

REPORT OF THE CONSTITUTION OF KENYA REVIEW COMMISSION

VOLUME FIVE TECHNICAL APPENDICES

PART THREE

**APPROVED FOR ISSUE AT THE 68TH MEETING OF THE COMMISSION HELD ON
10TH APRIL, 2003**

PART THREE

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**SECTION TWO : ELECTORAL SYSTEMS AND
POLITICAL PARTIES SEMINAR**

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FOREWORD

The Constitution of Kenya Review Commission is pleased to publish this volume of the Commission's report, comprising the technical appendices to the Commission's main report. The contents of this volume are a reproduction of the proceedings of technical seminars held by the Commission. It is presented in five parts as follows:

Part One

Interpretation of the Constitution of Kenya Review Commission's Mandate Seminar
Independence Constitution Seminar

Part Two

Culture, Ethics and Ideology Seminar
Gender Question Seminar
National Convention for Persons with Disabilities
Human Rights Seminar

Part Three

Devolution Seminar
Electoral Systems and Political Parties Seminar
Legislative Reforms Seminar
Judiciary Seminar

Part Four

Economic Sensitisation Seminar
Land Seminar
Constitutional Reform to Fight Corruption Seminar

Part Five

Expert Review of the Draft Bill Seminar

This volume is one of a number, which the Commission has published. It has produced a main report on its work and its recommendations for a new Constitution, a short version of it, a series of reports for each of Kenya's 210 constituencies, and a volume on the Commission's method of work. The authority to prepare and publish these documents is derived from Sections 26 (2) and (7) and 27 (1) of the Constitution of Kenya Review Act (Cap. 3A).

This particular volume has been prepared by the Commission working through the Research, Drafting and Technical Support Committee. The Chair of the Commission, Prof. Y. P. Ghai, and the Chair of the Research, Drafting and Technical Support Committee of the Commission, Prof. H. W. O. Okoth-Ogendo, co-ordinated the work of these seminars. Backstopping assistance by way of research and logistical support was provided by the Technical Staff of the Research, Drafting and Technical Support Department of the Commission.

We wish to acknowledge and thank the local and international experts and professional groups and institutions, who offered their views, opinions and comments freely and sincerely during the Commission's seminars. We also want to thank the individuals and organisations

who gave their material and moral support during the exercise. We as Commissioners are pleased to release this volume to the public for perusal and discussion.

1. Prof. Yash Pal Ghai, Chairman
2. Prof. Ahmed Idha Salim, 1st Vice-Chair
3. Mrs. Abida Ali-Aroni, Vice-Chair
4. Prof. H. W.O. Okoth-Ogendo, Vice- Chair
5. Dr. Mohammed A. Swazuri
6. Dr. Charles Maranga Bagwasi
7. Ms. Salome Wairimu Muigai
8. Hon. Phoebe Asiyu
9. Mrs. Alice Yano
10. Prof. Wanjiku Kabira
11. Bishop Bernard Njoroge Kariuki
12. Dr. Abdirizak Arale Nunow
13. Pastor Zablon Ayonga
14. Ms. Nancy Makokha Baraza
15. Mr. John Mutakha Kangu
16. Ms. Kavetsa Adagala
17. Mr. Paul Musili Wambua
18. Mr. Abubakar Zein Abubakar
19. Mr. Ahmed Issack Hassan
20. Mr. Riunga Raiji
21. Mr. Ibrahim Lethome
22. Mr. Keriako Tobiko
23. Dr. Githu Muigai
24. Mr. Isaac Lenaola
25. Dr. K. Mosonik arap Korir
26. Mr. Domiziano Ratanya
27. Dr. Andronico O. Adede
28. Hon. Amos Wako, Attorney-General – *ex officio*
29. PLO-Lumumba, Secretary – *ex officio*

SECTION ONE

SEMINAR ON DEVOLUTION OF POWER AT THE SAFARI PARK HOTEL, NAIROBI 13TH – 14TH DECEMBER, 2001

List of Presentations and Resource Persons

1. “Speaking Notes on Devolution” by Yash Ghai
2. “The Pros and Cons of Federalism: Comparative Experiences” by Ron Watts
3. “Modes of Devolution” by Richard Simeon
4. “Federalism and Diversity in Canada” by Ronald L. Watts
5. “Structure of Government and the Scope and Method of Division of Power” by Dr. Peter Wanyande
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SPEAKING NOTES ON DEVOLUTION

Prof. Yash Ghai

Chairman, Constitution of Kenya Review Commission

1 Purpose of the meeting:

- To open up the subject of devolution, to explore its forms and varieties, to assess advantages and disadvantages to enable Kenyans to decide on whether they want devolution and if so, what form,
- To enable leaders of political parties and other key stake holders an opportunity to meet, discuss and debate and hopefully, resolve differences—the Review Act requires the process of review to be consensual, and this workshop is held in order to lay the foundations of consensus on what is undoubtedly likely to be the most decisive, and perhaps also the most controversial, issue for the review,
- To bring to bear on our national debates the experiences of other countries, as is required by the Act—although we have experts from only two countries, Canada and South Africa - all three experts are world renowned comparativists who are able to discuss the experiences of a large number of countries, including developing countries.

2. Resource Persons

Professor Ron Watts is President Emeritus of Queen's University in Canada, he has advised the Canadian cabinet and numerous countries on constitutional reforms, is the author of several books and articles on federalism and federations. He is undoubtedly the

world's foremost authority on the subject.

Professor Richard Simeon is Professor of Politics and Law at the University of Toronto. He has advised in Canada and elsewhere on constitutional reform. He has written extensively on federalism and constitutional change.

Professor Christina Murray is Professor of constitutional law and human rights at the University of Cape Town. She was an adviser to the Constituent Assembly in South Africa. She is an alternative member of the South African Human Rights Commission. She has for long been a political activist in her country. She is a leading specialist in the provincial system in South Africa. In addition, we have a number of home grown experts who have already helped us to think through the constitutional agenda of reform and we are grateful and delighted that they could come to this workshop.

3. Provisions of the Review Act

- Directly on devolution.
- People's participation through devolution.
- Examine local government.
- Examine unitary or federal system.
- Indirectly on devolution.
- Generally, people's participation in public affairs.
- Respect for ethnic and regional diversity
- Enhance democracy.
- Diffusion and separation of powers.

- Promote the accountability of public authorities.
- Whether the best response to these goals is devolution, is controversial which makes decisions difficult.
- Those provisions which have a bearing on how devolution, if it happens, should be organized, and if not, how the central institutions should be organized.
- Emphasis on national unity and integrity of the Republic, which might suggest a unitary system (as the argument went in 1963-4, which led to the demise of *majimbo*).
- Equitable framework for economic growth and equitable access to national resources.
- Consensual method for resolving national issues (the above may militate against devolution, on one theory at least that it threatens national unity, creates conflict and may not allow enough flexibility to transfer resources from one district or province to another)- but if devolution is to be established, then the form of devolution must be determined.
- Need for national unity and integrity of the Republic—suggesting minimizing the negative aspects of ethnicity.
- Promoting people’s participation (this may have a major impact on the level and scale of unit for devolution-the smaller the better the prospect for participation).
- Creating separation of powers and checks and balances (might influence the method of distribution of power and dispute settlement).
- Human rights, including the right of movement, and the right to own and enjoy property, and the general prohibition of discrimination (which might militate against devolution if raised on ‘ethnic homelands’, and argue therefore for a spatial rather than ethnic devolution).

4. Alternatives to Spatial/ Ethnic Devolution

There does seem to be consensus on-

- the need to remove the concentration of the powers of the president;
- to deconcentrate/decentralize the powers of the central administration.

Can these goals be achieved without spatial/territorial devolution (such as coalition/power sharing governments, better separation of powers between the executive, legislature and the judiciary, greater use of independent institutions (e.g. a National Fiscal Commission to distribute resources, an effective ombudsman, an electoral system which encourages cross-ethnic appeals, recognition and promotion of cultural and linguistic heritage of the country, through central institutions, etc. Alternatively, can these be tied in to some form of devolution?

Or, is the concept of the central state too closely tied to ethnic domination for effective reforms?—e.g., many ethnic groups, with the encouragement of political leaders, are now demanding that it is their turn to have a president and to reap the rewards of the political control of the state.

Connected to the above—since the salience of the devolution debate has been due to perception of its connection with ethnicity/tribalism, e.g., security and identity — are there other ways to solve the ethnic question (power sharing at the center, strong minority protection, powers of central government to intervene, co-operative rather than an adversarial system of elections)—and what implications do they have for devolution (e.g., decreasing its importance or providing for minority rights within devolved areas). Devolution

has to be fitted **within** the general vision of the future Kenya as a:

- unified state with strong emphasis on common citizenship, or
- community of ‘nation’,

and awareness of the problems of the second approach (e.g., defining citizens by ethnic criteria, the danger of group or communal rights subordinating individual rights, possible oppression of ‘minorities within minorities’).

4. Issues in Devolution

- Do we have enough financial resources?
- Do we have the requisite administrative capacity/skills?
- Can we possibly agree on the unit/s of devolution?
- Can we possibly agree on new boundaries for these units?

5. Implementing Devolution

How would devolution be best implemented? It would no doubt require a long period of time to fully put in place. There will also no doubt be resistance to implementation from whichever party is in power/ at the center. What are good models of implementation strategies and mechanisms?

6. The Wider Context

The question of devolution needs also to be examined in a wider context constituted by the following considerations:

- Globalisation – how best do we position ourselves to cope with the vulnerabilities and potential of globalisation; the role of internal devolution as we become more

integrated in the East African Community and COMESA – is simultaneous devolution upwards and downwards possible/desirable?

- Poverty – we are exceedingly poor, yet with huge disparities of wealth, resources and opportunities – does devolution have any bearing on this issue especially with regard to:

– Feasibility of equalization measures,

– The expenses of more than one tier of government.

- Corruption – does devolution lead to more or less corruption.

- Ethnicity – its salience and prevalence today; how the principle and form of devolution might affect it.

- Contemporary weaknesses of institutions – the effect of devolution on this question (including existing capacity).

THE PROS AND CONS OF FEDERALISM: COMPARATIVE EXPERIENCES

Ronald L. Watts

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**Emeritus Institute of Intergovernmental Relations Queen's University,
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1. Contemporary Challenges of Managing Diversity

1.1 The Contemporary Relevance of Federal Political Solutions

Throughout the contemporary world, including Africa, modern developments in transportation, social communications, technology and industrial organization have produced pressures not only for larger states but also for smaller ones. Thus, there have developed two powerful, thoroughly interdependent, yet distinct and often actually opposed motives: the desire for integration to build an efficient and dynamic modern state, and the disintegrating impulse arising from the search for community identity and self-determination of distinct regional and local groups.

Given these dual pressures throughout the world, for larger political units capable of fostering economic development and improved security on the one hand, and for smaller political units more sensitive to their electorates and capable of expressing local distinctiveness on the other hand, it is not surprising that the federal solution should currently have considerable political appeal. Federalism provides a technique of political organization that permits action by a shared government for certain common purposes together with autonomous action by regional or local units of government for other purposes that relate specifically to maintaining their distinctiveness. Indeed, at the beginning of the 21st century, some 25

countries in the world call themselves federations or meet the criteria usually accepted for a federation (Watts 1999). Taking account of such examples as Canada, the United States and Mexico in North America, Brazil, Argentina and Venezuela in South America, Austria, Belgium, Germany, Spain, Switzerland and Russia in Europe, Australia in Australasia, India, Pakistan and Malaysia in Asia, the United Arab Emirates in the Middle East, and Nigeria, South Africa and Ethiopia in Africa, more than two billion people, 40 percent of the world's population, live in countries that can be considered federations. These encompass some 480 federated-constituent units; Furthermore, many of these federations are clearly multi-ethnic or multinational in their composition. In these situations, the aim has not been to eliminate diversity but rather to accommodate, reconcile and manage diversity within an overarching harmony and unity. This suggests to many that federal political systems of government, by reconciling the need for large-scale political organization with the recognition and protection of ethnic, linguistic or historically derived diversity have the advantage of a closer institutional approximation to the multinational reality of the contemporary world.

1.2 The Federal Solution is not a Panacea

Experience since 1945 also makes it clear, however, that federalism is not the panacea

that many have imagined it to be. In that period a number of federal experiments have had to be temporarily suspended or abandoned. The secession of Bangladesh from Pakistan, the separation of Singapore from Malaysia, the Nigerian civil war, and the dissolutions of the colonial federations of the West Indies and Rhodesia and Nyasaland are examples, as have been the more recent break-up of federations in the USSR and Czechoslovakia and the shrinking of the Federal Republic of Yugoslavia. Even in such classical federations as the United States (1789), Switzerland (1848), Canada (1867) and Australia (1901), which stand out among the more than one hundred independent countries of this world for the longevity of their constitutions, there have been tensions between the responsibilities appropriately concentrated at the level of central government and the degree of responsibility and autonomy left with the governments of the constituent units as the pressures for inter-regional integration and for regional self-expression have both been intensified by conditions in the contemporary world. The degree to which federal systems, and in what form, may be expected to accommodate or resolve these contemporary pressures, therefore, warrants careful examination and is relevant to the work of the Constitution of Kenya Review Commission. That is the focus of this presentation.

2. Varying Popularity of the Federal Solution during the Past Century

2.1 *The Period Before 1945*

The popularity of the federal solution has fluctuated during the past century. Prior to 1945, the general attitude seemed to be benign contempt for the federal form of government. Federation was seen by many, especially in Europe, as incomplete national government, as only transitional mode of political organization, as a not really

desirable but unavoidable concession in exceptional cases to accommodate political divisiveness, and as a product of human prejudices or false consciousness preventing the realization of unity through such compelling ideologies as radical individualism, classless solidarity, or the General Will.

Indeed, writing in 1939 Harold Laski in an article entitled, "The Obsolescence of Federalism" declared: "I infer in a word that the epoch of federalism is over" (Laski 1939: 367). Federalism in its traditional form, with its compartmenting of functions, legalism, rigidity and conservatism was, he suggested, unable to keep pace with the tempo of economic and political life that giant capitalism had evolved. Federalism was, he argued, based on an outmoded economic philosophy, and was a handicap in an era when positive government action was required. Decentralized *unitary* government, he concluded, was much more appropriate to the new conditions of the Twentieth Century. Sir Ivor Jennings, a noted British constitutionalist (who was to be an advisor in the 1940s and 1950s in the creation of several new federations within the Commonwealth) once wrote that "nobody would have a federal constitution if he could possibly avoid it" (Jennings 1953: 55).

2.2 *The Period Between 1945 and 1960*

But how wrong they were! While in 1945 the federal idea appeared to be on the defensive, the following decade and a half saw a remarkable array of governments created or in the process of construction that claimed the designation 'federal'. Indeed only eight years later, Max Beloff was able to assert that the federal idea was enjoying "widespread popularity such as it had never known before" (Beloff 1953: 114). One source of this popularity was the pronounced post-war prosperity of the long-established

federations such as the United States, Switzerland, Canada and Australia.

The popularity of the federal idea after 1945 stemmed even more, however, from the conditions accompanying the break-up of colonial empires at that time. The units of colonial government were often merely the product of historical accident, of the scramble for empire, or of administrative convenience. As a result, the colonial political boundaries rarely coincided with the distribution of the racial, linguistic, ethnic or religious communities, or with the locus of economic, geographic, and historical interests. In these circumstances, the creators of the new states approaching independence found themselves faced with simultaneous conflicting demands for territorial integration and balkanization. They had to reconcile the need, on the one hand, for relatively large economic and political units in order to facilitate rapid economic development and to sustain genuine political independence, with the desire, on the other hand, to retain the authority of smaller political units associated with traditional allegiances representing racial, linguistic, ethnic and religious communities. In such situations, where the forces for integration and separation were at odds with each other, political leaders of nationalist independence movements and colonial administrators alike, found in the “federal solution” a popular formula, providing a common ground for both centralizers and decentralizers. The result was a proliferation of federal experiments in the colonial or formerly colonial areas in Asia, Africa and the Caribbean. These included India (1950), Pakistan (1956), Malaya (1948) and then Malaysia (1963), Indochina (1945-7) and Indonesia (1945-9) in Asia, Nigeria (1954), Rhodesia and Nyasaland (1953), French West Africa (A.O.F.) and its successor the Mali Federation (1959) and French Equatorial Africa (A.E.F.) in Africa, and the West

Indies Federation (1958) in the Caribbean. In addition, a functional confederation, the East Africa High Commission (1947), was devised to administer common services in that region. During the same period, in South America where the federal structure of the United States has often been imitated at least in form, ostensibly federal constitutions were adopted in Brazil (1946), Venezuela (1947), and Argentina (1949).

Meanwhile in Europe where World War II had shown the devastation that ultra-nationalism could cause, the federal idea gained momentum, and process in that direction was begun with the creation of the European Communities and the adoption by West Germany in 1949 of a federal constitution.

Thus, the first decade and half after 1945 proved to be the heyday of the federal idea. In both developed and developing countries the “federal solution” was seen as a way of reconciling the two powerful and often strongly opposed motives: the desire on the one hand for larger political units required to build an effective dynamic modern state, and the search on the other for identity through smaller self-governing political units. It was just at the end of this period in 1963 that the independence constitution of Kenya adopted an element of devolution in its quasi-federal design.

2.3 The Period Between 1960 and the Late 1908s

From the 1960s on, however, it became increasingly clear that federal systems were not the panacea that many had imagined them to be and that in many places they had been applied in inappropriate situations. Most of the post-war federal experiments experienced difficulties and a substantial number had to be temporarily suspended or abandoned. Examples were the continued internal tensions and the frequency of resort

to emergency rule in India, the secession of Bangladesh from Pakistan, the separation of Singapore from Malaysia, the Nigerian civil war and subsequent prevalence of military regimes, the early dissolutions of the Federation of the West Indies and the Federation of Rhodesia and Nyasaland, the disintegration of the federal efforts in the former French colonial areas of Indochina, Western Africa and Equatorial Africa, and the eventual demise, even of the East African Common Services Organization. In Kenya within a year of their adoption, the devolutionary features were abandoned. In Africa generally centralized government dominated by the “Big Leaders” came into vogue.

These experiences suggested that even with the best of motives, there were limits to the appropriateness of federal solutions. Furthermore, the experience of Latin America, where many of the constitutions were federal in form but had in practice operated in an essentially unitary manner, added further to the scepticism about the utility of federation as a practical approach in countries lacking a long tradition of respect for constitutional law and a genuinely federal political culture. In Europe, the slowness of progress towards integration, at least until the mid-1980s, also seemed to make the idea of an eventual federal Europe more remote.

Even in the classical federations of the United States, Switzerland, Canada, and Australia, renewed internal tensions and the loss of economic momentum during this period reduced their attractiveness as shining examples for others to follow. In the United States, the centralization of power through federal preemption of state and local authority and the shifting of costs to state and local governments through unfunded and underfunded mandates had created an apparent trend towards what has been widely described as “coercive federalism”.

Furthermore, the abdication by the Supreme Court of its role as an umpire within the federal system, exemplified by the *Garcia* case in 1985, raised questions about the judicial protection of federalism within the American system.

While Switzerland has remained relatively stable, the long-drawn crisis over the Jura problem prior to its resolution, the need to shift from defensive to affective federalism, and the problems of defining Switzerland’s future relationship with the European Community raised new questions about the Swiss federation. In Canada the “Quiet Revolution” in Quebec in the 1960s and the ensuing four rounds of contentious mega-constitutional politics, 1963-71, 1976-82, 1987-90 and 1991-92, produced three decades of internal tension. Aboriginal land claims, the crisis in fiscal arrangements and defining the relative roles of the federal and provincial governments under the free-trade agreements with the United States and later Mexico created additional stresses. Australia in 1975 experienced a constitutional crisis which raised questions about the fundamental compatibility of federal institutions and responsible cabinet - government, but several efforts at constitutional review since then have in the end come to naught. The result was a revival in some quarters within Australia of debate about the value of federalism. Through most of the period Germany remained relatively prosperous, but increasing attention was drawn to the problems of revenue sharing and of the ‘joint decision trap’ entailed by its unique form of administratively interlocked federation. More recently the reunification of Germany, possible *Lander* boundary adjustments, defining the relationship of the *Bund* and the *Lander* to the European Community, and relations with Eastern Europe have become a focus of attention.

At the end of this period, the disintegration or dismemberment of the former

authoritarian centralized federations, the Union of Soviet Socialist Republics, Czechoslovakia and Yugoslavia showed the limitations of such federal facades. This led in some of those areas to a reluctance to adopt new federal arrangements because of the past association in their experience of federal structures with centralization and authoritarianism.

2.4 *The Revival of Federal Popularity in the 1990s*

Nevertheless, despite all these developments, there seems in the 1990s to have been a revival of interest in federalism although this time with a more realistic appreciation of its possibilities and limitations. Political leaders, leading intellectuals and even some journalists increasingly refer to federalism as a liberating and positive form of organization. Belgium, Spain, South Africa and perhaps Italy, appear to be emerging towards new innovative federal forms, and in a number of other countries such as the United Kingdom some consideration has been given to the efficacy of incorporating some federal features, although not necessarily all the characteristics, of a full-fledged federation. Furthermore, despite some uncertainty, the European Community seems to have regained some of its lost momentum in the evolution to a wider European Union with some federal characteristics. On the African continent generally, as Wole Soyinka, the Nobel Laureate, has noted recently, the disappointing consequences of the centralism of so many first generation leaders has drawn attention to the desirability of devolution or federation (Soyinka 2001).

To what can this renewed interest in federalism be attributed? One major factor has been the recognition that an increasingly global economy has unleashed centrifugal economic political forces weakening the

traditional nation-state and strengthening *both* international *and* local pressures. My colleague Tom Courchene at Queen's has labelled this trend 'globalization' (Courchene 1995). Global communications and consumership have been awakening desires in the smallest and most remote villages around the world for access to the global marketplace of goods and services. As a result national governments today are faced increasingly with the desires of their populaces to be both *global* consumers and *local* citizens at the same time. Thus, the nation state is at the same time proving both too small and too large to serve the desires of its citizens. Furthermore, the spread of market-based economies is creating socioeconomic conditions conducive to support for the federal idea: emphasis upon contractual relationships; recognition of the non-centralized character of a market economy; entrepreneurial self-governance and consumer rights consciousness; the thriving of markets on diversity, no homogeneity; inter-jurisdictional mobility and competition as well as cooperation; and recognition that people do not have to like each other in order to benefit from working with each other. A second factor is that changes in technology are generating new more federal models of industrial organization with decentralized and "flattened hierarchies" involving non-centralized interactive networks and thereby influencing the attitudes of people about non-centralized political organization.

A third factor has been the collapse of totalitarian regimes in Easter Europe and the former Soviet Union. These developments have undermined the appeal of transformative ideologies and have exposed the corruption, poverty and inefficiency characteristic of massive authoritarian centralization. Following their collapse the outbreak in a number of cases of violent ethnic and religious conflict has also demonstrated that a transformative ideology

institutionalized by a centralized regime cannot produce human peace and unity through coercion and indoctrination.

A fourth factor is the resurgence of confidence in Europe's federal evolution as a result of the recent progress with the Single European Act and with the Maastricht Treaty, despite the hurdles that these have had to surmount. A paradoxical impact of the European Union has been not only its thrust to a wider and fuller Union of member states, but also the encouragement it has provided for regionalist and smaller nationalist movements by providing a framework within which such political entities might become viable as distinct members or as participants within 'a Europe of the regions' or at least a 'Europe with regions'. Illustrations are the hopes that have been given to such units as Scotland, the Flemish and Walloon regions in Belgium, Catalonia in Spain or prospectively, the former units within the Czechoslovak federation.

A fifth factor has been the resilience of the classical federations, which despite the problems they have experienced over the past three decades, have nevertheless shown a degree of flexibility and adaptability in responding to changing conditions

All these factors have contributed to the renewed interest in federalism, not as an ideology, but in terms of practical questions about how to organize and distribute political powers in a way that will enable the common needs of people to be achieved while accommodating the diversity of their circumstances preferences.

But this revival of interest in federal political systems differs from the enthusiastic proliferation of federations that occurred in first decade and a half after 1945. The experience since has led now to a more cautious and realistic approach.

3 The Pros and Cons of Federal Political Solutions

3.1 *Traditional Arguments in Favour of Federal Political Systems*

The pros and cons of federal versus centralized unitary political systems have been debated frequently over the years (for good discussions covering many of the points below see Ghai 2000: esp.494-525; and 2001). Turning first to the traditional arguments advanced in favour of federal systems rather than unitary systems, these have been:

- (i) federal systems promote the participation of citizens in governance through devolution and the exercise of power at governmental levels closer to the citizen;
- (ii) federal systems facilitate the establishment of free and democratic governance by diffusing authority and separating powers, and by comparison with decentralized unitary systems they establish non-centralization through effective constitutional checks and safeguards;
- (iii) federal systems contribute to the accountability of all public authorities;
- (iv) federal systems can enable territorially distinct ethnic and national communities a measure of self-determination through self-government at the regional or local level while retaining effective central policy-making on issues of common concern;
- (v) federal systems can reduce tensions and conflicts within a central government by siphoning off issues of greatest contention between different ethnic or regional groups, leaving these issues to be dealt with by each group in its own way at the regional or local level. This avoids what one member of the Constituent Assembly of India described as "overcentralization which leads to

anemia at the extremities and apoplexy at the centre”;

- (vi) federal systems provide a midpoint between the competing claims for sovereignty of unitary or confederal systems

3.2 Traditional Arguments against Federal Systems and Devolution

Among the traditional arguments against federal systems and devolution are:

- (i) fears that devolution and regional or local autonomy within a federal system would inhibit the performance by the central government of the key functions of establishing a framework for economic growth and equitable access to natural resources;
- (ii) fears that recognition within the political structure of ethnic and national differences would reinforce these divisions, undermine unity, and even possibly be a springboard to secession;
- (iii) concerns that it would not be possible to draw boundary lines totally along ethnic lines, and therefore attempting to create sub-units on ethnic lines would inevitably leave significant minorities within each constituent unit, and would also mean that major groups who are geographically more dispersed, rather than territorially concentrated, would be penalized;
- (iv) fears that the fundamental values of the society and state may be compromised by recognizing the autonomy of different cultural or religious values;
- (v) concerns that the costs in terms of finances and skilled human resources required to— operate dual or triple levels of government would be a serious burden.

3.3 Applicability to Multi-ethnic and Multi-national Situations

The applicability of federal political solutions to multi-ethnic and multi-national situations has been a particular subject of debate (Watts 2000:40). The contemporary period has been marked not only by pressures for both larger and smaller units, but as some authors have noted, particularly by strong pressures for ethnic nationalism. As Forsyth (1989) and Wiessner (1993) have noted, the uniting of constituent units that are based on different ethnic nationalisms into some form of federal system appears to be one way of containing pressures for fragmentation. But in practice multi-ethnic federations have often been difficult to sustain. This is illustrated by the experiences of Nigeria, Ethiopia, Pakistan, India, Malaysia, Canada, Belgium and Spain, as well as the efforts to federalize Europe. This has led some respected commentators, such as Elazar (1993), to question whether federations composed of ethnic units are workable or simply run the risk of eventually suffering civil war. It has led others to suggest that the boundaries of constituent units should deliberately avoid being based on ethnic lines. There is no doubt that fundamentally mono-ethnic federations like the United States, Australia and Germany have faced fewer difficulties than those which have included some ethnically differentiated constituent units. And the radically ethnic federations of Nigeria and Ethiopia show the serious problems that can arise where the federal institutions have been inadequate to the task of generating consensus among the diverse groups.

Nevertheless, the persistence of the federal systems in Switzerland and Canada for well over a century, in India for half a century, and Malaysia for nearly four decades suggests that despite their difficulties, multi-ethnic federations with appropriately

designed institutions can be sustained and prosper. Moreover, efforts to ignore the reality of ethnic communities by suppressing ethnic minorities within unitary political systems have often become the source of severe tensions and even disruption and civil war. Indeed, some have argued that this has been a major source of Kenya's current problems. Within federations that have attempted to draw the boundaries of constituent units to cut across rather than coinciding with ethnic lines, such efforts have often succumbed in the end to the pressure to recognize the basic ethnic divisions. The classic case of this has been the Indian federation. Under the constitution of 1950 most state boundaries did not follow ethnic lines. By 1956 it had become necessary to reorganize the states basically along linguistic lines, and since that time there have been further refinements to this pattern.

On this issue, it would appear that in the process of constitution-making, in the end, account usually has to be taken of the ethnic realities. In those cases where ethnic nationalism has been a crucial issue, devolution has in fact in a significant number of cases reduced tensions by giving distinct groups a sense of security through self-government, thereby paradoxically contributing to greater harmony and unity. Given that management of ethnic nationalism is a crucial issue in so many countries in the contemporary world, what is particularly important to consider is what kinds of devolution and federal structures and processes best enable federal political systems to accommodate distinct diversities and minimize ethnic conflict.

3.4 *The Balance of Pros and Cons*

While powerful arguments can be made both for and against federal systems, actual experience suggests that neither are totally conclusive. Some examples of federations,

including some multi-ethnic ones, have been remarkably successful. Examples are Switzerland, the United States, Canada, Australia, Germany, India and Spain. But there have been examples of serious failures too in Nigeria, Pakistan, Czechoslovakia and Yugoslavia to name just a few of those already cited earlier.

What should Kenyans make of this record? Part of the explanation for the mixture of successes and failures lies in the great variety of forms of devolution and of federation that these examples represent. Therefore, to think in simplistic "either-or" terms of endorsing or condemning federalism and devolution in general is to miss the point. The reality of experience elsewhere is that there has been a great variety of forms that devolution and federation have taken. Thus, it is essential to avoid the "tyranny of terminology" whereby it is assumed that there are only two alternatives and that the choice is simply between unitary or federal governmental systems. Rather, on the basis of the enormous variety in the experience elsewhere, the objective should be to draw upon the great range of alternatives and to devise institutions that would maximize the benefits of federalism while minimizing its negative effects, and to tailor any new constitution to the particular circumstances of Kenya.

Consequently, the balance of this presentation focuses not on the choice between unitary and federal systems, but on what we can learn from the enormous variety among federal political systems in their institutional arrangements.

4. *Variety in the Application of the Federal Idea*

4.1 *The Range of Federal Models*

First, we need to identify what characteristics a political system as “federal”. Federal systems represent a broad category of political systems in which, by contrast to the single source of central authority in unitary systems, there are two (or more) levels of government, combining shared rule through common institutions with regional or local self-rule in the constituent units (Watts 1999: 6-7).

This broad category encompasses a whole spectrum of more specific models of multi-level governance, combining elements of shared rule and self-rule. Within this broad spectrum are unions, constitutionally decentralized unions, federations, confederations, federacies, associated states, condominiums, leagues, and joint functional authorities (Watts 1999: 7-14). Since the current debate in Kenya has primarily focused on two types of devolution constitutionally decentralized union versus federation shall concentrate, however, on those two models. But in doing so, I would emphasize that within each of these two models, there are also many variations and at the margins. Like the colours in a spectrum, these models shade into each other. Thus, once again, I emphasize that it is important to avoid the assumption that it is simply a matter of choosing between only two alternatives.

Constitutionally decentralized unions are fundamentally unitary in form in the sense that ultimate constitutional authority rests with the central government, but unlike centralized pure unitary systems such unions have a strong federal element by providing constitutionally protected sub-units of government with some functional autonomy. Such systems generally provide for a measure of regional or local self-government, but these are ultimately vulnerable to the overriding constitutional authority of the central government. Some significant contemporary examples are

China, Indonesia, Italy, Japan, Tanzania and the United Kingdom.

Federations are compound polities, combining strong constituent units of government and a strong general government, *each* possessing powers delegated to it by the people through a constitution, each empowered to deal directly with the citizens in the exercise of its legislative, administrative and taxing powers, and each directly elected and accountable to its citizens. Currently, some 25 countries meet these basic criteria, although in the cases of Spain and South Africa their constitutions have not formally adopted the label of “federation”. Federations enable both strong federal and strong sub-unit governments, each directly responsible to the citizens, but this is achieved at the price of some tendencies to complexity and legalism. What particularly distinguishes them from constitutionally decentralized unions, is that each level of government derives its full authority from the constitution, not the other level of government, and that the constitution cannot be amended unilaterally by one level of government acting alone.

Hybrids are political systems that combine characteristics of different models. For instance, the term “quasi-federal” has sometimes been used to refer to those systems which are predominantly federations in their constitutional structure and operation, but have included some overriding federal government powers that are more typical of a unitary system. Among such examples are Canada, which initially under its 1867 constitution was basically a federation, but included some overriding federal powers. These are still in the constitution, but by the second half of the twentieth century had, by strong convention, fallen into disuse. India, Pakistan and Malaysia have predominantly federal constitutions, but their constitutions also

include some overriding central emergency powers which have been used from time to time. More recently, the South African constitution of 1996 has most of the characteristics of a federation, but retains some unitary features. A different form of hybrid is one combining the characteristics of a confederation and federation. A prime example is the European Union after the Maastricht Treaty, which basically establishes a confederation but with some features of a federation. Hybrids occur because statesmen are usually more interested in pragmatic political solutions to meet specific problems than in theoretical purity.

4.2 Variations among Federations

Within the range of models that we may describe as "federal political systems", as already noted, "federations" represent one particular and quite popular model. Their defining characteristic is that in a federation neither the federal nor the constituent units of government are constitutionally subordinate to the other. Each order of governments has its own sovereign powers defined by the constitution rather than by another level of government, each is empowered to deal directly with its citizens in the exercise of its legislative, executive and taxing powers, and each is directly elected by and accountable to its citizens.

The generally common structural characteristics of federations are the following:

- At least two orders of government acting directly on their citizens.
- A formal constitutional distribution of legislative and executive authority and allocation of revenue resources between the orders of government that ensures some areas of genuine autonomy for each order.

- Provision for the designated representation of distinct regional views within the federal policy-making institutions, usually including the representation of regional representatives in a federal second legislative chamber.
- A supreme constitution not unilaterally amendable and requiring for amendment the consent of both the federal legislature and a significant proportion of the constituent units either through assent by their legislatures or by regional majorities in a referendum.
- An umpire, usually in the form of courts or by provision for referendums (as in Switzerland regarding federal powers) to rule on disputes over the constitutional powers of governments.
- Processes and institutions to facilitate intergovernmental collaboration in those areas where governmental powers are shared or inevitably overlap.

Within the basic framework of characteristics identified as common to federations, there is considerable scope for variation, as evidenced by differences among existing examples. There have in fact been many variations, and the particular form that is appropriate in a given country has depended on the nature and extent of the social diversity to be accommodated.

4.3 Issues in the Design of Federations that affect their Operation

4.3.1 The number and character of the constituent units

The number and relative area, population and wealth of the constituent units in relation to each other within a federation, all have considerable effect on its operation. Where the number of units is relatively large, for instance 89 in the Russian federation or 50 in the United States, the relative political power and leverage of

individual constituent units is likely to be much less than in federations of six units (such as Australia and Belgium) or often provinces (such as Canada). Where there are substantial disparities in *area and population* among constituent units, this may generate dissension over the relative influence of particular regions in federal policy-making. In some instances, most notably India and Nigeria, some regional boundaries have been altered to reduce such disparities or to make the constituent units coincide more closely with linguistic and ethnic concentrations. Disparities in wealth among regional units, making it difficult for citizens to receive comparable services, can have a corrosive effect on solidarity within a federation. This explains why so many federations have found some form of financial equalization virtually essential.

Nearly all federations, as sharing communities linking diverse groups, have in practice constitutionally guaranteed the mobility of all citizens to any part of the federation. Furthermore, in the interests of promoting cohesion and solidarity among the diverse groups within the federation, they have almost always provided also for the redistribution of resources among constituent units through some sort of financial equalization scheme to assist the poorer provinces, although the precise form of such arrangements has varied. This is important to note because it runs counter to the assumption made by some of the supporters and critics of "*majimbo*" who would see devolution as entailing restrictions upon the mobility and access to resources within a region for citizens from other regional units or from other ethnic groups.

Federal systems have not been confined only to countries with large areas or populations like the United States, Canada, India and Russia. There are a number of moderately sized federations with populations or area

considerably less than that of Kenya. Switzerland, a highly successful federation for more than a century and half has a population of about 7 million and encompasses some 26 cantons and half cantons. Belgium with a population of about 10 million consists formally of six constituent units. Austria with a population of 8 million has 9 states Malaysia's 13 states total a population of 22 million. Thus, a significant number of moderately sized countries with internally diverse populations have found federal institutions a practical solution.

In considering the number and size of units that might operate within a Kenyan federation as a result of devolution, the Swiss example is worthy of some attention. In a federation of approximately 7 million people composed of four linguistic groups, instead of establishing four linguistically differentiated constituent units, they have as many as 20 cantons and 6 half-cantons, most of which are internally homogeneous in linguistic and religious terms. This arrangement of relatively numerous small cantons has brought government closer to the people and at a size making administration simpler, while recognizing rather than ignoring ethnic distinctiveness. At the same time it avoids concentrating each ethnic group in a single canton.

Perhaps some such solution for recognizing ethnic diversity could be applied to Kenya by adapting the current districts as the basic constituent units for devolution. When considering the character of constituent units, two other points arise for consideration. Traditionally, federations as a form of territorial political organization have seemed to be most applicable where diversities are territorially concentrated so that distinct groups can exercise their autonomy through regional units of self-government. Power-sharing among distinct non-territorial groups (i.e., distributed all

across the country rather than concentrated in regional areas) has more commonly been associated with a consociational form of political organization in which the different groups affect policy primarily through their representatives within a central government. However, Belgium, when it became a federation in 1993, provided an interesting experiment in which three territorial "regions" and three non-territorial "communities" constituted six self-governing units within the federation (since then, the councils of the Flemish region and the Flemish Community have been merged into a single "Flemish Council").

Another noteworthy recent development is the number of federations which have themselves become constituent units within a wider federal or confederal organization. The most prominent example is the European Union, which contains among its members four fully-fledged federations: Austria, Belgium, Germany, and Spain. This has had an impact within each of these federations upon the relative roles of their federal and constituent governments. Yet another trend contributing to the tendency for multi-tiered federal systems has been the increasing attention being given to the importance of local governments, including in some cases such as Germany and India, the constitutional recognition of their role as a third tier.

4.3.2 *The distribution of legislative and executive authority and of financial resources*

A key characteristic of all federations is the constitutional distribution of legislative and executive jurisdiction and of financial resources, but *the form* and *scope* of the distribution of powers has varied enormously. In some cases, such as Canada and Belgium, the exclusive jurisdiction of each order of government has been constitutionally emphasized, while in others,

such as the United States, Australia, Germany, and the Latin American federations, substantial areas have been constitutionally placed under concurrent jurisdiction. In some federations such as the United States, Canada, and Australia, executive responsibility for a particular matter is generally assigned to the same order of government that has legislative responsibility over that matter. In many of the European federations, on the other hand, most notably Germany, Austria, and Switzerland, there is constitutional provision for much federal legislation to be administered by the states. Thus, for instance, Germany, is in terms of legislative jurisdiction, much more centralized than Canada, but in administrative terms more decentralized.

The allocation of taxing powers and financial resources is particularly important because it determines the capacity of governments to perform their constitutionally assigned legislative and executive powers. There are also variations among federations in the allocation of taxing powers and revenue sources. Furthermore, federations vary in the employment of financial transfers to assist constituent units and in the degree to which these are conditional or unconditional, thereby affecting the relative dependence of the constituent units upon the federal government. They also vary in their emphasis on equalization transfers in order to reduce financial disparities among their constituent units.

Apart from these significant variations in the form of the distribution of legislative and executive authority and resources, there has been considerable variety among federations in the *actual scope* of the specific responsibilities assigned to each order of government. The net effect has been wide differences among federations in the degrees of centralization or noncentralization. It is

worth noting, as a broad indicator of the range of relative centralization, that in a representative group of federations federal government expenditures (after transfers) as a percentage of total federal-state-local government expenditures ranged in 1996 down from: Malaysia 85.6; Austria 68.8; Spain 68.5; United States 61.2; India 54.8; Australia 53.0; Germany 41.2; to Canada 40.6 and Switzerland 36.7 (Watts 1999: 47).

4.3.3 *Symmetry or asymmetry in the allocation of powers to constituent units*

In most federations, the formal allocation of jurisdiction to the constituent units has been symmetrical. However, in some federations where the intensity of the pressure for autonomous self-government has been much stronger in some constituent units than in others, asymmetrical constitutional arrangements or practices have been adopted (Agranoff 1999). Examples include the Canadian, Indian, Malaysian, Belgian, Spanish, and Russian federations and the European Union. Two types of constitutional asymmetry can be distinguished. One is provision for permanent asymmetry among the full-fledged units within a federation. This has occurred in, Canada, India, Malaysia, and Belgium. In other cases, such as Spain and the European Union, asymmetrical arrangements have been seen as transitional, with the intention ultimately to arrive at a more uniform autonomy, but at "varying speeds". Analysis of the various examples of asymmetry within federations suggests that asymmetrical arrangements may become complex and contentious, as exemplified by the efforts in the last three decades within Canada to increase the autonomy of Quebec. But experience also suggests that there may be cases where constitutional asymmetry is the only way to resolve sharp differences when much greater impulses for non-centralization exist in some regions than in

others within a federal system (Watts 1999:68).

4.3.4 *The nature of the common federative institutions*

While the constitutional establishment of regional units with self-government is an essential feature of federations in order to accommodate diversity, the character of representation and power-sharing within the federal institutions is an *equally important* aspect in the ability of federations to manage and reconcile diversity. A crucial variable among federations has been the legislature-executive relationship within the common shared institutions. The different forms of this relationship—exemplified by the separation of powers in the presidential-congressional structure in the United States and most of the Latin American federations, the fixed-term collegial executive in Switzerland, the executive-legislative fusion with responsible parliamentary cabinets in Canada, Australia, Germany (with some modifications), India, Malaysia, Belgium, and Spain, and the mixed presidential-parliamentary system in Russia - have shaped the character of federal politics and administration, and the role of political parties in coalition-building and consensus generation within the shared institutions in these federations,

A key issue is what special provisions are made for the proportionate representation of the diverse groups in the federal executive, legislature (particularly second chambers), public service, and agencies. With regard to federal second chambers, in some federations the constituent units are equally represented, whereas in others there is not strict equality but a weighting to favour smaller units (to correct their small representation in the popularly elected house). In the United States, Switzerland, and Australia, the members of the federal second chamber are elected directly; in

others such as India and Austria they are elected by the state legislatures; in Germany the Bundesrat consists of instructed delegates of the state governments; and in yet others, for example Belgium, Spain, Malaysia and South Africa there is a mixed form of selection. The relative powers of federal second chambers also vary, tending to be less in the parliamentary federations where the cabinets are responsible to the popularly elected chamber.

4.3.5 *The role of courts*

With the exception of Switzerland, where the legislative referendum plays a major adjudicating role in defining the limits of federal jurisdiction, most federations and also the European Union, rely on courts to play the primary adjudicating role in interpreting the constitution and adapting the constitution to changing circumstances. But here too there are variations. In some federations - the prime model being the United States, but Canada, Australia, India, and Malaysia and some of the Latin American federations also serve as examples - a Supreme Court is the final adjudicator for all laws. In others, there is a federal Constitutional Court specializing in constitutional interpretation. Germany, Belgium, and Spain provide examples. In most, it has been regarded as *absolutely essential* to ensure the independence of the Supreme or Constitutional Courts from political influence. In a number of cases, there is also an effort by constitutional requirement or by practice, to ensure a measure of balanced regional representation in the ultimate court.

4.3.6 *Constitutional protection of minority rights*

Federations are essentially a territorial form of political organization. Thus, as a means of safeguarding distinct groups or minorities, they do this best when those

groups and minorities are geographically concentrated in such a way that they may achieve self-governance as a majority within a regional unit of government. But in practice populations are rarely distributed in neat watertight regions. In virtually all federations the existence of some infra-unit minorities within the regional units has been unavoidable. Where significant intra-unit minorities have existed, three types of solutions have been attempted. The first has been to redraw the boundaries of the constituent units to coincide better with the concentration of the linguistic and ethnic groups. Examples have been the creation of the Jura canton in Switzerland, the reorganization of state boundaries in India in 1956 and subsequently, the progressive devolution of Nigeria from three regions to 36 states. A second approach has been to assign to the federal government a special responsibility as guardian of intraregional minorities against possible repression by a regional majority. Such provisions have existed in a number of federations such as Canada, particularly in relation to indigenous or aboriginal peoples. The third and most widely used approach to protect intraregional minorities has been through embodying a comprehensive set of fundamental citizens' rights in the constitution, to be enforced by the courts. This pattern is now found in most federations except in Australia and Austria.

4.3.7 *Intergovernmental relations*

Within federations, the inevitability of overlaps and interdependence in the exercise by governments of their constitutional powers has generally required extensive intergovernmental consultation, cooperation, and coordination. These processes have served two important functions: resolving conflicts and providing a means of pragmatic adaptation to changing circumstances. Here too there are variations among federations in these

intergovernmental processes, particularly in terms of the "executive federalism" that typifies most parliamentary federations and the more multifaceted character of intergovernmental relations in those federations marked by the separation of powers between the executives and legislatures within each government. These different arrangements affect the extent to which regional units of government may effectively participate in federal power-sharing.

5. Lessons from Experience

5.1 *The Effectiveness of Federal Systems*

Experience points to some positive things worth noting about the effectiveness of federal political systems: the United States (1789), Switzerland (1848), Canada (1867) and Australia (1901) are among the longest continually operating constitutional systems anywhere in the world today.

Furthermore, the latest U.N. annual Index of Human Development issued in 2001 which ranked over 160 countries in terms of the quality of life, based on a weighted average of life expectancy, adult literacy, school enrolment and per capita gross domestic product, ranked four federations—Australia, Canada, Belgium and the United States — among the top six, with two others Switzerland and Germany - not far behind.

A number of recent empirical comparative studies (e.g. Wachendorfer-Schmidt 2000) have suggested that federal systems do make a positive difference for policy-making performance when compared to unitary states. Federations, it would appear, because of the particular combination of constraints and opportunities for political action that they provide, have generally been characterized by improved macro-economic outcomes, such as higher rates of growth

and reduced inflationary pressures, and by more genuinely democratic governance and political stability. Indeed, competition between governments within federations to serve their citizens appears to have led to innovations and to have benefited citizens.

5.2 *The Timing and Sequencing of Constitutional Reform*

Timing and the sequencing of events has usually been a particularly important factor affecting the successful major reform of federal constitutions or the establishment of new constitutions. Just as using the narrow "window of opportunity" is critical for launching rockets to the moon or the space station, so timing has often been a critical factor in the launching of a federal constitution or its reform. This is clearly illustrated by the contrast between two events in Swiss history. After the Swiss civil war of 1847, there was an overwhelming sense of urgency and crisis that led to the completion of negotiations on the new constitution, the drafting of the details, ratification by successful referendums in the requisite number of cantons, and implementation of the new constitution within ten months. More than a century later, when Switzerland embarked on reviewing and reforming that constitution, without a sense of urgency the intermittent process took some 34 years before the new constitution was finally adopted in 1999. In the United States in a period of urgency, sharp internal differences of view were resolved and the principles and text for a new constitution were agreed upon in just five months at the Philadelphia Convention in 1787- although it took another two years for the requisite number of states to ratify it. The basic features of the Canadian constitution which has now lasted 134 years were thrashed out and agreed upon at two conference in Charlottetown and Quebec City over the space of two months in 1864.

These examples suggest that it is possible to draft and adopt a lasting federal constitution in a relatively short time if undertaken when there is a sense of urgency and public support for decisive action. If the process is drawn out over a long period, constitutional fatigue is likely to set in and the momentum lost. Canadian efforts at constitutional reform over three decades between the early 1960s and early 1990s, which in the end were largely unsuccessful, illustrate the danger.

Two related points might be noted. Insistence upon perfection may prove to be the enemy of the good. While legal details are important, excessive preoccupation with getting every detail right before proceeding with reform may lead to missing the opportunity at hand. Secondly, it may be possible to carry out both the conceptualization and the implementation by stages. Belgium, which transformed itself by four stages over two decades from a centralized unitary state into a full-fledged federation, provides one example. South Africa with an interim constitution in 1993 which embodied the justiciable basic principles for the next stage, followed three years later by a final constitution, and its three-stage process for the development of its local government system provides another. There is cautionary note to add here, however: the stages of constitutional development need to be designed so that the momentum for further constitutional reform is not arrested or frozen at a midpoint in the process. The design of stages must, therefore, include incentives to implement the later stages.

5.3 Four Concluding Cautionary Lessons

The successes and failures of federations during the past half-century point to four major lessons which have a bearing on the

ability of federal systems to reconcile and manage social diversity

- *First*, federal political systems *do* provide a practical way of achieving through democratic representative institutions the benefits of both unity and diversity. But they are clearly not a panacea for all of humanity's political ills. There have been some significant failures where the necessary prerequisite conditions for an effective federal system were not established.
- *Second*, given the inevitable interdependence of the different governments that constitute a federal partnership, an essential feature in federations has been the development of effective intergovernmental collaboration that does not at the same time smother the autonomy and initiative of governments of all levels.
- *Third*, the degree to which a federal system is effective depends not just on its constitutional structure, but even more on the degree to which there is a public acceptance of the political culture of federalism, of the need to cherish diversity and mutual respect, of a sense of shared rule and community, of respect for constitutional norms and the rule of law, and of the spirit of tolerance and compromise. Without these, a federal constitution is likely to become merely a facade beneath which authoritarianism and centralization in fact prevail or disintegration occurs.
- *Fourth*, there is no single ideal form of devolution or of federation. The extent to which a federal system can accommodate political realities, depends not just on the adoption of federal arrangements but upon whether the particular form or variant of devolution or federal institutions adopted gives adequate expression to the needs of that particular society.

In conclusion, I would emphasize that at the beginning of the Twenty-first Century, there is a great deal of fluidity in the application of the basic federal principle with a widening variety including many innovations in federal institutions and practices around the world. Ultimately, the application of the federal principle involves a pragmatic and prudential approach. Therefore, in tackling Kenya's development, much can be learned from the great variety of international federal experience, but ultimately it will be for Kenyans to determine the values and institutions they collectively wish to embody in their constitution.

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MODES OF DEVOLUTION

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1. Introduction

'Devolution,' 'decentralization,' federalism and related terms are much in vogue. A few years ago, it was conventional wisdom that centralisation and modernisation went hand in hand. Whether in advanced democracies in North America or Western Europe; or in newly emerging post-colonial societies, it was assumed that only a strong national state, with a unitary system of government could deploy the resources and capacity to assure national unity, to achieve growth and redistribution, and to promote democracy.

Today, in contrast, devolution has become the mantra. The reasons are many: the frequent failures of centralized large scale development, the association of centralization too often with **authoritarianism**, the failure, in particular, of the Soviet model at home and abroad, the continuing salience of ethnic and regional divisions, and most recently, the growth of **globalization** and its perceived undermining of the role and capacity of the modern state.

While Western Europe itself moves towards something like a full federal model, some of its member countries have themselves moved to establish federal, or semi-federal systems, as in Spain, Belgium, and most recently Britain. Federalism is alive and well in a number of developing countries, such as Brazil, India and Mexico; it is proposed as a political solution in Sri Lanka. Ethiopia has recently embraced a highly decentralized variant of federalism, while South Africa cautiously adopted it. And of course, in Kenya strong elements of federalism were

embodied in the original post-colonial constitution, but they were soon eliminated in favour of the strong central executive, but the debate has recently revived in the movement for Majimboism expressed by many groups in Kenya.

At another level, agents of international development, such as the World Bank have argued that local administration and delivery of services can be more responsive, more transparent and accountable and more effective than sclerotic central government.

So, devolution is very much on the agenda, here and in many other countries. But the term devolution is itself so broad, so general, and so open to varying meanings and interpretations that it is almost useless as a term of analysis. It is pointless to ask whether or not 'devolution is a 'good thing' or a 'bad thing' because it is impossible to know what it is.

So, we need to disaggregate, to think not of devolution in general, but devolution in its various forms; and in terms of the economic, political and social goals it is designed to promote. We need to realize that the meaning and implications of different forms of devolution are likely to vary widely depending on the specific context and history in each individual country. I might, for example, argue strongly for a certain kind of federalism in my own country, Canada, but argue just as strongly that such a model would have been a very bad one for South Africa to adopt. They were better advised to follow the German model, as they did. Moreover, as **Kenyans** well know,

various forms of devolution can serve, or undermine, distinct political interests; like other institutional forms, patterns of devolution are not neutral. As a result, they are often the subjects of intense dispute.

Like other institutions, devolved institutions will also embody many advantages and disadvantages. So in thinking about if and how to devolve power to local or provincial bodies we need not only to try to anticipate the benefits, but avoid the pitfalls; we want to reap the virtues of decentralization while avoiding some of its vices. We need to be very conscious of both.

2. Issues in Devolution

The key question underpinning any discussion of devolution is the extent to which the power and authority of the state - the power to tax and to spend, to regulate, to provide and deliver services, to distribute and redistribute, to define and enforce rights, to control land and other resources - is, or should be concentrated in the hands of a single set of institutions? Or, to what extent such powers should be dispersed across a range of sub-national or local institutions, each possessing or controlling some chunk of authority or autonomy. How should the roles and responsibilities of government be distributed; or, in the words of a recent Canadian exercise looking at the relationship between provincial and local government authority, 'who does what?'

Put another way, the central questions to ask in a discussion of devolution are: devolution to whom, of what roles and responsibilities, for what purposes or ends, and with what consequences?

The most common way to organize a discussion of this kind is to think of a continuum of possibilities. At one end is

unitary government- all constitutional authority is constituted in one set of hands, the central government, and that government will be responsible for administering or delivering its services and programs. In fact, in this narrow sense, there are probably no fully unitary systems in the world today; all governments will find it convenient to establish localized administration and service delivery in some form or another.

Next along the continuum is administrative devolution, decentralization, or as it is sometimes called 'deconcentration.' Here authority - including the authority to create or dismantle sub national entities and to prescribe their responsibilities — remains with the central government. Often such governments will place powerful central officials in local areas to ensure the national writ prevails. In other cases, more autonomy will be granted to local decision-makers, whether officials or elected politicians. But final constitutional authority rests with the centre.

So, next along the continuum is federalism. Its key defining characteristic is that two, or more, orders or levels of government are constitutionally recognized and two or more have an independent electoral base, giving them at least some independent political presence in the minds of citizens. All involve some combination of 'self-rule' for constituent units, and 'shared rule' for the country as a whole. Beyond these minimal conditions, federal systems vary enormously among themselves, so much so that at least one writer had said that to know that a system is 'federal' in law tells you almost nothing about how it functions in practice.

3 Examples of Constitutional Power Distribution in Federal Systems

- In some federal systems constitutional powers and/or political weight are tilted towards the central government, making them relatively centralized;
- In others they tilt towards the provinces or at least to an equal partnership of federal and provincial governments, as in Canada.
- In some, provinces are structured so as basically to represent and empower distinct ethnic, cultural, or linguistic groups (as in Ethiopia, Nigeria, Spain, Belgium and to some extent Canada and India); in others the design seeks to blur, cut across or minimize such institutionalization of distinct groups - as in South Africa, for example.
- In some, national and sub-national governments have distinct and separate lists of powers (as in Canada); in others many or most powers are shared or concurrent (Germany and South Africa). In some, legislative and implementation powers are combined, in others, again as in Germany or South Africa, the power to write the law and the power to implement it lie in separate hands.
- In some, fiscal and revenue-raising authority is distinct from legislative authority, with the centre controlling all major revenue bases; in others provinces have considerable autonomy and responsibility for raising their own funds that will finance their programs.
- In some, law, policy and fiscal arrangements are strongly designed to achieve redistribution and a certain measure of quality among provinces in their ability to carry out their assigned functions; in others, there is a weaker commitment to interregional sharing. Disparities in access to resources, fiscal capacity, levels of development and income and the like are frequent sources of conflict in federations, as wealthier regions seek to retain control; and weaker ones seek a greater share of the national wealth.
- In some, there are strong provisions to ensure that constituent units are strongly represented in the functioning of the national legislature; in others, such as Canada, there are weak mechanisms to achieve this.
- Similarly in some, national party politics integrates and ties together national and sub-national politics; in others the party system reinforces the differences.
- In countries like Canada with separate lists of functions, combined legislative and administrative authority, weak regional representation at the centre and distinct national and sub-national party politics, we can talk of a divided, and often highly competitive federal system; in others, notably Germany with high levels of concurrent powers, strong regional representation at the centre, **integrative** party systems at the centre and so on, we can talk of shared or integrated federations.
- In some federations, especially in developing countries, central governments or institutions have a considerable role in monitoring the performance of sub-national governments; in others these governments are very jealous of their own autonomy - though in all federations, the courts also play a critical role as umpires of the system.

- In some federations all provinces exercise the same powers; in others there is a considerable degree of asymmetry with one or more provinces exercising a significantly greater degree of **distinctiveness**, either in terms of the constitution, or in political practice. Asymmetry seems to offer major advantages where, as in Canada, one province is the clear home of a distinct minority, but it is often the subject of much conflict. And where it exists, there is a common tendency for all units to demand the same powers as the most powerful one, thus setting up a dynamic of 'leapfrogging decentralization,' as in Spain today. In some, strong emphasis is placed on putting nation-wide norms and standards in place; in others, more weight is placed on the ability of provinces to enact their own values and preferences.

Finally, it is critical to realize that federalism is seldom a steady or a fixed state; federations, rather, are dynamic constructs in which a wide variety of factors result in constant shifts in the intergovernmental relationship. The most fundamental difference in the dynamics that shape the development of a federation is what I call 'building' versus 'disbuilding.' Federations are often what we might call a coming together, of previously separate units, as with the Australian or US states, or the European Union recently. But they are also often the result of a 'coming apart' - in which a once unitary state devolves authority to sub-units, as in Scotland, Spain, Belgium and others. The key question is whether these dynamics are self-perpetuating. Does a 'coming together' lead ineluctably to greater and greater centralization? Does a 'coming apart' find a happy balance in federalism, or does it generate irresistible pressures towards separation?

I will say a bit more about some of these variations later.

4. Confederal Systems

Next along the familiar continuum are **confederal** systems. Here there are still two (or three) constitutional orders of government, but the essential character is that the centre is a creature of the constituent units, exercising powers that they delegate to it. Confederations are, in a sense, a mirror image of administrative decentralization. Perhaps the best example of the confederal model in operation today is the European Union; but the nascent African Union may evolve in a similar way.

A very important recent development affecting several federations is how their participation in supranational bodies affects their internal dynamics. On the one hand, the experience of Canada, the UK, Spain and Belgium all suggest that **globalization** and localization can often go together. On the other hand it is possible that the growing role of broader institutions can mitigate or limit the stakes of regional conflicts on the domestic front. As power moves to another level, minorities may feel less threatened by majorities; and majorities less threatened by claims for autonomy by minority provinces. Finally there are a variety of very loose associations between independent states, which take many forms both historically and in the present.

Listing these fundamental characteristics of the variety of forms of devolution is useful in some respects, but it is perhaps not the best way to approach the question of 'how much devolution,' or to ask what criteria we might use to decide on what is or is not an acceptable degree and form of devolution. The variations in the categories are too great, and they have little principled content.

Moreover, much of the thinking in this area has focused on federalism and its variants. And much of that focuses on the distribution of authority and the linkages between central and provincial governments. Local government, which in many developing countries is the most vital and politically dynamic sector of government, tends to be left aside. The reality is that there is a huge multiplicity of potential political forms that need to be considered: not just national government and provinces, but also regional governments, metropolitan governments, and others. Indeed, a major characteristic of the contemporary world is that we all live in systems of what can be called 'multilevel governance', in which power is not so much rigidly divided between two or three levels of government, but moves fluidly across national, provincial, local, and multinational institutions all of which are highly interdependent. Citizens participate simultaneously in all of them. The good news is that there are multiple arenas of political action, responding directly to the realization that an area like the environment is simultaneously a local, national and global problem; the bad news is that multilevel system are often complex, cumbersome and not transparent to citizens.

5. Goals of Devolution

I think a better approach to our question is to begin not with alternative institutional forms, but with political goals, purposes, and objectives. Why would we want to pursue devolution? And how could we judge or assess whether it is well designed or working well?

Three overarching set of principles or concerns need to guide a constitutional review process such as Kenya is engaged in.

First, is the democratic criterion: how can devolution contribute to the enhancement of the quality of democracy. How can it serve

the purposes of citizen participation, the representativeness of government, accountability, **responsiveness** and transparency? How might it get in the way of at least some democratic values? And how can those barriers or threats be avoided or minimised.

Second, is the effectiveness or efficiency criterion: how can devolution contribute to the design, development and implementation of policies and programs that meet the daunting challenges of development and transformation that face all developing countries. Again, how might devolution prove a barrier to this, and how can these barriers be overcome or mitigated?

Third, and most controversial, and not only in the Kenyan case, how can devolution contribute to the management, regulation, or peaceful resolution in societies divided along ethnic, linguistic or cultural lines.

In all three areas federalism and devolution are "Janus faced". Yes, a powerful case can be made for the proposition that decentralization serves and promotes democracy, but that can by no means be taken for granted. Decentralization poses some challenges for democracy.

Yes, federalism can contribute to effective public policy, but not unambiguously so.

Yes, federalism can contribute to the recognition and accommodation of ethnic differences: in some circumstances it appears to be an effective instrument for mitigating conflict; but in others, it can entrench, perpetuate and intensify these differences.

Each of these perspectives - decentralization and democracy, decentralization and effective governance and decentralization and the management of conflict-suggests a somewhat different set of questions about how to design an effective system of

decentralization, though of course they overlap a great deal as well. But let us look at each in turn.

5.1. The Democratic Perspective

The democratic case for decentralized governance is well known. It makes possible government closer to the people, increasing opportunities for participation, promoting a closer fit between citizen preferences and policy results, giving citizens a wider array of forums in which to participate, and so on. In some analyses, the competition among governments in a federation leads them to be more responsive. In other versions, the dispersal of authority in federal systems provides additional checks and balances, reducing the possibilities for authoritarian rule or the tyranny of the majority. Vigorous local and provincial governments can provide citizens to learn political skills and the arts of democracy and so on.

But decentralization can pose some dilemmas for democracy.

First, is the need to find a balance between majority rule, expressed through national institutions, and minority empowerment expressed through sub-national institutions. It is not easy to find agreement on what sorts of issues or questions should be governed by national majorities and which should be decided by local ones. Too much decentralization can frustrate the wishes of the majority.

Second, decentralized, multi-level government is inherently complex and difficult to understand. When responsibility is divided among several layers, it may be very difficult for citizens to know who is responsible for what, and thus to be able to hold governments accountable. Moreover, the inevitable overlapping and sharing of responsibilities characteristic of all federations requires extensive processes of

intergovernmental relations, and in many federations these processes are remote, inaccessible to citizens and conducted behind closed doors.

Third, there is no reason to believe that local governments or local elites need be any more democratic or less authoritarian than national ones. Tyranny can occur at any level; and there are too many cases where decentralized systems have empowered local power barons to subvert democracy. Moreover, many smaller governments may be below the radar screen of national media and hence not be subject to close monitoring and criticism.

If the democratic potentials are to be met, certain elements of design for decentralized institutions can be suggested.

First, consideration should be given to devolution to the smallest possible unit, where citizen involvement in governing their own affairs can most easily be realized. Participation in a province that may have several million residents is not much more feasible than in the nationwide polity. Indeed, any discussion of devolution should include the empowerment of very small communities and neighbourhoods. A concept recently popular in Europe is that of 'subsidiarity.' That is a principle that suggests that responsibilities should always be assigned to the lowest possible level: the burden of proof should be on the advocate of centralization, not the other way around. This idea is present in the South African constitution, though the reality is that the predominant view is that central is better.

Second, democracy is probably served by a formal constitutional division of powers rather than by administrative devolution, which can be extended or withdrawn on the whim of the central authority. Similarly, it is important to ensure that there is genuine room for local choice and initiative - that

national norms and standards not be so rigid as to prevent innovation and experimentation by local governments, that local units not simply become delivery mechanisms for policies decided by senior government and that national government supervision of local authorities not be so strict as to stifle local initiative and responsibility.

Third, accountability and transparency are facilitated if the division of powers is as clearly stated as possible.

Fourth, the empowerment of local minorities is meaningless if some of them have too few resources to carry out the responsibilities that are assigned to them. Hence an effective system of interprovincial equalization is necessary for democratic devolution. In Canada, the constitution states that all provinces are to have sufficient revenues to ensure a 'comparable level of public services at comparable levels of taxation,' and a national program ensures that all provinces have sufficient revenues. South Africa also has a very sophisticated - but complicated - system for ensuring the equal capacity of rich and poor provinces.

Fifth, it is critical that national institutions to protect democracy operate at the local level as well. This includes not only the Bill of Rights and the courts, but also such institutions as a National Election Commission.

Sixth, it is important that the machinery of intergovernmental relations be as open and participatory as possible. In Europe and Canada, we often talk of a 'democratic deficit' associated with the complex, hidden processes of intergovernmental relations. And there is much discussion of ways to open up the process, to make it more accessible to citizens, and to ensure that it is subject to parliamentary scrutiny. 'Executive federalism' carried out by governmental needs to be combined with 'legislative

federalism,' to ensure that the people's representatives are fully involved in the give and take of intergovernmental relationships. Seventh, a more controversial idea, prominent in the literature on the financing of federations, is that sub national governments should have revenue raising as well as spending powers. The argument is that democratic accountability is only possible when governments are responsible for raising the money they spend. This idea, however, is quite problematic in developing countries where the revenue raising capacities of poorer provinces may be weak or non-existent.

These are just a few of the ways in which the devolution of responsibilities might be fine-tuned to ensure that the democratic potential can be realized.

5.2 *The Efficiency Perspective*

The argument that devolution contributes to more effective governance is based on several ideas. First, policy can be better adjusted to the needs of local areas; a remote national government is unlikely to give priority to such matters. Complex modern governments cannot be governed from a single point. Second, devolution permits innovation and experimentation, allowing different tools to be tested: if they fail less damage is done; if they succeed, other governments can adopt them. Third, devolution can strengthen a central government: if it can devolve much policy-making and administration to sub-units, national authorities can be free to concentrate on major national priorities of economic and social development.

Two questions dominate thinking about devolution from the standpoint of effective governance - the ability of government as a whole to make and implement policy that serves the needs and policy priorities of the country. First is how powers and

responsibilities should be distributed among levels of government. What is most appropriately done at local, provincial, or national levels? Second, how can the difficulties of getting governments to work together, avoiding contradiction and duplication, be alleviated?

With respect to the assignment of responsibilities, it is easy to say that national issues should be dealt with nationally, provincial issues provincially and so on. In reality of course, modern policy problems are so multifaceted and multidimensional that they cannot be fitted into such neat boxes. This is why most modern federations have extensive lists of concurrent powers, and why even those like Canada with clearly separate lists of federal and provincial responsibilities, in reality have extensive de facto concurrency.

Economists do have some tools for thinking about the allocation of functions.

First, is the idea that there should be a direct link between the range of people affected by a policy and the government that makes the decision. Local governments should not be making policies that will affect those in other jurisdictions; and national governments should limit the temptation of legislate on matters that affect only a few.

Second and closely associated with this idea is that of 'externalities' or 'spillovers.' Local governments should not be able to make decisions that will impose harm on citizens of other jurisdictions or impose costs on them. The classic example is control over pollution in rivers that cross borders. If local jurisdictions have responsibility, what is to stop them having weak rules that will allow their pollution to be dumped in someone else's lap? Similarly, the rules should not permit local actions that would harm the overall national economy or impede what we Canadians call the 'economic union. The South African constitution has an elaborate

set of provisions that places limits on provincial discretion and allow national laws to trump provincial legislation under such conditions. The problem is that interpreted too rigidly, such limits might effectively remove any provincial discretion to improve their economic or social positions.

Economists also argue that assuming there is a commitment to some degree of equity or equality and thus to redistribution both between rich and poor regions, and between rich and poor citizens, this must be a responsibility of the national government.

A special problem in many developing countries is the question of the 'capacities' of local or provincial government. There is little point in assigning responsibilities if the financial ability, and the human or bureaucratic resources do not exist. This is a serious impediment to the evolution of provincial government in South Africa. It suggests that where sub national governments are given important roles it is an important obligation of the national government to ensure their financial viability and develop their administrative capacities.

The problem of transaction or coordination costs arises from the inevitable interdependence and overlapping responsibilities of the different levels of government. On one hand one does not want governments riding off in all directions, frustrating each other's policies and their citizens as well. On the other hand, one does not want governments to spend so much time and effort getting together to ensure consistency, that they are paralysed, with decisions delayed, the lowest common denominator predominating and the opportunities for variety and experiment that federalism offers denied. This is a particular problem in a system like Germany where there is not only a great deal of concurrency, but also a high value placed on consensual

decision-making. One German scholar has labelled it the 'joint decision trap.'

There are a number of ways that these difficulties can be minimized in a devolved system. Powers can be defined clearly, in order to reduce overlap as much as possible, though there are strict limits to this possibility. Clear rules to define which level of government is paramount in any particular area are also helpful in removing uncertainty, though, as in South Africa, this might open the door to excessive centralization. Strong provincial representation in the national government and effective mechanisms of intergovernmental relations, with clear rules of procedure can also help minimize coordination costs.

South Africa suggests another debate relevant to the costs of coordination. That is, how many levels or layers are desirable? The recent growth in the role of local governments, has led some to ask: did we create one level too many? What value do provinces add that local and national government working together cannot provide?

Economists have developed similar set of guidelines with respect to how taxing and other revenue-raising powers should be distributed.

Despite the work that has been done in this area, it is often imprecise about how roles and responsibilities should best be distributed. Much depends on political preferences and pressures that are impossible to place in simple models.

More important, while devolution is much advocated by agencies like the World Bank today, the reasons appear to be as much because of the failure of centralisation as they are about the value of decentralisation. In a country like South Africa, where there is much to be said in favour of the centralised quasi-federal model it adopted, it

is not easy to say that the new system is making a major contribution to the transformation and development that is necessary. Pervasive problems of capacity, combined with strong central government doubts about the value of federalist practices mean that so far the contribution to development is more of a potential than a reality.

5.3 *Devolution in Divided Societies*

Nowhere are both the potential contribution and the potential risks of devolution more sharply contested than in its role in the management of conflict in divided societies. As a student of federalism myself, I was surprised at the amazing consensus among a group of experts on constitutional design on the dangers of federalism as an instrument of accommodation in countries with territorially concentrated cultural minorities. Yet the logic underlying federalism, or other forms of devolution here is powerful. It says that a cultural group with a strong sense of identity, and which is a minority in the country as a whole will feel more secure, and therefore more willing to remain in the system, if it has a distinct political space of its own. This space and the empowerment associated with it will allow the group both to express its values and interests in its own institutions, without fear of veto by the majority. By preserving some areas from legislation enacted by the national government, it helps avoid a potential tyranny of the majority. The group is able better to counter assimilationist tendencies and to preserve and promote its own culture. Moreover, assimilation may actually benefit the national majority too since it is freer to achieve its goals without having always to secure the consent of the minority. The logic of federalism is that good fences make good neighbours.

It may be an especially critical device where national politics itself is strongly polarised

along tribal lines and elections turn out to be little more than an 'ethnic census.' Here the problem of permanent majorities with few constraints on their power and of permanent minorities forever frozen out of power becomes a recipe for intense conflict.

Nevertheless, federalism remains problematic in such situations.

First, there is the question of the 'minorities inside the minorities.' The territorial boundaries of federalism seldom coincide perfectly with ethnic or cultural boundaries. In Canada, for example, it is true that about 80 per cent of all French-speaking Canadians, a group with a powerful sense of national identity, is concentrated within the borders of Quebec. But it is also true that about one fifth of all citizens of Quebec are not French speaking; and one fifth of all French-speaking citizens live outside Quebec.

By itself, federalism does nothing to reassure such minorities and may, indeed, threaten them. This is especially the case if the nationalism that develops within the province is defined in ethnic or tribal terms, such that to be considered a full member one must share in the culture of the dominant group. The more any political institution, whether national or local, is seen as the 'property' of one group or another the greater the potential for the abuse of human rights, and for bitter conflict.

There are two solutions to this problem. The first is to bring the boundaries of the sub-units into line with the ethnic distribution of the population, either by redrawing boundaries, or by removing the minorities through 'ethnic cleansing.' Both are hugely contentious. Redrawing boundaries is almost always fraught with conflict; ethnic cleansing is almost always a denial of fundamental rights.

The alternative is to seek accommodations among ethnic groups both within provinces or other units and within national institutions. A federation may be able to survive if the nationalism expressed in the sub-units is a civic nationalism, tolerant of diversity; it is unlikely to survive minority nationalisms that are manifestations of purely ethnic nationalism. If this is achieved, then it is possible that accommodations among diverse groups can be worked out at the local level, serving as a model for the country and reducing ethnic conflict within national institutions.

The problem of minorities within minorities also underlines the necessity of ensuring that the provisions of national Bills of Rights apply to everyone in the province. If minority citizens in a province are denied their rights, they need to be able to appeal to national courts for protection.

The second big problem with ethnically based devolution is what might be called the slippery slope. Here, the worry is that endowing an ethnic group with a set of institutions that it fully controls will lead to an escalation of demands for greater and greater autonomy, exemplifying the 'dis-building' dynamic I mentioned earlier. The local government can provide the platform and the institutional, bureaucratic and fiscal resources for local elites to push for secession.

The debate is nicely illustrated by the discussion of devolution in the UK. In advocating devolution, the British government makes the prediction that by granting substantial autonomy to the Scots, they will be reconciled to the larger union, and secessionist tendencies will weaken. The opponents of devolution make the precisely opposite argument that devolution will simply allow the Scots to go their own way, to provoke conflict with the national government, and eventually allow an

avowedly secessionist Scottish party to win power. Devolution, they say, is a recipe for separation.

A parallel argument has been made in Canada, on the question of whether the most effective way to ensure that **Quebecers** choose to remain in Canada is to grant a degree of asymmetry that would recognise that the government of Quebec is the primary government of a distinct national community. Defenders of this approach argue that it will preserve the federation. **Opponents argue** that if this is done, Quebecers will simply demand more and more power and that gradually the ties that bind Quebecers into the larger system will wither. We have debated this for almost 40 years - and we still do not know which is right!

But the larger lesson seems to be clear. Yes, democracy and tolerance are served by devolving power to minority groups, but that is not clearly enough. For each devolution of power 'outwards' there need to be actions to strengthen the linkages between national and local institutions and citizens - 'building in.'

Institutionally this can be done by such measures as strong second chambers representing regions, provinces and perhaps ethnic groups, by consensus based decision-making at the centre that ensures that minority voices have an effective voice, by electoral systems that encourage parties and leaders to make cross-group appeals, and that bring provincial and national electoral campaigns together; by measures to ensure linguistic minorities have rights across the country, and by measures to ensure not only that minorities have self-government, but also that they are represented fully in national executive, legislative, bureaucratic and judicial forums.

The key to accommodation here is to realise that the alternatives of building out and

building in are not mutually exclusive. It is not a matter of "either/or", but of "and/and". Federalism is 'self rule' and 'shared rule' and it is participation and representation in both local and national arenas.' Both are necessary in divided societies. In the same way federalism is predicated on mutually reinforcing identities - both with the national and with local political communities.

Another way to deal with the 'one ethnic group-one province' problem is to devolve power not simply to provinces- each of which are ethnically homogeneous, but to smaller local governments. Each ethnic population would then still be able to control its own institutions, but its members would be distributed across several jurisdictions, rather than one.

Finally, ethnic conflict underpinned by federalism can be greatly exacerbated when there are large disparities in wealth and resources. Some groups will try to use their influence over the central government to claim a greater share of the resources in the richer province; the richer provinces are likely to seek to preserve their monopoly to what they consider rightfully theirs. As the case of Nigeria, for one, shows, there are no easy solutions to this problem, although the constitutional allocation of ownership and regulation rights can play a very important part.

Federalism can indeed promote 'localism, ethnic and racial xenophobia and undermine the sense of nationhood,' as one Kenyan has written. But this is not necessarily so. Federalism can also promote accommodation. Moreover, once ethnic identities are fully mobilised, there may be no alternative. To impose a unitary system would not end the conflict, only intensify it. And while federalism may reinforce and institutionalise ethnic divisions, it can also provide the means for integrating it more fully into normal democratic politics. In

Canada federalism is not going to end Quebec nationalism, but it has almost certainly made it more tolerant and democratic. Nor, we should realise does federalism necessarily create ethnic identity. That can happen in national politics as well. Indeed, if Kenya today demonstrates a somewhat debilitating degree of ethnic conflict, it is not the result of a federal system, which was after all, dismantled almost immediately after independence.

Thus the question of federalism, devolution and ethnicity is a vexed one. My sense is that federalism, or some alternative form of devolution is often part of the answer; it is almost never the whole answer.

6. Conclusion

Federalism and devolution are important elements in the repertoire of alternatives for the design of a modern constitution. But as I have tried to show, there is not a single model to consider, but an almost infinite variety of variations. Nor is there a handy tool box, with parts to fit all cases. The context and the choices of local citizens and leaders are all important. Hence, I have made no recommendations; rather I have tried to identify some of the issues, and some of the ways that you might think about them in this Commission.

FEDERALISM AND DIVERSITY IN CANADA: THE RELEVANCE OF THE CANADIAN EXAMPLE

Ronald L. Watts

1. Introduction

In a book aimed at exploring the role of federal political systems and autonomy arrangements in the management of ethnic differences and conflicts, this chapter focuses on the lessons- positive and negative- provided by the Canadian experience. While in many respects there are significant contrasts between Canada and other federations that must always be borne in mind, there are some features of the Canadian federation which make it particularly relevant to the examination of the interface between federalism and ethnic diversity. Unlike some other federations, such as the United States and Switzerland which were created by the aggregation of pre-existing states and cantons, the formation of Canada involved a substantial **devolutionary** process. A major part of its creation as a federation in 1867 was the splitting of the formerly unitary Province of Canada into two new provinces (Ontario, predominantly English-speaking and Protestant, and Quebec, predominantly French-speaking and Roman Catholic), each autonomous and responsible for its own affairs in those areas where the *two* communities were sharply divided. To these provinces were added two smaller provinces (New Brunswick and Nova Scotia).

The Canadian founders, concerned about maintaining effective unity, in 1867 adopted a predominantly federal structure that combined provincial autonomy with some constitutional quasi-unitary central controls over the provinces. Thus, the Canadian federal constitution, like those later established in India and Malaysia, and most recently in South Africa, was a hybrid

combining a basically federal form with some unitary features. These unilateral central powers were frequently exercised in the early decades of Canada's history and they still remain in its constitution, but they have fallen into almost complete disuse in the second century of its existence.

Canada provides an example where statesmen have wisely been more interested in pragmatic political solutions having the character of hybrids, than in theoretical purity. As a consequence, next to the United States and Switzerland, it is the oldest federation in the world. What is more, unlike the other two, Canada has not suffered a major civil war during the past two centuries, and it has achieved this by emphasising tolerance, negotiation and mutual adjustment. Furthermore, the continued vigour and vitality of the French Canadian community, concentrated in Quebec, shows that a federal system involving extensive provincial autonomy and a constitutionally asymmetrical recognition of the distinctive language, education and civil law of Quebec can accommodate a major federal minority, even though that may at times be a source of controversy.

A particularly relevant feature has been the Canadian innovation of combining federal and parliamentary institutions. The United States and Switzerland adopted federal institutions which emphasised the dispersion of power through the separation of the executive and the legislature. Canada was the first federation to incorporate a system of a parliamentary responsible government in which, within each order of government,

the executives are responsible to their legislatures. This combination of federal and parliamentary institutions has subsequently been adopted in Australia and in many other federations (often in a republican form, with a president), such as Austria, Belgium, Germany, India, Malaysia, Spain and South Africa. Canada provides the original example of the impact that parliamentary central institutions, with their majoritarian character and concentration of power in the executive, can have upon the dynamics of politics within a predominantly federal system.

One other feature giving Canada a particular relevance is that, during the past three decades, it has been going through the intense 'mega constitutional politics' engendered by public debate on possible reforms to its constitutional structure. The debates have focused on many issues similar to those in other multi-ethnic federations, especially issues relating to the appropriate degree of centralisation or provincial autonomy, the recognition and protection of major minority groups, and the role of a charter of rights.

2 Canada's Constitutional and Political Evolution

Canada was designed in 1867 as a centralised federation, with the key powers of the day vested in the federal government in Ottawa. Although, in recognition of the differences between English and French Canadians, most matters of cultural significance were assigned to the provinces, a strong federal government was established to be responsible for those matters where they shared common interests. Indeed, the federal government was also assigned a strong paternalistic oversight role with respect to the provinces. Despite that beginning, Canada over 132 years has become highly decentralised, for several reasons. Provincial areas of responsibility,

such as health, welfare and education, which were considered of little governmental significance in the nineteenth century and which were therefore assigned to the provinces, have mushroomed in importance in the twentieth century, thus greatly enhancing the role of the provinces. In addition, judicial interpretation of the constitutional distribution of powers has broadly favoured the provincial governments over the federal government. Since 1960, a strong Quebec nationalism has helped to force the process of decentralisation, from which other provinces have also benefited.

The result is that Canada has powerful and sophisticated governments, both in Ottawa and in the provinces, engaged respectively in 'nation-building' and 'province-building'. This has created both interdependence and competition between governments, resulting in elaborate forms of intergovernmental coordination as well as, at times, intense intergovernmental conflict.

Federal unity has remained a recurrent political problem since the rise of a powerful separatist movement in Quebec in the 1970s. Repeated attempts to amend the constitution - one, in 1982, partially successful but the others unsuccessful - have failed to staunch the growth within Quebec of support for secession, and may even have encouraged it. In addition to the ongoing debate about the recognition and status of Quebec in the federation, there are decentralist pressures from a number of other provinces which are economically strong and a continuing debate about the declining levels of financial support which the federal government has been offering to the provinces, particularly in the social policy field.

3 Facets of Canadian Diversity

3.1 *Impact of diversity on the operation of the federation*

An important factor affecting the operation of the Canadian federal system is the political culture that is expressed in the attitudes, beliefs and values that affect the political behaviour of politicians and citizens in Canada. A marked feature of this political culture is that it is fragmented and plural in character. This diversity is illustrated by the strength of regionalism, by the fundamental duality between the French-speaking majority in Quebec and the English-speaking majorities in the other nine provinces, by the policies of bilingualism and multiculturalism, and by the tension between the supporters of North American continentalism and the supporters of Canadian self-sufficiency and nationalism.

Differences in regional attitudes and interests affect politics throughout Canada. A number of factors have contributed to this. Important have been differences in the economic base of the provinces, such as different products and differing degrees of industrialisation and urbanisation. Furthermore, extensive trade with the United States has contributed to strong north-south links cutting across the east-west ties among Canadians. Differences in ethnic and cultural composition of the population in each region as a result of earlier patterns of immigrant settlement have given the Atlantic provinces, Quebec, Ontario, the Prairie provinces and British Columbia, each a distinctive cast. Different historical traditions have also contributed to regional consciousness, as provinces were settled in different periods and joined the federation at different times. Geography has also been a major factor. With most of the population spread along a narrow ribbon - 5000 kilometres long and 200 kilometres wide -

on the border with the United States, those at the eastern and western extremities have felt remote from central Canada. Furthermore, Canadians living near the Atlantic have tended to look to Europe for trade and international contacts and those near the Pacific, especially British Columbia, have naturally looked in the opposite direction to Asia for trade opportunities.

The result has been considerable variation in attitudes and values and a strong sense of regional consciousness and distinct provincial identity (Task Force on Canadian Unity 1979:21). This has had an important impact on the dynamics of Canadian politics. It has emphasised both the importance of provincial governments and the requirement within federal institutions, such as the cabinet, for the representation of members from all the provinces.

Given the variety of attitudes and beliefs, and the fragmented and plural nature of the political culture, Canadians have historically depended on 'elite accommodation' as a way of holding the country together. Agreements among the political leaders of different regions and language groups, arriving at negotiated compromises, have been a characteristic feature of Canadian political dynamics. These are reflected in the processes of both 'executive federalism' in intergovernmental relations, featuring interministerial negotiations as a predominant pattern, and the emphasis on a 'proportionality syndrome', that is, 'representativeness' of different regions and groups within the federal cabinet and, indeed, virtually all federal organisations.

3.2 *Quebec and Quebec Nationalism*

One of the principal reasons for the adoption of a federal system was to accommodate the differences between the two linguistic and cultural groups. This duality has been both

the motivating force to maintain a viable federal system and, at the same time, the root cause of the pressures that might lead to disintegration.

The province of Quebec, which includes just under 25 per cent of the Canadian population, is not a province like the others. In the 1867 constitution, two provisions in particular recognised this. One guarantees the use of the French and English languages in the Quebec legislature and in national institutions such as the parliament and courts (Constitution Act 1867, s. 133). The other preserves the civil law system in Quebec and a common law system in the rest of the country (Constitution Act 1867, s. 94). Thus, there are in Canada two completely different approaches to the law of property, contracts and family matters.

The evolution of Canadian federalism and federal institutions has been greatly influenced by this duality. For example, the Act establishing the Supreme Court of Canada provides that three of the nine judges on the court must come from Quebec in order to have judges trained in the civil law hear appeal cases originating from Quebec. There is also a convention to alternate the position of Chief justice of Canada between a Supreme Court judge from Quebec and one from other parts of Canada.

To be sure, many francophones tracing their origins to Quebec live throughout Canada but they are, in most other provinces, a relatively small minority. Nevertheless, while francophones at 4.6 per cent of the population are a minority in Ontario, their numbers, at about half a million, are not insignificant. In the province of New Brunswick, a very substantial French-speaking minority constitutes about one-third of the population. The Acadians, as the French Canadians in New Brunswick are known, have a very different history in

Canada from that of the francophones of Quebec. While the Acadians are also French-speaking, their culture is distinctive. It is these French minorities in other provinces and also the English-speaking minority in Quebec that led to the provisions in the 1867 constitution, and later the Charter of Rights and Freedoms of 1982, for special educational arrangements relating to religious and - linguistic minorities within provinces (Constitution Act 1867, s. 93; Constitution Act 1982, s. 23), and also the special provisions recognising both English and French as official languages for the province of New Brunswick (Constitution Act 1982, ss. 16(2), 17(2), 18(2), 19(2), 20(2)).

In the province of Quebec, francophones constitute over 80 per cent of the population, a decided majority. Within and for the province, the government of Quebec has always seen itself as having a special role in protecting the French language and culture. One policy area pursued in recent decades by successive provincial governments to accomplish this objective has been through language legislation. Since the early 1970s, the provincial legislature has enacted various statutes safeguarding and enhancing the French language in the province. The most significant law is known colloquially as 'Bill 101'. Originally enacted by the Parti Quebecois government in 1977, the formal title is the "Charter of the French Language". Under this Charter, fully supported by both Quebec federalists and separatists, priority is given to the French language within Quebec for all official and provincial purposes. This has contributed positively to the continued flourishing of the French language and to a vibrant sense of community in a territory that is surrounded by a continent of English-speaking

jurisdictions.¹ That is not to say that minorities within Quebec have been submerged. While French is clearly the official and predominant language, provision for English-language schools and universities is maintained by the provincial government, and the services provided to the English-language minority are, if anything, clearly more extensive than those available to the French-language minorities in the nine English-speaking provinces.

Over the years, language policy at the federal level has also been a recurring source of friction between the two major linguistic communities. As a result of recommendations arising from an inquiry into *bilin-gualism* and *biculturalism* policy, the Parliament of Canada enacted the Official Languages Act in 1969. The Act established English and French as Canada's two official languages for all federal government activities. One purpose of the legislation was to ensure that the one million *francophones* living outside Quebec could receive federal government services in French. Another was to make all *francophones* feel comfortable anywhere in Canada, not just in Quebec. As a result, all federal government programs throughout the country are available in French and English. Manitoba, Ontario and New Brunswick - all with significant French-speaking minorities - have also developed comparable language policies for the delivery of provincial services.

In 1982, when Canada adopted its Charter of Rights and Freedoms as part of the Constitution Act 1982, English and French were entrenched as the two official languages and given constitutional protection (ss. 16—22). In addition, to

protect official language minorities within provinces, the charter guarantees minority language (French or English) education rights, supported by public funds, wherever numbers warrant (s. 23). The guidelines for determining 'where numbers warrant' vary from province to province. With respect to the actual functioning of Canadian federalism, over the years Quebec has been the most vocal and vigorous advocate of provincial autonomy and the leading proponent of a more decentralised form of federalism. Other provinces, such as Ontario and Alberta, have also strongly championed provincial rights and autonomy but not as persistently and consistently as Quebec.

Since 1960, the continuing search for greater autonomy and the strong sense of identification with the Quebec 'nation', as opposed to the Canadian 'nation', has given rise to nationalist movements and political parties within Quebec. Underlying this trend was the modernisation and industrialisation of Quebec during and immediately after World War II, which by the 1960s had brought to the fore a new middle class determined to be *maitres chez nous* (masters in our own house). In the subsequent three decades, the previous strategy of *survivance* was replaced by *epanouissement* - the desire of Quebecers to blossom and fulfil not only their traditional cultural identity, but also their economic identity through greater provincial control of their economic affairs. This intensified Quebec nationalism has led to two distinct streams of political action: a greater emphasis upon the powers of the provincial government within a reformed federation (as espoused by the federalist Quebec Liberal Party), and a drive for sovereign independence from Canada (advocated by the sovereigntist Parti Quebecois). In the past twenty years, these parties have alternated in power provincially in Quebec. The Liberals governing in 1970-76 and 1985-94, and the Parti Quebecois in 1976-85 and since 1994. The Parti

¹ Census report indicate that the proportion of French speakers within Quebec has actually increased in recent decades

Quebecois has in its official platform the goal of Quebec sovereignty. The most recent manifestation of this drive was the 30 October 1995 referendum, sponsored by the Quebec government, which just narrowly failed to obtain majority support. Thus, an important feature of Quebec politics of the past thirty years has been the division within Quebec society between 'federalists' (supporting continued membership in the federation) and 'sovereignists' (supporting a sovereign Quebec, with some continued loose confederal links with Canada). To date, in two referenda (1980 and 1995) and in current opinion surveys, a majority (sometimes very narrow) has preferred the former.

At the same time, there is considerable pressure within Canada for reform to head off separation. One approach under consideration would involve the transfer of legislative authority to all the provinces for fields such as labour market training (which to a large extent has already occurred), communication and culture desired by the federalists within Quebec. This would involve decentralising further what is already one of most decentralised federations in the world.¹ Another approach, already reflected in the 1867 constitution in the areas of civil law and language is to increase the degree of 'asymmetry' among provinces. This envisages that Quebec alone would receive additional legislative authority, reflecting its unique circumstances. In recent decades, proposals to develop an increased asymmetrical relationship for Quebec have been questioned in other provinces on the grounds that asymmetry 'would conflict with the principle of provincial equality and, in the eyes of some critics, would imply a privileged position for Quebec.

¹ For a comparison of Canada with other federations in terms of their degree of decentralization, see Watts (1999:71-81)

3.3 *Multiculturalism*

Multiculturalism as a policy has been an outgrowth of the great variety of lands from which immigrants have come to settle in Canada since the federation was formed. Because Canada has become "a homeland of many peoples, federal policy has attempted to recognize this wider cultural variety". A constitutional expression of this was the recognition of Canada's multicultural heritage in the Charter of Rights and Freedoms adopted in 1982 (s. 27).

In the nineteenth century, most Canadians traced their ancestry to either the United Kingdom or France. Throughout the twentieth century, this pattern changed, with settlers coming from a variety of countries in Europe, the Caribbean and Asia. While these immigrants have integrated into mainstream society, the 'melting pot' approach encouraged by the United States has not been followed in Canada. Instead, governments have adopted policies of multiculturalism which encourage immigrants to preserve their cultures.

As such policies have taken root, there has been some conflict between multiculturalism and the fundamental linguistic and cultural dualism reflected in the original constitutional agreements. The Charter of Rights and Freedoms contains a recognition of multiculturalism and directs the courts to interpret it 'in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians' (Constitution Act 1982, ss. 27). Federal policies on multiculturalism emerged in the 1970s and, in part, were a response to the growing perception in western Canada that the interests of other cultures were being ignored in the debate over Canadian duality. The conflict between multiculturalism and the basic dualism also surfaced during constitutional discussions in the 1980s over

the Meech Lake Accord, and was reflected in a proposed clause shielding the multicultural provision of the charter from the proposed 'distinct society' clause applying to Quebec.

3.4 *Aboriginal Peoples*

In addition to Quebec nationalism and policies of multiculturalism, Aboriginal policies have also required special attention. Prior to the arrival of European settlers, Aboriginal peoples lived throughout Canada. They completely reject, therefore, statements to the effect that the English and French are the two founding nations. They argue that they were in Canada long before the occurrence of European settlement, which helps to explain the phrase 'First Nations' used by Indian peoples to describe themselves.

Aboriginal peoples in Canada today number over one million, representing 3 per cent of the population. The term 'Aboriginal peoples' currently encompasses four groups: some 250-300 Indian bands living on their reserves, calling themselves 'First Nations' and loosely linked in an 'Assembly of First Nations'; Indians living off the reserves, having mostly migrated to the cities, and for whom the Native Council of Canada speaks; the Metis, descended from the intermarriage of early French fur-traders and Indians and who settled in the western wilderness before other settlers arrived there, now numbering about 200,000 and represented by the Metis National Council; and the Inuit (once referred to as Eskimos), the majority of whom live in the Arctic in the Territory of Nunavut where they now number about 25,000 and for whom the national organisation is the Inuit Tapirisat.

The place of the Aboriginal peoples remains an issue of political importance in Canada because of their recent rising consciousness about maintaining their own way of life.

They argue that they never gave their sovereignty to the settlers and that they therefore have an inherent right, to self-government. In 1997 a Royal Commission on the Aboriginal Peoples issued a five-volume report dealing with their relation to the Canadian political system.

Under the 1867 constitution, "Indians and lands reserved for Indians" is a head of legislative jurisdiction (s. 91(24)) assigned to the Parliament of Canada. This provision was intended to protect the Aboriginal peoples from settler majorities governing the provinces. As a result of a Supreme Court decision, the Inuit in the Arctic were included within the scope of this provision (*Re Eskimos* [1939] SCR 104).

Over the years, the federal government employing this jurisdiction developed a series of policies to manage Indian and Inuit affairs. Provincial policies for Indians have been minimal, except in instances authorised by federal statute or in situations where the federal government has disavowed any responsibility, such as for the Metis people and many Indians in urban areas. The principal federal statute dealing with Indians, the Indian Act, has included a provision authorising provincial laws of general application to be enforced. Consequently, provincial laws on education, health and child welfare do apply on Indian lands. Aboriginal land claims have been a matter requiring federal-provincial cooperation because most of the land, and the accompanying natural resources, being claimed by Aboriginal peoples, is provincially owned public land.

A federal structure provides both opportunities and problems for accommodating the aspirations of Canada's indigenous peoples. Where they are geographically concentrated and constitute a majority of people in a region, the provision of territorial autonomy may enable them to

become self-governing. Furthermore, since the original **relationship** between many indigenous groups and the Canadian state was based on treaties, there has developed a theory of "treaty federalism" in which treaties are seen as the fundamental political relationship between the Aboriginal peoples and Canada, existing alongside the **provincial federalism** of the Constitution Act 1867 (Henderson 1993; Hueglin 1997; Tully 1995:118-39). Indeed, a part of the **Charlottetown Agreement 1992** (ss. 41-56) proposed, within a comprehensive set of constitutional reforms, the establishment of self-government for the indigenous peoples as a third order of government (since the units "would be of a much smaller scale than the provinces) within the **Canadian federation**, but the agreement failed to achieve ratification as a constitutional amendment. Since then, progress has been on a **piecemeal** basis.

In 1995 the federal government announced a new policy framework for Aboriginal self-government, based on a pilot project established in the province of Manitoba in late 1994. The emergence of autonomous Aboriginal governments will require their integration into and synchronisation with the existing federal system, which would then reflect three orders of **government**: Federal, Provincial and Aboriginal. Currently, these arrangements are the subject of negotiations among the federal government, the provincial governments and the various indigenous peoples.

Two further points of interest relate to the changing position of **Aboriginal peoples** in Canada. The three territories represent large, sparsely populated northern areas to which a large measure of autonomous self-**government** has been granted but which, because of their limited population and financial dependence on the federal government, are unable to sustain the full range of self-government normally exercised

by the provinces. In 1999, following a referendum and negotiation of the arrangements, a third territory was carved out of the former Northwest Territory. **Nunavut** now provides the **Inuit** people with autonomous self-government in a territory where they form 80 per cent of the population. It occupies an area nearly 20 per cent of Canada's land mass but has a population of only 25,000. The creation of Nunavut is one illustration of how federalism has been able to accommodate indigenous aspirations for self-government.

Second, the Indian peoples of northern Quebec, an example of a **minority** within a federal minority, have steadfastly resisted being included in a separate, politically independent Quebec. In the 1995 Quebec referendum, over 95 per cent of these First Nations people voted against separation, insisting that if Quebec separates from Canada they should have the right to separate from Quebec to remain within Canada. Since the vast hydro resources of northern Quebec are vital to its economic future, this is a prospect fiercely repudiated by Quebec **sovereignists**, who have attempted to win over the support of the Aboriginal peoples but have so far failed to succeed.

3.5 Efforts to Resolve these Issues

As a result of these various pressures during the last three decades, Canada has gone through four phases of constitutional deliberations (Watts 1996). The First of these, directed particularly at Quebec's concerns, culminated in the Victoria Charter that resulted in tentative agreement. In the end, however, it failed to receive the endorsement of the Quebec government. The second round, during 1976-82, followed the election in 1976 of the **first sovereignist Parti Quebecois** government. Issues relating to Quebec were central in this phase but a wider range of concerns

was also addressed. This round resulted in partial success with the passage of the Constitution Act 1982. This added new formal constitutional amendment procedures and the Charter of Rights and Freedoms to the constitution. Nevertheless, it left major issues relating to Quebec unresolved and Quebec therefore seriously dissatisfied.

The third round, in 1987-90, involved the attempt to ratify the 1987 Meech Lake Accord, intended to reconcile Quebec by meeting five points sought by the then federalist Liberal government of Quebec.² Initially hailed as a major achievement towards accommodating Quebec, in the end when the time limit of three years for ratification expired, two of the ten provinces (Newfoundland and Manitoba, together representing only 6 per cent of the Canadian population) had failed to ratify. The fourth round, in 1991-92, embodied an extensive and inclusive range of constitutional reforms in the Charlotte-town Agreement of 1992. These were directed not only at accommodating Quebec but also at the concerns of other parts of Canada, including the Aboriginal peoples. Although the complex set of compromises had the unanimous support of the federal prime minister, all the premiers of the ten provinces and two territories, and the leaders of all four of the national Aboriginal organisations, a subsequent Canada-wide referendum produced support from only 46 per cent of the electorate. Rejected both in

Quebec and in the rest of Canada, it proceeded no further to ratification.

The failure to ratify the **Charlottetown Agreement** has meant that many of the issues that gave rise to the past thirty years of 'mega constitutional politics' in Canada have remained unresolved. Particularly serious is the issue of Quebec's place in the federation. In the 1994 Quebec elections, the **sovereignist** Parti Quebecois returned to provincial power after a decade out of office. It immediately set about organising a referendum, on sovereignty, which was rejected by a very narrow majority of 50.6 per cent. The resultant public mood in Canada has largely been one in which **Quebeckers** feel frustrated and cynical about the repeated promises of constitutional change which have failed to come to fruition, and Canadians outside Quebec have become weary and wary of the contestant preoccupation with constitutional deliberations. Nevertheless, by 1998 the emphasis upon incremental rather than comprehensive constitutional adjustment and upon intergovernmental negotiation rather than unilateral government action and improved economic and political circumstances had improved the mood somewhat, and opinion surveys indicated some decline in the level of support within Quebec for the Parti Quebecois and for independence.

4 The Federal Accommodation Of Diversity

Canadian experience has implications for the federal accommodation of ethnic diversity within federations more generally.

4.1 The General Issue

The contemporary period has been marked not only by global pressures for larger economic and political units but also, in certain regions, by strong pressures for

² The 1987 Meech Lake Accord proposed that the Canadian constitution be amended to recognize Quebec as a "distinct society", within Canada, that Quebec's veto over constitutional amendments be restored, that the Quebec government have an enhanced rule over immigration into that province, that there be compensation for provinces opting out of federal-provincial shared-cost programs, and that Quebec representation on the Supreme Court of Canada be entrenched.

ethnic nationalism. As Forsyth (1989) and Wiessner (1993) have noted, the uniting of constituent units that are based on different ethnic nationalisms into some form of federal system appears to be one way of containing pressures for fragmentation. But multi-ethnic federations have been among the most difficult to sustain, as Nigeria, Pakistan, India, Malaysia, Canada, Belgium and Spain, as well as the effort to federalise Europe, have illustrated. This has led some commentators, such as Elazar (1993), to question whether federations composed of different ethnic units simply run the risk of eventual civil war. There is no doubt that fundamentally mono-ethnic federations, such as the United States, Australia and Germany, have faced fewer difficulties. Nevertheless, the persistence of federal systems in Switzerland and Canada for over a century, in India for half a century, and in Malaysia for over three decades suggests that under certain conditions multi-ethnic federations can be sustained. Given that the management of ethnic nationalism is a crucial issue in the contemporary world, we need to consider the structures and processes required to enable federal systems to accommodate ethnic nationalism.

In an analysis of conflict resolution within federations, Gagnon (1993) was right to remind us that such political systems should be assessed not by whether they can eliminate conflict but, rather, by their ability to manage it. Conflict is an inherent component of all societies. Federal systems that have persisted have done so not because they have eliminated conflict, but because they have managed it.

4.2 The Relation of Federal Solutions to Territoriality

Federal systems, by their very nature, represent a territorial form of accommodation. The applicability of a federal solution depends, therefore, on the

degree to which ethnic diversity is geographically concentrated and so can be territorially demarcated.

Although some authors, such as Elkins (1995), have explored the possibility of non-territorial federal arrangements for power sharing, and there has been some consideration in Canada of non-territorial forms of self-government for Aboriginals not concentrated on reserves, there is no question that most federations, including Canada, have been based primarily on a territorial matrix. Their effectiveness in accommodating shared-rule with self-rule for constituent ethnic groups has depended, therefore, upon the degree to which these groups have been geographically concentrated. For instance, in Canada, the fact that over 80 percent of French Canadians live within Quebec, and constitute over 80 per cent of the population there, has meant that the provincial government of Quebec has been in the position to provide francophone Quebecers with an effective political unit for serving their distinct interests.

4.3 Intra-provincial Minorities

The fundamentally territorial character of federal systems raises issues about the safeguards for intra-provincial minorities. Rarely do the elements of diversity within a federation fall neatly and precisely into geographical units. In the case of Canada, as noted earlier, although francophone Quebecers form an overwhelming majority within that province, close to 20 per cent of the population are anglophones or allophones.³ Furthermore, in a number of the English-speaking provinces (most notably New Brunswick and Ontario), there are significant francophone minorities. Two constitutional devices are intended to protect those who are in a minority position within a

³ Allophones are largely immigrant groups whose mother tongue is neither French nor English

province. One provides a right of appeal to the federal government. Such a provision was included in the Constitution Act 1867 in relation to religious minority education, **although** this federal power has in fact never been exercised (s. 93 (3), (4)) **The** other incorporates in the constitution a bill of rights protecting **individual** rights. The 1982 Charter of Rights and Freedoms includes an extensive list not only of individual rights but also of group rights in **relation** to minority language educational rights, multicultural groups and Aboriginal peoples, all judicially enforceable (ss. 1-34).

The existence of intra-provincial minorities raises a special problem **where** there is a significant secessionist movement within one of the **constituent** units of the federation and may, in fact, act as a brake upon such a movement. In the case of Quebec, **both** the **anglophone** and **allophone** population concentrated in the Montreal area, and the Aboriginal **peoples** in northern Quebec, voted overwhelmingly against separation in the 1995 referendum, tilting the balance.

4.4 The Special Problem of Bicomunal Federations

A particular problem arises in federal systems that are bicomunal in character and composed of only two constituent units. The literature on the particular difficulties of bipolar or dyadic federations is not encouraging (Duchacek 1988). Examples include the eventual splitting of Pakistan and Czechoslovakia. The problems of Cyprus and Sri Lanka also illustrate the special difficulties in bicomunal situations. The problem has generally been that the usual insistence upon parity in all matters between the two units has tended to produce deadlocks. This is because there is no opportunity for shifting alliances and coalitions, which is one of the ways in which multi-unit federations are able to resolve issues. In two-unit systems, the

resulting cumulatively intensifying **bipolarity** has usually led to their terminal instability.

In the Canadian federation, there is a strong **bicomunal** element, given the fundamental English-speaking and French-speaking division. But, while in terms of linguistic communities Canada may be bipolar, as a federation it has been composed of more than two units and Quebec has from time to time allied itself in federal politics with various English-speaking provinces. Furthermore, the English-speaking provinces have often taken different positions from each other on many issues, thus moderating tendencies to polarisation between the two linguistic communities. From time to time there have been proposals for converting Canada into a confederation of two units: Quebec and a nine-province federation of the 'Rest of Canada'. Among such proposals have been those advanced by the Parti **Quebecois** in 1979-80 and 1985 (Watts 1998). Such proposals have usually been met with strong resistance.

One feature that has been important to reducing polarisation between the two major communities has been the practice of emphasising representation of all major groups within federal institutions. By practice rather than by constitutional requirement, the position of governor-general has rotated between English-speaking, French-speaking, and non-English-or-French representatives, the federal cabinet has always contained a substantial number of **francophone** Quebec ministers and three of the nine Supreme Court justices have been from Quebec. Also, the two major federal political parties have alternated their leadership between leaders from Quebec and those from the rest of Canada during the last thirty years. This has resulted in the office of federal prime minister being held by three **Quebeckers** and three **non-Quebeckers**. Indeed, as a result of

particular electoral circumstances, the three Quebecers actually held office for twenty-eight of those thirty years. Furthermore, because Quebec represents a quarter of the federal population and because there are significant differences among the other provinces, any major federal party that hopes to gain office through an electoral majority in the House of Commons has found that, in practice, it must win substantial support in both Quebec and in English-speaking Canada, and this has induced a dynamic whereby major federal political parties attempt to bridge the bicomunal divide.

4.5 *Asymmetry within Federal Systems*

The issue of asymmetry among the constituent units within a federal system has attracted considerable attention in recent years. Fuelling this interest has been the debate in the European Union about the integration of Europe involving a 'variable geometry' and proceeding at variable speeds', and the debate within Canada about Quebec as a 'distinct society' differing from the other provinces. Attention has also been attracted by the asymmetrical constitutional arrangements or practices within Spain, Belgium, India, Malaysia, Russia and most recently the United Kingdom. These examples indicate that constitutional asymmetry among provinces or states in a federal system may, in some instances, be the only way to resolve situations where much greater impulses for autonomy exist in some constituent units than in others.

In the case of Canada, the distinctive character of Quebec led to the recognition of some constitutional asymmetry at the time of the establishment of the federation (Constitution Act 1867, ss. 22, 23, 93(2), 94, 97, 98, 133). Since then, further asymmetry has developed both constitutionally and - in practice (Milne 1991). Much of the intensive constitutional debate in Canada

has turned around the issue of the degree to which the current asymmetry might be increased to accommodate Quebec's concerns and the degree to which this might undermine equality among the provinces. (Watts 1999:63-8). This Canadian experience suggests that constitutional asymmetry may be an essential element in accommodating distinct groups within a federation but also that there may be limits beyond which asymmetry itself may contribute to divisiveness.

4.6 *Division of Powers and Interdependence within Federal Systems*

Classical expositions of federalism emphasise the importance of ensuring that each level of government within a federation is independent from interference or domination by the other (Wheare 1963). Perhaps more than in any other federation, the original distribution of powers in Canada attempted to achieve this by assigning virtually all Jurisdiction either exclusively to the federal government or to the provinces (Constitution Act 1867, ss. 91, 92). Only two matters were left to concurrent jurisdiction: immigration and agriculture (Constitution Act 1867, s. 93). This contrasts with virtually every other federation where, typically, substantial areas of concurrency were identified in the constitution.

But all federations, including even Canada with its emphasis upon exclusivities of jurisdiction, have found that it is impossible in practice to divide jurisdiction and policy making into watertight compartments. Over time, numerous areas of overlap and interpenetration in the functions' of different levels of government have developed. This has made necessary in all federations extensive forms of intergovernmental consultation and collaboration, a pattern that has certainly been true of Canada, where

these processes have involved a multiplicity of councils and committees of officials, ministers and first ministers (Watts 1989).

Where such extensive intergovernmental relations have proved necessary, ensuring that provincial self-rule is not undermined has been a constant concern.

A particularly important aspect has been the financial relationships between governments within the Canadian federation. Because over time the value of different tax sources and the cost of different expenditure responsibilities inevitably vary, it is difficult in any federation to maintain in balance the revenue capacity and expenditure requirements of each level of government. As in other federations, in Canada this has required intergovernmental agreement on frequent adjustments involving financial transfers from the federal government to the provinces. In addition to adjustments required by these vertical imbalances between levels of government, there have also been horizontal imbalances among provinces due to disparities in their fiscal capacities. As a result, Canada has developed an equalisation scheme under which the federal government makes unconditional financial transfers to the less wealthy provinces to reduce the disparities among them. Furthermore, in 1982, the commitment to the principle of equalisation payments and to promoting equal opportunities was embodied in the constitution (Constitution Act 1982, s. 36). This recognises that one of the most corrosive factors undermining federal harmony may be disparities in resources among the constituent units and that action to moderate such disparities is essential to federal solidarity. In Canada, the major recipients of financial equalisation assistance from the federal government have been Quebec and the Atlantic provinces.

4.7 *Federal Representative Institutions*

There are two fundamental aspects in the organisation of any federation: the institutions for autonomous 'self-rule' of the constituent units, and the processes for 'shared-rule' for dealing with shared objectives. The latter provide the glue to hold the federation together. The former alone, without effective arrangements for the latter, would merely lead to disintegration.

All federations have found it necessary, in establishing the institutions and processes for effective shared-rule, to take some account of regional diversity. Mere majority rule is bound to leave minorities concentrated in particular regions with the view that they have no say and therefore no stake in the processes of shared-rule. Even predominantly mono-ethnic federations, such as the United States, Australia and Germany, have therefore found it necessary to adopt bicameral federal legislatures, with representation by population in one chamber and equal or weighted representation of the constituent units in the second chamber. The need for such arrangements — and for employing, either by constitutional requirement or conventional practice, a representational balance of different internal groups within the various federal institutions - has been all the more essential in multi-ethnic federations. For instance, in both Canada and Switzerland, the 'representational syndrome' whereby different linguistic, religious and geographical groups are carefully represented within each of the federal policy-making bodies, including the federal executive, is very marked.

This draws attention to two particular points. First, where the federal institutions involve a parliamentary form of government with a cabinet responsible to the lower house, for example in Canada, Australia, India, Malaysia and Austria, inevitably the second

chamber's relative power, and therefore ability to represent the diversity of regional interests, has been weaker than in federations such as the United States and Switzerland in which the principle of separation of executive and legislature has been adopted. Germany, by creating the **Bundesrat** with certain **constitutionally** guaranteed veto powers which in practice operate in relation to over 60 per cent of all federal legislation, has to some extent counteracted this usual trend within parliamentary federations. By contrast, in Canada, the federal appointment of senators has only further weakened its legitimacy body to represent regional and minority interests. That is **why** the call for Senate reform has been so persistent in Canada.

Second, in the processes for **shared-rule**, it is not just the institutional but the way in which political parties operate and the **inter-**relationships between federal and state (or provincial) branches **of political** parties that affect the extent to which a federation-wide consensus **may** be developed. This has been an important factor in Canada.

4.8 *The Role of the Judiciary*

Judicial review serves two primary functions within a federal system: resolving conflicts between federal and provincial governments over the jurisdiction assigned to each, by interpreting the constitutional **provisions** governing the distribution of powers; and facilitating adaptation of **the** federal system without resort to constitutional amendment. The latter is achieved by interpreting how new policy areas, not envisaged at **the** time the federation was established (for example, in the Canadian **case:** air travel, nuclear energy, pollution policy and energy policy), may fall within the areas **of jurisdiction** identified in the constitutional **distribution** of powers.

During the nineteenth century and the first half of the twentieth century when Canada was a colonial federation, the Judicial Committee of Privy Council (**JCPC**) in the United Kingdom served as the ultimate appeal court on the Canadian constitution. The Judicial Committee's Judgments in a number of major cases, especially during the period 1890-1930, had a strong decentralising impact on the Canadian **federations**.⁴ Because, **unlike** many other federations (such as the United States and Australia), the Canadian constitution specifically enumerated exclusive provincial powers, this enabled the **JCPC** to give a generous interpretation to these, especially the provincial authority over property and civil rights, and a narrow interpretation of the federal powers relating to trade and commerce, foreign treaties and 'peace, order and good government' (Cairns 1971). This contrasted with the pattern of judicial review in the United States. There, in the original constitution, to emphasise the initial **decentralist** thrust, the states were simply assigned the **unenumerated** residual jurisdiction. Ironically, the Supreme Court, relying on the doctrine of 'implied powers', was therefore able to expand the enumerated federal powers at the expense of the non-specific residual state powers. Thus, where judicial review in the United States contributed in the long term to increasing federal powers and to greater centralisation, **the JCPC** in interpreting the Canadian constitution maintained a strong protection of provincial powers against federal intrusion. In this way, the JCPC contributed to converting the Canadian federation, which was more centralised than the United States at its origin, into one that became more decentralised.

⁴ See, for instance, *Hodge v The Queen* (1883) 9 App. Cas. 117, and *Liquidators of the Maritime Bank v Receiver General of NB* (1892) AC 437.

The Supreme Court of Canada was created in 1875 and since 1949 has been the final court of appeal on constitutional questions. Although its judges are appointed by the federal government, in practice the tradition of impartial judicial interpretation has been maintained. Studies analysing its decisions have generally concluded that, on matters relating to the jurisdictions of the federal and provincial governments, its judgments have been balanced without especially favouring one at the expense of the other (Russell *et al.* 1989:9, 131-288).

During the past twenty years of mega constitutional politics in Canada, the Supreme Court has been called upon to decide some very important constitutional issues. During the period 1980-82, there were three important cases in which the court ruled on the validity of the processes for constitutional amendment. In the *Senate Amendment* case and the *Patriation* case, it ruled that constitutional amendments affecting the fundamental federal character of Canada required the assent of a substantial number of provinces,⁵ although, in the *Quebec Veto* case, the judgment was that Quebec did not by itself, possess a veto on constitutional amendments.⁶ More recently, the Supreme Court ruled in a historic case that Quebec did not have the right to secede from Canada unilaterally, but added the qualification that, if *Quebeckers* indicated in a referendum by a clear majority in response to a clear question that they wished to secede (the measures of clarity were left unspecified), the rest of Canada would have an obligation to negotiate the terms of secession taking into account the interests of all parties, including Quebec, the rest of Canada and minorities in Quebec, and also the fundamental organising principles of federalism, democracy, constitutionalism

and the rule of law.⁷ Thus, the court attempted a balanced judgment to avoid inflaming passions among either federalists or secessionists.

One notable development affecting the role of the courts was the addition to the constitution in 1982 of the Charter of Rights and Freedoms. Interpreting the charter has enormously expanded the number of cases before the Supreme Court and this now represents the largest portion of its work (Russell *et al.* 1989:10-13, 385-678). Because the charter relates not to the powers of federal and provincial governments in relation to each other, but to relations between governments and individual citizens, this area has attracted increased citizen interest in the Supreme Court and its procedures and the method of appointment to it. The inclusion of certain minority group rights in the charter has also meant that the court has come to play a major role in their protection. Prime Minister Trudeau, in championing the adoption of the charter in 1982, had envisaged it as a document that would unite diverse groups by emphasising the common fundamental rights shared by all Canadian citizens. In large measure, it has been successful in this objective. Even within Quebec, surveys indicate significant support for it. Quebec nationalist politicians have been critical of it, however, as limiting Quebec's traditional jurisdiction over property and civil rights.

A number of provinces, including Quebec, have their own charters of rights. Wherever there are both federal and provincial charters, there is always the possibility of a charter duel, but in such cases the courts have normally judged that the federal charter, in so far as there is conflict, must prevail. What provincial charters have done, however, is to supplement or extend the

⁵ *Re Senate* (1980) 1 SCR 54; and *Re Amendment of Constitution of Canada* (1981) 1 SCR 753

⁶ *Re Constitution of Canada* (1982) 2 SCR 793

⁷ *Quebec Succession Reference* (1998) 161 DLR (4th) 385

rights available to their own citizens and minorities beyond those set out in the federal constitution. Indeed, when the Supreme Court in 1988 struck down a section of Quebec's controversial language law,⁸ it did so on the grounds that it conflicted with the Quebec charter rather than with the federal charter (Russell 1993:146-7). The impact of the Charter of Rights on Aboriginal autonomies and rights has been moderated by the inclusion of section 35, which recognises and affirms existing Aboriginal and treaty rights. Thus, since 1982, the courts have had the task of balancing these rights and the other rights set out in the charter.

4.9 *Autonomy as a Factor for Divisiveness or Unity*

The question is sometimes raised, especially where a federation is created by evolution from a previously unitary political system, as to whether a federal system by encouraging and facilitating regional autonomy is merely a step on the way towards secession and disintegration. Indeed, this was a very real and expressed fear during the debates of the Constituent Assembly of India and more recently in relation to devolution in South Africa and the United Kingdom. The rise of the secession movement within Quebec is often pointed to as such an example.

There is, however, also evidence to suggest that granting a substantial measure of autonomy and self-government to distinct groups within a polity may in fact contribute to enhanced unity. Indeed, the Canadian experience in 1867 was that much of the previous disharmony was reduced by replacing the previous unitary system under the Act of Union of 1840 with a federal system. The previous union had produced political conflict between the French and

English populations and a series of impasses. By creating a distinct self-governing province of Quebec, with its French-speaking majority having control over matters of cultural and social significance, many of the previously contentious issues were siphoned off from the realm of federal politics, leaving the federal sphere to focus on shared objectives and policies. It is true that during the past thirty years there has been significant secession movement, but it has been the product of a desire for national self-determination rather than induced by the existence of autonomy. Certainly, all the evidence points to the fact that, if there had not already been provincial autonomy, the movement would have been much stronger, not weaker. It is not insignificant that referendum results and repeated recent public opinion surveys have persistently pointed to the fact that a large majority of Quebecers want greater autonomy, but combined with continued association with the rest of Canada.

An important point to note is that unity as an objective should not be confused with homogeneity or uniformity. Where such a confusion has occurred, it has almost always fostered counter-pressures for separation and secession. Unity, to be effective in a multi-ethnic situation, should be understood as harmony in diversity. It involves the recognition of diversity within a harmonious whole. A noted French Canadian Prime Minister, Wilfrid Laurier, at the beginning of this century, once described federation as being like a majestic cathedral in which the various elements - the granite, the marble and the oak - were each clearly distinct but together were combined in an inspiring architectural harmony.

⁸ *Quebec v Ford et al* (1988) 2 SCR 712

5 The Adaptability of Federal Systems

Federal systems have sometimes been criticised as inflexible and rigid because of their emphasis upon constitutionally entrenched legal structures. Given the complexity and **legalism** inherent in federal constitutions, there is some validity to this contention. Nevertheless, an examination of the history of such federations as the United States (founded as a federation in 1789), Switzerland (converted to a federation in 1848), Canada (**federalised** in 1867) and Australia (federated in 1901) shows that they **have** displayed considerable flexibility in adapting to changing **conditions** over a century or more. And this has included multi-ethnic federations like Canada and Switzerland. Canada, over more than 130 years, has undergone enormous changes in the process of its evolution. What has been significant is that much of this has occurred, not through formal **constitutional** changes but through incremental and pragmatic adjustments **preached** through political negotiation, intergovernmental agreements and consensus. During the past three decades, efforts at comprehensive and radical constitutional transformation have repeatedly failed, and it is now widely recognised that a pattern of piecemeal adjustment is likely to **be** more successful in the long run. That has certainly been the case in most federations elsewhere (Watts 1999:121-2).

A number of authors have attributed the prosperity, stability and longevity of many federations to the effectiveness of federation as a **flexible** form of political organisation. Martin Landau (1973), for instance, has argued that the multiple channels of decision making provide **fail-safe** mechanisms that contribute to the reliability and adaptability **of federations** as political systems, compared with hierarchical or unitary systems, in

responding to changing circumstances and needs.

6 Prerequisites for Effective Federal Solutions

The analysis of conflict resolution within federal systems, the **importance** of particular structures and processes is borne out by the Canadian **experience**. But perhaps most important of all in enabling a federal system to manage internal conflict, is the existence of a supportive federal political culture emphasising constitutionalism, tolerance and the **recognition** of distinctive regional groups (Elazar 1993).

Past Canadian experience confirms the importance of such a political culture (Watts 1999:120-1). More important than its formal structures has been public acceptance of the basic values and processes required for the effective operation of the federal system. This includes an emphasis upon constitutionality, tolerance and compromise. It also involves the explicit **recognition** and accommodation of multiple identities and **aides** within an overarching sense of shared purpose and identity. Efforts to deny or suppress the multiple identities within its diverse society **have**, in Canadian experience, almost invariably led to contention, stress and strain. It would appear that, in any federation encompassing a diverse society, an essential requirement is acceptance of the value of diversity and of the possibility of multiple loyalties expressed through the **establishment** of constituent units of government with genuine autonomous self-rule over those matters most important to their distinct identity. At the same time, equally important has been the recognition of the benefits derived from shared purposes and **objectives**. The importance of these values is something that each generation of Canadian has had to relearn when faced with internal

crises, such as those in relation to place of Quebec within the federation.

The importance of tolerance as an essential element in the political culture necessary for an effective federation, especially a multi-ethnic one, points to the vital link between democratic institutions and processes and successful federations. Those who define democracy solely in terms of majority rule sometimes argue that federal structures and processes, by providing checks and balances against pure majority rule, limit democracy. The fault in such an argument lies, of course, in the definition of democracy in purely majoritarian terms rather than in terms of popular participation and consent to policy decisions. Indeed, federations, by providing for majority rule within different constituent units and by processes involving the participation and consent of the various distinct groups in federal decision making, maximise democracy in a broader sense.

7 Conclusion

Like all federations, Canada continues to undergo a constant evolution of its structure and practices. While still operating under the basic federal structure established by the Constitution Act 1867, much of that evolution has occurred not through constitutional amendment but through pragmatic development of intergovernmental practices and collaboration. These have responded to internal political, social and economic pressures and to changing conditions and circumstances. During its history, the federation has been faced with many challenges and crises to which, so far, its federal processes have managed to respond.

The current sovereigntist movement within Quebec once again presents the federation with a severe challenge. Yet there are some signs that, as before, Canada will adapt. Popular support within Quebec for

sovereignty, although still strong, has declined somewhat since 1995 and a substantial majority of Quebeckers are reluctant to break their links with the rest of Canada.

Much will depend on whether, in the immediate years ahead, the structure, practices and political culture of the Canadian federation will enable it to continue to respond adequately to the challenges facing it.

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STRUCTURE OF GOVERNMENT AND THE SCOPE AND METHOD OF DIVISION OF POWER

Dr. Peter Wanyande

1. Introduction

The purpose of this essay is to discuss the different organizational forms that a government can take and the methods of distributing power between different arms and levels of government. Included in the essay is a discussion of the scope of power that each level or arm of government may have. By scope of governmental power is meant any of the following two things. First, it refers to the range of functions over which any one arm or level of government has jurisdiction. Secondly, it refers to the amount or extent of power given to or possessed by any one arm or level of government.

The discussion of these issues is not intended to be prescriptive i.e., we do not intend to prescribe the governmental structure or form that Kenya should adopt nor the scope of governmental power to be adopted by Kenya. We chose to refrain from this because such decisions can best be arrived only after wide consultation with different groups and stakeholders in society. It must also be based on a definition and clear understanding and consensus regarding the objectives to be achieved by a particular form or structure of government.

In the Kenyan context the questions to be asked as we engage in the process of designing a constitutional framework for an appropriate governmental structure include the following:

- what are the problems with the current governmental structure?

- What is needed to solve these problems?
- What are the available options or alternatives to the present system of governmental organization that may be considered?
- How realistic and or practical is each of the available options as a solution to the identified problems?

These and many other related questions cannot be adequately answered in this workshop. This is because answering them requires the input of diverse groups in society. It is only in this way that consensus can be built around these critically important issues. Consensus on such issues is necessary for the successful operation of any governmental system that may be adopted. It is only after these questions have been satisfactorily settled that decisions on how to divide and balance power between different u-ms and levels of government can be undertaken.

What we have done in this essay therefore is to try to shed insights into the possible organizational forms that a concrete political order may take and the variety of ways by which power and responsibilities can or may be distributed among the different branches and levels. We have in this regard tried to identify some core principles that may guide the design of an appropriate governmental structure. In terms of the distribution of governmental powers, we shall concern ourselves mainly with the distribution of legislative, executive and judicial powers leaving out the distribution of financial power critical as it is. We have also refrained from a direct discussion of the merits and demerits

of any one form or structure of government. We have done this in the understanding that the two issues will be addressed in other presentations.

We, however, recognize that the distribution of financial power between different levels of government is of critical importance for the successful operation of any government irrespective of the form or structure it assumes. Finally, we wish to note that the discussion in this essay is based on the assumption that the type of government being envisaged is a democratic one.

We wish to say right from the outset that a concrete political order may operate on several levels of community, namely, local, regional or national. Governments can thus be run at different levels. This however, does not mean that each level is completely separated from the other(s) since they constantly interact in different ways and for different reasons reflecting the dynamic nature of politics and the political process. The choice of a governmental structure or form is a function of several considerations among them the history of a country, the objectives to be achieved, unique experiences such as war or colonialism. It may also be influenced by ideological factors especially the ideological orientation of the principal political actors at any one given time.

2. Structure of Government

A political system can take a variety of organizational forms. It can also operate at different levels. For purposes of this presentation we shall confine the discussion to the two most commonly adopted forms of governmental structures, namely the unitary system and the federal system. We wish to add however that these organizational forms represent extremes

and that several intermediate organizational forms are possible. This is especially so with regard to the unitary system or structure of government, a detailed discussion to which we turn momentarily. We begin the discussion of the structures of government by providing some clarification of the meaning of a federal system of government.

According to Friedrich (1968), federalism should not be seen only as a static pattern or design, characterized by a particular and precisely fixed division of powers between governmental levels. It is also and perhaps primarily the process of federalizing a political community, that is to say, the process by which a number of separate political communities enter into arrangements for working out solutions, adopting joint policies and making joint decisions on joint problems, and, conversely, also the process by which a unitary political community becomes differentiated into federally organized whole... In short we have federalism only if a set of political communities coexist and interact as autonomous entities, united in a common order with an autonomy of its own (Friedrich;1968:7-8).

The above definite clearly suggests that a unitary government can be transformed into a federal system of structure. But it also suggests that several hitherto independent unitary states may come together to form one federal polity or state.

In a more or less similar fashion Watts (1966) defines a federal government as a form of political association in which two or more states constitute a political unity with a common government but in which these member states retain a measure of internal autonomy. He goes on to elaborate further on the concept by saying that in other cases, federal government has been taken to be equivalent to decentralized

government. In this regard he points out that many of the governments of South America which purport to be federal, have in practice combined devolution of power to regional governments with an overriding authority exercised by the central government. Political theorists, students of political institutions, and constitutional lawyers, in attempting to make the term federal more precise, have usually fixed it exclusively on a form of government midway between these two extremes. To distinguish 'federal government' from both 'confederal government' on the one hand, and decentralized unitary government on the other. Watts notes that it has often been defined as a particular form of government in which following the model of the United States constitution of 1787, general and regional governments, neither subordinate to the other, exist within a single country by contrast in a unitary system in which if power is devolved, the regional governments would be subordinate to the central government. The fundamental and distinguishing characteristic of federal system is that neither the central nor the regional governments are subordinate to each other, but are instead co-ordinate (Watts; 1966:10). It is also the case in a federal system that once established the distributed powers could not be restricted to some sub-national units and not to others. More important, a federal structure, once created, can be altered only with the consent of all the constituent units, obtained by procedures laid down in the constitution, as interpreted by a supreme or constitutional court (Burrows: 1980:13).

In short, while in a unitary system the power to amend the constitution is vested in the national or central government acting alone, this is not permitted in a federal structure. Thus, according to Burrows (1980), removing the power to amend the constitution from the central government acting alone, is the most

essential feature that distinguishes federalism from devolution which can be undertaken in a unitary system. Thus, the common trend in federalism is that the ultimate authority to alter the distribution of power in a federal government resides in all the constituent units.

We wish to add here that under a federal system of government, the various sub-national units that constitute the system can have a local government system. In this case it will be the responsibility of the sub-national units that constitute the federation, to determine the scope of the responsibilities of the local government authorities. The parliaments of the sub-national units can, in other words, alter the distribution of power between it and the state governments in the same way as is done under unitary systems.

3. Options for Devolving Power in Unitary Systems

At this point it may be helpful to point out that while in a unitary structure or system of government, power and responsibilities are generally concentrated at one point, executive, legislative and judicial powers are usually assigned to different arms or branches of government. Secondly even under unitary organizational forms, a number of options for devolving power short of establishing a federation exist. A brief outline of the options may be useful in shedding insights into the way power may be distributed in such systems. The most familiar one is what obtains in Kenya currently, namely the establishment of local government authorities under the supervision of a minister of the central government. The local authorities would then be given specific functions and powers to carry out these functions. Such powers and responsibilities are normally spelt out in an Act of parliament, which gives the authorities the legal character. As

indicted in the previous paragraph, under this arrangement, parliament acting alone can alter the distribution of power as well as the relation between the centre and the local authorities.

The second option for devolving power in a unitary system is what Burrows (1980) calls cautious devolution. It is an arrangement in which a delimited range of matters would be devolved to a particular or group of regions while all other areas of legislation are reserved to the central government. The choice of the regions to which power is to be devolved will be dictated by the peculiar need of the country or the regions. Some regions may for example, demand a large measure of autonomy as a condition for remaining part of the state. Problems in Northern Ireland may require such an arrangement. Secondly under this type of devolution an executive responsible to the regional assembly would exercise executive power. Ultimate authority would still remain at the centre.

The third option is to establish regional assemblies through out the country. The assemblies would then be given greater legislative powers over a wide range of matters and the executives would similarly exercise more power than is the case under the cautious devolution. These regional assemblies would be represented in the second chamber of the national parliament. The national parliament would under this arrangement ensure that the rights conferred on the regional assemblies and executives are not interfered with by the national parliament or by the national government. This creates a highly decentralized constitutional structure. It is however different from a federal system in several respects the major one being that the national parliament retains the right and power to alter the distribution of power.

Burrows summarizes these arrangements thus: "devolution then may in principle take widely different forms, ranging from the grant of very limited legislative powers to assemblies for one or two selected provinces only or to a comprehensive decentralization of government to assemblies in all provinces, wielding extensive powers to legislate and to control provincial governments and therefore implying a great reduction in the scope of the central legislature and government (Burrows: 1980; 12). We may add here that even with such forms of decentralization a country could still have local government systems by creating local authorities in each of the provinces or regions. Local government system can thus operate both under a unitary system as well as under a federal structure.

4. The Concept of Decentralization and Devolution

From the foregoing discussion it becomes clear that one of the key concepts in the organization of government is decentralization. It may therefore be opportune at this point to define this concept a little more concretely. The literature on decentralization tend to agree that the concept refers to the transfer of authority on a geographic basis, whether by deconcentration of administrative authority to field units of the same department or level of government, or by the political devolution of authority to local government units or special statutory bodies (UN 1962). Decentralization thus has two aspects; namely, political and administrative aspects.

Distinguishing devolution from deconcentration, Smith observes that devolution is a practice in which the authority to make decisions in some sphere of public policy is delegated by law to sub-

national territorial assemblies (e.g. a local authority)... thus devolution entails a transfer of governmental or political authority (with the powers of the constituent units determined by legislation rather than by the constitution.) while deconcentration entails a transfer of administrative authority from the center to the field. It is the delegation of authority to make administrative decisions on behalf of central administration to public servants working in the field and responsible in varying degrees for government policy within their territories (Smith; 1967:1). In short therefore, devolution is a political device for involving lower-level units of government in policy decision-making on matters that affect them while deconcentration is its administrative counterpart (Oyugi; 200: 4). Devolution can be, as already suggested in the preceding section of this essay, applied to both unitary and federal structures of government. In a federal structure this would take place when for example some powers and responsibilities are transferred from a regional government to a local authority. Consequently, it is not necessary to create a federal system or structure of government in order to devolve power to lower level regions or units. This is because power can be devolved in a unitary system. Thus if the objective is to devolve power the objective can be achieved under a unitary structure.

5. Methods of Power Sharing

The sharing of power between different levels of government is usually the result of a political process involving negotiations, bargaining and compromise between and among different political actors. It is thus not a technical or purely constitutional issue.

The constitution must capture or at least take into account the issues and concerns expressed during the political process. The

actors will include political parties, pressure and interest groups and the citizens as a whole. This was, for example, what happened in the years preceding political independence in Kenya. The political parties, which were the main political actors in the struggle for an acceptable structure of government, engaged in many years of debate as to whether to adopt a federal or unitary system of government and the powers that each level of government would command. They finally agreed on a federal structure with clearly specified powers for each level of government. This was subsequently provided for in the independence constitution. The constitution also provided for the establishment of a local government system. The decision on how to share power is thus part of the political process with the constitution being merely an instrument to capture the concern and to legalize the decision arrived at by the political process. This is not to give the constitution a secondary role in determining how power is to be shared. Indeed the incorporation of these concerns in the constitution is of critical importance precisely because the constitution is an indispensable instrument of governance. Whatever method used it is important to ensure that each level or arm of government has sufficient power to enable it undertake its functions and responsibilities.

6. Scope of Governmental Powers

As indicated in the introduction to this essay, by scope of governmental power is meant the range of functions over which any one arm or level of government has jurisdiction and or the amount or extent of power given to or possessed by any one arm or level of government. A number of basic or preliminary issues regarding the

scope of governmental powers need to be clarified from the outset of this discussion.

First is that the scope of power in terms of the amount of power given to any one arm of government or even levels of government is likely to vary from one country to another and from one organizational form to another. Different types of governments are also likely to exhibit differences in terms of the scope of functions and powers assigned to different centers or units. Thus democratic governments are more likely to give more power to different governance units than authoritarian governments. It may also vary from time to time within a particular country. This is well captured by Friedrich in his observation that federal relations are fluctuating relations in the very nature of things (Friedrich: 1968; 7). Secondly, the extent to which power is devolved to any level of government cannot be conclusively decided at once. This is because it is likely to change in response to particular experiences gained in the course of operating the system. Adjustments are therefore likely to be made in the course of time. This occurs for example, when one level of government feels that it lacks the amount of power that it needs to do what it wants to do.

The observation by Livingston (1963) about the Australian federation with regard to the powers of the various levels of the system is relevant. He writes: 'one of the biggest problems that have dominated the debate on Australian federation has revolved around the performance of the federal system... In essence two experiences have conditioned the debate, the discovery by the commonwealth - read - centre - that it lacked the power to do what it wanted to do and the discovery by the states-read constituent parts of the federation - of their financial dependence on the commonwealth' (Livingston: 1963;

49). The extent of divided powers may thus change from time to time depending on particular experiences and or particular political exigencies.

During periods of war, for example, the central level government may wish to expand the scope of its powers over the sub-national or lower level units of governance. Current attempts by the Bush administration to amass more presidential powers are a good example of what is being suggested here. The starting point is to identify and define the functions and responsibilities of each arm and level of government as a basis for determining how much power is required for the efficient and effective performance of the identified functions.

Another important issue that must be taken into consideration in defining the division and scope of governmental power especially under federal arrangements is whether or not the matter should be defined as precisely as possible or to avoid too rigid a definition and thereby make definition as flexible as possible. Defining the scope and divisions of power precisely has the advantage of reducing the area of uncertainty and possible suspicion while the opposite permits action to be adopted to the needs of changing circumstances and conditions. Generally speaking, the tendency in recent times has been to specify a relatively explicit and detailed division of powers, leaving flexibility to be achieved by a variety of other special devices (Watts; 1966:173). The issue becomes important because in practice the overlapping of central and lower level functions and responsibilities are inevitable. This is especially true with legislative functions and powers in federal systems.

One way to handle this is to make provisions in the constitution specifying

the level of government that has the final authority in cases where laws made by the center within its competence and those made by the lower level units are inconsistent. Whatever the method used, it is important to specify it in the constitution. This reduces arbitrariness in the conduct of public affairs and in the relations between different levels of government.

The traditional way of organizing government is to make a distinction between legislative, executive and judicial functions and powers. This is done under the doctrine or principle of separation of powers and checks and balances. In this arrangement, legislative power is assigned to the legislature or parliament, which in democratic societies is made up of elected representatives. Their primary role is to make and amend laws or pass legislation by which the country is governed.

In addition to these purely law making powers and responsibilities, parliaments in well functioning democracies have the responsibility of determining the distribution of public resources. This is done through the requirement that national budget receive parliamentary approval before it can be effected. In some countries, notably the US, parliament plays a much more central role in the budgetary process than is the case in many other countries. The US does this by going beyond mere approval of the budget as presented by the ministry responsible for the technical aspects of the budget. This is because the budget is correctly regarded and treated in the US as a political tool for making important national decisions. The budget is not treated as a purely technical issue requiring only the input of technocrats as is the tendency and practice in many countries.

Over and above these functions and powers, and in line with the principle of

checks and balances, parliament has the power of ensuring that the other arms of government do not overstep their boundaries. To put it differently, parliament has the duty to check the possible abuse of power by the other branches of government especially the executive. This is what is commonly referred to as the oversight role of parliament. The ways in which this is done is fairly standard for most democracies. It includes the use of parliamentary committees such as the Public Accounts Committee and the Public Investment Committee. Some parliaments such as the Indian parliament has an implementation committee whose duty is among other things, to ensure that decisions and bills passed by parliament are implemented by the executive. Different countries will decide the type of committees to establish and which one to give priority in addition to the more common ones.

In view of the importance of the legislative power and therefore of parliament, some countries have found it appropriate to introduce constitutional provisions aimed at ensuring that parliament acts as a check on itself without relying on the other arms of government. Establishing two Houses of parliament or a bicameral legislature does this. The idea is to divide legislative responsibilities and power between these two houses in such a way that each House is responsible for specific functions. In addition, certain bills can only be passed after being subjected to debate and approval by both Houses. This is the practice for example in the US where certain bills from the House of Representatives can only pass if they receive the required majority approval by the Senate. A similar situation obtained in Kenya during the brief life of the Majimbo constitution, which provided for two Houses of parliament, namely the Lower and the Upper House. Britain also operates

a bicameral legislature. It is thus an arrangement that works under unitary as well as federal systems of government.

The division of power between the two Houses of parliament is important for another reason. It makes it possible to arrange the sessions of parliament in such a way that this arm of government is always in session. This is not common or easy in unicameral systems because under such systems parliament ceases to function when it is in recess or when it is prorogued. This is an undesirable situation precisely because of the importance of legislative and other functions of parliament. One of the dangers of a situation in which parliament ceases to function is that its functions may be taken over by the executive who may go on to misuse such powers. Details of ensuring that one House is always in session can be worked out. Suffice it to say at this point that it can be achieved by staggering the election timetable of the two Houses so that they are not elected at the same time. Again, the US provides a good example of this kind of arrangement.

The other advantage of bicameral legislature for an ethnically divided country such as Kenya is that it can make it possible to have equal representation of ethnic groups in parliament. One of the Houses could be set aside for ethnic representation. Requiring that the upper house be made up of equal number of representatives from each ethnic group can achieve this equal ethnic representation. Representatives to this house may be selected or appointed based on an agreed upon criteria. The bicameral arrangement is an arrangement that I believe is worth exploring for Kenya irrespective of the governmental structure that is finally adopted.

Under the principle of separation of powers and checks and balances the

executive branch of government is usually assigned the responsibility and power to implement those laws and policies passed by parliament. Apart from the chief executive, who in democracies is usually elected by popular vote, the rest of the executive is made up of appointed officials. These are usually professionals in different fields. Judicial functions and powers on the other hand are the responsibility of the judiciary. This is the arm of government whose primary duty is to interpret the law made by parliament and to facilitate the enforcement of the law including the application of the rule of law.

Through the courts of law the judiciary can also act as a check on the powers of the other two arms of government. The judiciary can for example declare a particular decision either by parliament or by the executive unconstitutional. The recent case of the Kenya Anti Corruption Authority comes to mind here. It is a good example of the watchdog role of the judiciary over possible misuse of power by the other arms of government.

The distribution of power between the different levels of government in a federal system becomes complex because each level of government must have legislative, executive and judicial powers and functions. As a starting point, the divisions of powers into legislative, executive and judicial operates more or less as in a unitary system. They are then replicated at the lower levels as well only that the scope will most likely vary. The functions that the center or federal level will undertake and those that will be the responsibility of the sub-national or lower level units must be defined and spelt out. In other words, the scope of their responsibilities must be established and then matched by the requisite power for carrying out the responsibilities.

The definition of responsibilities must be a function of negotiations and bargaining between the various levels that constitute or make up the federation. The common practice has, however, been that the centre is responsible for such functions as defense and security against external aggressors. Thus the federal government through the country's chief executive is responsible for functions such as declaration of war. Each lower level unit however is responsible for its internal security. It is also possible for the lower units to share this responsibility with the center. Thus we may have federal police operating side by side with state police. The point being made is that there are certain issues of a security nature that may require the cooperation of security personnel from the two levels of government.

The conduct of foreign affairs has also traditionally been the responsibility for the central or federal government. This is because the country can only espouse one foreign policy. This can only be guaranteed when the conduct of foreign policy is from one source or centre. National budget is also traditionally the responsibility of the central or federal government and so are matters of currency, trade, commerce and industry. Judicial functions are also shared with some matters falling under federal jurisdiction while others are under state jurisdiction.

7. Justification for Sharing or Devolving Power

Having identified the powers of various arms and levels of government and the institutions to which they are distributed, it may be useful to provide some rationale or justification for sharing of power. In short, we need to understand why governmental powers should be distributed in the ways discussed above. To start with, power sharing between different levels or arms of

government is recommended for political as well as for economic considerations. Administrative reasons have also been used to justify decentralization. The importance of the issue is perhaps best demonstrated by the fact that governmental power is distributed irrespective of the form the government takes. Thus legislative, executive and judicial powers are distributed in unitary as well as in federal and other forms of government. Even authoritarian regimes have found it necessary to share or distribute power at least between the three traditional arms of government.

In both unitary and federal structures of government, power is distributed between the different arms of government for the following reasons. First, it is done in order to prevent one arm of government from dominating the other arms of government. Thus it may aim at ensuring that the executive does not dominate the legislature, the judiciary or both. This happens when one arm of government assume too much power in relation to the other arms of government. This may lead to a situation or practice in which the activities of the weaker arms of government may be hindered or undermined by the interference or undue intervention by the more powerful arm or level of government. This may lead to authoritarianism or dictatorial tendencies in the management of public affairs. It can also encourage undesirable governance practices such as nepotism, negative ethnicity, corruption and the government remaining unresponsive to the governed and political patronage among other vices.

It is thus important to ensure that in a federal structure one level of government is not too powerful compared to the others as this imbalance may create problems of efficiency and loyalty. If, for example, the sub national units are too powerful they

may appear more attractive and thus attract qualified people from the center and thus lead to inefficiency in the center. The reverse may also be true. Care must thus be taken to distribute the power as equally as possible. At the very least, the power must not exceed what is needed by each arm or level of government to perform its functions and responsibilities efficiently. This argument applies equally to the distribution of power in a unitary system of government. The distribution of power is done also as a way of providing checks on the possible excesses of the other arms of government.

The division of power is also aimed at facilitating efficiency in the conduct or management of governmental affairs. This is done because each arm of government has responsibilities but requires sufficient power to carry out these responsibilities. The powers must not be excessive because this may carry the danger of that power being misused. The need to share and balance power for this as in other cases applies to both unitary and federal systems of government.

The other argument for sharing of power is that it facilitates democracy. The sharing of power and authority between different governmental units and levels of government has been associated with democracy. This is because it is normally assumed that democracy operates best in situations characterized by power sharing as opposed to situations where power is monopolized by an individual or group. Centralization of power and authority is normally associated with tyranny or authoritarianism. As Livingston says 'the political centralization of power is a threat to the democratic way of life ...and that bureaucracy is best controlled by devolution to local institutions by greater delegation to the states and by restoring

real parliamentary control' (Livingston: 1963; 54).

We wish to observe here however, that decentralization does not necessarily lead to good governance. The relationship is much more complex than is normally assumed. This is because whether or not decentralization leads to good governance depends on a number of factors. These factors include the way in which the decentralized power is shared, used and the purposes for which it was introduced in the first place. Available evidence suggests that different countries introduce decentralization for different reasons.

For these and other reasons therefore, some scholars and even policy makers prefer decentralization of power to centralization. Such arguments have been used in some cases for the adoption of a federal system or structure of government. These arguments are also used to justify devolution of power to lower level governance units. From a political point of view, the association between decentralization of power and authority and democracy is based on the assumption that once power is decentralized, the people at the sub-national level will not only have easy access to decision points but will also participate in their governance. Whether or not this is true is an empirical question that is likely to vary from country to country depending on many factors.

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PROVIDING A CONSTITUTIONAL FRAMEWORK FOR GOVERNMENTAL RELATIONS: THE SOUTH AFRICAN MODEL

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1. Introduction

As Kenyans consider whether to build a measure of devolution or decentralization into their renewed constitution, it is worthwhile to consider the case of another African country-South Africa, which had to face similar questions when it designed its new democratic constitution. Kenyans may or may not wish to emulate the quasi-federal pattern South Africa adopted, but the issues that it debated and the solutions that it chose may provide some lessons that will facilitate the debate in Kenya.

Despite their very different contexts, there is one strong similarity between the constitution-making process in Kenya and South Africa: the intense emotions that accompany any discussion of devolution. In South Africa (as, it seems, in Kenya) the motives behind calls for federalism (or some weaker form of devolution) were widely mistrusted. Were they rooted in a desire by the old apartheid rulers to prolong their rule in localised pockets of the country? Was the devolution of power not a means of blocking redistribution of wealth by weakening the central state? And did demands for devolution not seek to undermine the national identity of South Africans by encouraging ethnic nationalism?

In this context, the word ‘federalism’ was emotionally charged and provoked deep misunderstanding amongst the parties - it became the ‘F’-word - to be avoided at all costs. Similarly, the labelling of prospective sub-national units was controversial. The

use of the word ‘states’ reflected demands for a substantial devolution of power, suggesting sovereignty; ‘provinces’ implied less devolution, and the preferred term of the African National Congress - regions - suggested that minimal autonomy would be granted to sub-national units. Disagreement over the terms themselves frustrated coherent examination of the alternatives. In 1993, the South African solution to this problem was to agree to compromise on the language so that the substantial debate could continue. Readers of the records of our constitutional negotiations will encounter the cryptic acronym ‘SPRs’ (states, provinces, regions) to designate the sub-national units that we now call provinces.

This management of the use of language in the constitution-making process succeeded in opening up the very difficult debate on the merits of federalism - it may offer many advantages but these are accompanied by costs. As Simeon points out,¹ decentralisation can deepen democracy, enhance the effectiveness of government by ensuring that policy matches local needs more closely and in some contexts, allow diverse groups in divided societies to coexist peacefully without sacrificing their distinctive ways of life. But each of these benefits carries potential disadvantages. So, Simeon reminds us that decentralised politics is not inevitably more democratic - decentralised systems may empower local rulers to subvert democracy; lines of

¹ Richard Simeon, “Modes of Devolution: Notes for Presentation 13th September 2001

accountability may be confused, and the wishes of the national majority may be frustrated in a way that undermines national unity. Similarly, devolved government may mean expensive duplication and the complications resulting from overlap rather than more effective government. And, in accommodating demands for increased self-rule by ethnic minorities, institutionalising difference can fragment the state and marginalise minorities within minorities. The question facing constitution-makers who wish to exploit the advantages of federalism is how to design a system in which the costs are minimized. Part of the answer lies in constructing a framework for managing the relationships between levels of government, and between governments on the same level. These relationships must be responsive to the interdependence of the units, and the inevitable overlaps between them, without smothering them.

But setting out the details of intergovernmental relations cannot be considered until the basics of system are in place.² The ‘first order’ questions include what role the constituent units are to play; their number and size; the relationship between the national government and sub-national governments (are they to be equal or is the national government a ‘senior’ government?); and what financial arrangements will be made. The nature of the system of government (parliamentary or presidential or a variant of these?) and the nature of the electoral system and party system will also influence the relationship between governments. The design of machinery to enable the different governments in a multilevel system to fulfil their roles must follow from these basic

features of the system. It should also contribute to realising the underlying values of the constitutional framework. For instance, just as federalism brings benefits and costs, a system of intergovernmental relations carries costs. Increased co-operation and consultation as a response to problems of overlap and duplication in devolved systems may over-bureaucratise decision-making and weaken processes of democratic accountability. A constitutional system committed to open government must minimise these costs of intergovernmental relations. Similarly, the search for intergovernmental consensus on policy should not paralyse decision-making or frustrate the local innovation central to any system of devolution.

2. What belongs in the Constitution?

If the machinery and process of intergovernmental relations are seen as a ‘second order’ problem focused on enabling the overall system to work, then not all matters relating to intergovernmental relations belong in the Constitution, in fact, intergovernmental practices need to be flexible enough to respond to constantly changing political, social and economic needs and circumstances. They must counterbalance any tendency to rigidity that federalism may introduce. Ron Watts uses the analogy of building a university to illustrate the point: ‘Why’, asked the architect of a new university complex, ‘have you not put proper paths between the buildings? What routes will students follow?’ The students will make the routes that work best for them’, the architect answered, ‘and then we will pave those’. Like the paths on this campus, the paths taken in intergovernmental consultation and dispute resolution must be left to respond to the actual balance of power and the real needs that the system confronts.

² Ronald Watts provides a useful introduction to many of the basic conceptual questions in a paper entitled ‘Intergovernmental Relations: conceptual Issues’ in *Intergovernmental Relations in South Africa* ed Norman Levy and Chris Tapscott (Cape Town: Idasa 2001) p.22

Here it is perhaps useful to divide institutions of intergovernmental relations into two categories. There are those that provide the overall framework for the integration of the system. These include the second house, bringing provincial interests to bear on national decision-making; the courts, which are the ultimate arbiters of the intergovernmental balance; and other bodies (including independent advisory commissions) especially established to manage intergovernmental relations. Some of these, and their roles in intergovernmental relations, will need to be established in the constitution in order to secure the chosen balance of power. An institution for finally resolving intergovernmental disputes is essential. It may also be wise to spell out in the Constitution a method for agreeing on the division of revenue amongst regions and between the regions and the central government. But the second level, the shape and form of the institutions that will be involved in the day-to-day conduct of intergovernmental relations, is not a constitutional issue. Indeed, spelling out these details could result in a cumbersome and rigid framework, poorly equipped to adapt to changing policy agendas.

3. The South African approach

3.1 *A Framework of Principles*

South Africa has taken the unusual step of including what might be described as a philosophy of intergovernmental relations in its constitution, captured in the phrase ‘co-operative government’.³ Federal systems can perhaps be divided into those that emphasise the clear division and separation of responsibilities between the different levels and those that are integrated, emphasising the joint and shared responsibilities of different levels working together to develop

and implement policy.⁴ When South Africans considered these alternative models it was obvious that the country needed a closely integrated system. There were at least two reasons for this: One was historical. Apartheid had been deeply divisive and South Africans were seeking unity. If the institution was to adopt a system in which some power was devolved, it needed to include features that drew the regions into the centre. Secondly, devolution could not be permitted to inhibit the huge development programme that South Africa needed to overcome the legacies of apartheid. The patent need to redistribute wealth from rich to poor regions (including the impoverished bantustans or ‘homelands’) and to secure the basic needs of all South Africans was widely thought to require relatively unconstrained power to act on the part of the central government. Moreover, the newly structured provinces and local governments would have poor infrastructures and limited resources to carry out important responsibilities. For these and other reasons, South Africa was necessarily committed to an integrated and co-operative model of decentralisation in which the central government would play the dominant role.

This is reflected in many aspects of the Constitution, but it is most obvious in two: First, responsibility for many of the most important functions for the development of the country (welfare, health, housing and education) is shared between the national and provincial governments (and sometimes, local government as well). Second, chapter 3 of the Constitution, entitled ‘Co-operative Government’, presents multi-level government (or multi-sphere government as South Africa calls it) as a collaborative effort.

³ The 1998 Swiss Constitution also contains a list of principles of co-operation between sub-national units (cantons) and the central government. See article 44

⁴ Richard Simeon ‘Considerations on the design of federations: the South African Constitution in comparative context’ (1998) 1 *SA Public Law* 42 at p. 50

Chapter 3 provides ‘parameters’ for government action and sets out a list of “principles of co-operative government and intergovernmental relations”. They amount to a set of instructions as to how governments should behave, and include the two crucial elements required in any federal system. On the one hand, the ‘peace, national unity and indivisibility’ of the country must be preserved. On the other hand, each government must respect the integrity of all other governments in the country. In doing this, co-operation, consultation and co-ordination are key. Thus, section 41(l)(h) of the Constitution requires governments in South Africa to ‘co-operate with one another in mutual trust and good faith by -

- (i) fostering friendly relations;
- (ii) assisting and supporting one another;
- (iii) informing one another of, and consulting one another on, matters of common interest;
- (iv) co-ordinating their actions and legislation with one another;
- (v) adhering to agreed procedures; and
- (vi) avoiding legal proceedings.

The overwhelming emphasis is on co-ordination and co-operation, not on competition and divergence. The list and other provisions in the section of which it is a part have been described as a set of bureaucratic wedding vows and, indeed, with two exceptions, they offer principles rather than a set of rules. It is difficult to demonstrate their practical effect. Are these provisions disregarded as mere rhetoric or do they guide officials and politicians in their intergovernmental relations? The answer may be that they are sometimes ignored and sometimes provide guidance. By articulating shared values here and elsewhere, the Constitution departs from the more traditional Commonwealth mode of simply setting out rules and powers. In

doing this, Chapter 3 both helps to capture the spirit of co-operative government and provides support for those seeking to replace the formalistic and rule-bound approach of the old authoritarian order with an approach underpinned by shared values.

Two sets of provisions in Chapter 3 are much firmer. One requires an Act of Parliament to establish institutions that facilitate intergovernmental relations and to provide mechanisms for resolving disputes. Building on this, and on paragraph (vi) quoted above, subsections (3) and (4) of section 41 instruct governments to ‘make every reasonable effort’ to settle any disputes outside courts and require courts to dismiss matters if reasonable attempts to settle have not been made.

Although the dispute-settling legislation anticipated in these provisions has not yet been adopted, courts already routinely ask what measures have been taken to settle intergovernmental disputes before they will hear them.

3.2 *Courts: The Final Resolution Of Disputes*

As already noted, the constitutions of federal systems need to provide for the resolution of intergovernmental disputes. Most systems use the courts for this purpose, although there are some exceptions.⁵ For instance, Ethiopia’s 1994 Constitution establishes a House of the Federation as one of two ‘Federal Houses’. This House is not a law-making body. Instead, its chief functions are to manage the relationships between regions and to resolve issues concerning the ‘rights of Nations, Nationalities and Peoples to self determination’. It is also the body given the final power to interpret the Constitution, This means that it will be the final arbiter in

⁵ Of course, constitutional amendment and ordinary political process like elections may also resolve disputes.

intergovernmental disputes. In Switzerland, challenges to the constitutionality of acts of the central government are settled by referendum.⁶

One concern about using courts to resolve intergovernmental disputes is that the balance of power should be maintained politically and not artificially by the courts. This approach may be appropriate where the constitutional division of powers simply reflects a political balance of powers. But, where a constitution seeks to redistribute power, ordinary political processes are unlikely to provide suitable means for resolving intergovernmental disputes. Another objection to using courts for intergovernmental dispute resolution is that they do not allow for compromises and cannot deal appropriately with the multifaceted problems that are characteristic of intergovernmental disputes. As we have seen, South Africa's response to these and other related concerns is to make courts a last resort only. This approach seems to capture the best of both worlds. It encourages governments to use the flexible opportunities of bargaining and negotiation before appealing to courts, but it ensures that the fundamental constitutional principles underlying the division of powers are respected and preserved by the courts. Moreover, although courts are clearly not outside politics, court proceedings presided over by an independent judge remove matters from the immediate pressures of current politics and change the context of dispute resolution. Court proceedings demand that parties articulate the causes of a dispute and provide reasons for the outcome they support. Similarly, decisions by courts must be supported by reasons. In Commonwealth countries, disagreements amongst judges are recorded. These processes help to develop an understanding

of the framework within which power is devolved and, in so doing, contribute to building a stronger democratic culture.

However, if a court system (or perhaps the top court only) is to be used as the final arbiter in matters concerning the distribution of power amongst levels of government, the courts and judges must be legitimate. Who the judges are becomes important and, in the context of constitutional design, how they are appointed requires careful consideration. They should not be the tools of one level of government and so both levels in the federation should have a voice in appointments. Commonwealth systems, which developed from the Westminster model, generally have methods of selecting judges that are centralised and far from transparent. This is often the case even when a judicial service commission chooses judges. A more transparent system with broader representation is likely to enhance the legitimacy of the courts and, thus, the effectiveness of their decisions and the overall stability of the system, because judges will have the confidence of all levels.

Consideration may also be given to ways of ensuring that judges reflect a range of interests and are not drawn exclusively from one sector of society. In the United States, for instance, the interests of the States are represented in the judicial appointment process through the right of the Senate to veto presidential nominations to federal courts. But the practice is also to ensure that the Supreme Court includes people from the East and West, and from the North and the South of the country. In Germany, half of the members of the Constitutional Court are chosen by the Bundestag and half by the Bundesrat, which represents state governments. In practice, different parties take turns to select new judges.⁷ The South

⁶ See, generally, Wolf Linder *Swiss Democracy: Possible solutions to conflict in multicultural societies* (London: St Martin's Press, 1994)

⁷ David P Currie *The Constitution of the Federal Republic of Germany* (Chicago: University of Chicago Press, 1994) pp 155-6

African Constitution specifically requires ‘the need for the judiciary to reflect broadly the racial and gender composition’ of the country to be considered when judicial appointments are made. For the Constitutional Court, a judicial service commission made up of politicians and lawyers (including judges) must put together a (short) short list from which the President chooses new judges. Provincial representation on the Commission is relatively weak; four of its 23 members are designated by the National Council of Provinces- parliament’s provincially-based second chamber. Nominations to the Commission and aspects of its proceedings are public.

3.3 A Second Chamber as an Institution of Intergovernmental Relations

Most federations have a ‘second’ chamber in their national legislatures. The mode of selection and composition of such chambers varies greatly, as does their role in intergovernmental relations. Following the model of the German *Bundesrat* closely, South Africa’s second chamber, the National Council of Provinces (NCOP), has intergovernmental relations as its primary concern.

In the interim Constitution, passed in 1993, South Africa experimented with a senate, which operated as a ‘house of sober second thought’ rather than as an intergovernmental institution. Following a model developed in the Constitution of the Union of South Africa in 1910, each province was given equal representation and members were nominated by the parties in provincial legislatures. But there, the link with the provinces ended. The Senate rapidly came to be regarded as a failure. It replicated the political balance of powers in the National Assembly and it generally seemed to rubber stamp the decisions of the Assembly. This

led to complaints that it was an expensive waste of time, serving only to delay matters. When the Senate did apply itself seriously to the questions before it, complaints grew: these matters had been carefully considered in the National Assembly-why was the Senate revisiting them?

Despite strong opposition to the Senate, the final Constitution retained a second chamber. Two main reasons underlay this decision. First, the vested interests of senators chosen in 1994 could not be ignored. But, secondly, and more importantly, although the ANC had reluctantly agreed to a form of devolution in South Africa, it was searching for ways of tying the provinces into the centre. Discussions with German politicians and constitutional lawyers persuaded them that a second chamber could be used to do this.

The NCOP follows the old South African (and American and Australian) model of equal representation for each sub-national unit. Each province may send one 10-person delegation to the NCOP and, on all the issues most important to provinces, each delegation has just one vote. The NCOP is modelled closely on the German *Bundesrat* but there are two particularly significant differences. One concerns the composition of the regional delegations to the NCOP. They include members of both the provincial executives and the provincial legislatures, and must reflect the party balance in the provincial legislature. In Germany, only the executive of each Land participates in the *Bundesrat*. Involvement of provincial legislatures in the NCOP is made even stronger by the NCOP’s second departure from the *Bundesrat* model. Instructions about how to vote (‘mandates’) must be given to provincial delegations to the NCOP by the provincial legislature. This means that the provincial legislature must consider national legislation, propose amendments if it considers them necessary,

and then mandate its delegation to vote either in support or against the national legislation. Thus, the NCOP is closely bound to the provinces, the interests of which it is to serve.

South Africans considered these modifications to the German model to be an essential ingredient in building a robust democracy. The changes are a response to German concerns that their system is highly **bureaucratized** and executive-driven. South Africa's history of authoritarian rule made constitution-makers especially sensitive to the need for open government and balances to the power of the executive. The opportunity that the NCOP process creates for discussion of national legislation in open provincial legislatures is intended to provide opportunities for public participation in law-making and to contribute to the development of a democratic system in which political decisions are open to public scrutiny.

In drawing the provinces into the centre, the **NCOP** seeks to do two complementary things. First, it intends to ensure that national legislation is informed by provincial views (and needs). This regional influence is particularly important in South Africa because the provinces implement much national legislation. Secondly, through their involvement in the national law-making process, provinces are prevented from becoming too parochial. These are worthwhile goals, but, if the NCOP were to be issued with a report card on its performance since 1996, it would probably fail. The usual explanation is that the NCOP is too complex. This has two aspects. One relates to its administration, the other to its role.

There is no doubt that the NCOP places heavy administrative demands on both the national Parliament and on provincial legislatures. National bills need to be sent to provinces; provincial legislatures must

consider them and, in the course of doing so, should consider the views of their provincial executives; decisions must be taken by provincial legislative committees; and the provincial delegation must be chosen, briefed and travel to Cape Town to negotiate the provincial position with its provincial counterparts. All of this must take place in a time frame synchronised with the national Parliament and the other provincial legislatures. Despite e-mail and air travel, the coordination required by the NCOP has proved too demanding and a number of provinces simply do not keep up with processes in the NCOP and hence with their obligation to participate in the national legislative process.

Although it is administrative complexity that appears to explain the flaws in the operation of the NCOP, the complexity of its role and a reluctance to embrace vigorous provincial government in South Africa provides the real explanation. The NCOP is intended to ensure that provincial legislatures engage in the open debate on the national legislation that they will be required to implement. However, as I have already noted, the agreement to adopt a provincial system was a compromise for most South Africans. As a result, the careful balance that the system seeks to achieve between recognising provincial interests and allowing the centre to act is overlooked by most politicians in the governing **party** at both national and provincial level. Very little attention is paid to ensuring that provincial interests are properly represented at the national level. Instead, even many provincial politicians see their **first** loyalty to national party structures rather than to the provincial electorate. The fact that draft national legislation has been discussed in party meetings and presented to provincial ministers by the national Minister in intergovernmental forums is usually enough to satisfy politicians that it should be adopted. The result is that the **NCOP** acts

more as a device for central influence over the provinces than vice versa.

How does one assess the system in the light of these problems? They suggest that it is too early to judge. As the country develops, administrative structures should strengthen. Moreover, it is clear that the balance of power in South Africa plays a significant role in weakening the NCOP. All nine provinces are controlled to some extent by the ANC (in two through its participation in coalition governments; in the others it governs on its own). A political culture in which the diversity of the needs of provinces is understood and articulated in political forums has yet to develop. Under other circumstances, the NCOP could play a very different role - primarily by providing an institution in which the overlapping roles of the national and provincial governments can be negotiated. The role that it is already playing in oversight of intrusions by the national government into the jurisdiction of provinces and by the provinces into municipalities gives an idea of its potential.

An obvious question in a system in which the national, provincial and local levels of government are heavily dependent on one another, with many overlapping functions is what happens when a government fails to fulfil its responsibilities. For instance, what remedy is there when a provincial government in South Africa fails to fulfil its responsibility to implement national welfare legislation and pay out old age pensions? What can be done when a municipality fails to supply basic services? Under the South African Constitution the national government or a provincial government must intervene. And experience thus far suggests that rather than being an unfortunate limit on the autonomy of sub-national units, such a power to intervene is critical. A number of South African provinces and many municipalities simply do not have the capacity to fulfil their constitutional mandates. Thus, when bulk

electricity supplies to a municipality are cut off on account of the failure of the municipality to pay its bills, when a province fails to pay old age pensions, and when local councillors fail to pass a municipal budget, the national or provincial government has intervened.

The power to intervene is not unique to South Africa but it is easily abused. The way in which the central government in India used the tool of President's Rule in the 1970's provides an example. There the central government used its constitutional right to intervene in sub-national matters when opposition parties won State elections. The South African Constitution offers two safeguards against abuse. Courts can test an intervention against explicit criteria set out in the Constitution. Interventions must be necessary to maintain essential services, etc and must be directed towards building the capacity of the government concerned. Thus far, no intervention has been challenged in a court. This is probably because the second safeguard, approval by the NCOP, has been so effective.

An intervention which involves an assumption of the powers of a provincial government by the national government or of a municipality by a provincial government must be approved by the NCOP within 14 days or brought to an end. It is easy to understand why provinces will treat national interventions with caution. Each province will be mindful that it might be the subject of the next intrusion of the national government into provincial affairs. But the NCOP has also played an extraordinarily constructive role in interventions by provinces into municipalities. Through investigating the background to problems, bringing parties together and monitoring progress, it has contributed to achieving a co-operative approach in situations that are usually intensely adversarial and highly charged politically.

The role that the NCOP plays in overseeing interventions may have other benefits. It means that interventions become public. Every intervention prompts the question to the intervening party: Why did matters reach the stage that an intervention was necessary? Does the need for an intervention not suggest that you have failed in your constitutional obligation to support and build capacity in other governments? Over the past couple of years, interventions have become less frequent and mechanisms for monitoring governments and identifying problems at an early stage have become stronger.

The NCOP complements its intergovernmental legislative functions in other ways as well. For instance, should the national Treasury stop funds to a province, the approval of the NCOP (and the National Assembly) is required; the NCOP must approve the annual division of revenue amongst the national, provincial and local spheres of government and the division of the provincial share amongst the nine provinces and, with the National Assembly, it must approve international agreements.

3.4 Independent Commissions – Managing Fiscal Federation and other Roles

The distribution of finances is a critical issue in every federation and, as Ron Watts reminds us – “virtually every federation has found the need to correct two kinds of financial imbalances. The vertical imbalances occur when constitutionally assigned federal and unit government revenues do not match their constitutionally assigned expenditure responsibilities.... Horizontal imbalances occur when the revenue capacities of different constituent units vary so that they are not able to provide their citizens with services at the same level on the basis of comparable

taxes.”⁸ These imbalances undermine cohesion in a federation, which is intended to strengthen all the component parts and not to shift responsibilities to underfunded units or to insulate the better off from the poorer regions. So, to correct imbalances, most federations have arrangements for intergovernmental transfers. Transfers that are based on the view that all citizens in the federation are entitled to comparable services are usually referred to as 'equalisation' transfers. Another term, common in European federations is 'solidarity' transfers, emphasising the fundamental goal of binding together the component parts.⁹

The distribution of finances amongst governments is at once one of the most complicated and most sensitive issues in a federation. To avoid disputes, a precise formula could be included in the constitution but this would introduce great rigidity into an area of government in which flexibility is critical. Instead, careful thought needs to be given to the institutions that will manage intergovernmental financial relations. In South Africa, the Constitution gives the national government exclusive control over the most important sources of revenue - personal and corporate income tax, value-added tax, sales tax and customs duties. Accordingly, and despite their wide-ranging responsibilities, provinces have access to very limited sources of revenue. To correct this vertical imbalance, the Constitution requires the 'equitable' division of all revenue collected nationally among the three spheres of government. The provincial share must then be divided amongst the nine provinces. The Constitution requires that these arrangements be based on 'objective' criteria and not left solely to the discretion of the national government. The

⁸ Ronald Watts *Comparing Federal Systems in the 1990s* (Kingston: Institute of Intergovernmental Relations Queens University, 1996) pp 41-2

⁹ Watts p. 45

Constitution establishes two institutions to manage this potentially controversial process. First, as I have already mentioned, the annual bill providing for the division of revenue must be approved by the provinces through the **NCOP**. Second, before its approval, the recommendations of the expert Financial and Fiscal Commission (**FFC**) must be considered.

Despite the influence provinces can bring to bear through the **NCOP** and meetings of finance ministers, it is clear that it is the national government that dominates decisions about financial arrangements. One side in the negotiation process has most of the cards. This may be one reason why the drafters of the Constitution also created the Financial and Fiscal Commission.

Initially the FFC was large, made up of a Chair and Deputy Chair, nine members nominated by the provinces, two by organised local government, and nine other persons.

This size proved unwieldy and, in November 2001, membership of the Commission was reduced to eight. The Constitution states that the Commission is to be independent and impartial. Its main function is to make recommendations to government and the legislatures about the distribution of revenue. Section 214(2) secures this role by *requiring* Parliament or the Executive to consult with the **FFC** annually about the division of revenue.

Bodies like the FFC can be extremely influential.¹⁰ For instance, in Australia the recommendations of the Commonwealth Grants Commission are 'usually - but not automatically - accepted by the commonwealth and state governments involved.'¹¹ However, descriptions of the

role of the South African FFC frequently emphasise that it is merely an advisory body - its independence is rarely mentioned. Thus the South African *Intergovernmental Relations Audit* introduces a discussion of the FFC with the statement: 'The FFC is purely an advisory body in the budget process'. The FFC itself is modest about its role.¹² And, although the Department of Finance occasionally acknowledges the contribution of the FFC to its thinking, the Minister of Finance and departmental officials remain adamant that the decision-making power is theirs and frequently sound dismissive of the FFC. In **mid-1999**, as part of an enthusiastic comment about the success of this intergovernmental fiscal relations structures, the Minister of Finance voiced a view that many observers believed had long been held by the Department, saying that intergovernmental relations were working so well that the FFC was no longer necessary.

But there remains a strong case for a relatively independent commission, even if it must realise that as an advisory body, the commodity it deals in is not power - it has no power but influence. Recommendations of the FFC can help redress the imbalance of power between the governments and can ensure that objective criteria receive a hearing. The **FFC** can help avoid conflicts and can conduct analyses that can better inform the political process. Given its stock in trade - the capacity to provide impartial advice - the influence of the FFC in the future will depend on the quality of its economic analysis and information base and

(Washington: International Monetary Fund 1997) p 175 at 185

¹² *Intergovernmental Relations Audit: Towards a Culture of Co-operative Government* Final report December 1999 Pretoria p 147. Many examples can be given of the limited status attached to FFC recommendations (despite their evident impact on final outcomes). See also, for instance, IDASA's *Intergovernmental Fiscal Review*, which does not deal with FFC recommendations at all.

¹⁰ See Watts p. 49.

¹¹ Jon Craig 'Australia' in *Fiscal Federalism in Theory and Practice* ed. Teresa Ter-Minassian

hence on the technical resources available to it, and on its ability to convince political actors of the value of its advice. Again, and as with the **NCOP**, the real test of the usefulness of the FFC as an institution that strengthens co-operative government will come when the system is not dominated by one party with an overwhelming majority but when different interests compete for access to resources. Thus, the relatively poor performance of the South African FFC should not be construed to suggest it is a bad idea.

Commissions with advisory (or even binding) authority can play other roles in federations. One role was suggested by the Commission on Provincial and Local Government established in South Africa's interim Constitution. The main function of the **CPLG** was to explore the best way of **constitutionalizing** a system of decentralised government in South Africa's final Constitution. However, such a body could manage the process of implementing decentralisation (which in the South African case needed to be undertaken in stages). The distance that an independent commission has from the central government may also make it the best type of body for managing intergovernmental relations on a day-to-day basis. In South Africa a national ministry does this. However, in describing a similar situation in Spain, a senior bureaucrat suggested that the incorporation of the department responsible for intergovernmental matters to the national government silenced the regions.

3.5 Day-to-Day Intergovernmental Relations

Courts, second chambers and commissions established in a constitution play an important role in intergovernmental relations but the day-to-day work is done elsewhere. For effective government, a federal system must have processes that enhance flexibility

and ensure that it can respond to changing concerns. Watts reports that, in addition to informal intergovernmental communication by telephone and letter for example, in some federations there are over 500 meetings of committees, councils and conferences concerned with intergovernmental relations a year.¹³ These institutions and processes are usually a pragmatic response to needs, established by intergovernmental agreements, but they could be established in legislation or even a constitution.

South African constitution-makers wisely stopped short of prescribing the day-to-day processes of intergovernmental relations in the Constitution. To include such detail in a constitution would be to create a rigid system which would almost certainly fail to achieve the main goal of intergovernmental process, which is to counteract any tendencies towards inflexibility in the federal system and to ensure that overlaps and conflicts are managed as the context demands. In addition, constitution-makers are unlikely to be able to predict which paths governments will want to take as they build relationships and co-ordinate activities. But, as noted in the introduction to this paper, the South African Constitution does include a provision that requires an Act of Parliament to establish institutions that facilitate intergovernmental relations and to provide mechanisms for resolving disputes.

South Africans included this requirement because they were determined that the devolved system of government should be characterised by strong relationships between governments and by co-operation and co-ordination. Achieving this depends to a large extent on attitudes, but a constitutional demand that the machinery of intergovernmental relations should be established through legislation seemed to be a way of insisting that co-operative attitudes prevailed over competitive ones.

¹³ At page 52

The first five years of co-operative government under the 1996 Constitution in South Africa suggest not only that the concern of the constitution-makers was exaggerated but also that a constitutional requirement that legislation should regulate intergovernmental relations may be counterproductive. Intergovernmental relations need not take place within a framework established by legislation; they can be managed by agreement and practice. And if legislation proves to be useful in specific instances (perhaps as a way of demonstrating a commitment to processes on which agreement was difficult to reach), a Constitution is unlikely to stand in its way. But it may also be that inflexibility is not the only problem created by the constitutional demand for legislated inter governmental procedures. South Africa now has a plethora of 'intergovernmental practitioners' in national and provincial departments. Often their job descriptions are far from clear and their relationship to the concrete responsibilities of departments is very weak. The focus of intergovernmental relations must be more effective government. In South Africa that means that there must be a measurable improvement in 'delivery' such as more qualified school leavers, a lower rate of HIV-infection, more houses built and proper protection for women and children against sexual violence. The constitutional instruction to legislate for institutions of intergovernmental relations sometimes seems to have shifted the focus to the number of meetings convened and the distances traveled.

This suggests that a constitution should neither set out procedures for managing intergovernmental relations nor demand that legislation do that. But this does not mean that a constitution should pay no attention to the everyday practice of intergovernmental relations. Intergovernmental relations in parliamentary systems in particular tend to

be dominated by the executive (ministers and their officials) and this carries costs: plans are made and deals brokered outside the public gaze. In South Africa, the NCOP was intended as a counterbalance to this 'democratic deficit' by giving provincial legislators the opportunity to scrutinise such deals. But party politics makes even scrutiny by the legislature difficult. Constitutional principles that ensure access to information and transparency are essential - and every aspect of a constitution needs to emphasise the need for reasons for decisions that are taken in the exercise of public power. The need is especially great in a system struggling to throw off the deeply ingrained habits of authoritarian rule, as is the case in South Africa. In other words, a right to freedom of information and to administrative justice may be the most valuable contributions to healthy intergovernmental relations that a constitution can make.

3.6 Devolved Power and Cultural Diversity

Provinces in South Africa have not been designed to provide specific ethnic or cultural groups with a degree of autonomy or self-determination. Their borders match those proposed for decentralized economic regions some six years before the provincial system was introduced. Thus, intergovernmental relations in South Africa are not formally concerned with issues of cultural diversity.

However, instead, the Constitution seeks to protect and foster cultural diversity through the protection of an individual's right to 'use the language and participate in the cultural life of their choice' (section 30) and the right to 'enjoy culture and practice their religion' with other members of their community (section 31). In addition, the Constitution establishes a Commission for the Promotion and Protection of the Rights of Cultural,

Religious and Linguistic Communities, the objects of which are -

- (a) to promote respect for the rights of cultural, religious and linguistic communities;
- (b) to promote and develop peace, friendship, humanity, tolerance and national unity among cultural, religious and linguistic communities, on the basis of equality, non-discrimination and free association; and
- (c) to recommend the establishment or recognition, in accordance with national legislation, of a cultural or other council or councils for a community or communities in South Africa.

The Pan South African Language Board is expected to promote the many languages used by South Africans and although each province is only required to use two of the eleven official languages, “all official languages must enjoy parity of esteem and must be treated equitably” (section 6).

Whether or not the decision to treat ethnic diversity and culture as rights-related rather than as entitling groups to political representation is the correct one for South Africa remains to be seen. Thus far, however, it is the cruder matter of race politics and the deep divide between black and white that has created the greatest challenges for the emerging democracy.

4. Conclusion

The process of devolving power in South Africa has not been easy. As already indicated, the capacity of every level of government is low and a multi-level system needs to establish many efficient and honest administrations. National politicians still command a much higher level of confidence from the public than do provincial and local

politicians.¹⁴ Nevertheless, the system is evolving and, in certain fields, showing signs that we may reap the benefits of federalism “increased democratic participation at the provincial and local level and government policy that is truly responsive to local needs. While it is too early to claim with confidence that the South African model of intergovernmental relations ‘works’, one aspect of it seems to be successful. It is the balance that the Constitution demands between the role of courts and the role of other intergovernmental forums. Granting final decision-making power in intergovernmental disputes to courts but explicitly requiring attempts to resolve matters out of court first is a useful approach to articulate in a new system. It has contributed to the firm sense that South Africans have that a co-operative system of intergovernmental relations is a key part of the devolved system.

¹⁴ Robert Mattes, Yul Derek Davids and Charrel Africa, *Views of Democracy in South Africa and the Region: Trends and Comparisons* (Johannesburg: Southern African Democracy Barometer, October 2000)

CONSIDERATIONS ON THE DESIGN OF FEDERATIONS: THE SOUTH AFRICAN CONSTITUTION IN COMPARATIVE PERSPECTIVE

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1. Introduction

The purpose of this paper is to explore some of the issues which arise when thinking about how to design federal institutions in a comparative context. This requires that we think carefully about what values or purposes one is trying to achieve by opting for a federal system and about the alternative institutional arrangements or instruments which might strengthen or undermine these goals. We also have to think about how federal arrangements will interact with other elements in the political system, such as the design of the executive and legislatures and the party system, and with the underlying political, social and economic environment.

I will illustrate the issues by looking at how South Africa has thought about federalism and the ideas associated with multi-level governance in the development of its new democratic constitution. I begin with some of the normative issues underlying the choice of federalism and the design of federal institutions. Then, I explore two general models of federalism, which I call divided federalism and shared federalism, and which are exemplified by Canada and Germany, before turning to an examination of the choices South Africa has made, in its new quasi-federal constitution¹ and their

possible consequences. The new constitution was formally signed by President Nelson Mandela, in the political-charged setting of Sharpeville, on 6 December 1996. This was the culmination of a long process, starting with the negotiation of the Interim Constitution of 1993, through a Multi-Party Negotiating Process. It came into effect in December 1993, and provided the framework for the first democratic elections which were held on 27 April 1994. The complex compromise among the parties engaged in the transition to democratic, majority rule also included a set of 34 "Constitutional Principles" set out as a schedule to the Interim Constitution. These principles were critical to securing the acquiescence of the soon-to-be minority, largely white parties. They were to provide a set of constraints and guidelines for writers of the permanent constitution, since no new constitution could come into effect until the newly created Constitutional Court certified that it complied with the Principles. Following the election, there was a two-year deadline with which to write a "final" constitution.

the "Working Draft" of the new constitution, released on 18 November 1995; the New Text (NT) of the Constitution, agreed to by the Constitutional Assembly 8 May 1996; the Constitutional Court of South Africa, "Certification of the Constitution of the Republic of South Africa (Case CCT 23/96), 6 September 1996; the Amended Text (AT) of the constitution, October 1996; and the Constitutional Court, Certification of the Amended Text (CCT 37/96), 4 December 1996. All these documents (and other relevant materials) are found in the web site of the South African Constitutional Assembly.

¹ The following analysis is based on a number of recent South African constitutional documents. They include: the Interim Constitution of the Republic of South Africa (IC), which entered into force 27 April, 1994; the "solemn pact" of the 34 Constitutional Principles (CP's), contained in Schedule 4 of the IC;

This task was undertaken by the Constitutional Assembly, consisting of the two Houses of the national parliament. The assembly had two co-chairs - Cyril Ramaphosa, of the majority African National Congress, and Roelf Meyer, of the largely white, and previous governing party, the National Party. Its work was delegated to a 46-member Constitutional Committee of Members of Parliament, based on proportional representation of the parties. The Committee was divided into a number of "theme" committees focused on different aspects of the constitution, and served by a Constitutional Secretariat and a group of "expert" constitutional advisers. The Assembly devoted enormous effort both to solicit the views of all South Africans on their new constitution, and to communicate their on-going work back to the community in order to create a "credible and enduring constitution which will enjoy the support and allegiance of all South Africans."² Among the basic points of departure in addition to constitutionalism, democracy, the rule of law and a Bill of Rights, was to achieve a "balanced horizontal and vertical division and devolution of powers and functions."³

A first draft text, full of underlines, square brackets and "Options 1, 2, 3, etc" was published in November of 1995. There followed a set of rolling texts with at least four successive alterations, each narrowing the areas of disagreement, before a "final" draft was adopted on 8 May 1996. Under the terms of the interim constitution, however, the Constitutional Court was required to "certify" that the text complied with the original 34 principles before the new constitution could be finally adopted. In a

² For a detailed summary of the process, and an evaluation of its efforts at public involvement, see Secretariat of the Constitutional Assembly, *Annual Report, 1996*

³ T. M. Mbeki, Deputy President, in the Constitutional Assembly, 24 January 1995.

long judgement, handed down in September 1996, the Court found a number of areas in which the text did not comply (not least in the area of the role of the provinces).⁴ There followed a final flurry of negotiations to amend the draft, and a final passage in the Constitutional Assembly before the new constitution was officially adopted, and the structures and institutions of "one, sovereign, democratic state" of South Africa were put into place,⁵ with the Constitution as "the Supreme Law of the Republic." (Ss. 1, 2) Given South Africa's history, and the wide areas of conflict in the November draft, it seems almost miraculous that the task of constitution-making was successfully accomplished. Just as with the "miracle" of the 1993 constitution and subsequent successful elections, it required a huge act of last minute compromise among the major parties, and a continuing deep commitment to the politics of reconciliation which has been so striking a feature of South Africa since the end of apartheid. With justifiable pride, an "Explanatory Memorandum" to the new text could state that; "This text therefore represents the collective wisdom of the South African people and has been arrived at by general agreement."

Canada, of course, is one of the world's oldest federal states, one which has changed considerably from the original 1867 design, as a result of societal change, changes in the size and role of government, and judicial decisions. As we all know, this federation is in deep crisis, and its very continuation as a

⁴ The reservations included doubts about whether establishment of a national Public Service Commission interfered with legitimate provincial autonomy; and the finding that the powers and functions of the provincial governments failed to meet the requirement of CP XVIII.2 because they were "substantially less than and inferior" to the powers set out in the Interim Constitution. Constitutional Court of South Africa, CCT 23/96. Conclusion.

⁵ The final Certification concluded that provincial powers were still less than in the IC, but not substantially so.

federal state remains very much in question. This crisis in turn has generated a wide-ranging debate about almost every aspect of Canada's institutional design: the division of powers, the mechanisms and processes of intergovernmental relations, fiscal arrangements, and so on. In striking contrast to South Africa, despite at least five rounds of "mega-constitutional" discussion, Canadians have, in Peter Russell's words, failed to "constitute themselves as a sovereign people."⁶

Perhaps the most fundamental question raised by the recent Canadian experience is whether, and under what conditions, and with what institutional designs, federalism can be an effective means of managing regional and ethno-cultural conflicts in a deeply divided society, a situation with many - but deeper - parallels in South Africa.

Canadians must think about reforming a long-established federal system. The constitution-makers in South Africa following the end of apartheid were starting with a blank sheet of paper. They had to answer the threshold question of whether to have a unitary or a federal system. The general historical position of the African National Congress has been to argue for a unitary state largely on the grounds that only it could secure majority rule, that only it could ensure the concentration of resources necessary to undertake the massive tasks of providing schools, housing, hospitals, and eroding economic disparities, and that only it could contain the potentially centrifugal tendencies of race and tribe. The language and concepts of federalism were also associated with the racist and discredited previous policy of African "homelands." But other political forces (the mainly white parties seeking an American style system of

checks and balances against majority power, some Afrikaners dreaming of an Afrikaans homeland or "Volkstaat," and the Inkhata Freedom Party seeking more autonomy for KwaZulu-Natal province) all argued for a more or less federal state.⁷ The interim constitution of 1993,⁸ the result of the imperative of finding consensus among these political forces in order to pave the way for free elections,⁹ states in its "Constitutional Principles," that "Government shall be structured at national provincial and local levels," (XVII), that constitutional amendments require the approval of the provinces, or their representatives in a provincially-constituted second house of Parliament (XVIII), that each level will have "exclusive and concurrent powers" (XIX). It also endorses the principle of subsidiarity, stating that the "level at which decisions can be taken most effectively . . . shall be the level responsible and accountable." (XXI) So, while the word "federalism" does not appear anywhere in the constitution, the federal principle was to be deeply embedded in it. "In the Republic, government is constituted as national, provincial and local spheres¹⁰ of

⁷ For an excellent review of the evolution of the positions of the major parties, see Richard Humphries, Thabo Rapoo and Steven Friedman, "The Shape of the Country: Negotiating regional government," in Steven Friedman and Doreen Atkinson, eds. *The Small Miracle: South Africa's Negotiated Settlement*. (South African Review, 7). Johannesburg: Ravan Press, 1994. 148-181.

⁸ Republic of South Africa. 1995. *Constitution of the Republic of South Africa, 1993 Act 200 of 1993 as amended by Acts 2, 3, 13, 14, 24 and 29 of 1994*.

⁹ For a superb analysis of these events, see Alister Sparks. 1994. *Tomorrow is Another Country: The Inside Story of South Africa's Negotiated Revolution*. Sandton: Struik Book Distributors.

¹⁰ The choice of the term "spheres" rather than the more common "levels" or "orders" of government is not accidental. As we will see below, the word suggests that government in South Africa is a single regime, expressed through multiple institutions. The words "levels" or "orders" imply a conception of

⁶ Peter Russell, *Constitutional Odyssey: Can Canadians Be a Sovereign People?* 2nd ed. Toronto: University of Toronto Press. 1993.

government, which are distinctive, interdependent and interrelated." (S. 40. (1)) Each sphere is to be directly elected; each has at least some autonomous powers; and a Constitutional Court is the final arbiter of their relationships.

But having made that decision, then all the institutional design issues Canadians and others are debating had to be faced: how to divide powers, how to organize fiscal arrangements and intergovernmental relations, what role would the provinces play within the national government, etc. So despite the enormous differences between these two countries they face similar questions of institutional design. Each also must find ways of managing deep ethno-cultural cleavages, and strong autonomist movements - Quebec in Canada, KwaZulu-Natal in South Africa.

Before I proceed, a caveat; my focus is on considerations of institutional design. I think they are important, especially when, as in South Africa or Eastern Europe today, institutional regimes are in the process of being created. Thus this paper has an unabashedly institutionalist character; it assumes that institutions matter, and have consequences, and that the future of democracy is at least partly related to the quality of the Constitutional Assembly's handiwork.. But I do not wish to assert that formal institutional arrangements are the only, or even the most important, factors which will shape the future evolution of federal systems, or of democracy. Undoubtedly, the new South African constitution - though vastly more complex and detailed than the Canadian constitution - will, like ours, be a "living tree."¹¹ As Riker

divided sovereignty which South Africans wished to avoid. The term "spheres" is also consistent with the constitutional principle of "cooperative government," suggesting that all three spheres are working towards similar ends.

¹¹ Alan Cairns, "The Living Canadian Constitution," *Queen's Quarterly* 77 (1970) 1-16.

and others remind us, many other factors also play a large role in shaping the actual operation of federations - party systems, social structure, and the like.¹² Nor do I assert that how actual federal systems are designed flows neatly from abstract political principles: we know the results flow from real world conflicts, struggle, and the balance of power among competing forces. Constitutions, especially new ones which have yet to become deeply rooted, are no guarantee of democracy; they must be sustained by a democratic culture, and a supportive social and economic environment. Nevertheless, I think it useful to think through the value bases of federalism, and to examine how they can be played through in a consideration of the nuts and bolts of designing a federal constitution.

2. First Principles

Whether thinking about federalism from a fresh start, or from a situation of deep dissatisfaction with the status quo, as in Canada, it is worth starting with some first principles, with a reminder of the underlying values with which federalism is supposed to be associated, and with some criteria for judgement and evaluation which might be put to political institutions, such as federalism.

Three vantage points are especially relevant to debates about federalism in Canada and South Africa: the link between federalism and democracy; the link between federalism and what we might call effective government, or policy-making capacity; and the link between federalism and the ability to manage territorially concentrated ethno-cultural divisions, or between federalism and varying conceptions of community.¹³

¹² William Riker, *Federalism: Origin, Operation, Significance*. Boston: Little Brown, 1964.

¹³ See Richard Simeon, "Criteria for Choice in Federal Systems," *Queen's Law Journal* 18 (1982-3) 131-157.

To summarize briefly, from a *democratic* perspective, federalism serves or promotes democracy by: increasing opportunities for citizen participation, maximising the potential fit between preferences and outcomes, and offering citizens the choice of different "packages" or baskets of services in different jurisdictions. In the American literature on federalism, especially, it is also closely linked to the avoidance of tyranny through checks and balances, with the possibility that each level of government can check the excesses of the other.¹⁴

From an effective government perspective, the virtues expected of federalism are such things as the ability to tailor policy choices to local needs, the avoidance of policy overload at the centre and the opportunity for innovation and experiment.

From a conflict management perspective the basic argument for federalism is that it minimizes the potential for conflict by empowering territorially-concentrated distinct minorities with the tools to protect and promote their distinctiveness, without fear of the national majority imposing their values on the minority, or vetoing their aspirations. It is conflict management through empowerment, disengagement and the recognition of difference.¹⁵ Donald L. Horowitz, in an analysis of the application of federalism to South Africa, adds that federalism can "furnish support for an accommodative electoral formula"; provide arenas for socializing leaders to deal with conflict; disperse conflict more widely; and

make hegemonic domination by one group more difficult."¹⁶

Now what is interesting from the perspective of institutional design is that on each of these dimensions, federalism is Janus-headed; it points in two directions. Thus from the democratic perspective, it can be replied that federalism values the rights of minority communities over those of national majorities. How to balance these two was at the heart of the South African debate over the division of powers, and the ability of the central government to assert a national interest over provincial priorities. "Progressive" interests in Canada have often been similarly worried that the "complexities of federalism," and the powers of the provinces have frustrated or delayed progress on issues valued by the national majority. They argue that federal government tends to be weak government. In addition, Canadian critics have, along with critics in both Germany and the European Union, argued that the exigencies of policy-making in a federation, where much effort must be expended in a complex process of intergovernmental coordination, results in a "democratic deficit," as citizens are frozen out of access to policy-making, accountability is blurred, and emphasis is placed on the bureaucratic interests of governments rather than in the needs of citizens. This has emerged as a major issue in Canada; so far it has engaged less attention in South Africa.¹⁷

¹⁶ A Democratic South Africa? Constitutional Engineering in a Divided Society. Berkeley: University of California Press, 1991. 217.

¹⁷ See, for example, D. V. Smiley, "An Outsider's Observations of Federal-Provincial relations Among Consenting Adults," in Richard Simeon, ed. *Confrontation and Collaboration: Intergovernmental relations in Canada Today*, Toronto: Institute of Public Administration of Canada, 1979, pp. 105-113; Albert Breton, "Supplementary Statement," Royal Commission on the Economic Union and Canada's Development Prospects, *Report* Vol. III, 1985; Richard Simeon, "The Political Context for Renegotiating Fiscal Federalism," in Keith Banting,

¹⁴See, for example, Vincent Ostrom, *The Political Theory of the Compound Republic*. Lincoln, ND: University of Nebraska Press, 1987.

¹⁵ For a review of these bodies of literature, see Kenneth Norrie, Richard Simeon and Mark Krasnick, *Federalism and the Economic Union*. Toronto: University of Toronto Press, 1986.

With respect to effective policy-making, again there is this Janus-headed quality. Against the virtues of federalism are placed the dangers of duplication, contradiction and overlap. To the extent that the interaction of the division of powers and the policy agenda facing the country requires extensive intergovernmental cooperation, then critics worry about the potential for excessive coordination costs, delay, immobilism and policy which cannot surpass the lowest common denominator - the "joint decision trap."¹⁸ Again, this has important implications for institutional design: how to achieve the federalist virtues of innovation, experiment and the like, while avoiding the federalist vices of excessive intergovernmentalism and duplication? Does the interdependence among governments characteristic of all federations argue for high levels of concurrency and shared responsibilities (increasing the need for intergovernmental relations); or does the need to minimize these costs argue for what in Canada is called "disentanglement," an attempt to reconstitute powers into something like the original water-tight compartments, with each government solely responsible for a clearly defined set of functions?

The most striking element of Janus-headedness, however, concerns federalism and the management of territorial conflict. The dilemma of federalism is that it institutionalizes, perpetuates and reinforces the very cleavages it is designed to manage.

et al, eds, *The Future of Fiscal Federalism*, Kingston: School of Policy Studies, 1994, pp. 135-148; and Roger Gibbins, "Democratic Reservations About the ACCESS Models," in Institute of Intergovernmental Relations, Queen's University, *Assessing ACCESS: Towards a New Social Union*, Kingston, 1997, pp. 41-44.

¹⁸ F. W. Scharpf, "The Joint-Decision Trap: Lessons from German Federalism and European Integration." *Public Administration*: (1988) 239-278.

While providing some reassurance to territorially concentrated minorities, it also provides the institutional foundation - a provincial government - which can provide a strong base from which to argue for more powers, and indeed, for launching a plausible secessionist movement. Federalism in Canada has indeed had many successes in managing French-English conflict, but it has also helped transform French-English relations into a Quebec-Canada confrontation, and it is hard to imagine that the Quebec independence movement would be so strong without the resources of the Quebec provincial state behind it.¹⁹

Moreover, this also raises the question as to whether the best way to manage such conflicts is to *increase* the powers and autonomy of such distinctive provinces. This is the basis of a profound debate in Canada: on the one hand those who argue that responding to Quebec's demands by increasing its powers - especially if this involves a degree of asymmetry, in which that province would exercise powers not available to others - is a recipe for a slippery slope towards ever further autonomy and perhaps separation. This was the argument of former Prime Minister Trudeau: greater powers for Quebec would inevitably mean more and more such demands, and the progressive cutting of ties between Quebecers and the central government. Hence his powerful opposition to any form of "special status," and to increased decentralization. His alternative was to strengthen the presence of French-Canadians in the national political system. The contrary view is that *only* by granting recognition of Quebec as a distinct society and enhancing its powers can Quebecers be reconciled to the federal state, and the move towards independence stopped. If this is not done,

¹⁹ Stephane Dion, "The origins of Quebec Nationalism," in R. Kent Weaver, ed. *The Collapse of Canada?* Washington, DC: The Brookings Institution, 1992.

Quebec will certainly opt for independence.²⁰

South African constitutional designers faced exactly the same problem with respect to KwaZulu Natal. It and the IFP, led by Buthelezi, argued strongly for the special status model, and even managed, as the price of its agreement to participate in 1994 national elections, to get a 34th Constitutional principle added. It provides a somewhat ambiguous "right to self-determination" by any community sharing a common cultural and language heritage. This is transferred, equally ambiguously, into the new constitution. Provinces are also given the right to prepare their own provincial constitutions, subject to the overarching Republic constitution, and to certain nationally defined norms.

Thus the design problem: how to maximize the potential of federalism to empower minority communities, *and* link them to the larger system? Again the division of powers is implicated (more or less centralization, more or less asymmetry?). So also are institutions, especially the extent to which the *interstate* mechanisms of government-to-government relations are supplemented by stronger elements of *intrastate* federalism, in which the regional and linguistic groups are directly represented and involved in national political institutions. All regional and autonomist movement are a combination of "we want out" and "we want in." The trick is to find the right balance.

The other problem with federalism and the management of communitarian divisions also occurs both in South Africa and in Canada. That is the problem of "minorities in minorities." Thus to grant more autonomy to Quebec, for example, is seen as a threat

by non-Francophone in the province; just as more autonomy to the Zulus in KwaZulu Natal might be seen as a threat to non-Zulus in the province. This tension has led Alan Cairns to argue persuasively that "federalism is not enough"²¹ - that provincial autonomy must be supplemented by nation-wide guarantees of minority rights as well. And in fact, a very strong Bill of Rights is at the heart of the new South African constitution. A related issue is the status of the newly minoritized Afrikaners, some of whom have called for a *Volkstaat*, or Afrikaner province. Given the spread of the Afrikaner across the whole country, such a geographic entity is an impossibility, but it is interesting to note that the new constitution does have a number of provisions aimed at safeguarding the rights of distinct cultural groups. It also establishes a Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities. (Ss 181, 182)

3. Two Models of Federalism

As South Africans considered how to design their federal system, and Canadians considered how to reform theirs, there were many models from which to draw. Indeed, it has been said that there are as many variants of federalism as there are federations. Each federation seems *sui generis*, and it is clear that the actual operation of the federal system (centralized or decentralized, conflictual or cooperative) has as much to do with other political and institutional factors as it does with the federal design itself. Among the models which South Africa considered were those of Canada and Germany - Canada perhaps because of the

²⁰ For a thorough review of this debate, and a powerful critique of the Trudeau position, see Kenneth McRoberts, *Misconceiving Canada: The Struggle for National Unity*, Toronto: Oxford University Press, 1997.

²¹ . "Constitutional Government and the two faces of Ethnicity: Federalism is Not Enough," in Karen Knop, Sylvia Ostry, Richard Simeon and Katherine Swinton, eds. *Rethinking Federalism: Citizens, Politics and markets in a Changing World*. Vancouver: University of British Columbia Press, 1995.

Commonwealth link, and its marriage of federalism with a parliamentary system of government; Germany perhaps because of other cultural affinities, and its quite different model. The United States, India and Australia have also been sources of ideas, in the latter two cases in large part because they are relatively centralized models.

I will focus on Canada and Germany because they represent two models which give quite different answers to some of the design issues I have mentioned so far. I will label them the models of "integrated"²² federalism, on one hand, and "divided" federalism on the other. I will sketch out each model in a general form before turning to the details of the South African debate. We will examine each in terms of the major building blocks of federal regimes: the division of powers, responsibilities and competencies; federal-provincial fiscal arrangements; intergovernmental relations; regional or provincial representation in central institutions; and the role of the courts as umpires of the federal system

3.1 *The Divided Model*

The image suggested by the divided model, as illustrated broadly by Canada, is of two separate, independent sets of political institutions - federal and provincial - which interact with each other through bargaining which often looks more like the relations among independent countries than the interactions among component elements of the same political system. Hence the terms used to describe intergovernmental relations in Canada - competitive "executive

²² My initial intention was to label the German model "shared federalism," to capture the sense that governance is a joint responsibility of the two orders of government. I have used the term "integrated" instead, in order to avoid terminological confusion with Daniel Elazar's concept of "shared rule," which is the fundamental defining characteristic of all federal and multi-level systems of government.

federalism" or "federal-provincial diplomacy."²³

3.1.1 *The Division of Powers*

The model here is the classical one of clearly divided sets of responsibilities. The central government is responsible for A, B, and C; the provinces for X, Y and Z. There is a minimum of overlap or formal concurrency. In Canada, these powers are set out in Sections 91 and 92 of the *Constitution Act, 1867*. Only two areas of shared or concurrent jurisdiction were included in this Act - agriculture and immigration; a third, old age pensions, in which the provinces retain paramountcy, was added in 1949. This is not to say that there were not significant possibilities for overlapping responsibilities, even in 1867. The 1867 *Constitution Act* implied a sweeping potential federal power in the opening words of S. 91, the power to make laws for the "Peace, Order and Good Government of Canada," but this has since been interpreted in a far less sweeping way, to imply a power to intervene only in national emergencies, or clearly defined national needs. The Act also gave the federal government potentially unlimited powers to overturn provincial legislation, though the "disallowance" power, the power of "reservation," and the power to "declare" specific projects in the provinces to be for the benefit of Canada. However all these powers have fallen into disuse and most now consider them a dead letter. Indeed, while Canadian federalism has developed into the divided and decentralized model described here, its initial formulation led the British student of federalism, K. C. Wheare, to describe Canada's constitution as only "quasi-federal."

²³ *Federal-Provincial Diplomacy: The Making of Public Policy in Canada*. Toronto: University of Toronto Press, 1972.

This experience, however, underlines a critical issue in the division of powers: under what conditions, if any, should the central government be able to override provincial powers, even in areas assigned exclusively to them? What principles should guide such a power and what institution should judge when such action is appropriate? It also highlights a principle which has achieved increasing prominence in Canadian debates, and has been inscribed in the Maastricht Treaty of the European Union. This is the idea of subsidiarity: that responsibilities should be assigned to the lowest level at which they can be exercised appropriately, that the default position should always be local control, and that the burden of proof should always lie on the person who proposes centralization. Attractive as such a rule of thumb is, it is far from an unambiguous standard. It may as often be used to justify centralization (through national standards, economies of scale, externalities, etc) as it is to justify devolution. Canadian commentators have recently embraced subsidiarity largely as an argument to justify further decentralization. In the new South African constitution, while appearing as one of the original Constitutional Principles, it has turned out to underpin a broad set of criteria justifying federal paramountcy in shared or concurrent powers, and even in areas of exclusive provincial competence.

Nor does the water-tight compartments model suggest that there have not emerged large areas of *de facto* concurrency: the result of the old 1867 categories becoming obsolete, new issue areas unmentioned in 1867 emerging, and so on. Indeed, interdependence and overlapping are as characteristic of the contemporary Canadian model as of other federations. But the logic is one of separate, divided powers, with each order of government exercising substantial autonomy in its own spheres.

3.1.2 Fiscal Arrangements

Similarly, each level of government in the divided model is given independent taxing powers - in Canada, Ottawa can raise revenues by any means; the provinces are restricted to direct taxation, but in practice, apart from tariffs and a few other revenue sources, there are virtually no limits on provincial taxing and borrowing powers. Each level of government is free to levy its own independent taxes. Again, this is not the whole story. Through equalization payments (unconditional grants to poorer provinces to bring their per capita revenues in line with the revenues of richer provinces) and federal grants to provinces in areas such as health, post-secondary education and welfare, there are large intergovernmental financial flows in Canada. But what is most striking about these, in a comparative sense, is how few conditions are attached and how little policy influence is gained by the centre. Put another way, Canadian intergovernmental transfers are highly respectful of provincial autonomy. In any case, driven by fiscal crisis, these flows are now rapidly declining. There are, in addition, enormous differences in taxation rates across provinces. Again, relatively independent revenue systems.

Fiscal arrangements also highlight two other critical design issues. If there are to be large fiscal flows between governments (on the assumption that central governments have more revenue-raising capacity), then to what extent should such flows be conditional, implying considerable central control over provincial priorities), and to what extent should they be unconditional. Without fiscal autonomy, formal jurisdictional autonomy can be meaningless. Second, to what extent should it be a goal to use central powers to redistribute revenues between richer and poorer areas, and how much should fiscal federalism assure the equal capacity of the provinces to carry out the responsibilities assigned to them? In Canada, the principle

of equalization, ensuring that each province should be able to carry out roughly comparable levels of services with roughly comparable levels of taxation, was enshrined in the *Constitution Act, 1982*. (S. 36) This principle helps ensure that variations in provincial policies will be a result of different choices, not of unequal fiscal capacities, and thus sustains the primary virtues of federalism.

3.1.3 Intergovernmental Relations

The high degree of interdependence and de facto concurrency inevitable in any federal system ensures that intergovernmental relations are indeed at the heart of the Canadian system. But several characteristics of these relations are consistent with the divided model. The machinery of intergovernmental relations has grown up in an ad hoc way; it is nowhere mentioned in the constitution, or enshrined in statute. Rather it is an add-on to the Canadian constitutional design, made necessary by the inevitable interdependence of governments in the modern policy arena. The complex array of First Ministers, Ministerial and official-level intergovernmental meetings have no formal status, no decision-making powers, no formal schedules for meeting, no formal decision-rules, no serious bureaucratic backup. The relations among governments are conducted among high level officials and ministers - executive federalism - in which close ties among functional program officials at each level are subordinated to broader strategic considerations of power, turf and status. Again, relatively separated systems.²⁴

²⁴ A growing tendency in Canada, however, is to formalize intergovernmental agreements and to stress a model in which "national" standards and values are to be defined in a process of intergovernmental collaboration, and enshrined in intergovernmental agreements. The most notable example to date is the Agreement on Internal Trade (AIT), designed to strengthen the Canadian economic union. Similar initiatives are underway in social, environmental and

3.1.4 Intrastate Federalism

Perhaps the clearest manifestation of the divided model in Canada is that there is no formal institutional bridge linking provincial and national politics, no institutional means through the interests of provinces (whether their people or their governments) are directly represented with the central government. In most federal systems, this is the primary role of the Senate, or Second Chamber, but the principle of provincial representation can be extended to other national institutions as well. In Canada, as is well known, the Senate has conspicuously failed to play this role. Indeed, Canada is an outlier among federal systems in this regard, though there are important informal norms about provincial representation in the cabinet and the Supreme Court. Moreover, the Westminster-style Canadian parliamentary system, with its tight party discipline and executive dominance sharply limits the ability of individual Members of Parliament explicitly to represent and speak for their regions (unlike, for example Congressmen in the United States). As noted earlier this "failure" at the centre is one important reason why regional interests, even on matters within federal jurisdiction, are most commonly manifested through assertive provincial governments, and why provincial Premiers claim a role as national, not just provincial, policy-makers.

other policy areas. Some observers see this as a move towards a more confederal system, in which the federal government plays a less and less important role in defining, enforcing, and financing national standards. For analysis and commentary on these developments, see Michael Trebilcock and Daniel Schwanen, eds., *Getting There: An Assessment of the Agreement on Internal Trade*, Toronto: C. D. Howe Institute, 1995; Richard Simeon, "Rethinking Government, Rethinking Federalism," Institute of Public Administration of Canada, forthcoming; and Institute of Intergovernmental Relations., *Assessing ACCESS*, op cit.

Thus, at each of these institutional levels, and despite the reality of wide areas of interdependence, a sharp line is drawn between federal and provincial politics. They are separated systems, which negotiate and bargain with each other. This pattern is reflected in other areas as well. One consequence is that the Canadian party system does not integrate or bridge national and provincial politics. It is, as Smiley calls it, a confederal, rather than a federal party system. In some cases, parties active at the provincial level play no role in national politics; in others federal and provincial parties of the same name have few financial, organizational, ideological or personal links. This is also reflected in the fact that, with some important exceptions, there is remarkably little mobility of political leadership between levels of government. The pattern is repeated at the public service level: there is no unified Canadian public service, and remarkably little mobility among levels. Again, divided federalism.

3.1.5 *The Role of the Courts*

The courts have played a critical role in the movement of Canadian federalism from the "quasi-federal" pattern noted by Wheare to the more classical, decentralized and divided model of today. Reflecting Canada's colonial past, until 1949 the final court of appeal for Canada was the Judicial Committee of the British Privy Council. Its decisions transformed Canada into a classical federal system, limiting federal powers, and asserting provincial sovereignty in their assigned areas of jurisdiction. The Supreme Court of Canada has continued to be an umpire of the federal system, consistently seeking an appropriate balance between federal and provincial powers. This role has become more rather than less important as Canadian federalism, especially in the 1970 and 1980s became more competitive and adversarial.

3.2 *Integrated Federalism*

The integrated model, exemplified in large part by Germany, is different on all these counts. It is designed to integrate and pull together central and provincial politics at all levels. "The resulting institutions and horizontal federal arrangement are of the intrastate variety, which, perforce, requires consensus-building and cooperative behaviour if any degree of co-ordination is to be achieved." While the German federal system is considerably more centralized than the Canadian, it is undeniably federal. Art. 79(3) states that: "Amendments to this Basic Law affecting the division of the federation into Länder, and their participation in the legislative process . . . are prohibited."

3.2.1 *The Division of Powers*

Instead of water-tight compartments there are wide areas of concurrency or shared responsibility. In Germany a limited number of powers are allocated for both legislation and administration to the national government, including foreign affairs and citizenship and immigration, nuclear power, domestic and international trade, currency, postal and telecommunications, social insurance, air transport, railways and national highways and a few other matters (Arts. 73, 87-90); otherwise, "the exercise of governmental powers and the discharge of governmental functions shall be incumbent on the Länder" (Art. 30) However, in the case of conflict, federal law overrides Länder law. (Art. 31). There is also a long list of concurrent powers, ranging from the administration of justice, to welfare, to education, the environment and other matters. (Art. 74) Länder have the right to legislate in these areas, but only to the extent the federal government does not. (Art. 72) spells out the conditions under which the federation has the right to legislate, reflecting the idea of subsidiarity: where a matter cannot be effectively regulated by

individual Länder; where Landet regulation might prejudice the interests of other Länder or the country as a whole; or where it is necessary for the maintenance of legal and economic unity." (Art. 72 (2)) Similar language was incorporated into the South African constitution. Another key element of the German division of powers is that it takes the form of a national/local distinction within policy areas in which the centre is responsible for broad national "framework" legislation, within which provinces are responsible for fleshing out local variations and for implementation, with varying degrees of federal supervision, subject to approval by the Länder-appointed Bundesrat. (Arts. 75, 83-85) Most federal law is implemented by the Länder. The Basic law also provides for "joint tasks" where the federal government may participate in areas of Lander jurisdiction, where they are 'relevant to the community as a whole', and 'necessary to improve living conditions.' (Art. 91a (1). The constitution specifies higher education, regional economic structures, and agriculture and coastal protection. (Art. 91a(1)) Other joint responsibilities may be specified by federal law, again with the consent of the Länder, requiring joint planning and financing. The model is one of shared powers; there are few exclusive powers, at either level. It is also one in which, subject to approval through the Bundesrat, the centre has broad latitude to act and to shape Lander legislative and administrative discretion. "The *de facto* legislative quasi-monopoly held by the Bundersrat is counterbalanced by the undisputed supremacy of the Länder in the administrative sphere."²⁵

3.2.2 *Financial Arrangements*

Again, the model is not one of independent states and federal government exercising

²⁵ Yves Meny with Andrew Knapp, *Government and Politics in Western Europe* (New York: Oxford University Press, 1993), p. 288.

revenue raising powers autonomously: rather the model is primarily one of shared revenues and taxing powers, based on negotiated formulae. Income taxes, corporation taxes and turnover (sales) taxes "jointly accrue" to the federation and the Länder; and each has "equal claims" to current revenue necessary to finance their current expenditure, based on multi-year financial planning, and implemented by federal legislation with Bundesrat approval. The distribution is to "establish a fair balance to prevent excessive burdens to the taxpayer, and to ensure equal living conditions in the federal territory." Only a limited number of revenue sources are allocated exclusively to either level. (Art. 106)

3.2.3 *Intergovernmental Relations*

Shared powers and finances require that intergovernmental relations are not a peripheral add on to the system. Rather "in order to make the system work co-operation between the various levels of government is absolutely necessary."²⁶ As a result, Germany, compared to Canada, has a far more structured and institutionalized set of intergovernmental institutions, whose decisions are formalized by treaties or agreements, which have the full force of law.

3.2.4 *Intrastate Federalism*

The clearest difference between the integrated and the divided models is found in the direct presence of the states within the decision-making processes of the central government. The German second chamber, the Bundesrat, is made up of directly appointed ministers of the Land governments, who are subject to recall. Land

²⁶ Yves Meny, with Andrew Knapp, *Government and Politics in Western Europe*, 2nd ed. New York: Oxford University Press, 1993. 288.

Premiers and senior ministers comprise the Bundesrat's membership, and the presidency of the Bundesrat rotates among the Premiers. Members of the federal government have the right, "and on demand the duty", to attend sittings and to keep the Bundesrat informed on federal matters. While its legislative powers are somewhat less than the lower House, the Bundestag, it is a powerful legislative body and an important device for injecting land interests directly into the national legislative process. In area after area, central powers are qualified by the need to obtain Land approval through the Bundesrat. It is an essential element of German cooperative or integrated federalism and a powerful means for the Länder to influence national legislation (and, more recently, German participation in the European Union).

Canadian reformers have considered adopting the Bundesrat model as an antidote to the weak intrastate elements in Canadian federalism in the form of proposals to replace the existing Senate with a Council or House of the provinces with direct provincial representation. In recent years, however, such proposals have been superseded by arguments in favour of a directly elected Senate, with procedures designed to enhance its sensitivity to regional interests and to temper majority rule by equal representation of the provinces.²⁷ Nevertheless, the idea of institutionalizing intergovernmental relations through some more regularized, institutionalized Council remains alive.²⁸

3.2.5 *The Constitutional Court*

A separate Constitutional Court has the full power to interpret the Basic Law, and to rule

on any matters of conflict between the federal and land governments.

As with divided federalism, this integrated model spills over into other aspects of the federal political system. Thus, much more than in Canada, political parties are unified across state and national lines, providing a powerful integrating force. Mobility of politicians between Land and Bund is common. And Germany has a public service which is highly integrated across federal and state lines.

4 **Implications of Alternative Constitutional Designs**

How do these two models relate to the perspectives or lenses for thinking about federalism discussed above? Some tentative hypotheses might be advanced.

First, the divided model seems to weigh more heavily a view of democracy focused on the rights and autonomy of provincial communities. The integrated model tends to a more centralized, majoritarian federalism, or what Samuel Beer calls "national federalism."

Second, the divided model seems to simplify transparency and accountability; at least in principle. It suggests a lower democratic deficit, as each government is more directly and visibly responsible to its electorate for its activities. It is interesting to note that democratic criticisms of federalism in Canada, for example in constitutional negotiations, are raised in the context of those more limited areas where responsibility is in fact shared.

Third, with respect to policy-making, the picture is mixed. The integrated model tends to emphasize the need for harmony and consistency in policy across provinces; it gives provinces *collectively* a large influence on policy, but places less emphasis on the autonomy of each individual province to

²⁷ See Smiley and Watts, *op. cit.*

²⁸ For example, Andre Brunelle, *Le mal canadien: Essai de diagnostic et esquisse d'une therapie*, Montreal: Fides, 1995. 182.

pursue its own policy choices, and therefore less emphasis on the federalist virtues of variety, experiment and innovation. The integrated model enhances the likelihood of consensual policy-making, at the potential cost of the "joint decision trap" - delay, lowest common denominator solutions, etc. The divided model enhances the likelihood of contradiction and conflict among policies, with the advantage, again of decisiveness and variety of policy outcomes. As Martin Painter points out, "where federal-provincial political interactions are conducted in a climate of competitive political interaction, rather than under the banner of a managerially-inspired model of rational, cooperative planning, then some of the potential costs of intergovernmentalism may be avoided."²⁹

Fourth, with respect to conflict, the integrated model places a very high value on consensus and agreement; the divided model leans towards a more competitive, adversarial federalism.

Fifth, with respect to deep-seated territorial conflict the messages seem mixed. But one might argue that by setting provinces into a competitive relationship, and by so encouraging distinct, separate political processes in each province, the divided model both produces more autonomy for minority groups, and makes it easier for them to move in a secessionist direction. There are fewer ties to cut. The integrated model might avoid this by stressing the multiplicity of ties that link federal and provincial governments into a single system, making disengagement or secession more difficult. The constant interaction and need for cooperation in the shared system may also be more conducive to the building of relationships of mutual trust between

officials at both levels. On the other hand, once a strong regional or separatist movement did exist, then the integrated model would be a recipe for paralysis, since the emphasis on consensus multiplies the opportunities for veto.

5. Towards A South African Federalism

As I have mentioned, South Africa has opted for a federal model, however reluctant it is to use the term. The 1993 Constitution and the permanent constitution both envisage federal, provincial (and local) spheres of government, each elected separately by proportional representation. The provincial executive consists of a Council, headed by the Premier, who is accountable to the provincial legislature. The federal character of the South African constitution was made necessary by the imperative of finding all-party agreement on an interim constitution in 1993, and South African constitution-writers remained highly ambivalent about it. As the Constitutional Assembly worked towards a permanent constitution for the country, many issues for federalism remained highly contentious, and these were among the very last major questions to be resolved. In this section I outline some of the choices South Africans have made in their new constitution. In general, South Africa leaned strongly towards the shared model, much closer to the German than the Canadian example. As one leading ANC strategist, Albie Sachs, now a member of the Constitutional Court, has said, the attraction of the German model was that regions could participate fully in policy formation, but final power would remain with the centre. He admired the German system's "sophisticated network of interrelationships, with a lot of negotiation between the centre and the regions. . . This fitted in very well with what we wanted for South Africa." As I will argue in the conclusion, I believe this is the right choice.

²⁹ "Comparative Overviews: Canada," in Brian Galligan, Owen Hughes and Cliff Walsh, eds. *Intergovernmental relations and Public Policy* (North Sydney, Australia: 1991. 88-108, p. 104.

This model of cooperative, collaborative governance is asserted from the outset in Chapter Three. "In the Republic, government is constituted as national, provincial and local spheres (not "levels" or "orders") of government, which are distinct, interdependent and interrelated." (S. 40(1)) All spheres of government are enjoined to "exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional, or institutional integrity of government in another sphere." They are to "cooperate with each other in mutual trust and good faith," by "fostering friendly relations, assisting and supporting one another, informing one another of, and consulting one another on, matters of common interest; co-ordinating their actions and legislation with one another," "adhering to agreed procedures," and "avoiding legal proceedings against one another." (S. 41 (1)). This embraces what the ANC calls a concept of "cooperative governance,"³⁰ or "Ubuntu." Such exhortations might sound a bit like some bureaucratic wedding vows, and be no better guarantee of harmony than they are, but these provisions clearly illustrate the underlying philosophy of federalism here - one much closer to Germany's than to Canada's. And, as in Germany, provincial executives are responsible for implementing national legislation in areas of concurrent or exclusive provincial jurisdiction, and any other national legislation whose implementation the national parliament assigns to them. (S. 125 (2))

5.1 Division of Powers

Legislative authority for the country is exercised by national, provincial and local governments.³¹ The national Parliament is

empowered to legislate on "any matter," including a list of broad concurrent powers spelled out in Schedule Four. (S. 44(1)) Unlike Germany, the general residual power is left to the central government. (S. 44 (1) ii) There is also a much shorter, and more limited, Schedule Five, which lists areas of "exclusive [provincial] legislative competence."³² However, Parliament also has the power to legislate in these areas of provincial jurisdiction, if it is deemed necessary to "maintain national security," "maintain economic unity," "maintain essential national standards," "to establish minimum standards required for the rendering of services," or "to prevent unreasonable action taken by a province which is prejudicial to the interests of another province or to the country as a whole." (S. 44(2)). Otherwise, provincial legislation is to prevail. Provincial powers include the right, under strict conditions, to pass their own constitutions, to legislate in the concurrent and exclusive areas set out in Schedules Four and Five, and to act in areas where the centre has delegated powers to them (S. 104 (1)).

In the concurrent areas listed in Schedule Four, S. 146 sets out the conditions under which federal law will prevail. It must apply uniformly across the country; must deal with a matter that cannot be regulated effectively by the provinces acting individually; must set out national norms, standards or policies; and must be "necessary" for the maintenance of national security, economic unity, and the common market, the promotion of economic opportunities across provincial boundaries, the promotion of equal opportunity, or the protection of the environment. (S. 146(2)) Federal legislation also prevails where it is

stated that the legislative adhered for the Republic was the National Assembly.

³⁰ The term used in the constitution is "cooperative government." I use them interchangeably here.

³¹ This is a clearer statement of the federal principle than that found in the Interim Constitution, which

³² Including: abattoirs, ambulance services, archives, museums and libraries, other than national on, liquor licences, provincial planning, cultural matters, recreation, roads and sport, and veterinary services.

aimed at "preventing unreasonable action by a province" that is "prejudicial to the economic, health or security interests of another province or the country as a whole." (S. 146(3)) Thus, the federal government has broad powers to exercise paramountcy - but the constitution does require that its actions be justified, and linked to specified national purposes, reflecting the idea of subsidiarity. These limited provincial powers - and the subjection even of the "exclusive" powers to the sweeping federal override³³ led to much of the final debate about the constitution. Did it meet the terms of the Constitutional Principles XIX, that each level should have exclusive and concurrent powers, or of XXI, stating that decisions should be taken at the level which was most "responsible and accountable?"³⁴

In its assessment of the constitution, the Constitutional Court concluded that the provinces do have real, genuine and meaningful exclusive and concurrent powers, with "provision for extensive legislative and executive competencies." [252]; and that the conditions for federal override were based on clear and justifiable principles, and are "defined and limited." [257] Provincial autonomy is real, but it does not mean that provinces can ignore the overall constitutional framework, which "creates one sovereign state in which the provinces will have only those powers and functions allocated to them," and in which "the national government will have powers

which transcend provincial boundaries and competencies." [259] Thus, the new South African division of powers suggests a highly centralized federal system, but one in which there is the potential for considerable provincial initiative, given sufficient political will and institutional capacity.

5.2 *Fiscal Arrangements*

The central dominance extends into fiscal arrangements. Provinces will have very limited powers to raise revenues on their own account, and are barred from income and sales or value added taxes. (S. 228). Other provincial revenue raising and borrowing is subject to national regulation and legislation. And no provincial revenue raising activities are permitted that "materially and unreasonably" affect national economic policies, interprovincial commerce, or the mobility of economic factors. However, the provinces are entitled to an "equitable share" of revenues collected by the national government, as set out in national legislation. (S. 214) The distribution of funds is to take into account both the "national interest" and the needs and interests of the national government is to be "determined by objective criteria" and is to ensure that provincial and local governments are "able to provide basic services and perform the functions allocated to them." The shares are also to take into account provincial fiscal capacities, needs, and disparities, thus building in the principle of interprovincial revenue equalization, which is an important feature of both Canadian and German fiscal federalism. In addition, national legislation will determine the form and timing of the budgets at all three levels of government (S. 215); and will set out the rules to ensure "both transparency and expenditure control." (S. 216) Federal legislation sets the rules for provincial borrowing. (S. 230) The national government can also block the transfer of funds to the provinces for "serious and

³³ Including S. 100, which provides for national executive intervention when a province "cannot or does not" fulfil a constitutional or legislative obligation. Here the centre may issue directives, or even assume direct responsibility, though for a limited term.

³⁴ The first draft constitution had presented two possible options on this question. One was a plenary, unlimited power to legislate in areas of provincial jurisdiction; the other, which was eventually chosen, respects the federal principle more by specifying the conditions under which such a power can be exercised.

persistent breaches" of accounting practices and treasury norms, subject to assessment by the Auditor General and the provincial ability to respond to criticism. (S. 216) Bills prescribing such provincial standards and practices would need to be passed by both the National Assembly, and the NCOP, representing the provinces. In the event of disagreement within the Mediation Committee, then the Bill can pass in the National Assembly with a two-thirds super majority. (S. 76(4), CC 412)

Again, this is a potentially highly centralized model. But what the equitable share is, and what conditions will be attached to it, remain in question. Critical to the policy and political viability of the new provinces will be the extent to which the provinces' "equitable share" flows in the form of unconditional grants, which the provinces can allocate as they like, or in the form of conditional grants attached to specific programs. If the latter predominates, then provinces will have very little room to make their own choices and set their own priorities. The constitution is unclear on the point, though it does envision both sorts of grants.

There is also an important cooperative element in allocating revenues: it can only be done after "the provincial governments, organized local government and the 'independent' and 'impartial' Financial and Fiscal Commission have been consulted." (S. 214(2)) The Commission is modelled broadly on the Australian Grants Commission.(ss. 220-221). It is comprised of a centrally-appointed Chairperson and deputy chairperson, nine provincial nominees, two representatives of local government, and nine others. (S. 221(3)) It reports regularly to Parliament and the provincial legislatures. The Commission has argued that if the provinces are to be effective and accountable, they must have some real fiscal autonomy. Murphy Morobe,

the Chairperson of the Commission, asserts that "If we continue to make significant transfers from the centre, it will become difficult to have provinces with an executive." The Commission has proposed that the centre withdraw from part of the income tax, in order to allow provinces some room to impose their own.³⁵ At the moment, there is an enormous mismatch between revenues and responsibilities - and provinces raise only four per cent of their operating revenue. Provinces are highly dependant on federal funding, and are constantly under the threat of falling victim to unfunded federal mandates.³⁶ Giving provinces a stronger role in formulating national budgetary policy, and some greater autonomy in raising their own revenues will be a critical issue if provinces are to develop as viable institutional actors.

5.3 *Intergovernmental Relations*

Details of intergovernmental machinery are not spelled out in the constitutional draft: as in many other areas they are left to future legislation. In the summer of 1997, officials of the Ministry of Constitutional development were preparing a White paper on the subject. However, it is clear that South Africa envisions a dense network of linkages between levels of government, as part of the model of cooperative government. S. 41 (2) requires that an Act of Parliament establish or provide for structures and institutions to "promote and facilitate executive intergovernmental relations." It must provide "appropriate mechanisms and procedures to facilitate settlement of intergovernmental disputes." And there should be every effort to exhaust

³⁵"Provinces must 'bake their own cakes.'" *Weekly Mail and Guardian* 15 November 1996.

³⁶ Dr. Pundy Pillay, Director, Finance and Fiscal Commission. "National-Provincial Financial Arrangements in South Africa." Paper presented at Conference of South African Officials, Ottawa and Winnipeg, April 1997

such remedies before recourse to the courts to resolve disputes. (S. 40 (3)) . S. 148 also tries to minimise the role of the courts in adjudicating intergovernmental conflicts, stating that "if a dispute cannot be resolved by a court, the national legislation prevails. When considering conflicts, the courts must also "prefer any reasonable interpretation . . . that avoids a conflict over any alternative interpretation that results in a conflict." The Constitutional Court tartly noted that "resolving such disputes is inherent in the judicial function, and a court can hardly take the position that it is unable to do so." [246]

Thus the Constitutional Court has asserted a role in acting as umpire in the South African quasi-federal system, as it has in Canada and Germany. How this intergovernmental machinery will evolve remains unclear. Even before legislation is promulgated new institutions are beginning to emerge. An Intergovernmental Forum (IGF) is designed to bring Provincial Premiers and national Ministers together quarterly as a forum for policy dialogue at the political level. It is supported by the "technical intergovernmental committee" (TIC), made up of national and provincial senior officials, and chaired by the Director General (Deputy Minister) of the (national) Department of Constitutional development. In addition, some 20 ministerial forums (MINMECS) have been established to facilitate harmonization, consultation, and joint action in a number of functional areas. Each of these has important parallels in both Canada and Germany. And, as in these cases, the IGF and MINMECS have been criticized for lack of interest and participation by national ministers, failure genuinely to consult, and lack of a common information base. In addition, their link to NCOP, and to national and provincial cabinets remains unclear.³⁷

³⁷ J. J. Mulder, "Intergovernmental Relations in South Africa." Paper presented at a conference of South African Officials, Ottawa and Winnipeg, April 1997.

5.4 *Intrastate Federalism*

As in Germany, the counterweight to the legislative superiority of the national government, and the centrepiece for the model of "cooperative governance" is a provincially oriented second chamber in the national parliament. Two distinct models were on the table, with important implications for whether the body would be able to exercise significant provincial government control over national legislation.

The weaker option, similar to that in the Interim Constitution, would have created a 90-member Senate, "to represent the province in national decision-making" and act as a "second House of Parliament." It would be elected indirectly by the provincial legislatures, and selected according to proportional representation of the parties in the legislature. Senators would not be members of the provincial legislature or executive, though provincial executives could attend and speak, but not vote. The Senate would consider and vote on all bills. Where the two Houses disagreed, a mediation committee would be struck, and if it could not reach consensus, the bill would be submitted to a joint sitting of both Houses (where the Senators would be outnumbered five to one), and a simple majority of the total membership would prevail. The Senate would have greater powers on bills directly affecting the provinces. The approval of both Houses would be required for any alteration of provincial boundaries. Constitutional amendments would require a two thirds majority of both Houses sitting together, and amendments affecting provincial powers would protect the provinces even more strongly, by requiring a vote of two-thirds of each House.

This, then, would have been a fairly strong Second Chamber which would inject a

significant provincial presence into national decision-making. Unlike the Bundesrat, however, it would not represent either the legislatures or the executives of the provinces directly. To the extent that its members saw themselves less as provincial delegates, and more as members of national parties, its role as a check on central power could be greatly undermined. As the Constitutional Court observed, the method of appointment to the Senate in the Interim Constitution would have made it "more a House in which party political interests are represented than a House in which provincial interests are represented." [320]

A much more robust alternative was to establish a body much more akin to the Bundesrat. This is the model that has been chosen - one of the last big breakthroughs in the negotiations. The new second chamber is to be called the National Council of Provinces (NCOP). It is to represent the provinces "to ensure that provincial interests are taken into account in the national sphere of government," "by participating in the national legislative process and by providing a national forum for public consideration of issues affecting the provinces." (S. 42(4)). Its members will comprise a single, ten-person delegation from each of the nine provinces. It will be headed by the Premier, and consist of three other "special delegates," who would be selected by the legislature and, it appears, rotate according to the issues under discussion. There would be six other "permanent delegates," also selected by the legislature, under nationally determined rules to "ensure the participation of minority parties . . . in a manner consistent with democracy." (S. 61 (3)). Unlike the special delegates, they could not continue to sit as provincial legislators, but their terms would expire with that of the legislature and they would be subject to recall by the legislature. (Ss. 58,58, 60) Hence, the delegations would clearly be provincial delegates. Therefore, unlike in the previous Senate, there is at least the

possibility that they will act as the voice of the provinces, rather than as members of national parties, subject to national party discipline. This is reinforced by the provision that on most issues affecting the provinces, each provincial delegation has one vote, cast on its behalf by the Premier. (S. 65)

The powers of the NCOP would be significant, though varying according to the type of legislation. On ordinary legislation, not affecting the provinces, it may support, amend or reject bills passed by the Assembly. In such cases, members of NCOP vote as individuals. The National Assembly could assure passage of a Bill rejected or amended by NCOP simply by re-passing it. (S. 75). In purely national areas, then, its role is purely advisory. But on national bills in areas of concurrent responsibility set out in Schedule 4, federal intervention in matters of exclusive provincial competence, and Bills affecting the financial interests of the provinces. (S. 76(4)) NCOP's powers are much greater.³⁸ In this area, NCOP may also initiate legislation. If the two Houses cannot agree, then a Mediation Committee is established (made up of nine members of the Assembly, and one representative of each provincial delegation) (S. 76.1). If the Mediation Committee cannot agree (which requires the support of five of the nine representatives from each House), then the Bill can still be passed by the National Assembly, but it requires a two-thirds vote. (S. 76 1(d)). The Mediation Committee can also propose an alternate version of the Bill, which would then pass by a simple majority in each House.

NCOP is also the vehicle through which provinces participate in constitutional

³⁸ There remains considerable uncertainty about what criteria will be used to decide what category a particular bill fits into.

amendment. Proposed amendments to S. 1, which declares South Africa "one, sovereign, democratic state," or to the amending procedure itself, must be passed by at least 75 percent of the members of the National Assembly and six of the nine provinces. (S. 74(1)) Chapter Two, which sets out the principles of cooperative government, can be amended by six provinces with two thirds of the National Assembly. All other amendments can be made by two-thirds of the Assembly acting alone, if provinces are not affected; or by the Assembly with the concurrence of six provinces, if it affects the Council, alters "provincial boundaries, powers, functions or institutions," "or amends a provision that deals specifically with a provincial matter." (S. 74 (3)). Thus, if provinces are able to develop some real political autonomy from the national parties at the centre, they will have considerable protection against amendments affecting them negatively. This protection however, is not as strong as in Germany where Art. 79 requires approval of two thirds of the members of the Bundestag, and two thirds of the votes of the Bundesrat to amend the Basic Law; and where amendments "affecting the division of the Federation into Länder, or their participation in the legislative process" are prohibited entirely. (The "eternal federalism" clause, Art. 79 (3)) Nor is it as strong as in Canada, where general amendments require the consent of the federal parliament and seven of the ten provinces, representing at least 50 percent of the population; where some amendments require unanimity of the 11 legislatures; and where provinces have the right to "opt-out" of amendments which would diminish their powers. (Constitution Act, 1982, Ss. 38-43)

The National Council of Provinces does appear to give the provinces collectively considerable influence on federal legislation, especially in the many areas of concurrent jurisdiction. While not as powerful as the

German Bundesrat, it injects a large measure of intrastate federalism into the South African system. But, as the Constitutional Court pointed out, how effective it will be in this role is dependent on too many other factors to make a definitive judgement. [332,333]. As a new player in South Africa's institutional structure, it will take time for the role of NCOP to become clear. On the one hand is the question of whether it will become an important element in the national legislative process (as the Bundesrat is), on the other is how its relations with the provinces evolve. Will provincial legislatures find themselves debating national legislation, in order to instruct their provincial delegations in NCOP, rather than legislating and acting at the local level?³⁹ Another critical question is how the legislative interaction among spheres, represented by NCOP, will relate to the administrative level of intergovernmental relations.

5.5 *The Constitutional Court*

What role the Constitutional Court will play in interpreting the federalist aspects of the new constitution remains unclear. As we have seen, Chapter Two, on cooperative government seeks to minimize the role of the court, relying instead on political and bureaucratic mechanisms to manage the intergovernmental relationship. On the other hand, the constitution grants the Constitutional Court unlimited powers to determine whether a matter is a constitutional issue or not, and "to decide disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers or functions of any of those organs of state." (S. 167 (3)a, (4)a). Whether in its two certification decisions, or on other matters, such as the constitutionality of the death penalty, the Court has already begun to carve itself an

³⁹ Bills tabled in NCOP are to be tabled in the provincial legislatures on the same day.

autonomous and powerful role as guardian of the constitution. Given its enormous complexity, it is not unlikely that many issues of clarification and interpretation will come before the court, and that its decisions will therefore do much to shape how federal the new South African system will be.

6. Conclusion

Thus the emerging South African federalism is much closer to the shared than the divided model. It is a relatively centralized federal system, in which, subject to relatively few constraints, such as the principle of subsidiarity, the central government has broad-ranging powers to legislate, and to override provinces in the name of the national interest. This is tempered by the representation of the provinces at the centre, through the Council. The emphasis, both in the division of powers, and the fiscal arrangements, is strongly on shared, concurrent governance, a long way from the Canadian model.

No outside observer has the right to prescribe a model for any country. In the Canadian context, I tend to lean towards a more divided and decentralized model, but a very strong case can be made that, given the enormous policy agenda facing the country, and the staggering disparities both among provinces and racial groups, there is a need for strong central leadership in South Africa, as envisioned in its new constitution. This is reinforced by the realization that most of the provinces are entirely new entities, with relatively weak regional identities and weak political and administrative capacity, which need to build legislative and bureaucratic institutions virtually from scratch.⁴⁰ (Nevertheless, it is fascinating to see how quickly provincial governments led by

Premiers from the ANC, a party traditionally hostile to any form of federalism, have begun to assert the need for provincial autonomy and to chafe under central domination).

Thus, in terms of policy effectiveness, the new constitution may well have struck the right balance for South Africa. Provinces, especially if they develop the political will and bureaucratic capacity, do have much room to innovate, to tailor policies and programs to local interests, and so on. The danger, perhaps, is that the need for cooperation and coordination will drown the system in intergovernmental wrangling, rather than freeing each sphere of government to respond to its own needs, set its own priorities, and get on with its own job. In this, as in other areas of the new constitution, "cooperative governance" places an enormous premium on the processes of consultation and consensus building, which may in turn slow down the process of effective policy-making.

In terms of democracy, the federalist elements are only a small part of the commitment to democracy spelled out in the constitution, with its careful balance between majority rule and protection of the rights of individual citizens and groups. The existence of three effective orders of government will permit greater citizen involvement in public affairs than would be possible in a unitary state, especially one as large and diverse as South Africa. Whether or not this potential will be realized will depend greatly on how successful both levels - and local governments as well - are in developing the mechanisms for open, accountable, participatory government, to which the constitution commits them. The long run viability of the provinces indeed, will depend on their success in carving out a useful policy role and on their ability to respond to citizen concerns. The complex intergovernmental machinery envisioned in

⁴⁰ This is an important justification for the extensive federal controls over provincial budget matters, public services, etc. found in the constitution.

this constitution, and the non-elected Second Chamber might offend Canadians worried about the "democratic deficit," but are central to the South African's desire for "cooperative governance." The hope, as President Mandela put it on the signing of the 8 May constitution,⁴¹ is that the "preoccupation of elected representatives, at all levels of government, will be how to cooperate in the service of the people, rather than competing for power, which otherwise belongs not to us, but to the people." The danger is that it will be the other way around. The complexity of the new constitution may be both its greatest strength (ensuring consensus by incorporating all points of view and spelling out the fundamental requirement of on-going consultation), and its greatest weakness (creating a system in which the preoccupation with process precludes action).⁴²

With respect to the management of conflict in a deeply divided society, again the implications of the federal elements of the new constitution are unclear. For the protection of the rights of white South Africans in the context of an overwhelming black majority, it is other provisions, such as proportional representation and, especially the Bill of Rights and a strong Constitutional Court which offer the most important guarantees. Quasi-federalism, however, does also mean that power will be more dispersed and fragmented than in a purely unitary state. As for the specific cultural concerns of Afrikaners, there is no territorial "Volkstaat," not least because there is no single geographic area where Afrikaners would constitute a clear majority. There will however be a constitutionally mandated

Commission for the Protection of the Rights of Cultural, religious and Linguistic Communities, which may recommend "cultural or other councils" to serve the many self-defined communities in South Africa. (S. 185).

The most incendiary and difficult regional/cultural issue in South Africa remains the conflict between the ANC-controlled central government and the IFP controlled KwaZulu-Natal. This is the only area in South Africa in which high levels of political violence continue. The IFP only signed on to the Interim constitution and joined the democratic election process at the last minute. It has been an uncertain participant in the constitutional process ever since. Under the terms of the Interim Constitution, the provincial government passed its own provincial constitution in March 1996. The Constitutional Court declared it unconstitutional, on the ground that it proclaimed KwaZulu-Natal a "self-governing province," that it unilaterally defined relations between it and the national government, and that it gave the legislature powers beyond those assigned in the constitution. It thus constituted a usurpation of national authority. In addition, the KwaZulu-Natal government claimed in the certification process that the new constitution had failed to comply with the right to self-determination found in Constitutional Principle XXXIV (which had been added to the CP's at the last moment to bring the IFP on board.) The Court rejected this claim. "In this context, self-determination does not embody any notion of political independence or separateness. It clearly relates to what might be done by way of the autonomous exercise of these associational individual rights, in the civil society of one sovereign state." (CCT 37/96, para. 24) Thus the expression of cultural diversity in South Africa is primarily a private matter; it is not designed to empower a provincial majority to unilaterally

⁴¹ In Constitutional Assembly, 8 May 1996

⁴² This dilemma was a central concern of a conference of South African Officials, organized by the Canadian International Development Research Centre (IDRC) and the Institute on Governance, Ottawa and Winnipeg, 7-11 April 1997.

determine its own powers or pursue a secessionist course.

In addition, however, it may be argued that given the fissiparous potential in a deeply divided society, the principle of cooperative governance, binding federal and provincial government - their leaders and officials - together in a multitude of interdependent relationships - legislative, administrative and financial - is a way to minimize the likelihood of provincial governments becoming the jumping off point for secessionist movements. This is not in the short run, however, a solution to the festering conflict over KwaZulu-Natal.

How well the new South African model works will depend only partly on the constitution which has just begun to operate. Similarly the real levels of provincial autonomy remains to be seen given the flexibility in the constitution. Two scenarios are plausible: that despite their separate election, provinces will become subordinate administrative arms of the centre; or that they will aggressively and creatively use the political space they have been given to carve out an important role for themselves. Which course they follow will, as with the evolution of Canadian federalism, depend on a variety of factors, including the way the Constitutional Court interprets many of its provisions, the ability of provincial governments to develop expertise and mobilize support, and whether the ANC is able to maintain its current dominance not only at the national level, but as the governing party in most of the nine provinces.⁴³

What is clear, is that a federalist South Africa will continue to be a work in progress for many years. Despite its detail and complexity, the new constitution is full of uncertainties, contradictions and even

silences. What, for example, will be the relationship between provinces and municipal governments, which in South Africa, and unlike Canada, have a constitutional status of their own? How will the tests to determine the legitimacy of federal overrides of provincial legislation evolve? Will the provinces have any real financial autonomy? And how stifling will be the role of the central government with its many powers to supervise provinces in areas such as public finance and the public service?

Despite these uncertainties, the achievement of writing the constitution is itself an extraordinary achievement. It profoundly reflects the fundamental democratic values of constitutionalism, rule of law, protection of rights, citizen participation - and federalism. Given the ANC hostility to the idea, few would have predicted this result. Perhaps equally important is the way in which the constitutional document has been developed. The process of writing it reflected the same values. The engagement of the people at every stage of the process has ensured a powerful legitimacy for the new constitution, and thus helps ensure that its fundamental values will have strong societal roots. As President Nelson Mandela put it on 8 May 1996, "Reaching out through the media, opening the process to inputs from across society; and going out across the length and breadth of the country for face-to-face interactions with communities, the Constitutional Assembly reinvigorated civil society in a way that no other process in recent times has done." Canadians frustrated by our own constitutional processes can only react with wonder and envy at the way in which South Africans have developed their federal constitution. It is a remarkable blend of principle and pragmatism, politics and idealism. It is impossible to imagine that Canadians would ever accept a constitution as centralized as the South African. But they should be able

⁴³ The exceptions are KwaZulu Natal, and Western Cape, where the National Party Governs.

to learn much from the process. And the ideal of "cooperative governance" has much to recommend it.

Writing a constitution is only one of many tasks that face a democratic South Africa. It is no guarantee, in itself, of a democratic future. But it is a crucial building block for that future, and federalism has emerged as an important part of the mix. Whether or not the term appears in the constitutional

document, and whether or not the institutional design meets Wheare's strict definition of federalism, the reality is that South Africa has chosen a multi-level system of government, one which incorporates many elements found in other federal constitutions, such as Germany's, but which also responds, as all federal systems do, to the unique cultural, political, and economic dynamics of its own setting.

DECENTRALIZATION AND GREATER REGIONAL AUTONOMY FOR MORE EFFICIENT MANAGEMENT: FISCAL, RESOURCE DISTRIBUTION AND RELATED ISSUES

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1. Key Issues in the Debate

In the post-independence period, centralized political and economic system has been generally preferred largely because it was regarded as the most effective way of forging national unity. There is, however, need now to review this assumption. There are a number of weaknesses which are associated with a centralized system. One of these is the power that is given to the Central authorities in the management of national resources. Such powers tend to cause tension and intensify struggle to acquire such powers. Secondly, centralization tends to promote inequity in resource distribution and could stifle socio-economic development in some of the areas especially those which are politically marginalized. Thirdly, the center tends to monopolize policy formulation and implementation, giving the regions limited chance to increase their capacity to manage their affairs.

2. Proposed Strategies in the Devolution of Power

There is need to decentralize political and economic management to give more powers to the regions through the following measures: -

- Strengthen regional political and administrative institutional capacity either at the provincial or district levels. Every Province or district

would need to have their own legislative assembly.

- Regions should be allowed to collect revenue from their economic activities, retain most of it (say 75%), and surrender the remainder to the national/federal government.
- The national Parliament would determine the regional government's powers and those of the national/federal government.
- While regions would enjoy considerable autonomy, all citizens would be free to live, work, go to school, own property, etc., in any region and be accorded equal rights, privileges, protection, etc.
- Internal and External security and defence would be the responsibility of the federal government.
- Guaranteed Security of Life and Property

Security of life and property are crucial preconditions for both domestic and foreign investment. Lack of this security has become a major concern especially after the so-called land or 'tribal' clashes of early 1990s and the coastal ethnic clashes of 1997. Threats of eviction of Kenyans from certain parts of the country ostensibly because such people were not originally from those areas

have become rather too common. In some cases, threats became real, with wanton destruction of property and loss of life.

There is need for clear provisions in the constitution to enhance security of life and property to all Kenyans: Some of the necessary provisions include: -

- Clearly stated constitutional guarantees that Kenyans are all equally free to live and own property in any part of the country.
- The government must undertake to compensate citizens who lose property or life as a result of ethnic animosities. This will not only serve as an assurance to investors, it should also ensure that the government takes the necessary measures to prevent occurrence or scope of such incidents.
- Incitement to ethnic animosities, tensions should be classified as a treasonable offense, punishable with long jail term. People convicted of such crimes should be declared illegible for public offices or appointments.
- Property acquired through inheritance or through market forces of willing buyer - willing seller should have equal legal recognition and protection. There is need to clarify the role of history and indigenous ownership in a modern nation.

3 Issues in Fiscal Management and Resource Distribution

The success of the devolution exercise will, to a large extent, depend on how well the country's fiscal and resource distribution systems are designed. The following are some of the areas that must be properly thought out, debated and agreed before the details of the power devolution are finalized.

3.1 Taxes & Revenue Collection

- Tax jurisdiction for both the federal and regional authorities. This will depend on the responsibilities of these different levels of governance.
- Sharing formulae for tax revenue collected at various levels
- Overall supervisory authorities to ensure tax compliance at various levels.
- Personal and company taxation and the question of residence of nationals moving from one region to the other.

3.2 Public Expenditure & Resource Distribution

Specifying of financing responsibilities at different levels with regard to the provision of essential and social services such as education, health, housing, external defence and security, transport and communication, power, water and other infrastructural services.

Extent to which federal and regional financing of these services may exist side by side e.g. federal schools/universities vs. regional schools/universities, etc.

- Whose responsibility will it be to revive sluggish or economically stagnant regional authorities?
- Subsidies and related issues, e.g. should a regional authority subsidize another?
- Should the federal system subsidize regional authorities?
- Should regional authorities subsidize federal institutions?

- Nairobi and Mombasa generate much higher proportions of resources than the other areas. What is the implication for other regions as a result of devolution of power and fiscal responsibilities?
- Residence, tax payment and enjoyment of certain public services at regional and federal institutions for optimal incentives and equitable fair distribution of resources?
- Who finances regional bureaucracies?

3.3 Factors/Principles to Observe

These and related issues must be exhaustively and candidly discussed and debated before the design of the devolution of power is finalized. The final design must however, be guided by the following factors/principles.

- Need to maximize commitment and incentives of residents of a particular

region in financially contributing in the revenue collection of their region.

- Avoiding creating dependency or complacency of some regions, expecting to ride on the backs of others.
- Ensuring the national and international responsibilities are effectively catered for.
- Maximizing productive, creative energies of various regions through healthy competition in various activities.
- Maximizing socio-economic and infrastructural growth at both the federal and regional levels.
- Ensuring that there are providing for adequate resources at the federal and regional levels.

DEMOCRATIC PARTY OF KENYA'S POSITION ON THE MAJIMBO DEBATE: THE CASE FOR A UNITARY STATE

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Shadow Attorney-General

1. Introduction

The letter of invitation to participate in this debate was quite intimidating. It reads "as the most articulate voice of the unitary state, we are inviting you and DP to make a case for a unitary state with emphasis on its economics ... We need and hope to go beyond superficial claims and demonstrate that these positions are products of deep thought grounded on facts, logic and viability". We are expected to present our thoughts on the structural, operational and financial dimensions of the unitary model. We shall try to be equal to the task.

We agree with Prof. Okoth-Ogendo's assertion that all law and Constitutional Law in particular, is concerned, not with abstract norms, but with the distribution, exercise and legitimization of power. Constitutional Reform is a political act. It is a programme of social, economic and political transformation which must draw on our past experiences and future aspirations.

No constitutional issue excites the political passions of Kenyans the way *majimbo* does. The term *majimbo* has no precise legal definition. It is shrouded in political innuendo and ambiguity which sends different messages to different people. It is a confused expression of the scars of our past, our deep fears, and the longings and yearnings of our people.

2. *Majimbo v. The Unitary State*

This whole debate is based on a misconception - that *majimbo* and a unitary system are separate, distinct and mutually exclusive political systems. *Majimbo* should not be confused with or mistaken for federalism. A federation is created when two or more neighboring independent states unite for defined purposes, but each state retains its autonomy in its demarcated sphere of authority. The basis of a federation is mutual agreement between independent, autonomous, contracting states.

Majimbo is a form of regionalism. It is a structure of government which permits development of indigenous institutions and culture within different regions of the same unitary state. It involves delegation of substantial political and legal power from the centre, to semi-autonomous regional authorities.

Majimbo should be understood in the context of devolution. This involves transfer of legal and political powers to a subordinate entity while at the same time retaining political control by the centre over the exercise of those powers. While the subordinate institution has a defined geographical territory and social identity, a common language, shared history and culture, it has no sovereignty or autonomy. The subordinate entity exercises limited legislative and executive powers which are neither merely delegated nor truly autonomous.

This description accurately captures the *majimbo* system contained in the 1963 Constitution. Section 82 of that Constitution divided Kenya into seven regions and Nairobi. These were similar to the current provinces. Each region had a Regional Assembly with limited legislative powers. The Executive Authority vested in the Civil Secretary who was appointed by the Public Service Commission. He was in charge of the organization and administration of the Public Service in each region.

The primary responsibility to raise revenue was vested in the Central Government but the regions were given limited taxation powers. The Constitution made detailed provisions for distribution of revenue between the Central Government and the Regions. The Regional Governments were subordinate to the Central Government. Section 97 of the Constitution prohibited Regional Assemblies from exercising their power in any manner which prejudiced the exercise of Executive authority by the Central Government. It also required that the laws made by Regional Assemblies comply with laws made by the Central Legislature applying to that region.

The devolution of power under the *majimbo* system did not disturb or challenge the unitary system of government in Kenya. The question therefore is not *Majimbo v. the Unitary State*: it is about the extent and scope of the devolution, the structures of devolution, and the level of the local unit to which power is to be devolved.

The Democratic Party of Kenya supports an efficient devolution of power within a constitutional framework which guarantees national unity, social justice and fundamental rights, freedoms and equality of all Kenyan citizens.

3. The Political Context of the Majimbo Debate

The *majimbo* debate is taking place in a context of fundamental, political skepticism. Many Kenyans do not believe that there will be any meaningful constitutional reforms so long as Moi and KANU) are in control.

The democratic space is contested by two dominant political forces - one talking the language of civil rights and freedoms and the other talking the language of tribe and culture. *Majimbo* is a product of the latter. The elite groups from both the ruling party and the opposition who are competing for political dominance and control of resources have reconstructed and reinvented the tribe as a tool for winning and retention of political power.

Elite from the dominant tribe(s) receive most-favoured treatment while the elite from other tribes are subjected to various forms of oppression, exclusion and discrimination. The excluded elite devise various strategies of capturing state power, seducing it, or reducing its impact upon them. *Majimbo* could be such a strategy. It is an Instrument for the elite to win, retain or access political power and resources.

The *majimbo* appeal lies in the failure of the centralised post-colonial state and its unfair and irrational resource distribution mechanisms. The post-colonial state like its colonial predecessor is based on principles of concentration and centralization of power. Its dominant ideology is that of cronyism and client. This has resulted in an alienation and marginalization of the majority of the people. The people are not seeking *majimbo* per se. What they are seeking are structures of government which will guarantee them participation in political power, and a rational, equitable distribution of national resources. They all want a piece of the pie.

Those against *majimbo* are not opposed to the devolution of political power and resources to lower levels. What they are afraid of is (the very real possibility that *majimbo* will disrupt free trade and investment, entrench tribal hatred, and provide a basis for ethnic cleansing. Some people still bear the painful psychological and economic scars of ethnic clashes from Molo, Olenguruone, Mau Narok, Likoni and Enosupukia from which *majimbo* proponents killed, maimed, or expelled politically incorrect "foreigners".

The recent Cabinet re-shuffle in which KANU re-packaged itself by promoting youthful leaders associated with the massive violence and fraud in the 1992 general election revives the specter of tribal clashes as a strategy for changing the electoral demography ahead of 2002 elections. There will be many more Kiberas.

Majimbo will not lead to democratic transformation or renewal at grassroots level. It will merely constitute a geographical dispersal of authoritarian structures from the centre into the regions. At the village level, *majimbo* will merely perpetuate the absolute dictatorship of the chiefs under the guise of preserving tribal customs, traditions and culture. It will bring oppression closer to the people.

4. Why do we Reject *Majimbo*?

At theoretical level, there are some plausible justifications for *majimbo* -

- it will lead to a more equitable distribution of national resources;
- it will safeguard local ethnic and cultural interests;
- it will increase checks and balances and accountability in governance; and
- it will locate power closer to the people, create more participatory and accessible government and provide for better

identification and prioritization of local needs.

We however reject *majimbo* because at practical level, a *majimbo* structure of government is a complex, cumbersome, top heavy bureaucratic system which would be too difficult and expensive to implement. More specifically,

- (i) the *majimbo* system introduces an extra layer of government at provincial level which leads to an unnecessary increase in bureaucracy and public expenditure. Our meager resources should not be wasted in unnecessary and unproductive civil service costs; they should be prudently used to alleviate the suffering of our poverty-stricken citizens, and not allowances for an unnecessary political leadership;
- (ii) the demarcation of territorial boundaries to cater for ethnic and cultural identities and interests, is a difficult and dangerous exercise; a recent proposal of a Central Kenya Region extending from Londiani to Garba Tulla can only be implemented through bloodshed; expansive multi-ethnic regions like the Eastern Province which lumps together the Kamba, Meru, Embu, Borana and Somali communities will not enjoy the benefit of local identity or safeguard homogenous ethnic or cultural interests, and there are dangers of dominant tribes oppressing minorities within the Region;
- (iii) a *majimbo* system of government being "a government within a government" will be inefficient as it will be slowed down by jurisdictional conflicts, competition for power, and overlapping functions between it and the centre; Section 93 of the Constitution which gave Regional Assemblies concurrent legislative competence with the Central Legislature on such matters as economic

development, public order, land settlement, etc. would, if implemented, have been a major source of controversy and delay;

- (iv) a *majimbo* system of government creates complex financial relations between the Central and Regional Governments leading to an inefficient and ineffective system of tax collection, and distribution of resources; the system reduces the capacity of the state for central national planning including policy formulation and implementation; the *majimbo* system will further entrench regional disparities and marginalize the traditionally under-resourced regions; and
- (v) given the recent history of *majimbo* as a political tool to change electoral equations in multi-ethnic constituencies so as to safeguard the ruling party against threats from the opposition, *majimbo* will provide ideal conditions for ethnic Puritanism, exclusion and cleansing; the most fundamental objection to *majimbo* is that it is deeply associated with entrenchment of tribal entities and ethnization of violence which could easily tear this country apart.

5. Democratic Party Of Kenya (DP's) Model: Unitary System With Strong Local Authorities

The Democratic Party of Kenya does not believe in any "cast-in-the-concrete" solutions to our political problems. We have not come here to take sides or defend an entrenched political position. Ours is a proposal for an efficient, accountable and democratic structure of government which we offer as just that -a proposal to be considered on its intrinsic merits. Any improvement thereon is welcome.

The Democratic Party believes that the benefits of decentralization, popular participation, equitable distribution of resources, and local identity which are intended to be achieved through the *majimbo* system of government can be better achieved through devolution of power to strong local authorities within the context of a unitary state. DP therefore proposes that the country remains a unitary entity but with a strong local government system.

The calls for a *majimbo* system of government are partly a consequence of the collapse of the Local Government system. Chapter 12 of the 1963 Constitution established a strong Local Government system with local councils, area councils, county councils, municipal councils, township councils, and urban councils. During the one-party rule, the state pursued a policy of over-centralization and over-concentration of power. The Local Authorities were captured by the centre and used as instruments of consolidation of power and control. In their power structure, management and resource control, they were merely an extension of the Central Government.

Today, most local authorities are weak, under-funded, inefficient and unresponsive to the needs and aspirations of the local people.

In the rural areas, 'the state is still a structural continuation of colonialism. Despite the democratic pretences, state power in the village is still a crude personalized authoritarianism of the local chief.

The Democratic Party of Kenya proposes a radical transformation and a reform of the Local Government and Provincial Administration systems so as to provide an appropriate institutional framework for: -

- ensuring popular participation by the people in the structures of local governance;
- efficient delivery of public services at local level;
- mobilizing the people for their own local development; and
- promoting cultural diversity.

The County Council will serve as the District Legislature where local development goals priorities and strategies will be debated. District Development Committees (DDCs) will be abolished. District Commissioners and other civil servants at the district level will serve as the District Executive and will be reporting to elected local authorities.

Each Local Authority shall have limited taxation powers and shall have the authority to hire and fire its own employees. Each Local Authority shall benefit from and control the resources in its jurisdiction. The Central Government shall transfer adequate tax resources to the Local Authorities to ensure effective and sustainable delivery of services to the local people.

The lowest unit of Local Government shall be the Location Council at location level. We shall have Constituency Council at constituency level, and County Council at district level. In urban areas there will be Urban Councils, Town Councils, Municipal Councils and City Councils.

DP proposes to abolish the provinces and the provincial layer of the civil service, and make the district the principal administrative unit. District boundaries will be reviewed to about one-constituency districts and to create culturally and economically viable entities. The civil service at the district level will be rationalized and restructured so as to work more closely with the elected

leaders in local authorities. The local authorities will be financed through local taxation, proceeds from resources under their control, and block grants from tax revenue collected by the Central Government.

Vertical links will be maintained with Central Government line Ministry to enhance the management and technical capacity and to ensure compliance of Local Authorities with the Constitution, the law and national policies. The Centre will play a facilitative and supervisory role to curb any cases of financial irresponsibility.

This general proposal should be considered in the context of broader reforms in the area of governance which include reduction of Presidential powers, entrenchment of the role of Parliament, a modern Bill of Rights, and an impartial independent Judiciary.

MAJIMBOISM: THE SCOTTISH EXPERIENCE

The Right Honourable Lord Steel, KBE, MSP Presiding Officer, The Scottish Parliament

1. Introduction

I want to begin this lecture with two health warnings. I am aware that I am speaking in Kenya at a time of great public debate on your future constitution. And happy though I am to accept the kind invitation of the Chairman of your Constitutional Commission to describe the immense changes we have made in Scotland over the last years, I do not want anything I say to be misinterpreted as recommendations that you should do likewise. The form of new constitution you may finally adopt here must be a matter for the people and politicians of Kenya and not for outsiders. Nevertheless, I hope that you may gain some useful insights from our experience. That is my sole purpose: not interference in your internal affairs.

My second health warning is that some of you – especially in the media are used to me being here on my previous visits in a political role as a party leader or as President of Liberal International, when I was able freely to comment on political questions here. In my present role as Presiding Officer of the Scottish Parliament I am deprived of the luxury of expressing opinions, and I hope that will be understood when we come to the question and answer session afterwards.

I want to begin by saying that having lived in this country for four years in my teens at the latter end of the colonial period, I watched with genuine interest

the transition to independence in 1963 and the political developments since then, including the changes to *de facto* and then *de jure* one party state followed by the switch to multi-party politics.

Commentators have said that over the past forty years Kenyan politics have been dominated by two benevolent autocratic Presidents – Mzee Jomo Kenyatta and His Excellency Daniel Arap Moi – thereby avoiding the collapse of orderly government which some other African states have suffered. I recall in one of my early speeches in the House of Commons in the late sixties defending the single party system on the ground that newly independent governments were facing such national emergencies that unity was essential. Just as in wartime Britain we had suspended party debate and had single coalition governments. I pointed out that in a one party general election in Tanzania more government ministers had been removed at the hands of the electorate than in our own multi-party election in Britain in 1966.

But a single party system dominated by a strong Executive President is not one that can successfully last forever beyond an emergency period of years. It is enormously to the credit of President Moi that he has recognized the need for the distribution and diffusion of power in Kenyan society in what is now a mature democracy and charged your Constitutional Review Commission with the difficult task of consulting the public

and bringing forward proposals to that end.

The anxiety in Kenya is that left unchanged, the constitution could allow a future President to be less benevolent and more dictatorial. .

2. Scotland's Transition

Let me turn to describe our transition in Scotland under very different circumstances.

Scotland was a sovereign and independent country until the Treaty of Union in 1707. In 1603 the Scottish King had inherited the English crown and thus both countries existed for one century under the same head of state. Economics and political realities drove both to recognize the sense in creating a full political union. The debate in Scotland at the time was not for and against the Union but about the form the union should take. The total abolition of the Scottish Parliament and the creation of an incorporating union were bitterly contested, with riots in the streets and accusations of bribery of the Scots parliamentarians. But federalism had not yet been invented and the simplicity of a unitary parliament at Westminster won the day.

It is true to say this was never wholly accepted by the Scottish people, and the debate against it continued through the eighteenth, nineteenth and twentieth centuries. The restoration of a Scottish parliament under a system of internal home rule within the United Kingdom became the policy of the Liberal Party under Gladstone in the late nineteenth century. It was also the policy of the early pioneers of the Labour Party under Kier Hardie in the early twentieth century. Frustration at the lack of

progress led to the creation of the Scottish National Party in between the two world wars with a policy for the total independence of Scotland from the UK.

In 1978 the Labour government of Jim Callaghan enacted proposals for limited devolution to Scotland including the creation of an elected Assembly. In the referendum that followed, these proposals failed to achieve the necessary enthusiasm of the several people to overcome the set hurdle of 40% of population approval.

Mrs. Thatcher's Conservative government which followed in 1979 was opposed to any such moves and during the 1980s, popular frustration led to the creation of the Scottish Constitutional Convention of which I was co-chair. Unlike your convention, this was not an officially approved organization but rather was self-appointed, consisting of the majority of Scotland's Members of Parliament – Labour and Liberal Democrats – together with representatives of the trade union movement, and the main churches and most local authorities. It took several years to hammer out detailed proposals for a new and agreed devolution scheme which was a substantial advance on what was offered in 1979. The Conservative government continued to oppose these and the Scottish National Party stood aside from the process because "independence" was not on our agenda. The Labour Party (and the Liberal Democrats) adopted the recommendations as part of their party's manifestoes.

In 1992 Margaret Thatcher's successor John Major surprisingly won the general election for the Conservatives, although their numbers in Scotland were reduced to a rump of 9 MPs out of 72 whereas in

the 1950s they had held the majority of Scottish seats.

I went privately to see Prime Minister Major in the cabinet room at Number 10 Downing Street to try and persuade him that his opposition to devolution was mistaken. John Major has now left politics, so I feel free to recount that event. I told him his party was misreading the public mood in Scotland and that the 1992 election had now created an even greater democratic deficit which would lead to even stronger demands for the restoration of a Scottish parliament.

I should explain at this point that under the Treaty of Union the Scottish legal system with its separate courts was guaranteed. Scottish bills were therefore debated and passed by Westminster MPs, the majority of whom had naturally no interest in them. Over the years the civil service administration of government had been devolved to Edinburgh with the creation of the Scottish office under a Secretary of State in the UK cabinet with junior ministers. But we had in Malcolm Rifkind's words a legal system with no legislature to amend or improve it, and also no democratic assembly to control the governing administration. Government and democracy remained centralised at Westminster four or five hundred miles from the people governed.

My visit to Prime Minister John Major was an amicable failure. He was adamant in his belief that any such devolution would be the slippery slope to independence and the break-up of the United Kingdom. In fairness to him he maintained that view long after he ceased to be Prime Minister, in his speeches in the Commons during the passage of the Scotland Bill and even later. I am well aware that a similar concern about

Majimboism is widely held in Kenya. Here the example of Spain is instructive.

3. Spain's Experience

When democracy was restored after the end of General Franco's dictatorship in 1977, the natural regions of Spain were allowed to develop different levels of autonomy. The most remarkable region was that of Catalonia with its capital Barcelona. Under President Pujol's leadership there has been a strong revival of Catalan culture, language and economy. He freely proclaims "non secessionist nationalism" and it works. He visited Scotland three times prior to devolution and again last month to admire our progress.

4 Establishment of Scotland's Parliament and Executive

The 1997 election in May was a defeat for the Conservative Party at Westminster but a total disaster in Scotland where they lost all their seats. The incoming Labour government of Tony Blair moved quickly to give effect to their devolution promise with a White paper within two months and a referendum in the autumn when the "yes" vote of Scottish people was 75%. The consequent legislation – the Scotland Act with its opening sentence "There shall be a Scottish Parliament" – went quickly through both Houses of Parliament and received royal assent in the autumn of 1998. The first Scottish Parliament was elected in May 1999 – just two years after proposals were made – and Her Majesty opened the new parliament which assumed power in July.

The Scotland Act set out the structure and powers of the Scottish Parliament and the Scottish Executive which would henceforth govern Scotland and be accountable to the parliament. The Act's

starting point was that the parliament should assume total responsibility for those matters already administratively devolved to the Scottish Office. These include all the major domestic concerns of government: education, health, housing, agriculture, forestry, fisheries, planning and development, justice including the police and prisons, local government, roads, tourism, the arts and sport.

Those matters reserved to the Westminster parliament are specifically spelt out in the schedules to the Act – the Scottish parliament can do everything not mentioned. These reserved matters include the obvious subjects of foreign policy and defence, and macro-economic management including taxation and social security.

Even among those there are two cross-over points. The Scottish parliament is allowed to vary income tax up or down by 3 percent and on European Union matters Scottish ministers can be part of the UK delegation at European Council meetings.

The financial arrangements are simply a block grant from the UK treasury based on a formula of population and geography long established but of course open to debate and future change.

4.1 *Financial Arrangements*

The financial arrangements in any devolved structure are of crucial importance. There must be equity in any such arrangements, otherwise the poorer provinces would remain poor and the rich ones benefit from the change location of mineral wealth. In the UK, for example, most of the riches of North Sea oil are off the coast of Scotland, but oil revenues are a resource for the UK treasury.

4.2 *Existing Local Government Structures*

In Kenya, you also have to consider the impact of any future devolution on the current local government structure. When we were considering the first devolution proposals in 1979 we had two tiers of local authorities – district and regional – and one of the objections to the Callaghan government's proposals was that the citizen would suffer four levels of authorities and elections – district, regional, Scottish and the UK. Twenty years later we had streamlined local government into a single tier, now operating under the Scottish Parliament. The creation of any authorities at provincial level is bound to effect the operation of local government. I know that in Kenya the present effectiveness of local government is extremely patchy. Any consideration of provincial authorities should include debate on the powers and structures of local councils and the balance between the two. The object of the exercise is to consider how most effectively to ensure the delivery of essential services to each locality.

I should at this point mention the structure of the parliament including the election system. One of the improvements to the 1979 proposals hammered out in the Constitutional Convention was the introduction of a system of proportional representation. The first past the post system which you are familiar can be argued as producing strong government but its weakness is that it can fail to represent popular will. A majority can be achieved by a minority both in Kenya and in the UK. People often forget that during Mrs. Thatcher's 13 year period of undeniably strong government she never achieved a popular majority of votes in the country, which especially in Scotland, was her undoing.

Similarly in a tribal society “winner takes all” carries dangers.

4.3 *Parliamentary Process*

The lackluster public response to our 1979 proposals was partly because the Labour Party was so dominant in our four-party system in Scotland that people feared a permanent domination by that minority. The Labour Party was wise enough to recognise that fear and agreed twenty years later that proportional representation would be better for Scotland, even though the system adopted was not the one advocated by their Liberal Democrat collaborators. It is the German “added member” system. 73 members are elected in the usual way first past the post in the constituencies but a further 56 are elected in party lists in eight regions of Scotland on a second ballot paper to even out discrepancies thrown up in the first ballot, resulting in 129 Members truly representing the proportion of votes cast by the people. As a result no party can achieve total dominance unless it can get 50% of the popular vote – which in a four party system is extremely difficult. We have, therefore, currently a coalition government of Labour and the Liberal Democrats to secure the necessary majority in parliament. The Executive has to work for its majority – which it does not always achieve – and it is thus genuinely controlled by and answerable to the parliament. For example, the Executive was defeated by the Scottish Parliament’s wish to support a Private Member’s Bill to abolish an outdated Scottish system of enforcing debt payments. Within the partnership government the Labour party had to accept and implement a Liberal Democrat manifesto promise to abolish tuition fees for university students, while the Liberal Democrats have had to support some

Labour party policies which, were they not in coalition, they might have opposed. Give and take is the essence of a partnership government.

The shape of the chamber of the Scottish Parliament is semi-circular reflecting the more consensual approach to politics than the adversarial one of opposing benches at Westminster. As a result of Proportional Representation we also have one Green Party Member and one Scottish Socialist Party. The Conservative party opposed the Scotland Act and subsequently fought for the losing “no” side in the referendum. In our first election it had again won in none of the constituency seats but obtained 17 under the PR system. They have since played a significant and constructive role in the Scottish Parliament and it is no longer Conservative policy to oppose its existence. It is significant that in the current Tory party leadership election, neither candidate is advocating a return to the governance of Scotland from Westminster. The operation of the Scottish Parliament now clearly reflects the settled will of the vast majority of Scots.

One of the failures of *majimboism* or devolution in Kenya’s post-independence constitution was the lack of clarity – indeed confusion – between the roles of regional and central authorities. In Scotland we have lop-sided or asymmetric federalism and we also have a separate legal system unlike Wales whose more limited assembly is probably a better model for Kenya to contemplate. Their legislation is limited to statutory instruments under Westminster Acts. So how do we in Scotland avoid similar confusion? First, the Act is clearly drafted. Some competences overlap such as energy policy. The Holyrood parliament – our name comes from the

site of our new building under construction – is responsible for the development of renewable energy (solar, wind and wave, for example) but Westminster remains responsible for nuclear power.

On legislation there is a double check. Every bill whether executive or private member's has to come to me before introduction to obtain the Presiding Officer's certificate of legislative competence under both the Scotland Act and the European Convention of Human Rights. In that process I am assisted by the legal department of the parliament – separate from that of the Executive – who prepare detailed commentary and advice. Normally, this is straightforward but sometime legal doubts have been raised and argued back and forth between me and the executive – or rather our lawyers – out of sight not just of press and people, but indeed necessarily of parliament as well. If I get that wrong, my decision can be challenged in the courts. But there is a second check after an Act of the Scottish Parliament is passed. For one month the law officers – Scottish and English – can consider the final Act's competence. Only once have they found a minor drafting error. After that month I write to the Queen asking her to grant royal assent.

But the great success of our Parliament is its committee system which is much less controlled by party whips than at Westminster. No bill is debated in our Chamber until it has first been examined and reported on by a subject committee. They call evidence - both written and oral - from those affected by or interested in the proposed legislation. After debate the bill is passed back to the same committee for detailed consideration and amendment in the familiar manner. That process together with our petition system with its

own committee has brought the whole process of legislation and of governance closer to the people and made it both much more accessible and acceptable.

Our committees do not just meet in Edinburgh. For appropriate topics they travel to other cities and towns in Scotland where their presence is enthusiastically welcomed in the local media and by a large turnout of public spectators. Indeed, I should mention that own chamber gallery is regularly packed especially at our weekly question time for Ministers, and that the afternoon live television broadcasts of our proceedings have, the BBC tell me, drawn larger audiences than the equivalent broadcasts from Westminster.

5. Conclusion

Have there been mistakes? Yes, of course. I laughed when I read Professor Ghai's account of how your regional assemblies incurred public displeasure "by their solicitude for their own pockets". We have in Scotland as you have in Kenya a lively and vigilant press and they keep reminding us – fairly – of an early debate on our own allowance and – unfairly – of the pre-decided award of commemorative medallions to Members to mark our royal opening. There are also some details of the Scotland Act which will have to be revised in due course in the light of experience. If you were to go down the road of PR with constituency and regional members, I would counsel further thought on defining their respective roles in standing orders. The least pleasant of my many duties as Presiding Officer is dealing with niggling complaints between these two sectors and cut across all parties.

Professor Ghai has himself put the matter of decentralising power very well when he wrote about democratic structures: “it is not enough to be protected from tyrannical rule; it is also important to participate in the processes of government”. Government can seem remote. Bringing the process of delivering services closer to the people enables more to participate. It can also be creating a fresh start, open up more opportunities for women to serve their communities. In both the British and Kenyan parliaments they are too small a minority. In the Scottish Parliament 35% of our elected Members are female.

We have succeeded in Scotland in increasing participation through our founding principles of openness and accessibility. I believe the fear or Balkanisation or break up is unfounded, but other fears here such as the proliferation of administrative costs and politicians – “more jobs for the boys” – have to be overcome.

Of course there are some fundamental differences between Scotland and Kenya. We had as I have explained a fully operating devolved civil service administration in Scotland. You do not. We had a separate legal system within the UK. You do not. Yet you have the advantage of several provinces of reasonably equal size to balance the centre. We do not. Indeed the English (who outnumber the Scots, Welsh, and Northern Irish put together) have still to decide what they want!

Kenya, like Scotland, is a proud nation and you have proud historic communities of differing languages and religions within it. Majimboism carefully and intelligently constructed can give greater autonomy to these communities and a real sense of participation, bringing

government closer to the people and making it more accessible and accountable thereby in effect strengthening the unity of state. A more minimalist approach than ours in Scotland is probably wise.

Sir Walter Scott, the great Scottish novelist, wrote that any Scotsman’s soul was dead who could not say with feeling: “this is my land, my native land”. That is why as a Scot I can empathise with the ethnic and cultural pride which goes with being a Kikuyu or Kalenjin or Luo or Maasai or Samburu or being a member of even the tiniest tribe. But local identity must not be driven by ethnicity. That is why we are glad to have in the Scottish parliament several members who live and work in Scotland but were not born there. Ethnicity must not be the greatest predictor of voting behavior. The unity of the country can be strengthened if long held grievances (that local interests have not been fully protected) are abolished. Devolution has not separated Scotland from the rest of the United Kingdom. We have retained a common heritage, economic links, shared experiences, challenges and opportunities. We have become stronger together.

Devolved government strengthens democracy but in no way weakens the central need for co-operation and co-ordination. A new constitution will not automatically improve the lot of the wananchi. A “dry” written constitution is given life and meaning by the politicians who interpret and operate it. The end of “winner takes all power” will, I hope, reduce the concentration of political parties on that “all” and increase their readiness and eagerness to participate wherever they see the opportunity in all levels of government. There is an old popular song which goes; “proceed with

caution, but baby please proceed". That's not a bad watchword.

SECTION TWO

SEMINAR ON ELECTORAL SYSTEMS AND POLITICAL PARTIES HELD AT SERENA HOTEL ON 19TH – 20TH MARCH 2002

List of Presentations and Resource Persons

1. “Political parties, the Electoral System and the Electoral Process” by Prof. Yash Ghai
2. “The Electoral Process in a Democratic Society: the Kenyan Experience” by S. M. Kivuitu
3. “Electoral System Design in Kenya” by Andrew Reynolds
4. “Comparative Electoral Systems: the German Experience” by Dr. Christof Hartmann
5. “The Organisation and Observation of Elections in Kenya: Lessons Learnt and the Way Forward” by Grace Githu
6. “The Role and Functioning of Electoral Commissions” by Theo Noel
7. “Regulation of Political Parties and Electoral Systems: the Kenyan Experience” by Hon. Ochilo Ayacko
8. “Regulation of Political Parties and Electoral Systems: the Kenyan Experience” by Farah Maalim
9. “The Management of Post Election Disputes” by Ishan Kapila
10. “The Regulation of Political Parties in Germany” by Dr. Christof Hartmann

POLITICAL PARTIES, THE ELECTORAL SYSTEM AND THE ELECTORAL PROCESS

Prof. Yash Ghai
Chairman, Constitution of Kenya Review Commission

1. Introduction

Three broad issues constitute the agenda of our deliberations. In the order in which we shall deal with them, they are: (a) the electoral system, that is to say the system of voting; (b) the electoral process, that is to say the conduct of elections and the role of the Electoral Commission and (c) the constitutional role and regulation of political parties. In many ways this conference may be the most important of all the meetings organised by or for the Review Commission, for these issues cut across most of the terms of reference of the review of the constitution.

One of the objects of the review is promoting people's participation in the governance of the country through democratic, free and fair elections and the devolution and exercise of power (sec. 3(d)).

In addition, a number of goals and objectives of review are relevant to the design of the electoral system, which may be interpreted as requiring a good, fair and effective electoral system:

- democracy and good governance;
- national unity and integration, and the security of the republic of Kenya;
- recognition and promotion of ethnic and regional diversity;
- human rights, particularly those relating to public participation;
- the accountability of holders of public or political offices.

More specifically, the Act requires the Commission to ensure that in reviewing the Constitution, the people of Kenya 'examine and recommend improvements to the electoral system of Kenya' (sec. 19(iv)).

2 Electoral System

There are many kinds of electoral systems. The principal functions of elections are to:

- provide for the representation of the people in the legislature;
- register the views of the people;
- choose a government;
- act as an accountability mechanism of MPs and the government;
- provide people with choices about public policies, etc.; and
- promote and facilitate a competitive party system;

Electoral systems can also influence the structure and orientation of parties, affecting their strategies for recruitment of supporters and elections campaigns (for example by providing incentives to broaden their appeal beyond a specific community). They can influence the consolidation or proliferation of parties, and may even be able to determine whether parties will be mono-ethnically or multi-ethnically based, and thus affecting the direction towards or away from 'tribalism'. They can affect the political system of the country. Thus apart from the basic function of choosing representatives or a government, the electoral systems differ in their wider social and political objectives. It is sometimes said that an electoral system is one of the most effective devices for

constitutional engineering, that is, it is most effective in changing political attitudes and practices, since politicians respond quickly to take the maximum advantage of new rules.

An electoral system is judged by various criteria, such as:

- Does it convert votes into seats to reflect accurately popular choice, i.e., does it produce fair results? Does it respect the principle of 'one person, one vote and one value', so that all constituencies are broadly of the same size?
- Does it provide representation of minorities?
- Does it lead to fair representation of women?
- Does it lead to a clear and close relationship between the elected official and his/her constituency?
- Does it lead to a stable and firm government, as for example by producing two major parties, one of them with a clear majority, particularly in parliamentary systems?
- Does it lead to a proliferation of parties?
- Does it lead to ethnic harmony or ethnic conflict?
- Does it lead to ethnically based parties or **non-ethnic/multi-ethnic** parties?

Two things are clear from these criteria. First, that it is widely perceived that electoral systems do affect political behaviour and the organisation and conduct of parties. Secondly, that consequences of electoral systems are evaluated differently in different contexts. Thus some countries may desire a strong government, even if this result is achieved by a less than fair representation, while others may value an accurate reflection of popular opinion in the legislature, even if it leads to a proliferation of parties or to ethnically based parties, and to weak or unstable executives. Some countries value electoral systems which reflect accurately different ethnic

communities in the legislatures, while others aim for systems which compel a measure of ethnic integration.

There are some specific issues on which we would like your guidance. These are:

- How can we ensure fair representation for women? Is proportional representation more favourable to them? Is it possible within the mixed member proportional system to incorporate measures to increase the representation of women?
- How can we promote the legislative representation of minorities (whether they are based on ethnicity, social differentiation, or disability)?
- How can we enhance national unity and integration through the electoral system, to require individual candidates and political parties to broaden their appeal beyond their own narrow constituencies, given also that another object of the review of the constitution as defined in the Constitution of Kenya Review Act. is the recognition and promotion of ethnic and regional diversity?
- How can the goal of national integration be achieved through rules for the election of the president? At the moment, as you all know, one of the rules is that the successful candidate for the presidency must obtain 25% of the votes in 5 out of 8 provinces, in an attempt to ensure that he or she enjoys wide national support, and not merely among her or his own ethnic group. Are there any other special considerations that should apply in the case of presidential elections?

3. The Electoral Machinery

The machinery to ensure fair elections is just as important as electoral principles. Rigging of votes and other forms of the manipulation

of the electoral system lead to conflict and violence and the loss of legitimacy of the electoral, and ultimately the political system. A good electoral machinery includes the following elements:

- guarantees of the right to vote and stand as candidates for elections;
- the fair drawing of constituency boundaries, the primary criterion being their equal size;
- the fair compilation of the register of voters or other mechanism to identify voters;
- fair opportunity for nomination as candidates;
- fair and equal conditions for electoral campaigns, including access to media, especially state owned media;
- fair and honest system of voting, so that only those who are entitled to vote, vote, without intimidation or corruption, and in secrecy; and
- supervision of the conduct of political parties and disqualification or penalties for candidates or political parties which violate the electoral law or codes of conduct.

Because the government has an interest in the result of elections, most states now establish an electoral machinery which is independent and free from the control of the government, or political parties.

The electoral system in Kenya has not been without controversy. Controversy has centred around the following issues.

3.1 Drawing of Constituencies

The Constitution says that constituencies must of equal size, but the Electoral Commission may depart from this principle to take account of:

- density of population
- population trends
- means of communications
- geographical features

- community of interest, and
- boundaries of existing administrative areas.

There is the danger that these factors may be given too much importance at the expense of the fundamental principle of equal size, although there are also problems in applying the 'equal size' principle in a country which has both areas of great density and great dispersal of population. The formulation in section 42 allows the adjustment of boundaries to suit the interests of political parties. The voting population in constituencies varies greatly, from 7631 in Wajir North to 113848 in Embakasi (1997 figures). It has been alleged that average size of a secure KANU constituency was 28,350 voters while the average size in opposition areas was 52,169, a discrepancy of 80%.

3.2 Voter Registration

Because the right to register as a voter is not based on citizenship, but the possession of an ID card, which are issued by the Office of the President, and because there is inevitably administrative discretion in registration, parties and other groups often express the fear that the registration process favours supporters of the government and discriminates against its opponents. The issue of ID cards and the registration of voters has come very controversial, and whatever the truth about the allegations of discrimination, there appears to be serious deficiencies in the machinery of registration and consequently a considerable loss of faith in the fairness of the process.

3.3 Election Campaigns

The framework for the conduct of campaigns is provided by the human rights guarantees in the Constitution, which protect the right of association and assembly, and the freedom of expression. This framework is reinforced by the Electoral Code of Conduct which political parties agreed as

part of the IPPG reforms in 1997 and is now contained in the National Assembly and Presidential Elections Act. The Code forbids, among other matters, the use or threat of violence, the disruption of political rallies, carrying of weapons, and the use of foul language. The law on the Kenya Broadcasting Corporation was also amended, to ensure a fair allocation of broadcasting time to political parties. The KBC has to: 'keep a fair balance in all aspects in the allocation of broadcasting hours as between different political parties... in consultation with the Electoral Commission, during the campaign period preceding any presidential, parliamentary, or local government election, allocate free airtime to registered political parties participating in the election to expound their policies' (sec. 8).

Despite this admirable framework, elections are marked by abuse, corruption, intimidation and violence. Intimidation operates at all stages of the electoral process: at the time of nomination of candidates when some persons are prevented from going to the nomination offices, during the campaigns when some areas are declared no 'go zones' for particular parties or candidates, during the polling, and even during the counting of the votes. Most parties seem to have private armies of thugs for intimidation and violence. Ethnic cleansing has preceded or accompanied elections to exclude some from voting and more generally, to determine election results. There has been a dismal failure to enforce the law against even the most blatant violators. The Electoral Commission has been unable to conduct fair and free elections despite its independence.

4. The Constitutional Role and Status of Political Parties

I now turn to the second purpose of this meeting, which is to examine the role of

political parties in the national political and constitutional processes. Our deliberations here will guide us in our recommendations on how far the status, role and conduct of political parties should be covered in the constitution and supporting legislation.

Political parties play a fundamental role in the operation and development, of the constitution. Parties play a number of important roles in a political system:

- They mobilise opinion, as for example in the struggle against colonialism
- They aggregate opinion and resources, bringing together people with similar views or interests, whether they are economic, social, religious, etc.
- They are the principal means whereby the ordinary people participate in political and constitutional processes and exercise many of their civil and political rights
- They mediate in several ways between civil society and state institutions
- They secure the representation of the people in state institutions, particularly the legislature, offer them political, social and economic choices, being the key actors in the electoral process, and bring public opinion to bear on government policies
- They are the means which bring cohesion and discipline to the government and to the opposition, for they help to organise and co-ordinate ministries and parliamentarians, and enable the opposition to scrutinise and challenge the government
- In these ways parties play a key role in national integration, bringing people in different parts of the country or from different linguistic or religious affiliations together in common organisation and with common purpose, and help to develop national outlook and values.

It is therefore obvious that the health of the political process depends fundamentally on

the state and health of political parties. Democracy has a chance to flourish if parties are well and democratically organised, offer the people clear choices of policy and goals, uphold constitutional values, pursue their objectives with dedication and professionalism, and seek honestly to reflect public interest and public opinion. On the other hand, parties which are not so motivated can subvert the fundamental principles of the constitution, and become an instrument of manipulation and control. For example, if parties themselves are not run democratically, the larger constitutional system will reflect this lack of democracy. The political system will become corrupt and tend towards the criminalisation of politics, under the dominance of mafias, thugs and private armies. If parties see their primary role the aggregation and articulation of narrow sectional interests, like ethnicity or tribalism, they will divide society rather than integrate it. If they see their main objective as access to power rather than the safeguarding of moral values or national interests, they will engage in intimidation and violence, making fundamental compromises with democratic practices. In these circumstances individual politicians also become self-serving and lose personal integrity or sense of commitment to their constituents, frequently changing parties to suit their personal conveniences and ambitions. In this way politics and politicians become discredited, and people lose confidence in democracy which they associate with parties and politicians. Many people become alienated, and withdraw, from politics—in these conditions a *coup d'etat* becomes likely and is often welcomed.

Because of the impact parties have on the constitutional system, considerable attention has focused in recent years on how to make parties more nationally oriented, promote their commitment to justice and democracy,

increase their responsiveness to their constituents and ensure good governance. Since the organisation and operation of parties are so closely connected to the electoral system, one way to influence parties is to reform electoral systems. Another approach is to regulate the formation, management and dissolution of parties through the law. Traditionally political parties have been regarded as private associations, and have been subject to little formal regulation. But now parties have to be seen as public institutions, and their regulation a matter of national concern.

The principal ways in which parties can be supported and regulated is by specifying in the constitution the right of people to form parties, but also the obligation of parties to uphold the constitution, national unity and to observe democratic practices. Some countries now require parties which intend to contest elections to register with an independent electoral commission. They can only be registered if their own constitution acknowledges democratic values and provides for regular elections of party officials and the full disclosure of their financial affairs. Some laws restrict parties from making ethnic appeals or inciting supporters against another community. Since party corruption is closely connected to electoral campaigns, some laws prohibit or limit financial contribution to parties, especially by corporations and foreigners, and restrict expenditures on elections. Some countries have, and several others are considering, systems of public funding of political parties. Increasingly, the stability of political parties is promoted by anti-defection laws which forbid a member of the legislature who won the election with the support of a political party from 'crossing the floor' to join another party in the legislature, even though this may restrict their freedom of association and expression, and their discretion as how best to serve the interests of their constituency.

In common with many others constitutions, the Kenyan constitution does not contain a systematic set of provisions on political parties, although the provisions that exist establish important roles for parties. It contained none at independence, but the right of association presumably would allow people to form political parties—although the practice has been that administrative controls are exercised over the registration of parties, which is done under the Societies Act. In 1982 the constitution was amended to prohibit any party but KANU. However, after considerable agitation, this provision was repealed in 1991 and the multiparty system effectively restored. For the purposes of the constitution, a political party is defined as a political party which is duly registered and which has complied with the requirements of any law as to the constitution or rules of political parties nominating candidate for the National Assembly (sec. 132). In 1997 a section was inserted in the Constitution which declared that the 'Republic of Kenya shall be a multiparty democratic state' (sec. 1A), but the legislative framework for the registration, management and de-registration of parties was not altered. In the same year the restriction that the President must appoint ministers from his or her party was removed. Other ways in which the constitution recognises parties are:

- Candidates for presidential elections must be nominated by a political party
- Candidates for the National Assembly must be nominated by a political party
- Political parties nominate candidates for Nominated members of the National Assembly in proportion to their seats in the Assembly
- An elected or nominated member of the National Assembly loses his or her seat if that member resigns from the party that supported his or her election or nomination while that party is still a parliamentary party. If such a member

were to join another party when his or her original party has ceased to exist, he or she would lose the parliamentary seat also on resigning from that second party

- The standing orders of the National Assembly recognise parliamentary parties in the committees and procedure of the Assembly
- Although appointments to the Electoral Commission are made by the President, the understanding seems to be that he or she would consult with the leaders of political parties before making appointments.

I trust that our deliberations will enable us to examine ways in which political parties can contribute to the enhancement of constitutionalism and will give us some guidance, which we shall share with the public, on how the constitution can institutionalise this and other aspects of the role and status of political parties. Some specific questions on which we shall seek your guidance include the methods and rules for the registration of political parties for electoral purposes, the promotion of democracy within and the accountability of political parties, and the funding of political parties.

5. Conclusion - Elections: Preserving Or Destroying Democracy?

Elections are intended to be powerful affirmation of democracy. They demonstrate the sovereignty of the people and the accountability of politicians to the people. They lead to the choice or formation of governments, lending them legitimacy from the verdict of the people. They are intended to formulate and raise issues of policy and the development of the country. They should demonstrate peaceful ways in which the community makes fundamental choices and decisions. They help to integrate the nation as parties take their message across the country. Unfortunately Kenya's experience

shows that few of these objectives are served by elections. Instead they become occasions for violence and ethnic cleansing, manipulation of electoral boundaries and other aspects of the electoral system, corruption and bribery, and the disregard of policy choices in the pursuit of ethnic support and the promotion of ethnic conflict. Thus, far from strengthening democracy,

elections put democratic practices under great strain, and far from emphasising national unity or integration, they tend to fragment the people along ethnic cleavages. The future of national unity and democracy thus depends critically on how well we can design a good electoral system and our willingness to follow fair and democratic rules in the conduct of elections.

THE ELECTORAL PROCESS IN A DEMOCRATIC SOCIETY; THE KENYA EXPERIENCE

S. M. Kivuitu
Chairman, Electoral Commission of Kenya

1. Introduction

In this address, I may express some opinions on certain issues. I would like those to be taken as personal. The Electoral Commission of Kenya (ECK) has not met and discussed and adopted these views. They are thus my personal views.

I am not a political scientist or a political theorist. I therefore would not like to express my personal understanding of what is a democratic society and the linkage between elections/democracy. I prefer to take cover by citing what eminent speakers and thinkers have said on these.

The quotations I refer to discuss democracy and the relationship between elections and democracy. Most likely they state what you already know but I could not find any other way of discussing the topic you gave me without referring to these themes.

Writing in "*Elections Today*" a journal published by the International Foundation for Election System (IFES) in Vol. 7 No. 4, 1998 Dr. Keith Klein, the then Director of Programmes for Africa and Near East at IFES he stated, and I quote:

"The crucial importance of elections in the democratization process derives not from elections as an opportunity to choose new representatives and national leaders, but from the nature of the election process, in which many of the critical aspects of democracy are displayed and tested. Elections are not merely a necessary condition for

democracy; they heightened and concentrated testing ground for a country's democratic health.

Elections and the pre-election period are when the requirements of democracy are focused".

Dr. Klein then proceeds to discuss these requirements. He later on asserts, and I quote

"Elections flaws, however, are not just election flaws, but also flaws in democracy".

"Inevitably, flawed elections should be used as a diagnostic tool, as a pointer for adjusting programmes to strengthen democratic structures. Elections should not be seen as an end point, but as a periodic testing ground for democratization".

Again in 1998 Chief Emeka Anyaoku, the then Commonwealth Secretary General, while addressing a workshop for chief election officers at Cambridge, U.K., made the following remarks, I quote:

"Democracy is essentially about choice; there can be no meaningful political choices by the people when they cannot band together into parties and formulate policies to achieve their common ends, there must be freedom of expression, assembly and association.

In turn, all that must be accompanied by the assurance of access to, and political balance on the part of, public

broadcasting, and protection for the freedom of all the news media.

At the very top of the list, however, is the right of the people to freely choose who governs them, through elections and the related requirement of the independence from the government and political parties of those charged with the management of the elections”.

And later, in the same speech the eminent (Chief added) and I quote:

“First, because as I mentioned earlier it is through the election that choice is guaranteed, and we are morally bound to do everything we can to value and to protect that. Secondly, because since the electoral process is at the very heart of the democratic system it is essential to it: when elections fail to have credibility the result can be serious damage to, and even the destruction of the whole democratic structure, however strong the culture and however developed the civil society. Democracy simply cannot function without credible elections”.

The views expressed by these two personalities were derived from their experience. But they are in consonance with texts by eminent political scientists and theorists like Prof. Mackenzie (*Free Elections*), Dr. Andrew Reeve and Dr. Alan Ware (*Electoral Systems*), Guy S. Goodwin – Gill (*Free and Fair Elections: Internal Law Practice*) and H. F. Rawlings (*Law and the Electoral Process*)

Thus it is agreed that elections are linked to democracy. But such elections must be credible. In the search of what are “credible” elections the terms “free and fair elections” seem to have been adopted. Elections for a democratic society must be free and fair.

“Credible” elections or “free and fair” elections do not refer to the actual act of casting the vote in the ballot box or wherever. These phrases refer to the entire electoral process: the legal/and political environment within which the elections are contested, managed and actualized. For these ideals to be attained, the legal and political parties, enable these to operate freely and at the same time allow civil society to thrive in freedom; it should ensure that the freedom of association, assembly, speech and movement are respected; candidates and their supporters should enjoy the right to lawfully canvass for votes freely and without fear of harassment; the electorate should be free from threat of violence and intimidation; there should be no restriction to the electorate’s access to civic education; state media should be accessible to all the contestants equally and on same terms; the state resources should not be used for the promotion of the electoral adventures of only one of the contesting groups; public servants, especially the police and any other public units that provide security should be impartial; there should be an honest competent, non-partisan body that manages the election; and finally the arrangements for the holding of the elections e.g. registration of voters, setting up of polling stations, the layout of the polling stations, the recruitment and deployment of the relevant manpower, be undertaken with fairness and efficiency.

At election time quite often one or other of these matters may not be given the treatment it deserves in a fair and free election. The effect of such lapse will depend on the impact it had on the elections-overall. The evaluation of an election as to whether it was free and fair would depend on such consideration. It is not unusual to find differing conclusions upon such

assessments. However, honest and impartial evaluations will rarely differ widely.

2 How does Kenya's Electoral Process Measure Up?

Kenya has a national assembly, composed of 210 elected members, an elected president who is also an elected member of the national assembly and 12 nominated members. Each member represents a constituency and is elected by registered voters in that constituency. Each registered voter is entitled to cast only one vote. Voting is by ballot papers. Each ballot paper is designed showing the names of the candidates, the party symbols of the political parties for each candidate and a single empty space for each candidate for making of the voter's mark. It is a simple ballot paper.

The winner amongst the candidates is the one who receives the highest number of votes. Even one vote above everyone else is enough. Thus in 1974 I received 5500 votes. Mr. B received 5505 votes. There were 5 other candidates who had their votes. Mr. B was declared Honourable and I was consigned to the dustbin. I did not seek the Court's assistance – to win.

Only registered voters have a right to vote. In order to be qualified to be registered as a voter a person must be a Kenyan and 18 years and above old. There are additional residency qualifications in relation to the right for a voter to vote for a parliamentary and civic candidate.

For the election of the president the system still is first past the post subject to securing simply majority of votes in five provinces of the 8 Kenyan provinces.

After the general elections the Commission apportions the 12 vacancies for nominated MPs amongst the political parties who succeed to be represented in the legislature

in accordance with the strength of that representation. This is a form of proportional representation.

The Commission then informs the political parties of the number of such MPs that it has allocated to them. The parties then nominate their MPs and pass their names to the Commission. If they are qualified for such membership the Commission conveys these names to the president who then appoints them.

Issues have arisen as to how the political parties identify such people. Political parties have never been open about it. However, political party leaders cannot be denied their right to lead – even by choosing the persons they consider suitable.

Maybe there is need for the establishment of some middle ground in order to meet the needs of transparency and accountability.

Kenya has an Electoral Commission that conducts the registration of voters and the elections. The Commission's independence and security of tenure is secured by the Constitution of Kenya (Sections 41(9), 99(3) and (104). Currently, the Commission is comprised of 12 Commissioners, nationally, appointed by the ruling party and 10 Commissioners nationally appointed by the Opposition. Commissioners take an oath of office and are governed by a Code of Conduct – all which are intended to ensure impartiality and honesty.

The Commission's operational finances are debated and passed by parliamentary, yearly, along with the Government's Annual budget. Hence its budget is subject to Ministerial interference during its formulation as well as its subsequent utilization. This constitutes a constraint to the Commission's independence of action. In many jurisdictions, such finances are charged directly to the Consolidated Fund.

The Constitution empowers the Commission to appoint officers to serve under their directions and instructions. But it must settle their terms of service with Treasury. That is a limitation on its independence. Despite this hindrance it has been able to recruit, mainly from civil service, very competent personnel. It has officers at its Head Office and a district election coordinator in each district with skeletal support staff.

The Commission runs regular training sessions for its entire staff. It now has very highly trained manpower.

The post of a director (supervisor) of elections was abolished by parliament in 1991. There are some in Kenya who seem to romanticise with such a post. They would like it to be reintroduced. The name or title given to a position does not thereby automatically bring about improvement to the functioning of the post or the holder thereof. The duties that this office is expected to perform are currently in good hands. The Commission knows exactly what it is doing.

The Commission is empowered by the Constitution to review parliamentary constituencies and civic wards (electoral areas). There are 210 parliamentary constituencies in Kenya. The Constitution provides that these constituencies should have equal numbers of residents so far as the Commission can do that. However, it also allows the Commission to depart from that criterion in order to meet certain peculiarities expressly stated in section 42(3) of the Constitution. No national constituency quota has been prescribed for.

The present parliamentary constituencies do not contain equal populations. The variations are grounded on that "departure" clause (s.42(3)).

There is a degree of public discontent with these disparities in some quarters. A solution may be necessary during this time. However, the rights of minorities reserved by section 42(3) should never be undermined or underrated. Kenya is not a homogenous society. Minorities have clear tribal tag. Some are at the borders. They can secede to other nations.

Before 1997 elections, the Commission used to carry out the registration of voters once every five years meaning a few months before the next general elections. In 1996 the voters' registration was computerized. It became possible to revise the registers without calling for new registration of all qualified persons. The result has been that the Commission can now revise its register and "clean" it to the required accuracy. The Commission could do even better if the government enabled it to purchase a computer for each district.

The registers will put on public display for inspection before every general election is held. Sufficient time and opportunity for this will be ensured.

Before general elections the Commission carries out recruitment and training of election officials, i.e. Returning Officers, Presiding Officers and Clerks. The opportunity is open to all Kenyans who attain the high standards set by the Commission.

The Commission also plans polling stations. Their lists are published at least a month before the elections. Usually polling stations are the same as the registration centers, i.e. the places where voters registered.

The Constitution of Kenya enjoins the Commission to promote voter education. It has not been possible for the Government to provide funds for this purpose. The

Commission has thus been supporting civil society groups who carry out such activities. The Commission's only condition is that they must impart non-partisan voter education if they wish the Commission to support them.

The Registrar of Societies registers political parties in Kenya. The current law for such registration is clearly inadequate and outdated. It allows the registrar to register any political party even if it has no following beyond its subscribers. The laws regarding the management of the registered political parties are similarly inadequate for political parties.

There is no public financing of political parties. A political party can obtain funds from anyone in Kenya or outside. Thus a foreigner can in fact own a political party in Kenya whether he/she is living in Kenya or outside. These are areas that require attention. But appropriate safeguards against commensalism must be provided for in relation to public funding.

Political parties can spend as much as they wish in an election so long as they do not bribe. They can throw social parties for voters and certain voters with refreshments freely and legally.

Only registered political parties can put up candidates during elections.

There is an electoral code of conduct for political parties, candidates, their supporters and Government. None of these personalities and institutions seems to be aware of the Code though the political parties and candidates subscribe to it (by signing) at election time. The Code's weakest area is its enforcement. The Commission can only enforce its most effective penalty via the Courts. That is no good.

3 Challenges to the Electoral Process

The biggest challenge to Kenya's electoral process is violence. There was serious violence in 1991/92. There was serious violence in 1997. These were general elections' years. Violence was experienced during by-elections. It is violence that is related to elections. It is violence that leads to people fleeing from places where they are registered to vote. It is violence, which intimidates a voter to refrain from voting or to vote "the right" way. Though this violence cannot be curbed through the electoral code of conduct alone the promotion of the ideals in the Code and adherence to them would make significant changes for better. Thus the Code is vital.

These days' election campaigns are rarely hindered by state machinery. All that the rallyists are required to do is to inform the police in the area in advance of their holding a rally or meet-the-people forays. Occasionally the politicians and the police do clash over these matters but this is becoming more the exception than the rule.

Kenya Police is in charge of security at all times. During elections the Commission engages some of its officers to keep order at polling stations, to escort ballot boxes and ballot papers and to maintain order at the counting centres. The Commission expects police to attend to all breaches of the law including electoral laws. In my view of late the police do not show bias against any political contestants. Police have no security of tenure. They perform their duties at great risk as regards their jobs and their future. It is not fair to expect people to expose themselves to peril whatever the cause. Even those who are elected in a democratic election have their statutory immunities.

Kenya Broadcasting Corporation Act (Cap.221) enjoins KBC – the only State

broadcasting station “*to keep a fair balance in all respects in the allocation of broadcasting hours between different political viewpoints*”. I am not convinced that that provision is applicable where no allocation of broadcasting hours have been settled under the subsection which follows it. I am however clear that with or without that provision in order to measure to the standards requisite for free and fair elections KBC should never be seen to be promoting or supporting any political party or political viewpoint or strategy. KBC has to balance between Government pronouncements and programmes per se and party politics. It may need the backing of the law strong enough to protect its personnel against recrimination or reprisals.

4. Conclusion

The electoral process in Kenya is supportive of a democratic society. Like is the case in

many other countries there is always room for improvement. A few areas that may call for these have been highlighted in this paper. There may be many others that are known to other Kenyans. These should be given due consideration. But it is important to keep in mind that changes in law systems practices and procedures alone may not result in more democratic space. Nor should changes be introduced without the consent of the people. in the final analysis it is the people of Kenya by their acceptance after they fully know what is involved that will sustain democracy. Prescriptions that are not fully understood and accepted by the people will take us nowhere.

ELECTORAL SYSTEM DESIGN IN KENYA

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1. Introduction

All modern nations are socially diverse to some extent. They are characterised by ethnic differences, plural cultures, linguistic, religious or regional variations. Indeed, the strength of many a State rests on its diversity - upon successful marriages of different traditions and skills and attributes. The political theorist, John Stuart Mill, noted nearly a century and a half ago that a talented and efficient government was one which included the representatives of all sections of society. Even where social diversity does generate division and tension, there are many ways in which the political structures a nation puts in place can help to mitigate against such tendencies characterising relations between minorities and majorities. Properly crafted institutions can provide incentives for the leaders of various groups to act in accommodatory ways towards other leaders - in their mutual interest and for their mutual benefit.

Some of the most fertile ground for building nationhood and co-operation lies within the social-cultural sphere. Education can lay the groundwork for the appreciation of difference rather than the fear of it: the north of Ireland has made slow advances in this direction over the last thirty years. Sport and the Arts can do a huge amount to build a nation - just look at South Africa's multi-ethnic sporting achievements and the way in which they have at times unified a highly fragmented country. A rigorous media culture can provide the outlets of expression that channel dissent into positive discourse rather than destructive violence. Lastly, widespread economic development often

dampens the incentives for ethnic conflict and minority rebellion.

But beyond issues of culture and economics, a key part of this framework of mechanisms to encourage accommodation between groups is Democracy itself. The very 'rules of the game' which are put into place to structure political competition and power. And it is apparent that the underlying quality which marks out successful democratisation in plural societies is that of inclusion.

2. Importance of Electoral Systems

Electoral systems are tools of the people. They are the institutions used to select decision makers when societies have become too large for every citizen to be involved in each decision that affects the community. The electoral system is the method by which votes cast in an election are translated into the seats won in parliament by parties and candidates - and thus the choice of electoral system can effectively determine who is elected and which party gains power. Even with exactly the same number of votes for parties, one system might lead to a coalition government while another might allow a single party to assume majority control.

Some systems may give primacy to a close relationship between the votes cast overall and the seats won (proportionality), or they may funnel the votes (however distributed among parties) into a legislature which contains just a few large parties (majoritarianism). The existing Kenyan First-Past-the-Post system is classically majoritarian. A second important function of an electoral system is to act as the conduit

through which citizens can hold their elected representatives accountable.

Third, electoral systems can influence the way parties campaign and the way political elites behave, thus helping to determine the broader political climate. They help to structure the boundaries of acceptable political discourse by giving incentives to party leaders to couch their appeals to the electorate in distinct ways. Where language, religion or ethnicity represents a fundamental political cleavage, some electoral systems can reward candidates and parties who act in a co-operative, accommodating manner, while others reward those who appeal only to their own ethnic group.

It is important to remember that a given electoral system will not necessarily work the same way in different countries. Although there are some common experiences in different regions of the world, the effects of a certain electoral system type depends to a large extent upon the socio-political context in which it is used. This 'spin' that the electoral system gives to the system is highly dependent on the specific cleavages and divisions within any given society. Above all, Kenyans must be free to choose the system which is best for them.

Nevertheless, there is a truism which is applicable to all electoral systems. If the results are not considered "fair" and do not allow the opposition to feel that they have the chance to win next time around, the electoral arrangements may encourage losers to work outside the system, using non-democratic, confrontationalist and even violent tactics.

3. Designing an Electoral System in Context: Looking at the Overall Picture

When looking at reform we must remind ourselves of the broader context of the nation for which the system is being designed. There are two lenses through which to gaze at the broader picture.

The first includes the other political institutions outlined in the constitution - i.e., the broader framework of the state - or 'democratic type.' In sum the elements are;

- (i) *Executive Type.* Is there a presidential or parliamentary system? If it is a parliamentary system, are there single party governments, coalition governments, or constitutionally mandated governments of national unity?
- (ii) *Legislative type.* Is the parliament unicameral or bicameral? If bicameral, do the chambers have symmetrical or asymmetrical powers? Are there reserved seats or quotas for specific groups?
- (iii) *The constitutional nature of the state.* Is the state unitary or federal? If federal, is it symmetrical or asymmetrical federation? Are the provinces poly-ethnic or ethnically homogeneous? If there is autonomy for certain groups within the state is it territorial or non-territorial? Is there cultural, functional, or personal legal autonomy?

The second is the lens through which we may assess the broader socio-political context of the country. Chiefly;

- (i) The basis of group identity,
- (ii) The historical intensity of the cleavage/dispute,
- (iii) The nature of the dispute (i.e., what do people fight over),
- (iv) The number of groups,
- (v) Their spatial/geographic distribution,

- (vi) The country's land and population size,
- (vii) Its regional position and pressures,
- (viii) The nation's historical evolution and experience.

4. The Range of Choices

There are hundreds of electoral systems currently in use and many more permutations on each form, but for the sake of simplicity we can categorize electoral systems into three broad families, the *plurality-majority*, the *semi-proportional*, and the *proportional*.

Within these there are ten sub-families:

4.1 *Plurality-Majority*

- First Past the Post (FPTP)
- Block Vote (BV)
- Alternative Vote (AV)
- Two- Round System (TRS)

4.2 *Semi-proportional*

- Parallel systems
- Limited Vote (LV)
- Single Non-Transferable Vote (SNTV)

4.3 *Proportional representation*

- List PR
- Mixed Member Proportional (MMP)
- Single Transferable Vote (STV)

These systems are briefly described in the appendix.

The range of electoral systems being used for national legislative elections around the globe is now greater than it has ever been before. The distribution of systems in the southern-east African region shown in Table 1 mirrors the world distribution. Just over half of the world use plurality-majority systems, just under half (6/13) in the SE African countries. PR-type systems are used across one-third of the globe, 5/13 in Southern-East Africa (Four being List PR, while Lesotho moved to an MMP system in

2002). Madagascar and the Seychelles use Semi-PR mixed systems which combine both PR lists and single member districts - the global percentage for such systems is 10%.

The most important decisions revolve around three basic mechanistic issues: how many representatives are elected from each constituency/district? (i.e., the district magnitude). Is the formula used a plurality, majority, or type of PR? And, what is the threshold for representation for parties and candidates? (effective and imposed). In combination these three elements will be the chief determinants of the way votes cast are translated into seats won.

5. The Pace of Electoral System Reform around the World

Up until quite recently it was argued that once an electoral system is in place in a country it was very unlikely to change, as the power to change lay with those who had benefited from the system in the first place. However, this 'freezing hypothesis' appears to be melting faster than the polar ice caps. In the last decade the pace of electoral system reform has dramatically speeded up. This has given us a wealth of experience of electoral system consequences throughout the developing world. The discipline of constitutional design has become particularly innovative in Africa and its burgeoning new democracies.

For example, Lesotho's will move to an MMP system from its disastrous FPTP system for elections on May 25th, 2002. There are similar debates over a change to MMP in South Africa and it is the preferred option of the MDC in Zimbabwe. Over the past five years Fiji has moved from FPTP to AV and Ecuador from list PR to the Block Vote. But it is not just new democracies who are grappling with electoral system reform.

A number of established democracies have also changed or are looking to change their systems. Japan switched to a semi-PR system in 1993, New Zealand made a dramatic shift from First Past the Post to a MMP form of proportional representation system for their elections of 1996, and Italy modified their list PR system in the early 1990s.

The Labour Government in the United Kingdom set up a commission to recommend a proportional alternative to the British First Past the Post system in 1997 — a national referendum may (or may not!) occur in the next few years. Similarly, there are growing calls in Canada to change the First-Past-the-Post system to a more proportional system as a result of the increasing fragmentation of the party system which highlights the anomalous results that **majoritarian** systems can sometimes cause.

A survey of all these developments reveals that four main themes are driving the calls for electoral system reform, (i) The unease with vote-seat anomalies inherent in FPTP systems, (ii) The desire to increase the geographic representation of cities and villages and enhance the accountability of individual representatives within proportional representation systems, (iii) The desire to reduce party fragmentation, (iv) The hope of encouraging **inter-ethnic** accommodation in societies divided by **ascriptive** identities.

6. Where to begin? Criteria for design

Comparative evidence from around the world has highlighted the fact that electoral systems have different consequences from country to country. Although there are important shared experiences of electoral systems in variant regions of the world, the consequences of a particular electoral

system depend heavily upon the historical, **socio-** economic, and political context of the society in which it is used. For that reason good electoral system design is rooted in an understanding of the broader historical and political picture - the cultural-political context and the broader framework of political institutions.

How proportional representation works in Mozambique may be very different to the way PR works in Switzerland. While the political consequences of the **FPTP** in Lesotho were clearly divergent to the consequences of that system in the USA. For these reasons the electoral system designer has to be, at the very least, anthropologist, historian, and political scientist.

When designing an electoral system, it is best to start with a list of criteria which sum up what you want to achieve, what you want to avoid and, in a broad sense, what you want your parliament and government to look like. Some of the criteria overlap and may appear contradictory: this is because they often are, and it is the nature of institutional design that trade-offs have to be made between a number of competing desires and objectives. For example, one may want to provide the opportunity for independent candidates to be elected, and at the same time to encourage the growth of strong political parties. Or the electoral system designer may think it wise to craft a system which gives voters a wide degree of choice between candidates and parties, but this may make for a complicated ballot paper which causes difficulties for less-educated voters. The trick in choosing (or reforming) an electoral system is to prioritize which criteria are most important and then assess which electoral system, or combination of systems, best maximizes these objectives.

6.1 *Ensuring a Representative Parliament*

Representation may take at least three forms. First, geographical representation implies that each region, be it a town or a city, a province or an electoral district, has members of parliament whom they choose and who are ultimately accountable to their area. Second, a parliament should be functionally representative of the party-political situation that exists within the country. If half the voters vote for one political party but that party wins no, or hardly any, seats in parliament, then that system cannot be said to adequately represent the will of the people. Through the representation not only of political parties but also of independent **MPs**, an effective parliament should adequately reflect the ideological divisions within society.

Also, there is the question of descriptive representation which implies that parliament is, to some degree, a "mirror of the nation" which should look, feel, think and act in a way which reflects the people as a whole. An adequately descriptive parliament would include both men and women, the young and old, the wealthy and poor, and reflect the different religious affiliations, linguistic communities and ethnic groups within a society.

6.2 *Making Elections Accessible and Meaningful*

Elections are all well and good, but they may mean little to people if it is difficult to vote or if, at the end of the day, their vote makes no difference to the way the nation is governed. The "ease of voting" is determined by factors such as how complex the ballot paper is, how easy it is for the voter to get to a polling place, how up to date the electoral roll is, and how confident the voter will be that his or her ballot is secret.

Coupled with those concerns is the broader issue of whether an individual's vote makes a difference to the final results. If you know that your preferred candidate has no chance of winning a seat in your particular district, what is the incentive to vote? (Table 1 illustrates varying turnout rates in Southern/East Africa. In some electoral systems the number of 'wasted votes' (i.e., those which do not go towards the election of any candidate, as distinct from spoiled or invalid votes, which are ballots excluded from the count) can amount to a substantial proportion of the total national vote.

6.3 *Providing Incentives/or Conciliation*

Electoral systems can be seen not only as ways to constitute governing bodies, but also as a tool of conflict management within a society. Some systems, in some circumstances, will encourage parties to make inclusive appeals for electoral support outside their own core vote base; for instance, even though a party draws its support primarily from black voters, a particular electoral system may give it the incentive to appeal to white, or other, voters. Thus, the party's policy platform would become less divisive and exclusionary, and more unifying and inclusive. Similar electoral system incentives might make parties less ethnically, regionally, linguistically, or ideologically exclusive.

6.4 *Facilitating Stable and Efficient Government*

The prospects for a stable and efficient government are determined by many factors other than the electoral system, but the results a system produces can contribute to stability in a number of important respects. The key questions in this regard are whether people perceive the system to be fair, whether government can efficiently enact legislation and govern, and whether the

system avoids discriminating against particular parties or interest groups. The perception of whether results are "fair" or not varies widely from country to country. Twice in Britain (in 1951 and 1974), the party winning the most votes in the country as a whole won fewer seats than their opponents, but this was considered more a quirk of a basically sound system than an outright **unfairness** which should be reversed. Conversely, in Mongolia in 1992 the system (the Block Vote) allowed the ruling Mongolian People's Revolutionary Party to win 92% of the seats with only 57% of the votes. This was considered by many to be not merely unfair but dangerous to democracy, and the electoral system was consequently changed for the elections of 1996.

The question of whether the government of the day can efficiently enact legislation is partly linked to whether they have a working parliamentary majority or not, and this in **turn** is linked to the electoral system. As a general rule of thumb, plurality-majority electoral systems are more likely to give rise to parliaments where one party can outvote the combined opposition, while Proportional Representation systems are more likely to give rise to coalition governments. Nevertheless, it has to be remembered that PR systems can also give rise to single party majorities, and plurality-majority systems can leave no one party with a working majority. Much depends on the structure of the party system and the nature of the society itself.

Finally, the system should, as far as possible, act in an **electorally** neutral manner towards all parties and candidates; it should not overtly discriminate against any political grouping. The perception that electoral politics is an uneven playing **field** is a sign that the political order is weak and that instability may not be far around the corner.

6.5 Holding the Government and Representatives Accountable

Accountability is one of the bedrocks of representative Government, as it provides a check on individuals, once elected, betraying the promises they made during the campaign. An accountable political system is one where both the government and the elected members of parliament are responsible to their constituents to the highest degree possible. On the broader canvas, voters must be able to influence the shape of the government, either by altering the coalition of parties in power or by throwing out of office a single party which has failed to deliver. Suitably-designed electoral systems facilitate both of these objectives. Accountability involves far more than the mere holding of regular national elections; it also depends on the degree of geographical accountability (which is largely dependent on the size and territorial nature of districts), as well as the freedom of choice for voters to choose between candidates as opposed to parties.

6.6 Encouraging Cross-Cutting Political Parties

The weight of evidence from both established and new democracies suggests that longer-term democratic consolidation - i.e. the extent to which a democratic regime is insulated from domestic challenges to the stability of the political order - requires the growth and maintenance of strong and effective parties, and thus the electoral system should encourage this tendency rather than entrench or promote party fragmentation. Similarly, most experts agree that the system should encourage the development of parties which are based on broad political values and ideologies as well as specific policy programs, rather than narrow ethnic, racial, or regional concerns. As well as lessening the threat of **inter-societal** conflict, parties which are based on

these broad cross-cutting cleavages are more likely to reflect national opinion than those based predominantly on sectarian or regional concerns.

6.7 Promoting a Parliamentary Opposition

Effective governance relies not only upon those 'in power' but, almost as much, on those who sit in parliament but are out of government. The electoral system should help ensure the presence of a viable parliamentary opposition grouping which can critically assess legislation, safeguard minority rights, and represent their constituents effectively. Opposition groupings should have enough parliamentary members to be effective, assuming they warrant these members by their performance at the ballot box, and should be able to realistically present an alternative to the current administration. Obviously the strength of parliamentary opposition depends on many factors other than the choice of electoral system, but if the system itself makes parliamentary opposition impotent, democratic governance is inherently weakened. At the same time, the electoral system should hinder the development of a 'winner take all' attitude which leaves rulers blind to other views and the needs and desires of opposition voters, and in which both elections and government itself are seen as zero-sum contests.

6.8 Cost and Administrative Capacity

Elections do not take place on the pages of academic books but in the real world, and for this reason the choice of any electoral system is, to some degree, dependent on the cost and administrative capacities of the country involved. For example, a poor nation may not be able to afford the multiple elections required under a Two-Round System, or be able to easily administer a complicated preferential vote count. But it is

important to remember that, while cost and administrative issues should always be borne in mind, simplicity in the short term may not always make for cost-effectiveness in the longer run. An electoral system may be cheap and easy to administer, but it may not answer the pressing needs of a nation, and when an electoral system is at odds with a country's needs the results can be disastrous. Alternatively, the 'best' electoral system in any given case may at the outset appear a little more expensive to administer and more complex to understand, but in the long run it might help ensure the stability of the state and the positive direction of democratic consolidation.

7. Three Electoral Systems Options for Kenya

Kenya may indeed look far beyond the systems outlined here below but the following three broad choices seem to be most applicable as of now.

7.1.1 Stay with First Past the Post

FPTP electoral systems have been favoured on a number of theoretical and empirical grounds. Perhaps most importantly because of the way single member constituencies retain a link between voters and their representative. Furthermore, plurality-majority systems are favoured because of the way in which they usually funnel the party system of a country, and thus voter choice, into a competition between two broadly based political parties, make 'stable' single party governments more common; and give rise to a strong opposition in parliament. In fledgling democracies it is sometimes argued that such systems will help to encourage broadly-based multi-ethnic political parties and exclude 'extremist' parties from parliamentary representation.

However, despite their widespread use, FPTP electoral systems are criticised on a number of grounds and often they are considered inappropriate for fledgling democracies, especially those in the ethnically plural states of Africa. Chief among these criticisms is the charge that all single member district systems are 'exclusionary' in a number of important respects: That they exclude smaller parties from 'fair' representation, they exclude communal minorities from fair representation, and they exclude women from parliament. In 1998 women constituted 13.7% of the members of legislatures elected by proportional methods (70 cases) and 8.4% of the legislatures elected by plurality-majority methods (84 cases). In Kenya's neighbouring countries the averages were 25.1% for PR and 11.4% for FPTP in the most recent elections.

Such exclusion is indicated by the degree of **disproportionality** between votes cast and seats won. As Table 1 shows the FPTP systems in Africa are on average five times more **disproportional** than the PR cases.

In new democracies FPTP systems are also criticised for encouraging the development of political parties based on ethnicity or region. Such 'politicised ethnicity' is reinforced when, 'regional **fiefdoms,**' where one party wins all the seats in a province/district, are exaggerated. This maximises the existence of 'wasted votes,' which lead minority party supporters to feel that they have no realistic hope of ever electing a candidate of their choice. This poses a danger in nascent democracies, where alienation from the political system increases the likelihood that anti-democratic extremists will be able to mobilise anti-system movements. Finally, all single member constituency systems are open to the manipulation of electoral boundaries: i.e., the unfair gerrymandering or **malapportionment** of districts - this has been a particular problem in Kenya.

7.2 *Switch to List PR*

In some new democracies proportional representation systems are chosen precisely because they mitigate against the exclusionary tendencies of plurality-majority systems. By more faithfully translating votes cast into seats won, PR is sometimes said to produce 'fairer' results. Under proportional systems disproportionality and 'seat bonuses' for the larger parties are constrained and minority parties can gain access to parliament even if their vote is not highly geographically concentrated. The bulk of the cited advantages of PR revolve around this core principle of inclusion. That very few votes are 'wasted' under PR systems. That they facilitate minority parties' access to representation. They encourage parties to present inclusive and communally diverse lists of candidates, and thus, it is more likely that the representatives of minority cultures/groups are elected. Similarly, it is more likely that women are elected under PR systems. Nevertheless, criticisms of proportional electoral systems have been based around two themes: the tendency of PR systems to give rise to coalition governments, and the failure of some PR systems to provide a geographical linkage between a representative and her or his electorate. The **most-often** cited arguments against using PR are that it leads to a detachment of the representatives from their constituents; leaves too much power entrenched within party headquarters, wielded by senior party leadership; and fragments the party system, which can be inefficient for governance. The coalition governments born of fragmented party systems are criticised for allowing tiny minority parties to hold larger parties to ransom in coalition negotiations and entrenching parties in power despite weak electoral performances from time to time.

As can be seen by the previous discussions both model types - **majoritarian** and proportional representation - can exhibit serious flaws for the workings of representative government in certain circumstances. This is partly why electoral system design has become such a growth industry and the scientific study of electoral systems has gained so much ground over the past decade. The nature of electoral system design is increasingly one of innovation. States adopt new rules to reflect their own domestic desires and requirements. Mixed systems, of various forms, are rapidly becoming the norm where designers try to combine the advantages of geographical representation with the benefits of proportionality and/or incentives for **inter-communal** accommodation.

7.3 *Switch to a Mixed MemberProportional (MMP) system*

Mixed Member Proportional (MMP) systems, as used in Germany, New Zealand, Bolivia, Italy, Mexico, Venezuela, and Hungary, attempt to combine the positive attributes of both **majoritarian** and PR electoral systems. A proportion of the parliament (roughly half in the cases of Germany, Bolivia, and Venezuela) is elected by plurality-majority methods, usually from single-member districts, while the remainder is constituted by PR lists. This structure might on the surface appear similar to that of the Parallel systems; but the crucial distinction is that under MMP the list PR seats compensate for any **disproportionality** produced by the district seat results. For example, if one party wins 10% of the national votes but no district seats, then they would be awarded enough seats from the PR lists to bring their representation up to approximately 10% of the parliament. There is no inherent need for there to be equal numbers of constituency and PR seats for the systems to ultimately work in a proportional way. For example, in New

Zealand there are 65 constituency seats and 55 list PR seats. In Lesotho there will be 80 constituencies and 40 list PR seats.

While **MMP** retains the proportionality benefits of PR systems, it also ensures that voters have geographical representation. They also have the luxury of two votes, one for the party and one for their local **MP**. However, one problem is that the vote for their local **MP** is far less important than the party vote in determining the overall allocation of parliamentary seats, and this is not always understood by voters. Furthermore, MMP can potentially create two classes of **MPs**. It should also be remembered that in translating votes into seats, MMP can be as proportional an electoral system as pure List PR, and is therefore bedevilled with all the previously cited advantages and disadvantages of PR.

8. **Concluding Thoughts**

While it is true that the choice of electoral system can have important consequences for the path of **democratisation** and accommodation in any state, it is also true that the voice minorities have in parliament will be far less valuable if that parliament is impotent with power lying elsewhere. Participation in politics without influence is possibly the most dangerous situation, encouraging the disenfranchised to pursue their goals outside of the peaceful democratic sphere. But perhaps the most important conundrum is: how can we recognise diversity in society without necessarily entrenching division and fragmentation? Ultimately, the best hope for new democracies lies in a shared sense of nationhood which appreciates difference as one of the strengths of the country as a whole.

The best news is that there now exists a weight of evidence to show that properly

Crafted political institutions can help build this sense of shared Statehood between minorities and majorities and provide inclusive forums for the democratic settlement of differences of opinion. If the electoral system recognizes social diversity and treats ethnic plurality as a positive force

then the country as a whole will benefit in many ways. Along with the other crucial elements that the Commission is addressing, the choice of electoral system should come under the magnifying glass as it may be the last piece of the jigsaw in a consolidating democracy.

Table 1: The Electoral Systems of Southern/East Africa

	Electoral System	Leg. Size	Last Elect.	Lsq Id	ENPP	% of VAP Regist.	Vote/ Regist.	Vote/ VAP	% Women in Leg. (current)
Botswana	FPTP	44	1999	20.9	1.4	59	77	46	17.0(43 rd)
Kenya	FPTP	224	1997	11.6	3.3	51	65	33	3.6(106 th)
Lesotho	FPTP	80	1998	31.7	1.0	86	72	62	3.8(105 th)
Malawi	FPTP	193	1999	3.3	2.7	94	92	86	9.3 (75 th)
Tanzania	FPTP	275	2000	12.6	1.6	67	81	54	22.3 (26 th)
Zambia	FPTP	150	2001	16.3	3.0	56	69	39	12.0 (59 th)
Zimbabwe	FPTP	150	2000	11.0	1.9	80	49	39	10.0(69 th)
<i>Averages</i>				15.3	2.1	70	72	57	11.4
Angola	List PR	220	1992	3.9	2.2	97	91	88	15.5(47 th)
Mozambique	List PR	250	1994	7.7	2.1	75	88	66	30.0(10 th)
Namibia	List PR	72	1994	0.6	1.7	84	76	64	25.0 (20 th)
South Africa	List PR	400	1999	0.2	2.1	76	89	68	29.8(11 th)
<i>Averages</i>				3.1	2.0	83	86	71	25.7
Madagascar	Parallel	150	1998	-	4.9	68%	60	41	8.0 (84 th)
Seychelles	Parallel	34	1998	23.3	1.3	-	87	-	23.5 (22 nd)

Key:

FPTP = First Past the Post

List PR = List Proportional Representation

Parallel = A mixed electoral system using both constituencies and party lists.

Lsq Id = Least Squares index of **disproportionality**.

ENPP = Effective Number of Parliamentary Parties.

VAP = Voting Age Population.

Appendix 1

Electoral Systems: Glossary Of Terms

Alternative Vote (AV) - A preferential, plurality-majority system used in single-member districts in which voters use numbers to mark their preferences on the ballot paper. A candidate who receives over 50% of first-preferences is declared elected. If no candidate achieves an absolute majority of first-preferences, votes are re-

allocated until one candidate has an absolute majority of votes cast.

Block Vote (BV) - A plurality-majority system used in multi-member districts in which electors have as many votes as there are candidates to be elected. Voting can be either candidate-centred or party-centred. Counting is identical to a First Past the Post system, with the candidates with the highest vote totals winning the seats.

Closed List - A form of List Proportional Representation in which electors are restricted to voting for a party only, and cannot express a preference for any candidate within a party list.

First Past the Post (FPTP) - The simplest form of plurality-majority electoral system, using single-member districts, a categorical ballot and candidate-centred voting. The winning candidate is the one who gains more votes than any other candidate, but not necessarily a majority of votes.

Free List - A form of List Proportional Representation which provides for **apparentement** or cumulation.

Limited Vote - A plurality-majority system used in multi-member districts in which electors have more than one vote but fewer votes than there are candidates to be elected. Counting is identical to a First Past the Post system, with the candidates with the highest vote totals winning the seats.

List Proportional Representation (List PR) - In its most simple form List PR involves each party presenting a list of candidates to the electorate, voters vote for a party, and parties receive seats in proportion to their overall share of the national vote. Winning candidates are taken from the lists.

Majority-Plurality (Two-Round System) - In French Two-Round elections any candidate who has received the votes of over 12.5 per cent of the registered electorate in the first round can stand in the second round. Whoever wins the highest numbers of votes in the second round is then declared elected, regardless of whether they have won an absolute majority or not. We therefore refer to it as majority-plurality variant of the Two-Round System.

Majority-Runoff (Two-Round System) - The most common method for the second round of voting in a Two-Round System is a

straight "run-off" contest between the two highest vote-winners from the first round - this we term a "**majority-runoff**" system.

Mixed Member Proportional (MMP) - Systems in which a proportion of the parliament (usually half) is elected from plurality-majority districts, while the remaining members are chosen from PR lists. Under MMP the list PR seats compensate for any **disproportionality** produced by the district seat results.

Open List - A form of List Proportional Representation in which electors can express a preference for a candidate within a party list, as well as voting for the party.

Parallel System - A semi-proportional system in which proportional representation is used in conjunction with a plurality-majority system but where, unlike MMP, the PR seats do not compensate for any disproportionality arising from elections to the plurality-majority seats.

Party Block Vote (PB) - A form of the Block Vote in which electors choose between parties rather than candidates. The successful party will typically win every seat in the district.

Plurality-Majority Systems - The distinguishing feature of plurality-majority systems is that they almost always use single-member districts. In a First-Past-the-Post system, the winner is the candidate with a plurality of votes, but not necessarily an absolute majority of the votes. When this system is used in multi-member districts it becomes the Block Vote. Majority systems, such as the Australian Alternative Vote and the French Two-Round System, try to ensure that the winning candidate receives an absolute majority of votes cast.

Preferential Voting - Electoral systems in which voters can rank-order candidates on the ballot paper in order of their choice. The

Alternative Vote, the Single Transferable Vote and the system used to elect the Sri Lankan president are all examples of preferential voting.

Proportional Representation (PR) - Any system which consciously attempts to reduce the disparity between a party's share of the national vote and its share of the parliamentary seats. For example, if a party wins 40 per cent of the votes, it should win approximately 40 per cent of the seats.

Semi-Proportional Systems (Semi-PR) - Those electoral systems which provide, on average, results which fall some way in between the proportionality of PR systems and the disproportionality of plurality-majority systems.

Single Non-Transferable Vote (SNTV) - A semi-proportional system which combines multi-member districts with a First Past the Post method of vote counting, and in which electors have only one vote.

Single Transferable Vote (STV) - A preferential proportional representation system used in multi-member districts. To gain election, candidates must surpass a specified quota of first-preference votes. Voters' preferences are re-allocated to other continuing candidates when an unsuccessful candidate is excluded or if an elected candidate has a surplus.

Two-Round System (TRS) - A plurality-majority system in which a second election is held if no candidate achieves an absolute majority of votes in the first election.

COMPARATIVE ELECTORAL SYSTEMS: THE GERMAN EXPERIENCE

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1. Introduction

The mixed-member proportional system (MMPS), first introduced in the Federal Republic of Germany in 1949, and variously also called 'two-vote' or 'additional member' system, has become another highly demanded product 'made in Germany'. During the last two decades, the MMPS was adopted by a series of countries (Bolivia, Venezuela, and New Zealand)¹; and national debates on electoral reforms conducted in other countries, both old and new democracies, have increasingly drawn inspiration from the German electoral system.⁹ Whereas in the late 1960s the British 'first-past-the-post' system, which is applied in Kenya, was the leading international model, and at that time even recommended by German politicians and researchers as the system to adopt in Germany, it can now be stated that other countries are looking to and learning from Germany's MMPS when considering electoral reforms.¹⁰

¹ The Interim Political Authority of Lesotho introduced a MMPS-framework in 2001, yet relevant elections have not been held until today.

⁹ This is not only true for many post-socialist states of Eastern Europe, but also for countries such as South Africa, Portugal, and – most remarkably – for the United Kingdom (cf. Nohlen 2000)

¹⁰ Inside Germany, however the performance of the MMPS has been sharply criticised in recent years. Especially since the re-unification in 1990, several scholars, journalists and even politicians have repeatedly called for modifying the electoral system for our lower chamber, the Bundestag. The internationally celebrated reform model has thus become the object of reform 'at home' (cf. Jesse 1998; Grotz 2000)

Are electoral experts and politicians in other countries, especially in African countries, therefore right to consider the MMPS a model for electoral reform? And if so, which lessons can be drawn from the German experience for transferring the MMPS to other countries?

In the following presentation, I will try to answer these questions at both a theoretical and at an empirical level. In doing so, I will proceed in three steps: I will first situate the MMPS within a broader typology of electoral systems. In a second section I will discuss how this system has worked in the context of German politics; and I will conclude with some recommendations for the Kenyan context.

2. Defining The Mixed-Member Proportional System

The key features of electoral systems are not easily understood because they are often characterised by technical terms and mathematical formulas. But the study of electoral models is important, as they often have wide-ranging political implications. Electoral systems are issues of political power, and they are generally considered as a key variable in shaping political outcomes.

2.1 The Main Types of Electoral Systems

A first step is to differentiate between a broad concept of electoral systems and a narrow one. In many electoral reform debates - particularly in those countries that

have no pronounced electoral tradition - the concept of electoral system is used in a very general sense, and may encompass everything relating to the electoral process, including suffrage and the organisation of elections. A more specific usage understands electoral systems as the way in which voters express political preferences for a party or a candidate; and the method whereby votes are translated into parliamentary seats or into governmental offices. Debates on electoral reforms in Africa have often concentrated on aspects of the electoral process, like for example the competencies and nomination of election commissions. In discussing the German model I will, on the contrary, concentrate on the narrow concept of electoral system.

Until recently many electoral reform debates seemed to suggest that there were only two types of electoral systems, and that countries had to choose between plurality systems at one side and proportional representation (PR) systems at the other. In reality, if we take a broader perspective, we see not two, but an enormous variety in *world-wide* parliamentary electoral systems. We have not only some systems where both plurality and PR elements are combined (and I will come to this in a moment), but even within the same basic type of electoral system, there can be a multiplicity of ways in which various technical elements are combined. Such technical elements of parliamentary electoral systems include the size of constituency, the form of candidacy and ballot structure, and the formula for converting votes into seats.¹¹ The

¹¹ For details on these technical elements cf. Nohlen (1996, 2000) and the Glossary in Nohlen/Grotz/Hartmann (2001). If we want to analyze the political effects of electoral effects of electoral systems (i.e. the probability of parties or candidates to be elected or not) we should not simply look at the overall type of electoral system (say a PR system) but to the combination of the specific technical elements which may be responsible for

international scholarship has nevertheless agreed to speak of three basic groups of electoral systems: majoritarian, PR, and combined systems.

We have *first* majoritarian electoral systems, and the standard type is the plurality system or *first-past-the-post* system, normally in single-member districts, or in small multi-member constituencies. The candidate who receives the most votes in each constituency is elected. It is applied in Great Britain, and most former British colonies still use plurality system in *SMCs*.¹²

We have then proportional representation systems that may be applied in a national constituency or in several multi-member constituencies. All parties are required to present a list of candidates to the electorate giving as many candidates as seats to be filled in the constituency. Parties receive seats in proportion to their overall share of the vote. Winning candidates are taken from the lists in order of their respective positions. A pure PR system would mean one national constituency and no artificial

producing certain political consequences of an electoral system.

¹² Two other types of majoritarian electoral systems require the winning candidate or candidates to reach an absolute majority of votes. The Alternative Vote (in single or small multi-member constituencies) requires electors to rank the candidates in order of choice, marking a 1 for their favoured candidate, a two for their second choice and so on. If no candidate obtains 50% of the first preferences, the second or third preferences are transferred until one of the candidates reaches over 50%. The winner might thus not necessarily be the candidate with the plurality of first preferences. In the absolute majority system in single or small multi-member districts no preferences are marked, but in case of no candidate receiving an absolute majority of votes at polling day, a second round is held where the both strongest candidates or all candidates that have reached a certain threshold (of say 10 or 15%) qualify for a decisive run-off. This latter system is used in electoral system in most direct presidential elections in Africa (but not in Kenya).

thresholds in force.¹³ Electoral Thresholds or hurdles mean that parties have to reach a fixed percentage of valid votes in order to be considered in the distribution of seats.¹⁴

2.2 Functional Demands on Electoral Systems

The advantages and disadvantages of electoral systems have often been discussed with regard to the functions that such a system needs to fulfil. It is generally assumed that electoral systems perform multiple functions, including the following.¹⁵

Table 1: Functions of Electoral Systems

Simplicity	
Representation	Concentration
Participation	

¹³ In Africa, pure PR at the national level or in very big constituencies has only been introduced in countries that have gone through protracted civil wars, like Namibia, Angola, Mozambique and South Africa, and in the war-torn countries of Sierra Leone and Liberia, where it was only the pragmatic way to allow for the exercise of the suffrage by displaced population (voters do not need to register in a specific constituency).

¹⁴ If PR is applied in variable MMC what matters is the magnitude of constituencies. The smaller the size of the electoral district, the less the degree of proportionality of the electoral system. A PR system in small multi-member constituencies - say three or four seats - produces high distortion effects on the degree of proportionality, and is therefore actually - with regard to the effects - more of a majoritarian electoral system than a PR system. In Africa all former Portuguese and some francophone countries practice PR in variable multi-member constituencies, some of them in rather small MMCs like Benin or Burkina Faso.

¹⁵ For the discussion of evaluative criteria for electoral systems cf. Nohlen (1996: 94ff).

2.2.1 Representation of Interests

Especially of minorities as well as all opinions and relevant groups; but also fair in the sense of proportional representation of parties and candidates according to the share of votes they received.

2.2.2 Concentration of Interests

This relates to the aggregation of social interests in a way which enables political institutions to act. Too many parties are often understood as problematic, especially in new democracies as they might lead to institutional deadlock: It is highly improbable that unstable governments are efficient.

2.2.3 Simplicity

The system should not be too difficult for a less educated or illiterate electorate to understand and for administration to handle without risking a loss of transparency.

2.2.4 Participation/Accountability

With regard to voter participation, the key question is whether the voter can choose between political parties (party-list vote), or between individual candidates as well (personalised vote). As for the accountability of representatives, the key question is whether they are elected as individuals (in a constituency or through a non-closed party list) or through a closed party list. It is often assumed that a personalised form of voting and/or constituency representation improves the voter-representative relationship through increasing the participation of the votes and/or improving the accountability of the representatives. From this perspective, anonymous closed party lists are regarded as undesirable.

Different electoral systems satisfy these functional demands in different ways. Majority systems concentrate on achieving a governing majority of one party or a party alliance. The objective of proportional representation is, on the contrary, to achieve accurate parliamentary representation of the social forces and political opinions prevailing in the population.

It is, however, important to stress that no electoral system fulfils all of the requirements completely. Thus, the choice for an electoral system involves difficult trade-offs: For example, the requirements of ensuring adequate and fair representation and an effective parliament based on an appropriate (i.e. small) number of parties may not be reconciled.¹⁶ The importance attached to these different functional demands depends largely on the particular historical, social and political context in which an electoral system has to operate, and on the views and interests of the political players who decide which system to implement. In a system undergoing *democratisation* inclusion of all relevant political groups in parliament could thus be regarded more important than achieving a stable government majority.

2.3 Types of Combined Systems and MMPS

The emergence of the third group of systems, the combined (sometimes called 'mixed') electoral systems has thus to be seen in this same perspective. The underlying rationale is apparently to design electoral systems out of the 'best of both

worlds' (Mainwaring/ Shugart 2001), i.e. to cumulate the virtues of majority rule and proportional representation (PR). In this sense, the advantages of combined electoral systems are threefold:

They are believed to produce more proportional outcomes than 'pure' majority systems of the British type, thus meeting better the normative criterion of representation. Simultaneously, combined systems ought to perform better than pure PR-systems in generating parliamentary majorities according to the concentration function. Unlike both pure types, the two-ballot structure of combined systems should offer the voters to express their political choices in a more sophisticated way, enhancing the (qualitative) participation capacity of the electoral system. Admittedly, it is a type of electoral system which is more complicated than a plurality system.

There are again many options of combining majority rule and PR elements in one electoral system; and one has to distinguish at least three types of such combined systems.

Under a Segmented System (also known as 'Parallel System'), the seats of a parliamentary chamber are allocated by two completely separated procedures. For a fixed portion of seats, proportional representation in large (often national) multi-member constituencies is applied; for another portion of seats, MPs are elected in single-member constituencies by plurality (or absolute majority) rule. As these two parts are not connected by any means and their respective electoral formulas are also applied in a 'parallel' manner, the political effects of the entire system tend to be in-between majority rule and PR, regarding both the representation and concentration functions.¹⁷

¹⁶ To give another example: The demand for increasing the degree of participation within an electoral system that simultaneously ensures fair representation inevitably leads to a more complicated system. In such a case the demand for a simple and easily comprehensible electoral system may not be satisfied.

¹⁷ This theoretical argument of a 'medium effect

Contrary to the segmented system, the parts of a Compensatory System are **inter-connected** in so far as the unsuccessful votes of the **majoritarian** part are additionally taken into account in the allocation of the PR-seats. Technically, this can be achieved, for example, by subtracting the votes that all winners in the single-member districts have obtained, from the total party votes at the national level. By this procedure, smaller parties are partially compensated for their disadvantage in the distribution of the majority seats. Since existing compensatory systems are few (Italy, Hungary) and enormously complex, the relevant effects are very difficult to predict. They obviously depend to a large extent on the numerical relationship between the plurality part and the PR part of the system.

Finally, the Mixed-Member Proportional System (**MMPS**) is structurally different from both other types. In this system, the total seats are allocated by PR, i.e. the votes obtained by parties at the national level constitute the only basis for determining, proportionately, the seat share of parties. Like in both segmented and compensatory systems, a fixed number of seats (usually half of the seat total) is allocated according to the plurality system in **single-member-constituencies (SMC)**. Yet, these winning **SMC-candidates**—usually affiliated to a certain party—are then subtracted from the party's seat total, determined in a first step by the list votes according to PR at national level. Thus, the more district mandates a party wins, the fewer list seats it will receive. The results in the single-member constituencies only determine who among the single-member district and party-list candidates of a given party receive seats.

The MMPS is thus in effect a 'personalised' system of proportional representation, and it performs best among all combined systems with regard to the representation function. If a party wins more direct mandates than it was entitled to under the PR distribution of seats, it is allowed to keep these extra seats, and the size of the parliament is increased accordingly (so called surplus or overhang-mandates).

system' presupposes a 50:50-distribution of majority and PR-seats. In case of greater deviations in one or other direction, the segmented system will effectively come closer to the relevant 'pure' type.

Table 2: Types of Combined Electoral Systems

Type	Segmented System	Compensatory System	Mixed-Member PS
Technical Structure	<i>No Interconnection:</i> Parallel use of plurality rule and PR.	<i>Horizontal Interconnection:</i> Unsuccessful votes of the majoritarian part are 'compensated' in the PR-part to a certain extent.	<i>Vertical Interconnection:</i> PR-part is decisive for the partisan distribution of seats; 'personalised' SMC-seats are subtracted from the party's share of PR-
Theoretical Effects	medium effect in both representation and concentration.	medium effect in both representation and concentration.	highly proportional representation, limited effect in concentration.
Current Cases	Japan, Mexico, Senegal, Guinea, Seychelles, et al.	Italy, Hungary	Germany, New Zealand, Bolivia, Venezuela

Table 2 presents a comprehensive summary of this typological distinction. Now, it becomes clearer why the German **MMPS** (more than other combined systems) has become an international model for electoral reform: It integrates the 'personalised' element of single-member constituencies without affecting the overall proportionality of the election outcome. Admittedly, a possible disadvantage of this type of electoral system is a lower performance in the concentration dimension, and its technical complexity. Yet, if looking at the election results in Germany from 1949 until 1998, one has to conclude that the MMPS has produced both a high level of proportionality and a high concentration of parliamentary seats (cf. **Nohlen** 2000: 304ff). This - at first glance surprising - outcome leads to a further point: Technical details matter.

3. How the MMPS Works in the German Context

We have outlined at the beginning that the MMPS has been invented in Germany. Other countries have adopted the system but modified specific details. We should thus

separate the overall logic of the system from specific technical elements that may vary from case to case. Within the German MMPS, there are at least three technical details deserving closer attention: The 5% threshold, the two-ballot system, and regional party-lists.

3.1 Technical Elements of MMPS in Germany

A 5%-threshold is applied at national level since 1953.¹⁸ A party must receive at least 5 percent of the vote nation-wide or win three constituency contests in order to qualify for proportional representation in parliament. Hence, the minor parties with say 3% of the votes receive no seats at all, and the mandates they would have been allotted in a pure PR system are given to the parties that secured parliamentary representation by obtaining a minimum of 5% valid votes.

The Five-Percent Clause has been of tremendous significance for the political parties in Germany. The high hurdle was designed to prevent the proliferation of small parties - in particular, extremist

¹⁸ Originally, the 5% hurdle was introduced at the level of the *Länder*, the federal units of Germany.

parties, which won parliamentary representation in the Weimar years and which often limited the potential for establishing stable coalition governments. In the first Bundestag in 1949 there were ten parties represented, but since the 5-percent clause was introduced at the national level in 1953, there have been only four (since 83 five, since 90 six) parties. This threshold has thus proved to be an effective tool against over-fragmentation of the party system and become the main element of concentration. For a long time, its major advantage was not the mechanical 'filtering' of certain parties, but the convincing 'psychological message' that voting for splinter groups would not be rational. Many voters feel that voting for a minor party amounts to 'throwing away' their votes, since the minor parties will probably not win 5 percent of the votes. In recent years, however, the number of electoral parties - and, accordingly, the number of 'wasted votes' - has modestly increased. Therefore, while its overall legitimacy not being challenged, some critics regard the 5%-threshold as too high for a PR-system.¹⁹

Another specific element of the German MMPS is the *two-ballot system* (applied since 1953).²⁰ As noted above, the option of two different votes - for a SMC-candidate and for a party list - can generally be regarded as qualitative enhancement of participation. When Germans go to the polls they receive a ballot with two columns. In the left-hand column, the citizen votes directly for a candidate who has been nominated by a local political party

¹⁹ A further issue controversially discussed in this context is the 'direct mandate clause' stipulating that parties with at least three SMC-seats need not have 5% of the national vote in order to participate in the overall allocation of seats (see for details Jesse 1998).

²⁰ In the first Bundestag elections of 1949, voters had only one ballot for the relevant SMC.

organisation (there are no primary elections in Germany), in a single-member district. Germany is now divided into 331 SMC: Whichever candidate receives the most votes wins. In the right-hand column the citizen casts a 'second vote' for a political party, not a candidate, in a PR electoral competition. This second ballot determines the final proportion of parliamentary seats that each party will receive in the Bundestag, and the 'second' vote is thus, somewhat astonishingly, the more important.

The MMPs as practised in Germany is an important factor influencing the recruitment and nomination of candidates to parliament. The party-list section of the ballot allows parties to bring into the parliament, through a high position on the list, representatives of interest groups and experts with specialised knowledge who for various reasons (personality, background) would have a difficult time winning a grass-roots campaign. A district campaign, on the other hand, affords candidates an opportunity to establish their personal vote-getting appeal and can provide a 'second chance' for personalities left off the party list or given a hopelessly low position.

The two votes each voter has do not need to be cast for the same party. During the last decade, one could observe a growing use of 'ticket-splitting', i.e. more and more electors have chosen different parties by their relevant SMC- and list votes. Supporters of one party could cast their first ballot vote for its coalition partner, thus ensuring it a high number of constituency victories; while voters of the second party could return the favour by casting their second ballot for the coalition partner, thus increasing its share of mandates from the state lists. This voting behaviour was criticised by some analysts, as ticket-splitting in Bundestag elections would contradict the original rationale of the two-ballot system, because it is not the

expression of 'personalised preferences' for certain **SMC-candidates** of the same party, but a tactical behaviour of voters of the bigger parties helping the relevant smaller coalition partners to pass the 5%-hurdle.²¹

A third element to be mentioned here is the procedure of assigning PR-seats to party lists. Whereas New Zealand's **MMPS** allocates national seats to national party lists (cf. Roberts 2001), PR-mandates in Germany are first distributed at federal level, but then re-allocated to party lists at the *Länder* level. This rather complex procedure reflects the federal structure of the German political system.

To sum up: The model character of the MMPS does not necessarily include all technical details of the German system like two-ballot voting or a 5-percent threshold. We might easily imagine MMPS systems with a single ballot and no electoral hurdle applied. It is however important to note that the intended effects of the system will still depend not only on its overall structure, but also on certain technical details. Such provisions will necessarily include the existence of a legal threshold, the type of the ballot system and the procedure for "counting" the candidates elected in single-member constituencies.

3.2 *Contextual factors of MMPS in Germany*

German governments have typically been effective, stable and long-lived. This success is obviously not only caused by the technical provisions of the electoral system as outlined, but also due to some features of the overall party system (capacity to practice coalition-building, political culture and development in a broader sense). We would

normally assume that by designing electoral systems we might also influence the party system of a given country. But changes in the party system may also directly influence the working of the electoral system. This is also true for the German case, where party system change mainly explains different outcomes of the MMPS over time.

Table 2 shows the most important effects of the electoral system in *Bundestag* elections over time. There are two main observations to be made in this regard:²² First, the performance of the **MMPS** has been remarkably constant during the last 50 years. This is not the least due to the structural stability of the German party system. Second, greater changes in the party system systematically coincide with modified effects of the MMPS. This can be illustrated by both the mechanical effect of the 5%-threshold ('No. of wasted votes') and by the 'number of surplus mandates' before and after re-unification. The astonishingly big number of the surplus mandates after 1989, for example, has not only been caused by particularities of electoral districting in certain *Bundesländer*, as commonly supposed. Another main explanatory factor for the genesis of such additional seats lies in political differences between East and West Germany, namely in the existence of the **PDS** as 'third force' in the Eastern part (see Grotz 2000).

²¹ Additionally, ticket-splitting was blamed for causing 'surplus mandates'(see Grotz 2000).

Table 3: Effects of the German Mixed-Member Proportional System, 1953-1998

Election Year	Seats for the strongest party (in %)	No. of 'wasted votes' (in %) ^a	No. of Surplus Mandates'
1953	49,9	10,6	3
1957	54,3	10,3	3
1961	48,4	5,7	5
1965	49,4	3,6	0
1969	48,8	5,6	0
1972	46,4	0,9	0
1976	49,0	0,9	0
1980	45,5	2,0	1
1983	49,0	0,4	2
1987	44,9	1,3	1
1990	48,2	4,2	6
1994	43,8	3,6	16
1998	44,5	5,9	13

Source: Federal Statistical Office;

Calculations by Grotz (2000). The 1949 *Bundestag* election was not included because of slightly different elements of the electoral system. ^a Sum of the votes cast for parties not passing the 5%-threshold.

4. MMPS as a Model for Kenya?

Which lessons can be learnt from this analytical sketch of the German experiences with MMPS? Care has to be taken in identifying the 'relevance' of one country's system for another's reform debate. Political institutions are often embedded in a country's wider political tradition and institutional environment and cannot simply be transferred elsewhere. Bearing this condition in mind, let me just draw some tentative conclusions for the Kenyan reform debate:

1. At first glance, the introduction of MMPS would both allow for a higher degree of proportionality and preserve the constituency MP. It would certainly increase complexity, but we should not forget that any other electoral system that might be selected will be more complicated than plurality system. MMPS would allow Kenyan voters to keep a part

of their electoral tradition unlike other systems such as pure proportional systems or alternative vote that would mean a radical departure from the practice so far and probably not easily take root. MMPS would also strengthen the political parties.

2. Designing a functionally adequate MMPS for Kenya would necessarily require a context-oriented 'fine-tuning' of the relevant technical details, such as the level of the legal threshold (e.g. 2% of the total vote), perhaps a single ballot, calculation of party seats at the national level, and a new delimitation of SMC-boundaries (roughly the same number of registered voters per SMC). Constituencies would inevitably have to be larger than at present in order to keep the Parliament to a manageable size.
3. A thorough analysis of the current party system and the results of the last elections (see annex) would come to the result that a

MMPS is an adequate choice for the Kenyan context only if the part of list seats is not significantly lower than the SMC part, and second, if the principle of coalition government is accepted. The 'winner takes all' logic hardly survives with a MMPS system. If for lack of time the SMCs cannot be redrawn and reduced before the forthcoming elections, adoption of MMPS would lead to an enormous increase of Parliament.

4. If SMCs can't be reduced, the Commission should therefore consider as a transitional option the introduction of other types of combined systems like segmented or compensatory system where there is less need for a balanced proportion of both parts of the electoral system.¹⁵ The current SMCs could thus be complemented with a fixed number of additional seats drawn from national party lists. But again, and whatever type of combined system is adopted, the political effects in terms of a more proportional distribution of seats will depend upon the ratio of plurality to list seats.

¹⁵ Segmented systems are applied in Guinea, Senegal and the Seychelles. In all these cases, voters have single vote, and this same vote is counted twice, first to determine the winner or winners in the constituency and then to calculate the overall percentage of the party at the national level. In Guinea 33 out of 114 members of the National Assembly are elected in single member constituencies and the remaining 76 from a national list. In Senegal, 70 deputies are elected in small MMCs by plurality and the other 70 members from a national list. In Seychelles 25 members are elected by plurality in SMCs and up to 10 proportionally at the national level.

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THE ORGANISATION AND OBSERVATION OF ELECTIONS IN KENYA: LESSONS LEARNT AND THE WAY FORWARD

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1. Introduction

Elections are a necessary component of democratic governance in many of the world's civilized countries today. The 1948 Universal Declaration of Human Rights, the 1966 International Covenant on Civil and Political Rights, the 1969 American Convention on Human Rights and the 1981 African Charter on Human and Peoples' Rights all primarily require governments to be chosen through free elections in which the right to vote is equal and universal. The International Covenant on the Elimination of All Forms of Racial Discrimination prohibits any racial discrimination affecting the right to vote or stand for election and expressly calls for universal and equal suffrage. The Covenant on the Elimination of All Forms of Discrimination Against Women prohibits discrimination against women. Election observation in Africa is a phenomenon that developed in the late 1980s as countries were transiting from one-party states and military rule to multi-party democracies. The repeal of section 2A of the Constitution of Kenya re-introduced multiparty politics in the country and ushered in competitive politics whose central feature is the holding of free and fair elections. Professor Goodwin-Gill in *Free and Fair Elections: International Law and Practice*, states:

"Experience and recent state practice confirm the necessity for oversight of the electoral process.... [and] for institutionalized responsibility for implementation by impartial election officials...."

"An oversight mechanism that enjoys the confidence of parties and electorate is especially pressing in situations of transition, for example, from single to multi-party systems, or wherever the impartiality of the administrative authorities is in doubt."

Both the 1992 and 1997 general elections as well as numerous by-elections to fill up vacant parliamentary seats were observed by groups of domestic, diplomatic and international observers, who gave their assessment of the competence of electoral management as well as a verdict on whether the will of the majority of the people had been reflected in the final result. This paper seeks to analyse the preparatory activities, actual monitoring and verdict making processes with a view to learning from them and making proposals for a brighter future for election monitoring and observation.

Inevitably election observation sets out to examine the electoral environment before, during and after the polls. It looks at the laws and procedures governing the management of elections as well as institutions and processes that impact on the conduct of free and fair elections. It further focuses on the rules, procedures and practice governing the political process and participation of voters, candidates and political parties at various stages of the political process. Finally, it makes a judgement on the freeness and fairness or otherwise of the election.

2. Organization and Monitoring of the 1992 General Election

The National Elections Monitoring Unit (NEMU) a pioneering domestic observer team in Africa was the single largest and most influential monitoring and observation initiative in the 1992 multi-party elections in Kenya. NEMU was a loose collaboration of civil society organisations that had individually expressed interest in monitoring and observing the 1992 elections. Its membership included the International Commission of Jurists (IGJ, Kenya Chapter), the International Federation of Women Lawyers (FIDA, Kenya Chapter), Professional Committee for Democratic Change (PCDC) and the National Christian Council of Kenya (NCCCK).

Initially, these groups had in proposals for funding sent to prospective donors, expressed desire to monitor and observe the elections as independent entities. Donors however held a different view and as a prerequisite for funding, these groups were required to come under the NEMU umbrella.

NEMU, having come together as an alliance, received substantial funding for the observation exercise, and was able to field an estimated 7,000 poll watchers in the 9,000 polling stations on the polling day. NEMU's main objective for observing elections was to be able to deter fraud and other election malpractice and thereby give credibility to the electoral process. NEMU also wanted to ascertain whether everyone entitled to participate in the process as a candidate or a voter was able to exercise that right. After the observation NEMU would give a verdict on the process, which would interest the international community who had put donor aid on hold. The verdict would also be important for the Kenyans, as it would inform them on the degree of transparency, fairness and legitimacy of the

electoral process. It was also hoped that those in authority would use the report to institute improvements in the process.

The NEMU project experienced a number of problems, as would any project of its magnitude. First, there remained a lack of clear roles between the organizations leading to some shouldering responsibility for cross cutting roles. Although the accountability and management structures were not so clear, the work done by NEMU was commendable and was later improved upon in putting in place monitoring machinery for the 1997 general elections. A number of international observer groups observed the 1992 general elections. The role and presence of international observation groups in elections in Africa, though now accepted as norm, remains contentious in the minds of some. The most often quoted reason for opposition to this group of observers is the limited period which they take to evaluate the electoral process and their 'fly in and fly out' operation tied to the polling day. International observers also peg their evaluation on higher or rather international standards, that local politicians and their supporters often tend to view as irrelevant.

A big number of international groups observed the 1992 electoral period in Kenya. Few of these organisations had bothered to engage in any pre-election monitoring activities. This is apart from the International Republican Institute a US based NGO closely linked to the Republican Party, which had conducted a brief survey of the electoral process in the pre-election period. The National Democratic Institute of International Affairs (NDI), another US-based electoral assistance body had also registered a brief pre-election presence but was later denied accreditation by the Electoral Commission of Kenya (ECK) presumably on account of its critical appraisal of the electoral environment as

being insufficient to facilitate free and fair elections.

The Commonwealth Observer Group took part in observing the elections, with what was then its biggest team ever to an election assignment. It hastily gave a verdict of free and fair elections for which it was severely criticised. Other international observer teams in the elections were drawn from Finland, Canada and Sweden, Egypt, Japan, Netherlands, Switzerland and Germany. In all, more than 150 external observers watched the elections.

3. Organization and Monitoring of the 1997 General Election

Like in 1992, the observation and monitoring of the elections was done as a joint effort by a number of organizations. The joint effort was called the Domestic Observation Project and constituted the Institute of Education in Democracy (IED), the National Council of Churches of Kenya (NCCCK) and the Catholic Justice and Peace Commission (CJPC). It had a promotional banner: *“Together for Peaceful Elections”*, to improve on the monitoring activities of the 1992 elections, this project carried out both long-term and short-term observation. This means that there was concentration on pre-election activities such as campaigns, assessment of the electoral environment and polling, counting and announcement of the results. The project deployed a poll observer in almost all polling stations in the country.

As far as international observation was concerned, most of the observers were diplomats posted to Nairobi. In effect it can be assumed that most of them would evaluate the elections with sufficient information on Kenya's recent political history and context. In contrast to 1992, when most observers came a few days prior to the polling day and observed voting in a few polling stations then rendered their

verdict, 1997 was a big improvement. It is important to point out here that the roles of international and domestic observers are complimentary to each other. But the role of the domestic observers remains crucial because these are the people who are more familiar with the circumstance of a country, its terrain and the language and culture of the people. They have more at stake because they remain in the country after the elections.

The observation of the 1997 election's was crucial as it would either build upon the gains made in 1992 or suffocate them. Luckily the clamour for constitutional, administrative and legal reforms that had manifested itself since the beginning of the 1990s had grown stronger.

Electoral Reform International Services (ERIS), a London based consultancy group designed the overall observation project structure in consultation with the participating organizations. Every participating organization was given a role and responsibility in the area where it had established a niche. In this regard, CJPC's niche lay in its countrywide network and therefore ability to access, recruit and deploy poll watchers. IED was considered to have a competitive edge in technical knowledge of elections and election observation whereas NCCCK was considered to have the best understanding of the electoral and political context and ability to deal with publicity and the media. Funds were managed by the respective organizations under the project. This was to avoid the problems that plagued NEMU where funding was centralized.

The 1997 observation effort saw the recruitment and deployment of 840 people to monitor the campaign process, 28,126 poll watchers, 420 count certifiers and 19 regional officers.

4. What Did Observers Look For in the Two Elections?

The objective of election domestic observation is, first, to deter fraud through the presence of observers inside polling stations and counting centres, and second, to make an assessment of all aspects of the electoral process. In so doing, observers intend to contribute to the integrity of the process and further democratic development in Kenya.

Election observation is the process of certifying the validity of all or some of the aspects of the electoral process. Sometimes the word "monitoring" has been used instead of "observation". Monitoring means observers have more involvement and are allowed to intervene when they see procedures are not being properly followed. Kenyan election observers have therefore been seeking change on the part of the ECK and the regulations, so as to be designated as "monitors".

Election observation is not a one-day event and observers must be interested in the various stages of the electoral cycle from registration of voters, the campaign, to voting, counting and verification procedures, the announcement of results and resolution of disputes. The government of the day has a unique role to ensure that these activities are carried out in accordance with set down rules and regulations. On their part, observers must support the democratic process, but must be non-partisan and neutral. If observers are perceived to be partisan this can irretrievably compromise the outcome.

In undertaking the exercise observers identified a list of constituencies where critical developments had or were expected to take place. These included constituencies that:

1. were strongly pro-opposition
2. were strongly pro-KANU
3. were newly created (1996)

4. were hit by pre-election ethnic clashes/fighting

5. had a history of violence around election time

6. had presidential candidates

7. had women candidates.

There was close scrutiny during the analysis and processing of information from these constituencies.

5. The Electoral Commission Of Kenya (ECK)

This body, being charged with the task of administering and managing an election, is very closely watched by observers as its role lies at the very heart of the concept of transparency of an electoral process. The degree of transparency depends on the standing and character of its members, particularly the chairperson. Competence is also an important component and so is integrity particularly in politically charged elections. Observing elections therefore involves close observation of the work and various aspects of the Commission:

Composition: Questions such as how the members are appointed and by whom, will arise.

- Human resources and training: Adequate human resources and specialised skills are required to implement an election. Observers take note of whether electoral officials are familiar with the tasks to be carried out and whether there is standardised training at all levels.
- Material resources: The independence of a commission is guaranteed by a transparent and sufficient budget provided from government resources. An observer is also interested in the adequacy of polling stations and equipment as well as the number of ballot papers and ballot boxes, their procurement process and security.
- Voter registration: The right to vote must be given to all citizens who have reached

qualifying age subject to reasonable restrictions.

- Registration of candidates and political parties: Political parties should not be unfairly refused registration; they should also be able to nominate candidates on equal terms.
- Election boundaries: These should be drawn in a transparent manner, with criteria which is fair to all groups. This will be achieved if the task is assigned to non-partisan experts. This will help eliminate "gerrymandering".
- Voter education. Observers should note the extent and effectiveness of voter education. The electorate should be fully informed of their rights and responsibilities so that they can make informed choices. They should also know when, how and where to vote.

6. The Campaign

The government is responsible for ensuring that there is a level playing ground for all the campaigning parties. Campaigns should be conducted in an environment that assures freedom of expression, assembly and association. Campaigns should be free from violence and intimidation to both candidates and voters, particularly by security forces.

7. Media

The media should be allowed to gather and report objective information without intimidation and censorship. Additionally, state-owned media should give equitable access and coverage to all the contesting parties. State regulation is necessary as was achieved by the 1997 Inter-Parties Parliamentary Group (IPPG) package. However, such regulation becomes futile unless it can be enforced.

8. Election Day Activities

On polling day observers observe polling station activities as well as the vote count. It is important to have observing personnel present throughout at the polling stations and in counting halls. In some cases observers carry out a Parallel Vote Tabulation (PVT) with a view to counter-checking the vote count. Exit polls have been carried out where it has been considered necessary to forewarn the incumbent of the impending results.

9. Election Report

A report on the electoral process is an integral part of the observation exercise. It is not only useful for posterity but can be useful to other countries going through the same process.

NEMU'S 1992 General Elections report stated that the process had been so flawed that elections could not be termed free and fair. But the observers nevertheless urged the Kenyans to accept the results for a number of reasons. One reason was that by the time Kenyans went to the polls on 29th December 1992 these flaws were known and yet they had chosen to go on.

The other reason was that although the ruling party had had an undue advantage some important gains had been made in the democratisation process with these transition elections.

The 1997 elections had similar flaws to those of 1992. These shortcomings were detailed in the report as well as in the final statement and completion of the vote and count. The statement stated that, as a whole, the election results reflected the will of the Kenyan people. The statement coming from a combined group, which Kenyans had accepted as observers helped restore tranquillity and enabled Kenyans to get on with their lives.

Reports have also been produced by the IED, which has observed numerous by-elections in the intervening period. All these reports have pointed out what the flaws are and a majority of these seem to recur from election to election. Some of these are outlined below.

10. Lessons Learnt and The Way Forward

(1). There is need for a comprehensive electoral code, a single piece of legislation covering all aspects of the electoral process. The code should address among other areas of the electoral process:

- (a) registration of political parties and their Code of Conduct enforced by the ECK.
- (b) financing of political parties through state subsidies
- (c) disclosure of sources of funding of political parties and candidates ensuring accountability for funds spent at election time
- (d) a provision for independent candidates
- (e) counting of votes at polling stations
- (f) continuous voter registration
- (g) expand the forms of identification by a voter beyond the national identity card and passport during the twin processes of registration
- (h) voters to be assisted by a person of their choice and not the presiding officer
- (i) where a recount of votes shows clearly that a petitioner won the

ejection, a by-election should be dispensed with and the petitioner declared winner

- (j) Kenyans abroad should be offered facilities to take part in elections
 - (k) wider mandate enabling domestic observers to "monitor" the process
- (2). Provision of civic education should be given priority through the use of nationwide programmes. This should include the use of the Kenya Broadcasting Corporation (KBC). In this regard the Electoral Commission of Kenya (ECK) should work harder in fulfilling its constitutional mandate to promote voter education.
- (3). There is need for an Act of Parliament to deal with the issue of constituency boundary delimitation with the objective of ensuring that the tenet of one man, one vote holds true throughout the Republic of Kenya.
- (4). The Electoral Commission of Kenya should undertake a management audit of its capacity, performance and future needs and restructure accordingly.
- (5). Observation and monitoring projects should cover a longer time frame and should be planned well in advance.
- (6). Due to the donor requirement for an election monitoring coalition, the identification of issues, which require upfront agreement between partners, should be reached, and a procedure for their settlement spelt out. Such agreements should also include a lucid allocation of responsibilities to different players.

- (7). Funds should be released in a timely manner to avoid a rush in project implementation.
- (8). Monitoring and observation organisations must seek ways and means to expand their role and mandates, it is not enough for them to simply issue 'factual and businesslike' reports, however strongly worded they may be. There is need therefore to re-model both domestic and international monitoring and observation exercises, with a view to broadening their mandate, and where possible accord them international legal status and recognition.
- (9). Domestic monitoring and observation civil society organizations should seek ways to secure financial freedom and sustainability. At the same time, they should enhance their linkages with other civil society actors, both local and international. This twin strategy will ensure them of independence on the one hand from donor stranglehold and on the other hand offset their power deficit with the state.

THE ROLE AND FUNCTIONING OF ELECTORAL COMMISSIONS

Théo Noël
Electoral Consultant

1. Electoral Administration Models, Role and Functioning

The electoral administration (Electoral Commission or government office) is the key to the conduct of credible elections in democracies; the more independent and competent the electoral administration is, the more credible the results will be.

Let us remind ourselves who are the players of an electoral process: basically the electorate and the political parties (candidates). In addition, components of the electorate as the civil society and the media will also play a role. In order to successfully manage an electoral process, the election body has to acknowledge all the players and associate them to the process. The responsibility to conduct elections in democracies varies all over the world from a government office to an independent electoral commission.

Models vary also from advanced to developing democracies and rarely the same model can be used in both types of democracies even if the qualities for a good electoral administration are the same. In developing democracies where **multiparty** is quite new, there is fear that the former government will control the electoral administration to its benefit and the commission model is chosen because the capacity of the government to run credible elections is not trusted.

Rafael Lopez-Pintor in a study for **UNDP** found that over the world 121 developing countries, the Executive branch exclusively run elections in only 21 countries (18%)

while Independent Election Commissions are running elections in:

- a) 70% of the countries in Latin America;
- b) 54% of the countries in Asia and the Pacific;
- c) 50 % of the countries in **Sub-Saharan Africa**;
- d) 71% of the countries in Eastern and Central Europe.

In the advanced democracies, 14% have independent electoral commissions but responsibility for the conduct of elections is no longer a purely executive function.

In 75%, or 15 of 20 advanced industrialized democracies, the governments - not independent commissions - are responsible for conducting elections; there are numerous institutions with oversight responsibilities that keep the system honest as an independent Judiciary, good media access and coverage, good political parties organization.

Let us review briefly various models in use around the world, their role and functioning, as spelled out by Robert A. Pastor.

2. Electoral Administration Models

2.1 *Election Office within the Government*

An election office is created and mandated to conduct the elections; it can be permanent or ad hoc. If it is *ad hoc*, civil servants are seconded from other government offices; if it is permanent, regular staff man the office. A few examples of this model are the United Kingdom, France, USA Counties, Congo-Brazzaville. Usually, the establishment of the registry of voters constitutes the first

step, followed by the accreditation of the political parties wanting to run in the election and the organization and management of the polls followed by counting.

2.1.1 Role

This election office is responsible for the conduct of the elections in all its aspects including the certification of the results.

2.2.2 Structure and functioning

Usually, a permanent office is created within the Ministry, a budget is allocated and staff are seconded from other government offices. The subsidiary legislation has to be prepared by the Office but is published as decrees or instructions under the Ministry authority. The government services are used at the organisational level to plan, organize and manage the electoral process e.g. in France, the **Prefets, Sous-Prefets** and other civil servants are used for the elections. This approach works satisfactorily in advanced countries where the civil service is respected, but rarely works in transitional elections.

2.2 Election Office within a Government Ministry but Supervised by a Judicial Body

Same role and structure as above except that this commission is composed of judges, which oversee the government ministry responsible for conducting the elections. This has some, but not all, of the problems of the first model.

2.3 An Independent Election Commission Manned by Experts and Directly Accountable to the Parliament (Term Or Life) Composition

This model consists of one or more commissioners (Australia, Ghana, South

Africa, Thailand, Philippines) nominated and appointed by the Parliament and accountable to it; those commissioners are chosen among distinguished people and answer to clear criteria of competence and proven records in administration. When the Parliament is not one-sided, such a commission can be very credible, but when a **single** party dominates the legislature and virtually silences the opposition, such a Commission naturally leans toward the power. The term of office varies from staggered terms of five or ten years to life.

2.3.1 Role

This body is empowered to conduct the elections including the certification of the results; the courts will decide **on** any challenge of results.

2.3.2 Structure and functioning

This body receives its budget from the Parliament, has its own office and staff at all level; it is fully insulated from the government, although in some countries the political parties have an input in the nomination of the constituency returning officers.

2.4 A Multiparty Election Commission Composed of Representatives of the Political Parties

Examples of this model are Indonesia, Mali and some other West African Countries. In some cases, the presence of political parties representatives creates a balance by ensuring that all parties have a voice in the deliberations and an ear in **learning** what is being planned, but this model of electoral administration is subject to partisanship when it comes to decide on technical matters, thus impacting on the integrity of the process. Usually the ruling party dominates such a body. Apart from that, if there are too many parties in a parliament,

then these ECs become unworkable. Even when there are just two parties, these commissions can become polarized unless there is an effective, non-partisan chair.

2.5 A Non-Partisan Election Commission Composed of Distinguished Individuals from a List Proposed by the President and Legislature, Reduced by a Veto by the Political Parties, and Selected by a Group of Judges for a Ten-Year Term.

This commission could have autonomy and authority, although much depends on the leadership of the Chair

2.6 A body nominated by the Executive and the Political Parties and appointed by the President

This is the model in use in Kenya presently.

2.7 A Body Nominated by the Government, the Political Parties elected in the NA and the Civil Society approved by the NA and appointed by the King

Cambodia has chosen this model but problems occurred when it came to nominate the representative of the Civil Society because there was no legislation on the NGOs; over that, members from the elected parties in the NA are appointed for a five year term but the NA has a four year term of office, at one point leaving a member nominated by an elected party on the Committee while a newly elected party has to wait one year before nominating a member.

2.8. A Body Nominated by the Department Councils, chosen by the Three Powers and Appointed by the Executive.

The Constitution of Haiti prescribes an electoral administration body of nine persons chosen by the three branches of the government (3 each) from a pool of 27 people nominated by the nine Department Councils (3 each);

3. Principles for a Good Electoral Administration

In March 2000, the INEC of Nigeria drafted a set of guiding principles for the organisation as a whole. Those guiding principles are also part of any good election administration body around the world, as described by Andrew Scallan in the ACE Project (IDEA and IFES), be it an office within the government or a commission/tribunal.

3.1 Independence

A legal independent entity with full financial and administrative authority who demonstrates respect for the law and who is insulated from legislative and executive influence.

3.2 Impartiality

The EC endeavours to create a level playing field for all political actors.

3.3. Competence in management

The EC commits to providing the highest quality election services to the people and ensure that merit will be the basis for the compensation, promotion and recruitment of staff (gender balance). Obviously, we do find here also the structure of the electoral administration which had to be adapted to an electoral process, the definition of authority and responsibilities of each of the appointed body and the secretariat (when the model is an electoral commission).

3.4. *Transparency*

The EC is opened and keeps the stakeholders informed of all its activities. Its annual activities and financial reports are made public as well as its operations during or between elections.

3.5. *Credibility*

The EC strives to ensure that the stakeholders will readily accept all its actions and activities and becomes an institution that people can trust. All decisions are taken in view of levelling the field and running a process acceptable by all the stakeholders.

4. **Examples of Electoral Administration Bodies**

4.1 *Cambodia*

National Election Committee composed of 11 members nominated by the Ministry of Interior (2), the Political parties elected in the NA (4), the NGOs (1), the government (2) and two independent distinguished persons appointed by the King.

4.1.1 *Role*

The Committee is empowered to conduct the elections, to accredit the political parties enlisted to compete in the election and rule on disputes.

4.2.2 *Structure and functioning*

The Committee is assisted by a Secretariat at the national level, provincial and communal commissions at the lower levels.

The Committee members have a tendency to institute themselves as operators instead of policy makers and oversight body.

4.2 *Indonesia*

The electoral administration consists of two bodies, one making policies (53 members, 48 political parties and 5 government), one overseeing their implementation (53 members, 48 political parties and 5 government) by a Secretariat from the Ministry of Interior. This complicated structure is under review and will be replaced for the next Presidential Election in 2004.

4.3 *India*

EC authorized by the 1950 constitution: one of the most independent body in the world: "the superintendence, direction, and control of the electoral rolls for the conduct of all elections to parliament and to the legislature of every state and to the offices of President and Vice-President." Chief Election Officer appointed by the President, insulated from both legislative and executive influence. One of the most independent electoral administration in the world.

4.4 *Costa Rica*

Supreme Electoral Tribunal: 3 magistrates and three alternates, all elected by a 2/3 vote of the Supreme Court of Justice to six-year staggered terms.

4.5 *Mexico (Two bodies)*

Mexico, following decrees of electoral administration being an extension of the Executive and ruling party arm, has finally passed a reform creating two bodies: The Federal Election Institute mandated to conduct the elections and The Federal Electoral Tribunal mandated to adjudicate complaints about the elections. This structure appeared to run well and the last elections were credited as credible, fair and free.

4.6 Thailand

The Electoral Commission of Thailand created by an Act of Parliament is composed of five Commissioners appointed by the Parliament. The ECT is fully independent and empowered to conduct the elections and to accredit the political parties.

4.7 Ghana

The Independent National Electoral Commission (INEC) was first appointed in 1992 and was seen by the opposition as the arm of the Executive (NDC Party). In 1996, the INEC opposite to 1992, resisted pressures from the NDC to conduct the presidential and primary elections on different days, to reject the compromise on the issuance of ID cards, to extend the time for registration, to vet the names of domestic observers and the like; by doing so, it establishes itself as an independent body.

4.7.1 Composition

It is composed of seven commissioners, three full time and four part time, supported by a secretariat; the INEC is a legal entity.

4.7.2 Role and functioning

The INEC is mandated to delimit the constituencies, to conduct the elections, to conduct voter education and to assist any organization with the election of their board or executive members.

In addition, to the National Secretariat, there are 120 permanent election officers, one in each district of the Republic. The INEC is also supported by an information technology division, one of its main tasks being the maintenance and update of the permanent registry of voters.

4.8 South Africa

The Independent Electoral Commission (IEC) is appointed by the Parliament chosen among distinguished citizens. It has full financial and administrative independence.

5. Notes on Guiding Principles of Electoral Administrations

The electoral administrations around the world as well as the ones listed above are not all respecting the guiding principles for a good electoral administration- far from that. Those principles apply for all model of electoral administration, be it government or commission model to be successful in conducting credible elections.

6. Role of the Electoral Administrations

The role also varies from country to country. Apart from conducting a credible election, an electoral administration is usually also mandated to carry voter education/information and in some countries civic education like in Panama.

In other countries, they also have the responsibility to delimit the electoral areas or constituencies, a highly sensitive operation who can impact positively or negatively on the representation principle and the results of the elections (gerrymandering).

7. Best Model for Kenya

Kenya has to decide what will be the best electoral administration body for the Republic and the good of the people. Elections in the past were marred with allegations of rigging, stuffing of ballot boxes and manipulation of the results. Prior to 1992, elections were conducted by a government office headed by a Chief Election Officer; then a 12 members

commission was appointed. In 1997, 10 more members were added following a goodwill agreement between the government and the opposition parties.

The bottom line for an electoral administration when running elections is that the results are enough credible to be accepted by all the stakeholders of the process: the electorate and the political parties. In view of that, which model will the best suit Kenya?

7.1 Present Legal Frame

The constitution states that there shall be an Electoral Commission composed of not less than four and not more than 22 members appointed by the Executive. The National Assembly and Presidential Act, Chapter 7 further prescribes that any expenses properly incurred by the Electoral Commission in the performance of its duties under or by virtue of this Act be defrayed out of moneys provided by Parliament; an accounting officer of the Commission is appointed under the Exchequer and Audit Act.

Article 34 of the same Act empowers the Commission to make regulations generally for the better carrying out of the purposes and provisions of this Act in 20 areas provided these regulations have been laid before and has been approved by a resolution of the National Assembly.

7.2 Existing body

The present administration consists of a body composed of 22 members, 12 appointed by the Executive and 10 by the opposition political parties for a term of five years, supported at the national level by a Secretariat, at the District level by District Election Coordinators and at the Constituency level by returning officers.

7.2.1 Analysis

The ECK is not fully independent as the legal frame quoted above proves it; it is not a legal entity, cannot sue and be sued, cannot acquire assets and dispose of them. The word independent does not appear in the name of the Commission and is not entrenched in the Constitution.

Furthermore, the members are all appointed by the Executive and there are only criteria to be respected for the Chair and Vice-Chair who have to qualify as Justices. The Commission has no financial independence, is dependent on the Parliament for its funds and is subject to the same rules as any other government body. Its accounting officer is appointed by the government and the District government Treasury is doing the accounting for the ECK expenses at this level.

The ECK can only appoint staff after consultation with the Treasury. The regulations made by the Commission can only be enacted once approved by a resolution of the National Assembly.

The Constitution states that the ECK shall not take instruction from anybody but on the other side it didn't grant it the means not to take instruction. Those are all serious infringements on the independence of the Commission.

There is no justification for such a high number of members except for a situation resulting from a political stand off as it happened in 1997. The solution agreed to appoint 10 more members might have been acceptable at that time to provide the opposition parties a say in the electoral administration decisions but in a normal situation it would have not been a good solution. Political parties have to admit that their interest will be better served by non-

partisan competent members appointed by the Parliament and accountable to it.

7.2.2 *Number of commissioners*

The ideal number of members for an electoral administration would be one but this model works well if the three branches of the government are distinct and independent from each other, particularly the judiciary. A number between 3 and 5 or 7 is acceptable; this pattern being closer to a High Court composition.

8 Guiding Principles

If we look at the guiding principles for a good electoral administration, independence stands as the first: an independent legal entity appointed by the Parliament and accountable to it (A formula has to be found to nominate and appoint the members so that the people nominated are the best qualified for the job).

Competence starts with the members (qualified) of the body, the more qualified they are, the best policies they will make. Then, it continues with the staff-competence in management, operations, logistics, legal affairs, training, public relations, administration, information technology and the permanency status of the staff. Training is key in improving the competence of the staff. The structure of the electoral administration has to be adapted to the mandate of running elections; otherwise, there will be flaws and the integrity of the process may be questioned. Information technology support is now key to the operations of electoral administration. Its role has developed so much in the last decade that it has become a full division in most of the electoral commissions or offices. Information technology provides better and more accurate control on the registry of voters, accurate planning for the operations (materials and equipment), accurate logistics

plans, faster reporting of the results, accurate and faster payroll.

Impartiality is key in building the credibility of the electoral administration. Non-partisan decisions helps to level the playing field and provides equal services for the stakeholders, mainly the political parties and the candidates.

Transparency is a quality resulting from a decision of the commission to respect the right of the public to be informed of its activities. The Commission publishes its budget and its financial report; it also informs the public on the electoral timetable and operations. Credibility has to be established over the years, it is not given. If the electoral administration design and implement an electoral process in which the stakeholders trust and which produce credible results, then its credibility will be established and will be reinforced over the years.

9. Conclusion

Which is the best model?

It does not belong to the presenter to propose a model for Kenya. One is already in use that can be considered; a previous report reviewing the structure and role of the **ECK** done in February 2002 by **IFES/USAID** already provides a number of short and long recommendations for the Government, the Constitution of Kenya Review Commission, the ECK, the Political Parties and the Civil Society.

To choose a model which will best suit Kenyans, a number of factors discussed in this paper have to be taken in consideration: historical and cultural background, the objective of conducting democratic credible elections, the role of the electoral administration (elections, voter education, delimitation of the electoral areas), the best structure to attain those objectives and goals.

Will the proposed model be a legal, permanent, independent entity appointed by the Parliament and accountable to it, chosen among distinguished Kenyans, well insulated from political, legislative and executive influence or a model like the existing one or even an office of the government?

Will the proposed model determine clearly the authority and responsibilities of the Commission and the Secretariat?

Will the proposed body be funded by the Parliament, in control of its finances and staff, empowered to enact the regulations and to accredit the political parties?

Will the term of office of the commissioners cover more than one election? Will the appointments be staggered?

Will all the regular staff of the Commission be permanent?

Will this body be empowered to enact regulations?

Will this body be empowered to register and disenfranchise the political parties running in the elections?

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Regulation of Political Parties and Electoral Systems: The Kenyan Experience

Hon. Ochilo Ayacko, MP

1. Political Parties in Independent Kenya

- (a) 1963-1969 : **Multiparty**
- (b) 1969 - 1980 : *de facto* one party
- (c) 1983-1992 : *de-jure* one party
- (d) 1992 - present : **Multiparty**

2. What Role have Parties been Playing?

Party sponsorship has been a must in Presidential, Parliamentary and Civic election since independence - section 53 and 34 of the Constitution of Kenya, National Assembly and Presidential Elections Act, and Local Government Act, Cap 107 and Cap 265 Laws of Kenya. Standing **orders in Parliament** presupposes party-membership **i.e** Committee Membership is shared by parties on *prorata* basis.

There is no other role given to parties in any public dispensation.

3. Existing Legislation **that Touch on Parties**

- (a) Constitution of Kenya, sections 53, 34 and 124 - parties are not defined in any state except in the constitution which states that an organization registered under a law requiring the registration of political parties is a political party.
- (b) Parties are registered under the Societies Act Cap. 108 and are at the mercy of the Registrar General.
- (c) National Assembly and Presidential Elections Act and the Local Government Act stipulate the role of parties in elections.

4. Recommendations on Legislation to be Put in Place to Regulate Parties

- (a) There is need to put in place legislation to provide for protection and privileges of parties registration, meetings and funding of parties
- (b) There is need to review the standing orders to embrace **multiparty** politics
- (c) There is further need to consider independent candidates participation in politics.
- (d) There is need to discourage tribal, **racial** and sectoral parties
- (e) There is need to regulate party to party relationship and ultra-party relationship to ensure **multy-party** democracy thrives.

REGULATION OF POLITICAL PARTIES AND ELECTORAL SYSTEMS: THE KENYAN EXPERIENCE

Hon. Farah Maalim

1. The Ruling Party's Control

Our experience is one of total deregulation of the ruling party and absolute, arbitrary and whimsical regulation of all the opposition parties by the ruling party. The reality grounded in the Kenyan experience is that not even a thin line separates the ruling party (K.A.N.U) and the government (civil servants, military, police and paramilitary police). The absolute influence of the ruling party (Government) pervades absolutely.

In 1992 in Kakamega town when an administrator was warned by Martin Shikuku to be fair to the opposition parties or face the consequences of his actions when the opposition comes to power, the administrator replied, "I do not intend to work for an opposition Government. I will resign when you come to power." The administrator in question was soon after promoted. The tradition in our short multiparty democracy history is that the opposition parties operate in any form outside the parliament's chambers, at the pleasure of the government of the day. It is not uncommon to see opposition leaders being chased and clobbered in the streets of our towns and cities by the police and Government agents like common criminals. Democracy has for the last ten years served to legitimize dictatorship period!

2. Funding of Political Parties

It is absolutely imperative for the Government of the day to promote democracy and fair play in the politics of the country. All parliamentary political parties should be funded from the

consolidated fund through a structured statutory format.

3. Party Democracy

Strong and well-organized political parties are requisites for a functioning democracy and stability. Functioning and stable democracy is a powerful stimulant for investments, job creations thus leading to an economic growth.

We have in Kenya a highly heterogeneous society divided along ethnic, religious, regional and class lines. The experience in Kenya is that candidates from the same political party but different regions often times preach different messages to their peoples during campaign periods. In my opinion, third world developing countries need parties that are strong political organizations. Strong political parties give the public its greatest potential for influence. When a party is cohesive and disciplined enough to adapt a common national platform, which is unconditionally accepted by all its candidates, the electorate has an excellent opportunity to decide the policies by which the nation will be governed. Voters in all the constituencies have a common choice and consequently can act collectively.

Because of the absence of strong party organizations with central policy framework. Presidential (executive) based politics has assumed center-stage in Kenya. President centered politics tend to focus on ethnicity and the personality of the president period. Party centered politics in contrast is formulated by a broader spectrum of leadership and provides a fully representative set of views. We have a dark history in our recent past occasioned by personalities

based political contests. Kenyan political parties are relatively weak organizations. Individuals control the parties and the money necessary to win elections. Lack of party resources leading to inability to hire capable human resources are responsible for the weak party organizations. Parties are decentralized, fragmented and highly heterogeneous safe for civic, parliamentary and presidential nominations and national congresses. Nominations are conducted by the headquarters for a number of reasons including collecting a determined fee from the contestants. Whereas all parties hold their congress in Nairobi, delegates' lists are always drawn up by the leaders and have no role beyond choruses of approval and collecting small stipends after the facade. Often times, they are stranded in Nairobi in miserable conditions after completing the rubber-stamping ritual.

A political parties' Act should be enacted in Parliament to address registration and issues such as funding for political parties, a code of conduct for political parties with far-reaching penalties for offenders, provide for a director of political parties appointed by a constitutional body and approved by at least 2/3rds of parliament, a requirement of political parties to project the diversity of Kenya in its top leadership team, a rationalization of the careless proliferation of political parties- parties should be expected to achieve certain minimum national votes ratio, failing which they should be **deregistered**, registration of new parties be subjected to rigorous requirement i.e. 50,000 authentic signatures and a proper well thought-out manifestos, individual party internal elections/congresses to have minimum acceptable democratic features. The likes of the just concluded **K.A.N.U.s Kasarani** facade should not be allowed by an appropriate and independent regulatory structure.

I have appeared and presented before the commission late last year my party's

position on our preferred electoral system. An appropriate electoral system should be able to perform some very important political and social functions in an institutional framework namely;

1. It must be representative - to ensure adequate representation of women, youths, minorities and special interest groups in parliaments. It must also present a fair representation of parties according to their votes.
2. The electoral system should enable the formation of an effective parliament based on a reduced number of parties. It should also allow for the formation of a Government based on absolute parliamentary majority of a party or **party** coalitions.
3. The full and responsive participation of the voter in the process.
4. And finally, the electoral system should be simple and not difficult for the electorate and election administration to understand and operate.

My party holds that parliament should be expanded by at least 1/2 (half). The additional seats to be won through proportional representations. Voters should elect a party of choice in addition to the civic, parliamentary and presidential preferences. The additional seats should address among other things, women, youths, marginalized communities, special skills and other minorities who are poorly represented in our parliament. Presidential elections to be conducted on the basis of 50% plus. This will most likely extend to run-offs. A president elected by over 50% of the voters will have the support of a majority of **Kenyans** and the necessary legitimacy to rule.

THE MANAGEMENT OF POST ELECTION DISPUTES

Ishan Kapila, Advocate

1 Election Petitions

Perhaps my topic today should be entitled "The Mismanagement of Post Election Disputes in Kenya". Disputes of this nature are governed by the National Assembly and Presidential Elections Act, Chapter 7, Laws of Kenya. Such disputes are meant to be resolved by way of election petitions in conformity with the Act and the Election Petition Rules contained therein. Over the years election petitions have become more and more redundant to some degree because good and proper laws contained in the Act are not followed by the Electoral Commission and its Returning and Presiding Officers; partly because of a selective and insincere interpretation of those laws by election courts and lastly, because of poor amendments made to the law.

To fully understand why Kenya's election courts are totally **unsuited** to give effect to the will of the people as expressed at elections it is necessary to briefly examine the history of election petitions in Kenya. In the past, two separate election courts would be constituted each consisting of three judges of the High Court of Kenya. It used to be said that one bench was for election petitions in which the Executive did not particularly care about the outcome, and the other was regarded as a "fixing bench". In the case of one Presidential petition the election court made a ruling adverse to the incumbent President and was promptly **disbanded!** Nevertheless it was felt that a three-man bench was more difficult to influence than a court consisting of only one Judge.

A further problem was that the law was amended to deprive the parties to a petition of the right of appeal to the Court of Appeal. In matters in which the loser was of the view that

the ruling or judgement of the court was not fair or just, he or she had no recourse to any other tribunal. There is no doubt that there were many cases of this nature. A prime example of this is the petition in which a very large number of ballot papers were deemed to be spoilt votes because they bore two marks and it was not possible to identify which candidate the voter intended to vote for. The ballot papers had been kept in the "safe" custody of the court. It was obvious that the second mark had been made while the ballot papers were in the court's custody because the totally inept spoiler of the votes had used green ink to attach the second mark whereas the actual voter had used blue ink! It was therefore highly unlikely that each of the approximately 50,000 voters had made one mark on the ballot papers and then used a different pen to make the second mark.

Candidates guilty of wrong doings themselves during the election are often nervous of being cross-examined and therefore use a proxy in the form of a registered voter in that constituency to act as the Petitioner. This has its own problems because often that Petitioner's evidence is hearsay and because the loyalty of the Petitioner to his master cannot be taken for granted. This was demonstrated in one election petition after the 1997 elections from a constituency in North Eastern Kenya where the Petitioner was persuaded by his opponent to withdraw his petition. Unfortunately the respondent and/or his advocates did not realize that under the Election Petition Rule contained in the Act, it is permissible for the Petitioner to be substituted by another if the original petitioner wishes to withdraw. They found a simple solution- they persuaded the second petitioner to withdraw as well and managed to exhaust the will and the means of the losing candidate until he gave up.

The nature of Kenyan elections is such that the election offences and corrupt practices outlawed by our election laws are committed as a matter of course by virtually every candidate. The first amendment to the law that recognize this was the deletion of the limit to the amount of money that could be spent by a candidate as election expenses. Other offences remain. Any candidate who does not hand out money or bags of sugar to voters has no hope of winning and our courts find ways of turning a blind eye to these offenses of bribery. In many areas of Kenya, witchcraft is still believed in and many candidates retain the services of strange medicine men and spiritual healers. This offends against the prohibition against undue influence but again is usually disregarded by our courts. The prohibition against treating is similarly ignored and candidates have huge feasts for the voters in their constituency. This all results in the written law contained in the Election Offences Act, Chapter 66, Laws of Kenya being regarded as largely irrelevant in the conduct of elections.

Section 19 (2) of Chapter 7 provides for a petition to be filed in connection with the nomination of candidates for the Presidency. There is no such provision concerning the nomination of a candidate for a parliamentary seat. This invariably results in any application made to the High used blue ink! It was therefore highly unlikely that each of the approximately 50,000 voters had made one mark on the ballot papers and then used a different pen to make the second mark.

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Section 19 (2) of Chapter 7 provides for a petition to be filed in connection with the nomination of candidates for the Presidency. There is no such provision concerning the nomination of a candidate for a parliamentary seat. This invariably results in any application made to the High Court (as opposed to an election court) being heard after the election itself has taken place and the result announced. As far as I know, no such challenge has ever been successful in practice. In a country where it is not unknown for potential candidates to be kidnapped on the day of or the night before the day fixed for nominations this results in great injustice.

2. Implications of Amendments to the Law

As stated earlier there have been a number of amendments to the law, many of which seem well **intentioned** at first sight but which in reality have been disastrous to the conduct of election petitions. The best and most important examples of this are the amendments to Section 20 of Chapter 7. In the past, the law required election petitions to be filed 28 days from the date of the announcement of the result of the election and for them to be served within ten days of that filing either by **gazettement** in the Kenya Gazette or by serving it on the duly appointed advocate of the respondents.

After the 1992 elections, the advocates appointed by one political party did not observe the law and served all the petitions filed by them personally on the respondents. Unfortunately the Executive may have been partial to that party and the election court created new law in not only deeming that personal service as valid but went further to pronounce it as the best form of service and all the election petitions filed by that political party were therefore validated.

Just prior to the 1997 elections Section 20 was amended to read, "a petition -

- (a) to question the validity of an election shall be presented and served within 28 days after the date of publication of the result of the election in the Gazette.
- (b) to seek a declaration that a seat in the National Assembly has not become vacant shall be presented and served within 28 days after the date of publication of the notice published under Section 18".

This amendment, that is, the insertion of the words "and served" went unnoticed by most candidates and advocates and resulted in nearly every petition filed in 1998 being struck out for want of service. The Court of Appeal went further and stated that the amendment meant the relevant rules concerning service contained in the Election Petition Rules were inconsistent with the

amended section 20 and no longer applied. It went further and stated that the only form of service provided by the law after the amendment was personal service (this was in the Presidential petition filed by **Mwai Kibaki** against President **Moi**). The result of this is that any candidate declared the winner of an election needs **only** to go to Alaska or some other far flung jurisdiction for 28 days to prevent a petition from being served **validly** upon him.

Another amendment which has had drastic consequences is the amendment to Section 23 of the Act which by sub-section (4) provides that, "Subject to subsection (5), an appeal shall lie to the Court of Appeal from any decision of an election court, whether the decision be interlocutory or final, within thirty days of the decision". This has resulted in the situation where appeals are filed against every decision of the election court, however trivial, which can result in the life of an election petition being extended **upto** the end of the five year period to the next election without the actual substantive petition being heard. In my view, interlocutory appeals should only be permitted with the leave of the Court of Appeal.

Another problem with this amendment is that the Court of Appeal has found that the appeal must be filed within thirty days of the decision. The Court of Appeal Rules recognize the virtual impossibility of typing and compiling the entire record of proceedings and therefore exclude that period from the time limit specified for the filing of an ordinary civil appeal. The Court of Appeal has ruled that that exclusion does not apply to appeals filed from decisions of election courts. One other amendment that has made the filing of election petitions extremely onerous is the amendment to Rule 18 of the Election Petition Rules which requires the Petitioner to deliver to the Registrar affidavits sworn by each of his witnesses 48 hours before the time fixed by the election court for the trial of the petition. At first sight, this amendment seems a good one in that it should result in the saving of much time which would otherwise

be required for the giving of evidence in chief by each witness. In practice, this results in enormous expense as the Petitioner has to assemble witnesses from each polling station, assess their evidence, identify those that he wishes to call, if necessary translate their affidavit evidence, and all at one location first, within the 28 days allowed to him to file his petition and then within the period allowed to him 48 hours prior to the date fixed for the hearing of the petition.

The Court of Appeal has also held that it is permissible for advocates who are members of the Electoral Commission to represent the Commission in election petitions. Whether that decision was right or wrong, it has resulted in the Electoral Commission's advocates during petitions denying the existence of any failings or irregularities in the conduct of elections, however glaring. This is clearly wrong and is an issue that must be rectified.

The net result of everything that I have stated is that it is virtually pointless to file an election petition in Kenya under the laws as they stand at present. Those laws must be amended to recognize the reality of the election process in Kenya and to recognize the deficiencies of the Kenyan judicial system. Until then, any honest advocate conversant with election petitions should advise election candidates to save their money and avoid the stress of filing petitions which go nowhere.

THE REGULATION OF POLITICAL PARTIES IN GERMANY

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1. Introduction

It would be very difficult to analyse German politics without an explicit discussion of political parties. In comparative analysis the Federal Republic of Germany is often described as the typical case of a political system that has formally institutionalised the structure of political parties, and we describe the working of the German politics as 'party government'.

In stark contrast to other established democracies like Great Britain, this important role of political parties is not part of German political tradition, and something relatively recent. In the following presentation I will therefore start by giving you some brief information on the history of political parties in Germany in the main part. I will then deal in detail with the main constitutional and legal provisions on party formation, party organisation, and party finance and finally I will try to draw some conclusions.

2. The German Party State: From The Empire To The Bonn Republic

The party system that has evolved in Germany after Second World War differs in structure and in function enormously from that of previous periods in German history. Both during the empire (between 1871 and 1918) and during the **Weimar Republic** (1918-1933) parties were numerous, fragmented and narrow-based and they were rarely major forces in political life. Most of the important decisions were made by the executive, the bureaucracy, the military, and the economic

elites, but not by the political parties. During this time, the presentation of meaningful alternatives to the electorate, the ability to translate party policy into governmental programs and to control governmental leaders, were functions rarely performed by German parties.

At various times between 1871 and 1933 twelve to 25 parties were represented in the *Reichstag*, and this high number of parties made stable coalition government difficult during the Weimar Republic. Additionally, political parties were viewed as divisive, parochially self-interested in outlook, and unable to provide that **unity-of-direction** which is required of government and essential to **the** stability and effectiveness of the state itself. It was somehow the result of the traditional German political philosophy: Whereas in Britain, government was seen as an instrument of the (civil) society on whose concept its capacity for leadership depended, in Germany, government was viewed as an organ of the state, as the political aspect of public power which, unlike administration, provided leadership and control (cf. **Dyson** 1982). If the parties embodied the fragmentation which was held to be characteristic of civil society, government was part of a wider, ethical community - the state - and acted with reference to the idea of public interest which transcended the rivalries of groups.

During the Weimar Republic the word '**Parteienstaat**' (i.e. party state) was primarily a pejorative term which offered an explanation of political crisis. The success of the Hitler regime (1933-1945) with its fascist single-

party has to be seen in this context. It stressed unity and denied the parties any role in the political process. The failed democracy of the Weimar republic and 12 years of totalitarian rule had underlined the weakness of the party tradition in Germany.

Following military defeat a slow process of political reconstruction started under close supervision of the Allies. The role of parties was now going to be very different in the new Republic. The experience of the Third Reich had destroyed the institutional framework of the state and discredited the political class which ruled it. Political reconstruction began from a *tabula rasa* and the parties were singled out to play a key role in public life. Indeed, the parties created the new state between 1945 and 1950. The promotion of party government and party democracy consequently figured as a dominant consideration in the framing of the Basic Law. Art. 21 outlined the conditions of party life and charged the parties with the responsibility for 'forming the political will of the people'. (I will come to these provisions in detail below). Powers of patronage allowed and even encouraged the parties to infiltrate wide areas of public life. They insured that not only parliament but the bureaucracy, judiciary, educational system, and the media were led directly or indirectly by their supporters. As strange as it may seem, the framers of the German Constitution supported this process and they were convinced that historical experiences proved that the impartiality of those in public office could not be taken for granted. To post-war German leaders, a non-partisan civil service meant at best a bureaucracy indifferent to the democratic system, and at worst one opposed to it.

Changing the role of political parties, however, was not simply a question of constitutional right. Political life was marked by war, flight, expulsion, and all these factors had created many special interests. The population was still deeply marked by non-democratic traditions. At the beginning of the 1950s, 'over half of the German population thought an elected parliament an unnecessary

institution' and nearly as many were unwilling to say that they favoured the existence of more than one political party (cf. Loewenberg 1978, 24). If the parties slowly gained the acceptance of the population this process was due to several factors:

First, there were new parties often with new leaders;¹ second, party government proved to be politically and economically successful, and third, the character and type of the political parties changed. The extremist, regional, and small special-interest parties that had made stable coalition government so difficult during the Weimar Republic either did not reappear in 1949 or were absorbed by the two major parties: Christian Democratic Union (CDU) and the Social Democratic Party (SPD) by the elections of 1953 and 1957. Eleven parties were represented in the first Bundestag in 1949 by 1957, there were four. By 1961 the party system assumed a two-and-a-half party form which was to remain for the next 22 years.

Post-war German parties became key carriers of the new state and assumed an importance and status unprecedented 'in German political history. The Bonn Republic was even termed a 'party state' German political scientist Kurt Sontheimer provided a clear definition of this term: "all political decisions in the Federal Republic are made by the parties and their representatives. There are no political decisions of importance in the German democracy which have not been brought to the parties, prepared by them and finally taken by them." (Sontheimer 1973:95).

This is certainly not the end of the story. By the late 1960s the term 'party state' assumed negative connotations, suggesting that party democracy had turned from a source of strength to one of potential weakness. A weakening of party legitimacy culminated in the 1970s and 1980s in a syndrome of

¹ The political elite of Nazi Germany was killed or fled abroad. Many leaders of the Weimar republic democratic parties had been killed by the Nazis or died in exile.

alienation from parties. Discontent had its source in the structure and character of the parties themselves. Ordinary members had only limited opportunities to participate in internal party life. This led to a stagnation in internal party life and the growth of political activity outside the parties. But the entrance of the Green Party into the Bundestag in the 1980s and the arrival of a fifth party at the national level following German reunification in the 1990s reveals a relatively healthy party system, with existing parties capable of attracting a large share of votes but also with a fair chance for new parties to gain representation (cf. Poguntke 2001).

3. The Constitutional and Legal Framework

3.1 *The Constitutional Provision of Article 21*

Countries differ greatly in the extent to which the role of political parties is formally recognised in their constitutions. In some countries parties are not now -or have not been in the past - recognised by the law. Legally, they are no different from any other private association. In the German Basic Law, they are not only explicitly mentioned, but even given a very prominent place within the Constitution.² The Article 21 of our Constitution is indeed the first which deals with the political institutions of the new republic; its priority reflects the fact that party representatives had drafted the constitution.

Article 21 of the Basic Law (or Constitution) mentions the role of parties:

- (i) The political parties shall participate in the forming of the political will of the people. They may be freely established. Their internal organisation shall conform to democratic principle. They shall publicly account for the sources and use of their funds and for their assets.

- (ii) Parties which, by reason of their aims or the behaviour of their adherents, seek to impair or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany shall be unconstitutional. The Federal Constitutional Court shall decide on the question of unconstitutionality.

- (iii) Details shall be regulated by federal laws.

You see immediately that only the first two sentences are 'positive' in the sense of granting the parties rights. The remainder of the article deals with restrictions and qualifications. I will now discuss the exact role of these provisions: The political parties shall participate in the forming of the political will of the people.

In a fully parliamentary system (like the German one) parties fulfill two basic functions: one is government formation, government stability and government alternation; second; parties have to represent and integrate a wide range of political currents into the political system. Within government parties provide a regular structure for the organisation of legislative chambers, for coalition building, and for co-ordination among officials both within and across branches of government. Within society, parties provide a forum for the debate of political ideas and a ready-made venue for political involvement by interested citizens.

The stipulations of Article 21 are referring more to the function of representation, and the role the parties have in government formation is more implicit from the overall construction of the Constitution. Without regular participation in the forming of the political will of the people, i.e. regular participation in elections, they lose their status as political parties.

From the wording of the article it is also obvious that other political actors have a role to play as well. This might refer to other actors in government or other political and

² In the Constitution of Weimar they were mentioned only once, in a very negative context: Art. 130 said: "All public officials are servants of the community, and not of a party."

social forces outside government like media or interest groups. The party representatives who presided over the birth of the Bonn Republic were well aware of the economic and legal dangers that could arise from the strong position of parties. Careful attempts were made by the parties themselves to check the possible abuse of political power, an abuse from which they had themselves suffered in the recent past, by a complex system of balances: a federal system which was designed to maintain a decentralised political structure, a Constitutional Court whose purpose was to uphold an independent constitutional jurisdiction and a strong protection of basic rights, and a Federal Bank whose legal duty was to safeguard the currency and financial stability. They may be freely established. This means the formation of a party must neither be hindered nor prevented. There is an equal chance for all.³ Freedom means without state interference. Parties may be freely established. The state does not fix or limit the number of parties. During the last 50 years of its existence, the Federal Republic has seen 150 parties, but only a dozen has made it to the Federal Parliament. Nor does the State regulate their political outlook or ideas. Most German political parties have become so-called catch-all parties not because it was prohibited to be sectarian or single-issue, but due to their chances of being elected. There have always been parties that represent minorities or regional interests, but German voters generally preferred not to vote them.

Parties do not need any approval of the state or the government in order to exist, but they need registration when nominating candidates for elections, as systems of proportional representation are associated with party registration. As political parties are granted specific subsidies, and these subsidies are linked to participation in elections, there is an additional need for registration which is however not done at the national level by a centralised registration procedure, but by the

respective Federal, Regional or Local Election Commission. Beyond proving an internal democratic constitution and fulfilling additional qualifications of candidature there is thus no requirement of national spread. At the local level, political associations are fielding candidates in elections that do not claim to be political parties, do not receive any financial subventions, but are not forced to respect the strict norms that apply to the internal organisation of parties.

3.2 *Elements of party organisation*

Their internal organisation shall conform to democratic principle.

According to the Basic Law and the Federal Constitutional Court 'democratic' means that the people's will is formed on a bottom-up basis. The principle of the 'forming of the will' within the party must secure this 'bottom-up procedure'. The formal and practical way of proceeding is to hold regular elections within the parties. This means party positions of higher rank are to be filled from lower ranks by voting. According to the Federal Constitutional Court - the parties due to their powerful position within the constitutional organs - parties have to fulfill the same democratic standards as the state itself.⁴ The provision of Art. 21 regulates the basic framework. The parties have still the freedom to precise and define their own statutes.

The theory of political parties makes a difference between what is called 'party in public office' and 'party on the ground'. The party in public office is the fraction in parliament, the national president of the party and a variety of appointed officials. The party on the ground is composed of the organised supporters throughout the country, including - some professional staff.

Germany has never been a country of mass party organisation. Individuals apply for

³ The demand for equality only refers to the formation of a party, not to any 'positive' support by the state.

⁴ The court called this the necessity of a ...structural homogeneity of state and parties that is required by the functional interaction of both.

membership, and are accepted (or rejected). Membership includes obligations and rights on selection of candidates. Membership in political parties has remained relatively low (in comparative terms) at only about 4 percent of the total national electorate and most of these do little beyond the payment of membership dues.

3.3 *Party Financing*

They shall publicly account for the sources and use of their funds and for their assets.

We have here two requirements: First, to provide information about the sources of their money, and second to do it publicly. An account can be only effective and comply with the requirements of the Basic Law if done publicly, normally in a written account handed over by the treasurer of the Party to the President of the Bundestag. Who hides behind the parties as money provider, who tries, by these means, to exercise influence and power, will be made public to everyone.

Regulations concerning party finance can be divided into two basic categories: those concerning expenditure and those concerning contributions and other forms of income. The first are intended to prevent candidates or parties from buying elections, and the second are intended to prevent lapse with money from buying candidates (cf. Katz 1997). Although the German Constitution is silent about the funding of political parties, I will first deal with this aspect, and then come to questions of reporting and accounting.

Political parties in Germany are state-funded. The level of funding is tied to the number of votes cast for a party. Any party that gains 0.5% of valid votes for the national party lists, or 10% of first votes cast in a constituency (if no regional list has been accepted), is entitled to benefit from these grants. Individual candidates are excluded but some parties included which do not gain representation in the Bundestag (5% threshold). Additionally the state provides specific grants to party foundations. Indirect subsidies include the allocation of free broadcasting time, free or

below-cost meeting facilities, free mailing, and, most important, tax deductions. (Political contributions are made deductible against income tax).

Generally, the attraction of indirect support is that it does not require the state to make decisions regarding allocation. Direct support, however, forces the state to decide which candidates or parties are eligible to receive support in the first place, and then to choose between two criteria of allocation: equality and proportionality. Equality has the advantage of apparent fairness and neutrality, as well as reflecting the fact that the costs of many forms of campaign activity are independent of the level of party's support. On the other hand, it encourages candidacies motivated only by the availability of resources and the splitting of parties to multiply the resources provided (cf. Katz 1997). The alternative of providing resources in proportion to support, whether measured by vote shares, seats in the legislature, or private contributions raised, however, lends to entrench the already strong. In the German case, where significant direct cash subsidies are provided, they are invariably allocated roughly in proportion to strength. This concerns general campaign financing and grants to political foundations.

State subventions were introduced in 1959 in response to a ruling by the Federal Constitutional Court against the practice of tax concessions for business donors. Parties faced then a situation of dependence on decreasingly adequate internally generated resources. State finance was introduced, and subsequently stepped up, in order to reduce the reliance of parties on industrial and commercial donors. Proponents of financial subsidies also stressed that democracy requires strong and competitive parties. The best way to ensure that parties have sufficient resources to carry out their democratic functions is to give them subsidies from the public purse.

The provision of subsidies from the state, however, contributed to a change in the

character of the parties. In particular, state subventions typically were given first and most generously to the party in public office, thus partially freeing it from dependence on, and control by, the party on the ground. State support has of course been accompanied by state regulations enforcing internal party democracy, but rather than allowing the party on the ground to control the party in public office, this may actually make the party in public office more independent.⁵ Complaints about the German 'party-state' mostly refer to the fact that the parties are so heavily subsidised, and that they seem consequently more like government departments than independent organisations. The style of party politics in Germany is indeed only sustainable through a very high level of finance. The large parties sustain bureaucratic organisations and are drawn by intense electoral competition into enormously expensive electoral campaigns. The fulfilment of these financial demands is way beyond the capacity of the parties themselves. Income from internal sources such as membership subscriptions, covers less than a half of the parties' requirements. The remainder is drawn from state subventions and from private, and more significantly, corporate donations.⁶

The other aspect of political financing is the control of contributions: These fall under three main headings: limits on the acceptable source of contributions, limits on the acceptable amounts, and requirements concerning disclosure. Even if in Germany contributions may arrive from any group or person, an attempt was made to limit the concentration of influence in a few hands by limiting the amount that may be accepted from a single source. With the Party Law of

1967 the parties were forced to publish annual accounts of their income (including contributions, expenditures, assets) and to list individually large donors (of over \$ 6000). Donations continued to increase, and in the late 1970s a number of scandals brought the issue into the open. The revelations suggested that there had been some 1,800 cases of infringements of the law involving all the main parties, some of the most senior political figures and many of the country's top business corporations.⁷

A commission of experts was set up in the early 1980s to draft a new framework for party finance and a law was passed in 1983. Annual party accounts would from now on have to include not only the source of finance but also the details of expenditure. Tax exemptions were granted to small donations; and concessions allowed on contributions up to 100,000 DM (45,000 US-\$). Payments through intermediaries were strictly proscribed, and financial sanctions introduced against irregular donations. In short, the new party law sought to place party finance on an even-handed, legally prescribed and transparent basis.⁸ Expenditure Controls has, however, remained the central problem of German party politics in the last years. Implementation of reform legislation breeds the need for more (and more complex) reform legislation. The elaborate restrictions designed to control the flow of money into the political process have encouraged the professional

⁵ "Democracy comes to be defined not by the capacity of citizens to direct government but merely by the fact of electoral choice. Choice requires parties, and so the state guarantees the provision of parties much as it guarantees the provisions of hospitals, schools, and parties, rather than being tools or leaders of civil society against the state, become part of the state apparatus" (Katz 1997).

⁶ State funding remains the largest single source of party finance. The volume of state aid rose from 5 million. DM per annum to over 150 million DM by the 1980s.

⁷ As the German federal system with its several layers of elected governments brought all major parties to government in some place, no party was exempted from involvement in such illegal practices.

⁸ According to recent decisions of the Federal Constitutional Court political parties are characterized as groups that are freely established and deeply rooted in social and political conditions that presuppose independence from the state. In a widely read decision handed down in April 1992, the Court recognized the constitutional authority of the State to fund political parties. The Court also established strict and precise limits on this funding in an effort to ensure that it would not undermine efforts to receive financial support from party members and sympathetic citizens. The courts encouraged tax incentives for donations and party dues, while setting limits on these resources, particularly corporate funding.

politicians to engage in a creative search for potential loopholes either in the application of the existing law or when drafting necessary amendments" (Nabmacher 1992).

3.4 *The Prohibition Of Anti-Constitutional Parties*

Parties which, by reason of their aims or the behaviour of their adherents, seek to impair or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany shall be unconstitutional. The Federal Constitutional Court shall decide on the question of unconstitutionality.

In section 2, the government and the Federal Constitutional Court is granted the right to prohibit any party that does not accept the constitution: In other words, a political organisation exercising the rights of free speech and freedom of assembly that opposes the constitutional order may be outlawed. This provision has to be separated from the one obliging the parties to have a democratic structure. A party could still have an internal organisation which is basically democratic, but at the same time work towards the abolition of the overall constitutional framework.

Indeed, in two important cases before (the Federal Constitutional Court in 1952 and 1956, the Socialist Reich Party and the Communist Party of Germany were banned. In both of its party-banning decisions the Constitutional Court has tried to define the limits of political fighting. It has commented on the formulation 'free democratic basic order' as follows. It is an order "which represents a ruling system, free of any use of violence or arbitrary power, based on the rule of law, on self-determination of the people according to the actual majority and on freedom and equality.' This democratic basic order has the following fundamental principles: 'Respect of human rights as stipulated in the Basic Law. These includes above all the right to life and to free development of the personality, the

sovereignty of the people, the division of powers, the responsibility of the government, the legality of the administration, the independence of the courts, the principle of party plurality and of equal chances for all parties with the right to form and practise an opposition based on constitutional law.

Many constitutional scholars and political scientists questioned the wisdom of the party bans, arguing that the ballot box is the best place to defeat extremist groups in a democracy; but its inclusion in the constitution indicated the determination of the leaders to avoid a recurrence of Weimar conditions and to close the system to all extremist movements.

In a very recent case, early this year the government and its majority in Parliament called upon the Court to ban a right-wing-party which is believed to be involved in xenophobic attacks against foreigners living in Germany and which is de-facto outlawed by all major political parties in the country. Although the proceedings are not finished yet, it is nearly certain that the Court will not ban the party as the sufficient evidence could not be produced by the government. This might serve you as an example of how restrictive this clause has been used, and how important the Court does consider the principle of a free competition of political forces that is decided by the voter. It is thus not the government, but the State who regulates this admission of parties to the electoral competition.

4. Conclusion

It is certainly not easy to draw some conclusions from this presentation of the German provisions that might be relevant for the Kenyan situation. There are issues of importance to Kenya that are not considered important in Germany. Participation of parties in elections does also include formal involvement in electoral administration, but this is not a major issue in Germany, where we have a very administrative approach to the organising of elections, reflecting a

confidence in the non-partisanship of electoral officials and a low threat of electoral fraud.

The German example shows first that there are indeed compelling reasons why parties and candidates need to be regulated, but equally strong reasons why the complexity and cost of the regulations should be limited.

In countries where parties have a special role in the electoral process - as in those with list systems of proportional representation - their status needs to be regulated.⁹ The government and the Court have handled the issue of party-bans in a very prudent manner and did not use it for partisan interests.

There are certainly good arguments to have some basic public subsidies to parties. Democratic politics cannot proceed without financial resources. But in Germany, as in Kenya there is a danger that the growth of parties may be stifled by 'gold poisoning' in the form of such grants. If party leaders are able to benefit from financial aid, they risk losing their local roots. Even in new democracies parties might be damaged by well-meaning, over-generous, short-term financial subventions. With the best will in the world, it is hard to devise neutral regulations because even where regulations are intended to produce a level playing field, there is the underlying danger that they will benefit some parties at the expense of others. Regulations remain valueless unless a well-planned, professional and neutral system of implementation is created. If there is any lesson to be learnt from German experience it is that there are no simple solutions to these difficulties.

The regulation of political parties should, however, not be regarded as separated from other constitutional and political issues. It seems obvious that the need for regulation is much higher if and where? parties operate within the State; it will be less important the farther away from the state institutions the parties are operating.

⁹ There is additionally the by-effect of protecting its name and (if relevant) its logo or symbol form imitators.

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SECTION THREE

LEGISLATIVE REFORMS SEMINAR, SILVER SPRINGS HOTEL, NAIROBI 25TH – 26TH MARCH 2002

List of Presentations and Resource Persons

1. “Structure and Composition of Legislatures : Typologies of Legislatures”
by Hon. Bowen Wells
2. “Structure and Composition of Legislatures : Typologies of Legislatures”
by Bjarte Tora
3. “Recruitment and Accountability of Legislators” by Mr. Dan Ogallo
4. “The Functions of Legislatures” by Hon. Oloo Aringo
5. “The Functions of Legislatures” by Mr. John Johnson
6. “Public Finance/Financial Mechanisms” by Mr. Njeru Kirira
7. “Public Finance/Governance and Parliament” by Mr. Sam Mwale
8. “Public Participation in Law making and Policy Implementation” by Mr.
Oduor On’gwen
9. “Parliament’s Relations with the Executive with focus on Kenya” by Prof.
Walter Oyugi
10. “Parliament’s Relations with the Judiciary” by Hon. Justice Aaron Ringera
11. “Parliament’s Relations with the Lower Levels of Government” by Dr.
Karuti Kanyinga

STRUCTURE AND COMPOSITION OF LEGISLATURES : TYPOLOGIES OF LEGISLATURES -

Hon. Bowen Wells

1. Introduction

A useful system of categorising legislatures is to think of legislatures in their relationship to executive power placing them on a continuum from one extreme to another. The two extremes are legislatures which control the Executive totally, with the Executive in the role of civil servants carrying out the policy decisions taken by the legislature and, at the other extreme, legislatures which are controlled by the Executive where the legislature merely puts into law what the Executive has decided. Examples of the two types might be the model of the former Soviet Union, now China and North Korea or Vietnam, in which the Communist Party takes all the executive decisions, and the legislature drawn entirely from the Communist Party, who are an elite themselves and who simply carry out the wishes of the Executive. Kenya, during its one party state period, was moving towards this type of constitution.

2. Considerations

Before we try to put the world's legislatures on such a continuum, we must first consider the purpose of legislatures and, to do this, we must look back in history, both African and European. The whole purpose of the legislatures formed under monarchical power was to gain the consent of those who owned property, loosely defined, to being taxed and/or to provide services in kind to the Executive. The concept of consent to being ruled/taxed is common to both European and African experience. Many African countries, before the coming of the Europeans, were ruled by chiefs or kings, as Swaziland is ruled today. The Chief or King ruled with the consent of his people. Meetings of the tribe were called as needed to decide whether to go to war or increase

taxation and many other important matters both social and financial. The wise African Chief tried to get as high a degree of consensus from these meetings as possible. Once he had achieved this objective he acted but, if he failed, he made himself vulnerable to being replaced. So consent is a vital foundation stone of any type of government and the reason for the existence of legislatures and should be remembered whenever we consider proceedings in our legislatures. We must ask the question, as representatives of the people, how we can get them, or a majority, to agree to what is being proposed. Inevitably, as human societies grow in size, some form of representative assembly has to be created, whether in Africa, Europe, America or Asia. We shall return consistently to the concept of consent.

When classifying legislatures we will have to consider their powers, whether these should be divided between two houses of parliament and whether there should be local or regional government. The role of parties must be considered. How far should parties seek to impose discipline on individual members? What powers of independent action should an MP possess? Should he or she be able to change parties between elections or be made to face a by-election? This is a very important issue in Malawi right now. Which brings us straight to the question of whether legislatures should comprise individual members representing areas or constituencies or whether they should be elected by proportional representation of the parties seeking seats in the legislature.

We must also consider whether there should be a division of powers between the Executive, the legislature and the judiciary as in the United States. The issue of the rule of law as opposed to the law of the jungle

should be honoured at all times by the Executive and the legislature. If we agree that the law should be administered impartially by independent judges, how do we ensure that those judges are objectively appointed and remain independent? These are areas which are constantly under review and have not been answered fully in either the United Kingdom or the United States. In the UK, judges are appointed by the Queen on the recommendation of the Lord Chancellor and her Prime Minister, which effectively means the Executive. Is this right when the Lord Chancellor holds enjoyable parties in his apartments in the Palace of Westminster to raise money for the Labour Party from aspirant lawyers wanting to be appointed as judges or who crave other appointments from the Lord Chancellor? In the United States, the Supreme Court judges are appointed for their lifetime by the President but these appointments must be approved by Congress. There is, therefore, a check on the President's power of appointment, but not if he commands a majority in both Houses of Congress. The party political balance of the Supreme Court was, of course, crucial in the last presidential election in deciding which candidate had won the State of Florida. Equally, the composition of the Judicial Bench was crucial in the recent Zimbabwe election.

The independence of the judiciary is vital to the rule of law. The World Bank, in its recent report entitled, "The Voices of the People", states that exploitation and corruption of the police and the judiciary impact on people's lives more than any other single factor in keeping them poor.

There are two other functions we must consider in a modern democracy when trying to categorize parliaments. They are the role of the Opposition and therefore, the accountability of the Executive to the people through parliament, and the role of the media or any other group, such as Trade Unions or religious, ethnic or racial groups,

who become too powerful and exercise too much influence on the Executive.

Opposition and accountability are essential elements in a democracy if the Government or Executive is not to become corrupt. Lord Corrington said perceptively, "Power corrupts and absolute power corrupts absolutely". Such considerations lead us to the question of the frequency of elections and the period a party or president may stay in power. The Opposition, and indeed the Parliament as a whole, must have its own budget controlled by the Parliament. Opposition must be established in the Constitution and given a budget so that it can independently call the Government to account. This is leading us into the way in which a legislature can work successfully, which you will consider under the title of "Functions of the Legislature", so I will not elaborate here. But if, like Malawi, you have a good committee system in which the Opposition is properly represented and important committees, like Finance, are under the chairmanship of the Opposition, it is useless if they never meet and there are no staff to service the committees in any event. The role of the media is difficult. They must not be allowed to usurp the role of the Opposition - after all, nobody elected them - but they must be free to criticize. Free discussion of the issues before parliament is to be encouraged because it leads to the consent of the people which as we have seen, is an essential part of a successful democracy and in line with traditional government.

A further vital consideration - for Kenya, the United States and elsewhere - is how are elections and political parties to be funded. If they are left to raise their own money without any help from taxation, will they not have to agree to support certain policies and legislation important to large subscribers to their funds? However, I know that, in Kenya, it costs a great deal of personal money to keep constituents loyally supporting you at election time - something my wife would object to vehemently. This

also brings up the important question as to how MPs are to be remunerated and their expenses reimbursed. If you give too little, you will get inferior representatives - if you give too much, the taxpayers and the electorate at large will resent it.

3. Conclusion

To sum up, legislatures are the essential part of a democratic government if the consent of the people to be governed is to be realized. Their powers, method of election, functioning, remuneration and their ability to call the executive to account must be tailored to each country's traditions, make up and history.

I am deeply opposed to proportional representation because it establishes political parties as an essential element in the constitution. Whatever method you use, it will enhance the power of the party at the expense of the freedom of the individual MP and the people of the area or region he or she represents to influence the type of government elected. MPs must have a degree of freedom otherwise their voters will feel that their vote does not matter, consent will be jeopardized and dictators allowed to succeed. However, I have to concede that in some countries where you have equal numbers of different races, such as Guyana or Fiji, or, as in the case of Ireland, where one race will be kept permanently out of power by the majority race, alternatives have to be devised possibly using proportional representation. Equally, in South Africa, proportional representation will keep the ANC permanently in power, with the party dominating its MPs' democracy and leaving the individual with very little authority.

Where should Kenya seek to be on this continuum? This is the subject of r this seminar and you will decide, but here are some thoughts:

The Colonial Government of Kenya was highly centralized with huge power. The

Westminster system was adopted on independence which also gives great power to the party in Parliament who can command a majority in the legislature. This power suited Presidents Kenyatta and Moi. However, in recent years, Kenya has come to question the wielding of such power in the hands of a directly elected president. Is this truly in Kenya's best democratic and economic interests? I think your answer will probably be, "No".

In which case, why not consider having two chambers, one elected by first past the post and the other elected by proportional representation related to the different tribal interests in Kenya, so that no one can be excluded from the decision making process? How about making the President seek parliamentary approval (perhaps from the Upper House) for all presidential appointments, including the senior civil servants, diplomats and judges, and control over the Armed Forces?

How about abolishing direct election of the President and make him or her stand for election to Parliament? Alternatively, if you don't do that, make the Parliament very much stronger so that it can truly call the President to account.

Make certain that one or both houses have to approve all financial and economic measures. Make the Executive President truly accountable to the Parliament and therefore, the people of Kenya. The difficult choice is yours at this seminar.

STRUCTURE AND COMPOSITION OF LEGISLATURES TYPOLOGIES OF LEGISLATURES

Bjarte Tora

1. Introduction

During the next two days, this topic will be discussed in a broad sense. By doing so, it is important to keep in mind what should be included in the Constitution, what should be included in different laws and what is there to be put in the different rules and regulations.

Typologies of legislatures have to be discussed in the horizontal and the vertical framework. By horizontal I mean the independence and the relation between the legislature, the judiciary, the media and civil society. By vertical I mean the power, the role and responsibilities and the accountability of the local and provincial political structure, the legislature and the executive including the provincial administrative structure under the office of the President.

2. Legislative System

One major decision that has to be taken, is if Kenya wants to have a presidential system or a parliamentary system. How do you see the executive should be elected? By the people in direct elections, or by the parliament? Who should be the head of the government, an executive president or a prime minister? How should the executive be accountable to the parliament?

In a presidential system you can include the possibility of impeachment. In the parliamentary system you have the vote of confidence, which sometimes may be for one of the ministers and some times for the governments as a whole.

3. Legislature

In types of legislatures we have bicameral legislatures and unicameral legislature.

3.1 *Bicameral Legislature*

As you all know, a bicameral legislature is comprised of two chambers. Usually, the composition of the lower chamber is based proportionally on the population. The upper chamber tends to be smaller of the two legislative bodies. The upper chamber varies considerably in its composition and in manners in which its members are selected through inheritance, appointment and indirect or direct elections. Some upper chambers reflect regional or state divisions, as in Germany and United States. Citizens often exhibit greater confidence in those upper chambers where they participate in the selection of the legislators through direct or indirect elections, being more accountable and, for that reason, are deemed to be more democratic.

Advantages of bicameral legislatures include their capacity to:

- formally represent diverse constituencies (e.g., state, region, ethnicity, class etc.) .
- facilitate a deliberative approach to legislation
- hinder the passage of flawed or reckless legislation
- provide enhanced oversight or control of the executive branch

The authority of the two chambers in bicameral legislature varies widely among countries. Some countries, such as the United Kingdom, utilize a “weak” form for bicameralism, in which one chamber enjoys

superior legislative powers. The degree of predominance differs from system to system. Some upper chambers have the power to delay or review legislation adopted by lower chambers, while the duties of upper chambers in other legislatures are solely consultative. The United States, for example, employs a “strong” form for bicameralism in which both chambers possess equal or offsetting powers, and legislation must be received and approved by both chambers.

3.1 *Unicameral Legislature*

One-chamber, or unicameral legislature, are most often established in countries structured on a unitary governmental system where power is concentrated in one central unit. The unitary model is generally found in geographically small countries with homogenous population of fewer than 10 million inhabitants.

Advantages of unicameral legislatures include:

- the potential to enact proposed legislation rapidly (since only one body is needed to adopt legislation thereby eliminating the need to reconcile divergent bills)
- greater accountability (since legislators cannot blame the other chamber of legislation fails to pass, or if citizens interests are ignored)
- fewer elected officials for the population to monitor .
- reduce costs to the government and taxpayers.

When saying unicameral legislatures are most often established in countries with a unitary government means that bicameral legislatures are most often found in federal systems where power is distributed between the central government and constituent territorial units. In a survey done some years ago, in fact, among the 83 countries included, 94 percent of federal systems utilize bicameral legislatures.

In more details:

In countries with unitary governmental system, 54 of them have unicameral legislature structure and 12 have bicameral structure. In countries with federal

governmental system, only one has unicameral system and the rest have bicameral.

When all this is said, I should also mention there is a third model combining the two. In some unicameral legislature systems, when deciding on certain new laws, the legislatures split up in to two different bodies, e.g. in Norway, acting as a bicameral system, dealing with these proposals for new laws or changes in existing laws.

4. **Presiding Officers**

In the legislative structure we should also remember the presiding officers. The nature of the directing authority in different countries depends very often on the history, traditions and evolution of a legislature. In some legislatures, the directing authority is established in the constitution. In other legislatures, the office of the Speaker has evolved and has no legal basis. One question here is: What should be the role and responsibilities of the Speaker? What about the Speaker as a nonpartisan officer of the House?

5. **Parliamentary Committees**

Another important question for the structure and the functioning of legislatures is the question about committees. Almost all democratic legislatures depend on committees to conduct their business. As we all know, these committees are smaller groups of legislators who are assigned, on either a temporary or a permanent basis, to examine matters more closely than it could be done in the full chamber. In general, committees fall into two categories: standing committees and *ad hoc* committees. Most legislatures have at least some standing committees. Some constitutions require the legislature to establish specific standing committees. Some constitutions authorize the legislature to organize committees or, as a part of the legislature’s standing order (rule of procedure), to supplement the committees established by the constitution. The number of

committees vary among legislatures. Although the larger chambers tend to have greater number of committees, like the German Bundestag with 662 members having 24 committees, there are exceptions to that trend, like the French National Assembly with 577 members having only six committees. As important as the number, is the question: Should the structure of the committees follow the structure of the ministers and ministries in the government? What is the role and responsibilities of the committee versus the plenary? Should the MP's be member of only one committee each or more than one? What about committee hearings? And what about committee staff?

This brings me to another important question: How to make the work in the legislature structure as efficient as possible? What is the structure needed for committee staff? How should a secretariat for the political parties parliamentary groups be organized? What about the support staff, political advisor, secretary for the individual MP?

6. Political Culture

And if I have any more minutes left. Please let me also touch what one would call the democratic culture. The legislative structure and the way it works are totally dependent on the political culture. What is acceptable and what is not. In every democracy we have the written and we have the unwritten structures and laws, rules and regulations. The result in the end of the day depends on both. A democratic legislative structure should be one designed to promote the very best democratic culture possible. I wish you success in all your efforts to achieve that goal.

RECRUITMENT AND ACCOUNTABILITY OF MEMBERS OF PARLIAMENT

Dan Ogallo

1. Introduction

The Ugandan 1995 Constitution contains National objectives and directive principles of state policy. The objectives and principles are intended to guide all organs and agencies of state, citizens, organizations and other bodies in applying or interpreting the Constitution or any other law and implementing any policy decisions.

Five of those principles are that:

- (i) All the people of Uganda shall have access to leadership positions at all levels.
- (ii) The state shall be based on democratic principles which empower and encourage the active participation of all citizens at all levels in their own governance.
- (iii) All public offices shall be held in trust for the people.
- (iv) All persons placed in positions of leadership and responsibility shall in their work be answerable to the people.
- (v) All lawful measures shall be taken to expose, combat and eradicate corruption and abuse or misuse of power by those holding political and other public office.

The objective and principles of state policy are not enforceable. However, the president is required to report to Parliament and the nation at least once a year, all steps taken to ensure the realization of the policy objectives and principles. They are therefore the yardsticks by which the people can judge the performance of their government.

Recruitment and accountability of Members of Parliament are as seen above reflected in

the objectives and principles. I will review to what extent these objectives and principles have been reflected in the main body of the Constitution their enforceability and the obstacles which hinder their achievement and give suggestions on solutions to some of the problems arising.

2. Recruitment

Under the Ugandan Constitution two political systems are identified –

- (i) the Movement Political System, and
- (ii) the Multiparty Political System.

During the time when the Movement System is adopted individual merit is the basis for election to political office. This means that a candidate wishing to represent a Constituency in Parliament cannot be sponsored by a political party, cannot campaign on a political party platform nor use or attempt to use any political party color or symbol.

In short, a candidate goes to the electorate and presents himself as the best candidate for the office. He will rely more on his personal attributes and how they relate to representation. These personal attributes may include experience in public affairs, academic qualifications and the relevance of such qualifications to the office of Member of Parliament, past involvement in poverty programmes in the constituency, closeness to the President and other powerful political actors, past performance as a legislator, capacity to lobby for Government oriented projects, interaction with voters, age, involvement in *harambees*, proven capacity to oppose the Government and the President and high chances of being appointed a Minister. The electorate will take this factors

in account in deciding who is to represent them in Parliament.

Originally this principle of individual merit worked quite well especially in election prior to the 1994 Constituent Assembly Elections. Since one of the hotly contested issues in the Constituent Assembly was Multiparty Political System, people with various interests positioned themselves to influence the outcome of the exercise. There is no doubt that many powerful individuals in the Government favored the Movement system and took sides in the elections. Government functionaries were sympathetic to those candidates who appeared to favor the Movement system of governance.

Indeed, two groups were formed in the Constituent Assembly - the Movement Caucus and the Multiparty Caucus. Once the delegates associated themselves with the organizations the principle of individual merit was severely dented. When some delegates walked out of the Constituent Assembly because the Multiparty system of governance had, in their view, been given a raw deal, the stage was set for campaigns based on political ideology and not individual merit.

In the 1996 Presidential Elections, political parties backed one candidate against President Museveni who was the Movement candidate. The parliamentary Elections brought forth representatives who had openly campaigned for a return to Multipartism. And in Parliament they made it clear they were opposed to the Movement system. They further claimed that the Government had actually sponsored candidates against them because they believed in the Multiparty political system. They then concluded that they could no longer trust elections based on individual merit.

In the 2001 Presidential Elections Multipartists backed Retired Col. Dr. Kizza Besigye against Yoweri Museveni. They saw tile Colonel as a moderate Movementist

who was willing to discuss the opening up of political space so as to allow political-parties sponsor candidates since the Movement Government was doing so. He got a lot of votes from those areas where sitting Members of Parliament support Multiparty political system.

The effect of Col. Besigye candidature was to further dent the principle of individual merit because for the first time the Movement camp was split with the Colonel getting support from both the Movement and the Multipartists. It also pointed to contradictions in the principle of individual merit since the parties were openly offering a platform to the Colonel.

Worse was to come. Later in the year, Parliamentary Elections were held. In a few incidences, the President campaigned for some individuals. The problem was that their opponents were also movement supporters who had campaigned for Retired Col. Besigye. All over the country there were suspicions in the Movement camp. Was the Movement candidate offering himself or herself really a Movementist? meaning did he support President Yoweri Museveni. This brought Government functionaries and powerful political figures into the campaign field to support one Movement candidate against another. Candidates themselves sought out political godfathers or high ranking Military Officers to put in a good word for them during the campaigns. Individual merit ceased to be the criteria. It became patronage. The Movement seemed to have founders, core members, insiders and outsiders. Like a political party, its inner mechanism became exclusive.

In conclusion of individual merit which is central to Movement system of Government has been compromised.

The Movement system of governance contrasted with Multi partism because it was oriented towards consensus rather than confrontation, allowed participatory

democracy which makes politics all inclusive as opposed to winner takes all experience of political parties, fostered national unity and reconciliation and protected democracy and stability.

If one of the basic principles in terms of elections which made people prefer the Movement to political parties is gravely compromised then it is time to re-examine merit as a method of ascending to the office of the member of parliament.

3. Special Representation

Special interest representation in Parliament of Uganda consists of 214 directly elected members who represent geographical constituencies, one woman representative for every district, representative of the army, youth, workers, persons with disabilities and ex-officio members. The constitution provides for the review of this representation in 2005 and thereafter every five years for the purpose of retaining, increasing or abolishing any such representation.

We have special interest group representation because of the following reasons;

- (i) Women make up more than 50% of the population and make enormous contribution to society yet they are constrained and marginalized by a number of factors such as customs and cultural practices, discriminatory laws and other biases.
- (ii) Youth make up more than 60% of the population but are seldom given a hearing as to their needs and problems.
- (iii) Wage workers play an important role in creating wealth and yet no voice especially when compared to powerful employers.
- (iv) The army is best able to learn to work in partnership with civilian authorities if its representatives are sufficiently involved in major decision making process. It then understands and becomes committed to both the process and decisions made.

- (v) To focus attention of other sections problems and needs of such groups.

Therefore, there is need to give affirmative action to these groups in order to correct imbalances brought about by past representation.

The special interest groups are elected by Electoral colleges such as the National Youth Conference for youths, Army Council for soldiers and Trade Unions for workers. In order to represent special interest groups one must belong to such group. In order to represent persons with disabilities, you must point to some disability, while to represent the youth, you must be below 30 years. You cannot represent workers if you do not belong to a Trade Union. The Electoral College for women is not composed of women only.

What then has been the experience once representatives of special interest groups get elected? Do they limit themselves to issues related to the interest groups they represent? The 7th Parliament of Uganda was sworn in on 3rd July, 2001.

During debate, special representatives have exhibited a. national outlook on all issues but without disregarding their constituencies.

Persons representing special interest -groups have contested for and taken several chairs in Parliament. I reproduce below posts held by such representatives in the 7th Parliament.

3.1 *Standing Committees*

(1) *Committee on Appointments:*

Hon. R.A Kadaga

D / Speaker & Vice Chairperson

(2) *Committee on Business and Welfare:*

Ron. R.A Kadaga

D/Speaker & Vice Chairperson

(3) *Committee on Government Assurance:*

Hon. Bernadette

Bigirwa - Chairperson

(4) *Budget Committee:*

Hon. Beatrice Kiraso

Chairperson

(5) *Committee on Commissions, Statutory Authorities & State Enterprises:*

Hon. Jalia Bintu L.

Vice - Chairperson

(6) *Committee on Rules, Privileges and Discipline:*

Hon. Hope R. Mwesigye

Vice-Chairperson

3.2 *Sessional Committees*

(1) *Presidential and Foreign Affairs:*

Hon. Margaret Zziwa

Vice Chairperson

(2) *Social Services:*

Hon. Dorothy Hyuha

Chairperson

(3) *Agric., Animal Ind. & Fisheries:*

Prof. Victoria Mwaka

Vice Chairperson

(4) *Public service and Local Governments:*

Hon. Beatrice Byenkya

Chairperson

(5) *Tourism, Trade & Industry:*

Sauda Namaggwa Mugerwa

Vice - Chairperson

(6) *Legal and Parliamentary Affairs:*

Hope Mwesige

This clearly shows representatives of special interest groups do not regard themselves as being mandated to articulate issues concerning their constituencies only. By seeking the chairs as indicated, they send a very clear message that they will address all issues. Because of this fact, a fundamental question arises - for how long should affirmative action be allowed to continue?

Article 78(2) of the Constitution of Uganda reads:

“Upon the expiration of a period of ten years after the commencement of this Constitution and thereafter, every five years, Parliament shall review the representation under Paragraphs (b) and (c) of Clause (1) of this Article for the purposes of retaining, increasing, or

abolishing any such representation and any other matter incidental to it”.

I think this was a mistake. It gives the leeway for the special interest groups to be represented permanently.

Legislation introduced will be asking the representatives to abolish themselves from Parliament. Self-interest will defeat this. Special interest representation is necessary at particular times when certain sections of society form the opinion that they do not have adequate representation and see the mechanism as the only way to safeguard their interests. There interests become assimilated overtime and the need for such representation is therefore a stop gap measure. The Constitution should only provide for methods of phasing out such representation.

4. *Accountability*

A Member of Parliament must be accountable *to* his electorate. It is only when he is *so* accountable that he will fulfill his or her basic functions of representation, lawmaking and oversight. When this is achieved, then the legislature to which he *or* she” belongs will maintain the checks and balances which are central the promotion of good governance and consequently improvement of the welfare of the citizens. The principle of accountability should therefore underlie the, Constitutional provisions in respect of Parliament.

In Uganda there are six components of this principle namely the right of recall, crossing of the floor, conduct of a Member of Parliament, absence from Parliament, conviction in a Court of law and extension of life of Parliament.

4.1 *Right of Recall*

Before the promulgation of the 1995 Constitution in Uganda there were constant complaints about the people's inability to

remove non-performing members from Parliament before; the expiry of the term. There were calls for inclusion in the Constitution mechanism by which a Member of Parliament could be recalled by the electorate.

After considering the at length the Constituent Assembly enacted the following provision.

“84. (1) Subject to the provisions of this article, the electorate of any constituency and of any interest group referred to in article 78 of this Constitution have the right to recall their member of Parliament before the expiry of the term of Parliament.

(2) A Member of Parliament may be recalled from that office on any of the following grounds;

- a) Physical or mental incapacity rendering that member incapable of performing the functions of the office;
- b) Misconduct or misbehavior likely to bring hatred, ridicule, contempt or disrepute to office; or
- c) Persistent deserting of the electorate without reasonable cause.

(3) The recall of a Member of Parliament shall be initiated by a petition in writing setting out the grounds relied on and signed by at least two-thirds of the registered voters of the Constituency or of the interest group referred to in clause (1) of this article, and shall be delivered to the Speaker.

(4) On receipt of the petition referred to in clause (3) of this article, the Speaker shall, within seven days require the Electoral Commission to conduct a public inquiry into the matters alleged in the petition and the Electoral Commission shall expeditiously conduct the necessary inquiry and report its findings to the Speaker.

(5) The Speaker shall;

- a) Declare the seat vacant, if the Electoral Commission reports that it is satisfied

from the inquiry, with the genuineness of the petitions or

- b) Declare immediately that the petition was unjustified, if the Commission reports that it is not satisfied with the genuineness of the petition.

(6) Subject to the provisions of clauses (2), (3), (4) and article (5) of this article Parliament shall, by law prescribe the procedure to be followed for the recall of a Member of Parliament.”

There are good grounds that such a Member of Parliament will keep in touch with his Constituency and hopefully articulate problems of the people in Parliament. He will be under constant pressure to represent his Constituency for fear of recall. One who abandons his Constituency does so at his own peril. Indeed the 6th Parliament of Uganda won concessions from the Government to finance trips to their constituencies twice a month and the 7th Parliament has in addition obtained another concession a sum of money to open a Constituency office and pay an allowance to an office attendant.

Secondly, a voter has a right to elect his representative. Embedded in that right is the inherent right to recall such member.

This right has not been exercised so far, not because the voters did not wish to do so attempts were made against two members of the 6th Parliament of Uganda but because the mechanism was not established early enough.

Thirdly, if the President of Uganda can be impeached and a Minister can be censured by Parliament for inability to perform, a similar right should lie elsewhere for a Member of Parliament.

On the other hand, those against the right of recall urge that the right of recall is exercised through periodic elections and that an election is a contract between a Member

of Parliament and the electorate for a fixed term.

This argument does not take into account that subsequent events to an election may render a Member of Parliament incapable of representing his or her Constituency.

Secondly, it is urged that the right is liable to abuse especially where a Member is in Parliament with a minority.

It is urged that the losers can gang up to oust him. Against this argument it is contended that Parliament can lay down elaborate and well thought out procedures to take care of this fear. In any case the petition is subject to an inquiry by an independent body.

The third argument advanced is that in a Multiparty system choices and assessments of candidates are to some extent matters for the party rather than the people and as such a right of recall is not feasible.

To this, I would say that Members of Parliament represent voters and not political parties. Party affiliation is only one of the characteristics upon which voters may base their choice of a member. I should emphasize here that ultimately it is the decision of the voters which places a Member in Parliament.

The Uganda no party system which is based on individual merit despite its shortcomings has proved one thing - that members are likely to make decisions based on the interests of their Constituencies if they do not have a whip to tell them how to vote.

It would appear that the weaker the party influence, the stronger the Institution of Parliament is likely to be.

Lastly, it is urged that the right of recall may tend to curtail the freedom of expression of Members of Parliament who maybe unsure their views are acceptable to the Constituency.

In my view it was a mistake to enact Article 84(5) reproduced above.

The Constitution came into force in 1995. The first Bill which contained the procedures was introduced in 1998. The law was not enacted until two months to end of the life of Parliament.

I chaired the Legal and Parliamentary Committee which considered the bill - and later I presented a report to Parliament on the bill containing the right of recall. I can say that I observed a lot of reluctance in enacting this law. The reason is obvious. Members of Parliament were being asked to enact a law to facilitate their removal from Parliament. The electorate was therefore deprived of a Constitutional right for five years.

But even when we framed the Constitution we seemed to want to protect the political class. By requiring two thirds of the registered voters to sign a petition for removal we set a very high figure. In a Constituency of ninety thousand (90,000) voters you would require sixty thousand (60,000) voters. Most members of the Constituent Assembly were elected to Parliament. It cannot be ruled out that even then we sought to protect ourselves. I recall a Professor of law and now Judge of the Supreme Court suggesting that members of the Constituent Assembly be disqualified from contesting Parliamentary seats for the next ten years. His suggestion was met with a stony silence in the Assembly and attracted no debate.

I would therefore propose that to remove the temptation to kill the right of recall, all procedures should be provided for in the Constitution itself.

4.2 Crossing the Floor

Article 83(1)(g)&(h) reads:

“g) A Member of Parliament shall vacate his or her seat in Parliament if that person leaves the political party for which he or she stood as a candidate for election to

Parliament to join another party or to remain in Parliament as an independent member.

h) If having been elected to Parliament as an independent candidate that person joins a political party.”

This provision was a direct result of our history in the 1960's. Almost all opposition members including the leader of opposition crossed the floor to join the Government.

In the 1980s a considerable number again crossed to join the Government.

There was no obligation upon Members of Parliament to respect voter choices of candidates with particular party allegiances. Members of opposition were open to inducements and pressures from Government. Indeed the leader of opposition who crossed the floor in the 60s was immediately made Minister of Internal Affairs.

By the time Uganda became a de facto one party state in 1969 there were only two members on the opposition. There is no doubt that fear also played a big part in convincing members that crossing the floor could keep them out of prison as members of opposition were imprisoned. Benedicta Kiwanuka, President of Democratic was imprisoned. He was only set free when Amin over threw the Government (He was murdered soon thereafter).

It is wrong for elected members of a Multiparty legislature to ignore the choices made by the electorate in terms of party affiliation. The opposition is a Government in waiting with what is hoped to be alternative policies to the Government. By abandoning those policies upon which a member was elected he or she abuses the trust of the people. It is necessary to consult the electorate again if a representative changes his views about policies hence the requirement for him or her to seek fresh mandate.

4.3 *Misconduct, Abuse of Office and Corruption*

Under Article 83(1)(e) a Member of Parliament shall vacate his or her seat in Parliament if that person is found guilty by the appropriate tribunal of violation of the Leadership

Code of Conduct and the punishment imposed is or includes vacation of office of a Member of Parliament.

The constitution then directed Parliament to establish by law a Leadership Code of Conduct.

The Leadership Code of Conduct is before Parliament now and is expected to be enacted into law during this session. It requires specified officers inclusive of Members of Parliament to declare their incomes, assets and liabilities from time to time and how they acquired or incurred them. It also makes provision for protection of public funds and other public property.

The Code also prohibits conflict likely to lead to corruption in public affairs.

There is no doubt that in most African countries the majority of people are living in poverty. This is not due to the fact that resources are scarce but rather because the resources are siphoned by individuals in a position to do so.

Members of Parliament are among that class of society who have access or means of access to public funds and property. They monitor Government expenditure and this - brings them in contact with public officers who actually spend and sometimes embezzle public funds. They investigate public Corporations and in the process deal with officials accused of corruption. They themselves can end up being corrupt. In the year 1999 a Member of Parliament of Uganda Hon. Sam Kutesa accused Hon. Nathan Byanyima on the floor of the House of having received a bribe of Ushs.

5,000,000/= from officials of Uganda Posts and Telecommunications to cover up the corruption in the Corporation. Hon. Nathan Byanyima who was Chairman of a committee investigating that Corporation requested the Speaker of the House to refer the matter to the committee on Rules, Privileges and Discipline to investigate the truthfulness or otherwise of the accusation.

I chaired the committee which found that Ron. Kutesa's allegations were unfounded. The case however serves to illustrate the point of investigating corrupt public officials by Members of Parliament. The Members of Parliament come in contact with officials accused of corruption.

It is because of the possibility of corruption that the electorate expects the highest standards of conduct from their elected representatives hence the Leadership Code of Conduct - a method by which a Member of Parliament can lose his seat.

4.4 Absence from Parliament

Article, 83(1)(d) reads;

“A Member of Parliament shall vacate his or her seat in Parliament;

d) person is absent from fifteen sittings of Parliament without permission in writing of the speaker during any period when Parliament is continuously meeting and is unable to offer a satisfactory explanation to the relevant Parliamentary Committee for his or her absence.”

This provision is meant to remove from Parliament members who are found to be self-seeking. Some members once elected show little interest in the needs and problems of the electorate. They do not turn up in Parliament and will be found doing their private business.

In 2000, I was in the course of presenting my committee's report to the House on the Referendum and other Provisions Bill when Hon. Lukyamuzi stood on a point of order

and asked the speaker whether it was in order for us to proceed without a quorum.

This was an important piece of legislation which by order of the constitution had to be enacted by 2nd July 2000 otherwise, it would be an illegal statute.

The speaker ruled that there was quorum and asked me to continue with my report. The bill was enacted into law and assented to by the President the next day (the last day).

Some people and two Members of Parliament filed a petition in the Constitutional Court which held that there was no quorum and therefore the law was a nullity.

Parliament of Uganda was by then comprised of 272 members and 90 members (1/3) is quorum. How come two hundred members were not in the House during debate on such a crucial piece of legislation? The Court judgment was very costly in terms of credibility of Parliament.

This serves as an example for the need to be strict on members who don't turn up for work.

I think that the problem lay in enforceability. Some members had been absent for over 15 sittings without permission of the Speaker yet none had ever lost his seat. It is worthwhile to consider means of enforcing such a provision.

4.5 Conviction

If a Court sentences a Member of Parliament to a period of imprisonment exceeding nine months is awarded without option of a fine, the seat of such a Member of Parliament automatically falls vacant. Individual members must be accountable to their electorate for their actions. Members of Parliament serve as models to the people they represent. They must be persons of high integrity.

In 1998 a Ugandan Court convicted a Member of Parliament for the possession of opium. It was found that he had cultivated acres of it on his farm. The damage drugs do to society cannot be overemphasized. The Court sentenced the Member of Parliament to a term of imprisonment but with option of a fine. He paid the fine. He came back to Parliament.

In view of the above example one wonders why option of a fine should be the determinant factor. I would expect that the nature of the offence should determine whether one loses a seat. The basis should not be inability to be present in Parliament only but the type of offence one is convicted of. A conviction for a traffic offence in which sentence of nine months is awarded without option of a fine can not be compared with a drug trafficking case in which an option of a fine is handed down by the Court.

5. Extension of Term of Office

In Uganda there has been a history of Parliament extending its life. In 1967 the Constitution recognized a declaration in the 1966 Constitution that Assembly members had been elected under the law. This gave a further four years in office for the members elected in 1962 for whom 1967 would have been an election year under the 1962 Constitution. This meant that the Assembly was less accountable to the voters.

The National Resistance Council, a Parliament of sorts which first came in being in 1986 extended its term after facing the electorate only once in 1989.

In 1995 some of the constituent wanted the Constituent Assembly to automatically become the first Parliament under the Constitution. They urged that members had just been elected by adult suffrage the previous year and that it would be costly to the Government to hold another election. Fortunately their views were defeated.

It would appear that sometimes there is fear to face the electorate and if this succeeds it makes Parliament less accountable. The Constitution must therefore set strict limits on the possibility of the legislative extending its term.

The draft Constitution which was debated by Constituent Assembly provided the following text;

"Where there exists a state of war, state of emergency or such other circumstances that would prevent a normal general election from being held, may, by resolution supported by not less than two thirds of all Members of Parliament, extend the life of Parliament for a period not exceeding six months at a time".

I moved an amendment because I was unable to see what other circumstances could possibly prevent general elections and I thought such general words could provide room for manipulation to negate the concept of regular election especially in view of our history. To be accountable to the people Parliament must face regular elections

6. Conclusion

The principle of accountability reflects certain basic values which are crucial for democracy to flourish. These are honesty, integrity, hard work and commitment to the electorate.

Unfortunately these values have eluded us for a long time. It would appear that honesty, integrity, hard work, morality and commitment to the voters are the values at the center of this Principle. There is no doubt in my mind that these values are crucial for democracy to flourish. It is time to rise to the occasion and make Constitutions which will guarantee valuable leadership and thereby emancipate our people from misery.

LET THE PEOPLE GOVERN THROUGH AND WITH THEIR PARLIAMENT

Hon. Peter Oloo Aringo, EGH, M.P

1. Pre-independence Structures

Both the Parliament and the executive government in Kenya are part of the colonial legacy. In 1906, the Governor published the Order-in-Council which provided for the creation of an Executive and a Legislative Council to form the colonial government of Kenya. The first Legislative Council met on the 7th August 1907 and was attended by the seven members who were appointed by the Governor. The Governor was the Chairman of both the Legislative and Executive Councils and the head of the civil service in the country until 1948 when he relinquished his chair of the legislative council to the speaker who from then onwards presided over the deliberations of Legislative Council and its successor the National Assembly of Kenya.

The first priority of the Governor and the colonial government was the conquest and the subjugation of the Indigenous African peoples. The colonial government consolidated its occupation through conquest and violence and through the legal instrumentalism of the British Parliament and the colonial legislative council in Kenya. The theory of government in the colonial system was based on domination and control. The two organs of government - the executive and the legislative council - were dominated by the Europeans who used their monopoly of state power to oppress and suppress the African majority in the

country. This set the stage for confrontation, resistance and war in which the Africans were pitted against the British colonial government.

The confrontation in Kenya culminated in the Mau Mau war of independence which was a struggle over the control of the government of

Kenya and the determination of the African majority to overhaul the discredited colonial theory of government based on domination and control of the African peoples. The British were compelled to convene a constitutional conference at the Lancaster House in London to seek a constitutional settlement to end the escalating violence brought about by the Mau Mau war and to contain the growing African nationalism.

The Lancaster House constitutional settlement terminated the colonial system of government and replaced it with the parliamentary system of government. The constitution provided for universal adult suffrage of one person one vote. This provision altered the theory of government from colonial autocracy to a government by the people through their elected representatives in Parliament. By capturing the legislative council and by transforming it into the Parliament of Kenya, the African leaders and the mass of the African people created Parliament as the premier representative institution of all the People of Kenya and a community forum through

which the people find expression in their government.

The constitution vested executive power in the Queen, exercised on her behalf by the Governor General who was advised by the Prime minister and the Cabinet. The Prime minister was the leader of the majority parliamentary party and all members of the Cabinet were appointed from among the members of Parliament. The constitution provided for a bicameral legislature comprising the-Senate and the House of Representatives. It also provided for seven regional governments each with its own legislature. The power of the regions were entrenched in the constitution and an elaborate process was required to amend the constitution. The Lancaster House constitution provided for an independent Judiciary and a civil service regulated by the Civil Service Commission. The Lancaster House constitution also provided for a quasi-federal system in which power was shared between the central government, regional governments and local authorities. Checks and balances were built in the constitution to ensure that there was a democratic and responsible government for Kenya.

2. Post-Independence Structures

The parliamentary system of government based on the theory of the sovereignty of the people was nipped in the bud. Kenyatta ascended to power under the majimbo constitution and immediately embarked on a systematic programme of dismantling the majimbo system of government to restore political and administrative centralism. Kenyatta and the Kanu party embarked on a

series of constitutional amendments to achieve this objective.

The first constitutional amendment provided for a Republic in which the President replaced the Queen as the head of state while retaining the headship of the government. Both the President and members of the Cabinet retained their membership of Parliament and remained accountable to Parliament in the performance of their public functions. Subsequent constitutional amendments abolished the Senate and created the unicameral legislature in the form of the present National Assembly. Other constitutional amendments restored the powers of the President to appoint the Chief Justice, the Judges of the High Court and the Chairman of the Public Service Commission without reference to any other authority.

Kenyatta revived the Provincial Administration and appointed the Provincial Commissioners, the District Commissioners, District Officers and Chiefs to be his direct representatives in the areas of their jurisdiction in the same way the provincial administration were the extensions through which the colonial government controlled the country .By reviving these offices and by exercising personal control over the provincial administration, Kenyatta devolved the exercise of presidential powers to the civil servants at the expense of and to the detriment of Parliament and the local government institutions. The Provincial Commissioners, District Commissioners, District officers and Chiefs took charge of the maintenance of the law and order, mobilized the people to support the President and the government-and

coordinated all government departments in their areas.

President Moi succeeded Kenyatta and proclaimed the "nyayo" slogan with a promise to follow the footsteps of President Kenyatta. Indeed he perfected what Kenyatta had started by consolidating the imperial presidency as a system of government. During the Kenyatta era, Kenya remained a de facto one party state. Moi prevailed upon a compliant Parliament to create a de jure one party state. He then elevated the Kanu party to be the supreme organ over Parliament and over all the other institutions in the country. The Kanu party became the instrument to be used to discipline members of Parliament, cabinet ministers and other leaders who expressed dissenting views from those of the President. Expulsion from the party terminated the tenure of a member of Parliament or a Cabinet minister. Free and open debate was equated with dissent and lack of patriotism. Members of Parliament were punished for expressing dissenting views in the House in spite of the Powers and Privileges Act.

Civil servants were forced to join Kanu as life members. The queue voting system was introduced and fanatic provincial administrators rigged elections to fill Parliament with compliant members who would rubber stamp the decisions of the President and the government.

It is against this background that Moi prevailed upon the 6th Parliament to amend the constitution to remove the security of tenure from the following constitutional offices; the Attorney General, the Chief Justice and the Judges of the high court and the Controller and Auditor general.

The checks and balances which were entrenched in the majimbo constitution were swept away and Parliament was sidelined and emasculated. It became the "President's Parliament" as opposed to a "Peoples' Parliament" which was provided for in the independence constitution.

The imperial presidency in Kenya created and vested awesome personal power in the hands of one person and reinforced a theory of government based on control and domination that was identical to the discredited colonial theory of government. Parliament, under the imperial President abandoned its role as the watchdog of the constitution and the custodian of the public will and instead became the handmaid of the executive government. Parliament surrendered its powers and authority to the imperial President in a conspiracy against the sovereign people it was elected to represent.

3. Relationship between the Arms of Government

The rise of the imperial presidency undermined the doctrine of the separation of powers which is at the heart of democratic system of government. This doctrine provides for a symbiotic relation between Parliament, the Executive and the Judiciary in which each of the three arms of government is distinct and ought to enjoy autonomy in carrying out its functions without interference from the others. The doctrine also provides for checks and balances against abuse of power by anyone branch of government. It provides for the cooperation of the organs of the government, on the one hand, and control of

the President and the government by Parliament, on the other.

However, the Parliamentary system of government has not solved the perennial problem of the separate functions of the three organs of government. In the United Kingdom, for example, Parliament is defined as the House of Commons, the House of Lords and the Queen. Yet the highest court in the United Kingdom is Parliament by virtue of the law of Lords being members of the House of Lords. The link between the Judiciary and the legislature in the United Kingdom is therefore real and strong even if it exists only at the highest level of government.

The link between the executive and the legislature is equally strong in the United Kingdom. The Queen appoints the Prime Minister from among the leaders whose parliamentary party has the largest number of seats in the House of Commons. Once appointed the Prime Minister heads the government. He appoints his ministers, approved by the Queen, and they sit in the front bench in the House of Commons to dominate and control the legislative agenda and process.

The link between the legislature and the executive is therefore not only strong and permanent, but is a political reality that any elected government in the parliamentary system is always keen to enjoy.

The Kenya Parliament is defined in section 30 of the Constitution as comprising members of the National Assembly and the President who heads the executive government and appoints the Chief Justice and the Judges of the High Court. The

President forms part of the Parliament and that, without him there is no Parliament. Section 46 (2) of the Constitution gives him power to assent to Bills. Bills passed by the National Assembly cannot become law until and unless the President gives his assent. That is why there is an Act of Parliament and not an Act of the National Assembly. The legislative functions of elected members of Parliament is incomplete without the President.

In Kenya the President is a member of Parliament. Indeed the President cannot assume office if he won the majority vote in the Presidential election but lost his Constituency seat! The President of Kenya enjoys the privileges of the English Queen and the rights of the American President without any provision in the Constitution explicitly instituted to check those privileges and rights. Parliament is merely meant to bring the Government to account but there is no provision which empowers Parliament to bring the President to account. Parliamentarians even went further in the standing orders and prohibited him from being summoned by a parliamentary committee for questioning like can be done to other Ministers of whom he is one.

Members cannot quote him or mention his name as authority for what they allege in the house during debate unless they are Ministers. His personal conduct cannot be referred to adversely except upon a specific motion moved for that purpose.

Despite being a member of Parliament and Head of the Government, he is hardly there in the House to explain the policies of his Government the way the Prime Minister of Britain or Canada or of other parliamentary

systems of Government have to do. Yet he often freely comments on the debate that go on in the House during his several public rallies including his disagreeing with some resolutions the House has passed. To whom then is the President of Kenya accountable? Certainly not the people of Kenya who elected him nor to the elected representative of the people of Kenya in Parliament of which he is also a member.

The President derives his legitimacy from the votes he wins from the people in a national constituency. And that makes him more powerful than if he would derive his legitimacy by merely heading the party with the majority seats in the House. But where are the institutions created by the current Constitution to empower the public to hold the President they elected to be accountable to them? The current Constitution only restrains him from doing some things like firing a Judge of the High Court once he appoints him or her. But, he can appoint anybody to be a Judge so long as he or she is a lawyer.

The President has powers to summon, prorogue and dissolve Parliament without consulting any other authority. When he dissolves Parliament he paves the way for a general election. This means that one arm of the government is expunged by another arm even if this is only for three months. There is no time in this country when the executive branch or the judiciary branch of Government can be dissolved, least of all, by the legislature. This is a constitutional lacuna peculiar to Kenya. If the President of Kenya can only occupy that high office on condition that he also won his constituency seat in parliament as well, where does he get

the legitimacy to continue being in office after he has himself dissolved Parliament?

In countries like Uganda, Zambia and Tanzania the President is not a member of Parliament. In South Africa, for instance, members of Parliament can still be recalled in case of an emergency during the General Elections to transact business. In India, Canada and in the UK for example it is only the lower House which is dissolved during the General Election but the upper House remains intact. In the U.S.A. only 1/3 of the Senate goes for the election after every two years.

There should be no time when there is no Parliament in Kenya. Legislative continuity should ensure that members of Parliament remain so until the new elected members are sworn to take office in the New Parliament. In the Constitution of Kenya, Parliament is the supreme legislative arm of the Government. It exercises this power through Bills passed by the National Assembly. It has power to alter the Constitution and to terminate the tenure of the executive Government. But when it removes a Government from office through a vote of no confidence it also terminates its own tenure. This provision undermines the powers of Parliament over the Government because a vote of no confidence over government leads to political suicide for Parliament. The National Assembly should remove an incorrigible Government that has lost the confidence of the people without penalizing parliament for the failures of the government.

The mutation of the independence Constitution shifted the locus of political power from the elected representatives of

the people in Parliament to the presidential arm of the Government. The senate was inco-operated into the House of Representatives which became the National Assembly under a Republican Constitution. The political initiative shifted from the National Assembly to the President of the Republic. Under the imperial presidency the core function of Parliament became the legitimization of the powers of the president. This is the framework of power which is at the root of the constitutional Crisis in Kenya today.

The Political Upheaval of the 1990s was basically a rejection of the theory of government contained in the system of the imperial presidency. Like its carbon copy, the colonial system of government, presidential autocracy was based on control and domination and the restriction of freedom of the citizens. In this paternal benevolence, citizens were treated as unruly children to be punished and disciplined by an impotent President and his agents.

The removal of section 2A of the constitution restored multi-party politics. The limitation of the tenure of the president to two five- year terms; the sharing by parliamentary parties in the nomination of 12 members to parliament; and the opening up of the Electoral Commission to representatives of opposition parliamentary parties compelled the President to share power.

The Eighth parliament took the initiative to delink parliament from the control of the President when it created the Parliamentary Service Commission and the Parliamentary Service to provide an independent administration for the National Assembly.

There are other Bills which have been introduced in Parliament to strengthen the autonomy and authority of Parliament. The Constitution of Kenya (Amendment) (No.1) Bill of 2002 will remove the power of summoning, proroguing and dissolving parliament from the President and will vest these powers in the National Assembly. The Bill will provide for parliament to control its own calendar and agenda.

The National Budget is the most important policy declaration by the Government and yet Parliament is ineffective in the monitoring of the Public expenditure and programmes. The constitution, the laws and the standing orders limit parliament's capacity to debate and amend the Budget meaningfully. Parliament should be able to influence the drafting of the budget proactively by removing the veil of secrecy in the formulation of the budget and providing for transparency in the budget process.

The Eighth Parliament created the Constitution of Kenya Review Commission to listen to the people and to collect and collate their views and recommend to parliament a new constitution that would safeguard freedom, social justice and socio-economic development. The Commission as a technical organization of the people must study and understand the triple heritage comprising the autocratic colonial rule, the promise of the short lived parliamentary government at independence and the authoritarian presidential rule which has dominated Kenya for close to four decades.

4. Conclusion

The people throughout Kenya have rejected both the autocratic colonial rule and the presidential dictatorship. The remaining workable option that is available to the people is the theory of the government: based on the sovereignty of the people. Only Parliament duly elected in a fair and free election can provide participatory, democratic and responsible government.

But the Parliament must represent the diversities, multiplicities and the pluralities of the country. This can only be achieved in an election process that combines both majoritarian system of election and proportional representation.

In the prevailing situation, legislative reforms would best be visualized within definite holistic parameters. Among these are “the Kenya, the people want” and following this the creation of a set of principles which every organ of the government of Kenya will have to abide by in serving the interests of the people of Kenya including ensuring good, responsible and accountable governance and the rule of law, legality and universally recognized fundamental rights of the individual, human and peoples’ right. Such principles would constitute beacons that would guide the elected government and other public servants or act as standards from which derogation would lead to the execution of due political and other consequences by the electorate of the country. As political consciousness among the electorate builds into place, a culture of faithfulness to constitutionally set political values and standards would come to hold for the benefit of all. Constitutionalism, the rule of law,

legality and equality would come to flourish in the governance of the country as a matter of custom, political practice and tradition among those elected, chosen or appointed into public service.

FUNCTIONS OF LEGISLATURES

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1. Introduction

I want to do just three things in my talk today. First, I want to describe the basic functions of legislatures - what legislatures do, how they do it, and some factors that influence their behavior. Next, I will describe some of the important changes Kenya's National Assembly has undergone over the past few years. And third, I will make a few suggestions regarding possible future changes for the Parliament.

2. Basic Functions of Legislatures

Scholars list several functions legislatures perform (including conflict resolution and leadership development), but many agree that their three major functions are *Representation, Lawmaking and Oversight*. We will focus on these three this afternoon.

2.1 Representation:

First and foremost, legislatures *represent the people and groups in a nation*. Legislatures are the national level institution that:

(a) Tends to be most *diverse in its membership*. Members represent a broader range of interests/characteristics/ places than either the executive or the judiciary.

(b) Is the most open and transparent branch of government. It is the only branch that consistently conducts its deliberations in public.

(c) Allows citizens greatest access to its members.

Effective legislatures connect people to their government by giving them a place where their needs can be articulated. Political scientist Nelson Polsby calls them the "nerve ending" of the polity.¹

2.1 Lawmaking:

Legislatures not only represent society, but they also have a say in translating citizen preferences into policy (law). All legislatures have at least a formal role in this process (i.e., passing government initiatives), but some play major lawmaking roles. While legislatures vary in the formal lawmaking powers they command, a common problem for legislatures around the world is their inability to use even the power they have effectively. Legislatures often lack the financial, human, and information resources required to be truly effective in making laws.

2.3 Oversight:

Finally, legislatures oversee the activities of the Executive. Laws and programs often do

¹ Nelson W. Polsby, "Legislatures" in *Handbook of Political Science: Government Institutions and Processes*. eds. Fred Greenstein and Nelson Polsby (Reading, MA: Addison Wesley, 1975).

not turn out as expected or intended, whether due to design flaws, implementation problems, or social or economic changes. Further intervention by the legislature may be needed to detect and correct problems.

Ministries may be guilty of misusing of funds. Oversight involves monitoring the activities of the executive to ensure that they are carried out legally, efficiently, and according to legislative intent. Not surprisingly, executives are not always willing partners in this process. A parliament's practice of oversight is limited by:

- (i) Its formal oversight powers (e.g., power to compel the executive to provide information, lack of enforcement powers even when problems are found);
- (ii) Its resources for conducting oversight (e.g., professional staff, access to government information)
- (iii) The political will to oversee the executive.

Well-functioning legislatures bring the needs, aspirations, problems and concerns of people and groups in society into the policy-making and policy-amending process; they make the laws that govern a nation; and they practice oversight, assuring that laws and programs are carried out legally, effectively, and according to legislative intent. By providing citizens and groups in society with a place to be heard, and opportunities to influence the policies of a nation, effective legislatures may also help lead to greater stability and trust in the political system.

3. Some factors influencing legislative behavior

Dozens of factors influence how legislatures carry out their functions, and we will consider just two - regime type, and type of electoral system.

3.1 Regime Type: (*presidential, parliamentary, hybrid*)

- (i) Legislatures in *presidential systems* (in which the president and legislature are elected separately and the president selects his cabinet from outside the parliament) are independent of the executive. This independence allows them greater opportunities to play significant lawmaking and oversight roles and they tend to require greater staff resources. (USA)
- (ii) In *parliamentary systems*, the prime minister (the executive) is elected as a member of the parliament and is the leader of the party (or coalition) that wins the most votes. The powers of the executive and legislature are therefore fused. Party discipline tends to be strong, and the executive and legislature generally speak with one voice. All or nearly all legislation comes from the executive. Oversight is practiced by the opposition, through investigatory committees they control, such as public accounts committees.
- (iii) *Hybrid systems* have some characteristics of presidential and some of parliamentary systems. In Uganda, for example, the president is elected in a nationwide constituency (as in a presidential system), yet he chooses his

cabinet from within the parliament (as in a parliamentary system). Kenya is a unique hybrid in that candidates for president must at the same time run for a seat in Parliament (representing a local constituency) and run nationwide as a presidential candidate.

While the type of political system affects the kind of lawmaking and oversight roles the parliament will play, it is not determinative in and of itself. A number of other factors, such as party strength and electoral system (see below) affect legislative behavior as well. Legislatures in many presidential systems in Latin America (where, theoretically, independently elected legislatures should challenge the government) have systems of proportional representation and generally lack capacity to practice effective lawmaking or oversight.

3.2 *Electoral systems: plurality-majority, proportional, semi-proportional*

Another factor shaping legislative behavior is the nation's electoral system. The electoral system affects party discipline, and therefore impacts on legislative lawmaking and oversight. Following are some basic characterizations.

(i) In *plurality-majority systems*, elections are held in single member districts. One candidate per party runs for each seat, constituents vote directly for their candidate, and the candidate with the most votes wins. Since re-election depends on pleasing one's constituents, legislators must make constituent concerns a high-priority. When constituent interests conflict with party

interests, constituent interests often win out. (US, Canada, Kenya)

(ii) In systems of *proportional representation (PR)*, constituents vote for a list of candidates prepared by each party, rather than for an individual. Parties win legislative seats based on the percentage of votes they receive. If a party wins 40% of the vote, for example, the top 40% of the names on the party's list win legislative seats. In contrast to the legislator elected in a single-member district, who must please his constituents to be re-elected, the legislator elected through a PR system will want to maintain or improve his position on the party list. Party discipline, therefore, will likely be very strong. (Much of Europe)

(iii) *Semi-proportional systems* are most commonly a mix single-member districts and proportional representation. Bolivia is an example of a semi-proportional system. In 1997, Bolivia amended its electoral system so that half of the members of the lower house were elected through single-member districts, and half through party-lists. Semi-proportional systems are designed to try to balance within the legislature constituent-geographical needs, and national-governability needs. (Mexico, Bolivia, Germany)

4. **Observations on Changes to the Kenyan Parliament**

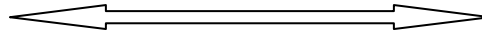
To help us better understand the changes that have taken place recently in the Kenya National Assembly, I want to present a simple model of generic legislative types. The models described below are adapted

from frameworks devised by Nelson Polsby and William Robinson in different works.

Chart 1: Legislative Types

Less Complex Organization
Low Information Need

More Complex Organization
High Information Need



Rubber Stamp – Emerging – Arena - Transformative

The chart presents four generic types of legislatures - rubber stamp, emerging, arena, and transformative. The four types vary in terms of their organizational requirements, and their information needs. Legislatures further to the left need less complex organizational structures and have fewer information processing needs than those legislatures further to the right.

Rubber stamps legislatures are legislative bodies that simply endorse policies made elsewhere in society. They are common in totalitarian systems but may also be found elsewhere. Some argue that where political parties are very strong and go to the electorate with detailed party programs, the party elected receives an endorsement for its program and the legislatures should therefore “rubber stamp” their proposals. Since a rubber stamp legislature does nothing to shape policies, it requires little in the way of internal, complexity and information processing capacity

We will skip over emerging legislatures now and go to arena legislatures. Arena legislatures are bodies where societal differences are represented and articulated. Arena legislatures draw their legitimacy

from their representativeness and not through actively shaping public policy. They

tend not to be internal complex and do not require a great deal of information processing capacity. Arena legislatures may exist in nations with very strong political parties and where political decisions are made through negotiations among parties outside of the parliament. The legislature serves primarily as a place for discussions where the views and interests of groups in society are aired, but where few political decisions are made. The congress of Chile might be considered an arena legislature.

The rarest type of legislature, one that both represents and shapes societal demands, is a transformative legislature. Transformative legislatures both represent interests in society and shape national policies, and do so requires an internal structure capable of channeling conflict and reconciling differences, as well as information capacities capable of initiating and perfecting policies. The United States Congress is an example of a transformative legislature. To carry out these functions, transformative legislatures require more complex organizational structures, and adequate information resources.

Finally, an emerging legislature is in the process of change from one legislative type to another. I believe that Kenya's Eighth parliament is moving to the right on this arrow - in the direction of the transformative legislature. Its beginning to play a new kind of role in representing interests in the nation and has begun shaping national policies. It is in the process of developing a more complex organizational structure to accommodate these new functions, and is beginning to receive greater amounts of information from groups in society.

What are some indications of these changes?

5. Changes in Kenya

Constitutional amendments enacted by parliament in 1999 and 2000 formally separated the legislative and executive powers. The amendments established the parliamentary service and the Parliamentary Service Commission, giving Parliament authority over its own budget and staffing, and over virtually all matters related to its management.

Not only has the parliament established its formal independence, it is also making the institutional changes required for it to take advantage of its independence. The PSC has adopted, and is in the process of implementing a 12-year plan to strengthen the institution. The plan presents what the PSC sees as the legitimate functions of the parliament. These are:

- (i) Legislation
- (ii) Financial appropriation and control
- (iii) Oversight and supervision of governance
- (iv) Checks and balances on the other two arms of government

- (v) Representation of the people in the Government
- (vi) Leadership of the people and the nation
- (vii) The making and unmaking of the Government
- (viii) Watchdog of democracy²

The PSC plan proposes a new institutional structure, and new professional services. These include a new directorate of information services, which will include the Library, a Department of Research, and a Department of Information. The plan also includes a Department of Legal Services, which, among its other responsibilities, will provide legislative drafting and bill analysis services to the Parliament. And Parliament enacted a larger 2001-2002 budget, at least a portion of which is to cover the costs of these new services. Referring back to Chart 1, one can argue that Parliament is moving in the direction of the transformative legislature, and is developing a more complex organizational structure, and more and better information resources to effectively fulfill its expanding role.

It has been said that the legislature at work is the legislature in committees, and this was clearly the case in the Kenya Parliament in 2001. There were more committee sittings last year (over 250) than in any previous year in Parliament's history, and many of these included outside parties who were invited to testify regarding legislation under consideration by the committee. Committees travelled outside of Nairobi to meet with stakeholders affected by legislation under their consideration. Hours for plenary

² Parliamentary Service Commission: *Strategic Plan of the Parliament (2000-2012)*. The Parliament of Kenya, February 2001, p 2.

sessions had to be increased at the end of the year to allow the House to consider committee reports. The amount of work and type of work carried out by the Agriculture Committee was especially impressive, but other committees - such as Health and Finance – also had a great impact on Kenyan national policies.

Last year the Committee on Agriculture submitted comprehensive legislative proposals on coffee and sugar, which became the Coffee Act 2001, and Sugar Act 2001. Members proposed 33 amendments to the Sugar Bill, and 22 were passed by Parliament. The amendments introduced by six different members generally shifted authority for this sector to sugar farmers, increased the speed of payments, etc. The history of the Coffee Bill was similar. Members proposed a total of 13 amendments to the Coffee Bill, and five passed. As with the Sugar Bill, the Coffee Bill gave coffee growers greater authority over their sector.

The Health Committee held multiple sessions to discuss the Children's Bill and met with groups interested in its passing and in its specific provisions. Committee members proposed a total of 23 amendments, and 22 were taken over by the Minister. And last year the Finance Committee made a number of significant changes to the Government's Finance Bill. The Committee used the full time it was allowed to discuss both the Financial Statement and Tax proposals. There were a total of 38 amendments to the Finance Bill, and Government accepted 65% of the changes recommended. Amendments reduced import duties on a number of items, rejected the Government's proposal to

criminalize bouncing checks (MPs argued that this provision did not belong in the Finance Bill), and rejected the proposal to require VAT on commercial property.

Other indications of a more independent Parliament were the defeat of the proposed KACA constitutional amendment, enactment of the Donde Bill, and the establishment of a lobby firm in Kenya to help individuals and groups to interact with the Parliament.

6. Considerations Changes for the Future

As the Commission deliberates on the shape of the Parliament under the new constitution, it is important to recognize that the institution has already begun to make fundamental changes. What remains to be done? That, of course, is for Kenyans to decide. I conclude with some ideas for the Commission's consideration, some of which would require constitutional change, and others could be done administratively by Parliament.

7. Representation

Does the Commission consider the Parliament to be sufficiently open and representative? Some proposals in the PSC plan would make it open, including the proposal to develop an outreach function in Parliament. One activity for this office might be publishing parliamentary agendas so that interested parties in Kenya would know when to attend sessions of Parliament.

Another possibility might be to open at least some committee meetings - on a pilot basis - to the public. Committees on Agriculture,

Health, and Finance invite guests to testify before them now - perhaps this could be expanded so that more people could attend. Public hearings, again, on a pilot basis, might be held to elicit comments on proposed legislation. Another possibility is to consider funding constituent offices so that MPs, and possibly a staff person, would have a place (other than their homes) to meet with constituents.

8. Lawmaking and Oversight

Parliamentary committees are beginning to take better advantage of the expertise available in society to help them in their lawmaking role. No matter how expert the new professional research staff in Parliament becomes, it will continue to need input and ideas from other experts in Kenyan society.

Specific lawmaking/oversight issues for the Commission to consider include the following

- Whether Parliament should have its own budget office to assist MPs to play their role in the budget process, and in overseeing the implementation of the budget. A number of nations, including the US, Uganda, and Philippines, utilize such offices.
- Whether it should require the Auditor General to provide information to PIC and PAC from the most recent budget year.
- Whether committee powers are adequate, or when they should be increased to enable MPs to carry out their lawmaking and oversight roles more effectively. The Ugandan Constitution (Sect. 90) gives committees the explicit authority “(3)(b) to initiate any bill within their respective areas of

competence, and grants them “powers of the High Court” for enforcing the attendance of witnesses, and compelling the production of documents 90 (4) (c)

- Whether Parliament should have a voice in constituting and abolishing offices and in approving certain appointments (Sections 24 and 25 of the Kenya Constitution)?
- Whether Parliament has sufficient power to deal with corruption, or whether it should have the power to censure ministers (as in section 118 of the Uganda Constitution).
- Whether the constitutional provisions on proroguing and convening Parliament should be amended. Section 95 of the Ugandan Constitution gives the Speaker the authority to prorogue Parliament (after consultation with the President). If at least 1/3 of the members request in writing that the Parliament be convened, the speaker is required to summon Parliament to meet within 21 days.

The issue of how much power to grant the Parliament is fundamental to the future of Kenya. A stronger Parliament has the ability to shed more light on the activities of Government, and should given Kenya’s single member constituency system - be more responsive to the needs of individual constituents. Yet greater legislative power is exercised at the expense of executive power, so a stronger parliament will change power relations in Kenya. You will need to determine the balance most likely to bring Kenya the future it desires.

FUNCTION OF LEGISLATURE PUBLIC FINANCE/FINANCIAL MECHANISMS

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1. Introduction

In Kenya the Legislature has three critical functions with regard to Public Finance. These are;

- (i) Revenue mobilization (imposition of taxes and borrowing)
- (ii) Allocation of resources
- (iii) Supervisory function

Under the Constitution, Exchequer and Audit Act, and respective tax laws, only parliament can impose taxes and authorize public borrowing. However, in practice there are serious Constitutional restrictions on parliamentary ability to act, especially as provided under Article 48. Parliament is further inhibited by other factors such as budgetary traditions and practices which allow for delegation of powers on taxation with very limited reporting. Besides, the current institutional arrangements lead to tax and debt administration matters being conducted by the executive branch with the role of Parliament relegated to post action audit reports which are subject to long Administrative delays. Other factors inhibiting the role of Parliament include lack of technical capacity to quickly scrutinize

finance data, conduct analysis and make pertinent conclusions.

The result is that once Parliament passes the tax law, the only time it ever gets involved again is when the Audit Report is filed, which can be as long as three years later. The debt situation is even worse since Parliament does not get involved at all in scrutinizing domestic borrowing. Indeed, there is no Constitutional or legal requirement for the local debt to finance approved expenditures or any expenditures. There is also no limit on how much the minister can borrow locally. It is up to the minister to decide how much to borrow, at what terms and for what purpose.

On external borrowing, there are only two soft conditions. First, there is a ceiling on how much government can borrow, which is a flat amount, and second, the external funds should be used to finance approved expenditures. However, here too there is no requirement to ensure productive investments or cost effectiveness in external borrowing. Indeed, as the law stands, the minister can borrow and spend before seeking Parliamentary approval as long as he submits supplementary estimates later. Under Article 100, 101, 102, 103 and, 104, Parliament is empowered to authorize spending public funds to meet various public purposes. However, under Article 100, the

minister is authorized to make alterations after Parliamentary approval. This authority has significant implications on how and where public money is used. This article is widely used together with section 5(2) of Exchequer and Audit Act, making Parliamentary Authority on resource allocation mainly proactive.

As regards supervisory function, this is performed on the basis of audits and reports of the Controller and Auditor General and Auditor General State Corporation. Looking at the records of deliberations of PAC and PIC, it is obvious that the supervisory role is limited to linking Parliamentary approval to release of funds. It does not relate to quality of expenditure or realization of results. In other words, the audits simply answer the question of whether or not the money was spent for the purposes approved by Parliament, and if the necessary procedures were followed in release and spending of funds. As long as these two conditions are fulfilled, the expenditure is considered to be in order whether the money could have been better used to e.g. buy medical supplies instead of buying Mercedes Benz cars for the executive. Besides, as long as the tendering procedures are followed, it is okay even when it means spending more than the economic value. These critical omissions were noted in 1997 when the Public Expenditure Review Report noted that "Government investments may not generate a commensurate level of GDP growth because the cost of acquiring capital is far greater than the value of the capital created". Unfortunately, there is no on-going implementation monitoring, or post-execution value-for-money audit. As a result, the whole process of public finance

management has not been managed in a manner which can enhance the public good.

2. Enhancing the role of Parliament in Public Finance

Parliament is one of the three branches of government, which include the executive and the judiciary. Of these three, only Parliament is empowered to impose taxes or allocate public resources. Ideally, Parliament should be the custodian of public interest with the authority to protect and preserve public property. All other persons and institutions with powers to collect taxes or spend public money, do so on basis of delegated authority. In exercise of such powers, if there is abuse or inept application of the law, Parliament should reserve the right to take corrective action, especially on mobilization and allocation of resources, to ensure that fiscal policies are not used indiscriminately and that they are efficiently implemented.

To achieve national objectives, tax policies and tax administration should not serve partisan or vested interests. Yes, fiscal policies can target specific activities of problem areas which need to be addressed, but not individuals or communities unless that is the agreed policy. It is for these reasons that over the years, writers on public finance have advocated for observations of principles of (1) efficiency (2) equity (3) stability (4) neutrality and (5) predictability, in matters of taxation and public expenditure. These principles are necessary to enable the public assess effectiveness of fiscal policies and also encourage managers of public affairs to be accountable for what they do, how they do it and finally ensure that they conduct public affairs

transparently. Unfortunately, this is not the case with fiscal policies in Kenya, neither accountable nor transparent.

3. Factors influencing Parliamentary effectiveness in management of public funds

Management of public affairs can be significantly influenced by:

- (i) institutional arrangements between the three branches of government
- (ii) demarcation of functions and responsibilities between the three branches
- (iii) capacity of each of the three branches to act as checks and balances on each other
- (iv) quality of management within the executing agencies
- (v) ability of Parliament to enforce accountability and demand transparency on other branches.

4. Institutional arrangements

Right from independence, Kenya got into a situation which was analogous to an (elected) absolute, monarchy which led to accumulation of powers under office of the president such that the life of the nation revolved around the occupant of that office. Soon, there was no distinction between the personal and official life of the chief executive. The president appointed permanent secretaries, ministers, judges, PCs and DCs - all of them single-handed. As a result, the functions of all public offices

revolved around his wishes, wisdom and vision. His word and wishes became law with powers to give directives without due regard to the law. Thus the traditional concept of checks and balances that were expected to be in place fizzled away. In the process, Kenyans created a president who, many people still consider to be above the law. To preserve this image, any person who questioned the presidency was swiftly dealt with and removed. Against the presidency, even Parliamentary immunity had no meaning as MPs were arrested and detained from precincts of Parliament. As the presidency became stronger, other institutions became weaker, leading to a point where Parliament was reduced to a feeble voice mostly supporting the executives.

Using the provisions of Articles 16 and 19 of the Constitution, the presidency secured full influence over Parliament by appointing a large number of ministers and assistant ministers to facilitate passing motions introduced and defeat of motions tabled by government. The president powers over Parliament were enormously increased by the ability to nominate extra twelve MPs, who until 1992, could be replaced if they did not support government position on any matter; Even as late as in the 7th Parliament, a nominated MP had to vacate his seat to create room for somebody else, a situation which in other countries would be unthinkable. This flexibility in the use of executive powers has serious negative implications to public/national interests.

As regards the rest of the executive branch, the presidency appoints permanent secretaries, heads and directors of public enterprises, commissioner of police, and

heads of army, and is the chancellor of every public university. He wields powers to hire and fire any person in the public sector without reference to anybody else.

As regards the oversight agencies, the Controller and Auditor General, and Auditor General State Corporations, these are appointed singly by the president. All Parliament can do is criticize but cannot remove those it is dissatisfied with. Similarly, the president appoints the Chief Justice, Judges of the High Court and Court of Appeal with Parliament playing no part. In some cases, individuals who have been openly criticized by Parliament have been appointed to key Positions in the judiciary and the cabinet. Therefore, the president has the capacity to reward those who are supportive and leave those he considers not, in the cold. Consequently, Kenyans know which of the three branches can give bread and butter and which cannot. They also know that Parliament can criticize and even Pass motions, but it cannot fire. In terms of balance of Power and influence, it is the executive which calls the shots. This feeling is reinforced by article 25 of the Constitution which provides that every person who holds office in the service of the Republic of Kenya shall hold that office during the pleasure of the president. The reality is that even the private sector has shown unwillingness to hire anybody singled out as giving the presidency displeasure. Therefore in all fairness, Parliament is a junior partner to the Presidency while the judiciary is perceived as part of the presidency.

Unless the existing weak institutional arrangement is corrected, Parliament cannot play its part effectively in the management

of public finance. This situation is not only deleterious to Parliament but also to the judiciary and the executive. The responsibility to make appointment of all senior holders of positions in the public sector exposes the presidency to undue pressure by vested interests, a situation which can lead to corruption by those who pose as middlemen or agents, sometimes by pretending to be kingmakers. Some have even been arrested extorting money from senior public officers.

It is critical that a neutral system of appointing senior members of the executive and judiciary branches is instituted with final approval by Parliament. Finally, holding of public office should not be at the pleasure of the president or Parliament. It ought to be in public interest, so that it does not generate partisan interests to anyone branch. Of vital importance is the need to ensure the institution of Parliament is not and cannot be controlled by any other branch or individual. To achieve this, it is necessary that the ratio of ministers and assistant ministers does not exceed 25% of Parliament.

5. Demarcation of functions and responsibilities

Under the current system, Parliament is responsible for imposition of taxes, levies and other charges, and also authorizing expenditures from Consolidated Fund. However, over the years, Parliament has delegated a lot of powers, both with regard to taxation and expenditures to other government agents. This delegation has been done without adequate requirements on reporting and monitoring. The result is that when there is abuse of deleted powers, there

is no ready mechanism for identifying the problem and taking corrective action. A short survey of demarcation of functions shows the following:

5.1 *Taxation and other charges*

Under all imposition laws, whether for: taxes, levies or other common charges, Parliament has delegated powers to exempt and sometimes to vary the rate, to finance minister, revenue departments etc. In all cases, there are provisions which require that these powers be exercised in public interest. Consequently, if these powers are exercised to foster public interest, it should be in the best interest, of both the government and the public, to make interests served by exemptions, variations and abandonment or revenues, known. However, this is not how it works as will be recalled from recent public complaints by the Minister for Agriculture in connection with importation of milk powder.

As will be appreciated, these powers can be very useful when responsibly managed, but they can be very detrimental to the economy when abused. For example, the minister can vary the existing rate: of duty and VAT, in force, by up to 30 percentage points without going back to Parliament. Suppose two millers ordered cereals which have a rate of 35% and one miller pays duty at 35% and takes delivery of his cereals but influences the finance minister to vary the existing duty upwards by 30%, before his competitor clears his consignment. If the minister agrees he could increase the duty to 45.5%. With this type of influences, it is possible for one person to use his connection to ruin his competitor financially, especially where

the minister may have his financial interests at stake.

Similarly any Kenyan can form a charitable organization, purportedly to alleviate suffering, whether from disease, injury or famine. Such an organization can import a wide range of goods and get duty exemption, which may confer substantial financial benefits, running into millions of shillings, which may be as high as Ksh.10 million in one waiver. If Government cannot spend such amounts of money without seeking approval from Parliament, would it not be of interest to know how a similar amount given away benefits the government or national interests? Fundamentally, it is critical that such exemptions are not given to businesses to enable them undercut their competitors. Besides, such a variation makes Kenyan taxes unpredictable and so discourages private investments, particularly since it is done quietly outside public view. Parliament imposes taxes and allocates money to benefit the public. If the tax is paid and the money spent but the desired results are not achieved, the responsibility should be on Parliament to find out why. This is because if no taxes are imposed there would be no resources to divert. Therefore, Parliament has to ensure proper collection of taxes and spending of public funds. It is therefore incumbent on Parliament to require that budget execution be monitored and performance audits conducted to assess achievement of results. On this matter, Parliament should face no hindrances.

5.2 *Expenditures*

Under the current Constitution Parliament can only reactive finance bills” submitted by the presidency. Under article 48, Parliament

cannot introduce or amend finance bills to increase taxes, budgetary allocations, or to forgive debt. It cannot even correct known cases of misallocation or under-allocations. Under article 100, the government can spend more money on selected budget items, introduce new budget items and spend money before informing Parliament provided it subsequently submits Supplementary Estimates. These powers are reinforced by section 5 (2) of the Exchequer and Audit Act, which allows the finance minister to suspend government budget, in part or wholly, without reference to either other ministers or Parliament. These are the powers that give the executive authority to divert public goods and services to preferred areas and tell people openly that only those who support the ruling party will get development.

These provisions have several undesirable implications; first, other ministers and their officers need not be consulted before their budgets are cut or suspended, since without assurance of funds flows, it is difficult for them to plan their work programmes. For the private sector, these provisions make the budget unpredictable, making it difficult to decide on their investments on the basis of the public Budget. In this respect, the Kenyan budget suffers from one of the most critical elements of public finance - lack of predictability.

For Parliament, these powers undermine its authority to allocate financial resources, making the actual allocation dependent, solely, on the finance minister. Besides, these provisions allow the budget to be used as an instrument of political power play. In fact, they make the executive the real power to decide who gets what benefits and who

pays for them, a condition which undermines tax administration.

Parliament plays the ceremonial role of getting the money out of the Consolidated Funds, but how and where money is used, depends entirely on the executive. Once again, this undermines the balance of power between the three branches and makes allocation of public money dependent on politics not on economic returns. More fundamentally, this excessive discretion promotes a culture of dishonesty and insecurity amongst elected leaders.

There is little doubt that poor budget allocation and implementation contribute to bad economic governance as well as poor economic performance. To correct the situation requires that the budget process be changed to give Parliament greater say to ensure proper tax administration, resource allocation, adequate monitoring, transparency and accountability. Public resources, in our view, should be budgeted for results hence, implementation should be made firm. Where the executive does not deliver on budgeted results, those responsible should be required to account for their actions.

6. Quality of management

A good constitution, good laws and appropriate institutional arrangements on their own, cannot lead to proper management of Public Finance, They need good and competent managers to execute public programmes. It therefore incumbent on Parliament to ensure that qualified managers, competent, and persons of integrity, are hired to man key areas of public sector. Their concerns should include,

senior management in executive, Judiciary and public enterprises who should be required to demonstrate value for money.

In management of public finance, two institutions are critical, namely, the Central Bank (CBK) and the Kenya Revenue Authority (KRA). They have critical roles to play in resource mobilization and have great potential for abuse. Any slippage in the two, especially the Central Bank, can cause serious damage to the economy. It is therefore proposed that appointments to senior positions of these two organizations be based on proved and pre-determined qualification, integrity and competence. For these reason it is important that Parliament approves appointments of the chief executives, their deputies, and directors of these institutions. Once appointed, they should have tenure of office and the executive should not be in a position to fire them. As regards the civil service, there should be complete protection of officers to avoid victimization. In many instances, officers have been victimized simply because the executive expressed displeasure with them, a subject matter - a situation which creates insecurity.

Unless public officers are protected, it is impossible to achieve proper use of public money. Firing public officers without proper cause makes them seek ways to please the executive at the expense of the other branches and in particular the public interest. Officers need to have confidence to say no to diversion of public resources without fear of being sacked. One way to stop arbitrary sacking of officers is to require the Public Service Commission to file annual reports of its activities and in particular: -

- details of officers sacked or retired before their age
- reasons for sacking or early retirement, (not voluntary early retirement)
- if sacked for irregularities, the ministry concerned should advise the PSC what action has been taken to avoid recurrence of such irregularities
- where officers are victimized, the PSC should order reinstatement and, the accounting officer should be required to account for the wrong-doing
- give public officers a fast track appeals system to avoid long court delays.

7. Ability of Parliament to enforce accountability and transparency

Over the years Parliament has demonstrated its ability to identify areas and individuals involved in abuse of office. In 1975, it was able to pin point individuals who were suspected to be associated with the disappearance and subsequent murder of one of the MPs. Subsequently, many more incidents have come to light, but Parliament has not demonstrated the capacity to enforce accountability on such public officers. In some cases, it has not even had the capacity to access information on critical of public interest. These omissions need to be corrected and Parliament enabled to access and assess all information necessary to fulfill its mandate as protector of public interests. To be effective, Parliament should have the capacity to cause removal of any public officer, whether at; political or technical level, if it feels the present of such an officer, in service, is prejudicial to public interests.

To achieve this goal requires that Parliament have both legal and technical capacity to understand matters of public finance. It also ought to have the capacity to access technical skills from outside government where and when need arises. It should be in a position to order or commission special investigations into any matter, along the lines of those of Watergate, Lewinski's Affair, or more recently, the ENRON scandal in the USA. In the three USA cases, the issue was not so much public money but ethics in conduct of public affairs, which is critical to proper and accountable management of a country.

8. Delegated functions

Among the delegated functions, there are some which are more critical than others. Looking at management of public affairs, it is obvious that the following functions have been over delegated and need to be corrected:

- matters of public debt; external and domestic
- external relations, with development partners
- extra budget funds i.e. earmarked funds, and financing of regulatory agencies
- public enterprises.

It cannot be overemphasized that where Parliament delegates any function, it must retain the capacity to follow up on implementation, demand accountability and transparency together with value for money. In particular it must retain the power to demand reports on the delegated functions.

9. Public debt

The legal provisions on matters of public debt are scanty, offering very little room for effective Parliamentary supervision. The requirements on external borrowing appear inappropriate and inadequate, with the basic requirements confirmed to:

- (i) allowing the minister for finance to borrow on such terms and conditions as he may think fit
- (ii) external debt proceeds to finance approved expenditure
- (iii) minister to file details to Parliament as soon as it is practicable but with no time limit
- (iv) minister to report the amount of indebtedness through the annual accounts
- (v) the minister or any other officer authorized by him, in writing may execute the debt instrument.

Under the External Loans and Credit Act (Cap 422) the minister is not required to:

- (i) file the terms and conditions of the loan in Parliament before signature
- (ii) finance development costs only, which means debt proceeds can finance consumption
- (iii) ensure the country has capacity to sustain the debt before contracting it
- (iv) ensure debt procuring is cost effective.

As will be recalled, under Article 100 of the Constitution the minister can introduce new expenditure items after the Budget is approved by Parliament, he can also spend more money on items of his choice and seek Parliamentary approval, retrospectively. This means that the requirement to finance

approved expenditures is not effective at all. On domestic debt, the minister is free to borrow in Kenya currency sums of money in such amounts on such terms and conditions as the minister may think fit and also use the money as he wishes. This is the case because under the Internal Loans Act, Cap 420, there is no restriction on use of such debt proceeds. The minister is not even required to report the local indebtedness at any time. In our view, the excessive delegation of borrowing powers has encouraged excessive and unsustainable borrowing, going hand in hand with very poor investments.

As of December 2001, external debt amounted to 44.6% of GDP, representing a slight decline, while domestic debt rose from 24.6% to 25.8% of GDP, an increase of Ksh.16.2 billion in six months, June to December 2001. Going by this current rate, domestic debt can be expected to increase by at least Ksh.32.4 billion, during the fiscal year 2001/2002. This is happening at a time when the Government has released a Poverty Reduction Strategy Paper and a Development Plan, both of which indicate that Government will not engage in net increase in domestic borrowing. Under the circumstances, it appears that the government's left and right hands work at cross-purposes. The critical question is whether the Government has any commitments or firm policy strategies. One could be excused if he/she concluded, that the two documents are intended for public consumption only and not for operational purposes.

In addition to formal debt, there is a growing problem of pending bills. These are principally, obligations which are contracted

without money to pay. According to independent auditors, hired to scrutinize this debt in 1998, there was clear evidence of gross irregularities in contracting pending bills. The announcement by the finance minister that these bills increased from about Ksh.13 billion in June 2001 to Ksh.19 billion by December, 2001, suggests this potentially explosive situation is - getting worse. To address the problem of public debt, it is urgent and critical that Parliament gets on top of all issues of debt, policy on debt contracting, and use of debt resources.

Towards this end, Parliament needs to set very clear performance and monitoring benchmarks. As a first step, the stock of public debt both local and external, should be strictly related to the country's - capacity to service it, i.e. as a ratio of either GDP or public revenues. Already, the level of debt is way in excess of what is sustainable, and is already diverting credit from the productive sectors of - the economy to Government. Besides, most of the recent debt financed projects have stalled adding to poor economic performance at a time when the old debts are maturing and increasing the cost of debt service.

10. External relations.

Over the last decade or so, Kenya has lost substantial ground and credibility on the external front. The country has not been able to deliver, wholly, on its commitments on any agreement with development partners. Every time an agreement is reached, and signed, it seems the government runs out of steam to implement the agreement. As a result, external receipts have dried up, causing a major problem for Fiscal year 2001/2002 Budget, when Government expected over sh.23 billion from external

sources, which will not be realized. Consequently, there has been an accelerated programme of local domestic borrowing which will derail social sector expenditures. The diversion of funds from essential services to debt servicing adds to poverty, as government is unable to provide pro-poor services such as health and education together with the basic infrastructure.

In a globalised world economy, no country can survive with such a dented image as Kenya has and still cope with the soaring public debt. The multilateral institutions such as IMF and World Bank have become pace setters for foreign direct investments. Now, it is either Kenya agrees with Bretton Wood institutions or investors go elsewhere. This has been happening for over ten years, with private investments declining to almost zero and poverty levels rising. To salvage Kenya's reputation, Parliament needs to step in and insist on being fully involvement in any external agreements. Once an agreement is approved by Parliament, it should be easier to implement it in total. If for any reason, there are issues which the house cannot peruse, a special committee of Parliament should be set up and after taking oath of secrecy, scrutinize issues on behalf of Parliament and make recommendations. In any case, time has also come when Kenyan leadership must stop experimenting with the country. It is from this background that it is proposed that the following changes be made to the Constitution.

11. Legislative changes to protect institutional arrangements

Amendment to Articles 16, 19, 20, 22, 23, 24, 25, 39, 48, 58, 59, 99, 100, 102, 103, 106, 108, 109, 110

11.1 Article 16 and 19: Appointment of Ministers

The two articles give the president powers to appoint ministers and assistant ministers. To protect the institution of Parliament and ensure only qualified people of integrity are appointed ministers, it is proposed that these two articles be amended to ensure:

- (i) the total number of ministers will not exceed 25% of Parliament
- (ii) ministers will be appointed by the president and approved by Parliament
- (iii) no minister will assume office until and unless Parliament has approved the appointment. If the president wishes to appoint a minister when the House is in recess, it must be recalled or the person does not assume office until cleared
- (iv) that to increase the number of ministers to exceed 25% of Parliament will require approval by at least 50% of Parliament.

These provisions are necessary to avoid excessive appointments into the cabinet and also ensure individuals who have already, been cited by Parliament for irregularities are not appointed into public - positions. Such changes would also keep the cost of running the government down.

11.2 Article 20: Appointment of Vice-President

It is recommended that this article be amended to provide for Parliamentary approval of the person appointed as Vice-President.

11.3 Article 22: Appointment of Permanent Secretaries (PSs)

This article provides for the following, with regard to appointment of Permanent Secretaries:

- (i) appointment of permanent secretaries by the president - .
- (ii) determination of the number of permanent secretaries
- (iii) placement of government departments under more than one PS

These provisions make PSs appointees of the president while in fact they are public officers accounting for public funds.

To ensure the institution of public secretary is responsible for protection of public interest, it is proposed that: -

- (i) permanent secretaries be appointed by the president on advice of a revamped Public Service Commission
- (ii) the appointment be subject to approval by Parliament
- (iii) the number of permanent secretaries be fixed by Parliament through an appropriate law
- (iv) each government department be answerable to one PS only.

11.4 Article 23: Use of Executive Authority -

This article confers executive powers on the president, with the only condition attached to it being subject to the Constitution. Therefore, the president is not bound to follow the specific laws in exercise of this power. This anomaly has encouraged issuance of directives, which in some cases are contrary to sectoral laws.

To correct this anomaly, it is proposed that the article be amended to provide that:

- (i) the executive authority shall be exercised subject to the Constitution and laws of Kenya
- (ii) the president obeys the Constitution and laws of Kenya in exercise of his executive authority
- (iii) it is a duty and obligation to uphold the Constitution and laws of Kenya to promote welfare of Kenyans.

These provisions will remove the misconception, which currently exists, to the effect that the president is above the law while he is actually the custodian of the Constitution and laws of the land.

11.5 Article 24: Abolition and constituting of Public Offices

This article gives the president powers to constitute and abolish public offices. The article is misplaced and leads to unnecessary duplication of public agencies. For example we have several agencies dealing with the same matter, e.g. exports and investment promotion, investment Promotion Centre, Export Processing Zones Authority, Export Promotion Council, and Department of External Trade in the Ministry of Trade and Industry. Similar duplications exist within other sectors, e.g. the financial sector with the CBK, CMA, RBA and Insurance Commission. These duplications are costly and cause confusions to private sector operators who are required to obtain multiple licenses for their operations. To avoid duplication, it is proposed that this article be amended to:

- (i) require constitution of new offices and abolition of those already in place, be

- subject to appraisal by the Public Service Commission and
- (ii) require approval by Parliament.

11.6 Article 25: Holding of public office at pleasure of president

The reading of this article is that if the president is displeased, he can get rid of any public office holder. In practice if the president expresses concern over any individual officer, the officer can be fired, interdicted or retired immediately, without notice. In case of early retirement, it is done in public interest. This creates insecurity within the service but of greater concern is the fact that those seeking favours use the name of the president to intimidate public officers. They may also give false information on officers to facilitate their removal. We have witnessed many incidents of people going round collecting money under the guise of being closely connected to powers that be. To remove this source of insecurity in public service it is proposed that the article be amended to provide that:

- (i) holding of public office shall be in public interest
- (ii) where public interests conflict with other interests, public interest shall take precedence
- (iii) PSC and other Commissions be solely responsible for personnel matters in the public service.

11.7 Article 33: Nominated MPS

This article provides for twelve nominated MPs who are selected according to the strength, i.e. number of MPs a political party has in Parliament. In the current Parliament, one nominated MP had to leave to make room for another person, which was a repeat of a similar incident earlier. Whatever good

reasons may have occasioned these changes, they open an avenue for abuse and political manipulation. Similar changes occur more frequently, with nominated councilors.

In our view, this is an abuse of public institutions. The Constitution requires the nomination be made to represent special interests not special situations. Special interests cannot be synonymous to special situations. Consequently, to avoid abuse expression, the Constitution should be changed to provide that once nominated the MP or councilor should serve the term. Unless stopped, these nominations can be a source of political corruption

11.8 Article 39: President Power to Protect MPs due to vacate seats

Under this article any MP who misses Parliamentary sittings for eight consecutive days, without the speaker's permission loses his seat but the president can direct otherwise. In absence of any set criteria on which this authority is to be exercised, it is not possible to see fairness and neutrality in its exercise. In an effort to restore Parliamentary supremacy, this article should be amended to provide neutral criteria, not subject to favours by the executive. The ideal criteria for exemption should include "absence from Kenya, sickness or similar just cause".

This would require proof of physical impediments.

11.9 Article 41: Appointment and removal of members of the electoral commission

The responsibility of appointment and removal is conferred on the president subject

to tribunal findings. However, the article does not provide for a solution where a member of the commission has misbehaved and deserves to be removed but the president does not appoint a Tribunal. In view of the critical role the Electoral Commission plays in ensuring proper conduct of elections, the constitution should provide for a way to remove a member even when the president does not appoint a tribunal to investigate him or her. It is therefore proposed that the article be amended to:

- (i) require Parliamentary approval of the chairman and members of the commission
- (ii) require that the Parliament, by a motion passed by at least 50% of members, may require removal of a member who deserves to be removed
- (iii) require that once the motion is passed, the member be duly removed.

11.10 Article 48: Bills dealing with finance

Under this article, only the president through a Minister can introduce a Finance Bill to parliament. But there is no requirement for the president to comply with any social or economic principles in course of preparing finance bills. To ensure efficient use of scarce financial resources it is proposed that the article be amended to require the president to observe basic principles of efficiency, stability, equity, sustainability and predictability, in preparation of finance bills. Hence it should be amended to ensure that:

- (i) finance bills are submitted to

Parliament on the basis of an agreed fiscal strategy. resources are allocated efficiency to provide identifiable national objectives and targets to meet public needs

- (ii) mobilization and allocation of resources target achievement of economic stability the government budget enhances equity
- (iii) public expenditure is sustainable especially with regard to debt
- (iv) with regard to public debt and investment, the government maintains intergeneration equity.

If these principles are not followed, Parliament may amend the finance bills and make changes, as it deems fit.

11.11 Impact of Article 58 and 59 on Parliament Authority

Under article 58 and 59, the President can summon Parliament, prorogue it or dissolve it. These powers give the president enormous influence over Parliament, thus tilting the concept of checks and balances clearly in favour of the president. With such powers, everybody, including members of Parliament, knows who has the superior power. This was demonstrated when in 2001, the president prorogued Parliament despite opposition by majority of MPs who wanted to entrench the Constitutional Commission into law.

To restore supremacy of Parliament it is proposed that:

- (i) Parliament sets its own calendar, when to be in session and when to be on holiday
- (ii) Parliament establishes clear timetables to avoid powers of summoning, prorogation and dissolution being used as a political weapon
- (iii) The president be endowed with authority to recall Parliament when national interests so demand.

12. Chapter IV: Appointments of Chief Justice, Judges of the High Court and Court of Appeal and the Judicial Service Commission

There is a public belief that the presidency has undue influence over the judiciary. This is not good for the separation of powers and functions. However, every time the president expresses his opinion on matters before the court, the final decisions appear to tally with his wishes. This is not good for development of checks and balances or for independence of the judiciary. To enhance the concept of checks and balances, it is proposed, that

- (i) appointment of members of Judicial Service Commission be done by the president and be approved by Parliament
- (ii) to protect judicial officers, the chairman of Judicial Service Commission be an independent person, preferably a former holder of a Constitutional office, not the Chief Justice, just as the Head of Public Service is not the Chairperson of PSC.
- (iii) appointment of chief Justice and Judges of High Court and Court

of Appeal be done by president subject to parliamentary approval

13. Article 100: Preparation of Annual Estimates

The article requires the minister for finance to prepare annual estimates of revenue and expenditures and to lay them before Parliament. The expenditures are required to be prepared in separate votes. But as regards revenues, the Constitution does not require any form of presentation, as to the source.

13.1 Tax Waivers

For revenues, these details are provided in both the Exchequer and Audit Act and the respective tax laws. To correct the omission, it is proposed the Constitution be amended to provide for:-

- (i) specific reference to taxation
- (ii) a requirement that to require every person, or agent conferred with authority to waive or vary taxes and charges imposed under the law under his/her responsibility, will report periodically on exercise of such powers
- (iii) the Constitution or specific laws, to require that authorised persons make at least quarterly reports on waivers or variations, showing the person for whom the tax is waived, amount waived, reasons for waiver, and details of benefits the government gets from such waivers.

It is essential to note that once the tax is imposed, the amount payable becomes public money. Any person who gives such money away dispenses public funds and

needs to be accountable. Besides, the public needs to know the people it assists and the reasons for such assistance.

13.2 Article 100: Estimates of expenditure

Under the current Constitution, Parliament does not get any direct information from the government departments. It only receives departmental budgets as approved by Treasury and as included in the annual estimates. This omission denies Parliament critical information on which to assess the soundness of proposals submitted by departments. To enable Parliament to consider the effectiveness of departmental expenditure proposals and to hold such departments responsible for their performance, it is necessary to get the background information. Besides, the type of budget information submitted to Parliament by the Treasury does not afford Parliament opportunity to relate proposals to on-ground operations. To correct the situation it is proposed that: -

- (i) annual budget estimates be accompanied by a budget policy statement indicating long-term and medium Government objectives
- (ii) budget includes the following information
 - details of proposals submitted by departments together with the comments and recommendations of finance minister on the proposals.

- to enable Parliament scrutinize departmental proposals they should be submitted not - later than one and a half to two months before the budget day
- (iii) departmental proposals be scrutinized by Parliamentary sectoral committee before Parliament - debates on the consolidated annual estimates
- (iv) annual estimates be submitted together with necessary economic data and information to justify the estimates and prove their sustainability in the future
- (v) departmental budgets target clearly indicated objectives and targets to facilitate monitoring
- (vi) once approved, the budget becomes a firm commitment on the part of government to its people ,not to be significantly changed without reference to Parliament
- (vii) any change in excess of 3% of total expenditure, should be considered significant and referred to Parliament for approval before expenditure starts.

In ideal situations, these details should be incorporated in a Budget Law, but given Government reluctance to institute strict budgetary controls, some of these details may need to be incorporated into the Constitution.

14. Article 102: Role of Civil Contingencies Fund (CCF)

The purpose of this fund is to finance unexpected and unforeseen emergencies.

However, many accounting officers consider CCF as a reserve fund to be used to meet expenditures which cannot be accommodated under the ministerial ceilings. The tendency is to leave out essential expenditures with the hope that they can be financed from CCF. To avoid misuse of this fund and enhance accountability it is proposed that:

- (i) the minister be required to report any charges (withdrawals) from this fund, to Parliament within 21 days of such charge.
- (ii) details provided to include the nature of emergency, the department which was responsible for dealing with it, and the extent of the emergency, i.e. expected duration
- (iii) use of CCF to finance non-emergency activities, be prohibited.

15. Management of specific purpose funds: Extra Budget Activities

These are extra budget activities set aside to meet specified public goods and services. They range from payroll taxes such as National Social Security Fund (NSSF) and NHIF to consumer taxes such as dairy levy, road maintenance, rural electrification levies, and sugar development levy. One primary objective of these levies is to improve the concerned sector or target service. As a general rule, if the benefits generated by the Fund do not exceed the burden borne by the consumers, the economy and the country are worse off and the Fund should be abolished.

A critical examination of these Funds leaves many Kenyans wondering whether they

would not have been better off without many of them. For example, the dairy industry collapsed many years ago while the dairy development levy continues. Despite the deteriorating road network, the road maintenance levy continues to be imposed. Similarly, though electricity consumers continue to pay rural electrification levy, one cannot think of a place where rural electrification was done during the last three years. However, the greatest disappointment is to be found in sugar development levy which was expected to develop the local sugar industry, yet it collapsed several years ago but the sugar levy lives on. What should worry Kenyans is the fact that the Kenya Sugar Authority, the agency charged with promoting local sugar production, has on several occasions, been involved in importation of duty-free sugar to the disappointment of local producers, a behaviour similar to warden and preachers. Such actions add to the problems of this industry, the principal sources of income for many farmers in Western Kenya region. There can be no justification for paying subsidies to sugar traders (through duty and levy free importation), if anything, we should give assistance to local producers.

These kinds of inconsistencies occur where there is no adequate supervision over authorities executing specified mandates. It is therefore critical that Parliament reasserts its authority over matters of all taxes and charges of equivalent effect so that if the benefits of the Fund activities do not exceed the burden borne by those who pay the levy, it is economically beneficial to leave the resources in the hands of the private sector. To achieve this objective it is proposed that:

- (i) Parliament assumes responsibility over budget approval and execution of all

public Funds

- (ii) Fund budgets be approved through Parliamentary Sectoral Committees
- (iii) Parliament requires submission of annual budget execution reports on each fund
- (iv) Parliament requires regular evaluations to ensure that each Fund remains necessary.

16. Article 103: Public Debt

With debt burden of about 75% of GDP, Kenya is heavily indebted. A large portion of external debt is currently tied to stalled projects. This means that Kenyan taxpayers are servicing part of public debt which is not providing any benefits to the economy. There are far too many public projects which are poorly selected, planned and executed, leading to many of them stalling. There is also an added problem of contracting liabilities which are not provided in the budget thus leading to accumulation of pending bills. According to a study conducted in 1997, these contracts are entered into without proper protection of public interests giving contractors excuses to escalate charges.

The debt problem is exacerbated by lack of limits to domestic borrowing, leaving room for borrowing, without due regard to debt carrying capacity of the Government budget.

To address the problem of public debt, it is proposed that: -

- (i) the Constitution requires Parliament to enforce debt limits through a specific law to ensure that debt is strictly restricted to affordable level, based on either GDP or revenue performance
- (ii) borrowed funds are productively

invested to increase economic capacity to service debts the ratio of total debt is maintained at a reasonable and sustainable level

- (iii) any public officer who commits public funds outside the approved budget, is held personally responsible for the debt
- (iv) such an officer be required to make good any loss the government suffers due to unauthorized action
- (v) provision be made, either in the Constitution or in a specific law, that where Parliament has previously cited an individual or department for irregularities, it should require proof that corrective action has been taken before releasing funds to that department
- (vi) government should have to report all public debts and all contingent liabilities at least once a year and explain the changes.

To control the level of debt and ensure that debts are properly contracted for productive investments, the Constitution should provide that:

- (i) while an Act of Parliament governs the whole arrangement of debt related issues
- (ii) terms and conditions of the loan should be laid before Parliament and the debt
- (iii) shall not take effect until and unless approved by a resolution of Parliament
- (iv) the government can only borrow to finance approved budget expenditures

With regard to public enterprises, the Constitution should provide:

- (i) that terms and conditions shall be

- laid in the House and approved before the money is released
- (ii) these conditions shall apply whether the money is from the Consolidated Fund or from any other public fund.

To afford the taxpayers an opportunity to relate the amount of money spent to expected results, the Government should be required to file a Budget Performance/Outcome Report. This report to be available as follows:

- (i) within four months after the end of fiscal year
- (ii) indicate the specific achievement to be sought through of the public outlays
- (iii) the report be displayed for public inspection for at least six months.

17. Appointment of Governor” Central Bank and Commissioner General Kenya Revenue Authority

17.1 Governor Central Bank

The Central Bank is a critical institution for proper management of public finance. It should therefore, be entrenched in the Constitution to:

- (i) protect the tenure of office of the Governor, deputy an board members
- (ii) have the governor appointed by the president with the Parliamentary approval
- (iii) provide for an appointment period of five years renewable once provide for modalities of removal
- (iv) provide for an agreed performance evaluation.

17.2 Commissioner General KRA

This is a critical Office in revenue mobilization and needs to be protected. Therefore, the Commissioner General, his deputy and directors should be appointed with approval of Parliament

18. Appointment of Controller & Auditor General (CAG)

The current CAG has been in office for over 30 years. The performance of the office has been lackluster especially in the 1990s. Inadequate resources and lack of an effective supervision, together with poor institutional arrangements may have been responsible for CAGs poor performance. To correct the situation, it is proposed that:-

- (i) a public audit board be put in place to oversee the operations of CAG’s work
- (ii) appointment of the CAG and the board be made by the resident with approval by Parliament
- (iii) the CAG be appointed for a period of 5 years, for a maximum of two terms only
- (iv) the government should conduct performance, value for money audits and; file the report in Parliament
- (v) the CAG department as a whole be made a Constitutional office
- (vi) the Parliamentary Committee on Finance be empowered to appoint an auditor for CAG.

19. Accountability

Recent experiences show public officers, particularly at political level as very shy on

taking responsibility. As will be recalled, in August 1999, a train accident occurred in India killing 200 people. The Railway Minister, Nitish Kumar, took moral responsibility and resigned. In Kenya, many more people have died under circumstances which suggested negligence, yet nobody takes responsibility. For example, tribal clashes occurred in 1991/92, again in 1997, when several hundred Kenyans died. In 2001, over 100 Kenyan died in Tana River while recently 15 Kenyans died in Kibera and 21 in Kariobangi North, both within a stone throw from both Harambee House and Police Head quarters, but so far nobody has taken responsibility. It is therefore not surprising that even ordinary people can openly say they cannot feel the presence of the government. To restore Government credibility, Parliament needs to enforce full accountability on all those in charge of public offices, especially with regard to public finance. It is therefore proposed that the Constitution be amended to provided the following:

1) On public finance

- (i) make Permanent Secretaries or Accounting Officers and heads of self-accounting organizations, accountable to Parliament for money under their responsibility
- (ii) hold any person who uses, directs use of public funds, refrains to collect, or fails to protect public funds, whether at political or technical level, in disregard of the law/procedure or instructions, accountable for any loss which may occur. Such a person should be required to reimburse the government for the loss, whether in office or after retirement

- (iii) Parliament should be empowered to monitor all forms and operations on public finance on a continuous basis.

2) To enforce discipline and accountability at political level, the Constitution should be amended to introduce an article empowering Parliament to pass a motion by a vote of 50% of members of, Parliament, for removal of a minister on grounds:

- (i) incompetence in conduct of his/her duties
- (ii) abuse of office or willful abuse of oath' of office, or lack of confidence misconduct or mismanagement
- (iii) incapacity, whether physical or mental
- (iv) the motion of removal be initiated by receipt of a petition signed by at lease 30% of MPs
- (v) c) As part of promoting accountability, the Constitution should be amended to,
- (vi) exclude from the Official Secrets Act, any matters relating to, corruption in public sector,
- (vii) misuse, theft and diversion of public funds, directives issued contrary to the law, and procedures on public finance etc.

3) The Constitution should be amended to provide for removal of a member of Parliament where it can be proved that the MP has,

- (i) abused his oath of office
- (ii) deliberately acted contrary to the Constitution
- (iii) been involved in misconduct, such as promoting hatred, discrimination or other similar

- cause
- (iv) the process be initiated either through a Constitutional court or ,
- (v) a petition signed by 25% of registered voter in his Constituency.

Given the serious problems facing this county, Parliament should spend more time working for the county than the case is now.

20. Article 106: Public Service Commission, Teachers Service Commission etc

To enable the Public Service Commissions perform, it is necessary to appoint competent professionals, to administer these commissions, including: of PSC, TSC, Medical and Dentist Boards etc. Appointments of the chief executives and board members should be made by the president and approved by Parliament. Once appointed, these officers should only be removed if they are incompetent, incapacitated, or for misconduct /misbehavior. Among the functions of these commissions should be to:

- (i) advise the president on appointment of CEOs and other senior officers
- (ii) advise the president on establishment and abolition of public offices
- (iii) advise the president on professional matters of their responsibility.

These commissions should operate independently and not be subject to direction by any person.

20.1 Protection of Public Officers

It is further proposed that the Constitution be amended to protect public officers from:

- (i) victimization and discrimination in promotion/advancement if they perform their duties faithfully
- (ii) removal from office/dismissal etc except for a provable cause.

As part of strengthening the public service, the duties and functions of Permanent Secretaries should be spelt out to include

- (i) ensuring efficient and effective management and operation of their departments or ministries
- (ii) offering professional advice to ministers and the government
- (iii) implementation of policies and programmes of the government
- (iv) ensuring efficient management of public funds under their ministries or departments.

21. Article 108: Appointment of Police Commissioner

The police force has come under very critical scrutiny and criticism of late. Besides, the Police force has been assigned duties which undermine its image. They have also been used to restrain Kenyans from exercising of various forms of fundamental rights, leading to loss of public support. To correct the situation, it is proposed that:

- (i) the appointment of the police commissioner be done by the president and approved by parliament
- (ii) he be appointed for five years renewable once only
- (iii) the Commissioner be accountable for the money allocated to the police force.

22. Article 109: Appointment of Attorney General

To ensure an effective institutional arrangement between the three branches of the government it is critical to ensure that the offices of the attorney general and the public prosecutor are held by persons who are qualified, competent and of integrity. It is therefore proposed that appointments of the Attorney General and the Public Prosecutor be done by the president with approval of Parliament

In addition, to avoid misuse of powers of prosecution as a means of targeting individuals, it is proposed the AG be required to file a full report of all prosecutions he starts but withdraws before completion, including details of the persons involved and reasons why cases are withdrawn.

PUBLIC FINANCE GOVERNANCE AND PARLIAMENT.

Sam Mwamburi Mwale

1. Introduction

Laws enacted by Parliament to Govern Public Finances in Kenya

- The Constitution of Kenya
- Exchequer & Audit Act (Cap 412)
- Paymaster – General’s Act & Regulations (Cap 413)
- Internal Loans Act (Cap 420)
- External Loans & Credits Act (Cap 422)
- Government Financial Regulation & Procedures of 1989 (22 Chapters)

2. The Constitution of Kenya

- Confers the Executive with primacy in exercise of sovereignty, authority 7 power of the purse.
- Sect 1- implies sovereignty resides in the state, not the people.
- Sect 16-22- all principal offices, officers, and institutions of executive derive authority and exist at pleasure of president.
- Sect 23-25- implies that sovereignty lies in the presidency .
- Sect 48- implies that the “power of purse” lies with the president.

The Constitution of Kenya’s Sections on Finance 48, 99-105

- Sect 48- Power to initiate taxation (Finance Bill) and expenditures (Appropriate Bill) proposals limited to the executive only.
- Sect 99 (Consolidated Fund) & Sect 102 (Contingencies Fund)- all public monies raised & used only Parliamentary authority.

- Sect 100- Financial Statement (Budget) and Estimates (Appropriation Bill) to be presented to and authorized by Parliament through Appropriation Act.
- Sect 101- Vote on Account by June 26th – 50% of Appropriations
- Sect 103 –Public Debt to be authorized by Parliament
- Sect 104 –Emolument of public officers
- Sect 105- Parliamentary oversight of Executive spending on timely basis through Controller & Auditor – General.

3. Public Finance Laws on sects 48, 99-105 of Constitution and Common Practice

- Exchequer 7 Audit Act (Cap 412) – an Act of Parliament to provide for control & management of public finance i.e. Sect 48,99-105 hands executing power to the PS Treasury nominally accountable to Minister, and auditing and reporting to Controller & Auditor – General.
- Paymaster – General’s Act (Cap 413) an Act of Parliament establishing PMG takes the finance controller’s authority (sect 105 (a) from the CAG and hands it over to the Financial Secretary, leaving only audit & report function
- Internal Loans Act (Cap 420) – an Act of Parliament to provide for domestic debt (Sect 103) has Minister and PS doing all borrowing

and only reporting to the House with no sanctions if they exceed limits

- External Loans & Credit Act (Cap 422) – An Act of Parliament to provide for external borrowing (Sect 103) is similarly observed.

4. Where Does this Leave Parliament?

- Representation: Section 48 reduces parliament's ability to carry out any amendments except in the Finance Bill (downwards) unless supported by Minister. The Standing Orders reinforce Parliament's limits to authorizing and auditing estimates despite the language sections 99-105 that appear to give Parliament power of the purse
- Lawmaking: (Sects 99-104) Although the only way taxing and spending is authorized is by Appropriation and Finance Acts, Parliament is still subordinate to the Executive because of limited amendment power. Similarly Caps 413, 420, and 422 rarely observed, and Parliament rarely invokes these.
- Oversight: Sect 105 & Cap 412 should be Parliament's instruments of effective oversight, but they are rarely observed. Therefore PAC, PIC, Dept. Committees, and special Select Committees less effective than law provides

5. Parliament Lacks Capacity To Enforce following governance principles

- The People's Sovereignty - eroded by Constitutional and Governing philosophy since 1907 beginning with sect 1, and backed up by sects 16-25, 48, 100, 102, and 103
- Political Accountability and Culpability eroded by weak

provisions in sects 17 (3), 99 (1), 105 (2), and poorly administered Caps 412, 413, 420 and 422 .

- Improved Public Good & Welfare as Sole Basis for Taxation & Spending - Kenya lacks any Constitutional or Legal provisions.
- Parliamentary Primacy to Ensure Equitable and Accountable Taxation & Spending -no parliamentary capacity to enforce Sect 99- 105, and Caps 412, 413, 420 and 422.
- Freedom of Information to ensure Public Probity - restricted by Officials Secrets Act .

6. When Sovereignty Lies with the State

The two main tenets of people's sovereignty will not be observed in the managing of public finances which are:

- (i) No Taxation Without Representation - meaning the final power to tax and incur spending lies with Parliament and not the Executive as is the case now.
- (ii) Some Taxation and Spending is Locally Accountable - meaning the power to tax and spend is devolved to representative institutions and officials as much as possible, and not highly centralized as is the case now.

7 Where there is no political accountability or culpability

The following occurs -

- (i) Leadership is not personally and collectively accountable or culpable despite language in Sect 17 (3) and Caps 412 and 413 that make the cabinet, minister, PS, CAG and FS or any other accounting officers appear culpable if they do not manage public finances & property with probity
- (ii) There is no political cost to bad financial governance - there is no language

anywhere that describes this

- (iii) The raising of public monies through taxes, grants, and loans is not specific, targeted or accountable by any entities that receive public monies. The language in Sect 99-105, and Caps 412,413, 420 and 422 does not hold anyone to specific accountability.

8. When Public Good & Welfare Are Not the Basis for Taxation & Spending

Without recognition of People's Sovereignty, the governing philosophy for taxation and spending is by the State for the State.

These two key tenets are not recognized

- (i) The intrinsic equality of every citizen, and the right for each citizen to be equitably treated in terms of taxation, and equitably treated in terms of budgetary allocations, and
- (ii) Each cent collected and spent to be used solely to benefit the public good and welfare

Not a single clause in the Constitution; Caps 412, 413, 420, and 422; and Government's Financial Regulations & Procedures mention these tenets at all. As a result, public discretionary and non-discretionary spending is by the State, and for the State.

9. When Parliament Does Not Hold The Purse Strings

Two Key Tenets are Overturned

- (i) Thorough Parliamentary Scrutiny Which Is A Must becomes an option exercised largely at the Executive's wish, so that Sects 99-104 have been effectively overridden by Sect 48, Standing Orders, and Sects 16-25.

- (ii) Executive's Tax Collection and Spending Must Be Fully Accounted For to the Public Through Parliament- is rarely observed since Parliament has no order prosecution of those who have misgoverned public finances. Therefore sect 17 (3), 105, and Caps 412,413, 420 and 422 are thoroughly weakened by common practice, and executive powers exercised through Sect 48, Standing Order, and Sects 16-25.

10. When Parliament and Society Have Limited Access to Official Information.

- (i) Three tenets are distorted by the Official Secrets Act.
- (ii) Statutory disclosure and scrutiny is not made available only as per the discretion of senior officials, and not as per the requirements of probity
- (iii) Media does not have full access to all unclassified or declassified information-because arbitrary decisions can turn it into official secret at any time.

11. In Conclusion

The basic framework exist but has been weakened. To strengthen it, the following principles apply

- (i) The governing philosophy should be that of people's sovereignty
- (ii) Power of the purse should belong directly to the people through Parliament and elected local authorities
- (iii) Power to tax and spend should be devolved to representative loci away from appointed ones

- (iv) Power to amend, authorize, oversee and audit taxation and spending to be retained exclusively by Parliament & elected local bodies
- (v) All information on taxation and spending to be put into the public domain, in easily accessible and usable forms for the civil society and media

PUBLIC PARTICIPATION IN LAW MAKING AND POLICY IMPLEMENTATION

Oduor Ong wen

1. Introduction

In the context of complexity, Institutions of decision-making, policy Implementation and resource management will need to be guided by strong political leadership, able to make difficult policy judgements, work with a range of players and guide the actions of the administration to promote the social and economic well-being of the citizenry.

Strong and sustainable governance environment requires a political leadership which:

- (i) *Provides community wide leadership and vision:* Policy-making institutions are often diverse and exhibit a multiplicity of diverging interests. By putting forward a vision for national and local action, building coalitions of common interest and encouraging the development of a vibrant civil society, local political leadership can enhance the capacity of diverse groups of people to act together around shared goals.
- (ii) *Constantly builds its capacity to make policy judgements:* Governing is about making choices, from the prioritization of a range of demands to the allocation of limited resources. Political leaders can actively strengthen their ability to make policy judgements through deepening their understanding of the dynamics in the local area, anticipating changes and learning from past practice.
- (iii) *Is accountable and transparent:* Accountability means being willing to take responsibility for one's decisions and actions. Sound governance requires a political leadership that creates opportunities to account to the citizenry over and above regular elections. Increased accountability ensures that the actions of the leadership reflect the aspirations of the community, increases the legitimacy of that leadership and deepens local democracy.
- (iv) *Builds partnerships and coalitions:* The challenge of meeting the needs and aspirations of local communities requires a political leadership able to build partnerships with communities, business, labour and other public agencies. A political leadership that engages in ongoing dialogue with a wide range of local actors will be able to identify and act on opportunities to build partnerships between sectors. In this way, human and financial resources and capacity can be mobilized to achieve developmental goals.
- (v) *Represents the diversity of interests:* Institutions that represent the diversity of interests within society are best able to provide credible and effective leadership. Legislative and policy-making agencies should take active steps to ensure that representatives from groups which tend to be marginalized (such as women, people with disabilities and

the poor) are encouraged to take active part in decision-making processes. One way to achieve this is through running stakeholder support programmes, which provide information to different social categories and prospective candidates on issues such as electoral systems and processes, decentralized resource management and the functions and operations of the government; and build skills in areas such as public speaking, organizing public meetings, fundraising and so forth.

- (vi) *Demonstrates value for money*: The political leadership is responsible for ensuring that taxes and other public resources are utilized to the maximum benefit of the citizenry. The political leadership should, therefore, be concerned with the efficiency and effectiveness of the local administration, and constantly seek to enhance performance and service quality.

Various support mechanisms are required to enable dynamic political leadership, including capacity-building development for ministers, legislators and senior civil servants, support for the policy formulation process and information systems.

Changes to the current governance system may also be required. For example:

- (i) Legislative democracy requires a degree of responsiveness to needs of the public in a manner that makes extra-parliamentary forums for generating, packaging and debating legislative proposals a prerequisite.
- (ii) The ability of political leaders to ensure value for money and quality services requires a system

of performance management which allows councilors to assess the performance of their own administration as well as that of other service providers.

- (iii) The development of partnerships requires a framework of support and regulation to enable various types of partnership.
- (iv) Building a community-wide vision requires strong support for councilors, district level civic actors and local business community to engage local communities, and planning and budgeting processes that are participative and open.

These systems, although closely linked to the support and development of strong political leadership, are discussed elsewhere in this paper.

2. Public Participation in Law Making

Public participation has, of late, become a buzzword in the political and development lexicon. The explanation for this derives from the experience that people tend to own the consequences of their decisions even if those decisions were out rightly wrong. It is in this context that it is argued that people should participate in the making of laws that govern their relations in a polity. The rationale thereof is that people are incapable of putting in place a body of laws that would go against their best interest.

Direct participation of the people in law making is viewed to be untenable. They are, therefore, expected to participate indirectly through their elected representatives in the legislature. Many persons that have argued against people's participation in legislation have argued that by casting their vote and

electing a representative to the legislature, people surrender their power and right to make laws to their representatives so elected. While this is a largely valid argument, a strong case is still made for input into legislation before the legislature debates and enacts the law. There are a number of modalities that a democratic state employs to ensure popular legislative framework is put in place and made to function. These include:

- Organizing public debates and discussions
- Lobbying
- Public hearing
- Task forces and commissions of Inquiry
- Research by legislators

2.1 Public Debates and Discussions

Through organized public discourse on identified legislative issue, the government, through the relevant department, can solicit views from different segments of the society, synthesize such views and then prepare and present legislation to the legislature for enactment. While this is fairly transparent manner of public engagement, many governments employ it more as public relation gimmick than genuine way of soliciting public input into a legislative process. Nonetheless, the public can turn this process on its head. One familiar example is the Bills Digest initiative of the Centre for Governance and Development (CGD), a local NGO. Through this initiative, the organization identifies forthcoming legislation of wide public interest, organizes debates involving professionals, members of parliament and other interested parties thereon and produces a summary of views in an easy to read *Bills Digest*. The publication is then distributed to the legislators. Many members of parliament have said they have found this initiative very

useful, since they lack official research facilities.

2.2 Lobbying

Lobbying is the oldest form of public participation in law making. In fact, the word was j coined out of legislative practice, informal though it was. This practice developed in Britain from the action of various interest groups that would go and wait for the members of parliament at the lobby of the House of Commons to try and persuade them to support or oppose a Bill or motion in which they had interest. Lobbying has not only now become so sophisticated that it is no longer confined to “ambushing” legislators in the lobbies of parliament building, but it has now developed into a science that is studied in many universities and other institutions of learning.

2.3 Public Hearings

This method has been popularized in the United States of America and other democracies modeled on the US system. This is an approach where the legislature provides a time frame for the public to make submissions either verbally or through memoranda with regard to a Bill pending before it. These submissions then determine the direction and quality of debate as well as the final legislation.

2.4 Task Forces and Commissions of Inquiry

Through instituting inquiries by setting up task forces, select committees or commissions of inquiry, the government or the legislature can get a clear feedback from the citizen on the kind of legislation they (the citizens) want or do not want. The Kenyan experience has however, has made the public be skeptical of the value of these

commissions or task forces. This is because their findings are never made public, thus making it difficult to know whether or not their views are translated into policy or legislation.

2.5 Research by Legislators

Law making is such an important national matter that extensive research into the possible ramifications and potential popularity or otherwise of the proposed Bill cannot be dispensed with. Many legislators in advanced democracies conduct surveys or commission opinion polls before sponsoring Bills or motions. In Kenya, however, the legislators have no research facilities, save for an ill-stocked library.

3. Public Participation in Policy-Making and Implementation: Building Sustainable Partnerships

Governance is about the involvement of the various stakeholders in conceptualization, design, implementation, evaluation and monitoring of interventions affecting their lives. It is anchored in the mainstreaming and internalization of holistic and integrated development planning and delivery of basic social services. Governance institutions should, therefore, endeavor to develop strategies and mechanisms (including but not limited to, participatory conception, design, planning and implementation) to engage the citizens as individuals or through their businesses and community groups.

Below are some of the levels of active partnership between different actors:

3.1 As Partner in Development

A governance structure that is based on collective decision taking and equitable

accrual of economic and social benefits should have mechanisms for citizen participation and active engagement in policy initiation, formulation, implementation and monitoring. These mechanisms can be realized via:

(i) Community-driven forums from within the locale which facilitate various stakeholder formations to initiate or intervene in policy debates with a view to influencing policy design and implementation, as well as engage in monitoring and evaluation of activities. These kinds of forums work optimally where what is at stake is the formulation of either nationwide development visions or issue-specific policies, rather than for formulating multiple policies that affect a multiplicity of interests. For instance, many pastoral communities have been very critical of electoral regime in the country, which they observe is tailored to cater for the interest of sedentary segment of Kenyan population with little regard to pastoralist interests. They argue that localities where they register as voters are not necessarily the same localities they are likely to be come election time, since they have to keep shifting domicile in pursuit of pasture and water. If their input were sought prior to the enactment of both Presidential and National Assembly and Local Government Acts, this concern would have been anticipated and addressed.

(ii) Structured stakeholder involvement in certain committees or task forces of the National Assembly, local authorities or DDC, in particular if these are issues-oriented committees with specific mandate and limited lifespan rather than permanent structures. This ensures that elected organs of central and local governance retain residual mandate of development planning and can singularly

be held accountable while the input of various stakeholders, particularly those either directly affected or have professional or experiential competence, are sought and mainstreamed.

(iii) Participatory budgeting initiatives aimed at linking community priorities to capital and social investment programmes. This should be based on participatory needs assessment and resource inventory-taking. Institutions of governance like the parliament, County councils and Municipal councils as well as the DDCs are expected to deliver services within the constraints of available resources. Although infusing efficiency into the resource use machinery is one way of achieving this, another is to mobilize off-budget resources additional to those budgeted for through partnerships with the business community and non-profit organizations. Governance institutions can utilize partnerships to promote business, support non-governmental organizations (NGOs) and community based organization (CBOs), mobilize private sector investment and promote development projects, which they initiate but do not necessarily finance. Examples of available options for this kind of approach include various blends of the following:

- Physical infrastructure development e.g. using the abundant rural and urban labour force for the construction of roads, bridges and footpaths;
- Community contracting for the services such as cleansing and refuse collection;
- Community information and learning centres (telecentres) as central points for using new information technologies - e.g. the internet and e-mail - for development purposes;

- Developing partnerships around issues of immediate local economic development, livestock marketing, eco-tourism or farming capacity enhancing initiatives aimed at building skills base for development and monitoring of resource use;
 - Initiatives for value-added processes such as transformation of waste into useful products e.g. recycling of waste being linked to job creation for the unemployed; and
 - Community banking and various forms of community finance control (e.g. merry-go round and various forms of revolving funds)
- (iv) Support for the organizational and institutional development of professional, neighborhood and welfare associations. The import of this is that people tend to participate via associations rather than as individuals.
- (v) Focus group participatory research conducted in partnership with NGOs and CBOs can generate detailed information and wellspring of data on specific needs and values.

3.2 *Citizens as Consumers of services*

For many citizens, their main contact with institutions of governance is through consumption of their services. It is here that these institutions need to begin laying a firm foundation for relationships with citizens and communities. Institutions of decision-making and implementation must be responsive to the felt needs of and priorities set by citizens and business as consumers and end users of their services. Improved customer management and service provision are critical to the creation of an environment conducive to social development. A viable approach to building a culture and practice

of responsive service provision is predicated on the following key principles:

- (i) **Engagement:** Organized groups should be consulted and involved in determining the level and quality of public service they receive, and, as much as possible, be given a range of available services provided from which to make their choices.
- (ii) **Access:** All citizens should have an unhindered and equal access to the services to which they are entitled.
- (iii) **Quality of Service:** Citizens should know the standard of service to expect.
- (iv) **Transparency:** citizens should be told how departments, committees and sections are run, how resources are allocated and utilized, and who is in charge of particular services so that they may hold those in charge accountable.
- (v) **Information:** Members of the public should be given full, accurate, timely and relevant information about the services to which they are entitled.
- (vi) **Courtesy:** Members of the public should be treated with courtesy and consideration.
- (vii) **Value-for-money:** Public services should be provided in a cost effective manner in order to ensure that the community members and the business sector gets the best possible value-for-money.
- (viii) **Redress:** If the promised services are not delivered or the quality thereof is compromised, the community and other end users are entitled to apology, a full explanation and effective remedy;

and when complaints are made, the service users should receive a prompt, sympathetic and positive response.

4. New Approaches to Policy Implementation and Service Delivery

Currently, there is glaring and systematic under-investment in infrastructure in rural areas. This has deprived millions of people of access to basic services including water and sanitation, refuse collection and roads. Developmental governance approach has to address this aberration. Its central mandate is to develop service delivery capacity to meet the basic needs of communities. Basic services enhance the quality of life of citizens, and increase their social and economic opportunities by promoting health and safety, facilitating access (to work, to education, to recreation) and stimulating new productive activities. Institutions of governance in Arid and Semi-arid districts have a range of delivery options to enhance service provision. They need to strategically assess and plan the most appropriate forms of service delivery for their areas. Their administrations need to be geared to implement the chosen delivery options in the most effective manner and so ensure maximum benefit to their communities, which have been marginalized over the years. This cannot be done without their active involvement both at policy formulation level and during the stage of implementation.

4.1 Principles for service delivery

In choosing the delivery options, governance institutions should be guided by the following principles:

- (i) **Accessibility of services:** All citizens - regardless of ethnic background, race,

- gender or age - have access to at least a minimum level of services. Imbalances in access to services must be addressed through the development of new infrastructure, and rehabilitation and upgrading of existing infrastructure. A Consolidated infrastructure Programme should be established to provide capital grants to assist local county councils and municipalities in funding bulk and connector infrastructure for low-income households and so extend access to services. Accessibility is not only about making services available, but also about making services easy and convenient to use. Policy institutions should particularly aim to ensure that women, the youth, children and people with a disability are able to access basic social services and amenities. Parliament and implementation institutions and agencies have an obligation to solicit input from the people on how these could be realized.
- (ii) Affordability of services: Accessibility is closely linked to affordability. Even when service infrastructure is in place, services will remain beyond the reach of many unless they are financially affordable. The authorities can ensure affordability through:
- a. Setting tariffs that balance the economic viability of continued service provision and the ability of the poor to access services.
 - b. Determining appropriate service levels. Services level that are too high may be economically unsustainable and jeopardize continued service provision. However, inadequate service levels may perpetuate stark spatial divisions between low, middle or high-income users (particularly in urban areas) and jeopardize the socio-economic objectives of the change.
 - c. Cross-subsidization (between high and low-income users and commercial and residential users) within and between services.
- (iii) Quality of services: The quality of services is difficult to define, but includes attributes such as suitability for purpose, timeliness, convenience, safety, continuity and responsiveness to service-users. It also includes a professional and respectful relationship between service-providers and service-users.
- (iv) Accountability for services: Whichever delivery mechanism is adopted, public agencies remain accountable for ensuring the provision of quality services that are affordable and accessible.
- (v) Integrated development and services: Central and local government institutions should adopt an integrated approach to planning and ensuring the provision of social services. This means taking into account the economic and social impacts of service provision in relation to local policy objectives such as poverty eradication, spatial integration, livestock marketing infrastructure development and job creation through public works.
- (vi) Sustainability of services: Ongoing service provision depends on financial and organizational systems that Support sustainability. Sustainability includes economic

- viability, technological appropriateness, cultural acceptability and the environmentally sound and socially just use of local resources.
- (vii) Value-for-money: Value in the public sector is both a matter of the cost of inputs, and of the quality and value of the outputs. The above principles require that the best possible use be made of public resources to ensure universal access to affordable and sustainable services.
- (viii) Ensuring and promoting competitiveness of local business: The job-generating and competitive nature of business must not be adversely affected by higher rates, licensing fees and service charges on industry and commerce in order to subsidize domestic users. Greater transparency is required to ensure that investors are aware of the full costs of doing business in the country.
- (ix) Promoting democracy: Central and local administration must also promote the democratic values and principles enshrined in the Constitution.

4.2 Local Government

Given their strategic and positioning as the nearest political institutions to communities, local authorities are expected to be the barometer for measuring the degree of good governance in a country. Development, like charity, should begin at home and local authorities should be the natural vehicle for the translation of grass roots communities' developmental needs into tangible and implemental programmes. Sadly, the

structure, operations and institutional culture of local authorities in Kenya have not enabled them to play the role of midwifing social development. They have been rendered virtually inoperative thanks to increasing incapacity to plan, collect revenue, prudently manage resources and make independent decisions on matters affecting local residents. Far from being facilitative institutions for people's self-empowerment, local authorities in Kenya have instead replicated the central government's bureaucratic ineptitude, corruption, inefficiency and high-handedness. They are largely seen as burden on communities they were created to serve.

Recent efforts at sanitizing the realm of governance in Kenya have preferred the central government as the target of the struggle for change, leaving the majority of local authorities limping by the wayside - many of them unable to deliver to the local residents and rate-payers the most basic of services. These efforts aimed at re-inventing governance at the central level have yet to yield any appreciable positive results for the people who are meant to benefit. This increasing need to harmonize democratic development of the society downwards, therefore, enjoins on advocates of good governance a powerful consensus around the preference to target, for critical democratic discourse and social re-engineering, the institutions of local governance. The challenge: the relocation and concentration of democratic engagement among the people and mainstreaming popular participation in the local governance agenda.

The aforementioned challenge is real and a need exists, therefore, for pushing upwards the good governance agenda if the much sought after democracy and development are to be translated from mere wishes into a reality for Kenyans. It stems from the rude

awakening and realization that all forms of development including the policy dispensations that legitimize them need to find popular expression in primary institutions of governance and respective actors therein. These are the coordinates where democracy and social development meet and infuse with the raw popular will of the citizenry and conflates with other central governance efforts to enable the popular forces in society to reclaim the stewardship of their collective destiny. Disappointingly, these sites are by and large occupied and controlled by unpopular forces, making operationalisation of economic democracy a Sisyphean task.

Efforts to address some of the problems associated with the dearth of good governance at local authority levels have generated paradigm shifts that require firming up through institutional renovation of local authority governance mechanisms, modalities and institutions. The underlying concern for a bottom-up approach to governance in Kenya is thus seeking a systematic and systemic articulation in ideas that will add a new edge to the instruments of social re-engineering. The following areas need focus:

5. Socio-political Dimensions of the management of Change

This should include a look at, and training in, key components of governance and development at the local community level with a view to understanding and/or defining the complex and multiple roles that elected leaders and chief officers of local authorities have to perform. A look will also be made of the motivations and ethos of local authority management and the institutional nexus between local authorities and other public, private, voluntary and community organizations. The relationships between the

elected councilors and chief officers, the tensions between local authority officers appointed by the central government and those locally hired; as well as the role of political parties need to be studied, and appropriate training conducted thereof.

5.1 Structural and Cultural Change

Issues related to management structure, work ethics and relationship between political leadership, strategic direction, operational management and frontline service delivery to the rate-payers; the extent of diffusion of cultural change throughout the organization; and the efforts to transform local authorities into truly democratic and learning institutions.

5.2 Strategies for Responding to Change

Understanding the level of responsiveness and strategies of local authorities to respond to pressing challenges as combating the widespread and rising poverty, ethnic and other social tensions, crime, juvenile delinquency, homelessness and environmental concerns. Local authorities' preparedness and positioning to play a central role in the Constitutional Review Process and readiness to adapt to and implement the new constitution that will emerge therefrom will also be re-examined.

Since most local authorities overtly exhibit growing tension between the political leaders (the councilors) and chief officers appointed by the central government, leading to steady deterioration of services to residents, it is important to explore the possibilities for addressing the structural aspects of these important institutions with regard to their institutional development needs (capacity assessment), their service delivery systems, decision-making processes and ability to respond to a rapidly changing

political, economic and social milieu. These should be grouped under four broad themes, namely:

5.3 Capacity Assessment

Local Authorities, like other community-based institutions, need a systematic nurturing and improved institutional health in order to discharge their duties effectively and efficiently. This requires a through-going institutional audit to establish structural and functional capacity of county councils, urban councils, town councils and municipalities (including the Nairobi City Council) to respond to the needs of their rate-payers and social and political changes taking place in the country.

The capacity assessment must therefore focus on the following among others:

- A study of the power relations at the political and administrative levels within the local authorities with a view to establish their disposition to service delivery and organizational development
- Study the existence, appropriateness and functionality of management systems, identify institutional development gaps and appropriately propose the training needs. This should focus on key areas of local authorities capacity including, but not confined to: Human resource development and management; revenue collection, budgeting and resource utilization, including financial and inventory controls; the extent to which environmental and social concerns are integrated into the planning and operations within the boundaries of various local authorities; capacity to effectively plan and execute programmes and

projects that respond to felt needs of local residents and other rate payers; standards and procedures of financial and social audits; community outreach and civic education capabilities; conflict prevention, management and resolution

- An examination of existing academic, Professional and experiential needs for the leadership of local authorities at both the political (elected and nominated councilors) and administrative levels (council staff), identification of gaps therein and recommendation on standards of professional and academic attainment necessary as well as the degree of experience that would be essential.

6. Political Dimensions of Change Management

It is important to examine issues of local democracy and the changing roles of councilors (and other actors in the political process). This includes the role councilors play in:

- Developing and articulating, as representatives, the felt needs and interests of their grassroots communities
- (i) Determining and directing the strategic direction of the local authority's organizational development, resource mobilization and prudent utilization thereof and efficient delivery of services to residents and other rate-payers.
- (ii) Facilitating and orchestrating the work of other local development agencies and partnership with public, private and voluntary agencies (including NGOs, CBOs and religious organizations)

- (iii) Providing civic leadership and acting as the voice of the local residents in national affairs - particularly with respect to the constitutional review discourse, budget dispensation and social development policy matters.
- (iv) International relationships, particularly with regard to the evolving East African Community.

6.1 Social and Cultural Change in Local Governance.

Under this theme, a study has to be done of:

- (i) The mobilization of changes in the structure, culture and values of the local authorities, harnessing the energies of the staff at all levels in the organization, and overcoming resistance to positive change.
- (ii) Ways and means of helping the local authorities transform themselves into learning institutions
- (iii) The changing role of the corporate centre of the local authority - the inter- relationship between the political leadership, chief officers and their management teams, the central support services and corporate policy units
- (iv) Imaginative and innovative approaches to monitoring and evaluating the effectiveness of organizational and cultural change from the point of view of a wide variety of different stakeholders.

6.2 Strategies for Responding to Change

The final area of focus in transformative intervention should be concerned with the corporate inter-departmental and inter-agency strategies for responding to major changes in the external context of legislative, administrative and local governance. In particular, though not

exclusively, we should identify the challenges associated with:

- (i) Poverty, marginalization and social exclusion - focusing upon the challenges associated with poverty in remote rural communities, slum areas and peripheral estates as well as the role of and interaction with other stakeholders in combating poverty, creating employment, dealing with social disintegration and exclusion and preventing crime.
- (ii) The need for an integrated and strategic response linking housing, health, education, transport, policing, leisure, social care, public, private and voluntary sectors.
- (iii) East Africanisation of the market and the state - focusing on impacts of the East African community as envisaged in the draft treaty and implication for transnational networking.

PARLIAMENT'S RELATIONS WITH THE EXECUTIVE WITH FOCUS ON KENYA

Walter O. Oyugi

1. Introduction

This is a 'requested paper'. Therefore its content is restricted to the expectation of the conference organizers. I was specifically asked to prepare for presentation at this workshop a paper entitled "Parliament's Relations with the Executive" under the theme of "checks and balances". The specific tasks I was asked to perform include:

- Overview of the current situation
- Issues and challenges in the respective areas of presentation
- Opportunities and gaps for strengthening the role of the legislature in the respective area of presentation, particularly with regard to improving democratic governance, peace, national unity and integrity of the republic of Kenya.
- Best practices and lessons learnt, giving appropriate examples from Kenya and/or other countries.
- Recommendations on constitutional principles and practices that would make the legislature to function more effectively.

In preparing this paper, I have drawn from works which have been done in the field under review while at the same time falling back on my own memories and reflections especially with respect to the Kenyan specific cases.

2. Overview of the Relationship Between the Legislature and Executive in 'Global' Perspective

A country's constitution usually spells out the powers of the various organs of the state as well as the nature of their relationship, although the latter in some instances may not be spelt out in detail. In general, however, the relationship is derivable from the powers which the constitution confers on the individual organs.

As two authors put it (Jim Chalmers and Glyn Davis) the relationship between the executive and the parliament is the buckle which joins a system of government. It determines the character of national politics, the role of key public institutions, and the balance between government and the broader political system.

In discussing the relationship between the Legislature and the executive in Kenya, we shall first make broad generalization about the subject before relating the same to the Kenyan situation. The actual relations between a legislature and the executive is also determined by, as one authority puts it (Wiatr Jerzy).

The type of political party or alternative system the constitution encourages through electoral design or establishes by law, whether it is unitary or federal; the role of the chief executive in relation to the legislature (parliamentary or presidential); and the electoral process and the structure of parliament (for example, unicameral or

bicameral chambers, the official powers of a legislative Presiding officer etc).

But there are certain principles which are common regardless of the type of constitutional or political system so long as the executive and the legislature exist as distinct organs of state albeit with some overlapping functions.

Since the emergence of the liberal state in the 19th century in some Western countries, the principle upon which the organization of the state system has been based is the doctrine of separation of powers. As it has come to be known, it is the allocation of powers among the three branches of government so that they are a check on each other. Intended by its proponents to make tyrannical concentration of power impossible, it found articulate defense in James Madison's article which has since been referred to as Federalist paper No. 51.

The doctrine finds expression in checks and balances i.e. the notion that constitutional devices can prevent any power within a nation from becoming absolute by being balanced against, or checked, by another source of power within the same society. The device (i.e. checks and balance) was first put forward by the French philosopher, Charles de Montesquieu (1689-1755) in his *spirit of the law* (1734) and further developed by Thomas Jefferson (1743-1826) in his notes on the state of Virginia (1784). There are arguments and/or principles which have been put forward to justify the need for the institutionalization of the system of checks and balances in the government system. These principles are based on the assumption that good governance i.e. democratic governance is desirable while at the same time recognizing the fact that there are factors within society that tend to work against it. This is what an

American scholar had in mind when he stated: "Man's capacity for justice makes democracy possible; man's inclination to injustice makes it necessary." (Said Niebuhr).

There are challenges however, which the notion of checks and balances encounter in its actual application. These arise from the fact that parliaments are made of elected or appointed leaders who individually or as groups in a party context, may be members of the same political 'family' with the chief executive. The potential for conflict of interest that dual membership entails cannot be underrated.

There is also the character of the legislature to consider. As one observer puts it: "The characteristics of an individual legislature are often varied and related to the historical and cultural traditions of a nation or state." (Norman Ornstein).

But this is often not the case in a number of countries which have imported legislative systems which are based on the cultures which are completely alien to the system to which they are being transplanted. An attempt by Nigeria in 1979 to replicate the American legislative system did not stand the test of time. So was the importation of the Westminster model in the former British colonies on the eve of independence. As it would turn out the operationalisation of the notion of checks and balances as applied under the Westminster model soon became problematic.

It was also soon realized that for a legislature to play its mandated functions effectively certain conditions have to obtain: A few examples are illustrative:

- legitimacy of the legislature i.e. whether it is popularly elected and therefore responsible to the

electorate and concomitantly responsive to the public interest.

- Self-sufficiency in resources or adequate resource endowment which enables it to institutionalize mechanisms for gathering information relevant to policy analysis and formulation, and subsequently, the ability, to monitor the implementation of policies through the use of its own staff and/or think tanks/research units contracted by it.

It is worth noting that legislatures exist both in democratic and non-democratic societies. In the latter case, the legislature tends to lend legitimacy to the ruling government, thereby contributing to the stability of the political system as a whole. They do not serve as a means of popular participation - direct or indirect - although they do provide an entry into the upper echelons of government for a select few. This was the practice in the totalitarian one-party states of the Soviet Union and Eastern Europe before the collapse of communism. It was also the case in many authoritarian single party states in Africa (and still is the case in quite a number) before the resurrection of multipartyism in the early 1990s.

In a number of African countries, legislature exists in a twilight zone of two constitutional practices i.e., Presidential and parliamentary. And this is where problems might and/or do in fact arise. In other words, they are neither presidential nor parliamentary. In a number of African countries especially the former British colonies, the Westminster model remains an attraction; but the emergence of dominant executives some of whom are still members of parliament in name complicates the situation. The problem which arises is how to reconcile in practice the common constitutional provisions in such countries

which in theory places parliament as the supreme organ of the state while at the same time conferring a lot of power in the office of the chief executive; which powers in practice, do pose a threat to the authority of parliament as provided for in the constitution. The uneasy relationship between the legislature and the executive in Africa can to a large extent be traced to the conflicting powers of the two organs.

3 Issues and Challenges Facing the Relationship

"If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions." (James Madison).

And this is where the role of parliament as a watchdog organization over the government of the day becomes important.

The doctrine of checks and balances as crafted by James Madison in Federalist paper (51) was an elaboration on how the three branches of government as then outlined in the draft constitution of the United States could be made accountable through a system of counterchecking of one another's activities. In a presidential system in which a president is directly elected by the people and conferred with rights to appoint his cabinet outside the elected bodies, there is need for some form of checks on the exercise of these powers which are being performed outside the day

to day reach of other organs of the government. The system of checks and balances was therefore established to ensure that the separated institutions shared power in the course of service to the general public. Indeed a noted American scholar (Richard Neustadt of Harvard) has referred to the arrangement as "separated institutions sharing power". This is where the problem begins in the case of the parliamentary democracies in the third world where the doctrine of the separation of powers and checks and balances that gives expression to it have been taken at their face value.

There are limitations if not challenges inherent in the doctrine of checks and balances in the Westminster type of parliamentary democracy which many African countries have imported. The challenge is how one comes to terms with a system in which the president, as in Kenya and many other African countries, is an elected Member of Parliament, a leader of the ruling party and also head of the executive branch of the government. According to this system a president's influence and/or power is felt, not only in the executive branch but also in parliament where his cabinet are also members and in the party where he is the leader of the elected group in parliament as well as outside the parliament. In this kind of situation, a dilemma of some sort emerges. And this dilemma is felt more by the legislature as an institution than by the executive, in that, the electorate usually expects its members to check on the excesses of the executive and to ensure that the government of the day does live up to its electoral promises.

The fact that the executive and the legislators belong to the same ruling party in parliament often create a dilemma of some sort whenever there is a difference of opinion over an important issue, usually over a piece of legislation or a policy.

Members of Parliament are put in a position where they have to choose between public interest; and partisan interest, and more often than not, the latter is usually not in the interest of the electorate. The overlapping membership therefore creates problem of loyalty which can lead to compromises that may end up serving the interest of those with relative leverage in the bargaining process.

It is common knowledge that in the pre-multiparty era, executive penetration of the legislature and the legislature's subservience to it was the norm in many African countries, then ruled by dominant one-party systems with authoritarian chief executive at the top.

There is also the self-interest of the MP to consider in any analysis of the relationship between the legislature and the executive. For some MPs, his parliamentary seat may be the only source of income. Any decision that might bring his parliamentary career to an abrupt end would naturally be dreaded. Which is to say that faced with a situation in which the very continuation of the life of parliament is an issue, as for example in a situation where the abuse of power by the executive necessitates the passing of a vote of no confidence, as provided in many constitutions many MP usually develop cold feet, change their minds and vote against their own conscience for fear of facing an election whose outcome they cannot predict. A major role which the legislature has to address is one of policy formulation. The initiative in policy formulation is usually taken by the executive before being presented to parliament for approval or, where the policy involves enactment of an act of parliament, it goes to parliament in the form of a Bill. Studies which have been done on some African countries e.g. Botswana (Batlang Comma Serena, Molutsi, Kenneth Good) indicates that the relationship between the legislature and the

executive has been lopsided in the interest of the executive and this has also been the case of Kenya since independence. Parliamentarians are usually presented with a *fait accompli* and all they are required to do is to approve decisions in which they have had no input.

Parliaments in Africa operate under different circumstances. They lack support staff that can prepare well-informed position papers on policy issues. The situation is further aggravated by lack of basic facilities such as a good reference library. There is also the usual reluctance on the part of senior bureaucrats to avail relevant information to the parliamentarians either as a matter of routine or whenever called upon to do so by the relevant committees of parliament. As a result, the executive is always having an advantage over parliament in terms of information access; which information is sometimes put to good use in depriving the parliamentarians of their 'voice' to respond to policy issues initiated by the executive. The challenge is, how does parliament overcome this problem? If parliament is to play a meaningful role in the governance process, it can only do so if there is transparency on the part of the executive in areas where the functions and/or roles of the legislature and the executive overlap. The legislature cannot create its own intelligence unit to gather information that would enable it to know for example, the security situation which exists in the country. If it is to be called upon to legislate in this area, transparency as an ingredient of good governance would require that at least a relevant committee of parliament (in the Kenyan case this would be, National Security and Local Authority Committee) is taken into confidence before any security related legislation is presented to parliament. In this respect the challenge to the executive is whether the security committee can be

made to draw a distinction between what the public has a right to know and what should be regarded as state secret. In other words the problem that parliamentarians have to grapple with is how to improve the volume and quality of information which they need in order to be rational decision makers.

An important point on the relationship between the two organs is the manner in which the executive has exercised some of its constitutional powers. The constitution gives the president the power to summon, prorogue and dissolve parliament. This power touches directly on the security and integrity of parliament as a decision-making institution. Since independence, this power has more often than not been subject of abuse by the executive. There have been occasions when parliament remains in recess for a long time even when there were important matters of national interest one would expect it to address. Sometimes parliament has been sent home i.e. prorogued as a way of denying it the opportunity to discuss an issue of national interest. And the dissolution of parliament has been used as a political weapon to spring surprise on the opposition parties, purposely to ensure that they are denied the opportunity to plan their campaigns properly.

Unprogrammed interventions in the life and operation of parliament by the executive presents not only a major challenge but also a threat to the integrity of parliament. In this age of openness and accountability parliament must begin to take charge of its own agenda with respect to these three areas i.e. it must have time-table for its sessional terms i.e. it must determine when it meets and when it goes on recess and when it returns from recess. And lastly on this issue, parliament must initiate a legislation that would indicate under what circumstances the life of parliament can be shortened.

4 Lessons of Experience in the Relationship Between Parliament and the Executive

In this section of the presentation, the Kenyan specific lessons of experience as well as the experiences of other countries is presented before discussing at a later point how these experiences can inform the need for a stable relationship between the two organs i.e. the legislature and the executive.

It is a truism that in many countries, parliament as has been indicated above performs three key functions in the governance process: formulation of public policies; provisions of funds necessary to implement the policies; and overseeing the implementation of the policies.

At independence, Kenya inherited a neo-federal constitution generally referred to as *Majimbo* constitution. The *Majimbo* constitution in theory operated between June 1963 and the end of 1964 and between 1965 and 1966, a process was put in place that saw it being dismantled before Kenya emerged as a unitary state once again from 1966. During that period, however short it was, a few lessons were learnt in respect to the relationship between the executive and the legislature both in a neo-federal set up as well as in a bicameral legislature. It should be noted that a neo-federal constitution was a colonial imposition in that one of the main political parties, KANU, was vehemently opposed to it and accepted it only as a way of ensuring that the granting of independence was not delayed. But once in power, KANU put in place mechanisms and practices that ensured non-implementation of the major provisions of the constitution, especially those relating to power sharing between the centre and the regions. Kenya had never been governed before, either as a

federal unit or as a quasi-federal one. Therefore, the system lacked cultural base which would have supported its survival in the post-independence period.

As a system put in place to address the fears of the so-called minority ethnic groups, its disappearance from the scene was to be expected the moment the Kenyatta regime had assured the leaders from those communities of a place in the structure of power and access to privileges.

Another lesson was learnt also, and this was in the area of legislation. It is important to note that no effort was made to introduce any changes in the constitution before the absorption of KADU into KANU, for according to the *Majimbo* constitution, any constitutional change required the concurrence of the House of Representatives and the Senate. Both were controlled by KANU but KANU could not raise the percentage required to change the constitution, which in the case of the Senate, was as high as 90 per cent. Thus the existence of a bicameral legislature where the ruling party failed to command the required number of supporters acted as a constraint on constitutional change.

With both KADU and the *Majimbo* constitution out of the way as the target of attack by the - ruling party KANU, the latter would turn on itself soon thereafter. Although the intra-party power struggle had started even before independence, it would be accentuated after the collapse of KADU and the *Majimbo* constitution. This would provide the excuse for the executive to introduce legislations intended to neutralize the party in parliament as an arena for power struggle. It was after 1966 that the series of constitutional amendments (which I need not go into here because they have been well covered in other studies readily available to

the audience here i.e. Okoth Ogendo's paper in African Affairs 1971, Ghai and McAuslan, Getzel 1970 etc.) were enacted with the sole purpose of subordinating the legislature to the executive and introduce a culture of fear among the members of parliament in their relationship with the executive. This fear was occasioned by the introduction of Preventive Detention Act in 1966 as a result of which any critical posture perceived to be against the executive would easily win an individual a term in detention. Most of these legislations were enacted between 1966 and 1970.

Granted, there were still a few voices of courage but the number steadily declined with the passage of time. Executive legislations would be pushed to parliament with the full knowledge that they would be passed in the form in which they had been pushed. Isolated critical voices would be heard from time to time the irony however, is that in the end, the same voices would vote for what had been the subject of their criticism. Therefore for the better part of the life of the Kenyatta regime (up to 1978), parliament was constrained in the performance of the three key roles referred to above. Decisions made in the executive department were presented to parliament, as *fait accompli* and the parliament complied out of fear and not because of the soundness of the policy. With parliament having been marginalized as a factor in the governance process, public servants whose implementation activities were supposed to be 'watched over' by parliament would take their cue from the political executive and ignore parliamentary questions and interventions with abandon.

Indeed, by the late 70s a crop of very powerful public servants had emerged; men and women with political connections and strong economic clout. Their arrogance

increased with the passage of time and by the end of the Kenyatta regime, some of them were the effective administrative and political heads of their respective organizations whether in the civil service or state owned enterprises. The constitutional right which parliament had in questioning their activities especially over the expenditure of public funds was rendered a nullity by habitual refusal by the powerful bureaucrats to appear before the parliamentary committees.

The lesson that one learns from the foregoing discussion is that the prevailing political culture in a given country can make or break the beneficial working relationship between the executive and the legislature in the interest of the public that the government exists to serve.

Not much seem to have changed following the accession to power by Kenyatta's successor. An attempt to strengthen the party as an instrument of governance after Kenya became a de facto one-party state from 1970 did not materialize and efforts thereafter to strengthen the ruling party remained in abeyance until 1979 when the long overdue KANU elections were held and efforts made thereafter to strengthen the party outside parliament especially in the mid-eighties. These intentions and/or moves had little or no effect on changing the inherited nature of the relationship between the parliament and the executive as it had been under Kenyatta.

Although the overbearing power of public bureaucracy began to diminish and virtually diminished by the end of the eighties (except for the provincial administration) the executive continued to use parliament simply as a 'rubber stamp' in the passage of Bills and was always marginalized in

decisions involving Kenya and other states {see Adams Oloo's work).

As a watchdog body on the executive actions, the legislature fared no better under the current regime up to the late 80s. No efforts had been made before the resurrection of multipartyism to ' closely consult with members of parliament on key legislation. Funds allocated for specific purposes were being embezzled with defiance in spite of the annual reports of Auditor General that identified the culprits and recommended the line of action to be taken. The Public Accounts Committee and its sister committee, Public Investment Committee, would year in and year out, call on the executive to initiate action against the culprits without any action being taken. Voices of reason would be heard but instead of being responded to, would be dismissed with scorn. The culture of fear became entrenched and in the process, the phenomenon that has been styled 'personal rule' would emerge and be reinforced with consequences that suffocated the freedom of the legislature to perform its constitutional function. But there is an explanation to all this from the parliament angle.

The parliament has since the early seventies become a beneficiary of the government policy which allowed public servants to engage in private business following the recommendation of the Duncan Ndegwa's report on the Public Service in 1971. As public bureaucrats especially those in the higher reaches of the bureaucracy increasingly became involved in private business in disregard of conflict of interest, they would co-opt the politicians into this new structure of access as a way of buying political protection. Senior political leaders, usually cabinet ministers with good connections in the political system would soon become partners in the newly

established companies or subsidiaries of Multi-National Corporations. This would extend to ordinary members of parliament who also found themselves being appointed as member of the board or directors of various private companies and subsidiaries of multi-national corporations.

A special kind of relationship would emerge over the years involving politicians, bureaucrats, and representatives of MNCs - a relationship that was once characterized as symbiotic (see Steve - Langdon). This kind of relationship had the effect of neutralizing key members of parliament - as critics of the performance and behavior of public servants. The MPs had thus become accomplices in what would turn out to be the mismanagement of the national economy that saw the steady collapse of key institutions and sectors of the economy over the years.

With the collapse of global communism in the late eighties and the shift of interest from Africa to the former Soviet Union and eastern Europe on the part of Western government that had always turn a blind eye to what was happening in the governance front in Africa, the African leaders found themselves at once exposed to criticism. Ironically, from the same Western powers that had turned blind eyes over the years to the wrong doings of the leaders. The civil society organizations would take their cue accordingly and begin an assault on the regime. Sooner rather than later, the authoritarianism gave way to some political accommodation which saw some opening of the political space in a number of African countries including Kenya. In the Kenyan case, the 1992 elections would return a parliament with strong opposition representation. This would embolden the parliament in a way, and as a result, some of the parliament's organs which had become

dormant over the years were resurrected and parliament through the opposition MPs began to question the policies of the executive, conduct hearings on reports of the Auditor General by summoning senior civil service mandarins to appear before it. They also increasingly began to question the expenditure patterns of some ministries. But nay! This was not the parliament of angles. Some of the people now masquerading as 'Messrs Clean' had been yesterday's accomplices in mismanagement of the national economy and in some cases had even defied the summons to appear before parliamentary committees! Put differently, multipartyism did not rid parliament of compromised individuals-people with no moral integrity to question the mismanagement of the polity by the executive, people who themselves are still agents of MNCs and therefore cannot have the moral courage to question the bad economic governance associated with activities of MNCs

The lessons that one therefore learns from the Kenyan experience with regard to the relationship between the executive and the legislature in the governance process are the following:

(i) Where the party in government is an instrument of the executive in the pursuit of parochial political and economic interests, the party in parliament cannot be an active watchdog on the performance of the executive.

(ii). Where any political opposition is associated with rebellion, sooner or rather than later the critical role played by the opposition as the watchdog of the government of the day " collapses and parliament becomes a rubberstamp of the executive.

(iii) Where elected members of parliament are compromised economically, they lose their 'voice' and in so doing become accomplices of those who are bent on the mismanagement of state affairs.

And with regard to the position of the executive these lessons can be learned

(i) Where the political executive gives the public bureaucrats a 'free hand' in the running of the state affairs, the latter sooner rather than later, acquires excessive power which they put to 'good' use to neutralize those constitutional organs that are supposed to watch over their activities.

(ii) Where on the hand the political executive circumscribes the operational areas of the public servants in its own interest, however defined, public servants become timid, feel insecure and therefore end up making more mistakes than would have been the case. This manifests itself in lack of initiatives and creativity for fear of the unknown consequences of their actions. A scared public servant would hesitate to share information precisely because doing so might threaten his own survival; which explains why many civil servants called before committees of parliament either mislead the committees or avoid appearing before the committees if they can get away with it.

The net effect of all this is that there is still an air of distrust between parliament and the executive. These fears are based on political and economic culture that has developed since independence and has become deeply institutionalized in the society - a problem which a constitution *per se* cannot adequately address, which is why there is a need for a new cultural dispensation in the country involving the reorientation of the bureaucracy and the political class into what

it takes to bring about good governance both in the economic and political fields.

But the Kenyan experience is not unique. A few cases presented below are illustrative. Already a casual reference to the experience of Botswana has been made. We return to it in here again.

From studies conducted on Botswana, it has been learnt that the availability of information or the lack of it, determines the extent to which an institution is empowered to make decisions. The executive possesses quality information as compared to the Constituency Representatives and is therefore better placed to make decisions and implement them. Due to the lack of quality information, constituency representatives have been reduced to what Good calls a "rubber stamp", that is, they just endorse decisions taken by the executive. This then has ensured that decision-making is skewed towards the executive. Thus, policy making in Botswana is dominated by the executive and the role of the constituency representatives is either to affirm or provide half-hearted input on policy and its intended outcomes.

And on the legitimacy of the committees alot is still to be accomplished as most committees I have met behind closed doors including the Public Accounts Committee. The committees in the Botswana parliament are at best defunct. If parliamentary committees are defunct, can we still say that Parliament scrutinises the administration? And"this raises the question: where is the balance of power?

The Kenyan and Botswana cases do capture in general what is happening in many African countries. But even in developed countries such as Australia the relationship between parliament and the executive has

never been rosy. In Australia, parliamentarians are not free to express their views freely unless those views are shared by his own party as a study on Australia cited below indicates.

The Liberal Party of Australia maintains that elected members are free to make their own judgment. However, the reality is - vastly different. If a member steps out of line or rocks the boat in any way, he can be subjected to the most intense pressure, from both the parliamentary executive and the party organization. Rank and file members of the Liberal Party complain that the Public Service has too much power and influence, yet the discipline that they, through their organization, exert entrenches the Public Service power. If a member suggests that a department is inefficient or that a matter of government operation should be scrutinized, he is accused of disloyalty to the Minister, to the government and to his party, with a covert threat to withdraw endorsement." (Max A Burr).

Ironically all this is done in the name of party discipline which is considered to be essential in maintaining the unity of the party in a competitive parliamentary system. And two other writers observe that, the dominance of the executive in Australia is entrenched by party discipline, procedural control, a monopoly of information and advice, increasing government complexity workload, and the scarcity of parliamentary time. (Jim Chalmers and GlynDavis).

Elsewhere an opposition party in Australia is reported to have complained bitterly about the contempt with which the executive treats the house and also complained of sitting for fewer days each year, with less opportunity for private member to raise matters of importance to the public -“ (parliamentary

debates, 21 December 1989, p. 3350 cited in Jim Chalmers).

However there are some positive indications or the relationship between parliament and the executive which could be learnt from the experience of Britain which is regarded as the so-called mother of parliamentary democracy. In Britain the culture of participatory decision-making has been ingrained in the body politic of the society. This culture finds expression in parliament through a committee system that links parliament with the executive. As one writer has put it:

"In fact, during the period from 1895 to 1972, with one minor wartime exception, no government with a working majority in the House of Commons had any legislation of real substance defeated. This stems from a whole host of factors: the willingness of the government to make concessions in order to avoid party revolts, the desire of "back-benchers" for eventual promotion to ministerial office, the fear that the electorate will not support a disunited party, and a unique sense of loyalty to the party and its causes. An additional factor is undoubtedly self-interest on the part of individual members of Parliament. Each member realizes that voting against the government risks bringing down the government, thus forcing a new election that could result in defeat for the member and his or her party." (Norman).

And since the introduction of a new committee system in 1979, modeled on the US congressional committee system, the committee system is said to have fared relatively well. In general, the committees have had their greatest success in dealing with technical matters while avoiding

controversial or politically charged issues. Most observers agree that they have played a valuable role in making the political system more open. They have provided outside viewpoints, an entry into the policy-making process and have exposed the ruling government's positions and decisions to increased public scrutiny. In addition the committees have been a success in that they have had a significant impact on the accountability demonstrated through parliamentary scrutiny of ministerial and departmental policies, through direct and public questioning of ministers and in particular officials. (Winetrode and Seaton). But like other legislatures in parliamentary democracies, the committees continue to suffer from lack of adequate resources (e.g. support staff).

What lesson one learns from all these experiences is that smooth working relationship between the legislature and the executive is largely dependent on the operative political culture of a given country; which is to suggest that the norms governing transparency, openness and popular participation that they lead to, ought to be cultivated and scrupulously nursed in a polity.

5 Opportunities and Gaps in Strengthening the Relationship Between the two Organs

The establishment of a harmonious working relationship between the legislature and the executive requires good will on both sides - good will that is tinged with a spirit of give-and-take, a relationship that is built on the recognition of interdependence of roles between the two organs of government. To begin with, the first move in the Kenyan context has to be made on the executive side. If the government accepts that there has been a change in the international

environment resulting in the establishment of good governance as a condition for development assistance and if the government further appreciates that it cannot develop on its own without aid from her development partners, then it is time that the government accepts the requirements of good governance. With specific reference to relationship with parliament, the government must provide a framework for participatory, consultative decision-making over issues on which parliament is an interested party. These issues should be openly and freely discussed between parliament and the relevant agencies and units of the executive branch of government.

What is more, the executive should continue to facilitate parliament to play a meaningful role in this interaction, by assisting it through budgetary allocation to build its own capacity for policy analysis, budget formulation, monitoring and evaluation. By monitoring and evaluation, reference is being made to the need for relevant committees of parliament to have the requisite skills that would enable them to appreciate successes or failure of the implementation of government programmes especially in the field. The implicit suggestion here is that the sector-based committees such as education, health etc. should be able to go out in the field with a view to gaining first hand impression of what ministries are doing not as a matter of routine but whenever there is a need to do so.

The success of legislature executive interaction to a large extent depends on whether or not the executive is prepared to avail to the legislator and/or the relevant committees the critical and accurate information in good time to enable parliament to engage in informed discussions/interaction. But as suggested

above already, parliament itself should in the final analysis develop its own capacity for information gathering and analysis.

The integrity of parliament as a constitutionally supreme organ of the state would seem to depend on the respect with which it is held by the public that elects its members in the first place which suggests that "the government party in parliament" and opposition parties must regard each other as partners in the governance process; for there are matters of public interest which supersede partisan loyalty, and which require collective action by the parties in parliament regardless of their constitutional standing. There have been cases since independence where the Kenyan parliament "managed to stand up to be counted". Some of the select bi-partisan committees of parliament that investigated matters of national interest manifests what is meant in this regard. The recent Kiliku committee on ethnic clashes in the various parts of the country comes to mind readily.

Similarly, parliament has to regard the executive as a partner and a critical one at that in the governance process. It should use whatever capacity it acquires to support and strengthen the machinery of government where necessary. In its watchdog role it should be able to scrutinize without fear or favor the performance of various government agencies and do so with a sense of duty and subjectivity; for if its role should be perceived as one of 'witch hunting' chances of its getting information in subsequent investigations will be frustrated. There are at present functions of the executive which are its exclusive domain but which in the interest of transparency and accountability should be open for parliament participation. One such area is the appointment of senior government officials such as cabinet ministers, permanent

secretaries, managing directors of strategic parastatals, judges of the high court and senior members of the diplomatic corp which should be done with concurrence of the legislature and conversely their removal should be notified to the relevant committees of parliament.

Currently, the Kenyan constitution section 14 (1) stipulates that "no criminal proceedings whatsoever shall be instituted or continued against the president while he holds office, or against any person while he is exercising the functions of the office of the president, and section 14 (2) protects him against civil proceedings against him or anybody else acting on his behalf.

There might have been good intentions in protecting the president from any litigation while in office, but in consideration of the fact that many crimes' e.g. grabbing of properties, land, houses etc. have been committed by people claiming to act in the name of people in high authority. Perhaps the time has come for this particular provision in the constitution to be revisited with a view of ensuring nobody takes advantage of this provision in an abusive manner. If in the good judgement of parliament it should be establishment that this provision has been subject of abuse, then parliament acting in the public interest must enact an appropriate legislation to prevent its abuse. In doing so, parliament will not be fighting the executive, rather it will be acting in the national interest and it is the national interest that parliament is expected to promote and to defend. The current democratization process sweeping across the continent should be seen as a begotten opportunity by parliament to critically re-examine the existing provisions of the constitution which have over the years attributed to poor political and economical governance.

The changes suggested above if implemented are likely to contribute to the improvement of democratic governance, national unity and integrity of the republic of Kenya.

6. Recommendations

The arguments around which the recommendations presented below are based are presented in the text.

6.1 *On Constitutional Principles*

1. There should be no improper pressure on MPs such as the use of criminal law to restrict legitimate criticism.
2. Appointment of key public servants should be subject to approval by parliament and their dismissal reported to appropriate committee of the legislature with reasons for the dismissal.
3. The principles of nomination of MPs should be retained provided they do not have voting rights. Non-partisan criteria should be established for the said nomination.
4. An MP should retain his status as such even with the dissolution of parliament, until elections are held and concluded. This would enable parliament to reassemble in case of an emergency.
5. There should be a fixed term of parliament to avoid political expediency.
6. All agreements and treaties with other states and international organizations must be subject to approval by the legislature.

6.2 *On Strengthening the Operation of the Legislature*

1. Parliament's own capacity should be built and strengthened in critical areas to enable it to discharge its stated functions efficiently and effectively, notably in these areas:

- Policy analysis
- Drafting of bills

- Research/information gathering
 - Budgetary formulation
 - Adequate support staff
 - Service of independent legal counsel.
2. Consensus building among MPs across party lines through purposeful and regular workshops on topical issues or issues bearing on the functions of the legislature should be instituted immediately
3. There should be established a code of conduct linked to the improvement of ethical standards in the house (NB: the Donde Act is a case in point where personal interests of some MPs and some members of the executive branch in the so-called political banks coincided with foreign interest to frustrate the legislation.)

In the final analysis, however, it is a change of attitude on the part of individual members of parliament as well as those in the executive branch, that is the crux of the matter.

PARLIAMENT'S RELATIONS WITH THE JUDICIARY

Hon. Justice Aaron Ringera

1. Scope of The Paper

Let me at the outset state that all the views made in this paper are made in an extra-judicial capacity. They are accordingly of no persuasive value in any court and nobody has a right of appeal from any aspect thereof however aggrieved they might feel. Let me also enter the caveat that nothing said hereafter should be construed or misconstrued as representing the views of the Judiciary or any member thereof other than my miserable self.

I do not suppose that the seminar participants are keen to have any insights on whether the relationship between parliament and the Judiciary is warm, luke warm or cold. If that is what was sought I would have stated with a little fear of contradiction that the relationship is formal and correct and that proper distances have been kept. In my discernment, what is of moment on this occasion is the role that the two institutions have played or should play in a scheme of good constitutional governance. That subject cannot in my opinion be adequately addressed without some consideration of the broad societal value of constitutionalism.

2. Constitutionalism

Constitutionalism as a concept in liberal democracies be tokens limited Government under the rule of law in which the enjoyment of human rights is given pride of place. Limited Governmental power is encapsulated in the doctrine of separation of powers. The doctrine which may be traceable to Aristotle and is evident in the writings of John Locke was best articulated by *Montesquieu*, the French Philosopher of the 18th century who wrote in his *De L'Esprit de Lois* that:-

“when the legislative and the executive powers are united in the same person or body... there can be no liberty, because apprehensions may arise lest the same monarch or senate should enact tyrannical laws to execute them in a tyrannical manner... Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would be the legislator; were it joined to the Executive power, the Judge might behave with all the violence of an oppressor” .

James Madison who later became the 4th President of the United States of America, writing in the Federalist papers under the Pseudo name of “*publius*” in defense of the new constitution then under discussion correctly observed that the mirror in front of the eye of *Montesquieu* when he propounded the doctrine was the British Constitution under which there was no complete separateness of power and so *Montesquieu* could not have meant that the three departments of Governmental power, namely, the Executive, the Legislature and the Judiciary ought not to have any, partial agency in, or control over, the acts of each other. His meaning, as his own words imported and even more conclusively J as illustrated by the example in his own eye, amounted to no more than this:

“That where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free Constitution are subverted. That would have been the case if the King as sole Executive had possessed also the complete legislative power or the; supreme administration of justice, or if the entire legislative body had possessed the

supreme Judiciary or the Supreme Executive Authority.

The above is the meaning of the doctrine which I would want to commend to you. It is the one practiced in many constitutions. Understood that way it does not preclude for instance a Parliamentary Executive as we have today nor does it preclude the executive from having a limited role in law making and even adjudication. It would not prevent the legislature from having a role in appointments to the other branches of Government and it most definitely would not preclude individual members of each branch of Government performing certain roles in any other branch. The doctrine as understood by some of my brothers on the High Court bench is, in my view, not informed by logical, historical, or juridical foundations. What should be clear in the scheme of separation of powers is that the primary role of the legislature is to make the law, the executive is to formulate and implement policy and general administration including execution of the laws, and the Judiciary is to adjudicate conflicts based on its interpretation of the law. None of those organs, departments or branches of Government should in addition to its specified primary role be assigned or allowed to assume the entire or nearly the entire function of either or both of the other organs, departments or branches. Nobody is to be allowed to make the laws, interpret them and enforce them as to do so would be the quintessence of oppression and tyranny.

The rule of law on the other hand is a broad concept which captures three imperatives.

First, that the powers of Government must be based on authority conferred by law. Secondly, that all persons are equal before the law; none is too high to be above it, and none is too low to be beneath it. Thirdly, that no person shall be deprived of his life, liberty or other substantial interest without

being afforded an opportunity to be heard fairly by an impartial tribunal established by law.

That being the essence of Constitutionalism, it becomes obvious that in a sense the first plank in the facilitation of Constitutional governance is the architecture of the Constitution itself in vesting governmental power on three branches of Government which are meant to be independent of each other and to provide mutual checks and balances. That, I think, is the reason why the very first specific mandate of the Commission as spelt out in Section 17 (d) (i) is to get the people of Kenya to examine and make recommendations on the composition and functions of the three branches of Government with a view to maximizing their mutual checks and balances and securing their independence.

3. Checks and Balance between the Judiciary and Parliament

From the above theoretical exposition of the doctrine of Constitutionalism, it is evident that both Parliament and the Judiciary have equally important roles to play in constitutional governance. The one is a lawgiver and the other is the interpreter and enforcer of the given law. Both are supposed to check each other from a foundation of institutional independence. In this part of the paper I will consider how that has been or is done and how better, if at all, it can be done in the expected new Constitutional dispensation.

3.1 Judicial Checks On Parliamentary Power

In the Constitutional scheme of things the Judiciary is envisaged as the Primary defender and Champion Constitutionalism. This is evident from a consideration of *inter alia*. Sections 3, 44, 67 and 84 of the Constitution. Section 3 declares the

supremacy of the Constitution over other laws. Section 44 gives the High Court exclusive original jurisdiction to adjudicate on questions as to membership of the National Assembly. That has a bearing on the composition of the executive for ours is a Parliamentary executive. And Section 67 vests the Cardinal responsibility of the enforcement of the Bill of rights in the High Court.

I doubt that anybody would quarrel with the basic premise that the power of adjudication based on the interpretation of the Constitution and other laws properly belongs to the Judiciary. What to my mind is unacceptable is that the final word on the interpretation of the Constitution should be confined to the High Court. And it is to be remembered that until the constitutional amendments of 1997, even the enforcement of the Bill of rights began and ended at the High Court. The historical reason for that sad state of affairs is that in the days when we had an East African Court of Appeal, Governments in East Africa for reasons of nationalistic pride preferred to have their Constitutions interpreted and enforced by their own courts. Things have changed since the collapse of the East African Community in 1977 and there is no longer neither rhyme nor reason why Constitutional adjudication should continue to be the province of the High Court. It ought to - be vested in the nation's highest court. In that regard I am of the - opinion there ought to be a Supreme Court which should be the Constitutional Court of Kenya.

I would suggest that such a Court ought to be the guardian of the Constitution and it should accordingly be vested with original jurisdiction to the exclusion of all other courts in the following four matters: (i) the enforcement of the bill of rights and the interpretation of any provision of the Constitution; (ii) where a question arises whether an enactment was made in excess of

the powers conferred upon Parliament or any other person or authority by or under the Constitution or other law; (iii) where a question arises as to whether any Act of Parliament or any Treaty to which Kenya is a party or any part of such Act or Treaty is inconsistent with the Constitution; and (iv) where a question arises whether an executive administrative of other act is in accordance with the Constitution. I would also suggest that such a court could also be the final appellate court of the Republic with jurisdiction to hear as of right appeals in civil and criminal cases from the Court of Appeal in instances where such causes were first adjudicated upon by the High Court in exercise of its original jurisdiction and with either the Leave of the Court of Appeal or of itself in any other matter which is certified by the Court of Appeal or itself to be a matter involving a substantial question of law of public importance.

With a Supreme Court of the right strength and caliber, the ideal of Constitutional checks and balances would be translated to a powerful reality. A part from the check on the Parliamentary power afforded by the practice of Judicial Review of Legislation, Parliament itself checks on its own deliberative function in deference to the courts through the application of the doctrine of *sub judice*. Standing Order number 37(10) prohibits reference in any question asked in the house to a matter which is *sub judice*. And standing Order No.74 prohibits members from referring to any matter which is *sub judice*. By this devise matters which are pending before court are not to be made the subject matter of debate in Parliament. I think the rule encapsulates good practice and pays homage not only to the doctrine of separation of powers but that of a fair trial by an impartial and independent court established by law. So much of Judicial checks on the exercise of parliamentary power.

3.2 Parliamentary Check on Judiciary Power

To my knowledge the only formal check that parliament may have on the exercise of Judicial Power is the possibility of discussing the conduct of Judicial officers. In that regard, Standing Order number 73 contemplates such discussion but prohibits adverse reference to such conduct save upon a specific substantive motion moved for the purpose. I have no recollection of or knowledge of any such discussion in the past.

The informal and potentially strongest check parliament may have on the judiciary is the power of the purse. It is parliament which in exercise of its powers under section 100 of the Constitution approves estimates of expenditure (other than expenditure charged upon the consolidated fund) of all state agencies. In the case of the Judiciary only the salaries and allowances paid to Judges are charged on the consolidated fund. And it should not be forgotten that Judges are paid such salaries as have been prescribed by parliament. In my view, although there is no evidence that parliament has abused its power of the purse vis-a-vis the Judiciary, this check has a potential for greatly undermining the effectiveness and independence of the Judiciary. I would propose that one way of maximizing Judicial independence is to provide in the Constitution that all administrative expenses of the Judiciary and all the salaries, allowances, gratuities and pensions payable to judicial officers - shall be charged upon the consolidated fund. The Constitution should also provide for a mechanism other than Parliament or a purely executive agency for determining the salaries and allowances payable to judicial officers. The Judicial Service Commission in consultation with the Treasury may well be an appropriate device.

As regards the appointment and discipline of judicial officers, Parliament has no role. That is presently the province of the President and the Judicial Service Commission should Parliament have a role? The matter is debatable. In my own opinion Parliament ought to have a role in the interests of checks and balances in Constitutional governance. I would myself suggest that all Judicial appointments to the Superior Courts of record, i.e. High Court, Court of Appeal, and the Supreme Court, (if there will be one) should be made with the approval of Parliament. And for effective and detailed consideration of the nominees, it is best if there is a standing Judicial Service Committee of Parliament to consider the candidates. The nominations themselves could be by the Chief Executive of the country in his sole discretion in the case of the Chief Justice and upon the advice of the Judicial Service Commission in the case of other Judges. Such a Committee could also deal with other matters flowing from the relationship between Parliament and the Judiciary such as considering changes to the law recommended by the courts in their various judgments. The Committee could then take up those issues with the Attorney General for necessary action.

4. Concluding Remarks

The tenet of mutual checks and balances between the organs of state power is a modern desiderata. It has a vital role to play in constitutional governance and should find expression in the new Constitutional Order. There is scope for maximizing those checks and balances between the legislature and the Judiciary without diluting the independence of either of them. However, good though the idea of institutional check and balances may be, constitutional governance may still suffer if the men and women elected or appointed to the institutions concerned do

not have either the competence, integrity or the mental inclination to appreciate and/or stand up for the best constitutional values. It may also suffer if there are no checks and balances within those organs of governance themselves. I therefore suggest that the challenge in the new constitution making is not only to provide for better for institutional checks and balances without derogating from institutional independence but also to consider and provide for mechanisms by which the right calibre of persons of integrity is elected or appointed to the institutions concerned and the diffusion of power within those institutions themselves.

PARLIAMENT AND LOWER LEVELS OF GOVERNMENT

Karuti Kanyinga
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1. Introductory Remarks

A discussion on relations between the parliament and lower levels of government anywhere in sub-Saharan Africa would be incomplete if that discussion is not built on contemporary state-society relations in the continent. A proper understanding of state-society relations is indeed important because in it, lies explanations for many social-economic and political actions including economic and political reforms as well as the constitution making process itself. It is important also because it provides a moment to look deeply into the history of the society in order to answer the question, where did we go wrong?

For the current discussion, we need to recall certain important observations that have been made by contemporary political historians. Some have accurately pointed out that the social- economic and political problems around Africa today are the result of the colonial legacy. The colonial state was not completely transformed at independence. It was simply de- racialised. It was not democratized.

Secondly, the post-colonial state did not transform the authoritarian apparatus of the colonial state. It adopted them as tools of trade. Attempts to transform them have been slow and intermittent.

Thirdly, the colonial state and its mode of governance ethicized the society. Native reserves for each ethnic group and rule by customary law in the native reserves tended to consolidate the many perceived

differences between the different groups. From the very beginning this consolidated the divisions among the different groups.

A point to emphasis is that the mode of colonial rule resulted in a bifurcated society. This was true especially of settler colonies. There was a society for the settlers - the civilized race. This society and its citizens enjoyed all rights. The principle of separation of powers applied here as well. Power was not concentrated in one hand. It was decentralized and constantly checked. The settlers had a voice; they decided how they wanted to be governed. They were consulted.

The society for the natives on the other hand, did not enjoy all the rights. There was no separation of powers between the different institutions. Power of the Chiefs was overwhelming. The chiefs had all powers concentrated in their hands. Their powers, were like a clenched fist. They ruled without checks and balances. Custom and tradition were subjugated to state structures and behavior. Native authorities were crafted on this foundation. From the outset the Native Authorities were subjugated to the settlers and the central government.

Post-colonial period has not witnessed extensive reforms towards decentralization. The local authorities in Kenya, for instance, have continued to be weakened through a series of legislative reforms. Their basis of power has continued to shrink and the central government has continued to exert more control over their management.

There is need to reflect on how to revitalize the local authorities given that the local authorities are the single most important institutions for local self-governance. All their institutions and structures are located at the local level and are staffed by local residents.

They attend to local problems and therefore reflect local aspirations. Their effectiveness as mouthpiece of people's grievances and aspirations demands that they be given attention required of institutions that can safeguard and/or promote democracy.

This discussion note aims at raising a discussion on how to revitalize the local authorities and ensure that they become the base for popular participation in national development. The notes also seek to identify the type of relations between local authorities and the parliament that is critical in this respect.

2. Local Authorities in Kenya: A History

Local Authorities serve an important purpose: they provide avenues through which the local communities can exercise their influence in social-economic and political matters at the local level. In theory they are institutions which the local communities should use for purposes of self-governance. Local communities are supposed to be in total control of the local authorities. They are supposed to do so through their local representatives and the councilors in particular. The councilors in turn constitute various committees where they express the interests of the local communities.

This suggests that local authorities are created to respond to unique social-economic conditions and involve people in articulating their aspirations and expectations. Some problems are local in character; they require local solutions and only local institutions can respond in an

effective manner to them. Local authorities thus have an origin in the desire by the central government to involve people and local resources in addressing local needs. Needs and expectations at the local level are taken up by the local authorities instead of the central government on the understanding that solutions to them would be fast and reflect local aspirations.

The extent to which the above theoretical premise has been a reality is a matter of debate. One may even argue that it varies from one country to another. In Kenya, local authorities began during the colonial period when the government introduced the policy of separate development. This led to different structures of local government in African and European areas. However, the first involvement of Africans in administration was through the East African Order in Council in 1897, which sought to create 'native courts'. In 1902, the Village Headmen Ordinance was passed. It specified the role of Africans in administration at the local level.

In 1924 Local Native Councils (LNCs) were established to encourage Africans to develop a sense of responsibility and duty towards the state. The councils had some legislative powers but implementation of their resolutions was subject to the approval of the provincial commissioner and the governor.

The procedural journey from the LNCs to the African District Council was long and frustrating both to the colonial government and the African nationalists. This was bound to be so considering the different perceptions each of the parties had on the objectives of the LNCs. The colonial government saw them as instruments of control and avenues of communicating to the people. They were a means of containing any 'disloyal' elements in African leadership. The Africans on the other hand, saw them as possible organs of deciding their community affairs and channeling

their political grievances. They were determined to turn them into genuine organs of local government.

The LNCs became a great source of disappointment to the African nationalists. The relationship between most LNCs and the African political associations became extremely strained. The powers wielded by the LNCs and the support they had from the colonial government estranged them from the people. They were turned into objects of scorn and suspicion and any possible co-operation between them and the African nationalist movements was impossible.

In 1937, a new Native Authority Ordinance was enacted. Even though the ordinance was not substantively different from the others, it was comparatively a more democratic document. The structure of the LNC remained the same but, for the first time, the people could elect councilors. A major limitation remained that the DC could remove any councilor he considered undesirable.

In 1946, a new ordinance seeking to replace LNCs with African District Councils (ADC) was proposed and sought to change the name from Local Native Councils to African District Councils and formalise the establishment of locational councils. Although ADCs were legally established in 1950 there were no elections until 1958 due to the state of emergency. The African District Councils remained as the local authorities in rural areas until 1963 when they were combined with those in European areas to form county councils.

Local government became one of the Key issues of discussion during Kenya's independence constitutional conferences at the Lancaster House Conference. Soon after Sessional Paper No. 2 of 1961, which sought to lay out the general framework of local government operations in Kenya, was tabled before the Legislative Council to become the

Draft Local Government Bill, of 1962. The bill set out the local government regulations and structures. Local authorities operated on the 1963 regulations until 1977 when regulations were enacted by Parliament and became Local Government Act,(Cap 265), of Laws Kenya.

The 1963 Local Government Regulations harmonized the structure that existed before independence in African and European areas. The separation between European and African areas was removed. The ADCs became county councils. Below them were area town councils and urban councils. Municipalities and townships remained on their own.

3. Some Emerging Issues

Discussion on this subject is not anything new. Significant attention has been put on the relations between the local authorities and the central government and how this has affected their operations. Some have accurately observed that Central Government exerts enormous influence on how the local authorities are managed. Chief officers are recruited by the Public Service Commission and therefore answerable to the Central Government. The Clerks and other chief officers are accountable to the central ministry. Admittedly, this is an area of possible conflict especially when Clerks are required to satisfy interests of the councilors and the ministry. The local authorities, with recommendations of the relevant council committee, employ lower grade officers and especially the subordinate staff. It is not surprising that this grade is staffed with individuals owing special allegiance to particular councillors, irrespective of qualifications, the results being over-employment on this grade.

Prior to the 1969, provision of most basic services was under local authorities. The amendment transferred the functions relating

to education, health, water, housing and graded roads to central government ministries. This transfer did not however, affect municipalities as they were given powers to maintain basic services in their localities. County Councils on the other hand, were left with fewer functions the main one being maintenance of feeder roads. They also continued providing auxiliary services to the main sectors such as education where the main task continued to be provision of education funds in the form of 'school bursaries' to the less fortunate members of the society. The councils also maintain local market places, license small businesses, and support of veterinary services.

Local Authorities also played an important role in community development. They seconded community Development Assistants (CDAs) to the Department of Culture and Social Services. These officials, on behalf of the council, attended to local community development matters under the guidance of the ministry.

Local authorities derive their revenue from their activities, which include land rates, service charges, licenses etc. The ever-rising demands have meant the need for the Councils to improve on their revenue base. Many authorities are not able to do so however. The proposed amendments to the Local Government's Act are in the right direction since the Act has been cited as a major constraint to the self-governance of the local authorities.

Other problems affecting local authorities in Kenya include overstaffing particularly because of non-clear procedures for recruiting staff in the lower grade. Recruitment is often based on patronage and loyalty to Councilors and the Chief officers. There are also no systems to monitor efficiency of the local authorities. Their sources of revenue are inelastic and often any new source that is put in place is taken over by the central government. People also

have a generally poor attitude towards local authorities because of lack of services.

4. The Parliament and Local Authorities

The problems around local authorities cannot be perceived only in terms of lack of autonomy for the local authorities. Councillors in local authorities also tend to operate under the wings of parliamentarians. Some of them seek support on basis of being identified not only with a particular political party but also with a particular individual. They depend, even as individuals, on the support they receive from their political godfathers. A patronage system thus is deeply entrenched in the relations between parliamentarians and local authorities. This prevents the local authorities from being effective. It is a strong base for local authorities tendency to promote individual interests.

In spite of the local authorities and councillors being responsible for making decisions on local level social-economic issues, it is the Parliament where some of the issues concerning the locals are expressed. The Local Authorities thus appear not only as appendages of the central government but also of the parliament itself. In places where the local authorities are strong, they provide the framework for local leadership which some utilize to get to national politics. In this case, they are a training ground for both local leadership and democratic representation. In Britain, for instance, local authorities give rise to individual politicians whose effectiveness as leaders often lead to their getting to parliament. In Kenya, there are several similar examples. Some councillors get in to parliament using the local authorities framework.

In terms of operations, however, the parliament has tended to usurp the

responsibilities of the local authorities. The parliament and MPs in particular have merged both national and local responsibilities. They have taken the responsibility of congesting the central level with local level demands. They raise issues which Councilors should be raising. They follow on matters of local level importance which councilors would be more suited to follow. On account of this, some people see no need for the local authorities - they have no value for Councilors or even the local authorities except when required by law to have a license from them. This has had several consequences on the leadership of local authorities. People elected into councilor positions have poor leadership qualities and some may not even pass the integrity criteria. People are not very keen to vet the Councilors compared to, sometimes, the vetting that the MPs undergo at the local level.

Secondly, there are no keen eyes placed on what happens at the local level. Council operations may sometimes stall without residents knowledge because, 'who knows what happens there?'

Relations between MPs and Councilors can be demonstrated more clearly by a discussion on what happens at the District Development Committee level where both local authorities and Members of Parliament are represented. The DDC's first have, without the backing of law, compared to the local authorities. In spite of this, at the peak of their operation in the late 1980s they usurped all the powers of local authorities. MPs had more influence than the Councilors. The latter ceased to have any effect on the development of their own areas of jurisdiction.

5. Some Lessons

The above discussion suggests that the local authorities are not autonomous institutions and that the parliament has contributed to

weakness. Although the local authorities are meant to serve as institutions of representative democracy at the local level, the hands of the central government has enfeebled them. The local authorities have been weakened by a series of legislations especially legislations seeking to remove functions away from them to the central government. Of course this has been possible because the parliament has also not been independent of the executive.

At times and because of the ineffectiveness of the local authorities, parliamentarians have ended into dealing with local issues that would require attention of a councillor. This has had several consequences; it has lead to local residents having a negative attitude on the local authorities and the Councillors in particular. This negative attitude is reflected on how people perceive local government elections - not many vote for their councillors. Others do not know their Councillors. They have no business with their councils.

There is need for reforms that should promote local authorities as institutions for enhancing participatory democracy at the local level. Local authorities should reclaim the responsibilities of attending to local development issues such as providing for basic services and infrastructure. A clear division of responsibilities between the Councils and the central government institutions need to be established. Parliament should concern itself with making enabling legislative changes and policies rather than seeking a role in implementing the same. It should concern itself with national level issues while local authorities should concern themselves with local level issues.

Development of a democratic leadership at the local level is imperative for the success and effectiveness of local authorities, however. Improved powers of local

authorities should be accompanied by legal guidelines on leadership development at the local level. Literacy and integrity should be a criteria, in this respect, councillors elected to office at the local level should be literate and pass the integrity test. Local residents should be empowered to have more influence on what happens at the local level - electing the heads of the local authorities directly would be a good contribution in this regard.

SECTION FOUR

**REPORT OF THE ADVISORY PANEL OF EMINENT
COMMONWEALTH JUDICIAL EXPERTS
NAIROBI, KENYA MAY 17, 2002**

**RESOURCE PERSONS:
ADVISORY PANEL OF EMINENT COMMONWEALTH JUDGES**

Chair:

The Hon. Justice Dr. George W. Kanyeihamba
Supreme Court of Uganda

Members:

The Hon. Mr. Justice Damian Z. Lubuva
Court of Appeal, Tanzania

The Hon. Justice Yvonne Mokgoro
Constitutional Court of South Africa

The Hon. Justice Robert J. Sharpe
Court of Appeal for Ontario, Canada

Professor Ed Ratushny, Q.C.
University of Ottawa, Canada
President of the International Commission of Jurists (Canadian Section)

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1. Mandate of the Advisory Panel

The Advisory Panel was established by the Constitution of Kenya Review Commission "CKRC" to advise it on constitutional reforms regarding the Kenya Judiciary. With the support of the Chief Justice, the CKRC contracted the International Commission of Jurists (Kenya Section) "ICJ (K)" to coordinate this project.

In the letters of invitation the Panel Members received, the Advisory Panel was asked to:

- a. Advise the CKRC on what reform proposals to make regarding the Kenyan Judiciary in a new constitutional framework;
- b. Advise the CKRC on what corollary proposals and recommendations of a legislative, policy or administrative nature to make for further efficacious working of the Judiciary in a post-Constitutional making dispensation;
- c. Advise the CKRC on what to do to "transit" from the current to a post-constitution making dispensation.

The specific Terms of Reference for the Advisory Panel are as follows:

- Examine and make recommendations on the constitutional jurisdiction of the courts and whether a separate Constitutional Court should be established.
- Examine and make recommendations on the structure of the courts and whether a separate Supreme Court should be established.
- Examine and make recommendations on the electoral appellate jurisdiction of the Courts.
- Examine and make recommendations on the jurisdiction of the Kadhis' Courts and appeals therefrom.
- Examine the procedure for the appointment, discipline and dismissal of judges as well as magistrates and make recommendations for strengthening the independence and competence of the Judiciary.
- Examine the backlog of cases and recommend methods to speed up the management of cases.
- Examine other improvements to the procedures and facilities of courts, including case management, 'fast tracks', alternative dispute resolution, computerization, etc.
- Examine and recommend any other aspect of the Judiciary, which will strengthen the general independence, efficiency and accountability of the Judiciary.
- Examine and make recommendations on the financial and administrative autonomy of the Judiciary. In so doing examine and make recommendations on the physical facilities of the Judiciary.

appointment, tenure and functions of the Attorney General.

- Examine and recommend on the powers of prosecution.

2. Programme of Consultation

The Advisory Panel followed a programme of consultation established by the ICJ (K) in cooperation with the CRKC, the Chief Justice and key stakeholders. A detailed outline of our programme is attached as Appendix 1. During our visit to Kenya, we met with the Chief Justice and senior members of the Kenya Judiciary. We also met the Attorney General with whom we had a full and frank discussion. The Panel received the full cooperation and enthusiastic support of Prof. Ghai, Chairperson of the CRKC. We received written and oral submissions from key stakeholders, including the Law Society of Kenya and the ICJ (K), with whom we had most fruitful discussions. We made site visits to various courts and we had useful discussions with several magistrates and court officers. We met the Chief Kadhi and Muslim advocates with whom we discussed the Kadhis Courts. The Panel also had the pleasure of meeting many Kenyan judges, magistrates, lawyers and court officers in various less formal settings during our time here.

We are most grateful for the warm Kenyan hospitality we have received during our stay. We are grateful to all those who took the time to meet with us and to give us the benefit of their views on the current state of the Kenya Judiciary and their suggestions for its place in a new constitutional order.

We make our report on the basis of this programme of consultation and on the basis of our own experience as judges of sister Commonwealth countries. Two of us are neighbours from Uganda and Tanzania,

countries with close and historic legal, social, economic and political ties to Kenya. Uganda has recently experienced a fundamental political change and adopted a new constitution. One of us comes from South Africa, a nation with a different history that has recently experienced a fundamental change to its constitutional and political order. Two of us come from Canada, a distant land that enjoys very different economic and social conditions, but which shares with East Africa a common legal tradition. All of us come from countries that have recently experienced constitutional renewal. For ease of reference, we attach as Appendix 2 relevant provisions of the Constitutions of South Africa, Tanzania and Uganda.

It has become apparent to us that there is a common bond that transcends any differences between Kenyans, Ugandans, Tanzanians, South Africans and Canadians. That common bond is a passion for equal justice, respect for fundamental human rights and a firm commitment to the rule of law. As human beings we must accept our shortcomings. Our human institutions are bound to fail us at times. Our ideals and principles do not suffer the same weakness. We share with many Kenyans we have met the belief that if we are true to our principles and willing to engage in the struggle, we can achieve justice despite our human frailties.

We are convinced that the Kenyan people aspire to and deserve a just society governed by the rule of law. The people of Kenya through Parliament have established the CRKC to achieve that goal. An independent and accountable Judiciary will be essential in the new constitutional order. We are deeply honoured by the invitation extended to us by the CRKC and the ICJ (K), in cooperation with the Chief Justice, to assist Kenya in this mission. As visitors to this country, we offer our suggestions for reform humbly but with the sincere hope that they

may help Kenya in its current process of constitutional renewal and in its quest for democratic governance under the rule of law.

3. The Need for Reform

The Advisory Panel has drawn two general conclusions as a result of its Programme of Consultation. Regrettably, the first is negative. We have concluded that as presently constituted, the Kenyan judicial system suffers from a serious lack of public confidence and is generally perceived as being in need of fundamental structural reform. It is our considered view that strong measures are necessary for Kenya to achieve an independent and accountable Judiciary, capable of serving the needs of the people of Kenya by securing equal justice and the maintenance of the rule of law under a new constitutional order.

Some members of the Kenya Judiciary have recognized the need for change. The Kwach Committee on the Administration of Justice was appointed in 1998 by the then Chief Justice to recommend measures "in regard to maintenance of Judicial Rectitude of Judicial Officers in the discharge of their judicial functions" as well as other matters in relation to organization and efficiency of the courts. However, many of the fundamental recommendations of the Kwach Committee have not been implemented. We are disappointed to report that the Kenya Judiciary has failed to come to grips with the crisis confronting it. We regret to report that the group of judges delegated by the Chief Justice to meet with us did not come prepared to discuss the issues identified in our Terms of Reference.

Our second general conclusion is positive. We have found that there is a commitment on the part of key members of the Kenya legal community to undertake those reforms. The people of Kenya through Parliament

have expressed the wish for constitutional renewal by establishing the CRKC. *The Constitution of Kenya Review Act*, s. 17 (v) gives the CRKC the specific mandate "to examine and make recommendations on the judiciary generally and in particular, the establishment and jurisdiction of the courts, aiming at measures necessary to ensure the competence, accountability, efficiency, discipline and independence of the judiciary." The Attorney General told us of his wish for judicial reform. The Law Society of Kenya and the ICJ (K) are prepared to take a leading role.

The Panel was concerned about the many allegations it heard about misconduct on the part of members of the bar. However, we have had the benefit of excellent submissions from many groups and individuals. Many of those who came before us are talented young lawyers, full of energy, ideas, integrity and the willingness to work for a reformed Judiciary. In stark contrast to our negative assessment of the current state of the Kenya Judiciary, the Panel was impressed by the dedicated lawyers and members of civil society with whom it met. These dedicated men and women eagerly await a reformed judicial structure. Kenya is privileged to have this strong group of lawyers and jurists who exhibit superb legal skills, knowledge and vision. They are men and women of the highest integrity, well educated, articulate, and determined to achieve a just society. We have been deeply moved by their passionate belief in the rule of law and their commitment to the highest ideals of justice. We were also deeply moved by their courage in speaking so frankly to us and in confronting the serious problems that bedevil the judicial system in which they work.

We are confident that these bright, capable and dedicated jurists reflect the capacity of the Kenya legal community to find its way

on the path to justice. They are the future and that future is bright. We sincerely hope that the establishment of proper structures and mechanisms will give this new generation of jurists the tools necessary to restore public confidence in the Kenya judicial system and to allow the courts of Kenya to play their vital role in a new constitutional order.

We adopt a useful statement of the goal to be reached from the submission of the ICJ (K):

“The objective is to come up with a judiciary that is independent, efficient and accountable. *Independent* in terms of institutional and financial autonomy; freedom from undue executive, parliamentary or private sector interference; independence in administrative operations; and also the independence of individual judges and magistrates, and freedom from executive, judicial or other patronage structures that influence their work. *Efficient* in terms of delivery of consistent, fair and timely justice; thus laying a constitutional basis for legislative or other follow-up on matters such as case management, procedural reforms, guaranteed law reporting etc. *Accountable* in terms of accessibility by all consumers of justice to the court, its structures and its outputs; transparency and consistency in its operations and outputs; integrity, appointment criteria and procedures, and non-corruption”.

Crisis of Confidence

Our Terms of Reference do not give us a mandate to investigate specific complaints or allegations. We are in Kenya for a short period of time and we have had a limited opportunity to observe Kenya's judicial

system. We are not fact finders. However, as judges we report without the slightest hesitation that we have been persuaded that there is a serious and urgent need for significant reform of Kenya's judicial system.

We heard consistent complaints about the integrity and the competence of the Kenya Judiciary. We have been told by senior members of the legal community and by representatives of civil society that corruption is widespread. Corruption takes various forms. Bribery is the most obvious. It hardly needs to be stated that offering or accepting bribes in relation to judges, magistrates or court officials is completely inconsistent with the law and represents an assault on the integrity of the judicial system. Another form of corruption is the exertion of political pressure or influence on a judge or a magistrate to decide a case other than in accordance with the law and the evidence before the court. Regrettably, we must report that we have been told by virtually everyone to whom we have spoken that both forms of corruption are common in the courts of Kenya.

The Panel was shocked and dismayed by the widespread allegations of corruption in the Kenya Judiciary. While many of Kenya's judges continue to fulfill their judicial office faithfully to their judicial oath, public confidence in the independence and impartiality of the Judiciary has virtually collapsed.

This in turn threatens the principle of the Rule of Law, the very foundation of all modern democracies. The Judiciary must be the one bastion where the citizen may go to challenge the arbitrary or oppressive actions of the state. It must be the safe haven where the most impoverished or abused citizen may find support for his or her legal rights when they conflict with those of the rich and powerful in society. A court of law is the

forum where corrupt police officers and government officials may be brought in order to condemn their misconduct and impose punishment for their abuse of public trust. Where justice is not dispensed with impartiality, there is no hope for citizens to be treated with objectivity, fairness and honesty by other institutions.

The maintenance of judicial independence and impartiality is the very reason why judges are given such a privileged position in society. It is why they have security of tenure in office. It is why they are given guarantees of financial independence. It is why they are treated with deference and respect in their courtrooms. As the High Court has stated in the *Gachiengo* case:

“A judge occupies an enviable position in society. He is enveloped by an aura of dignity. He is always on a pedestal. That position has to be jealously guarded”.

Where corruption occurs in the Judiciary, it is the worst form of abuse of public trust since honesty, integrity and fairness are the features that entice citizens to such recourse in the courts, only to be ambushed.

In the short time available to the Panel, we have not been able to document the full extent of this problem. However, the allegations we have heard have come from highly credible sources. These sources are diverse and the allegations are both persistent and consistent.

The Panel is aware that great caution must be exercised in accepting allegations of judicial corruption. In almost every case that is tried, one of the parties will lose and may be devastated. Where a losing party has gone to court with complete confidence in the justice of his or her cause, he or she may rationalize that the only explanation for the result must be that the judge acted with

impropriety. We also fully realize that judges can be wrong. Errors in decision-making do not, in themselves, constitute corruption, or even misconduct. It is expected that judges will err, from time to time, and that is why appellate courts exist.

The air is full of allegations of corruption, incompetence and inefficiency. If the Judiciary is to carry out its vital function in an acceptable manner, the air must be cleared.

This conclusion should come as no surprise. In recent times, the Kenya Judiciary has been openly criticized for its alleged shortcomings in the daily press and in Parliament. While we were here, an editorial in the *Daily Nation* congratulated the Chief Justice for certain anti-corruption initiatives, but also urged further action, stating: "The perception that the Judiciary is corrupt is becoming widespread. A general lack of confidence in it contributes greatly to a creeping erosion of social mores."

The Kenya Judiciary itself has recognized that there is a problem. When appointing the Kwach Committee, the then Chief Justice "stressed the need for the Judiciary to inspire confidence in the Kenyan public, who have perceived it with fear and suspicion; that the necessary steps need to be taken to improve the image and the performance of the Judiciary in the administration of justice." The Kwach Committee Report stated:

“The Kenyan Judiciary has experienced, in the recent past, lengthy case delays and backlog, limited access by the population, laxity in security, lack of adequate accommodation, allegations of corrupt practices, cumbersome laws and procedures, questionable recruitment and promotional procedures and general lack of training, weak or non-existence of

sanctions for unethical behaviour and inequitable budget”.

The Kwach Committee Report specifically stated that the Commission had received allegations of "actual payment of money to judges and magistrates to influence their decisions." The Committee reported that while most were unwilling to name judicial officers who are guilty of corrupt practices, "the Commission was given several names in confidence of those known to be corrupt."

The ICJ (K)'s published report under the title *Strengthening Judicial Reforms. Performance Indicators: Public Perceptions of the Kenya Judiciary* contains disturbing evidence of bribery, corruption and lack of public confidence. Similarly, Transparency International's survey entitled *The Kenya Urban Bribery Index* places the Judiciary high on the list of public institutions reported by citizens as places where bribery is encountered.

The evil of corruption confronts Kenyan society on many fronts. In the recent past, various steps have been taken by the state to combat corruption. The Judiciary itself has taken certain steps. A Judicial Code of Conduct has been developed. We are told that some magistrates and court officials have been prosecuted and convicted. Special anti-corruption courts have been established. We applaud these steps. However, it is our view that they are plainly inadequate to combat the present crisis. Fundamental changes are required and we respectfully recommend that a number of specific steps be taken immediately to combat corruption in the Judiciary.

We have also heard consistent complaints regarding the level of competence of the Judiciary. As experienced judges, we know that disappointed litigants will often attribute a loss in court to imagined shortcomings of the judge. We have all

been subjected to these complaints and we recognize that they must be expected and tolerated in an open and democratic society. Regrettably, we must report that the complaints we have heard far exceed the level that can be expected or tolerated. While there can be no doubt that many of Kenya's judges exhibit the requisite knowledge, skill, and judgment necessary to carry out their judicial functions, some judges are widely perceived to lack those qualities. We have heard consistent complaints that judgments are made without proper regard to the evidence or to the law. Highly credible and reputable members of the legal profession have told us repeatedly that in a disturbing number of instances, the courts have rendered inconsistent judgments without regard to precedent. There has been deplorable failure to ensure the dissemination of judicial decisions to the legal community and the public for proper scrutiny. We have also been told repeatedly that many judges bring to their work an unacceptably rigid and technical approach, refusing to consider legal arguments and legal principles in the manner that is required for the attainment of justice. This, we are told, has been especially prevalent in constitutional cases dealing with the fundamental rights of the citizens of Kenya and in connection with the investigation and prosecution of corruption cases.

As judges, we are naturally reluctant to repeat such serious allegations regarding the shortcomings of the integrity and competence of the Kenya Judiciary without the opportunity to consider the evidence in detail and without the benefit of a full and fair hearing. We repeat that we are not in a position to make specific findings of wrongdoing. However, we must report that we view the nature and extent of the allegations made against the integrity and competence of the Kenya Judiciary to be extremely alarming. No person and no institution should be condemned on the basis

of allegations and perceptions. Unfortunately, the committee of judges appointed by the Chief Justice to work with us was not prepared to discuss these issues. Justice cannot be provided under a cloud of suspicion and distrust. At a certain point, perceptions become a reality that must be dealt with. We are convinced that that point has been reached in Kenya.

Public trust and confidence in the Judiciary is vital. Without it, the Judiciary cannot do its important work. If public trust and confidence are lost for whatever reason, immediate steps must be taken to restore them lest the judicial structure collapse under the weight of suspicion and distrust.

We are mindful of the hurt that sweeping and general allegations must cause conscientious, hardworking and dedicated judges and magistrates. To them we simply say it is time to clear the air. They deserve to have the cloud of suspicion lifted so that they can perform their judicial functions with pride and confidence that they work in a judicial system that aspires to the highest ideals.

It is the considered view of the Advisory Panel that the Kenya Judiciary is confronting a crisis of confidence. It is also our opinion that immediate and urgent action should be taken to restore public confidence in the Kenya Judiciary as an institution capable of delivering justice in accordance with the rule of law. In the words of the presentation of the Law Society of Kenya, the Judiciary of this country is at the cross-roads. The Advisory Panel agrees with the Law Society that a fundamental change in the architecture of the administration of justice is required. We also agree that there must be a fundamental reconstruction of the Judiciary through the process of constitutional reform.

The Advisory Panel's most significant recommendations for constitutional reform are premised on two fundamental principles. The first is judicial independence. The *U.N. Basic Principles of the Independence of the Judiciary* (1985), article 1 requires states to guarantee judicial independence "in the Constitution or the law of the country."

Judicial independence shields the Judiciary from the threat of corruption. The *U.N. Basic Principles of the Independence of the Judiciary* (1985), article 2 provides:

"The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason".

We recommend the entrenchment of the terms of office for judges to ensure that as individuals, they enjoy the necessary protections to allow them to decide cases without fear or favour, affection or ill-will, in an open and public manner and in accordance with the law.

The Advisory Panel was urged by some credible and reputable members of the legal community to take the drastic step of recommending that all current judges be asked to submit their resignations and reapply for appointment to the bench under a reformed appointments process. We do not agree with this suggestion. In our view, such action would represent an insult to those conscientious members of the Judiciary who carry out their duties with integrity. It would also represent an unacceptable infringement of the security of tenure of office enjoyed by individual judges. However, in view of the crisis the Judiciary faces, it is imperative that

immediate action be taken to ensure that complaints of misconduct are properly investigated and that, where necessary, appropriate action is taken for the removal of any judges found guilty of misconduct. The Advisory Panel recommends that an effective interim mechanism be adopted to inquire into allegations of judicial misconduct pending completion of the Constitutional Review process.

The second vital principle that motivates our recommendations is accountability. Public office is founded upon public trust. Judges, magistrates and judicial officers must be accountable to the public for their conduct and actions. Judicial accountability goes hand in hand with judicial independence. It is our view that the twin goals of accountability and independence can best be achieved by exposing the judicial structure to public view. At present, there are crucial aspects of the Kenyan judicial structure that are hidden from public view. Secrecy breeds suspicion and distrust. It is the Advisory Panel's view that several reforms are required to make the institution of the Judiciary more accountable to the public. We have concluded that more transparent processes are called for and we make several recommendations in that regard in relation to appeals, the appointment of judges, the conduct and removal of judges and the Judicial Service Commission.

4. Specific Recommendations

4.1 Vesting Judicial Power and the Principles of Judicial Independence in the Constitution

There is need for express declaration of judicial independence in the Constitution. This is a foundational constitutional principle. It has several aspects.

4.1.1. Vesting Judicial Power

Although section 23(1) of the Constitution expressly vests executive power in the President as head of the Executive and section 30 vests legislative power in Parliament, there is no similar entrenchment of judicial authority in the Judiciary. This immediately creates a perception of a weak foundation of judicial authority and an imbalance of power between the Judiciary on the one hand, and the other two arms of government on the other. The Judiciary is the body that, in any credible democracy, must have the final authority to protect the fundamental rights of the people and to decide whether impugned legislative enactments or decrees, or actions of the executive have transgressed the Constitution.

The courts should be independent and not subject to control or direction of any person or authority in the exercise of their functions. Organs of state shall, through legislative and other measures as may be required, assist and protect the courts, to ensure their effectiveness and independence. A restructured independent Judicial Service Commission will also serve to ensure the institutional independence of the courts.

The Judiciary may be required to act at crucial times and in crucial areas that may determine the destiny of the nation. It is therefore important that the foundation of judicial power is guaranteed to be unshakable. This also protects the Judiciary against undue interference and influence.

It is therefore necessary that the Constitution explicitly vest judicial power or authority in the Judiciary. In this way, the boundaries of public power and authority will be clearly drawn. This, however, does not preclude the need to design mechanisms that create a balance of power between the Judiciary and the other arms of government. This usually

augers well for the operation of the doctrine of separation of powers.

In order to reinforce the authority of the Judiciary and cultivate respect for its orders and decisions, it may also be necessary that the Constitution explicitly provide that court orders and decisions shall be binding on all persons, entities, organs and institutions of state to whom and to which they apply.

We recommend vesting judicial authority in the Judiciary along side the Executive and Parliament to ensure recognition of and respect for the distinctive role of the courts in the governance of the Republic of Kenya.

We are of the opinion the organization of the Judiciary should avoid undue concentration of authority in a single judicial officer. Consideration should be given the role of the Chief Justice in the administration of the courts. The Chief Justice shall have over-all responsibility for the Judiciary. However, he or she will only have direct administrative responsibility for the Supreme Court and only general supervisory jurisdiction for the Judiciary as a whole. Along the same lines, the Court of Appeal and the High Court should each have its own President with direct administrative responsibility for the administration of those courts.

We are of the view that the general principle of local administrative responsibility within each court should also apply to the Magistrates' Courts and we return to this topic under Part IX.

We recommend that the Chief Justice shall be head of the Judiciary and shall provide judicial leadership at all times. The Chief Justice shall preside over and have direct administrative responsibility for the Supreme Court. There shall be a President of the Court of Appeal and President of the

High Court to preside over and have direct responsibility for the administration of those courts.

4.2.2. Principles of Judicial Independence

We recommend that the following principles be enshrined in the Constitution in relation to the terms and conditions of judicial office:

- Judges shall be persons of integrity and ability with appropriate training and qualifications in law.
- Judges shall exercise judicial power impartially and in accordance with the law and authority without fear, favour or ill-will.
- The tenure of Judges shall be guaranteed and adequately secured by the Constitution.
- The Constitution shall provide that the remuneration and other terms and conditions of service of Judges shall be adequately secured by law and shall not be reduced or altered to their disadvantage.
- Judges shall not be liable to any action or suit for any act or omission in the exercise of their judicial powers or functions.
- Judges shall be free to form associations that represent their interests, to promote their professional training and to protect their judicial independence.
- Judges are entitled to freedom of expression, belief, association and assembly on condition that they shall always conduct themselves in a manner that *preserves the dignity* of their office, their impartiality and the independence of the Judiciary.
- Judges must always strive to uphold their integrity and independence by refraining from impropriety or any appearance of impropriety.
- Judges shall devote their full time and attention to their judicial duties and

shall not engage in any business, trade, profession or other activity inconsistent with the judicial function.

4.1.3. Financial Independence

We recommend that the financial independence of the Judiciary be entrenched in the Constitution. The Judiciary should enjoy financial budgetary autonomy, draw up its own budget and deal directly with the relevant state finance authority. The state shall be obliged to provide adequate financial resources to enable the Judiciary to perform its functions effectively.

4.2 A Supreme Court

An effective appeals process is one important means to ensure the accountability of judges in their day to day legal work. Judges are required to explain their decisions and if the explanation given reveals error, the decision may be reversed on appeal. The appellate process imposes quality control upon judicial decision making.

The Advisory Panel agrees with those who advocate a further level of appeal to a court of last resort. It has been our experience that such a court significantly strengthens the quality of decision-making in the lower courts. Supreme Court judges have the aptitude and the time necessary to give mature reflection to the most difficult legal issues confronting the country. Their judgments provide necessary guidance for the lower courts and serve to ensure that the law, especially the Constitution, evolves in the manner necessary to address the changing needs of society.

We recommend the establishment of a Supreme Court comprised of a small number of select jurists of

unquestionable skill, judgment and integrity.

Some representations urged us to recommend the creation of a Constitutional Court. While a specialized Constitutional Court was admirably suited to meet the particular needs of the new constitutional order of South Africa, we are not persuaded that it represents the best solution for Kenya. Both Uganda and Canada have had positive experience with a Supreme Court with general appellate jurisdiction. A Supreme Court has the advantage of allowing courts of first instance to address constitutional issues, while avoiding the obvious limitation of having such issues decided once and for all, without appeal, by one court. Important constitutional issues find their way to the Supreme Court to be finally resolved by jurists of high repute. In practice, if not in law, a Supreme Court becomes a specialized constitutional court. At the same time, this select body of jurists is available to resolve difficult issues of law that fall outside the realm of constitutional law, providing more general judicial leadership to the lower courts. Moreover, given Kenya's size, adding both a Supreme Court and a Constitutional Court would be difficult to justify.

We recommend that in addition to the existing courts of judicature of Kenya, namely the High Court and the Court of Appeal, there be established the Supreme Court of Kenya to consist of:

- ***The Chief Justice and***
- ***Such number of justices of the Supreme Court not being less than six, as Parliament may by law establish.***

The Supreme Court shall exercise general appellate jurisdiction. It shall be the final court of appeal in all matters.

4.3 . Appointment of Judges

Current practice relating to the appointment of judges is a matter of grave concern. We are informed that judicial appointments have regularly been made without public exposure and consultation. Vacancies are not advertised and criteria for appointment appear to be uncertain. Lawyers with disciplinary proceedings pending before the Law Society have been appointed to high judicial office. This is obviously unacceptable and bound to undermine public confidence in the Judiciary. Judges should not be appointed for political, tribal or sectarian reasons.

We are persuaded that a lack of transparency in the manner in which judges are appointed has undermined public confidence in the quality of those named to judicial office. We have heard the consistent plea that a more transparent appointment process is required to ensure that those appointed as judges have the required standing in the community as jurists of integrity, learning and wisdom. We agree with Mr. Justice Kwach who wrote (*The Lawyer*, December 1998): "The procedure for the appointment of Judges including the Chief Justice is faulty and in dire need of change." We also note that the Kwach Committee identified the shortcomings of the present appointments system and we also agree with the Committee's conclusion that:

...rigorous vetting is necessary before appointment of judicial officers. The appointments process must be transparent and tailored to identify individuals of the highest integrity for recruitment. There must be a transparent and merit-based judicial appointment system.

We recommend the adoption of a clearly established transparent appointment process with clearly stated criteria under the authority of a

restructured Judicial Service Commission.

We received representations that Parliament's approval of judicial appointments ought to be required to ensure transparency. We do not agree with the suggestion that nominations to the bench ought to be subjected to full-scale debate and majority vote by Parliament. In our view, that process carries an undue risk that the appointment of judges will be politicized. In our view, transparency can be assured through the crucial role we have recommended for the restructured Judicial Services Commission and by requiring the President when making judicial appointments to consult formally the Parliamentary Committee responsible for judicial affairs. We recommend that such a Committee be established.

We recommend that the appointment of all judges, including the Chief Justice, be made by the President in accordance with the written recommendation of the Judicial Service Commission and after the President has duly and formally consulted the Parliamentary Committee responsible for judicial affairs, which we propose be established.

We recommend that only distinguished judges and jurists of proven integrity and impeccable character as determined by the Judicial Service Commission be appointed as Chief Justice and as judges of the High Court, Court of Appeal and Supreme Court.

- The minimum constitutional qualification for appointment as Chief Justice or as a judge of the Supreme Court shall be a total of fifteen years experience:
- as a judge of the High Court or Court of Appeal,
 - practising as an advocate, or

- full-time law teaching in a recognized University.

The minimum constitutional qualification for appointment as a judge of the Court of Appeal shall be a total of ten years experience:

- as a judge of the High Court
- practicing as an advocate, or
- full-time law teaching in a recognized University.

The minimum constitutional qualification for appointment as a judge of the High Court shall be a total of ten years experience:

- as a magistrate, or
- practicing as an advocate.

4.4 Terms of Office, Conduct and Removal

Under s. 62 (3) of the present Constitution, a judge may be removed from office "only for inability to perform the functions of his office (whether arising from infirmity of body or mind or from any other cause) or for misbehaviour". There is a widely held belief among Kenyans that complaints regarding sufficiently serious judicial misconduct to warrant thorough investigation have not been pursued. Such complaints have become publicly known through press reports and Parliamentary debate. There is a widely and strongly held perception that allegations of judicial misconduct are not taken seriously by those who have the constitutional duty to act. This amounts to an abdication of constitutional responsibility and represents a serious stain on the Judiciary. If there is nothing to an allegation of judicial misconduct, the judge concerned deserves to have his or her name cleared. If judicial misconduct is proved, the Constitution and the public interest require that the judge be removed from office. Failure to address

openly and publicly serious allegations of judicial misconduct saps public confidence in the Judiciary. We have concluded that there is an urgent need for the establishment of a more transparent complaints and removal process.

In some cases, the Judicial Service Commission may find that the judge's behaviour is inappropriate, but not so serious as to warrant removal. In such cases, the judge should be informed of the Commission's assessment. This is not a formal sanction. It is also important that the complainant be advised of the Commission's conclusion. Experience in other jurisdictions is that a judge may acknowledge the inappropriateness of the conduct in question and, possibly, express regret. A situation such as this may prove to be "remedial". The judge has recognized that there are consequences for inappropriate behaviour and will improve in future. The complainant is satisfied that his or her complaint was taken seriously by the judges as well as by the Commission. The independence and credibility of the Judiciary will be enhanced rather than diminished where there is institutional acknowledgement and redress for judicial misconduct even where it falls short of warranting removal from office.

We recommend a transparent complaint and removal process, to be established through a restructured Judicial Service Commission in the following terms:

- A judge may be removed from office only for
 - Inability to perform the functions of his or her office arising from infirmity of body or mind, or
 - Misbehaviour, misconduct or incompetence of such a nature as to make the judge unfit for judicial office.

- A judge may only be removed from office in accordance with the procedure prescribed by the Constitution.
- The Constitution shall provide that any individual or institution, society or group of individuals may lodge a complaint against any judge to the Judicial Service Commission.
- The Judicial Services Commission shall investigate and if it is satisfied that consideration should be given to the removal of the judge from office, it shall request the President to appoint a Judicial Tribunal of eminent judges to conduct a hearing into the allegation.
- If the Judicial Service Commission finds the judge's behaviour to be inappropriate but is not satisfied that consideration should be given to the removal of the judge from office, it may inform the judge of its assessment of the judge's conduct.
- The Judicial Tribunal shall report its findings and recommendation to the President who shall act in accordance with that recommendation.
- Where a judge is under investigation by a Judicial Tribunal, the Judicial Service Commission may recommend to the President that the judge be suspended without loss of remuneration or benefits pending the Judicial Tribunal's hearing of the complaint and the President shall act in accordance with the recommendation of the Judicial Service Commission.

We also recommend that a comprehensive Code of Conduct for judges, magistrates and judicial officers be formally adopted and that it should impose two important obligations. First, all judges, magistrates and judicial officers should be required to file with the Judicial Service Commission upon appointment and annually thereafter a financial disclosure statement clearly disclosing

all assets, property or investments owned and all sources of income. Failure to make full and accurate financial disclosure may constitute judicial misconduct. Second, all judges, magistrates and judicial officers should be under a legal obligation to disclose to the Judicial Service Commission any instance known to them of bribery or corruption in the administration of justice. Failure to report may constitute judicial misconduct.

4.5 Judicial Service Commission

It is our opinion that a restructured Judicial Service Commission will both protect judicial independence and to enhance judicial accountability. Our proposed reforms to the appointment and removal process require the creation of an independent body comprised of members of proven integrity who reflect the interests of the public at large as well as the interests of the Judiciary.

The Advisory Panel recommends that a restructured Judicial Service Commission be entrenched in the Constitution.

The Judicial Service Commission will recommend appropriate terms and conditions of service for judges and magistrates, a function now left to the vagaries of the political process. In the exercise of its appointment and removal functions, the Judicial Service Commission will also ensure that these important decisions are protected from political influence. Because its membership is broad-based and not within the control of any single constituency, the Judicial Service Commission will also bring transparency to these matters and thereby enhance accountability. Finally, we believe that a restructured Judicial Service Commission

will have the capacity to improve the administration of justice by providing education and training for judges and advising on the administration of justice, including efficiency and measures designed to ensure access to justice.

From the various presentations made to the Panel, it was persistently emphasized that the Judicial Service Commission as presently constituted is not effective in relation to judicial appointments. As a result, it was urged that a number of the appointments are based not on merit but on other considerations. Appointments are made in a manner that is not transparent. It is therefore imperative that an effective, efficient and transparent procedure of appointing judges and other judicial officers is put in place.

The Panel recommends that the Judicial Service Commission as presently constituted should be restructured in order to ensure that it is independent and effective and not subject to the direction and control of any other person or authority in the exercise of its functions. Its membership should be broad-based, consisting of members drawn from various sections of the society and stakeholders. In this regard, while the Panel is aware of the stature and position of the Chief Justice as head of the Judiciary, it is concerned that the inclusion of the Chief Justice as chairman of the Judicial Service Commission may inhibit it from properly exercising its functions. Given his position, the Chief Justice is directly affected by and interested in the Judicial Service Commission's recommendations relating to both the appointment and removal of judges. His direct involvement in the functions of the Judicial Service Commission risks putting him or her in the unenviable role of a judge in his or her own cause. For these reasons, it is recommended that the Chief Justice should not be a member of the Judicial Service Commission. However, it

is recommended that the Chief Justice shall appoint one member to represent his office on the Commission.

4.5.1 Composition of the Judicial Services Commission

We recommend that in its restructured form, the Judicial Service Commission shall comprise the following members who shall be persons of high moral character and proven integrity:

- A full-time chairperson whose qualifications shall be comparable to those of a Supreme Court Judge.
- One member appointed by the Chief Justice.
- Two lay members of the public appointed by the President in consultation with the proposed Parliamentary judicial affairs committee.
- Two members nominated by the Law Society of Kenya.
- Two members elected by the faculties or schools of law of the universities Kenya.
- Three judges elected by the Supreme Court, Court of Appeal and the High Court respectively.
- Two members elected from the subordinate courts.
- One member representing the Public Service Commission nominated by the Public Service Commission.
- The Attorney General as an ex-officio member.

4.5.2 Functions of the Judicial Service Commission

We recommend that the Judicial Service Commission shall have the following functions:

- To recommend to the President persons for appointment as judges, including the Chief Justice.

- To review and make recommendations on terms and conditions of service of judges, magistrates and other judicial officers.
- To appoint, discipline and remove registrars, magistrates and other judicial officers including paralegal staff in accordance with the law as prescribed by Parliament.
- To receive and investigate complaints against judges in accordance with the Constitution.
- To prepare and implement programmes for the education and training of judges, magistrates and paralegal staff.
- To advise the government on improving the efficiency in the administration of justice and access to justice including legal aid.
- To encourage gender equity in the administration of justice in Kenya.
- Any other function as may be prescribed by the Constitution or any other legislation enacted by Parliament.

4.6. Access to Justice and Efficiency

Our terms of reference include issues related to access to justice and the efficient operation of the courts. In the time available to us, we have chosen to focus our efforts on structural and constitutional issues and we have not had adequate opportunity to give to these issues the attention they deserve. Our inability to do so, however, should not be taken to minimize the importance of these issues. As was so forcefully put by FIDA's submission to us, the courts will fail to serve the public interest if their doors are effectively closed to the poor and disadvantaged.

We recommend that the restructured Judicial Service Commission be specifically mandated by the terms of

the Constitution to advise the government on improving access to justice. It is our hope that this would focus attention on this vital issue and achieve the necessary reforms.

We have heard many suggestions for reform that deserve serious consideration. Several representations urged the establishment of a Small Claims Court with user-friendly simplified rules of procedure and evidence. Small Claims Courts should be accessible without the assistance of a lawyer. Similarly, consideration should be given to the development of alternative methods of dispute resolution, possibly by building on traditional local tribunals or customs, as a means of enhancing access to justice.

We recommend that serious consideration be given to enhancing the availability of legal aid. We find particularly disturbing the present failure to ensure full legal representation for all proceedings involving persons accused of capital offences.

We have also heard many complaints that there is lack of adequate resources to ensure the efficient operation of the courts. On our site visits, we saw some evidence of this. Proper court records must be maintained and case management systems are required to ensure the proper and timely disposal of all matters. Justice cannot be done if court files are lost because of inadequate storage or retrieval systems.

We recommend that the restructured Judicial Service Commission be specifically mandated to advise the government on improving efficiency in the administration of justice.

4.7. Kadhis' Courts

The Kadhis' Courts are constitutionally recognized as subordinate courts which only deal with matters of Muslim personal laws and are presided over by Kadhis. Appeals from Kadhis' Courts lie to the High Court.

Removal of the Kadhis' Courts from the formal judicial structure was not strongly advocated. On the other hand, submission was made to abolish appeals from Kadhis' Courts to the High Court. A separate system of Kadhis' Courts, including an appellate Kadhis' Court, would be created. These Courts would exercise jurisdiction in all matters where Muslim personal law is applicable. Presiding officers would profess the Muslim faith and be proficient in Muslim law.

We are of the view that it is undesirable to have in one jurisdiction, a parallel court system without any supervision by the ordinary courts. This is particularly so in a legal system where the Constitution is the supreme law.

We recommend no change to the current constitutional provisions regarding the Kadhis' Courts. We recommend, however, that consideration be given to the appointment of judges to the High Court who are proficient in Muslim Law.

4.8. Attorney General and the Director of Public Prosecutions

The Constitution does not establish the office of the Director of Public Prosecutions, yet that office is central to the administration of criminal justice in jurisdictions with similar legal systems to that obtaining in Kenya. Some members of the Panel come from countries with similar legal systems. The powers normally vested in the Director of Public Prosecutions in other jurisdictions

are vested in Kenya in the Attorney General by section 26 of the Constitution.

The Panel recommends the establishment of an office of the Director of Public Prosecutions, vested with the powers that are now vested in the Attorney General under section 26(3), (4) and (8) of the Constitution together with any other appropriate powers for this office and these should be clearly set out in legislation. The Director of Public Prosecutions shall exercise these functions independently without interference, control or direction of any other person or authority.

We further recommend that the Director of Public Prosecutions should be appointed by the President in accordance with the recommendation of the Public Service Commission after consultation with the Parliamentary committee responsible for legal and Constitutional affairs. The Director of Public Prosecutions should be appointed from among persons of proven integrity and moral character qualified to be appointed a Judge of the High Court. The Public Service Commission shall consult with the Judicial Service Commission prior to making its recommendation.

With the creation of the office of Director of Public Prosecutions, the Attorney General would retain the conventional functions set out under section 26 (2) of the Constitution. He would act as the principal legal advisor to the government of Kenya.

By section 36 of the Constitution, the Attorney General is an ex-officio member of the National Assembly. Although he is not entitled to vote in the National Assembly, he is presently entitled to participate in debate. In our view, the Constitution ought to reflect the independence of the Attorney General

from the government of the day. That independence is inhibited by the present arrangement whereby the Attorney General effectively acts in the National Assembly as the Minister of Justice.

We recommend that the Attorney General no longer be a member of the National Assembly and that there be a Minister of Justice to attend to all political issues, including responsibility for legal, judicial and constitutional issues in Parliament.

We recommend that the Attorney General be appointed by the President with the approval of the Parliamentary committee responsible for legal and Constitutional affairs from among persons of proven integrity, moral character who are qualified to practise as advocates and who have not less than 10 years experience.

4.9 Structure and Jurisdiction of Magistrates' Courts

Section 7 (1) of the *Magistrates' Courts Act, 1985* establishes District Courts but there is no clear distinction made between the geographical areas and the judicial offices. Courts are therefore designated either as Chief, Principal, or District Magistrates' Courts depending on the grade of the magistrate posted at the station. This is unsatisfactory.

We recommend:

- That the Magistrates' Courts Act be reviewed in order to realign the Courts established under section 7 (1) with their respective grades in every District throughout Kenya.
- Each Magisterial area should be designated to its grade and jurisdiction to which a magistrate of a specified grade would be posted. Magistrates of lower grade posted to the courts of higher grades or

designation may only do so in an acting capacity.

- Magistrates assigned to the courts of specified grade shall exercise such jurisdiction as may be determined by Parliament from time to time.
- A hierarchical system of appeal in all matters from the lowest to the highest Magistrates' court and thereafter to the High Court, Court of Appeal and the Supreme Court should be established by Parliament.
- The Judicial Service Commission shall be responsible for making recommendations on the remuneration, terms and conditions of service for Magistrates' and other subordinate courts.

During our visits to the Magistrates' Courts and from other representations we received, it became apparent that the efficient administration of these courts and the treatment of individual Magistrates has been adversely affected by the concentration of administrative responsibility for this court in the office of the Chief Justice. The administration of justice would benefit from greater devolution of administrative responsibility for this court.

Direct administrative responsibility would permit greater focus on the special needs of magistrates in various regions of the country. For example, we heard of the absence of toilet facilities in some rural court houses and inadequate transportation for a Magistrate who was responsible for providing judicial service to court houses in two different locations. There is a clear need for greater efficiency in the deployment of resources to provide better service to the public. A comprehensive and uniform system for filing and better communication facilities should be established. Greater initiatives should be encouraged in relation to training, including emphasis on ethical conduct. The

Magistrates should be given greater resources to assist them in carrying out their professional responsibilities to the people of Kenya

We recommend that there should be a judicial officer designated to have primary responsibility for the administration of all Magistrates' Courts throughout Kenya.

4.10 Election Petition Appeals

Section 44 of the Constitution vests jurisdiction in the High Court to hear and determine issues pertaining to the validity of the election of a member of the National Assembly. With the enactment of the 1997 amendment appeals lie to the Court of Appeal by parties who are dissatisfied with the decision of the High Court. Consequent upon the recommendation to establish the Supreme Court, it is the Panel's view that it should be open for the parties to appeal to the Supreme Court if they so wish. However, in view of the fact that election petitions are by their nature of great public interest, speedy disposal of these cases is needed.

We recommend that appeals in election petitions should lie from the Court of Appeal to the Supreme Court on a point of law only.

4.11 Interim Measures

It is not clear when changes to the Constitution of Kenya will be adopted to provide a new process for dealing with complaints about judicial conduct. Even after the Constitution is amended, legislation will have to be passed, appointments to the new positions will have to be made and administrative machinery put into place. The Panel strongly believes that corruption in the Judiciary of Kenya is such a serious problem that a strong and immediate response is required. It is therefore

necessary to take appropriate action within the framework of the existing Constitution.

The Panel recommends that necessary measures be taken immediately under the present constitutional arrangements. Section 62(4) of the Constitution of Kenya currently provides:

“A judge of the High Court shall be removed from office by the President if the question of his removal has been referred to a tribunal appointed under subsection (5) and the tribunal has recommended to the President that the judge ought to be removed from office for inability as aforesaid or for misbehaviour”.

Subsection 5 provides that the President shall appoint such a tribunal:

If the Chief Justice represents to the President that the question of removing a puisne judge under this section ought to be investigated....

The limitation of these provisions is that they do not prescribed the means to receive complaints about the conduct of judges, assess those complaints and establish whether they are serious enough to warrant a formal investigation by a tribunal. The Judicial Service Commission that we have recommended will eventually fill this need. But currently, there is no institution to receive and assess complaints against judges and assist the Chief Justice in the discharge of his constitutional obligation to decide whether a complaint "ought to be investigated" by a tribunal appointed by the President.

The appointment of a tribunal is a serious matter and is not to be undertaken lightly. However, we understand that such a tribunal has never been established in Kenya in spite of widespread allegations of judicial

corruption including specific allegations against specific judges. Quite frankly, it is clear that the Chief Justice cannot be relied upon to fulfill this constitutional responsibility on his own initiative. As a result, there is need for a mechanism to assist the Chief Justice in the discharge of his constitutional obligation to decide whether a complaint ought to be investigated by a tribunal appointed by the President.

The Panel recommends that as an interim measure there be a Committee to receive complaints about the conduct of any judge in Kenya in order to assist the Chief Justice in the discharge of his constitutional obligation to decide whether a complaint ought to be investigated by a tribunal appointed by the President under s. 62(5).

This would establish a preliminary stage to provide information to assist the Chief Justice to carry out his constitutional responsibility under section 62(5) of the Constitution. The Committee would not make a finding or recommendation as to whether a judge should be removed from office. Rather, it will gather information for the benefit of the Chief Justice in deciding whether a tribunal should be established because a judge's conduct ought to be investigated. The tribunal prescribed by s. 62(5) of the Constitution will still carry out its constitutional responsibility to conduct the investigation and to decide whether a recommendation for removal should be made.

The Panel feels a profound professional obligation to the people of Kenya and, particularly, to the many impressive younger lawyers, judges and magistrates who spoke to us, to offer an avenue of hope for immediate respite from the cancer of corrupt elements within the Judiciary.

We recommend that the Committee be set up by the Attorney General and include the following:

- A member appointed by the Attorney General to represent the public of Kenya.
- A member nominated by the Law Society of Kenya.
- A member nominated by the International Commission of Jurists (Kenya Section).
- A member nominated by the Federation of Women Lawyers of Kenya.
- A member nominated by the Faculties of Law of Kenyan Universities.

The Committee shall be responsible for selecting a Chairperson from among its members. It is crucial that the members of this Committee be persons of unquestionable integrity, competence and resolve. The Committee must be provided with adequate resources to fulfil its role, including office space, staff and equipment.

We recommend that the mandate for the Committee be as follows:

- To receive complaints about the conduct of any judge in Kenya from any source.
- To assess the merits of such complaints and to refer to the Chief Justice any complaints that he should consider for investigation by a tribunal pursuant to section 62 (5) of the Constitution of Kenya.

The Committee must be "user-friendly" when receiving complaints. Publicity should be given to its role and it must be provided with adequate resources to fulfill its functions. It will be necessary to have a screening process to filter out complaints without merit. It will have to be made clear

to the public that the Committee has no authority to deal with judicial decisions that the complainant considers to be erroneous. Something more than mere error is necessary to constitute misconduct. It is important that the Committee act only on specific complaints and not initiate investigations into the conduct of a judge. The process must not be allowed to become or be perceived as a "witch hunt".

After preliminary examination, where it appears that a complaint may be well founded, the judge in question should be provided with a copy and invited to provide a reply in writing. Where the judge's response does not resolve the matter, the Committee will gather further information by interviewing the complainant and any others who may have relevant information. This will be done informally since the Committee will not have the authority to summon witnesses or compel production of documents.

Upon completion of its fact-finding, where the complaint appears to be serious enough to warrant referral to the Chief Justice, fairness must be extended to the judge involved. Complete disclosure should be provided to the judge who should be given the opportunity to respond in writing and his or her response must be included in the report of the Committee, if it decides to refer the matter to the Chief Justice. Where a complaint is referred to the Chief Justice, the Committee may make its report public. Experience in other jurisdictions has demonstrated that where a judge has engaged in serious misconduct, and is presented with the evidence that his or her misconduct has been exposed, the judge will resign rather than face the embarrassment of a formal inquiry and the inevitable result of removal.

The process followed by the Committee must reflect:

- Sensitivity to the complainant
- Fairness to the judge and respect for judicial independence
- Credibility in the eyes of the public.

Corruption by a judge must be exposed and condemned simply because it is evil. Such judges must also be removed from the Judiciary so they are no longer able to prey upon the public. They also tarnish the image of other judges who carry out their judicial role with integrity. These judges are entitled to have the cloud of suspicion lifted. Moreover, the very creation of such a Committee will have an immediate chilling effect on judges who engage or are tempted to engage in improper behaviour.

5. Conclusion

The Panel was saddened by the reports of corruption which appear to be endemic in Kenya's public institutions and have found their way into the Judiciary as well. We believe a short, sharp, shock is necessary to detour this path towards a culture of corruption. We hope, for the sake of this great country, that the proposed Committee will prevent the Judiciary from being a complicit partner in public corruption, rather than its greatest enemy.

6. Summary of Recommendations

I. Vesting Judicial Power and the Principles of Judicial Independence in the Constitution

1. We recommend the entrenchment of the terms of office for judges to ensure that as individuals, they enjoy the necessary protections to allow them to decide cases without fear or favour, affection or ill-will, in an open and public manner and in accordance with the law.
 2. We recommend vesting judicial authority in the Judiciary along side the Executive and Parliament to ensure recognition of and respect for the distinctive role of the courts in the governance of the Republic of Kenya.
 3. We recommend that the Chief Justice shall be head of the Judiciary and shall provide judicial leadership at all times. The Chief Justice shall preside over and have direct administrative responsibility for the Supreme Court
 4. There shall be a President of the Court of Appeal and President of the High Court to preside over and have direct responsibility for the administration of those courts.
 5. We recommend that the following principles be enshrined in the Constitution in relation to the terms and conditions of judicial office:
 - a) Judges shall be persons of integrity and ability with appropriate training and qualifications in law.
 - b) Judges shall exercise judicial power impartially and in accordance with the law and authority without fear, favour or
 - c) The tenure of Judges shall be guaranteed and adequately secured by the Constitution.
 - d) The Constitution shall provide that the remuneration and other terms and conditions of service of Judges shall be adequately secured by law and shall not be reduced or altered to their disadvantage.
 - e) Judges shall not be liable to any action or suit for any act or omission in the exercise of their judicial powers or functions.
 - f) Judges shall be free to form associations that represent their interests, to promote their professional training and to protect their judicial independence.
 - g) Judges are entitled to freedom of expression, belief, association and assembly on condition that they shall always conduct themselves in a manner that preserves the dignity of their office, their impartiality and the independence of the Judiciary.
 - h) Judges must always strive to uphold their integrity and independence by refraining from impropriety or any appearance of impropriety.
 - i) Judges shall devote their full time and attention to their judicial duties and shall not engage in any business, trade, profession or other activity inconsistent with the judicial function.
5. We recommend that the financial independence of the Judiciary be entrenched in the Constitution. The Judiciary should enjoy financial budgetary autonomy, draw up its own will-budget and deal directly with the

relevant state finance authority. The state shall be obliged to provide adequate financial resources to enable the Judiciary to perform its functions effectively.

II A Supreme Court

6. We recommend the establishment of a Supreme Court comprised of a small number of select jurists of unquestionable skill, judgment and integrity.
7. We recommend that in addition to the existing courts of judicature of Kenya, namely the High Court and the Court of Appeal, there be established the Supreme Court of Kenya to consist of:
 - The Chief Justice,
 - Such number of justices of the Supreme court not being less than six, as Parliament may by law establish.

The Supreme Court shall exercise general appellate jurisdiction. It shall be the final court of appeal in all matters

III. Appointment of Judges

8. We recommend the adoption of a clearly established transparent appointment process with clearly stated criteria under the authority of a restructured Judicial Service Commission.
9. We recommend that the appointment of all judges, including the Chief Justice, be made by the President in accordance with the written recommendation of the Judicial Service Commission and after the President has duly and formally consulted the Parliamentary Committee responsible for judicial affairs, which we propose be established.
10. We recommend that only distinguished judges and jurists of proven integrity and impeccable character as determined by the Judicial Service Commission be

appointed as Chief Justice and as judges of the High Court, Court of Appeal and Supreme Court.

- a) The minimum constitutional qualification for appointment as Chief Justice or as a judge of the Supreme Court shall be a total of fifteen years experience:
 - i) as a judge of the High Court or Court of Appeal,
 - ii) practising as an advocate, or
 - iii) full-time law teaching in a recognized university.
- b) The minimum constitutional qualification for appointment as a judge of the Court of Appeal shall be a total of ten years experience:
 - i) as a judge of the High Court,
 - ii) practicing as an advocate, or
 - iii) full-time law teaching in a recognized University.
- c) The minimum constitutional qualification for appointment as a judge of the High Court shall be a total of ten years experience:
 - i) as a magistrate, or
 - ii) practicing as an advocate.

IV. Terms of Office, Conduct and Removal

11. We recommend a transparent complaint and removal process, to be established through a restructured Judicial Service Commission in the following terms.
 - a) A judge may be removed from office only for
 - i) inability to perform the functions of his or her office arising from infirmity of body or mind, or
 - i) misbehaviour, misconduct or incompetence of such a nature as to make the judge unfit for judicial office.
 - b) A judge may only be removed from office in accordance with the procedure prescribed by the Constitution.

- i) The Constitution shall provide that any individual or institution, society or group of individuals may lodge a complaint against any judge to the Judicial Service Commission.
- ii) The Judicial Services Commission shall investigate and if it is satisfied that consideration should be given to the removal of the judge from office, it shall request the President to appoint a Judicial Tribunal of eminent judges to conduct a hearing into the allegation.
- iii) If the Judicial Service Commission finds the judge's behaviour to be inappropriate but is not satisfied that consideration should be given to the removal of the judge from office, it may inform the judge of its assessment of the judge's conduct.
- iv) The Judicial Tribunal shall report its findings and recommendation to the President who shall act in accordance with that recommendation.
- v) Where a judge is under investigation by a Judicial Tribunal, the Judicial Service Commission may recommend to the President that the judge be suspended without loss of remuneration or benefits pending the Judicial Tribunal's hearing of the complaint and the President shall act in accordance with the recommendation of the Judicial Service Commission.
12. We also recommend that a comprehensive Code of Conduct for judges, magistrates and judicial officers be formally adopted and that it should impose two important obligations. First, all judges, magistrates and judicial officers should be required to file with the Judicial Service Commission upon appointment and annually thereafter a financial disclosure statement clearly disclosing all assets, property or investments owned and all sources of income. Failure to make full and accurate financial disclosure may constitute judicial misconduct. Second, all judges, magistrates and judicial officers should be under a legal obligation to disclose to the Judicial Service Commission any instance known to them of bribery or corruption in the administration of justice. Failure to report may constitute judicial misconduct.
- V. Judicial Service Commission**
13. The Advisory Panel recommends that a restructured Judicial Service Commission be entrenched in the Constitution.
14. We recommend that in its restructured form, the Judicial Service Commission shall comprise the following members who shall be persons of high moral character and proven integrity:
- full-time chairperson whose qualifications shall be comparable to those of a Supreme Court Judge.
 - One member appointed by the Chief Justice.
 - Two lay members of the public appointed by the President in consultation with the proposed Parliamentary judicial affairs committee.
 - Two members nominated by the Law Society of Kenya.
 - Two members elected by the faculties or schools of law of the universities Kenya.
 - Three judges elected by the Supreme Court, Court of Appeal and the High Court respectively.
 - Two members elected from the subordinate courts.
 - One member representing the Public Service Commission nominated by the Public Service Commission.

- i) The Attorney General as an ex-officio member.
15. We recommend that the Judicial Service Commission shall have the following functions:
- a) To recommend to the President persons for appointment as judges, including the Chief Justice.
 - b) To review and make recommendations on terms and conditions of service of judges, magistrates and other judicial officers.
 - c) To appoint, discipline and remove registrars, magistrates and other judicial officers including paralegal staff in accordance with the law as prescribed by Parliament.
 - d) To receive and investigate complaints against judges in accordance with the Constitution.
 - e) To prepare and implement programmes for the education and training of judges, magistrates and paralegal staff.
 - f) To advise the government on improving the efficiency in the administration of justice and access to justice including legal aid.
 - g) To encourage gender equity in the administration of justice in Kenya.
 - h) Any other function as may be prescribed by the Constitution or any other legislation enacted by Parliament.

VI. Access to Justice and Efficiency

16. We recommend that the restructured Judicial Service Commission be specifically mandated by the terms of the Constitution to advise the government on improving access to justice. It is our hope that this would focus attention on this vital issue and achieve the necessary reforms.

17. We recommend that serious consideration be given to enhancing the availability of legal aid. We find particularly disturbing the present failure to ensure full legal representation for all proceedings involving persons accused of capital offences.

18. We recommend that the restructured Judicial Service Commission be specifically mandated

to advise the government on improving efficiency in the administration of justice.

VIII. Kadhis' Courts

19. We recommend no change to the current constitutional provisions regarding the Kadhis' Courts. We recommend, however, that consideration be given to the appointment of judges to the High Court who are proficient in Muslim Law.

VIII. Attorney General and the Director of Public Prosecutions

20. The Panel recommends the establishment of an office of the Director of Public Prosecutions, vested with the powers that are now vested in the Attorney General under section 26(3), (4) and (8) of the Constitution together with any other appropriate powers for this office and these should be clearly set out in legislation. The Director of Public Prosecutions shall exercise these functions independently without interference, control or direction of any other person or authority.

13. 21. We further recommend that the Director of Public Prosecutions should be appointed by the President in accordance with the recommendation of the Public Service Commission after consultation with the Parliamentary committee responsible for legal and Constitutional affairs. The Director of Public Prosecutions should be appointed from among persons of proven integrity and moral character qualified to be appointed a Judge of the High Court. The Public Service Commission shall consult with the Judicial Service Commission prior to making its recommendation.

22. We recommend that the Attorney General no longer be a member of the National Assembly and that there be a Minister of Justice to attend to all political issues, including responsibility for legal, judicial and constitutional issues in Parliament.

23. We recommend that the Attorney General be appointed by the President with the approval of the Parliamentary committee responsible for legal and constitutional affairs from among persons of proven integrity, moral character who are qualified to practise as advocates and who have not less than 10 years experience.

24. We recommend:

a) That the *Magistrates' Courts Act* be reviewed in order to realign the Courts established under section 7 (1) with their respective grades in every District throughout Kenya.

b) Each Magisterial area should be designated to its grade and jurisdiction to which a magistrate of a specified grade would be posted. Magistrates of lower grades posted to the courts of higher grades or designation may only do so in an acting capacity.

c) Magistrates assigned to the courts of specified grade shall exercise such jurisdiction as may be determined by Parliament from time to time.

d) A hierarchical system of appeal in all matters from the lowest to the highest Magistrates' court and thereafter to the High Court, Court of Appeal and the Supreme Court should be established by Parliament.

e) The Judicial Service Commission shall be responsible for making recommendations on the remuneration, terms and conditions of service for Magistrates' and other subordinate courts.

25. We recommend that there should be a judicial officer designated to have primary responsibility for the administration of all Magistrates' Courts throughout Kenya.

X. Election Petition Appeals

26. We recommend that appeals in election petitions should lie from the Court of Appeal to the Supreme Court on a point of law only.

XI. Interim Measures

27. The Panel recommends that as an interim measure there be a Committee to receive complaints about the conduct of any judge in Kenya in order to assist the Chief

Justice in the discharge of his constitutional obligation to decide whether a complaint ought to be investigated by a tribunal appointed by the President under s. 62(5).

28. We recommend that the Committee be set up by the Attorney General and include the following

a) A member appointed by the Attorney General to represent the public of Kenya.

b) A member nominated by the Law Society of Kenya.

c) A member nominated by the International Commission of Jurists (Kenya Section).

d) A member nominated by the Federation of Women Lawyers of Kenya.

e) A member nominated by the Faculties of Law of Kenyan Universities.

The Committee shall be responsible for selecting a Chairperson from among its members. It is crucial that the members of this Committee be persons of unquestionable integrity, competence and resolve. The Committee must be provided with adequate resources to fulfil its role, including office space, staff and equipment.

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