

KENYA

1. PRESENTATION¹

| Basic Facts: ² | |
|---------------------------|--|
| Name of Country | Kenya |
| Capital | Nairobi |
| Population | 33,800,000 |
| Area | 582,650 sq km |
| Average Life Expectancy | 47 |
| Ethnic Groups | Kikuyu (22 percent), Luhya (14 percent), Luo (13 percent), Kalenjin (12 percent), Kamba (11 percent), Kisii (6 percent), Meru (6 percent), other African (15 percent), other [including Asian, European, and Arab] (1 percent) |
| GDP per Capita (PPP) | \$1,100 (2005 estimate) |

| Community of Democracies | |
|--------------------------|--|
| Previous Participation | Warsaw: Participant Seoul: Not invited Santiago: Participant |

Timeline of Recent Major Events in Kenya

- **2005 February** - John Githongo, Permanent Secretary of Ethics and Governance in the office of the president (with a special assignment to promote the war on high level political corruption) and former head of Transparency International Kenya, resigns in protest of ongoing corruption and government inaction.
- **2005 February 17** - Ministers of Energy, Finance and Education resign over corruption allegations.
- **2005 May 2** - President's wife, Lucy Kibaki, with body guards and Nairobi's police chief, enter the Nation Media Group offices, threaten journalists and stage a sit-in over their "alleged unfair" reporting on the first family; a cameraman is brutally attacked.³
- **2005 July 20** - Parliament paves way for referendum on a draft constitution, which increases the scope of the President's powers.
- **2005 November 13** - Police kill 4 protestors at rally against the draft constitution in Mombasa.
- **2005 November 21** - Voters reject the version of a draft proposed Constitution that had been prepared by the Attorney General in referendum.
- **2005 November 23** - Responding to the defeat of the proposed constitution, President Kibaki dissolves cabinet.
- **2005 December 7** - President Kibaki announces new cabinet.

¹ Principal author: Center for Democratic Development - Ghana

² 2005 World Population Data Sheet, Population Reference Bureau; CIA Factbook 2006, <https://www.cia.gov/cia/publications/factbook/geos/ke.html#People> ; accessed on 9/26/06.

³ Reporters without Borders, Kenya Annual Report 2006 http://www.rsf.org/article.php3?id_article=17386.

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- **2006** March 2 - Standard Group media is raided by government Special Forces squad.
- **2006** April 10 - Five Parliamentarians die in plane crash while on a peace mission to Northern Kenya.
- **2006** May - Kenya successfully completes African Peer Review Mechanism; report is tabled in Banjul detailing successes and challenges facing the country in the areas of Democracy, Political, Economic and Corporate Governance.
- **2006** July 25 - By-elections to fill the five vacant Parliament seats are held; three of the seats are won by the new political party associated with Government – NARC – Kenya.
- **2006** September - Kenya Anti-Corruption Commission begins building a case against the highly vocal Kenya National Commission on Human Rights Chairman Maina Kiai.

2. BACKGROUND

In 2002, the opposition succeeded in uniting behind Mwai Kibaki in national elections. Kibaki won the presidency, defeating Uhuru Kenyatta of Kenya National African Union (KANU), the son of Kenya's first president and former President Moi's chosen successor. In addition, the National Rainbow Coalition (NARC), which supported Kibaki, won the majority of seats in the National Assembly. These elections raised the prospect of a major shift in Kenyan politics: the new leadership's ambitious reform program included tackling corruption and economic and social issues, as well as undertaking institutional reforms designed to build and promote Kenyan democracy.

Kenya is now a more democratic country than it was under the KANU regime. Nonetheless, the high expectations that accompanied Kibaki's victory have been tempered by a more measured recognition of the complexities and constraints regarding democratization in the Kenyan context. It has become apparent that neither the fundamental nature of Kenyan politics nor the institutional bottlenecks to transition have changed. Numerous aspects of the post-2002 constitutional, legal, and political context remained incongruent with human rights objectives and have to date lacked transparency, equity, access and voice for the civic commons. Significantly, continuity with the ethnic centered, and corruption ridden patron-client based political system have threatened to undermine the consolidation of democratic governance in Kenya.

Kenya is in the process of defining the limits and boundaries of democratic conduct as well as the relationship among various components of a democratic system. There are numerous layers and sectors in this kaleidoscope, some of which are moving more certainly in a democratic direction than others.

3. ANALYSIS

Elections and Democratic Participation

Kenya has had three successful elections since the re-introduction of multiparty politics in 1992. The 2002 elections, widely viewed as legitimate and reflective of the will of the people, resulted in the alternation of power—with KANU losing, and the opposition NARC coalition, led by president-elect Mwai Kibaki's Democratic Party, gaining power. A wide variety of political parties representing a range of ideological, regional, and ethnic interests exists, and there are no significant impediments to party formation. However, the country is far from consolidating its nascent and fragile democracy, including its electoral processes. Opposition parties remain weak and fragmented and even the NARC coalition itself is divided on most issues. The president is elected for a five-year term. The single chamber National Assembly has 210 members elected for five years, with an additional 12 members appointed by the various political parties depending on their strength and then the president. The National Assembly is the setting for much of the nation's political discourse, and a varied and energetic civil society plays an important role in public policy debates.

A proposed revised constitution was soundly defeated, approximately 58 percent to 42 percent, in a November 2005 referendum. The lengthy constitutional revision process had raised hopes that the result would further strengthen democracy. An initial draft known as the Bomas version reflected considerable popular support and input, but the final government-edited draft contained a number of controversial provisions. In addition, many key actors and commentators characterized the votes more as a referendum on President Kibaki's rule than on the relative merits of the draft constitution.

In January 2007, President Kibaki announced nine new members of the Electoral Commission, to replace the Commission members whose terms end in 2007. Opposition and civil society leaders have expressed concern about the fact that the terms of the chairman and the deputy chairman of the Electoral Commission expire in December and October 2007 respectively, even though presidential elections are expected in December 2007; they have called on President Kibaki to extend their terms beyond the election.⁴

Rule of Law and Separation of Powers

The current Kenyan constitution provides for the separation of power between the three branches of government. Over the year, however, the executive has influenced the amendment of the constitution to amass more power and create a semblance of imperial presidency. From independence until the end of Moi's rule in 2002, the executive had undue influence in each branch. President Kibaki has continued this trend, although to a lesser degree.

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

⁴ 'Kenyan presidential hopeful regrets new electoral body appointments' Nairobi, NTV, January 11, 2007, through BBC Monitoring, through www.nexis.com.

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panel of Commonwealth judicial experts from Africa and Canada examined the court system. It concluded that Kenya's court system was among the most incompetent and inefficient 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.

The Kibaki government came into power promising that the rule of law would be upheld, and judicial independence strengthened, however these promises have not been realized in full. Kibaki has criticized the extent of corruption in the judiciary and instructed the minister of justice to establish a process to identify corrupt judges. In late 2003, Kibaki appointed new judges to replace those allegedly tainted by corruption. These actions, however, raised concerns about the criteria used and the lack of transparency in the appointment process.

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. In mid-2005, the Kenya Human Rights Commission raised concerns over the government's failure to establish a truth, justice, and reconciliation commission to deal with the issues of transitional justice.

Basic Freedoms

Demonstrations and public protests in Kenya are generally permitted. However, numerous sources cite the arrest and charge of those protesting fair trade, the constitutional referendum, and human rights violations in 2005. Protests related to the constitutional referendum resulted in at least eight deaths. In December 2006, the police use tear gas to disperse opposition protests, led by a group of MPs, claiming that the protest had not been registered and was therefore illegal.⁵

One of the core strengths of Kenya's political culture is its energetic and robust civil society. The success of the 2002 elections was due in large part to the ability of NGOs in Kenya to pry open political space and gain greater freedom. However, many NGO leaders in 2002 were appointed to government positions leaving a dearth of leadership in the NGO sector.

The constitution provides for freedom of speech. Reflecting Kenya's generally positive record on freedom of thought issues, academic freedom is the norm. However, President Kibaki has been accused of appointing the university heads, such as the vice chancellor of the University.

Kenya's press is considered to be relatively free and the constitution explicitly guarantees press freedom. Reporters, however, continue to face some harassment from the government, whose attitude toward press freedom oscillated throughout the year. On

⁵ 'Police tear-gas Kenyatta protest' *BBC News*, 5 December 2006, at <http://news.bbc.co.uk/2/hi/africa/6209470.stm>, accessed on February 12, 2007.

the one hand, the Kenyan press is more critical than ever before, and there has been a decrease in the number of reported cases of extralegal intimidation. However, journalists are still subject to some government intimidation, arbitrary arrests, and legal actions particularly when reporting on political scandals (see 2 May 2005 and 2 March 2005 in the timeline above). In November 2007, assistant information minister Koigi wa Wamwere suggested that foreign radio stations with rebroadcasting licences, such as the BBC, Radio China, and the Voice of America, would face termination of their licences if their respective governments did not grant reciprocal rebroadcasting rights for Kenya Broadcasting Corporation in the United Kingdom, China and the United States.⁶

Arbitrary Arrest, Torture, and Criminal Justice

While the law prohibits arrest or detention absent a court order, unless there is reasonable suspicion of a suspect having committed or being about to commit a criminal offense under the law, it is widely known that police arbitrarily arrest citizens often to extort bribes. As police are considered the more notorious abusers of human rights, arbitrary arrests can often have greater implications than just the extraction of a bribe, including lengthy, unwarranted detention, and in severe cases, torture.

In 2003, the Kibaki government introduced into the National Assembly the Suppression of Terrorism Bill, a controversial draft legislation aimed at combating terrorism. The bill was redrafted following protests from a wide range of advocacy and human rights organizations, but concerns remain over the extent to which the final bill may restrict civil liberties. Amnesty International, for example, critiqued its “vague and broad definition” of terrorism and terrorist acts and the wide-ranging powers it gives authorities to search and detain persons in connection with terrorist activities. In 2005, the government found itself under considerable international pressure to pass the revised legislation.

Although torture is prohibited by law, 397 cases of torture were alleged in 2005, according to Independent Medico Legal Unit. The Oscar Foundation Free Legal Aid Clinic-Kenya reports 1432 deaths from torture since 2002. Nearly all allegations have gone uninvestigated or have not been prosecuted, reinforcing the impunity of the police. Kenyan citizens are still reluctant to report incidents of torture.

Gender and Minority Rights

Women in Kenya continue to face serious obstacles in the exercise of their freedom. According to a report issued by Human Rights Watch, women in Kenya are denied equal property rights, which puts them at greater risk of poverty, disease (including HIV/AIDS), violence, and homelessness.

In 2002, a draft gender equity bill created considerable public controversy, with some Muslims protesting that it was too sweeping in scope. The government announced in 2004 that a revised bill would be introduced in the National Assembly. It subsequently

⁶ ‘Kenya could halt BBC broadcasts’ *BBC News*, 16 November 2006, at <http://news.bbc.co.uk/2/hi/africa/6155142.stm>, accessed on February 12, 2007.

promised that gender units would be established in all government ministries but this bill never become law.

There is evidence of widespread violence against women; one report determined that more than 50 percent of women had been victims of domestic violence. Traditional attitudes limit the role of women in politics, although there are no legal restrictions and some change is occurring. The 2002 elections increased the number of women in the National Assembly to eight elected and seven nominated, along with three cabinet ministers. The Kibaki administration has explicitly targeted improving women's rights as a key policy goal. This issue is also the focus of considerable attention and discussion in the constitutional review process.

The constitution prohibits discrimination on the basis of a person's "race, tribe, place of origin or residence or other local connections, political opinions, color, or creed." Yet the country's population is divided into more than 40 ethnic groups, and not surprisingly, the challenge of governing such a disparate population has been complicated by frequent and credible allegations of discrimination as well as sporadic interethnic violence.⁷

4. SUGGESTIONS FOR IMPROVEMENT

For nearly two years, President Kibaki and his administration made concerted efforts to consolidate power. Contradicting their own actions, they have at once set up independent commissions on corruption and human rights, only to harass the men and women in these Presidential-appointed positions. The government talks about the need for ridding the country of corruption, but continues to violently harass media who report on such initiatives and refuses to fire the ministers who have been stealing public funds.

While the room for political space has improved since Moi's reign, Kibaki's latest actions indicate that his government supports his sustained power, rather than a democratic government. Many of the reforms of the government, which may have been well-intentioned at first, have proven to be only shallow promises, not fundamental change in the government and thereby the lives of Kenyans. Following from this, therefore, there need to be major improvements in various areas of the political process:

- President Kibaki should hold a dialogue with the opposition and civil society to discuss his appointments to the Electoral Commission and their concerns about the appointments process.
- Renew constitutional review process, with the Bomas draft used as a point of reference.
- Greater emphasis should be placed on reforming police structure- to make the police more professional and accountable - and operations to reduce human rights violations and improve the quality of cases prosecuted.

⁷ *Kenya: Minority, Indigenous Peoples and Ethnic Diversity* (London: Minority Rights Group International [MRGI], 2005).

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- Renewed emphasis should be placed on developing and implementing initiatives designed to promote the rights of women through increased education, stricter enforcement of existing laws against discrimination, and greater women's representation at all levels of government.
- The state needs to institute more transparent and qualitatively improved judicial appointment procedures.
- Greater emphasis should be placed on judicial training.
- The Anti-Corruption Commission should be embedded in the constitution and should either be given prosecutorial powers or develop a more effective and productive relationship with the director of public prosecutions.
- Address the challenges facing political party organization.
- Enactment of a Right to Information law to facilitate accountability and participation.

5. COUNTRY STATISTICS AND INDICATORS

| World Bank Institute Governance Indicators 2005 | Kenya Score | Key |
|---|-------------|--|
| Voice and Accountability | 43.0 | Range 0-100 (Lower value indicates weak voice and accountability; higher value indicates strong voice and account) |
| Political Stability and Absence of Violence | 14.6 | Range 0-100 (Lower value indicates weak voice and accountability; higher value indicates strong voice and account) |
| Government Effectiveness | 25.4 | Range 0-100 (Lower value indicates weak voice and accountability; higher value indicates strong voice and account) |
| Regulatory Quality | 42.1 | Range 0-100 (Lower value indicates weak voice and accountability; higher value indicates strong voice and account) |
| Rule of Law | 18.4 | Range 0-100 (Lower value indicates weak voice and accountability; higher value indicates strong voice and account) |
| Control of Corruption | 14.8 | Range 0-100 (Lower value indicates weak voice and accountability; higher value indicates strong voice and account) |

| Freedom House: Freedom in the World 2007 | Kenya Score | Key |
|--|-------------|---|
| Political Rights | 3 | Range 1-7 (Lower value indicates good system of political rights; higher value indicates bad system political rights) |
| Civil Liberties | 3 | Range 1-7 (Lower value indicates good system of political rights; higher value indicates bad system political rights) |
| Status | Partly Free | 3 Categories: F (Free); PF (Partly Free); NF (Not Free) / (*) Indicates electoral system |

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| Freedom House: Freedom of the Press 2006 | Kenya Score | Key |
|--|-------------|---|
| Total Score | 58 | Range 0-100 (Lower value indicates total free press; higher value indicates less freedom) / 3 Categories: F (Free); PF (Partly Free); NF (Not Free) |

| Countries at the Crossroads 2006 | Kenya Score | Key |
|----------------------------------|-------------|---|
| Accountability and Public Voice | 5.16 | Range 0-7 (Lower value indicates weak accountability and public voice; higher value indicates strong acc. and p.v.) |
| Civil Liberties | 4.58 | Range 0-7 (Lower value indicates weak civil liberties; higher value indicates strong civil liberties) |
| Rule of Law | 3.90 | Range 0-7 (Lower value indicates weak rule of law; higher value indicates strong rule of law) |
| Anticorruption and Transparency | 3.24 | Range 0-7 (Lower value indicates weak anticorruption and transparency; higher value indicates strong a-c and transp.) |

| Bertelsmann Transformation Index 2006 | Kenya Score | Key |
|---------------------------------------|-------------|---|
| Stateness | 7.5 | Range 0-10 (Lower value indicates negative democratic development; higher value indicates positive democratic development) |
| Political Participation | 7.0 | |
| Rule of Law | 5.5 | |
| Stability of democratic Institutions | 5.5 | |
| Political and Social Integration | 6.8 | |
| Total Score Political Transformation | 6.45 | Range 0-10 (Lower value indicates negative democratic development; higher value indicates positive democratic development) / Arrow shows trend in democratic development (↑ Improved; ↓ Worsened) |
| Total Score Political Management | 4.53 | Range 0-10 (Lower value indicates lower quality of political management; higher value indicates higher quality of political management) |

| Corruption Perceptions Index 2005 | Kenya Score | Key |
|-----------------------------------|-------------|---|
| Total Score | 2.2 | Range 0-10 (lower value indicates high corruption; higher value indicates lower values of corruption) |

6. SOURCES

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