing of the CBK’s petition to have the injunctions lifted. Charterhouse Bank’s customers have furthermore sought injunctive relief from investigation of alleged tax evasion on the basis that CBK breached bank confidentiality of information requirements (Section 31 of the Banking Act) by passing information obtained through its inspection process to the Kenya Revenue Authority. In another bank where the CBK had evidence of malfeasance, the CBK was unable to secure a conviction because an injunction was issued before the CBK could put the bank under statutory management, partly because prior approval of the Minister of Finance is required. In sum, without completely clear and specific legal authority, and in the face of a corrupt court system, the ability of the CBK to act expeditiously and effectively in cases of financial crime is severely curtailed. Even more so now with the decision of the Attorney General on this case.

A similar situation occurred when the authorities attempted to move ahead with the forensic audit of the private sector nonperforming loans (NPLs) of NBK, which amount to approximately KES 5. This audit would be intended to identify, and refer to the appropriate judicial authorities for further investigation, instances of suspected fraud or malfeasance in this portfolio. While there was technical agreement with the CBK regarding the conduct of the forensic audit itself, the CBK was concerned that it lacks the legal powers required to make criminal referrals and transfer information based on the results of the forensic audit to relevant investigating/prosecuting authorities, and that it could be exposed to civil actions (primarily injunctions) which could make the whole forensic audit process futile.

The CBK faces the same difficulties as already experienced with Charterhouse Bank regarding bank secrecy with respect to passing on information generated as a result of AML activities and its customers. As a result, most banks are unwilling to provide AML

reports on their customers to the CBK, and one bank has already been sued by a customer for doing so.

Recommendations

- The AML Bill was scheduled for presentation to Parliament in June but this has not yet been tabled. The AG promised a recent (September 2006) Bank mission that the Bill will be published in October 2006 and push for early consideration of the Bill. Given the importance of the AML agenda and suspicions that Charterhouse Bank may only be the ‘tip of the iceberg’ it is strongly recommended that the authorities make a concerted effort to ensure the passage of this Bill as soon as possible.
- Due to the absence of the AML law and the inadequacy of the existing banking sector legislative and regulatory framework the CBK has been unable to effectively conduct AML supervision of the licensed financial institutions. Thus, while the CBK moved expeditiously to undertake a full forensic audit of Charterhouse Bank, the CBK lacks the formal powers to ensure compliance with Prudential Guideline on Crime and Money Laundering (which it has issued). Consequently, so as to re-enforce the provisions of the proposed AML Bill, it will be important to incorporate as amendments of the Banking Act relevant enforcement powers relating to AML. The authorities are urged to move ahead with the recommended amendments to the Banking Act as expeditiously as possible.³⁷
- There is an urgent need to strengthen the capacity of the judiciary to enforce financial sector related laws and regulations. This is illustrated by the Charterhouse Bank case (under CBK Statutory management) where the court with no jurisdiction over the matter heard an appeal from the owners of the Bank resulting in an order of the court to the CBK to relinquish its statutory management. The decision was made without any regard to the prudential powers of the CBK and its role as the regulatory. The authorities are to be commended for succeeding in overturning several injunctions attempting to retrain the powers of the CBK in the Charterhouse Bank case and are advised to continue fully and publicly to throw their weight behind the CBK’s legal position, and subject courts to intense scrutiny where clearly invalid injunctions are being issued and where case files are “disappearing”.

Strengthening the autonomy and accountability of financial sector supervisors

By vesting most of the responsibility for the stability and solidity of the financial system with the Minister of Finance the current legal framework undermines the responsibility of financial market regulators and thereby also these regulators’ commitment to professional excellence. In extension financial market regulators cannot reasonably be held responsible for underperformance in executing their authority. This undermines the

³⁷ The authorities are preparing a complete revision of the Banking Act. However, given that the passage of a revised Act will take time, considerations should be given to inserting the required amendments to strengthen the CBKs’ AML enforcement authority as part of the Finance Bill.

integrity of the supervisors and weakens confidence in the financial system and its potential contribution to economic growth.

Reflecting this lack of autonomy the CBK has in the past been made the scapegoat for delaying the recognition of weaknesses in particular banks. This has happened although the authority to act rests with the MOF potentially leading to considerable delays in decision-making. Although there have been significant improvements in how regulation and supervision is conducted by the CBK under the current government, the CBK is still by no means independent of the Ministry of Finance (MoF). The MoF has jurisdiction over important regulatory actions such as enforcement orders and licensing decisions. Accountability and responsibility for banking stability and supervision is vested with the Minister and removed from the Governor. This defrays the accountability and professionalism of the CBK and politicizes decisions that should stand or fall on their technical merits.

Similar arguments apply to the other Kenyan financial sector regulators in Kenya. Since the Capital Markets Authority was made subject to the State Corporations Act in 2002, the CMA has lost its autonomy with respect to managing its budget and finances, as well as in making policy and regulatory decisions. Furthermore, the president has the authority to remove the Chairman and Board members, and representatives of the Inspector of State Corporations participate in board and committee meetings. Investor sentiment is largely contingent on the credibility of the underlying market institutions. Thus an independent and strong regulator is crucial in assuring investors that capital markets will be allowed to function with minimal political interference.

The Insurance Commission is a department of the Ministry of Finance and lacks autonomy as regards its funding base and expense structure making it difficult to recruit and retain qualified staff. While the Retirement Benefit Authority does have considerable autonomy relative to the CBK, the CMA and the Insurance Commission, its ability to enforce the regulations it issues has proven to be weak and – importantly – the Government has provided NSSF with explicit exemptions from the RBA legislation seriously undermining the RBA's authority vis-à-vis the largest Kenyan institutional investor.

Recommendations

- Full independence and accountability of the CBK in line with international best practice and giving the CBK full and exclusive jurisdiction over all banking sector activities.
- Similar authority to be vested in the CMA by re-instating the CMA's exemption for the state corporations Act.
- The Minister of Finance to follow through on his proposal (in the 2006 Budget Speech) to provide the Insurance Commission with greater autonomy and responsibility.
- The NSSF should be obliged to fully comply with the RBA legislation and the responsibility for supervising NSSF should be fully vested in the RBA.

Financial Sector Transparency

The report on data dissemination prepared by the International Monetary Fund in 2005³⁸ provides an assessment of Kenya's macroeconomic statistics against the recommendations of the General Data Dissemination System, complemented by an assessment of data quality based on the IMF's Data Quality Assessment Framework (DQAF). The DQAF lays out internationally accepted practices in statistics, ranging from good governance in data producing agencies to practices specific to datasets. The datasets covered are national accounts, government finance, monetary and balance of payments statistics compiled by the Central Bureau of Statistics, the Ministry of Finance, and the Central Bank of Kenya.

i) *Methodological soundness* is uneven across datasets and needs significant improvement in GFS and national accounts. In these two datasets, the main weaknesses pertain to limitations in scope and classification. In addition, international concepts and definitions are not closely followed in GFS.

ii) *Accuracy and reliability* do not receive adequate attention in any of the datasets. Shortcomings are particularly evident in the national accounts and balance of payments. National accounts suffer from poor source data and limitations in statistical techniques that compromise the reliability of the gross domestic product (GDP) estimates. The BOP is affected, in particular, by data sources that do not sufficiently cover transactions between residents and nonresidents and do not allow for reliable classification according to *BPM5*. Shortcomings with respect to the conduct of revision studies are evident in all datasets.

iii) *Serviceability* of the disseminated macroeconomic statistics is generally adequate. The periodicity and timeliness of all disseminated data meet or exceed the GDDS recommendations. The degree of internal consistency with various datasets varies; in particular the internal consistency of the GFS needs improvement. There is a need to rationalize and publicize revision policy and practice in all datasets.

iv) *Accessibility* of macroeconomic statistics is adequate, except for the BOP, for which only summary data are published. The availability of metadata for all datasets is, however, mainly limited to links established between the national websites and the IMF's DSBB. For most datasets, greater efforts are needed to enhance assistance to users.

Recommendations

Based on the review of Kenya's statistical practices, discussions with three data-producing agencies, and responses from data users, the report includes a set of crosscutting recommendations:

³⁸ IMF (2005), Kenya: Report on the Observance of Standards and Codes (ROSC) - Data Module, Detailed Assessment Using the Data Quality Assessment Framework, www.imf.org/external/pubs/ft/scr/2005/cr05388.pdf

- Delineate and assign clearly the statistical responsibilities of the CBS, the MOF, and the CBK.
- Allocate sufficient resources to data-producing agencies to support implementation of their work program.
- Make more effective use of the Internet to disseminate comprehensive data and metadata.
- Carry out regular revision studies to improve the statistical process and publicize the results, along with the underlying revision policies.
- Seek feedback from users regularly to better meet their needs.

CHAPTER 10. Private Sector Climate, Regulatory Environment, and Privatization

The last two decades have seen a decline in Kenya's economy, once the most prosperous in East Africa, with a fall in living standards and in the quality of its institutions. A decline in the country's investment climate, manifested in a deterioration in economic governance, uncertainties over reforms and a deterioration in the physical infrastructure, led to investor perceptions of risk turning strongly negative and hence to a stagnation in the rate of private investment during the 1990s. Indeed, the following graph shows Kenya as the country with the weakest enabling environment for the private sector, out of the sample of African countries where the African Government Assessment was carried out in 2005.

Figure 10.1 The development of the private sector is always or usually encouraged by government policies



Source: African Governance Report 2005

Despite these constraints, there have been some successes in export markets, particularly tea, horticulture (especially cut flowers) and garments have performed strongly in recent years, recording high rates of growth and contributing a major share of the country's export earnings, suggesting that there is a window of opportunity for Kenya to maintain and strengthen these trends, by addressing investment climate constraints and facilitating the role of the private sector in these sectors.

Private sector development is key for growth and poverty reduction but also for good governance and fighting corruption, providing an alternative source of employment to the

public sector and reducing pressures for nepo. Private sector has to be considered an active player in the fight against corruption. A fallacy that still persists today is the presumption that the state is almighty in shaping the investment climate--and thus seen as the investment climate "maker"--while the atomic and powerless enterprise sector is viewed as the passive investment climate "taker." In reality, powerful corporations often exert enormous influence over public policy, public institutions and officials, and particularly so in weak states. It is therefore recommended that the private sector in Kenya takes the lead in this agenda, for example by requesting the GoK to subscribe to the Extractive Industries Transparency Initiative (see Box 10.1).

Major constraints to doing business cited by firms in the Investment Climate Assessment 2004 survey³⁹ related to infrastructure, cost of finance, tax administration and corruption with three quarters of firms surveyed reported this as a problem and about half reported having to spend resources in terms of unofficial payments (averaging 6.1% of annual sales revenues). For Kenya, infrastructure indicators are seen to compare very poorly with other countries in the region, particularly in power supply and transport, which impact directly on manufacturing costs of production. On infrastructure, power supply was seen as the most problematic, on account of the high number of outages, compounded by high losses in transmission and distribution. 64% of firms reported damage to equipment on account of power outages or fluctuations valued at nearly \$15,000 per firm per year. To cope with these outages 70% of firms had acquired generators, further adding to the cost of doing business. Road and rail services were reported by most firms as being of very poor quality, and nearly a quarter of firms reported having to spend their own resources to improve the quality of roads in surrounding areas.

The Kenya Growth and Competitiveness report⁴⁰ suggest that action is taken by the GoK in the following key five areas to promote private sector development:

(i) *Improving the investment climate* through removal of entry barriers and lowering of transactions costs, facilitated by a strengthening of economic governance, institutional frameworks and the predictability of policies. In ensuring the implementation of reforms, key areas of focus would include the administration of the customs, ports, utilities and other authorities, courts and other regulatory bodies.

(ii) *Reviving the pace of privatization* through more determined implementation of the on-going privatization program, while promoting greater private participation in infrastructure and social sectors, through alternative approaches, including management contracts and concessions, specially in infrastructure sectors.

(iii) *Addressing the high cost of and limited access to finance for entrepreneurs (including micro-finance)*, the result of the impaired portfolio of commercial banks. With lending rates in excess of 24% and with NPL ratios as high 40% (estimated), access to finance for all but the largest borrowers is extremely poor, a problem exacerbated by

³⁹ based on a survey of 368 manufacturing firms drawn from across the country.

⁴⁰ World Bank 2005

weak judicial enforcement of security. Priority actions will include strengthened regulatory enforcement of the financial sector, measures to restructure banks through resolution of impaired assets and improving legal processes for enforcement of security. In the area of microfinance, actions may need to include a micro-finance law that would permit greater commercialisation and outreach of micro-finance institutions through licensing to mobilize savings.

(iv) *Improving economic competitiveness*, by (in addition to addressing deficiencies in physical and financial infrastructure) addressing the training and skills development needs of the economic work force and supporting medium and small enterprises (MSEs). Effective mechanisms and programs would need to be designed and implemented aiming at forging backward and forward linkages between small and large firms as well as between MSEs to increasing local content in other inputs. To achieve this goal, development of industry-relevant skills and techniques through education and vocational training programs as well as through business development services (BDS), is key.

(v) *Ensuring sustainability of key export sectors*, to face the threat of heightened competition after expiration of AGOA benefits. A key challenge will be to develop a regional strategy to gear up the thriving garment industry for development of backward linkages on an urgent timetable, to be able to face heightened competition, once China's quota-free access to the US market kicks in after 2005, under its WTO agreements. Development of infrastructure linkages will be a key focus of any strategy to promote growth of other foreign exchange-earning sectors, such as cut-flowers and tourism. At the same time, there is a need to address some of the structural factors contributing to the decline of traditional export-earners such as coffee⁷ and pyrethrum. Coffee saw a near-collapse during the 1990s when the impact of exogenous global factors were exacerbated by inefficiencies arising from the cooperative structure and in the farm-to-market supply chain, but – with the right policies - has the potential to significantly expand its market share.

Legal and Administrative Impediments to Investment

The legal and administrative framework is a key element of the investment climate. For markets to function effectively in a globalized environment, legal and regulatory institutions must be in place, providing a body of legislation to enable corporate entities to function, contracts to be drawn up and enforced, and collateral to be pledged and enforced, as well as providing clear rules governing entry and exit, competition, and the tax regime. The analytical work conducted by FIAS in 2004, has highlighted the deficiencies that exist in this framework in Kenya, which constitute significant administrative and regulatory barriers to doing business.

Though reform of this framework is a key stated priority of the Government, institutional inertia and lack of a clear private sector focus continues to impede the pace of implementation of reforms in this sector. Key weaknesses in the legal framework relate to entry procedures, registration issues, commercial legislation, the insolvency regime, secured transactions and commercial dispute resolution. Enforcement of compliance with regulations affecting individual firms tends to be poor and patchy. Rent-seeking is a

feature. The result is that regulatory objectives are not achieved, while, at the same time, the playing field is made uneven. Secondly, the malfunctioning of the court system means there is no credible sanction against non-compliance. The lack of effective dispute resolution means that much business is transacted between individuals and families that know and trust each other. Contracts made in the wider community run much higher risks.

The World Bank's Doing Business database indicates that the direct costs for registering a new business amounted typically to 46.3 % of income per capita of 13 procedures, taking 54 days, relatively high numbers compared to South Africa and Zambia. Under Registration, the Business Names Register appeared to be seriously out of date and inefficient, with no attempt at enforcement. The Registrar General's department was found to be in disarray, with a backlog of many thousand annual returns not yet placed on company files. Equally problematic was the Chattels Transfer Register, where searches were almost impossible, and where inefficiencies resulted in delay and cost in the issuance of secured transactions. A modern Personal Property securities Law needed to be adopted, to create a simpler, transparent system of registration, to support expanded access to credit. Most seriously outdated was the Companies Register under the Companies Act, where – among other things - registration procedures necessitated the reservation of names prior to registration.

Table 10.1 Doing Business 2006, selected African countries

	Kenya		South Africa	Botswana	Tunisia	Ghana
	2005	2006	2006	2006	2006	2006
Rating in Ease of...						
Doing Business	80	83	29	48	80	94
Starting a Business	103	111	57	93	59	145
Dealing with Licenses	23	24	45	136	110	83
Employing Workers	67	68	87	62	92	120
Registering Property	114	115	69	34	71	113
Getting Credit	33	33	33	13	101	117
Protecting Investors	58	60	9	118	151	33
Paying Taxes	120	127	74	67	139	77
Trading Across Borders	154	145	67	89	39	61
Enforcing Contracts	64	67	43	77	40	50
Closing a Business	120	128	65	22	29	94

Source: www.doingbusiness.org

Previous attempt to review licenses have been primarily ad hoc. They have resulted in some licensing requirements such as exchange controls and business permits have either

been scrapped- in case of foreign exchanged- or simplified- in the case of a number of business permits. Though the Single Business Permit has no doubt simplified trade licensing, it has not eliminated the other collateral requirements relating to sites, water, health that are imposed by the by-laws. However, there is a significant residue of licensing requirements enforced through a bureaucracy of city and municipal by-laws; occupational licensing and public health regulation. Though some of these, such as those on public health, are objectively justifiable, their implementation is laden with corruption. The licensing office in every local authority ministry is invariably a veto point for extorting bribes. This fact and the reality that local authorities are service points for most citizens is probably the reason why municipal authorities continue to rank high, year in year out, in the Transparency International's Kenya Bribery Index. However in February 2005, Kenya launched comprehensive reform of business licenses and fees based on a "regulatory guillotine" strategy

In February 2005, Kenya launched a broad reform of business licenses and fees based on a "regulatory guillotine" strategy. The reform has been championed by the Ministries of Finance and Trade and Industry, and spearheaded by a cross-ministerial *Working Committee on Regulatory Reform for Business Activities in Kenya*. The license reform in Kenya is well underway, but far from over. The 2006/2007 Budget Speech announced the elimination of 118 licenses, and the simplification of another 700 of the licenses reviewed by the *Working Committee*.⁴¹ The licensing review is scheduled for finalization at the end of 2006. Indications are that the review will lead to the elimination of a total of some 400 licenses. A Regulatory Reform Unit has been set up in the Ministry of Finance, charged with vetting the quality of *new* licenses, so that the results of the current reform will not be eroded by a new wave of inefficient licenses. Steps are underway to introduce an electronic registry of all valid business licenses in order to facility businesses' access to information about licensing procedure and costs. Two factors constrain the implementation of the reform. First, the Regulatory Reform Unit in the Ministry of Finance must have adequate staff to support the finalization of the review, and to gradually expand the regulatory reform activities beyond licensing. We recommend that the Government assures that the Unit is staffed with a minimum of 6 dedicated staff, partially seconded from other ministries involved in business regulation. Second, limited capacities of Parliament have made it difficult to obtain a slot on the Parliamentary agenda. We recommend that the Government more actively pursues the need to table the relevant legal measures to implement the licensing reform to Parliament. Another option that could be explored is eliminating all of them as a principle and include only the ones that could be justified.

Companies Act and the Bankruptcy Act. Key elements of commercial legislation impacting on the overall investment climate are the Companies Act and the Bankruptcy Act, both of which are fundamentally sound, but extremely dated. In comparison with

⁴¹ Out of the 118 licenses for elimination announced for elimination in the Budget Speech, 37 have already been eliminated through Ministerial legal notices. A separate Bill on Business Regulation Reform presented to Parliament in 2006 will include proposals to implement the remaining eliminations and the results of the simplification of the additional 700 licenses. The elimination of these licenses needs to be fast-tracked to be able to have an impact on the business climate.

international best practice, they are also unduly technical, complex and bureaucratic. A fundamental reform of the company law regime appears necessary for Kenya, aimed at replacing the existing 50 year Companies Act with a more modern one aimed at (a) relaxing the rigid capital maintenance rules by abolishing par value shares and the concept of nominal capital; (b) simplifying formalities for private companies; (c) enhancing protection for minority shareholders; (d) reforming the *ultra vires* rule; (e) simplifying company formation procedures; and (f) fundamentally reforming secured transactions regime for companies. The reform of the Companies Act is underway and is spearheaded by the Kenya Law Reform Commission. However, this process has faced delays and should be expedited.

Insolvency procedures. By international standards Kenya's insolvency procedures – vital to any market economy - are lengthy and costly, even in comparison with other countries in SSA. The insolvency regime is contained in three pieces of legislation – the Bankruptcy Act; the Deeds of Arrangement Act, which deals with insolvency of individuals, including unincorporated businesses; and the Companies Act, which deals with corporate insolvency. These laws contain serious weaknesses, including lack of a modern system for promotion of corporate rescue, limited ability of creditors to recover assets, and relatively outdated bankruptcy procedures for individual insolvents, and indicate the need for a fundamental overhaul.

Land issue. Key weaknesses in Kenya's legal framework for secured transactions include complex and unduly technical legal procedures for creating secured interests. There are particular problems with the creation of security interests in land, where an estimated 200,000 titles have been illegally granted. Disarray in the land registries frequently causes delays in registering charges. There are also problems with the use of moveable property as collateral because of an absence of a comprehensive framework for recognizing and ranking security interests. There are also problems in dealing with default; it being relatively for borrowers to stall the process, by seeking a court injunction. Consent from local Land Control Boards was also required for rural land transfers, further reducing the usefulness of land as security. As a result, commercial banks have been reluctant to lend on the security of land alone. There is hence a need for significant improvement of land title registries and in the overall process of judicial enforcement of security.

Contract enforcement has historically been a problem in Kenya on account of inefficiencies in the court system. Fieldwork indicates serious problems of collusion between judges or magistrates and lawyers. Injunctions appear to be granted frequently, on dubious grounds, particularly against enforcement of security interests with cases being often delayed on technicalities. The Doing Business database 2007 indicates that the time and cost of enforcing contracts in Kenya takes an average of 360 days, at a cost of 41.3% of debt, which compares very poorly with many other countries in SSA. There is a need for fairly urgent reform of court procedures, with an initial focus on *ex parte* injunctions and listing requirements. Active case management techniques, linked to alternative dispute resolution (ADR) are worth introducing as a mechanism to ease the pressure on courts.

Concerns regarding the Licensing Laws (repeals and amendments) Bill 2006

Through the Licensing Laws (Repeals and Amendments) Bill 2006, the Minister for finance proposes to amend a total of 33. Though the spirit of most of these amendments is positive, many of the proposed changes raise key concerns - highlighted in detail below- that Members of Parliament need to scrutinize. These concerns include:

1. Careless, incoherent and cavalier amendments: In many of the laws, licenses have been repealed but other provisions of the amended laws that need to be changed as a consequence of the revocation of the licences have been left intact. The result is either incoherence or contradiction. This is true for changes that are proposed to be made the Canning Crops Act; to the Cotton Act; to the branding of Stock Act; to the Hides, Skins and Leather Trade Act; to the Liquor Licensing Act all suggest that the proposed amendment and repeals bill was a rushed and carelessly executed job. There are way too many careless mistakes.
2. Risk of some reforms leading to smuggling and money-laundering: Some amendments, such as those to the Diamond Industry Protection Act and those to the Antiquities and Monuments Act could, if abused lead to diamond smuggling and money laundering or to the plunder of historical artefacts.
3. In agriculture, many the proposed changes may be desirable but they are half-hearted and shallow: many of the changes proposed to the agricultural laws are really an acceptance of the existing realities. Unfortunately, for many of these laws, once the licensing requirements are removed, the law serves no purpose and should in fact be repealed. Laws such as the Coconut Act, the Sisal Act, the Cotton Act and the Pyrethrum Act should have just been repealed not amended. In some other laws, the changes appear half-hearted and a number of very draconian provisions still remain and these, too, need to be repealed.
4. In some sectors slated for reform intrusive government controls remain: In some laws - such as the Hides, Skins and Leather Products Act- licensing requirements have been abolished but government retains a significant regulatory function that will be difficult to police and, if implemented will operate like a licensing regime.
5. Editorial attention: Much editorial work remains to be done in order to:-a) correct statutes that have either been misnamed or misnumbered; b) ensure that all provisions proposed to be amended are indicated in the amendment bill; c) ensure that all consequential changes are made to all the statutes that are being amended and d) remove the many careless errors included in the various amendments⁴².

⁴² For example: The proposed amendment to Canning Crops Act section 33-at p.1008- makes no sense unless the words the words, “the holder of” are deleted. A detailed Memorandum has been submitted to Members of Parliament reviewing this Bill.

Controls on import-export transactions

Kenya received its worst Doing Business rating on trading across border. Customs and other official border controls involve significant delays to import, export and transit transactions, and impose a high burden on trade-related business activity. Investors interviewed in connection with the Investment Climate Assessment frequently complained of excessive delays in processing of Customs declarations and extremely slow clearance times, particularly at the Kilindini Port in Mombassa, the Inland Container Depot, the Nairobi Long Room, Jomo Kenyatta International Airport and several land border stations. Moreover, traders claimed that Customs have tended to demonstrate insufficient concern for their business needs and/or previous compliance record and that Customs officials at all levels are obsessed with maximizing revenue collections at the expense of trade facilitation objectives.

As with internal taxes, Customs is seen as only focused on revenue collection, not balanced by service considerations. Procedures involve excessive documentation and high levels of physical inspection. Other agencies having a role in border controls include: Kenya Bureau of Standards, the Department of Health, and the Kenya Plant Inspection Service. Most of the criticisms of Customs relate equally to these agencies. In spite of the Government spending money on independent pre-shipment inspection (PSI), the data provided is then checked again by Customs or Kenya Bureau of Standards. In addition, traders complain that the two PSI companies regularly ignore evidence of the price paid for goods, and determine Customs value in a non-transparent manner. Although Kenya implemented the WTO Valuation Agreement in 2001, Customs routinely uplift the declared valuations of import consignments, leading to a self-defeating cycle of non-compliance and conflict. A Valuation Appeals Tribunal has been announced, but not convened. There is little use of modern Customs concepts such as risk management, post-clearance audit, and intelligence-directed inspection. Records on compliance performance by industry or by trader, and records on performance indicators are not currently being collected. The decision on which consignment to inspect is usually made based on the memory and intuition of the individual officer. Disincentives against noncompliance are almost non-existent.

Recommendations

Customs has prepared a modernization program, intended to address areas of weakness, with considerable emphasis on use of upgraded IT systems. However, systems and procedures need to be completely reengineered before IT could provide any real help. It is therefore recommended that:

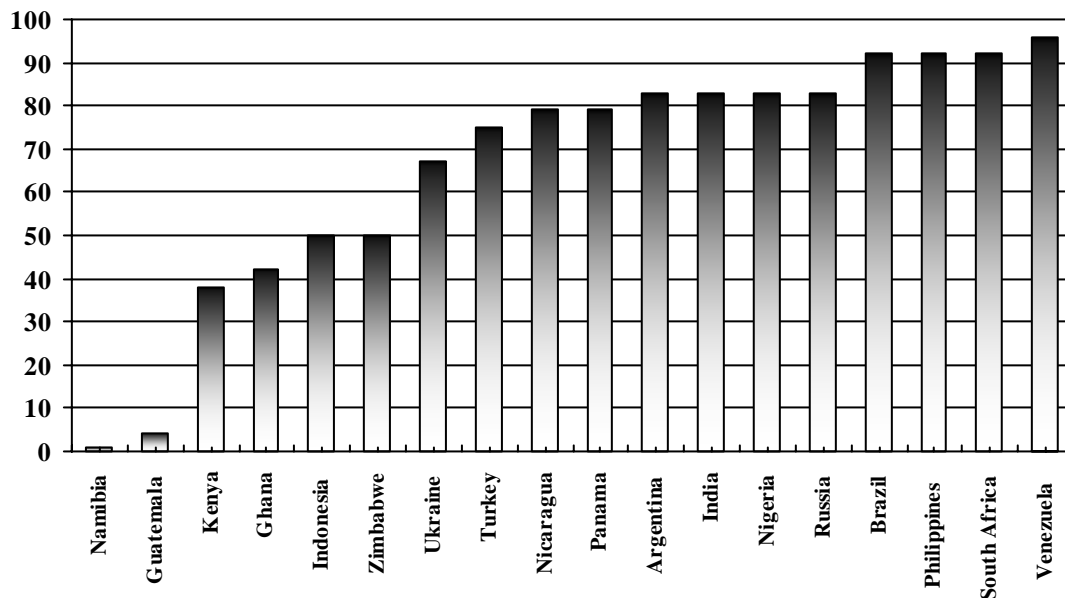
- any such automation should only be as part of a wider set of comprehensive reforms, aimed at introducing modern customs concepts inline with the principles embodied in the WCO revised Kyoto Convention on simplification and harmonization of customs procedures;
- these reforms support the development of a comprehensive risk management program, a national intelligence and investigation capacity and introduction of a post clearance audit regime.

Competition and anti-monopoly regulation

There is both a Monopolies Commission and a Monopolies and Restrictive Practices Legislation in Kenya but neither has been very effective or visible in matters of competition. Concentrations of commercial power are common and visible in the media, the oil companies and the banking industry but it has not been clear what the role and function of the legislation and the commission is in ensuring that this concentration is not anti-competitive. Other areas in which there are regulatory issues include 1) communications - telephony, ICT and broadcast licensing; 2) capital markets- especially the need for reforms to deepen and widen the market with regard to secondary investments; derivatives and futures; debt instruments; commodities trading and foreign participation in the stock-market (which is currently limited).

It is recommended that the Privatization Commission is set up under the Privatization Act and that Government demonstrates a strong commitment by publishing a program for privatization to be completed before the elections.

Figure 10.2 Privatization, 2004



Source: Center of Public Integrity, 2004. The Privatization Index includes assessments in two sub-indicators: 1) Is the privatization process effective? And 2) Can citizens access the terms and conditions of privatization bids?

Corporate governance

Private sector accounting and auditing in Kenya is regulated by the Accountants Act, Chapter 531 of 1977. This Act sets standards for accounting practice in the country and enforces rules. To do this the Act established three key institutions: Registration of

Accountants Board (RAB), the Kenya Accountants and Secretaries National Examinations Board (KASNEB) and the Institute of Certified Public Accountants (ICPAK). Kenya adopted the International Accounting Standards (IAS) and the International Standard of Auditing (ISA) in 1999. All financial statement covering the periods beginning January 1, 1999 have been prepared in accordance with IAS while the ISA has been used since December 31, 1999. The Kenyan tax authorities require enterprises to produce IAS compliant income statement for determining accounting profits and taxes. A number of regulators in Kenya including the Central Bank of Kenya (CBK) and the Capital Markets Authority (CMA) also insist on the observance of IASs although this is not engrained in the Kenyan Law. Although the adoption of the IASs and ISAs has closed the gap between Kenyan and international accounting standards, there continues to be gaps in compliance. However, there are still gaps between the practice in Kenya and international standards in a number of areas.

The Capital Markets Authority (CMA) has issued instructions requiring all quoted Companies in their annual reports to report on corporate governance. Compliance levels with these instructions and enforcement have been uneven. Some companies may have already voluntarily subscribed to corporate governance codes and standards, but it is nevertheless important that these regulations are enforced. The revised Companies Act should be passed and enacted expeditiously by Parliament, including provision for: a) Safeguarding the effective practice of good corporate behavior; b) Protection of minority shareholders' rights; c) Training and education of shareholders and the public, especially on the benefits of transparency and ensuring effective performance; and d) Proper assessment of directors and the boards.

Box 10.1 Transparency in the use of natural resources- Private and Public sector

Publish What You Pay is a coalition of over 300 NGOs worldwide calls for the mandatory disclosure of the payments made by oil, gas and mining companies' to all governments for the extraction of natural resources. The coalition also calls on resource-rich developing country governments to publish full details on revenues. This is a necessary first step towards a more accountable system for the management of natural resource revenues. Standards to assess the performance of companies and governments in support of revenue transparency are published and progress monitored over time. These are used by investors, NGOs, ratings agencies and other relevant actors.

The Extractive Industries Transparency Initiative (EITI) aims to increase transparency in transactions between governments and companies within extractive industries. The objective is the publication on a regular basis of all material oil, gas and mining payments by companies to governments and all material revenues received by governments from these companies to a wide audience in a publicly accessible, comprehensive and comprehensible manner. In addition, the EITI requires that payments and revenues are independently audited, applying international auditing standards. Some twenty countries have either endorsed, or are now actively implementing EITI across the world – including the following African countries: Angola, Cameroon, Chad, Democratic Republic of Congo, Equatorial Guinea, Gabon, Ghana, Guinea, Mauritania, Niger, Nigeria, Sao Tome and Principe and Sierra Leone.

Forest Law Enforcement and Governance (FLEG) processes are been carried out in many world regions, including Africa, bringing together nearly 300 participants from 48 countries representing governments, the private sector, civil society and international organizations to take

action to address illegal logging and associated forest crimes. In African countries, millions of dollars in revenue are being lost every year due to poor regulation of timber production – in Cameroon, losses are estimated at \$5.3 million; in Congo Brazzaville, it's \$4.2 million; in Gabon, \$10.1 million; and in Ghana, losses reach \$37.5 million per year. Recently, 39 African countries committed to a Ministerial Declaration and Actions targeted at combating illegal logging, associated illegal trade, and corruption in the forest sector at the Africa Forest Law Enforcement and Governance (AFLEG) conference held in Yaoundé, Cameroon. This declaration builds upon an agreement on the same issues reached in East Asia in 2001

Private Sector Financial Accounting and Auditing

Private sector accounting and auditing in Kenya is regulated by the Accountants Act, Chapter 531 of 1977. This Act sets standards for accounting practice in the country and enforces rules. To do this the Act established three key institutions: Registration of Accountants Board (RAB), the Kenya Accountants and Secretaries National Examinations Board (KASNEB) and the Institute of Certified Public Accountants (ICPAK). Kenya adopted the International Accounting Standards (IAS) and the International Standard of Auditing (ISA) in 1999. All financial statement covering the periods beginning January 1, 1999 have been prepared in accordance with IAS while the ISA has been used since December 31, 1999. The Kenyan tax authorities require enterprises to produce IAS compliant income statement for determining accounting profits and taxes. A number of regulators in Kenya including the Central Bank of Kenya (CBK) and the Capital Markets Authority (CMA) also insist on the observance of IASs although this is not engrained in the Kenyan Law. Although the adoption of the IASs and ISAs has closed the gap between Kenyan and international accounting standards, there continues to be gaps in compliance. However, there are still gaps between the practice in Kenya and international standards in a number of areas. In accounting, Kenya fails in a number of disclosure items including: the accounting policy used in the preparation of financial statements; revenue recognition; related party relationships; maturity dates and effective interest rates of each type of financial assets; information on deferred taxes; information on post-employment benefits; revaluation of fixed assets; impaired assets; risk management policies and objectives; and the concentration of assets, liabilities and off-balance sheet items.

CHAPTER 11. External institutions of accountability –Parliament, Media, Human Rights and Civil Society

Parliament

Kenya's parliament has been historically weakened by executive control. Section 59 of the Constitution provides the president with the power to recall or dissolve parliament. Various constitutional amendments have strengthened the power of executive, for example by limiting parliament's control over the passage of 'emergency legislation'. President Moi maintained strict control over the ruling party, which effectively removed any sources of dissent within parliament during the single party era, and continued to stifle debate after the restoration of multi-party democracy.

There are signs that parliament is starting to recover its power. Since the establishment of the Parliamentary Services Commission in 1999, Parliament has enjoyed greater autonomy and assertiveness, and has regained control of its budget and members' salaries and allowances. This has sometimes generated controversy. One of the MPs' first acts following the creation of the Commission was to award themselves a large pay increase. The level of the debates has risen over time. However, MPs are divided factionally, and generally pursue local, ethnic and personal interests, rather than national interests. This is a direct consequence of the nature of political competition in Kenya, and the expectations of the electorate towards their elected representatives that relate more to gaining access to short-term, tangible and ad-hoc benefits rather than addressing broader policy issues. Therefore, the obstacles to strengthening Parliament's role in promoting growth and poverty reduction should not be underestimated. Improvement will have to come about through a combination of changes over time to the nature of party politics and, in a shorter time-scale through constitutional reforms to strengthen parliamentary powers vis-à-vis the executive, as well as measures to strengthen the technical capacity of parliamentarians.

The Parliament has important control and oversight functions over public financial management. The Finance Committee, among others, is responsible for the oversight and examination of the annual estimates of revenue and expenditure, and the Public Accounts Committee's main function is to examine the report of audited accounts submitted to Parliament by the Auditor General. Other scrutiny functions are also assigned to other parliamentary committees dealing with specific sectors. The efficiency of parliamentary oversight has been constrained by various factors, key among them being the lack of facilities and capacity, in particular the lack of research capacity on policy and public expenditure issues.

Parliamentary committees, and in particular the Finance and Public Accounts Committee (PAC) and the Public Investment Committee (PIC) (which is supposed to oversee parastatals) could play a more effective parliamentary oversight if strengthened technically and legally. Most of the recent PAC and PIC reports have presented to parliament, findings showing the enormity of the public financial mismanagement

together with recommendations that would improve the government's financial probity and accountability. However, the Committees' findings are not legally binding, and they are usually ignored by the Executive, which routinely protects culprits. As far as the PIC is concerned, many state corporations have been exempted from having their affairs scrutinized. Most of the scrutiny of government expenditure by the committees is always done on past events rather than on current issues. This does not help much in the prevention of possible embezzlement of public funds by those public officers entrusted with the custody of such funds. Because of delays in implementing the recommendation of the committees by the executive, some public officers tend to misappropriate funds entrusted to them since there are no prompt punitive measures taken against them to deter recurrence of such incidents.

Suggested Reform Areas

- ***Extend the Role of Parliament in the Budget Process:*** To enable the Parliament to play its oversight role in the area of economic management more effectively and to professionalize its interaction with the government, it is important to provide support to the various parliamentary committees in the area of economic management (budget preparation, budget execution, expenditure control and financial reporting). This would include providing supporting an office of Fiscal Analysis in Parliament, which is a Parliamentary research and analytical unit that will focus on studying budgetary and fiscal issues, and provide Parliament with objective, timely and non-partisan analysis necessary to inform economic, budget and other policy decisions that may be made by Parliament.
- ***Provide Capacity Building for Relevant Committees and follow up on their recommendations:*** Provide technical and logistical support for effective oversight by the Public Accounts and Public Investment Committees. In the short term, such support would include, but not limited to research capacity and operational support of the committees. The impact of such support would be geared towards improving their responsiveness to audit findings and follow up of their recommendations as well as addressing the backlog of reports not dealt with would have been completed and new processes operational. Comment: The Attorney-General is supposed to follow up on the recommendations of PAC and PIC. Cases involving corruption and abuse of office should be forwarded to KACC.
- ***Provide Specialized Training:*** With regard to (i) capacity building at both the individual level (Member of Parliament and parliamentary staff) and institutional level, specialized training in macro-economic and financial management, with a particular focus on budget process (budget preparation, budget execution, and expenditure control) would boost the skills of Members and staff.
- ***Support Independent Budget Office:*** Providing support to an independent parliamentary budget office would ensure that Parliament has access to independent budget information and analyses. Such capacity building will result in Members of the key parliamentary committees (Finance and Public Accounts) being able to understand key budget issues and information and able to interact with Treasury officials on a more equal footing.

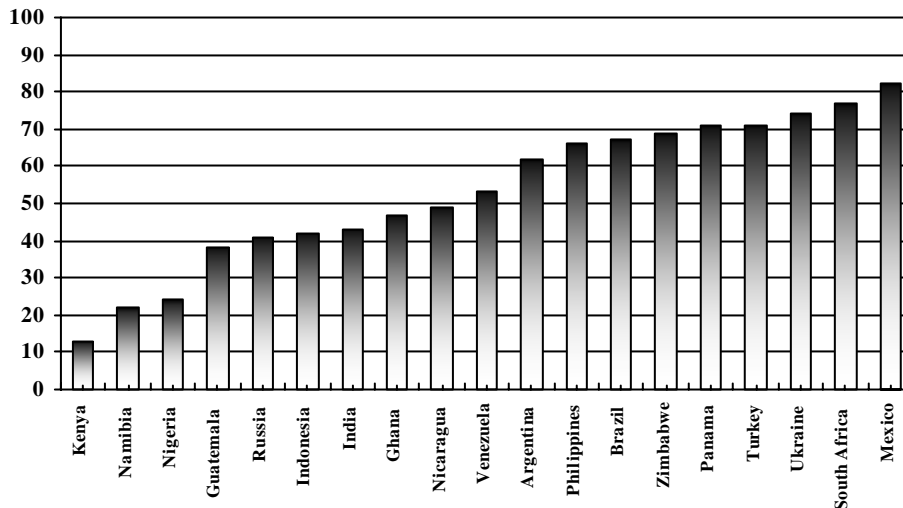
- **Provide Technical and Logistic Support** to strengthen the relationship between the Public Accounts Committee and the Office of the Controller and Auditor General. The broad goal of such support is to ensure the recommendations of the PAC are implemented to Government.
- **Enhance transparency of Parliament.** Publish recommendations of PAC and PIC and other Commissions on the official website. Carry out follow up on implementation of recommendations and publish them on the website. Publish voting results and other relevant information about performance of Parliament. Engage different stakeholders in discussions about important reforms.

Access to Information and Media

As can be seen from the figure below, transparency and access to information are weak in Kenya compared to other African countries and from other regions. The legal framework does not guarantee the right to access to information and freedom of expression in the current constitution is weak and subject to a series of controversial exceptions and the questioned Official Secrets Act.

The government of Kenya is taken a number of steps to enhance transparency in the Public Administration, reviewed in chapter 5, and has also drafted a Freedom of Information (FOI) Act, posted in the Ministry of Information Website. Civil society has also been active in this area and the ICJ/FOI Network has drafted legislation consistent with international standards that has been discussed by stakeholders and refined by a legislative drafter. We welcome the efforts of the GoK for enhancing access to information in the country and in particular, for drafting legislation in this regard. We encourage the GoK finalize the development of the law in an open and participatory manner, engaging different stakeholders and, given the proximity of elections, fast-tracking the submission to Parliament so it can be passed as the legacy of this administration.

Figure 11.1 Access to Information, 2004



Source: Center of Public Integrity, 2004. The Access to Information Index includes assessments in two sub-indicators: 1) In law do citizens have a right of access to information?
2) In practice, is the right of access to information effective? Best = 100.

The media has been an active player in the anticorruption campaign in Kenya, and has even forced the removal of three cabinet ministers. But the effectiveness of the media has been sundered by a number of serious challenges, including: 1) the overall legal environment especially regarding the laws of defamation; the Books and Newspapers Act which requires one to execute a onerous bond before publishing a newspaper; the Penal Code which has provisions that criminalise the publication of “alarming reports,” an omnibus undefined offence; 2) on the ICT and broadcast side, there are three issues here: one, absence of transparency, standards and criteria for allocating of radio frequencies and the regulation of broadcasters after licenses have been granted⁴³; two, the role of the Communications Commission of Kenya which needs to be strengthened to regulate broadcasting in the country; and three, the new ICT policy over which media owners have concerns relating to potential regulation of media content ; 3) Overall regulation of the media and especially the question of what model to opt for between government and self-regulation; 4) concentration of ownership and lack of pluralism in media; 5) There are transparency issues arising from the fact that Kenya does not have a freedom of information law yet and 6) Training, capacity building and conditions of work.

Since liberalisation of the airwaves and changes allowing for some space, there have been concerns on media regulation. The Media Council of Kenya set up by the industry is a voluntary organisation about 20 months old and in its infancy. It has handled some complaints including one from the first lady, but it has been felt that there is need to strengthen it by ensuring that it is set up according to law. Successful modes of self regulation and disciplinary mechanisms are in force in other occupations supported by Law – Law Society of Kenya, Medics, Engineers etc., and the Media needs to carefully consider such legislation.

There is a Draft Media Council of Kenya Bill which is a good starting point in terms of the principles on self regulation without the hand of Government interfering. However, this Bill needs to be re-looked and discussed by stakeholders before a legislative drafter is called on to refine the provisions. The Bills under consideration cannot afford to be poorly drafted as that will give room for wrongful applications of the law. If there is a law that should be clear on its intentions and application it is the Media Council of Kenya Bill.

Pending Issues/Key Questions

⁴³ Some radio stations have been pulled off air-, for instance KASS FM which was shutdown for awhile during the referendum debate or the raid on the Standard Group on the authority of the minister for internal security.

- ***The overall legal environment:*** The key questions here relate to 1) the laws of defamation especially those concerned with criminal libel; 2) unfavourable judicial decision; 3) the Law of contempt of court which courts have used to shield judges; 4) laws relating to registration of Books and Newspapers which requires one to execute an onerous bond before one can publish a newspaper; 5) the Penal Code which has provisions that criminalise the publication of “alarming reports.” In the past, it has been alleged that this law has been used to punish stories that the government does not like, including raiding and dismantling printing presses.
- ***Broadcast and ICT issues:*** There are three issues here: 1) the allocation of radio frequencies and the regulation of broadcasters after licenses have been granted; 2) the role of the communications commission of Kenya and its ability and competence to regulate broadcasting in the country; 3) the new ICT policy and its potential impact on content.
- ***Regulation of media generally:*** The debate in Kenya has centred around two competing models of regulation; 1) government regulation and 2) self-regulation. The media owners prefer self-regulation and have in this connection helped set up the Media Council of Kenya. The Media Council has drafted a Bill to create a framework for self-regulation but the council fears that in the context of recent official hostility to the media if the Bill goes to parliament, it may be drastically altered to enhance government’s control of media.
- ***Concentration of ownership and pluralism in media:*** There are also competition issues in the media. The government has been keen to reduce cross-ownership but has not shown a simultaneous interest in enhancing effectiveness of the media through further legal reforms. This has raised the spectre that the concentration of ownership is being used as a proxy for invasive attacks on media effectiveness. Government needs a media policy that covers all its dimensions. The implementation of such a policy could then be staggered over the next few years.
- ***Soft Censure:*** There is a question of the Government applying soft censure to media houses e.g. putting adverts only in the Nation Newspaper and mentioning severally that the Standard Newspaper is not good.
- ***Transparency Guarantees:*** One of the more serious constraints on the operation of media in Kenya is the absence of a freedom of information (FOI) law. There are efforts, under International Commission of Jurists, to push for the enactment of such a law. Prospects are good but because it is a Private Members Bill, it ranks low in the priorities of the National Assembly. The freedom of information needs to be reinforced with provisions on whistle-blower protection
- ***Training, capacity building and conditions of work:*** In addition to legal and ownership issues there are important questions relating to the training and capacities of journalists. This is particularly evident in the coverage of technical policy issues such as the budgets and government’s financial processes generally; legal reform;

court-proceedings; environment and science issues. The coverage of the constitutional reform and of successive budgets is particularly appalling; the former being confined to regurgitating political posturing and the latter merely affirming political platitudes. This problem is compounded by insufficient investment in training and investigative journalism by media owners. In addition, conditions of work especially for the rural correspondents of the leading media houses, are particularly awful: the pay and benefits are low, and, often, they have to rely on the goodwill and financial support of the very MPs, politicians and corporate leaders they are meant to objectively cover.

Suggestions for the Future

- ***Creation of an enabling legal environment for press freedom*** to thrive through repeal of restrictive laws, amendments to others and enactment of progressive legislations. Democratic and increased space for the media needs to be consolidated in the law. An additional issue to address includes the question of enforcing transparency and openness in Governance in light of the Official Secrets Act which may be used to deter freedom of the press.
- ***Sequencing:*** In terms of sequencing it would be better if the Freedom of Information Law is enacted before the Media Bill – i.e. first open up the space and access to information before you regulate its use and dissemination
- ***Internal press freedom*** – individual journalists need to have space within their media houses to operate, labour issues, contracts, intellectual property rights etc., need to be addressed in the face of technology. Additionally, there are issues relating to editorial policies and other malpractices such as corruption at all levels reported to emanate from media houses. Consequently, there may be a need for an Ombudsman or perhaps Media Council of Kenya can play this role.
- ***Self Regulation:*** There are questions of media ethics and professionalism how these can be addressed and what is their cause – poor unregulated training, employing unqualified staff, in both print and broadcast, lack of peer review within the media industry, etc.
- ***Media development.*** It is recommended that an independent review is carried out to assess the structural constraints of the sector and identify initiatives to promote media development and freedom of the media.
- ***Programme on a general review of the laws and practices that allow official repression and concealment of public information:*** Laws that may be covered in such a programme would include: the Books and Newspapers Act; the laws of criminal libel; provisions of the Penal Code; the Official Secrets Act; the Public Order Act; the Defamation Act; City Council licensing rules and regulations; court judgements awarding huge and unjustifiable damages to public figures and the laws of contempt of court. Some of this laws made it hard, if not down-right impossible to

criticize corrupt public officials, judges and magistrates. Even when there is criticism of government conduct, newspapers usually stop short of openly naming those implicated in corruption and related crimes for fear of reprisals. Though these laws have been reviewed in different contexts a number of questions have not been tackled including

- extent to which these laws hamper the fight against corruption and bad governance and the possible inconsistencies between these laws and the new anti-corruption laws such as the anti-corruption and economic crimes act; the public officer ethics act; the audit act etc;
 - whether these laws are consistent with Kenya's international obligations both in the context of human rights and investment agreements;
 - an explanation as to how review of these laws would support on-going reforms whether these are political or economic.
- ***Training and capacity building for journalists especially in investigatory techniques and in coverage of technical policy issues:*** Though the laws identified above have serious impact on the effectiveness of the media, their deleterious impact is deepened by insufficient investment in training by media houses. Part of the problem lies in these houses stunted understanding of the complexities, legal and methodological, of researching into and reporting technical issues and challenges such as corruption. The second problem is poor workload management in media houses leading to insufficient allocation of time to stories that need detailed analysis and time commitment. The result is that journalists and editors have very little capacity, if any, to do investigatory journalism. Moreover, the headline rush and the reporting culture of media houses erode editorial interest in investigatory reports and discourages sustained attention to single issue investigations. A programme can be developed with a dual objective of 1) twinning arrangements with interested media houses on such issues and 2) building the capacities of particular journalists to undertake training in these issues.
 - ***Programme to deepen access to and increased use of ICT:*** There are three issues to deal with 1) the coherence and effectiveness of the proposed policy reforms; 2) the adequacy or otherwise of the existing regulatory environment and 3) the use of ICT as governance tools especially as relates to transparency, accountability and broadcasting.

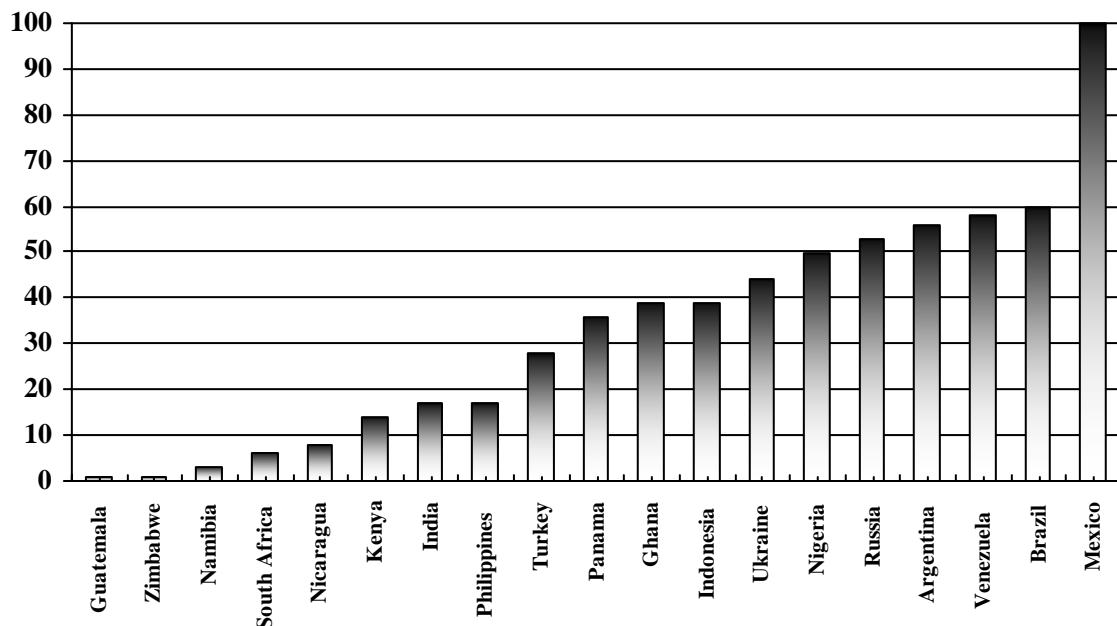
Political Campaign Financing

The repeal of section 2A of the Constitution in 1991 reintroduced multiparty politics in Kenya. This led to the formation of many political parties--over 60 political parties are registered in Kenya today (the registration requirement is provided in the *Society's Act*, Cap 108). A number of parties, though, exist just in name without any central operations office. The three dominant ones are: (i) the National Rainbow Coalition (NARC); (ii) the

Kenya African National Union party (KANU), currently running in opposition; and (ii) the Forum for Restoration of Democracy – Kenya (FORD-K). The ruling NARC is a coalition of the National Alliance Party of Kenya (NAK) and the Liberal Democratic Party (LDP). NAK itself is made up of 15 small parties.

Status. Currently, there is no specific legal framework governing political party formation, organization, functions, regulation, and funding or campaign expenditures in Kenya. The first attempt to introduce a legal framework was made in 1995 with the tabling of the *Political Parties Bill, 1995*. But citizens were against giving executive control over political parties and the bill was not passed. In 2002, another serious attempt was made with the *Political Parties Funding Bill 2001*, which was discussed but was never passed nor implemented because the then President Moi dissolved parliament—rendering the Bill invalid. This Bill (otherwise known as the Kombo Bill) provided for state funding to political parties and for the registration, management and regulation of political parties. See annex 1 for summary details of the Kombo Bill. In the absence of an explicit law it is assumed that political parties are bound and regulated by the existing electoral laws. See annex 2 for the set of electoral laws that govern elections in Kenya. In recent years, however, the debate about state funding of political parties has intensified under a global effort spearheaded by the National Democratic Institute. Annex 3 describes the efforts led by civil society on political campaign financing. The Kenya Law Reform Commission (KLRC) is currently preparing a Draft *Political Parties Bill, 2006*.

Figure 11.2 Political Party Finances, 2004



Source: Center of Public Integrity, 2004. The Political Party Finances Index includes assessments in three sub-indicators: 1) Are there regulations governing political party finances? 2) Are the regulations governing political party finances effective? and 3) Can citizens access the financial records of political parties? Best = 100.

Disclosure of funds. There is no public disclosure to account for receipts and expenditures of political parties—there are no audits done and party finance figures for the last three elections do not exist (1992, 1997, and 2002).

Sources of funds. Observers note that in the case of legislative campaigns, sources of funding range from personal savings, private financial support (including vaguely defined sponsorships) to diverted funds coming from the Constituency Development Fund (CDF) in recent years. In the case of financing party operations, income from membership appears to be small compared to income generated through private contributions, fundraiser activities conducted by party leadership, from external or foreign support, and from charges levied from parliamentary and civic nominations (the NARC parliamentary nominations attracted close to 2000 candidates for 210 parliamentary seats, charging KSh 40,000 per parliamentary nomination and KSh 10,000 per civic nomination). However, it is not known the relative weight or magnitude of these sources of funds in party financing.

Uses of funds. The closest definition of what type of activities are not permissible in party financing is found in Paragraph 6 of the Electoral Code of Conduct, Section h (see annex 5), which states that ...“all those bound by the code shall, throughout any election period have the duty to refrain from offering any inducement or reward to any person in consideration of such person either in joining any party; attending or not attending any political event; voting or not voting...” If infringed, the Code can impose several forms of penalties, including fines and partial or permanent bar of a political party from holding particular activities. Enforcing the code, however, has been a challenge. Observers believe there are cases in court dealing with these issues since before the previous elections which have not been resolved yet.

Unregulated party funding leads to corruption. The general perception is that powerful interest groups easily influence the very few actors controlling the internal dynamics of political parties in Kenya, reducing parties' responsiveness to its constituencies. This gives way to patronage and misallocation of economic opportunities and resources. Corruption then results when party support gets rewarded with government contracts (e.g., Goldenberg, Anglo-Leasing). Observers noted that recent cases of grand corruption have been related to the party in power amassing wealth to finance re-election campaigns.

Civil society involvement in political campaign reform.

Consultations with various actors (civil society, elections administration, and government officials) culminated in a party finance stakeholders' forum in August 2004. At the event, political party, civic, parliamentary and elections administration officials came together to discuss the way forward for party finance reform in Kenya. Three issues were identified as key:

- Civil society should work with political parties in charting the way forward for reform;
- Party finance reform should address a broad range of issues and not just public subsidies; and
- Reform efforts should recognize the need to strike a balance between public funding on the one hand, and overdependence on the State, government interference in parties' internal affairs and parties' alienation from their members on the other.

As the Kenya Law Review Commission was in the process of drafting new legislation on party registration and finance, government representatives and civil society agreed to share information and collaborate on reform initiatives. Another workshop was held in December 2004 where civil society pointed out to the following principal areas of concern:

- i) poor policies or the lack of state regulatory frameworks governing political party operations;
- ii) marginalization of women, youth, physically and fiscally challenged persons;
- iii) electoral malpractices and the need for electoral reform;
- iv) lack of internal party democracy; and
- v) lack of awareness/understanding of political parties' role and functions.

Challenges and issues going forward

Establishing institutions of democracy takes time and experience show there is no one solution to the issue of political campaign finance. Healthy, accountable, competitive parties and broad political choices are all anti-corruption safeguards of the future and key pillars of inclusive governance. Thus, a new regulatory framework providing the enabling environment for the establishment and emergence of political parties is needed. Procurement reforms which the Bank is supporting (e.g., e-procurement) should contribute to arresting corruption related contracting linked to political campaign financing Challenges, however, arise in the following areas:

- ***Commitment to state financing of political parties is not known.*** The draft *Political Parties Bill of 2006* contemplates state financing of political parties through a "Political Parties Fund" and governed by transparent allocation criteria (See annex 6 for the criteria). The draft bill does not specify the size of the fund. It is speculated (from insider information at the National Democratic Institute, Kenya Chapter) that the cabinet has recently rejected the bill on the grounds that there is no money in the budget to finance political parties even if the bill is passed. NDI privately shared their concern with me that the Bill will not make it in time to be effective in the upcoming elections and if it does, there would not be enough time to implement and properly capitalize the fund. In checking the 2006-07 Budget, we could not find a line item on the political party fund. Close attention to developments in this area is recommended. One word of caution: experience shows that political subsidies can be an undesirable substitute for organized grassroots and party participation to the extent that they can create incentives to undesirable activities and misuse of funds. A sound regulatory framework must be in place in any case.
- ***Need for transparency.*** The draft *Political Parties Bill of 2006* contemplates publishing the sources of party funds within three months of the end of the financial year, including the amount received from the political parties fund and its members and supporters. It specifically calls for annual audits of every political party account by the Auditor General and for the audits to be sent to Parliament and the Electoral Commission. In this regard, the Electoral Commission will prepare an annual report on the audited accounts of every political party. It is not clear, however, the extent of

commitment by the authorities. A disadvantage of this is that limits on contribution and spending may threaten civil liberties; so too, may disclosure policies to the extent that they create insecurity among regime leaders, and thus make prospective candidates objects of further repression. So far, the only initiative proposed on transparency of party finances is contained in the 2006-2007 Budget speech of June 15, 2006 in Paragraph 142:

“...To facilitate wider participation in registered parties, and promote transparency in funding political parties, I propose to make income tax deductible any contribution by an individual or enterprise up to KShs.1.0 million per annum, provided that these contributions are made through guaranteed cheques drawn in the name of the political party.”

- ***Link corruption in an election environment with poverty.*** Poverty and illiteracy motivates money changing hands and sustain patronage networks that are an obstacle for inclusive and democratic governance. In addressing this interrelationship, the Bank could help eradicate corruption in elections—this is a long term engagement action. Further international comparative research in this subject is greatly needed.
- ***Support civic/voter education campaigns.*** Open, competitive, and fair participation within a framework of legitimate, credible institutions enables citizens and groups to defend their interests, to act on issues they care about, and to hold officials accountable for their actions. Citizens must come to expect answers on tough issues rather than goods and services in exchange for their votes. The Bank should encourage civil society in carrying out civic education campaigns with the goal of curtailing the vulnerability of the voter, in partnership with NGOs and with support from the international community.
- ***Support the media.*** The media can act as a catalyst for deterring the negative use of money during party nominations and elections. The Bank should encourage the media’s role as the public’s watchdog in exposing corrupt electoral practices.
- ***Support the electoral commission through judicial reform.*** The Electoral Commission of Kenya (ECK) should be empowered to enforce its own regulations as stipulated in the election offences act and the electoral code of conduct. Quasi-judicial powers could be given to the ECK either through the constitutional review or parliamentary amendments to avoid the slow speed of court cases and petitions. In general however we need to differentiate between election offences and general criminal offences. The ECK’s process of seeking justice at the national level has been quite slow; this is partly because the ECK does not have prosecutorial powers. This has meant that the ECK cannot nullify an election and can only seek redress through courts of law. Reformulation of these laws should be geared towards empowering the ECK to have the capacity to enforce the Election Offences Act. The Bank could help enhance the institutional framework of the ECK.

Human Rights

Having been elected on the platform of democratic governance and respect for human rights, the Kenya Government has taken significant steps forward in this area. However, key international conventions have not been signed yet, such as: i) Optional Protocol on the Convention Against Torture (Not signed or ratified); ii) The Geneva Convention Relative to the Protection of Civilian Persons in Time of War- (not signed or ratified); iii) Convention on the Political Rights of Women (Not signed or ratified); iv) Protocol on the Rights of Women in Africa (Signed but not ratified); v) AU Convention on Preventing and Combating Corruption (signed December 17th- 2003, not ratified); vi) The AU Peace and Security Protocol (signed July 7th, 2003, not ratified); and vii) The Convention for the Protection of Rights of Migrant Workers-(not signed or ratified).

The Kenya National Commission on Human Rights was established by an Act of Parliament in 2002 as a watch-dog agency to protect and promote human rights and fundamental freedoms of Kenyans. The Commission is empowered to investigate human rights violations; and recommend to Parliament effective measures to promote human rights, among other things. In 2003, a presidential task force solicited views from the public and recommended that a truth commission be established to probe injustices perpetrated since 1963, but such a commission has yet to be constituted.

NARC fulfilled its promise of dealing with human rights issues by establishing the Kenya National Commission on Human Rights (KNHCR) but failed establish a Truth and Reconciliation Commission to investigate the ethnic clashes. The KNCHR has successfully pushed for a significant number of human rights initiatives including having human rights principles infused into government policy promoting accountability of public resources (it published a report on government waste through purchase of vehicles) and accountability in the electoral process (monitoring public officials using public resources in referendum rallies) and profiling corruption on human rights issues. Since its inception, the Commission has received over 1,400 complaints of human rights abuses. However, the KNHCR has of recent times been fighting with the Ministry of Justice and Constitutional Affairs and the Kenya Anti-Corruption Commission over investigations into its financial expenditures following a report by the Controller and Auditor General.

Report card on human rights practices in Kenya – some perspectives of Human Rights advocates and groups. The government has in many areas respected the human rights of its citizens or attempted to institute reforms to address deficiencies. It has consolidated and extended some of the human rights reforms it had taken over the last couple of years. Politically motivated arrests or disappearances have stopped in recent years and prison visits by human rights groups increased. However, serious problems remain, particularly with regard to abuses by the police service.

Police and Prisons: Although the government made some improvements in prison conditions, conditions over there are still bad. Most prisons, especially the men's

facilities, are severely overcrowded. To decrease congestion, the government began sentencing petty offenders to community service, imposing fines rather than confinement, and offering probation, but the implementation of this program has been too slow and weak to effectively address overcrowding. Prison overcrowding was also due to a backlog of cases in the judicial system.

The law prohibits arrest or detention without a court order unless there is reasonable suspicion of a suspect having committed, or being about to commit, a criminal offense under the law; however, police occasionally arrest and detain citizens arbitrarily. The government took some steps in 2005 to curb abuses of authority by police. The government arrested and charged some police officers for various offenses, including corruption. To reduce incentives for corruption, the government provided the police with a 115% increase in salaries.

Women: Although all forms of violence against women are prohibited, domestic violence against women is a serious and widespread problem. Police generally would not investigate in cases of domestic violence. The August 2004 Kenya Demographic and Health Survey revealed that more than half of women had experienced domestic violence after the age of 15 years. Wife beating was prevalent and largely condoned by much of society. The government has created a gender office in the Ministry of Trade and Industry and there is a gender department in the Ministry of Gender, Sports, Culture, and Social Services.

Children: The government is generally committed to the rights and welfare of children and has enacted legislation and developed policies to promote education and protect children's rights. However, the government lacks the resources to implement its policies fully.

Trafficking in children is a problem, as is child prostitution. Child prostitution has grown considerably due both to economic contraction and to the increase in the number of children orphaned because of the spread of HIV/AIDS. The government has provided programs to place street children in shelters and assisted NGOs in providing education, skills training, counseling, legal advice, and shelter for girls abused by their employers. In 2003 the government provided an employment program for orphans and abandoned youth that included training and subsidized employment, but its effectiveness has been limited.

Protection of Refugees: The law does not provide for the granting of asylum or refugee status in accordance with the 1951 UN Convention relating to the Status of Refugees and its 1967 protocol, and the government has not established a legal system for providing protection to refugees. In practice the government has generally provided protection against the return of persons to a country where they feared persecution. The government also voluntarily hosted approximately 240 thousand refugees from virtually all the neighboring countries and beyond, predominantly from Somalia, Sudan, Ethiopia and Eritrea, in cooperation with the UN High Commissioner for Refugees (UNHCR), and recognizes UNHCR refugee status determinations. A Department of Refugees has been

recently created in the Ministry of Immigration specifically to deal with the problem of refugees and a Refugees Bill has been drafted to provide the recognition protection and management of refugees in Kenya and covers all the legal provisions under the 1951 convention relating to the status of refugees

The government requires that all refugees reside at designated UNHCR camps, most of which were located near the Somalian and Sudanese borders, unless granted permission to live elsewhere in the country. However, security at refugee camps remains a problem, particularly at the Kakuma camp where rape was among the most frequently reported crimes, some perpetrated by members of the local community. To reduce incidences of sexual abuse in these camps, 15 relief agencies have begun implementing the provisions of a November 2004 document, entitled *The Kenya Code of Conduct for Humanitarian Workers in the Kenya Refugee Program*. Refugees are often mistreated and abused by citizens and by residents of different refugee camps because of ethnic and religious differences. . Amnesty International reports that refugees are subject to constant police harassment often for the purpose of obtaining bribes.

Impact of Kenya's "anti-terrorism" operations on human rights

Twelve international conventions related to "terrorism" have been adopted within the UN context and Kenya is a party to all. Kenya is also party to all major international and regional human rights treaties, including the *International Covenant on Civil and Political Rights* (ICCPR), and *Convention against Torture and Other Cruel, Inhuman or Degrading the Treatment or Punishment*, and the *African Charter on Human and Peoples' Rights*. However, several Human Rights groups have expressed concerns that measures taken to counter "terrorism" violate the rights guaranteed by these and other instruments and by customary international human rights law.

As part of the response to "terrorism" in Kenya, extensive arrests were carried out throughout most of 2003 and 2004 in coastal towns, as well as in Nairobi. Arrests have continued, though to a lesser extent, throughout 2004 and to date. Suspects are detained without charge, in many cases incommunicado and in undisclosed locations. They are often denied access to lawyers and some have stated that they were tortured or ill-treated. Family members of suspects are sometimes also detained and harassed.

Human Rights advocates have expressed concerns that the lack of information and secrecy that surrounded detentions could have prevented detainees from being able to effectively challenge the lawfulness of their detention and to be released if that detention were determined to be unlawful, this being another important right under international law. There is also concern that the rights of refugees and asylum-seekers were violated in the context of the "counter-terrorism" actions taken by Kenyan government.

Women's rights

Kenya has still a serious imbalance in gender representation at various levels of our government and society. Although, specific targets have been set up in certain institutions, such as the Ministry of Education that aims at 30% of top managers in universities being women by 2010, the Government needs to design and adopt

expeditiously a comprehensive affirmative action policy to address the structural challenges and imbalances faced by women at diverse levels in the political, civil, economic, social and cultural spheres. Measures identified to counter these problems should filter down to all districts and local authorities. Violence against women is common. Women are more likely than men to be poor, and female headed households are particularly vulnerable. Women also are disadvantaged by inheritance and divorce practices. Although women can legally inherit land in rural areas, traditional customs essentially support a patrilineal mode of inheritance and property distribution. If a married woman is divorced most of the assets, which were initially jointly owned, revert to the husband's possession.

Gender inequalities are also substantial in formal business, although women are very active in the informal sector. Surveys have shown that nearly half of Kenya's micro and small entrepreneurs are women. However, women tend to be concentrated in traditional activities, such as brewing, knitting, dressmaking, basketry and retail trading, for which returns are low. Women microentrepreneurs tend to have lower levels of education and lower incomes than their male counterparts. Levels of education differ widely by gender. Although the number of boys and girls at primary school is roughly equal, boys substantially outnumber girls in secondary and higher education. Although women remain grossly under-represented in national politics, there are signs of some improvement in women's political empowerment. There are still only six female MPs, but this is a record number. The NARC government has appointed three female cabinet ministers, a better performance than the previous regime. The National Gender and Development Commission has been given the mandate to develop and act on an overall affirmative action program.

Violence against women: Violence against women is widespread, despite efforts to increase public awareness by the authorities and by civil society. Women's rights groups have attributed the low rate of convictions in sexual offences cases to a lack of trained police officers to carry out investigations, difficulties in the preservation of forensic evidence in rape cases, and a lack of lawyers with specialized training to prosecute such cases. The authorities have announced several measures to address violence against women, including a special unit in the office of the Director of Public Prosecutions to handle sexual offences and a women-only police station to deal exclusively with rape, domestic violence and child abuse cases.

Women's property rights violations: A complex mix of factors underlies women's property rights violations in Kenya, particularly discriminatory laws and customs. The current situation reflects Kenya's traditional, patriarchal property systems and the failure of Kenya's government to combat discrimination against women. Women in Kenya are denied equal property rights, putting them at greater risk of poverty, disease (including HIV/AIDS), violence, and homelessness. A woman's access to property usually hinges on her relationship to a man, be it her husband, father, son, or other male relative.

Recommendations

The Country Review Report of the African Peer Review Mechanism as well as some human rights groups such as the Human Rights Watch and Amnesty International have

made several recommendations for the GoK to consider to improve the human rights situation in Kenya and a couple of them have been summarized below:

- Government to take immediate legal and administrative steps to remove all forms of discrimination prevailing in Kenya
- Government to check human rights transgressions of law enforcement officers. Citizens should be sensitized about their rights to seek redress against such abuses and law enforcement agencies to undertake human rights training program for their staff
- Economic, social and cultural rights are crucial to individual well-being and overall national development. The authorities are encouraged to accord them the necessary recognition and relevance.
- The Law Reform Commission, together with the Ministry of Justice and Constitutional Affairs amend the current Inheritance laws to all men and women equal rights to inheritance.
- Kenyan Authorities to develop a time-bound national action plan to combat child trafficking and other forms of child labor. In addition, border security, training for law enforcement officials and anti-trafficking awareness campaigns be increased.
- Consumers' protection associations to be resourced so that they can investigate and advocate for the rights of consumers.
- GoK to enforce child labor laws and ensure those children's rights are protected.
- The Ministry of Labor to investigate the infringement of labor laws in EPZs and severely punishes all breaches of human rights by these entities.
- Ensure that no incommunicado detentions are carried out. Anyone arrested or detained should be given prompt access to legal counsel, relatives and medical care if needed. Anyone arrested or detained should only be held in recognised places of detention.
- All arrested or detained persons should be brought promptly before a judge. They should have access to courts so that they may challenge the lawfulness of their detention. There should be periodic review of the necessity for and lawfulness of continuing the detention by a judicial authority.
- Investigate all crimes under international law and other human rights abuses and, where there is sufficient admissible evidence, prosecute the suspect.
- Ensure that all prisoners and detainees are treated humanely in accordance with international human rights law and standards, whether in police cells or in prisons.
- Establish promptly an independent, efficient and external Police Complaint/Oversight Mechanism in order to improve the effectiveness of the police and for the population to regain confidence in the police.
- Ensure that the rights to a fair trial of all persons investigated or prosecuted for alleged "terrorist" activities, as guaranteed by Kenyan law and Kenya's international obligations, are fully respected.
- Send out a strong message to all law enforcement officials that any action that does not adhere to the rule of law and respect for human rights will be dealt with severely, including prosecution if so required.

- Ensure the development of high-quality preliminary investigations, including forensic investigations in order to avoid unlawful arrests, detentions and holding people without charge or trial in violation of their human rights.
- Train police officers at all levels in human rights law in order to improve the quality and effectiveness of the policing and to gain the respect and confidence of the population.
- Enact and enforce protections against both direct and de facto discrimination in access to education. GoK should review relevant legislation and judicial decisions to ensure that the right of AIDS-affected children to non-discrimination in access to education and other social benefits is explicitly recognized in national law.
- Fulfill the right to free primary education. GoK should ensure that no child is ever denied his or her right to education because of school fees or related costs of education.

Civil Society

Kenya's civil society has always been vibrant despite the country's post-independence legacy of autocratic governments. Compared to other countries with similar non-democratic governments, civil society has always played a part in political and societal changes in Kenya. The Country Review Report (CRR) of the African Peer Review Mechanism (APRM) attests to this by describing the civil society in Kenya as vibrant and diverse. Their impact on the political process has been more evident over the last decade. There is no doubt that the civil society sector in Kenya played a significant role in the clamor for multi-party democracy in the early 1990s. Coalitions of professional groups like the Law Society of Kenya, religious groups like NCKK and the Catholic church, student unions, NGOs and a number of lobby groups pushed for political pluralism and democratization. The success of their activities was realized in 1991 when Kenya became a multi-party democracy.

In 2002, civil society groups helped organize a powerful civil society program of mass civic education, mobilization of support and active lobbying that catapulted the National Rainbow Coalition (NARC) to victory in the December 2002 general elections over the incumbent regime. However, in present times, the euphoria of the return to multi-party democracy has worn off and there are increasing concerns, whether real or perceived that the sector is losing its strength. The Kenyan public and civil society itself observe that during the transition, the sector lost some of its leaders to political parties and the state bureaucracy. It is claimed that there has also been a usurpation of its agenda by the government and many civil society organizations are thus having trouble defining a role and a mandate for themselves in relation to the NARC administration. Given the important role civil society plays in giving voice to citizens as well as keeping the government in line, it is obvious that no matter who is to blame for the present state of civil society, both sides will need to reengage in a more positive way. The important role of civil society in the governance of Kenya is made clearer by the fact that a number of the recommendations made in the CRR of the APRM calls for the government and civil society to jointly perform several tasks, especially in civic education for the citizenry.

Civil Society perspective about the challenges in GoK and Civil Society relations

Presently civil society has a very dim view of its relationship with the government and they view every action of the government with suspicion. It has described its participation in decision-making as being at a very elementary level. It is their assertion that the government only consults it to rubberstamp what it has already decided on. Even when there are interaction between CSOs and government they fail to translate into policy. They therefore conclude that GoK has shown no commitment to Civil Society participation in the governance of Kenya.

Among the laws which regulate civil society in Kenya is the Non-Government Organizations Coordination Act of 1990. The Act sets up an NGO Council as well as a NGO Board (which is the government arm in charge of regulating NGOs). Civil Society Organizations (CSOs) have indicated that this Act was passed at a time when Kenya did not have a vibrant and active CSOs. In addition, it was prepared without a requisite policy in place which partly explains the inherent weaknesses in the legislation. Some of the challenges the CSOs point to, is the lack of clear delineation of roles and responsibilities of the NGO Board and NGO Council. The recent Sessional Paper No. 1 of 2006 on Non-Governmental Organizations issued by Government is partly designed to address the gap in the legislation. The Executive Summary of the Sessional Paper indicates that challenges in the NGO sector resulted from internal wrangles, misappropriation of resources and lack of accountability /transparency at the NGO Council. Therefore, the regulation of CSOs is necessary. On the other hand, CSOs point out that the requirement in the paper to disclose sources and purposes of funds will deter them from working on projects that involve their playing a watch dog role over government activities. Examples they provide are potential projects involving whistle blowing on corruption in government projects. These competing interests need to be addressed by both the Government and CSOs.

According to members of CSOs, part of President Kibaki's re-election strategy is to weaken, if not altogether kill the once powerful civil society. In an elaborate strategy targeting the money hitherto available to democracy and human rights, Most of this basket donor funding has gone to the State as opposed to NGO activities through the GJLOS Program. There are discussions to set up a similar facility (basket fund) to cater for NGO activities. This has been done through the GJLOS project. Its hitherto Sh3 billion-plus a year budget has been cut down by 83 per cent - to Sh500 million, and even then, this money is yet to be disbursed to them to carry out their human rights and democracy work. Approval is required from the Ministry of Finance before this money is released and so far the Government has been reluctant to approve this funding, a situation that has seen a number of NGOs fold up.

Civil Society further alleges that the Government has also been raiding NGOs, incorporating key civil society personalities into Government, thereby compromising NGOs or depleting their human resource base. However the Government says it is only trying to integrate with civil society so that they can work together. The result is that Kenya's civil society is unable to meaningfully blow the whistle on the Government's

human rights abuses nor can it mobilize mass action to push through desired change as happened in 1991, 1997 and 2002.

The civil society sector claims that GoK has also resorted to actions that can only be deemed as hostile to the existence of Civil Society. Examples of some of the hostile government actions:

- Presently, KACC is preparing abuse of office charges against Mr. Maina Kiai, the KNCHR chairman, in a move likely to be interpreted as aimed at harassing the human rights campaigner into silence.
- Systematic harassment of civil society organizations, like the Kenya Land Alliance, Catholic Diocese of Kitale, Osiligi, Waso Trust and MPIDO, that have attempted to mobilize the victims of historical injustices in land to document the said injustices and seek redress thereto;
- Violent disruptions of lawful activities of Kenya Land Alliance, including the launch of its policy briefs in Mombasa in October 2004;
- The violent disruption by the Kenya Police of a peaceful procession on WTO issues in Ukunda on 3rd March 2005 where several civil society members were arrested and later arraigned in court;
- The violent disruption by the Kenya Police of the peaceful processions by the Yellow Movement demanding for enactment of a new Constitution on 15th March 2005;
- The disruption of the Kenya National Human Rights Commission processions and subsequent arrest of 5 civil society members demanding for the repeal of the Official Secrets Act and enactment of a right to information law on 18th March 2005;
- The current mobilization of the Kenya Revenue Authority to inspect the books of Kenya Land Alliance in spite of the fact that the organization has dutifully complied with tax returns requirements, which we consider to be an act of intimidation.

Challenges within the Civil Society sector – public perception

Despite the rhetoric within civil society about the government being the source of their woes, the civil society is well aware the fact that most of its problems are self-inflicted. The sector acknowledges that it is undergoing a post transition crisis and it is a dim season as civil society groups, particularly governance and advocacy organizations show a fractured and disjointed response to fundamental constitutional issues. There seems to be very little dialogue and collaboration within the civil society sector in the country.

The challenge of adaptation on the part of civil society and developing the structures that operate around it, staying the course of pro-people mediation has been a great problem in the country. As times have changed, civil society has not evolved new strategies and techniques for achieving genuine social and political transformation. They have abdicated their role in facilitating dialogue for understanding and transforming the state and its institutions. To continue playing their rightful role in the post-transition period, civil

society organizations must regain their autonomy, redefine their relationship with the state, broaden the base of their memberships and create strategic synergies to push forward the reform agenda but also to make government accountable to the people of Kenya. In this sense, the transparency agenda is crucial if civil society is to play a meaningful role in demanding governance reforms, participating in policy dialogue to ensure public policies and institutions became more responsive to the needs of the majority of the population.

CHAPTER 12: CONCLUSIONS

[TO BE FINALIZED AT A LATER STAGE- LIST OF RECOMMENDATIONS MADE ALL THROUGHOUT THE REPORT IS INCLUDING- PENDING INTEGRATION WITH THE GAP MATRIX]

Transparency Reforms

One important thread throughout this report, which is of paramount importance for effectively enhancing checks and balances on the executive and thus on overall governance, refers to transparency reforms and making information flows more efficient. A definition of transparency is the release of information by institutions that is relevant to evaluating those institutions. Because transparency is a tool to facilitate the evaluation of public institutions, the information provided needs to account for their performance. At the same time, the public ought to have access to the information provided and use it to hold institutions accountable.

The potential benefits of transparency are many. It can improve investment climate and performance in financial markets. A more transparent institutional environment can contribute to increase the rate of return of investments in many ways. When policies and administrative procedures that guide investment decisions are clear and transparent, uncertainty and business costs are lower, leading to more efficient investment decisions. Furthermore, transparency in the public sector can also be a direct mechanism to promote competition. When the process to allocate public contracts is transparent, greater competition among suppliers results in better quality of the services and goods offered. Transparency is also associated with other governance indicators such as control of corruption and government effectiveness.

Transparency can also reinforce the independence and integrity of financial institutions, promotes the public debate and facilitates early identification of the weaknesses and strengths of policies. Rightly implemented, it can provide an important guard against abuses, mismanagement and corruption. Legislatures, the media and civil society are better able to hold the executive to account when they have information on its policies, practices and expenditures. Transparency is also associated with better economic and human development indicators. Increase transparency may also increase trust in government and commitment to policy trade-offs enhancing social cohesion. For instance, if the public can better understand what their government is doing and why, they may have more confidence in that government developing citizen trust in democratic institutions.

Uganda's information campaign⁴⁴ in schools illustrates the impact of transparency and public access to information to reduce corruption. In the late 1990s, the Ugandan government initiated a newspaper campaign to boost schools' and parents' ability to

⁴⁴ Reinikka and Svensson, 2003

monitor officials' handling of a large school-grant program and reduce corruption . The results of the campaign were striking: capture was reduced from 80 per cent in 1995 to less than 20 per cent in 2001. The provision of information empowered citizens to demand certain standards and monitor and challenge abuses by public officials. The more exposed were teachers and the community to the information campaign, the greater the reduction in the capture.

Transparency reforms, while they often require some political capital and leadership, generally are not as costly as other institutional reforms in terms of resources or capacity. Reforms to increase the freedom of the press, disclosure of contributions to political parties, financial disclosure programs for public officials, the publication of public tenders or other information relevant on internet are all transparency reforms that are not resource-demanding. In fact, once the benefit side is factored in, other transparency reforms such as e-procurement or control systems to prevent corruption are likely to be huge net savers of resources. Apart from the obvious direct and quantifiable benefits of transparency such as cost reductions in public procurement, other indirect benefits include prevention of bankruptcies, savings due to prevention of corruption, reduction in racial and gender discrimination, reduction in preventable hospital errors or other social benefits.

Governments around the world are increasingly adopting Freedom of Information laws and making more information about their activities available. Access to government records and information is an essential requirement for enhancing transparency. And it is important that the right to access information is guaranteed by law. Even though ministers and officials may recognize the importance of transparency, the political and bureaucratic pressures to control information can be irresistible. Merely the act of adopting a law can limit certain abuses and can make people aware of their rights. It is also a way of signaling government's commitment to transparency and it can contribute to enhance citizen's trust in their institutions. In Mexico, the Access to Information law has been a key element of the ongoing democratic transition.

The GoK initiative of drafting legislation to access information is a significant step forward in improving the governance framework in the country and an indication of its commitment to the new agenda. It is important to fast-track the enactment of the law as it would have an enormous impact on enhancing transparency in all the areas of the public administration reviewed in this report, such as procurement, financial management, service delivery, and the investment climate. International experience suggests, however, that the enactment of a FOI law is only the beginning. For it to be of any use, it must be implemented and public institutions must change their internal cultures. The mere existence of a law does not mean that access to information is possible or that the information provided is reliable and relevant. Countries who have adopted a FOI law differ significantly on the extent and quality of the information they provide to their citizens and the private sector. Kenya would have to continue with its commitment towards transparency.

Despite their potential benefits, transparency reforms have been insufficiently appreciated and integrated into institutional reform programs. Transparency reforms can be very effective in altering the incentives of political leaders to serve a broad range of social groups. Institutional reform is a cumulative process where it is key to identify entry points for reform which even though modest in themselves, have the potential to catalyze further changes down the road. Again, given their effectiveness in mobilizing social support, and given that they are not necessarily intensive in resources; transparency programs might be politically more feasible and constitute invaluable entry-points to other institutional reforms.

In the current political context of Kenya, 15 months away from a general election, it is unlikely that deep and comprehensive political reforms will take place. This suggests a more realistic path forward, prioritizing and focusing on reform measures that do not always require new legislation or policy documents that need legislative amendment. A focus on a core package of reforms that could bring about high payoffs and are feasible within the current political realities, where Kenya's record is lagging (see evidence in the empirical chapter 3) points to transparency reforms as one such pillar. A focus on transparency would not preclude also emphasizing parallel measures that are much needed in other areas, such as in the judiciary, for instance – some feasible in the short term, others for the medium term.

At the risk of reiterating some of the specific suggestions on transparency-related reforms highlighted in various chapters in this report, these are consolidated here, given their importance not merely in isolation of each other. For the next stage of governance reforms for Kenya, transparency is suggested as a key common theme to make a concerted effort. In this context, particular incentives and innovations to promote transparency reforms would be valuable, such as awarding and publicizing the set of best reforming institutions in terms of a transparency scorecard consistent with a governance and transparency reform program agenda.

Suggested Transparency Reforms-

Access to Information. The initiative of the GoK of preparing access to information legislation is a crucial step towards improving transparency in all areas of the public administration. We encourage the GoK to:

- Fast-track development and passage of the FOI Bill, with provisions on whistleblower protection, as a priority issue to be accomplished this calendar year.
- Develop a policy on records management and as part of the e-government program in coordination with the ongoing administrative simplification effort, digitization of application forms and other documents to be available on official websites.

Transparency of Public Institutions (including Central Administration, Judiciary, Police, Line Ministries and local governments)

- Publication on the official website of Service Charters

- Publication on the official website of performance contracts of Ministers, permanent secretaries, heads of departments and senior officers in local governments and results reporting institutionalized and disseminated widely.
- Publish the salary structure under the new Public Service Pay policy and other HR policies on official website
- Enabling public access to the declarations of assets of Public Officers

Transparency of the Judiciary

- To enhance transparency of the Judiciary: i) Open hearings; iii) publication of judgments and courts statements and iii) use of information and communications technology for case management and monitor progress.

Transparency of Parliament

- Publish reports of PAC and PIC and other Commissions on the official website and follow up reports on their recommendations.
- Publish voting results and performance-related information of Parliament.

Transparency of Political Finance

- Fast-track the passing of the *Political Parties Bill of 2006*, which contemplates publishing party funding sources (including from private contributions) and an annual audit of party accounts.

Transparency in policy-making- Engaging stakeholders

- Provide a forum for citizens' participation in government activities and promote a national dialogue on key reforms to engage different stakeholders
- Publish implementation timetables of proposed reforms with periodic reports of progress/lessons learned and seek feedback from citizens and private sector.
- To mobilize all Kenyan stakeholders in the fight against corruption, a Public Complaints Unit handling mechanism is put in place to report A-C cases and a communication campaign to raise awareness and sensitize public on the use of complaint channels.
- Publish governance and consumer surveys– report cards, score cards, diagnostic surveys on corruption, etc- to be conducted as part of GoK Anticorruption Plan and organize public forums to discuss results and implications.

Transparency of external controls and audit

- Bring all the audit reports to date in compliance with The Public Audit Act 2003 and publish them on the official website.
- The National Audit Office to develop audit issues' post-implementation review process and results of such reviews communicated to the PAC and published. Publish internal audit reports.

Fiscal and revenue transparency

- Expand fiscal data to cover general government, including extra-budgetary funds and operations of Fund Accounts and Semi-autonomous government agencies. Publication of fiscal data mandatory, within specified timeframes/ modalities.
- Budget documentation, reports from Parliamentary Committees (PAC and PIC) and audit reports could be published and posted on the official website together with a tracking system to monitor implementation of recommendations.
- Establish a consultation process on policy formulation, planning and budgeting to engage external stakeholders more actively in the budget process early on.
- Prepare an annual tax expenditure budget listing tax concessions and the estimated revenue loss from each concession. Incorporate remaining exemptions and publish a list with all exceptions to remove administrative discretion.

Inject sunshine principles in bidding and procurement contracts

- All Ministries, Departments and Agencies publish the information on contracts required by law on a Government website (ie. amount of contracts, winning bidders, procurement opportunities, as well as decisions of the Procurement Appeals Board on concluded cases) and information regarding bidders' and contractors' performance.
- Prepare procurement manuals and publish them on the official website.
- Publish list of pre-qualified suppliers.

Financial Sector Transparency

- Operationalize the financial management information systems (IFMIS), ensure full operationalization of the payroll database and its integration with the IFMIS.
- Enact new Statistics Bill establishing the CBS as autonomous agency with broad responsibilities for developing and coordinating the National Statistical System.
- Delineate and assign clearly the statistical responsibilities of the CBS, the MOF, and the CBK and allocate sufficient resources to data-producing agencies to support implementation of their work program.
- Make more effective use of the Internet to disseminate data and metadata and seek feedback from users regularly to better meet their needs.

Transparency in the Real Sectors

- Code of Conducts developed and published. Communication campaigns rolled out.
- Develop disclosure policy and implementing arrangements to manage the flow of information, for instance in the Health sector.
- *Sector-wide service delivery charters* completed for all sectors and published. Monitor compliance and customer satisfaction periodically with Citizen Report Cards and publish progress reports on the official website.

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The Government Action Plan (GAP) on Governance: An annotated matrix with suggestions

GOVERNANCE ACTION PLAN

JULY 2006 - JUNE 2007

The action plan identifies specific time-bound actions that the country plans to implement during July 2006-June 2007. The objectives are:

1. To encourage and facilitate broad-based public participation and vigilance in the fight against corruption.
2. To promote and support professionalism, efficiency, transparency and accountability in the public service.
3. To establish a sound legislative platform on which to anchor the war on corruption.
4. To enforce existing anti-corruption legislation.
5. To identify and seal corruption loopholes through public sector management controls, implementation of macroeconomic and structural reforms and privatization, inter alia.
6. To conduct public awareness and education campaigns.
7. To facilitate timely and robust assessment of overall actions and results.
8. To embrace all necessary stakeholders in the fight against corruption

The Government of Kenya continues, as a top priority in its agenda, with its policy of Zero Tolerance in the war against corruption. Already, much has been done and achieved as against the indicators set out above in 1-6. However, more remains to be done.

The war against corruption in Kenya will succeed only with support from and active participation of all stakeholders. A National Anti-Corruption Plan is the rubric within which the participation and contribution of all sectors of Kenyan society, and all stakeholders, will be channeled to ensure that there is synergy countrywide. This Governance Action Plan (2006-2007) set out priority, selective intervention initiatives for the next 12 months towards achieving the overall goal of a corruption-free Kenyan society.

The key interventions are in the following areas: (a) Transparency and Public Access to Government Information; (b) Public Awareness and Participation in Development Planning, Results and Anti-corruption; (c) Accountability and Integrity of Ministers and other Public Officers; (d) Judicial and Promote Integrity and Accountability in the Judiciary and Along the Judicial Chain; (e) Public Financial Management Improvements; (f) Governance Improvements in High Priority Sectoral Ministries and Institutions; (g) the Legal Platform; (h) Investigate Economic Crimes, Recover Assets, and Strengthen Prosecutorial Infrastructure; (i) Scaling Down the Role of the Public Sector and Bureaucracy; (j) Financial Sector Contribution to Anti-corruption; and (k) Measurement of Results and Overall Progress.

We have also suggested empirical monitoring measurements (EMM) as additional results indicators.

World Bank Governance Mission's additions to GoK's Governance Action Plan (July 2006-June 2007)

1. Notes explaining new additions to the GAP

- a. Some Actions Already Taken have been added to the "Mid-October 2006 Status/Comments column
- b. Additional table on pages 39 and 40 showing actions from the 2005/2006 GAP with no clear evidence of completion or status and not carried over into the 2006/2007 GAP
- c. Additional table on page 41 showing action from the 2005/2006 GAP not carried over into the 2006/2007 GAP because they have been completed

2. Color coded explanation of World Bank Governance Mission's additions

Black	Original text
Blue	World Bank Governance Mission's comments (last column)
Red	World Bank Governance Mission's comments identifying pending actions carried over from the 2005/2006 action plan
Green	World Bank Governance Mission's suggested new actions/critical milestones
Brown	World Bank Governance Mission's suggested results indicators

THE GOVERNANCE ACTION PLAN

	Action to be Taken	Lead Agency Responsibility	Implementation Table (Month/Yr)	Critical Milestones	Results Indicator	Mid-October 2006 Status/Comments WBGW comments
A. Facilitate Transparency and Public Access to Government Information					EMM: Transparency Indicators by the World Bank Institute	
1	Codify public access to information in general held by the Government	Ministry of Information & Communications (MOIC)	September 2006 June 2007 – almost a year away for such an important reform. December 2006	A stakeholders meeting to discuss further the Freedom of Information Bill Freedom of Information Bill submitted to parliament. Begin digitizing Government records Plan to strengthen PCO	Draft Bill agreed upon with key stakeholders, incl. Parliamentary Committee. FOI Bill submitted to Parliament, discussed and approved. Policy on records management established. Digitalization of government forms and publication on the web. Begin digitalizing records in key selected institutions. EMM: PFM performance indicator: Public access to Key fiscal information,	After consultation with key stakeholders in 2005, and posting of the Ministry's website for public review, the draft Bill is being revised. Further dialogues with stakeholders are necessary. Public Communications Office (PCO) created It is important for the GoK to have a discussion with Professor Anyang Nyongo who has sent notice of sponsoring an FOI Bill in Parliament. There are currently two FOI drafts Bills which propose important sets of reforms. Rather than delaying the process by having two Bills, some collaboration would help. Some collaboration between the Parliamentary Committee on Law and Administration of Justice would help.

	Action to be Taken	Lead Agency Responsibility	Implementation Table (Month/Yr)	Critical Milestones	Results Indicator	Mid-October 2006 Status/Comments WBGM comments
2	Establish legal framework for media operations and self-regulation	MOIC	Date? April 2007	Media Policy finalized after extensive consultation with all stakeholders. Media Bill submitted to Parliament Independent media review for media freedom and media development carried out. Stakeholders participate in the finalization of draft Media Council Bill and Bill submitted to Parliament	Setting up of a Working Group with key stakeholders and workshops organized to discuss the key issues in the policy before it is finalized. Media Bill submitted to Parliament, discussed and approved. EMM: Press Freedom Indices from Freedom House and reporters without Borders	A highly participatory media study, overseen by a broad alliance of stakeholders (representatives of the industry, consumers, government and development partners would be a useful basis for investigating key issues and generating options for the future development. Media policy and bill are posted on the Government's website for public comment. Discussions with Kenyan stakeholders are also taking place. Since 2002, Kenya has seen an explosion of media outlets-which now include 4 daily newspapers, 4 weeklies, 10 television stations, and 35 operational radio stations (one of which has 18 vernacular outlets covering most of the country) Government to provide an enabling environment for free press, repeal anti-defamation laws and ensure that state-owned media operate professionally and are independent. Additionally, the Government should focus on broadcast, regulation of Media and ICT issues. For example: 1) the allocation of radio frequencies and the regulation of broadcasters after licenses have been granted; 2) the role of the Communications Commission of Kenya and its ability and competence to regulate broadcasting in the country; 3) the new ICT policy and its potential impact on content and 4) concentration of ownership and pluralism in media
3	Accelerate implementation of a more coordinated and prioritized E-government Initiative, with public access to procurement as one of the highest near term priority. New	Ministry of Finance (MOF), MOIC	June 2007	Establish an interactive website for Public Procurement Oversight Authority. All Ministries, Departments and Agencies to publish the	Publication at the website the opportunities to supply goods and services to public sector and public procurement awards above a certain threshold value. EMM: Global E-government	In 2004 the Government prepared an e-government strategy. In 2005, a new Procurement and Public Disposal law was enacted The GoK can also enforce blacklisting of companies found to be guilty of some procurement-related issues. Such a provision exists in the current procurement law, but the mechanism to report and enforce this provision has not been

	Action to be Taken	Lead Agency Responsibility	Implementation Table (Month/Yr)	Critical Milestones	Results Indicator	Mid-October 2006 Status/Comments WBGW comments
	PPOA should be operational (E.10) before this action.			information on contracts required by law on a Government website, including names of contractors, decisions of the Procurement Appeals Board on concluded cases, and information regarding bidders' and contractors' performance Establish mechanism to report and enforce blacklisting provisions.	Index by Brown University's Center for Public Policy Training program for public officials and private sector on e-procurement. Blacklisting mechanism operational.	established by government. May also be important to inject sunshine principles in bidding and procurement contracts - such as placing bids on the web; providing bidders' and contractors' performance information on the web for scrutiny by the public and the media.
4	Launch comprehensive wireless-based public information hubs in districts and constituencies, with public access to government sites a high priority	MOIC, Ministry of Local Government (MOL) , MOF	March 2007	Number or percentage of District Information and Documentation Centers that are operational (internet point of presence).	Target % of district Information centers to be established.	To build on UNDP-supported pilot program that was launched in 8 districts in 2004-- Bondo, Bungoma, Garissa, Kilifi, Meru South, Muranga, Suba and Turkana covering 7 provinces of Kenya A survey could be carried out in the pilots to find out what type of information is more demanded, by which social groups and the experience so far in obtaining it. This would be very helpful to inform the FOI implementation strategy.
5	Enable the public access to the declarations of assets made by Public Officers. This action has been	Attorney General's (AG) Office, MOJCA	April 2007	Amendments to <i>The Anti-Corruption and Economic Crimes Act 2003</i> and to <i>The Public Officer Ethics Act 2003</i>	Amendments to both Acts made.	The proposed amendments are contained in the Statute Law (Miscellaneous Amendments) Bill, 2006 which has been published and is awaiting debate in the National Assembly Mode of making declarations public should be stated (Website?). Once approved, a communications campaign to

	Action to be Taken	Lead Agency Responsibility	Implementation Table (Month/Yr)	Critical Milestones	Results Indicator	Mid-October 2006 Status/Comments WBGW comments
	carried over from the 2005 Action Plan. The amendment bill was to have been submitted to parliament by April 2005. It is awaiting debate in the National Assembly					be carried out on access to declaration procedures. This should be seen as part of the overall new framework of transparency in Government. It makes the case for an FOI Bill and an abolition of the current Officials Secrets Act. Even if declarations are not public, enforcement of existing legislation and capacity of AG's office and KACC to verify content should continue (see C1). Voluntary disclosure could be encouraged (as in Mexico).
6	Provide for regulation, disclosure, expenditure limits and state subsidies financing of political parties. This action has been carried over from the 2005 Action Plan. The Political Parties Bill was to have been submitted to the National Assembly by December 2005 but it is now to be done by December 2006	AG, MOJCA	December 2006	Submit the Political Parties Financing Bill to the National Assembly.	As per original GoK indicator EMM: annual ratings of extent of illegal donations to political parties from the World Economic Forum's Global Competitiveness Survey	Regulations should make provision for public access to the financial records of political parties. One key issue that needs to be very clear in all these regulations is what the penalties for transgressions are. If this is not made explicit, any transgressions would lead to unnecessary litigation when sanctions are taken. Important to also draw on lessons of experience in countries with such legislations in place. Additionally, the key issue to success of such regulations is for the public to know about them. Consequently, some public announcements would be helpful as well as on a website that public can access.
7	Begin comprehensive quarterly reporting on budget implementation	MOF	September 2006 December 2006	Revamped Budget Monitoring Unit, MOF Expand fiscal data to cover the general government. In particular, regularly cover extra-budgetary funds and operations of FA and	As per original GoK indicator EMM: PFM performance indicator: Quality and timeliness of annual financial statements	Initiative was recently announced in the 2006/2007 Budget Speech. Need to specify who the recipient of the quarterly reports is. Parliament or Public? Reports need to be made public. Ministries need to be made to prepare annual reports and to have them published. It is important to enable the Parliament to play its oversight role more effectively and to professionalize its interaction

	Action to be Taken	Lead Agency Responsibility	Implementation Table (Month/Yr)	Critical Milestones	Results Indicator	Mid-October 2006 Status/Comments WBGW comments
				SAGA. Make the publication of fiscal data mandatory and an obligation of the government within specified timeframes and modalities.		with the government by providing support to the various parliamentary committees in the area of economic management (budget preparation, budget execution, expenditure control and financial reporting). Providing research and analytical capacity to understand budgetary and fiscal issues, and with objective, timely and non-partisan analysis necessary to inform economic, budget and other policy decisions that may be made by Parliament.
8	Implement arrangements for public display of financial and implementation progress information for community based Government funded initiatives.	MOF, MOH, MOE, OOP, MOJCA, Parliamentary CDF committee.	December 2006	Public display boards in place, financial and implementation information regularly updated and public sensitized on the use of complaint channels. Effective complaint handling arrangements in place.	As per milestone	
B. Strengthen and Facilitate Public Awareness and Participation in Development Planning, Results and Anticorruption (especially the sub-national levels)						
1	Strengthen capacity for decentralized and participatory development by empowering local structures within the constituencies and local governments tasked with the responsibilities of managing local	Ministry of Finance	Ongoing- date for finalization of development plan? December 2006	Following recent assessment of pilot, fine tune and development plan for scale up. Decentralized and participatory development plan that defines responsibilities and strategy to strengthen	Development plan for scale up. Decentralized and participatory development plan.	Which local structures within the communities are already in place? How are they going to be empowered (financially, capacity building, decision-making)? What is their role? (project design, supervision, budget formulation and implantation) How are local governments going to be strengthened? Which are the spaces for dialogue between these two institutions? Milestones should be included regarding the implementation

	Action to be Taken	Lead Agency Responsibility	Implementation Table (Month/Yr)	Critical Milestones	Results Indicator	Mid-October 2006 Status/Comments WBGW comments
	resources.			social accountability mechanisms, and local governments.		of the Decentralized and participatory development plan.
2	Mobilize all Kenyan stakeholders in the fight against corruption	MOJCA, OOP, KACC	July-September 2006 September 2006	National Anti-corruption Plan launched nationally and in provinces Set up a NACP Secretariat <i>Who is in the Secretariat and what is their role?</i> Action plans prepared by key stakeholders Establish toll free anti corruption and complaint reporting "hotlines" and independent follow-up action arrangements.	As per original GoK indicator As per original GoK indicator As per original GoK indicator Anti corruption and complaint reporting channels established and publicly available with clear guidelines on procedural issues and resources EMM: Control of Corruption Indicator from the World Bank Institute EMM: Transparency/Corruption Indicator from the World Bank's CPIA	National Stakeholders Conference to validate the proposed National Anti-Corruption Plan (NACP) held in late May 2006. Official launch set for July 6, 2006. Premises for Secretariat secured at the Nairobi Business Park <i>Who has Lead Responsibility for this? Is it KACC, MoJCA, National Anti-Corruption Steering Committee? Who monitors that the various actions are implemented? What are the incentives for the Civil Society and other non-state Actors to implement these programs beyond participation in the Stakeholders workshop? Linkages with other on-going programs with support should be made very clear.</i> Important for Government to clarify responsibilities of different AC institutions and consider building on existing AC mechanisms instead of creating new ones. Communication campaign joint for B2 and B5.
3	Develop an Ethics Development Centre to operationalize ethics development centre	KACC MOJCA	March 2007 April 2007	Operationalization of Ethics Development Centre	As per original GoK indicator Set a number of codes of	Establish ethics desks in each public institution. On fiscal discipline in the public sector, it is important for example to sensitize and make available to the public in a website all existing ethics codes and controls system so they can also

	Action to be Taken	Lead Agency Responsibility	Implementation Table (Month/Yr)	Critical Milestones	Results Indicator	Mid-October 2006 Status/Comments WBGW comments
	activities Support organizations and associations in the formulation of Codes of Conduct and Ethics	NACP Secretariat NACP stakeholders		No. of organizations with developed codes of conduct, with effective implementation, monitoring, enforcement and clear complaint procedures.	conducts published on the web as target Training of public officials on content of the code and complaints procedures	monitor violations and promptly notify the KACC or Ombudsman. Consider building on existing AC mechanisms instead of creating new ones. Complaints regarding code of conduct could be dealt with by the Ombudsman or channeled through the anticorruption hotline not to duplicate.
4	Develop, document and disseminate materials on core values for good citizens. Simplify <i>The AC&EC Act</i> and <i>The POE Act</i> . Examine basic values enshrined in the various Kenyan traditional cultures	KACC MOJCA	Continuous July 2006 – June 2007	2 simplified ACECA & POEA developed disseminated Post all material on websites	As per original GoK indicators	Anti-corruption handbook being developed Materials are being developed for dissemination under ACECA and POEA
5	Continue countrywide public education and awareness campaign against corruption. This action has been carried over from the 2005 Action Plan. It is a continuous process and so work is still being done. Carry out outreach/Caravan Programmes Sensitization workshops	MOJCA KACC National Anti-Corruption Steering Committee	Continuous July 2006 – June 2007	No. of seminars/workshops/rallies conducted 10 outreach programmes held in districts 10 sensitization workshops held 4 community based Corruption monitoring groups created	As per original GoK indicators	Exploratory work is underway Set up working group with civil society to prepare report cards and to alert public in the progress of implementation of NACP. Involve media and civil society organizations in public education. Distribute information through brochures, leaflets and posters. Important also that these sensitization campaigns not be done in isolation from the efforts of KACC. For example, it would be particularly helpful if the sensitization campaigns make use of the recently published surveys. These outreach campaigns should be used also to launch the National Anti-

	Action to be Taken	Lead Agency Responsibility	Implementation Table (Month/Yr)	Critical Milestones	Results Indicator	Mid-October 2006 Status/Comments WBGm comments
	Create Community based Corruption Monitors					corruption Plan as in B2.
6	Introduce national core values in educational institutions, encourage contests and best trophy, interface with National Musical Festivals	MOE	Continuous- Date?	National anti-corruption values disseminated to 2000 secondary schools Ethics trophy for best school/college introduced Introduction of anticorruption and life values in curriculum	Dissemination strategy should be roll out with clear targets and deadlines.	Would be helpful if students understand that corruption is bad, and see concrete and credible action taken by those in power against people who violate such values. Would be helpful to start with the education sector: carrying out a diagnostic and implementing an Anticorruption and Transparency strategy.
7	Establish a Public Complaints Unit (PCU) to serve as a central referral and a Monitoring and Evaluation unit This action has been carried over from the 2005 Action Plan. The PCU was to have been established by June 2005 but it is now scheduled for April 2007.	MOJCA Office of the President	April 2007	Public Complaints Unit established and operational Harmonized structures and Database highlighting number received, processed, resolved cases per quarter and location Develop interface between PCU and existing similar structures in all Divisional, District, Provincial and O.P Headquarters to receive	As per original GoK indicators	An Executive Order has been developed and forwarded to the Cabinet Office for implementation Important also to ensure the public can access the data base to know the kinds of actions taken by Government on complaints. Important also to establish responsibilities of this PCU, the Ombudsman and the AC hotline, and procedures to handle corruption allegations. Should have some mechanism to either "blacklist" firms/individuals as a result of corrupt practices, or refer to appropriate authorities for further investigation.

	Action to be Taken	Lead Agency Responsibility	Implementation Table (Month/Yr)	Critical Milestones	Results Indicator	Mid-October 2006 Status/Comments WBGW comments
				public complaints/compliments on service delivery issues by officers by Government offices		
8	Implement arrangements for presentation of annual performance reports by Ministries and public institutions, together with annual audited financial statements to the public.	All Ministries under the guidance of MOF	December 2007	Annual reports presented by all key Ministries and public institutions.	As per milestone	The performance reports and audit reports should be posted on the web.
C. Promote Accountability and Integrity of Ministers and Other Public Officers					EMM: Voice & Accountability Indicator from the World Bank Institute	
1	<p>Ascertain the validity of wealth declarations of Ministers and Assistant Ministers by random sample under the Ministerial Code of Conduct</p> <p>This action has been carried over from the 2005 Action Plan. Verifications for Ministers were to have been completed by December 2005 but are now scheduled for December 2006.</p>	KACC	December 2006	<p>Ensure compliance of asset declaration legislation (including provision for annual updates).</p> <p>Increase capacity of the</p>	<p>Publication of names of top public officials (including Cabinet and Parliamentarians) that don't comply with legislation.</p> <p>Public awareness campaign of obligation to declare and content of declarations.</p> <p>Parliamentary Service Commission provides asset declaration forms for Ministers and Assistance Ministers to KACC.</p> <p>Strategy for enforcement and verification content, including</p>	<p>KACC has requested Parliamentary Service Commission for declarations but has yet to receive them</p> <p>Need to ensure that the provision of declarations to KACC has legal backing to ensure that they are submitted promptly.</p> <p>Important also to identify the unit who is responsible to monitor the declarations—not just for submission, but to verify content and investigate, ensuring they are checked against assets, past remuneration, tax declarations and lifestyles. Important to have a selective strategy to define a target control group.</p> <p>KACC needs to provide avenue for the public to review declarations and to provide input for verification. But even if the declarations are not public yet, nothing stops KACC from publishing the name of those public officials who don't comply and generate public awareness.</p>

	Action to be Taken	Lead Agency Responsibility	Implementation Table (Month/Yr)	Critical Milestones	Results Indicator	Mid-October 2006 Status/Comments WBGW comments
				KACC to verify content of the declarations and undertake investigations.	definition of control group. KACC signs collaboration agreements with other institutions such as AG's office, Prosecutor, SAI and Tax Agency.	
2	<p>Increase awareness and sensitize public officers on the Government's anti-corruption agenda, focusing on : Ministries; Government Departments; Parastatals (SAGAs); Local authorities; Cooperatives, the Kenya Police and Parliament</p> <p>Undertake survey to assess the level of knowledge from the NACP- Link to broader diagnostic under section K1</p>	<p>KACC</p> <p>Office of the President, Directorate of Personnel Management (DPM) MoL</p>	<p>April 2007</p> <p>Continuous- a specific target and deadline should be established</p>	<p>Increase the number of Integrity Assurance officers (IAOs) trained by 175</p> <p>Establish corruption prevention committees in all Ministries and key parastatals (including the Kenya Ports Authority and Kenya Revenue Authority)</p>	<p>As per original GoK indicator</p> <p>As per original GoK indicator</p>	<p>350_IAOs trained to date</p> <p>25 corruption prevention committees in place</p> <p>Conduct specific training programs on the typology of corruption, penalties in the event of transgressions and conflict of interest legislation. Hold workshops, seminars and town hall meetings on the NACP. It would be helpful that the AC hot-line also answers basic questions on the content of AC legislation.</p> <p>Survey could be used not only to assess level of knowledge but also current practices in public administration to be able to design an effective AC strategy as part of the broader diagnostic to be carried out in section K1.</p>
3	<p>Undertake a compliance audit to uncover and address service delivery and corruption-facilitative bottlenecks in the public service through</p> <ul style="list-style-type: none"> ▪ Targeted Corruption Risk Assessments. 	<p>The Head of the Public Service – for all GoK Ministries & Departments</p> <p>KACC</p>	<p>December 2006</p>	<p>Six (6) targeted Corruption Risk Assessments planned, including the Kenya Revenue Authority, Kenya Ports Authority and other important public service parastatals</p>	<p>Implementation plan to carry out (6) targeted Corruption Risk Assessments</p>	<p>The KACC has conducted two (2) Advisory Briefs to the Kenya Human Rights Commission and the Mombasa Municipal Council.</p> <p>KACC has completed 4 reports on examination of systems and process (i.e. for Mombasa Municipal Council, Department of Immigration, Department of Motor Vehicle Registration and Licensing (KRA, Kenya Police and the</p>

	Action to be Taken	Lead Agency Responsibility	Implementation Table (Month/Yr)	Critical Milestones	Results Indicator	Mid-October 2006 Status/Comments WBGW comments
	<ul style="list-style-type: none"> ▪ Targeted Examinations of the systems, processes and procedures of key Government Ministries and Departments. ▪ Provide advisory services to Government departments on good governance and anti-corruption <p>These risk assessments could be drawn from the governance diagnostic under section K1.</p>	Office of the President, Directorate of Personnel Management (DPM), MLG	<p>March 2007</p> <p>March 2007</p> <p>June 2007</p> <p>Continuous (date?)</p>	<p>3 Corruption Risk Assessments finalized and other 3 ongoing.</p> <p>Three (3) additional examinations planned</p> <p>Three (3) Implementation Plans developed and adopted from examinations conducted</p> <p>Three (3) advisory circulars released</p>	<p>3 Corruption Risk Assessments finalized</p> <p>Three (3) Implementation Plans developed</p> <p>EMM: ratings of corruption of various ministries and Departments by Transparency International's Kenya Bribery Index</p> <p>EMM: Various corruption ratings from the World Economic Forum's Global Competitiveness Survey</p>	<p>Ministry of Transport), Ministry of Health (KEMSA) and the Nairobi City Council (ongoing)</p> <p>Publish audit results and monitor the actions taken to address bottlenecks identified in service delivery survey results; clear and transparent actions to be taken against regular under-performers and rewards for good performers.</p> <p>Incorporate AC strategy as part of a broader strategy to increase efficiency in service delivery and users satisfaction and achieve administrative simplification.</p>
4	Develop Service Charters, and of Organizational Performance Pledges Institutionalize performance contracting	KACC, DPM, The Head of the Public , Ministries & Departments, NWSC	<p>March 2007</p> <p>Date?</p>	<p>Number of Service Charters completed</p> <p>Performance contracts disclosed and results reporting institutionalized and disseminated widely.</p> <p>Service Charters and Performance contracts published on the web with monitoring indicators(some from citizen scorecards)</p>	A number or % should be set as target-	<p>Service charter completed at the Nairobi City Water and Sewerage Company, and should be scaled up to other water operators.</p> <p>Develop service charter/codes of conduct with participation from all staff members; staff manuals and regular testing of staff knowledge and surveys on the use of the manual.</p> <p>Need to have a target number or percentage of public organizations to have done this by the March 2007 deadline.</p>
5	Enact and enforce legislation for remedial	Head of Public Service, MOJCA and	June 2007	Performance contracting legislation in place and	As per milestone	Legislation is being prepared by the Performance Contracts Steering Committee Secretariat. Will be in place by the

	Action to be Taken	Lead Agency Responsibility	Implementation Table (Month/Yr)	Critical Milestones	Results Indicator	Mid-October 2006 Status/Comments WBGGM comments
	action against non compliance with Service Charters and performance contracts. Performance contract terms and remedial actions to be included in employment contracts for public servants.	DPM		public servants employment contracts amended to include non compliance remedial actions. Publication of Service Charter for the Judiciary and the Police and establish independent complaint reporting mechanisms that can also follow up on implementation of reform programs.		agreed time.
6	Enforce fiscal discipline in the public sector through <ul style="list-style-type: none"> Strict adherence with existing financial and budgetary controls and prompt action on C & AG reports (without waiting for the PAC comments) Establish a national M&E system of public expenditure 	Ministry of Finance Ministry of Planning and National Development	December 2006 March 2007 April 2007	Initiate administrative action in all cases of egregious financial misconduct identified by the C&AG in the most recent two reports on central government accounts and public corporations. Zero pending bills in the ministries at the closure of the financial year M&E framework in place Public institutions to publish salary structure,	As per milestone EMM: Quality of Budget and Financial Management Indicator from the World Bank's CPIA As per original GoK indicator	Monitoring and Evaluation Department established under Ministry of Planning and National Development. Finance officers appointed in all ministries. MTEF Integrated Financial Management System Government should consider allowing for civil society participation in the monitoring and evaluation system. Drop pending bills enter as it is covered elsewhere.

	Action to be Taken	Lead Agency Responsibility	Implementation Table (Month/Yr)	Critical Milestones	Results Indicator	Mid-October 2006 Status/Comments WBGGM comments
				HR policies, procurement plan, performance contracts (including monitoring indicators)	As per original GoK indicator	
D. Promote Integrity and Accountability in the Judiciary along the Judicial Chain					EMM: Rule of Law Indicator from the World Bank Institute	
1	Enhance the capacity of the judiciary by recruitment and updating the scheme of service This action has been carried over from the 2005 Action Plan. Updating the scheme of service was to have been submitted to Parliament by May 2005.	MOJCA AG State Law Office Judiciary	December 2006	Increase the no. of paralegal staff to 3317 Increase the no. of magistrates to 300 Increase the no. of judges of the High Court to 70 Increase the no. of Court of Appeal Judges to 15 Update scheme of service for Judiciary staff Increased rate of opening prosecution cases where investigations have been turned to the AG's office	As per original GoK indicators	At present, there are 2690 paralegal staff; 261 magistrates, 50 High Court Judges, 11 Court of Appeal Judges. Updating scheme of service for Judiciary staff is underway
2	Set up and operationalize the Judicial Service Commission Secretariat Organize open days/clinics/forums to inform and advise the public on court process and procedures.	The Judiciary Chief Justice KACC Attorney General's office MOJCA	March 2007 Date?	Judicial Service Commission Bill to facilitate the setting up the Judicial Service Commission Secretariat developed and published Standing committee on ethics and integrity established and judicial	As per original GoK indicators	Rules Committee is considering this issue. One day open forum planned for December 2006. Training Committee is already in place. Important to have a functioning commission within the Judiciary to review controversial judgments by Judges and Magistrates to ensure they are within sentencing guidelines. Important for this Committee or some Administrative Committee in the Judiciary to review the case load of judges and Magistrates to ensure cases are not adjourned

	Action to be Taken	Lead Agency Responsibility	Implementation Table (Month/Yr)	Critical Milestones	Results Indicator	Mid-October 2006 Status/Comments WBGGM comments
3	Prevention of financial crimes: Introduce legislative changes to enable CBK to make criminal referrals when CBK uncovers fraud or malfeasance. Upgrade judiciary to prevent issuance of unjustified injunctions	CBK, MOJCA, The Judiciary	December 2006	Referral of tax evasion, AML and fraud cases for prosecution by CBK. Cessation of issuance of injunctions without good reason. All injunctions to be sanctioned only after prior consultation with the regulator	As per milestones	Need to amend Banking Act and to sanction judiciary where injunctions are issued without due cause.
E. Accelerate Public Financial Management Improvements and Improve Fiscal Transparency						
1	Implement outstanding Public Expenditure Management Action Plan benchmarks This action has been carried over from the 2005 Action Plan. 13 benchmarks were to have been completed by June 2006 but only 6 had been achieved as of that date.	Ministry of Finance	December 2006 March 2007 June 2007	8 benchmarks achieved 10 benchmarks achieved 11 benchmarks achieved	As per original GoK indicators EMM: PFM performance indicator: Transparency of Inter-Governmental Fiscal Relations EMM: Quality of Budget and Financial Management Indicator from the World Bank's CPIA	6 benchmarks achieved Risk based audit approach introduced in mid-2005 initially covering Ministries of Planning and National Development and Roads. The approach has been accepted by AOs and has now been extended to cover OP, MOF, Ministry of Education and Ministry of Trade. Mission recommends that these PEM-AAP benchmarks should not be monitored and updated any longer. Therefore future PFM reforms should be referenced to the PFM reform strategy. It will be important though to relate the identified priority reform measures to specific PEFA indicators as well so that progress can be measured The GoK should review the latest PEFA document and address the areas in the assessment that were highlighted as weak.
2	Review and amend existing financial management procedures		December 2006	Treasury Circulars and guidelines updated to be consistent with current	As per milestones EMM: Quality of Budget and Financial Management	Procurement of a consultant to review existing guidelines is in progress with invitation for expression of interest advertised in July 2006.

	Action to be Taken	Lead Agency Responsibility	Implementation Table (Month/Yr)	Critical Milestones	Results Indicator	Mid-October 2006 Status/Comments WBGW comments
	and practices to fully comply with the Government Financial Management Act, 2004, generally accepted accounting principles and current international accounting and internal audit standards.		March 2007 December 2006 June 2007	legislation. Arrangements for adoption of International Public Sector Accounting Standards in place and under implementation. Arrangements for adoption of best practice internal auditing and reporting fully implemented in all Ministries and public institutions. Treasury's role realigned to providing independent fiduciary oversight and superintending over accounting officers.	Indicator from the World Bank's CPIA	Rollout of a risk based internal audit approach is in progress with risk assessments completed in MOH, MOE and MOPND; and in progress in 7 ministries.
3	Roll out of IFMIS to the remaining Accounting Units This action has been carried over from the 2005 Action Plan and it is still within the scheduled time frame	Ministry of Finance	December 2006 December 2007 December 2007 June 2007	Networking of 5 additional accounting units Full operationalization of IFMIS and IPPD. IPPD and IFMIS are integrated Training extended to 16	As per original GoK indicators	The central servers are now in place and the process is being expanded. 12 buildings and 14 accounting units in Nairobi have network; Networking is ongoing in 8 other government buildings accommodating 5 accounting units and 2 departments 6 accounting units (ECK, KENAO, State House, DOD, NSIS and KACC) are yet to be networked. Fixed wireless connectivity has been installed in 20 government buildings covering 27 ministries. Contract has been issued for remaining 8 buildings covering 9 accounting

	Action to be Taken	Lead Agency Responsibility	Implementation Table (Month/Yr)	Critical Milestones	Results Indicator	Mid-October 2006 Status/Comments WBGIM comments
				other ministries/ accounting units		units Members of staff from the 27 ministries have also been trained IFMIS urgently requires leadership that would effectively fast-track roll-out and full functionality. Progress in rolling-out has been stalled for a few years primarily due to leadership issues and lack of someone in Government high enough to make this a priority.
4	Develop and implement a payment plan for Pending Bills This action has been carried over from the 2005 Action Plan. This action should have been completed by December 2005 but now scheduled to be completed in December 2006. First round review was completed by June 2006.	Ministry of Finance	December 2006	Final report on Pending Bills harmonized, compiled and published Settlement Action Plan prepared	As per original GoK indicators	Pending Bills committee has completed a first round of reviews. In early October, the Minister of Finance announced that out of about KShs 70 billion of claims investigated by the Pending Bills Closing Committee, only about KShs 233 million has been found payable. In addition, some of the firms claiming payments from the Government were found to have been overpaid by KShs 800 million and would be required to pay back this sum to the Government. The government should move quickly to complete the rest of this exercise.
5	Bring all audit reports up to date in compliance with The Public Audit Act 2003 by clearing the significant arrears of local authority's audits and completing audits of all Ministries and public institutions within 6 months following the end	Kenya National Audit Office MOF and MOLG	December 2006 July 2007	All Audit Reports completed and presented to Parliament on time. Completed reports also must be submitted to oversight authority and published in a timely manner KNAO develops audit	As per milestones EMM: PFM performance indicator: Legislative scrutiny of the annual budget law	2004/5 Ministries audit reports finalized but not yet presented to Parliament. Audits of parastatals for 2005/6 and prior periods' expected to be completed by December 2006. Ministerial action plan to clear the significant arrears on local authorities' audits not finalized. Mainstream the "risk audit" approach by taking preventive steps as well as focus on "high risk" areas rather than audit all areas just for the sake of it. While timely audits are important, more important action is action on C & AG findings.

	Action to be Taken	Lead Agency Responsibility	Implementation Table (Month/Yr)	Critical Milestones	Results Indicator	Mid-October 2006 Status/Comments WBGGM comments
	<p>of the reporting date (9 months for local authorities).</p> <p>This action has been carried over from the 2005 Action Plan. With the 2004/05 SAGAs completed by June 2006, it seems some progress has been made in spite of the "small" delay</p>		June 2007	<p>issues post-implementation review process and communicating results of such reviews to the PAC</p> <p>The government acts in a planned and concerted manner to resolve all cases of financial misconduct identified by KNAO in the last two reports (reports yet to be considered by the PAC) on central government and public corporations.</p>		<p>Proactive action on C &AG findings even before they are considered by the PAC will demonstrate good faith and commitment to punish misconduct.</p> <p>Important for Government to continue with reforms of the CAG's offices especially to ensure 1) adequate staffing levels; 2) develop an understanding with government about HR policy (job security, transfer and career policies) for trained CAG staff in line with outsourcing policy.</p> <p>Review extent of implementation of recommendations of CAG by Treasury and affected GoK departments and Agencies.</p> <p>Agree indicators (process as well as outcomes) with government on the audit of, consistent reporting framework and oversight of devolved funds such as Constituency Development Funds; HIV/AIDs etc.</p> <p>It would be important for the GAC Office to present the audit reports of local governments to the social monitoring mechanisms that exist at the local level, so they can provide feedback and follow up on recommendations.</p>
6	<p>Ensure timely remedial action on audit recommendations by (i) establishing Ministerial Audit Committees that are appropriately staffed and provided with a clear mandate and other terms of engagement.</p> <p>Central Government funding for LATF, CDF and parastatals to be</p>	MOF	<p>December 2006</p> <p>July 2007</p>	<p>Ministerial Audit Committees established and their mandate and other terms of engagement, including responsibility for overseeing implementation of institutional risk management policy frameworks and audit recommendations issued.</p>	As per milestones	<p>Treasury Circular for the establishment of Ministerial Audit Committees issued in October 2005. Staffing guidelines, mandate and other terms of engagement not yet clarified.</p> <p>Establishment of Ministerial Audit Committees in progress in MOE, OOP (Special Programmes) and MOH.</p>

	Action to be Taken	Lead Agency Responsibility	Implementation Table (Month/Yr)	Critical Milestones	Results Indicator	Mid-October 2006 Status/Comments WBGM comments
	based on timely submission of satisfactory audit reports in respect of prior accounting periods.			Local Authority Transfer Fund (LATF), CDF and parastatal funding remittances based on timely submission of satisfactory audit reports.		
7	Parliamentary Accounts Committee clears arrears of prior period audit report reviews and complies with annual reporting timelines.	MOF and PAC	July 2007	PAC completes reviews of audit reports before the end of the ensuing financial year. All audit reports presented to Parliament within the time provided in the Public Audit Act, 2003. Public Audit Act amended to strengthen the PAC's ability to impose sanctions and penalties in financial misconduct and non-compliance cases.	As per milestones EMM: PFM performance indicator: Orderliness and participation in the annual budget process	2004/5 audit reports not yet presented to the PAC by the Minister for Finance.
8	Prioritize the Public Financial Management strategy and establish targets with reference to PEFA ratings.	MoF	December 2006 December 2006	Public financial management strategy launched Implementation of the Action Plan commenced.	As per original GoK indicators	Strategy launched on June 23, 2006 GoK needs to ensure that implementation of this plan is of high priority since it would help strengthen the PFM system. Focus now has to be on implementation to show concrete results on the ground.
9	Finalize the development of criteria for the granting of exemptions and	MoF	September 2006 June 2007	Criteria for granting waivers and exemptions in place.	As per original GoK indicators	Draft criteria in place Important to have a transparent system of exemptions and waivers rather than just discretionary and determined by one

	Action to be Taken	Lead Agency Responsibility	Implementation Table (Month/Yr)	Critical Milestones	Results Indicator	Mid-October 2006 Status/Comments WBGM comments
	waivers in order to eliminate/minimize discretion in the granting of waivers and exemptions by the Minister		June 2007 June 2007	All revenue exemptions are incorporated in the revenue laws and made available to all enterprises on the same terms to remove administrative discretion. Waivers granted published More IT department resources are allocated to monitor and audit the financial records of companies registered under various tax incentive schemes in order to combat abuse.		individual.
10	Establish an autonomous Public Procurement Oversight Authority This action has been carried over from the 2005 Action Plan. The action to be taken by April 2005 was the submission of the procurement bill to parliament which was done on April 5 2005	MoF AG	December 2006 July 2006 July 2006	CEO appointed PPOA operational Regulations completed	As per original GoK indicators	Pursuant to the implementation of the Procurement and Public Disposal Act (November 2005) Organizational structure for PPOA being developed Regulations are being developed Crucial reform that needs to be fast-tracked. The Government should consider the set up of an independent civil society committee to monitor implementation of the reform. PPD should set up a monitoring and reporting system for compliance of the Public Procurement Regulations by

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11	Increase system of checks and balances for security related procurements	KENAO Office of the President MoF National Assembly	September 2006	A Departmental Parliamentary Security Committee is established. Procurement regulations gazetted	As per original GoK indicators	<p>procuring entities, and a mechanism for taking punitive measures against reported incidents of non-compliance to the procurement procedures.</p> <p>Would ensure that national security interests are protected while ensuring a system for checks and balances remains in place, including procedures to categorize security equipment to ascertain their degree of secrecy.</p> <p>Include the PPOA and KACC in the list of institutions with lead responsibility Procurement authority to provide input on security related procurement.</p> <p>Ensure balance in representation of all political parties. Parliament to be a part of the proposed Departmental Parliamentary Security Committee to be established.</p> <p>Appoint representatives from KACC and PPOA to be part of the committee</p>
12	Contingent fiscal liabilities	MoF	March 2007	<p>The survey of financial position identified 25 key public corporations is completed.</p> <p>The treasury prepares a plan to deal with the identified fiscal liabilities</p>	Per milestones	
13.	Raise absorption of public funds, especially in the Ministry of Roads and Ministry of Health	MoF, MR&PW, MoH	<p>November 2006</p> <p>June 2007</p>	<p>Carry out a review for reasons of low absorption in roads and health</p> <p>Implement recommendations of the review to ensure that at</p>	<p>Review completed</p> <p>Improved health and roads services</p>	New action proposed by the GM

	Action to be Taken	Lead Agency Responsibility	Implementation Table (Month/Yr)	Critical Milestones	Results Indicator	Mid-October 2006 Status/Comments WBGGM comments
				least 75% of available funds are utilized		
14.	Increase transparency through fiscal reporting – especially of extra-budgetary funds – Funds Accounts and Semi-autonomous government agencies	MoF	December 2006 December 2007	Start reporting fiscal accounts of extra-budgetary funds and operations of Fund Accounts and Semi-autonomous government agencies together with other fiscal reporting. In the medium-term expand fiscal data to cover general government		New action proposed by the GM
F. Support Governance Improvements in High Priority Sectoral Ministries and Institutions					EMM: Government Effectiveness Indicator from the World Bank Institute	
1	Improve governance and service delivery in the Ministry of Health inter alia by: (i) Improving procurement	MOH	September 2006 September 2006	MOH procurement regulations reviewed and finalized Policy developed on	Improved clarity in regulatory framework Improved clarity in respective	Improvements are part of the SWAp approach under development, including attention to key issues such as budgeting, procurement, financial management, and monitoring and evaluation. Government just concluded a highly participatory review of the Fund. A new draft governance manual was agreed for formal adoption. Draft plan has been prepared and discussed with stakeholders. Implementation of the actions in the plan is critical. These are all credible actions, but the challenge lies in getting them done.

	Action to be Taken	Lead Agency Responsibility	Implementation Table (Month/Yr)	Critical Milestones	Results Indicator	Mid-October 2006 Status/Comments WBGW comments
	(ii) Improving financial management		September 2006	health procurement responsibilities at headquarters and decentralized levels, and also vis-à-vis KEMSA	roles and responsibilities for procurement actions	A recent PETS report concluded that systems are the weakest at the district level.
			October 2006	Preparation and agreement by all parts of the MOH and KEMSA on procurement plan covering next 18-24 months	Agreement on procurements to be carried out and priorities	It is important to ensure public access to key MoH fiscal and district information in webpage, including approved and actual allocations together with actual expenditures and the criteria used to allocate funds.
			October 2006-08-02	Arrangements for efficient remittance of funds directly to peripheral health facilities using commercial banking system and community participation	Improved system for efficient and accountable flow of funds to local health facilities	Risk management policy has been drafted but not yet approved.
			October 2006	Effective Audit, Finance and Facilities Management Committees in place	Enhanced capacity in the MOH for financial management	Working group has been established and consultancy being selected to help with analytical work
			October 2006	Risk Management Policy Framework in place	Clarity regarding extent and nature of risks, and risk mitigation measures	Draft code of conduct being developed
			October 2006	Effective Internal Audit function in place	Enhanced capacity to monitor and address potential governance problems	Communications strategy under discussion
	(iii) Improving governance		October 2006		Increased transparency	MCPC in existence but not functioning efficiently
						Interim report carried out in July, but still information gaps
						Tender for auditor held up due to lack of procurement agent in the MOH
						Various staff have been moved, but no disciplinary measures have been taken.

	Action to be Taken	Lead Agency Responsibility	Implementation Table (Month/Yr)	Critical Milestones	Results Indicator	Mid-October 2006 Status/Comments WBGIM comments
	(iv) DARE Forensic Audit follow up		<p>October 2006</p> <p>November 2006</p> <p>October 2006</p> <p>October 2006</p> <p>August 2006</p> <p>September 2006</p> <p>October 2006</p>	<p>Public Disclosure arrangements in place.</p> <p>Partnership framework with FBOs developed</p> <p>Code of conduct developed for MOH and development partners</p> <p>Policy communications strategy developed</p> <p>Mandate and membership to Ministerial Committee for Prevention of Corruption reviewed and reactivated</p> <p>Performance contracts disseminated publicly</p> <p>Comprehensive update of progress on action plan from Forensic Audit</p> <p>Recruitment of auditors</p> <p>Prosecution of any officials alleged to have</p>	<p>Increased efficiency in service provision</p> <p>Improved harmonization of support to the sector</p> <p>Increased transparency of sectoral planning with all stakeholders</p> <p>Strengthened institutional framework for addressing corruption in the sector</p> <p>Enhanced transparency</p> <p>Increased transparency on progress being made to rectify problems identified</p> <p>Increased confidence in the progress reporting</p> <p>Increased accountability</p>	

	Action to be Taken	Lead Agency Responsibility	Implementation Table (Month/Yr)	Critical Milestones	Results Indicator	Mid-October 2006 Status/Comments WBGW comments
				been involved in corruption completed		
2	<p>Improve governance and service delivery in the National AIDS Control Council (NACC) by:</p> <p>(i) Implementing a risk management policy.</p> <p>(ii) Monitoring performance contracts</p> <p>(iii) Prosecuting those accused of fraudulent activities (cross-referenced in H1)</p> <p>(iv) Public disclosure</p>	NACC	<p>July 2006</p> <p>September 2006</p> <p>September 2006</p> <p>September 2006</p> <p>December 2006</p> <p>October 2006</p>	<p>Begin implementation of the risk management policy, with completion of training of NACC Council members and staff on risk management policies and procedures</p> <p>Service Charter for NACC under full implementation</p> <p>Performance contracts for 2006/2007 between the Council and all senior staff of the NACC signed.</p> <p>Conclusion of investigation of suspended NACC Director</p> <p>Completion of investigation of 35 NGOs and prosecution where appropriate.</p>	<p>Reduced risk of governance and corruption problems in the sector</p> <p>Increased transparency about service provision</p> <p>Number of contracts signed</p> <p>Report issued on the investigation outcome</p> <p>Report issued on result of the investigations</p>	<p>Risk management policy was adopted by NACC on November 2005 and implementation arrangements are being developed, including TORs.</p> <p>A Risk based audit work plan has been drawn for the period July 2006 – June 2007.</p> <p>The Service Charter for NACC was developed and approved by the Council</p> <p>Performance contract agreed between the Council and the Council Director</p> <p>Previous director of NACC under suspension since early 2006.</p> <p>NACC is currently pursuing 35 NGOs, 10 have been handed over to KACC and Criminal Investigations Department (CID) and 5 cases are already in court while 6 are still being investigated. Meanwhile NACC has blacklisted adversely mentioned organizations and withheld funding to them.</p> <p>NACC is currently updating the website, LAN and WAN to allow for faster and easier communication and interaction. Field officers are connected to NACC Secretariat and a new PABX has been installed to enhance communication.</p>

	Action to be Taken	Lead Agency Responsibility	Implementation Table (Month/Yr)	Critical Milestones	Results Indicator	Mid-October 2006 Status/Comments WBGm comments
	Functioning Internal Audit unit			<p>Quarterly reports issued to the Audit Committee</p> <p>Internal Audit Unit in the NACC operational and running effectively.</p> <p>The NACC audited report for FY06 ready by December 31, 2006</p>	reports	
3	<p>Secure and scale up gains in governance in the Education Ministry:</p> <p>(i) Community involvement through decentralized financing and procurement;</p> <p>(ii) Resource allocation</p> <p>(iii) Teacher management</p>	MOE	<p>September 2006</p> <p>September 2006</p>	<p>Design completed of decentralized program (with community participation) for school infrastructure and improvement grants</p> <p>Finalization of improved program for targeting the poor under the school bursary scheme.</p> <p>Improved distribution of primary school teachers through new norm of 1 teacher per every 45 students; use of part-time or contract teachers; and</p>	<p>Plan available</p> <p>Redesigned program available</p> <p>More equitable distribution of teachers</p>	<p>An independent public expenditure tracking survey has already been completed, and it concluded that "Overall, the flow of funds has been efficient, with schools receiving funds allocated on time.</p> <p>Detailed strategy for school infrastructure development program has been drafted, reviewed and revised accordingly. The first phase of the program is presently under implementation. Participants on recent field visits have concluded that the moving along well.</p> <p>There was PETS done in August 2005 and revised in March 2006. Bank staff confirmed that the report was indeed positive on funds disbursement, utilization and reporting.</p> <p>There was nothing in the original matrix on the Teachers Service Commission, where the locus of corruption in this sector lies. Given the very limited supply of, and extreme demand for teaching jobs, the recruitment processes have become high-risk areas for potential corruption. New measures have been introduced to reduce the level of</p>

	Action to be Taken	Lead Agency Responsibility	Implementation Table (Month/Yr)	Critical Milestones	Results Indicator	Mid-October 2006 Status/Comments WBGW comments
	<p>(iv) Financial management</p>		<p>October 2006</p>	<p>multi-grade teaching in schools with small classes.</p>	<p>Hours worked by secondary school teachers</p>	<p>corruption, but these need to be monitored. There is also urgent need for the Government to approve the proposed new staffing norms for teachers.</p>
			<p>March 2007</p>	<p>Secondary teachers have increased teaching loads between 25-30 hours per week.</p>	<p>Progress report on risk-based internal audit work</p>	<p>There is a well managed program in place for decentralized procurement of textbooks.</p>
			<p>October 2006</p>	<p>Full use of risk based internal audit with evaluation carried out of progress made.</p>	<p>Reports available</p>	<p>MOE has maintained pro-poor orientation of budget with emphasis on Free Primary Education.</p>
			<p>October 2006</p>	<p>Independent procurement review arrangements in place.</p>		<p>MOE and TSC are implementing a teacher rebalancing exercise.</p>
			<p>October 2006</p>	<p>Share of schools where the community is directly involved in the purchase of instructional materials under the responsibility of the Head Teacher.</p>		<p>Computerization of Form One selection has been done successfully</p>
	<p>(v) Strengthen governance at the Teacher Services Commission (TSC) by:</p> <ul style="list-style-type: none"> ▪ Reinforcing the teacher recruitment process ▪ Extending the implementation of the Education Sector 	<p>MOE and TSC</p>	<p>Date?</p>	<p>Implement report recommendations of a TSC Taskforce.</p>	<p>Improvement shown in Kenya Bribery Index , 2007 report</p>	<p>Extra tuition banned</p>
				<p>Conduct a comprehensive audit and review of the staffing department</p>	<p>Report on issues raised and actions taken</p>	<p>Proposals made to change Education Act.</p>
						<p>Tendering now required to conform to Public Procurement and Disposal Act.</p>
						<p>Guidelines on school procurement released.</p>
						<p>Officers in charge of financial management and investments in KESSP were trained on resource leakage, transparency and accountability issues in a recent workshop.</p>

	Action to be Taken	Lead Agency Responsibility	Implementation Table (Month/Yr)	Critical Milestones	Results Indicator	Mid-October 2006 Status/Comments WBGGM comments
	<p>Governance and Accountability Action Plan to the TSC</p> <ul style="list-style-type: none"> Reinforcing the Integrity Division <p>(vi) Improve governance in higher education institutions (Universities and Colleges)</p>			<p>Respond to issues raised in the recent Transparency International report and conduct a comprehensive internal corruption risk assessment,</p> <p>Review the Integrity Division's current policy on, and actual content of, anti-corruption briefings, and subsequently boost its capacity and requirement to conduct these within Nairobi and also in the field</p> <p>Governance strategy paper developed for higher education as part of new Higher Education Strategy</p>	<p>Report on review, and assessment of knowledge of corruption issues by teachers</p> <p>Strategy developed</p>	<p>MoE has developed a handbook of financial management instructions for primary schools and a financial management training manual for primary schools</p> <p>Scale-up to a pilot on a risk-based internal audit approach has started and the preliminary risk assessment of the Ministry of Education has been completed. The report is serving as the basis for establishing a new risk management function. An Audit Committee is in place at the Ministry since December 2005 and greater use of electronic funds remittance arrangements and direct remittance to schools is envisioned.</p> <p>Problems identified in Transparency International report Draft report of Transparency International reviewed by TSC management</p> <p>The development of a strategy on higher education now underway, managed in conjunction with Professor Wandiga.</p>
4	Consolidate gains in sector governance through the ongoing water sector reform by continuing the reform process and to take action against corrupt practices and enhancing consumer voice	Ministry of Water and Irrigation	March 2007	Fully transfer mandate for service provision responsibility and accountability to Water Services Boards (WSBs)	<p>No. of WSBs with full budgets and staffing commensurate with responsibilities</p> <p>No. of operator agreements signed by WSB</p>	<p>WSBs have taken over many operational areas but MWI are yet to hand over all operations. Outstanding key issues: WSBs not yet in control of main sector budget and permanent staffing implying lack of full autonomy. This is priority and should be remedied within the 2006/07 budget cycle. Contracting with operators is proceeding but GOK should consider similar clear contracts between WSBs, MWI and WSRB</p>

	Action to be Taken	Lead Agency Responsibility	Implementation Table (Month/Yr)	Critical Milestones	Results Indicator	Mid-October 2006 Status/Comments WBGM comments
		Nairobi City Water & Sewerage Company (NWSC) Athi Water Services Board (AWSB)	December 2006 March 2007	Full progress report on issues put forward by the latest water perception survey for Nairobi Water and sanitation reforms in Nairobi, Mombasa, and Kisumu prioritized according to the problems highlighted in their respective Citizen Report Cards.	Completion of fully traceable billing and collection system Improving customer perception in annual surveys, including the Kenya Bribery Index Timely financial audits	Billing and collection system installed in Nairobi. Verification and transfer of accounts ongoing. The anti-corruption activities at NWSC and AWSB have achieved results that could be scaled up to other WSBs and operators by 2008 (i.e., completion of sector reform). Statutory financial audit as well as special technical and financial audits of the AWSB – NWSC contracts are being carried out. Citizen Report Card survey ongoing and report should be available by December 2006.
5	Significantly improve governance in the Road sector by establishing three autonomous road authorities to streamline ownership, management, accountability and financing of all road network activities in the country	Ministry of Roads & Public Works	September 2006 December 2006 March 2007 June 2007	Submission of Policy to Parliament Submission of the Roads Bill Establishment of the National Urban, and Rural Boards Study on absorptive capacity of the MOR&PW completed MOR&PW spends 75% of its development budget allocation	Reduce the backlog in rehabilitation and reconstruction from 11 years to 7 years (provided resources are available US\$1bill) Reduce average freight and passenger travel times along the Northern Corridor from 24 hrs to 18 hrs between Mombasa and Uganda border (provided all the road sections currently in poor conditions are rehabilitated). MoR&PW spends 75% of its development budget Study on comparative unit	This action will be implemented as soon as Parliament approves the legislative instruments. Analysis of unit cost and preparation of road construction and maintenance standards underway. Lengthy payment procedures requiring 23 approvals and signatures streamlined and the number reduced to 6 and oversight function strengthened. Five major new road works contracts awarded on the Northern Corridor

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					costs of road construction completed	Consultant already hired to study road construction costs.
6	<p>Consolidate gains in governance reforms in the water sector by continuing to take action against corrupt practices and enhancing consumer voice.</p> <p>Institutionalize the Citizen Report Cards in Nairobi, Mombassa, and Kisumu and disseminate its findings</p>	Nairobi Water Company	<p>December 2006</p> <p>March 2007</p>	<p>Progress report on issues put forward by the latest water perception survey for Nairobi—e.g., 20% cited inefficiency or other malpractice and water continues to be perceived as one of the most corrupt sectors in major cities</p>		<p>The anti-corruption campaign at the Nairobi Water Company produced important reforms which should be encouraged in the rest of the country: (i) dismissal of corrupt staff; (ii) improvement in hiring and terms of service; (iii) fixing the billing back log and improved billing timeliness; (iv) installed 30,000 meters to identify illegal connections; (v) developed a customer charter and all staff have signed performance contracts and have signed Code of Ethics, including the Board of Directors; and (v) procurement process is transparent.</p>
7	Improve governance in Kenya Revenue Authority	KRA	July 1, 2007	<p>Put to a stop members of the board who have business transactions with KRA</p> <p>Externally Audit, for validity and legitimacy, all VAT refunds and publish the names of individuals and firms and amount of refunds given in a website</p> <p>Develop an institutional risk management policy framework to guide and monitor the continuing efficacy of fiduciary safeguards.</p>	<p>No members of the board has any personal business activity or his/her related firms with KRA</p> <p>All VAT refunds are audited</p> <p>Institutional risk management</p>	These are new suggested measures which KRA can quickly implement with political goodwill.

	Action to be Taken	Lead Agency Responsibility	Implementation Table (Month/Yr)	Critical Milestones	Results Indicator	Mid-October 2006 Status/Comments WBGGM comments
				Enhanced the effectiveness of the KRA board's audit and finance committees through appointment of appropriately experienced and independent members and establishment of operational mandates	policy in place Experienced and independent members are appointed into KRA audit and Finance committees	
G. Strengthen the Legal Platform					EMM: Rule of Law Indicator from the World Bank Institute	
1	Introduce legislation to address money laundering and proceeds of crime.	MoF, AG, National Assembly Clerk	December 2006 June 2007 Date should be	Submit the Money Anti-Laundering and Proceeds of Crime Bill to Assembly. Unclear why two bills will	As per original GoK indicators EMM: Annual evaluation of extent of formal money	Draft bill have not yet been published Other than the delay in introducing the AML Bill (which has been promised for a year now) two issues: (a) Will

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	<p>This action has been carried over from the 2005 Action Plan. The bill was to have been submitted to Parliament by April 2005 but as of the end of June 2006, the draft bill was yet to be published.</p>		<p>brought forward to September 2006</p>	<p>be needed.</p> <p>Set up Financial Investigations Unit (FIU)</p>	<p>laundering from the World Economic Forum's Global Competitiveness Survey</p>	<p>accompanying legislative changes be introduced to enable the CBK to make criminal referrals in cases which it uncovers? (b) Will measures be taken which prevent the judiciary from issuing injunctions which prevent the CBK in undertaking investigations into suspicious transactions?</p> <p>Setting up FIU and taking measures to enforce CBK regulations issued in 2005 (can be done prior to passage of new legislation).</p> <p>Section D on the integrity of the judiciary is too vague, and does not provide any comfort on these issues.</p>
2	<p>Modernize Company Law and computerize company registry and records management. Undertake diagnostic needs assessment and complete filing annual returns.</p> <p>This action has been carried over from the 2005 Action Plan. The Company law was to have been submitted to Parliament by September 2005 but as of June 2006, research was still on going to help draft the bill.</p>	<p>MOJCA, AG</p>	<p>February 2007</p> <p>January 2007</p> <p>April 2007</p>	<p>Companies Bill, 2007 published</p> <p>Companies Registry computerized</p> <p>Diagnostic needs assessment completed</p> <p>Implementation Plan to computerize Companies (This is an activity that will depend on the recommendations from the diagnostic needs assessment]</p>	<p>As per original GoK indicators</p>	<p>Research is ongoing with a view to developing a new Companies Bill. Diagnostic Assessment completed. Consultants report reviewed by government. Discussion on its finalization and implementation ongoing. We recommend that the government implements report findings.</p> <p>We support the efforts of the Law Reform Commission in reviewing the Companies but encourage wider consultations to enrich the reforms; if requested, we and/or other development partners could provide technical assistance to the Commission on the ways in which a good company's legislation can be used as anti-corruption tool, especially on such issues as corporate disclosures; revelation of beneficial owners of shares.</p> <p>Open Capital Markets to Global Best Practices on Corporate Governance: As stock exchanges in the region integrate in the sub-region, it is crucial that bad performers do not export their bad practices across borders.</p> <p>We encourage the Government to support a corporate governance initiative by working with civil society and business associations which would help CSOs suffering</p>

	Action to be Taken	Lead Agency Responsibility	Implementation Table (Month/Yr)	Critical Milestones	Results Indicator	Mid-October 2006 Status/Comments WBGM comments
						terminal governance problems as well as companies with corporate governance weaknesses and SOEs facing similar challenges.
3	Provide for regulation, disclosure, expenditure limits and state subsidies financing of political parties This action has been carried over from the 2005 Action Plan. The Political Parties Bill was to have been submitted to the National Assembly by December 2005 but it is now to be done by December 2006	AG, National Assembly	December 2006	Submit to Parliament the Political Parties Financing Bill to the National Assembly	As per original GoK indicators EMM: annual evaluation of frequency of illegal donations to political parties from the World Economic Forum's Global Competitiveness Survey	The Political Parties Bill have been drafted and submitted to the Cabinet for consideration and approval before publication This action is a repeat of the action in A.6 above
4	Provide robust legal framework for contracting public debt		December 2006 March 2007 May 2007	Submit to Parliament amendments to the Internal Loans Act Submit to Parliament amendments to the External Loans Act Complete draft of the Debt Management Bill	As per original GoK indicators EMM: Annual ratings of budgetary leakages from the World Economic Forum's Global Competitiveness Survey	Announced in 2006/7 budget speech and intended to close loopholes used to pilfer public funds
5	Strengthen legal framework for public finances		June 2007	Submit to parliament amendments to the Audit Act, Financial Management Act and (perhaps) a new budget	As per milestones EMM: PFM performance indicator: Legislative scrutiny of the annual budget law	The Audit Act amendments would provide for enhanced oversight by the PAC and strengthen PAC's ability to impose sanctions and penalties in cases of financial misconduct and non-compliance with financial rules.

	Action to be Taken	Lead Agency Responsibility	Implementation Table (Month/Yr)	Critical Milestones	Results Indicator	Mid-October 2006 Status/Comments WBGM comments
				law.		The FM Act amendments will provide for the reporting on off-budget activities and guarantees etc., the mandatory publication of fiscal data within specified timeframes and modalities. The budget law will possibly codify the new budget practices related to MTEF and provide for enhanced scrutiny by the legislature.
H. Investigative Economic Crimes and Recover Assets and Strengthen Prosecutorial Infrastructure						
1	Strengthen the Anti-Corruption Prosecution Unit established in the Department of Public Prosecutions to enable it to deal effectively with prosecutions arising from investigations into the Goldenberg matter, the Anglo Leasing matter, Security Projects, Public Accounts and Public Investment Committee Reports.	MOJCA The State Law Office The Department of Personnel Management	September 2006 December 2006 June 2007 December 2006	11 additional State Counsel appointed Plan of action, with clear milestones, for phasing out police prosecutors. All vacant positions filled Reviewed terms of service	As per original GoK indicators	The AG's Office has recommended recruitment of an additional 130-132 lawyers of which 65 would serve the State Law Office, 42 the DPP office and 23 the Civil Litigation Department. Of these lawyers, 65 are proposed to serve GOK on a contract basis. Bids invited for the engagement of Private Counsel and Special Prosecutors. One Special Prosecutor has already been appointed and is already working. The review of remuneration is underway It would be important for the Government to develop principles and methods for coming to closure on past corruption especially the Goldenberg Scandal as this stands in the way of efforts to fight new corruption.
2	Finalize consultations on an Implementation Plan to address the issues raised in the Ndung'u Commission Report This action has been carried over from the 2005 Action Plan. The	MOJCA KACC Ministry of Lands	December 2006	Implementation Plan developed Cabinet Memorandum presented	As per original GoK indicators	133 title deeds of the illegally and irregularly allocated public land have been surrendered to the Ministry of Lands Cabinet Memorandum on the implementation of Ndung'u Report is under development Land Advisory Committee established

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	main recommendations of the Ndung'u report were to have been implemented by October 2005 but the action to be taken in this 2006 Action Plan seems to take things back a bit by finalizing consultations on the implementation of the plan.					
3	Continue investigations of the Anglo Leasing and security related contracts.	KACC AG MOFA	Continuous	Investigation completed and files forwarded to the AG	As per original GoK indicators	
4	Recover public assets suspected to have been corruptly-obtained locally and abroad This action has been carried over from the 2005 Action Plan and the timing was stated as "ongoing" and so it is not possible to know whether it is on schedule or not.	KACC MOFA MOJCA	March 2007	No. of Special Prosecutors, Private Counsel, Investigators and Forensic Auditors hired Additional cases filed	As per original GoK indicators	Hiring of Special Prosecutors, Private Counsel, Investigators and Forensic Auditors to pursue asset recovery is in process. KACC has already filed 23 asset recovery cases in court Training of officers in asset recovery and training held.
5	Deploy/invest recovered assets optimally	KACC, State Law Office, MoF	Continuous	Some milestones should be included to strengthen investigative capacity, signing of international agreements, and investigations carried out.		

	Action to be Taken	Lead Agency Responsibility	Implementation Table (Month/Yr)	Critical Milestones	Results Indicator	Mid-October 2006 Status/Comments WBGW comments
6	<p>Implement Goldenberg Commission of Inquiry's report</p> <p>This action has been carried over from the 2005 Action Plan. The enquiry was to have been completed by July 2005 and the action plan for implementation by October 2005. The timing for this action slipped – the Cabinet approved the memorandum for implementing the report in February 2006 and it is now supposed to be implemented by December 2006.</p>	State Law Office, MOJCA KACC CID	December 2006	<p>Action Plan developed Completion and submission to the AG of a report by a team set up to consider possible charges & further investigations as recommended by Bosire report on the Goldenberg scam</p> <p>All Goldenberg related cases to be filed in court (Ksh 13.8 billion transactions)</p>	As per original GoK indicators	<p>On February 9, 2006, the Cabinet approved a memorandum on the implementation of the Goldenberg Affair Commission Report.</p> <p>A Coordination Committee has been established to oversee the implementation of the Report.</p> <p>Special implementation units have been established in the offices of the DPP; CID; KACC and MoJCA.</p> <p>2 cases and 3 applications have already been filed in court arising from the Ksh 5.8 billion transaction</p>
7	Amend the law of limitations so as to facilitate proceedings of recovery after the expiry of limitations	KACC State Law Office	May 2007	Submit bill to Parliament	As per original GoK indicators	Removal of limitation of actions in respect of Goldenberg is pending debate in Parliament through the Statute Law (Miscellaneous Amendments Bill)
8	<p>Automate recording of court proceedings</p> <p>This action has been carried over from the 2005 Action Plan. This action was to have been completed in December</p>	MOJCA, Judiciary	April 2007	<p>6 pilot courts automated for recording of court proceedings</p> <p>Publication of judgments and court statements.</p>	As per original GoK indicators	Procurement of automation services is in progress. It should be concluded and the work embarked upon.

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	2005 but procurement is still in progress and it is to be completed by April 2007					
9	<p>Introduce legislation for witness and whistle blower protection</p> <p>This action has been carried over from the 2005 Action Plan. The bill was to have been submitted to Parliament by April 2005 but as of June 2006, it was awaiting consideration by Parliament.</p>	State Law Office Parliament	March 2007	Witness protection bill submitted to the National Assembly	As per original GoK indicators	Bill already published and awaits consideration by Parliament
I. Scale Down the Role of the Public Sector and Bureaucracy					<p>EMM: Regulatory Quality Indicator from the World Bank Institute</p> <p>EMM: Business Regulatory Environment Indicator from the World Bank's CPIA</p>	
1	<p>Set up the Privatization Commission under the Privatization Act.</p> <p>Publish Government program for privatization (i.e. to be completed</p>	Ministry of Finance Attorney General	December 2006 Date?	<p>Privatization Commission operational</p> <p>Tenders for x number of privatizations issues</p>	Greater market deepening after privatization	<p>The Privatization Act was passed by Parliament on August 10, 2005 and ascended to by the President of Kenya on October 13th, 2005. The next step is to operationalize the privatization law. This will require:</p> <ol style="list-style-type: none"> 1) Appointment of Executive Director (selected by competitive process) 2) Appointment of non-government directors. Minister of

	Action to be Taken	Lead Agency Responsibility	Implementation Table (Month/Yr)	Critical Milestones	Results Indicator	Mid-October 2006 Status/Comments WBGGM comments
	before elections)			Management contract with a private company signed for Kenya Power and Lighting Company		Finance propose and submit them to the relevant Parliament Commission who is provides with final approval. 3) gazzement of the commencement date by the Minister for Finance. The Privatization Commission is a mechanism, not an outcome. What is needed is concrete commitment to a program of privatizations and timetable
2	<p>Review all business licenses, permits and fees</p> <p>Eliminate 367 business licenses recommended by Working Committee on Regulatory Reform for Business Activities in Kenya</p> <p>Simplify a further 737 licenses as recommended in the report</p>	<p>Working Committee (WC): MOF, MOTI, AG, Law Reform Commission.</p> <p>MoF, Parliament</p> <p>MOF, Ministry of Local Government, Parliament, State Law Office</p>	<p>May, 2006</p> <p>December 2006</p> <p>December 2006</p>	<p>Ministry of Finance gazetted extension period for the WC to review additional 40, licenses, support the simplification of 700 licenses and the review of local government licenses.</p> <p>Licensing Laws (Repeals and Amendments) Bill enacted into law by Parliament.</p> <p>The Business Regulation Reform Bill revised following the outcome of review of the 700 licenses and tabled in Parliament for approval.</p>	<p>Institutionalized review of business licenses in Kenya</p> <p>Less burdensome licensing environment 400 licenses are eliminated, including the most burdensome licenses identified by the Committee and 700 are streamlined)</p> <p>The business regulatory reform unit is established, which prevents the reintroduction of licenses that have been repealed, and ensures that appropriate laws and regulations are complied with before new licenses are approved and admitted to the</p>	<p>The WC reviewed around 1347 business licenses and presented the GOK with recommendations.</p> <p>An additional 40 licenses will be reviewed by December 2006.</p> <p>2005 Action Plan still ongoing, as it was too broad and did not have time bound action with specified number of licenses to be repealed as the 2006 action plan has outlined</p> <p>In June 2006, through the Finance Minister's budget speech, the Kenyan government committed itself to eliminating 118 licenses, and to simplify another 700 of the licenses reviewed by the Working Committee. Of the 118 licenses, 8 and 21 licenses were eliminated effective from June 8, 2005 and June 15, 2006, respectively. Additional license eliminations are likely to follow as the review process continues throughout 2006, among others to the review of the 436 licenses issued by local governments. The reform is scheduled to be fully implemented by 31 December 2006.</p> <p>Continue the reform, and implement the time bound commitments already set out, among others in the 2006/2007 Budget Speech. Legal measures to implement the reform should receive priority in the Parliamentary agenda. Assure that licenses considered by businesses to be</p>

	Action to be Taken	Lead Agency Responsibility	Implementation Table (Month/Yr)	Critical Milestones	Results Indicator	Mid-October 2006 Status/Comments WBGM comments
	<p>Establish a Business Regulatory Reform Unit in the Ministry of Finance</p> <p>Establish an electronic consolidated regulatory registry for all valid licenses</p> <p>This action has been carried over from the 2005 Action Plan. The overhaul of business licensing was to have been completed by December 2005 but it is still ongoing.</p>	<p>Ministry of Finance</p> <p>Ministry of Finance</p>	<p>May 2007 To be moved to December 2006</p> <p>March 2007</p>	<p>Business Regulatory Unit established and operational</p> <p>Reduced regulatory burden on trade and agriculture companies</p> <p>Electronic register of licenses in place</p>	<p>Regulatory Registry."</p> <p>The Regulatory e-Registry is established, provides easy access to all valid business licenses, and Quality Control Unit will be established</p>	<p>particularly burdensome are prioritized. To keep the reform on track, and gradually expand to other priority areas of regulatory reform, recently established Regulatory Reform Unit in the Ministry of Finance must be staffed adequately and with dedicated staff partially seconded from other ministries responsible for business regulation.</p>
J. Enhance Financial Sector Contribution to Anti-corruption						
1	Strengthen corporate governance, roles and responsibilities of the Central Bank of Kenya (CBK)	MoF		Amendment of Central Bank Act	<p>CBK to be made fully responsible and accountable for all decisions relating to the licensing and de-licensing of banks</p> <p>EMM: Annual ratings of quality of corporate governance from the Global Competitiveness Survey</p>	<p>Chairman of Bank will be an independent person, not the Governor as is current practice. Governor becomes CEO and answerable to the Board of Directors</p> <p>This section needs to be strengthened.</p> <p>The proposed amendment of the governance structure of the CBK is not harmful, but only mildly helpful.</p> <p>The crucial change -- as the Bank and the IMF have been arguing since 2003 - is that responsibility and accountability for bank licensing and de-licensing be moved from the</p>

	Action to be Taken	Lead Agency Responsibility	Implementation Table (Month/Yr)	Critical Milestones	Results Indicator	Mid-October 2006 Status/Comments WBGGM comments
						Minister of Finance to the CBK Governor.
2	<p>Establish and make operational the Forensic Accounting Unit at the CBK.</p> <p>Initiate full forensic audit of NBK's non-performing assets, particularly loans made to private individuals and companies.</p>	CBK	December 2006	<p>Unit is fully staffed and operational</p> <p>Launch of tender for consultants for NBK forensic</p> <p>Launch audit</p>	<p>As per original GoK indicator</p> <p>Terms of reference for NBK audit in draft</p>	<p>Terms of reference for advisers to assist with training CBK staff are in final discussion.</p> <p>While the forensic audit unit (primarily to undertake the forensic audit of NBK) is being established, the ability of the CBK to refer findings for prosecution is still in doubt (see comment to G - 1 above). As with the Privatization Commission establishing the unit is NOT an outcome.</p> <p>The table should state the Government's program for the unit's activity -- e.g. to undertake a complete forensic audit of NBK (and possibly also NSSF, see below).</p>
3	Sell Government and parastatal shares in NBK and Consolidated Bank	MoF	June 2007	<p>Approval of Cabinet Memorandum directing the MoF to privatize NBK.</p> <p>Agreement of NSSF to sell its NBK shares via MoF</p>	As per original GoK indicators	<p>Cabinet has so far approved the restructuring (recapitalization) of NBK.</p> <p>This is a step backwards. Re-capitalization should ONLY take place in the context of privatization to reputable investors. This action implies that the decision to recapitalize NBK prior to any decision to privatize is a step along the same path. On the contrary the recapitalization - if undertaken prior to an agreed sale -- is an invitation to plunder the bank again.</p>
4	Prepare for reform and restructuring of the NSSF	MoF, RBA	March 2007	<p>Completion of diagnostic audit.</p> <p>Forensic audit if cases of malfeasance or fraud are found.</p> <p>Financial restructuring of NSSF to achieve solvency</p>	<p>As per revised GoK indicators</p> <p>Replace trustees with independent and competent professionals</p>	<p>The RBA has performed a preliminary analysis of the NSSF indicating major financial problems and instances of fraud, malfeasances and unprofessional investment practices.</p> <p>The proposed diagnostic audit of NSSF is a step in the right direction. A forensic audit may well be warranted depending on the findings.</p> <p>Financial restructuring should ONLY take place when improvements in the governance structure are undertaken.</p>

	Action to be Taken	Lead Agency Responsibility	Implementation Table (Month/Yr)	Critical Milestones	Results Indicator	Mid-October 2006 Status/Comments WBGW comments
				NSSF compliant to the RBA and also with supervision by the RBA, including providing frequent and accurate financial reports to its members	Investment management function delegated to external fund management professionals.	Immediate steps should be taken to achieve the proposed results indicators.
5	Strengthen the governance of KCB	MoF	September 2006	Replace state employee directors with directors meeting criteria regarding professionalism and independence	As per milestone	One state employee replaced with independent director at AGM in May 2006. Two such employees (Government appointees) remain on the board
6	Introduce risk-based banking supervision	CBK	September 2006	Strengthen oversight of critical decisions (such as larger credits), particularly as provided by banks with state influence or considered too important to fail	As per milestone	CBK making progress with institutional strengthening program
K. Measure Results and Assess Overall Progress						
1	Conduct Governance Assessment Surveys	Ministry of Planning	August 2006 August 2006 November 2006 February 2007 April 2007	Steering Committee established. Questionnaire designed Firm procured for data collection Pilot test conducted and data collected	As per original GoK indicators	To ensure integrity and broad participation, the Government intends to establish a Steering Committee comprising Permanent Secretaries, representatives of the private sector, civil society, media, parliament and development partners. In addition, to ensure independence of the diagnostic process from the executive and credibility of the process, data collection and analysis will be undertaken by an independent firm It would be important that this survey is as much comprehensive as possible and is used to carry out all the

	Action to be Taken	Lead Agency Responsibility	Implementation Table (Month/Yr)	Critical Milestones	Results Indicator	Mid-October 2006 Status/Comments WBGW comments
				Basic report produced and published		small diagnostics proposed all along the GAP. To cover aspects of transparency, anticorruption (perception, experience, awareness), service delivery (quality, coverage, users satisfaction), and institutional design (lines of accountability, performance incentives, control systems).

Kenya's Anti-corruption Action Plan (April 2005-June 2006)

ACTIONS FROM THE 2005/2006 ACTION PLAN WITH NO EVIDENCE OF COMPLETION AND YET NOT CARRIED OVER INTO THE 2006/2007 ACTION PLAN

	Action	Lead Responsibility	Timing (Month/Year)	April 2005 Status/ Comments	End August 2005 Status/Comments	Mid-October 2006 status
A. Further Strengthen the Legislative Platform						
1.	Expand the jurisdiction of special Magistrates and to enable them to deal with corruption and economic crimes. Empower the High Court to appoint a receiver of property suspected to have been obtained through corruption. Permit the KACC to take over investigation involving corruption commenced by the police.	Office of the Attorney General	Submit to Parliament by April 2005	The Statute Law (Miscellaneous) Bill was gazetted on April 6, 2005. It amends, among others, the Anti-Corruption and Economic Crimes Act (2003) and the Public Officers Ethics Act (2003). See separate entry on increase in the number of judges, etc.	Request has been made by the Attorney General to the Clerk of the National Assembly for the withdrawal of the Bill in order to incorporate urgent amendments requested by Ministers and stakeholders to various proposed amendments in respect of other Acts such as the Kenya Roads Board Act and the Constituency Development Fund Act. No further amendments will be made to the Anti-Corruption and Economic Crimes Bill. The Bill has not yet been republished due to Legislative Drafting Department's recent focus on drafting the proposed new constitution. It is unlikely that the Bill will be republished in time for it to be debated in September 2005, as was originally intended, but it is expected that it will be republished and submitted to Parliament by October 2005.	The proposed amendments are contained in the Statute Law (Miscellaneous Amendments) Bill, 2006 which has been published and is awaiting debate in the National Assembly.
B. Investigate Economic Crimes, Recover Assets, and Strengthen Prosecutorial Infrastructure						
1.	Complete investigation of the alleged twenty (20) corruption cases.	KACC	On-going	Of the 20 alleged cases, KACC had already investigated 4 cases to conclusion and 3 Permanent Secretaries, 3 senior civil servants; directors of a commercial bank and the Managing Trustee of an entity were arraigned in court on corruption charges. CID had completed	Investigations into 8 out of the original list of 20 cases that the KACC took up are at an advanced stage. So far the Commission has Obtained crucial evidential material including contracts, correspondence, statements of accounts from treasury, CBK, Office of the President and Kenya Police Air wing; Undertaken local searches and due diligence	Investigation of 5 cases completed. KACC has recommended that the AG prosecute 12 twelve officials associated with the five projects. These include four former Cabinet Ministers (including the immediate past

	Action	Lead Responsibility	Timing (Month/Year)	April 2005 Status/Comments	End August 2005 Status/Comments	Mid-October 2006 status
				investigation of one resulting in the prosecution of the Managing Director of a large firm and was already investigating the second one. Another 4 cases are the subject of ongoing civil proceedings in the High Court and therefore cannot be investigated properly by KACC. Two more cases are not under investigation because of lack of evidence of wrong doing. An additional 8 of the alleged 20 are under investigation.	tests in respect of the suspect companies Commenced Exploratory Consultations on mutual legal assistance Interviewed fifty five (55) prospective witnesses and recorded thirty two (32) statements. Investigations are ongoing	Minister of Finance), three former Permanent Secretaries and five senior government officials (including a Financial Secretary). The AG's decision on prosecution is pending.
C. Improve Public Sector Management						
1.	Harmonize the granting of discretionary exemptions with the new exemptions regime of the EAC Customs Union in order to eliminate the use of such discretionary powers.	Ministry of Finance	June 2005	The exemptions regime would become harmonized with the 5th schedule of exemptions under the EAC Customs Union.	The exemptions regime has been harmonized with the 5th schedule of exemptions under the EAC Customs Union. Nonetheless, there are some elements of discretionary powers yet to be addressed.	The exemptions regime has been harmonized with the 5th schedule of exemptions under the EAC Customs Union. Nonetheless, there are some elements of discretionary powers yet to be addressed.

ACTIONS FROM THE 2005/2006 ACTION PLAN NOT CARRIED OVER INTO THE 2006/2007 ACTION PLAN BECAUSE THEY HAVE BEEN COMPLETED

Kenya's Anti-corruption Action Plan (April 2005-June 2006)

	Action	Lead Responsibility	Timing (Month/Year)	April 2005 Status/ Comments	End August 2005 Status/Comments	Mid-October 2006 status
B. Investigate Economic Crimes, Recover Assets, and Strengthen Prosecutorial Infrastructure						
1.	Complete the independent Audit by Controller and Auditor General of the security related contracts	Kenya National Audit Office (KNAO)	May 2005	Government has suspended payments for the contracts pending the outcome of the audit. Interim Audit report has been completed and the final report will be ready by mid May 2005. Based on this Interim Audit, KACC is conducting investigations. Government to consider public disclosure of the findings as appropriate.	Audit has been completed and the final report was submitted on August 18, 2005. Consultations on implementation of recommendations are on going. A copy of the final report has been forwarded to KACC.	Audit has been completed and the final report was submitted on August 18, 2005. Consultations on implementation of recommendations are on going. A copy of the final report has been forwarded to KACC.
C. Improve Public Sector Management						
1.	Ensure that the Budget Strategy is approved by full cabinet and forms the basis for the 2005/06 line item budget consistent agreed macroeconomic framework and ministerial priorities in the Budget Strategy.	Ministry of Finance	April 2005	For the 2005/06 budget, authorities have prepared a Budget Strategy (including MTEF) that lays down budget priorities and ceilings by vote.	The Budget Strategy Paper was prepared, approved by the cabinet and formed the basis for which the 2005/06 line item budget was prepared, which is consistent with the macroeconomic framework and BSP ministerial priorities	The Budget Strategy Paper was prepared, approved by the cabinet and formed the basis for which the 2005/06 line item budget was prepared, which is consistent with the macroeconomic framework and BSP ministerial priorities