

# **REPORT OF THE CONSTITUTION OF KENYA REVIEW COMMISSION**

## **VOLUME FIVE TECHNICAL APPENDICES**

### **PART SIX**

**APPROVED FOR ISSUE AT THE 110<sup>th</sup> MEETING OF THE COMMISSION HELD  
ON 30 NOVEMBER, 2005**

**PART FIVE:**

- 1. DEVOLUTION OF POWER AND GOOD GOVERNANCE SEMINAR**
- 2. REFERENDUM SEMINAR- 2003**
- 3. JOINT CONSTITUTION OF KENYA REVIEW COMMISSION/ELECTORAL COMMISSION OF KENYA WORKHOP ON THE REFERENDUM- 2004**

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

- (a) Section One: Devolution Of Power and Good Governance Seminar, held from 3<sup>rd</sup> – 5<sup>th</sup> December 2003
- (b) Section Two: Referendum Seminar -2003, held from 7<sup>th</sup> – 10<sup>th</sup> December 2003 at Whitesands Hotel, Mombasa.
- (c) Section Three: Joint Constitution of Kenya Review Commission/Electoral Commission of Kenya workshop on the Referendum 2004 held from 13<sup>th</sup> – 16<sup>th</sup> June 2005 at Leisure Lodge, Mombasa.

This particular part has been prepared by the Commission working through the Research, Drafting and Technical Support Committee. The Chair of the Research, Drafting and Technical Support Committee of the Commission, Prof. H. W. O. Okoth-Ogendo, co-coordinated 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. 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).

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. Mrs. Abida Ali-Aroni, Chairperson
2. Prof. Ahmed Idha Salim, 1<sup>st</sup> Vice-Chair
3. Prof. H. W.O. Okoth-Ogendo, Vice- Chair
4. Prof. Wanjiku Kabira, Vice-Chair
5. Dr. Charles Maranga Bagwasi
6. Ms. Salome Wairimu Muigai
7. Hon.Dr. Phoebe Asiyo
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21. Mr. Keriako Tobiko
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26. Dr. Andronico O. Adede
27. Hon. Amos Wako, Attorney-General – *ex officio*
28. Dr. PLO-Lumumba, Secretary – *ex officio*



## SECTION ONE

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### **DEVOLUTION OF POWER AND GOOD GOVERNANCE SEMINAR: 3<sup>RD</sup> – 5<sup>TH</sup> DECEMBER 2003 AT WHITESANDS HOTEL, MOMBASA**

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#### **List of Presentations and Presenters:**

1. “The Design of the Devolved System” by Mr. Mutakha Kangu
2. “The Road To Devolution Of Power: Progress And Gains Made” by Prof. Wanjiku Kabira
3. “The Structure and Management of Nairobi as the Capital Territory and Metropolitan City” by Mr. Johnson Mbugua
4. “Representation & Local Authorities in the Devolution Design” by Prof. Peter Wanyande
5. “Devolution and Participatory Governance” by Prof. Hans Peter Schneider
6. “Fiscal Devolution” by Dr. Walter Odhiambo
7. “Taxes and Revenue Collection” by Mr. Andrew Okello
8. “Revenue Sharing and Equitable Development” by Mr. N. T. T. Simiyu
9. “Fiscal and Financial Aspects of Devolution” by Mr. Ndung’u Gathinji
10. “Costing of Government and other related issues” by Mr. Julius Kipng’etich.

**SECTION ONE: DEVOLUTION OF POWER AND GOOD  
GOVERNANCE SEMINAR: 3RD – 5TH DECEMBER 2003 AT  
WHITESANDS HOTEL, MOMBASA**

**THE DESIGN OF THE DEVOLVED SYSTEM**

**Mr. Mutakha Kangu,  
Commissioner, Constitution of Kenya Review Commission**

Ladies and Gentlemen, I would like to share with you what there is on the question of Design of the Devolution System and I would like to begin by saying that Pakistan, which is also trying to address the question of Devolution, after working up to a certain level and putting in place the structures they wanted to use, one Speaker said that “the foundations of your State have been laid and it is now for you to build and build as quickly and as well as you can”.

I want to say that indeed Devolution is supposed to be the foundation of the State and whereas this Speaker was saying after they had finished the job, I want to use those words to emphasize the need for us in designing Devolution to be extremely careful, because that is supposed to be the foundation of the State and if we go wrong at the design level, then we shall have a lot of problems.

Now, in addressing the question of design, I want to say that the Commission which has been working on this issue for quite sometime and as Prof. Yash Pal Ghai has said, we have held several Workshops and have come up with some conceptual framework within which we are trying to design Devolution. It is therefore our hope that this Workshop will help us in refining

concretely, issues that fall within this conceptual design we are trying to look at.

At that conceptual level, the first design question we need to address and refine, which we have decided on as a Commission, is that we are not talking about delegation of power, or deconcentration of power, we are talking about Devolution proper, of power; serious Devolution, so that the people are given actual power that can make things move, that can ensure that they receive effective and efficient services that can bear fruit in their well-being. Therefore, at the design level, we are seeking to design for Devolution, not deconcentration, not delegation.

Now, point number two is that at the level of concept, we have settled for four levels of government. We want to have a Government at the National Level, a Government at the Zone level - although I know in the Committee the question of the name was left hanging, people are agreeable to that level, but they said they may have to rethink the name of that level then we have a third level called the County which basically is supposed to be the Local Government as is known everywhere, then the lowest is going to be the Location.

We want to think through more about these levels and see how best to place them, structure them and so on. For instance, if you look at the Location level, we may need to refine the operations of that level, taking into account the needs of the village because a number of people still think that the Location would be too far and we may need to rethink whether we want to bring that fourth level, lower than the Location, or we want to constitute that level, in terms of institutions of Governance and representation, by involving villages as the points or the Constituencies that produce representation at the Location level. Therefore, we need to refine those issues.

When we talk about the County, I said it is basically supposed to be Local Government as is known and therefore, knowing that Local Government in Kenya has a lot of weaknesses, how do we reorganize that to make it a very effective Local Government and then of course the Zone level? What do we place there to make the whole system workable?

I want to note here a point that I will come to at a later stage, that if you look at the Draft, Article 215, where we are mentioning these four Levels of Government, there is a sub-Article [2], which says that “These Governments are distinctive, interdependent and consultative.” I have myself been arguing that we need to add their “distinctive, interdependent, consultative and negotiated” so that we are able to see how they operate. Because I will come to this later, I do not want to say much but only comment that this particular Clause obviously suggests that what Prof. Ghai has been saying, that we go for a co-operative system, seems to have already been accepted because if you analyze that Clause, you clearly see that we are talking about

Governments that have to work in co-operation because they must be distinct from each other. Which means that the Lower levels of Government, are not just agents of the higher level of Government, but in fact each is distinct and draws its authority direct from the Constitution. Its functions are clearly allocated and defined by the Constitution. Therefore, it is distinct, it is not a mere Agent of merely another system.

On the other hand, they are interdependent because you do not want to divide the country and so they must work in a co-operative way, a consultative way, a negotiated way and so on. I will come back to that. So, effectively, we have already chosen what Prof. Ghai refers to as the co-operative approach in Germany and South Africa.

Now, issue number three in terms of design at the conceptual level is that of functions and we have already pointed out that we want to have the National Level of Government, having the Legislative functions, Executive functions, Judicial functions and financial functions. The second level of Government, the Zone, will have Legislative, Executive and Financial functions. The third level, the County, will also have the Legislative, Executive and financial functions and the fourth level will have the Executive and financial functions. It will not have Legislative and Judicial functions.

I need to point out that the concept we have adopted is that Judicial functions should be retained at the National Level, but then be dealt with by way of deconcentration, by requiring the National Level of Government to establish certain Judicial Institutions in the other levels of Government, but the other functions are disturbed, as I have stated.

Now, we need refinement of this because this is at a general level and, therefore, even other Executive or Judicial, you may need to know on which issues is each level entitled to legislate or to perform Executive functions, and at that level you may need to

look at the services the citizens require; water, health, education and so on. If you go that route, then you may need to un-bundle these services in terms of Policy

# THE ROAD TO DEVOLUTION OF POWER: PROGRESS AND GAINS MADE

**Prof. Wanjiku Kabira,  
Commissioner, Constitution of Kenya Review Commission**

## **PART I**

### **(I) Where we Begun**

#### **(a) The Mandate of the Commission**

In addition to examining and making recommendations on organs of government, the Review Act requires the Commission to examine and make recommendations on:

- structures and systems of government, including the federal and unitary systems;
- the place of local government in the constitutional organisation of the Republic; and
- the extent of devolution of power to local authorities.

Further, the Act requires the Commission to ensure that the review process:

- promotes people's participation in national governance by devolving power;
- respects ethnic and regional diversity and communal rights, including the communities' rights to enjoy their cultures and express their identities;
- establishes a free and democratic system based on good governance and the separation of powers and checks and balances; and

- promotes the accountability of public authorities.

At the core of this mandate is the challenge of devolution of power.

#### **(b) The Views of the People on Devolution**

The views of the people on the question of devolution were expressed in different ways. The views touched on different issues relating to the structure and organisation of government. The following is an executive summary of the views.

- Government should be required to apportion benefits from resources between the national government and communities where such resources are found.
- While some said that power should be devolved to provinces, others favoured districts as the principal units for devolution.
- Many people, especially in the Coast Province and parts of the Rift Valley Province, recommended majimbo; on the other hand many opposed majimbo.
- There was wide support for local government, which people said should be strengthened to support the State in administrative management and development at the local level.
- The Budget should be done from the

grassroots level to the top.

- All councillors should be elected - none should be nominated.
- Mayors and chairs of local authorities should be elected directly by the people.
- Councillors should be required to have certain minimum educational qualifications.
- There should be a certain proportion of women in local councils.
- Local elections should not be on a party basis.
- Local authorities do not deliver the services they are supposed to.
- Chiefs should be elected.
- A role should be found for traditional institutions, including elders/council of elders to handle administrative and development matters in villages.
- The provincial administration should be abolished entirely.
- Some said the provincial administration should be retained at the district level and below but not at the provincial level.
- Replace the provincial administration with strengthened local authority administration.
- Abolish the provincial administration, replace with elected bodies, so that they can be answerable to the people.
- Those who advocated the retention of the provincial administration wanted it to be more accountable to the people, where the key officials are elected.
- The local community should control/regulate land.
- Rename districts with 'tribal' connotations, e.g., Kuria, Kisii, and Embu.
- Local councils to be involved at central level decision making through the Senate.

## Summary Of The People's Views On: Structure and Systems of Government

| <b>Structure and Systems of Government</b> |                                       |                                     |  |   |                              |                                  |                               |                               |                                     |   |  |                                       |  |
|--|---------------------------------------|-------------------------------------|--|---|------------------------------|----------------------------------|-------------------------------|-------------------------------|-------------------------------------|---|--|---------------------------------------|--|
| <b>Province</b>                            | <b>Retain the Presidential System</b> | <b>Adopt a Parliamentary System</b> | <b>Prime Minister to head Government and appoint the cabinet</b> | <b>President to be ceremonial, symbol of national unity and receive state guests, swear cabinet and open Parliament</b> | <b>Adopt a Hybrid system</b> | <b>Retain the Unitary System</b> | <b>Adopt a Federal System</b> | <b>Adopt a Majimbo System</b> | <b>Strengthen Local Authorities</b> | <b>Devolve powers to Provincial level</b> | <b>Devolve powers to District Levels</b> | <b>Devolve powers to Lower Levels</b> | <b>Devolve powers to Council of Elders</b> |
|  |                                       |                                     |  |   |                              |                                  |                               |                               |                                     |   |  |                                       |  |
| <b>Central</b>                             | 100                                   | 208                                 | 183  | 159   | 36                           | 176                              | 42                            | 16                            | 56                                  | 13  | 17                                       | 37                                    | 7  |
| <b>Nairobi</b>                             | 46                                    | 21                                  | 45   | 34  | 11                           | 30                               | 34                            | 6                             | 11                                  | 1   | 2  | 10                                    | 0  |
| <b>Coast</b>                               | 47                                    | 62                                  | 56   | 43  | 7                            | 25                               | 403                           | 57                            | 16                                  | 7   | 11                                       | 17                                    | 4  |
| <b>Eastern</b>                             | 46                                    | 80                                  | 71   | 59  | 16                           | 46                               | 34                            | 4                             | 19                                  | 6   | 15                                       | 15                                    | 2  |
| <b>N. Eastern</b>                          | 25                                    | 24                                  | 25   | 24  | 4                            | 31                               | 34                            | 1                             | 2                                   | 0   | 3  | 3                                     | 1  |
| <b>Nyanza</b>                              | 42                                    | 117                                 | 83   | 68  | 20                           | 53                               | 135                           | 7                             | 12                                  | 5   | 10                                       | 20                                    | 11   |
| <b>Rift Valley</b>                         | 61                                    | 111                                 | 89   | 93  | 15                           | 76                               | 204                           | 11                            | 24                                  | 6   | 20                                       | 30                                    | 1  |

## Structure and Systems of Government

| Province     | Retain the Presidential System | Adopt a Parliamentary System | Prime Minister to head Government and appoint the cabinet | President to be ceremonial, symbol of national unity and receive state guests, swear cabinet and open Parliament | Adopt a Hybrid system | Retain the Unitary System | Adopt a Federal System | Adopt a Majimbo System | Strengthen Local Authorities | Devolve powers to Provincial level | Devolve powers to District Levels | Devolve powers to Lower Levels | Devolve powers to Council of Elders |
|--------------|--------------------------------|------------------------------|---|--|-----------------------|---------------------------|------------------------|------------------------|------------------------------|------------------------------------|-----------------------------------|--------------------------------|-------------------------------------|
| Western      | 22                             | 28                           | 17  | 17   | 7                     | 20                        | 23                     | 0                      | 4                            | 1                                  | 3                                 | 8                              | 0                                   |
| Direct       | 30                             | 24                           | 48  | 23   | 8                     | 33                        | 60                     | 4                      | 13                           | 12                                 | 8                                 | 4                              | 5                                   |
| <b>Total</b> | <b>419</b>                     | <b>675</b>                   | <b>617</b>  | <b>520</b>   | <b>124</b>            | <b>490</b>                | <b>969</b>             | <b>109</b>             | <b>157</b>                   | <b>51</b>                          | <b>89</b>                         | <b>144</b>                     | <b>31</b>                           |



The Commission considered the importance of the independence Constitution and its efforts in the area of devolution. The Commission also organized a workshop on the Independence Constitution and Devolution and consulted the Lancaster House Veterans on this issue.

The Commission also organised a seminar and held consultations with various experts on Devolution of Power at the Safari Park Hotel, Nairobi on 13th and 14th December 2001. The purpose of the seminar was to open up the subject of Devolution, to assess the advantages and disadvantages of Devolution, the principles and design thereof and to debate the experiences of other countries on the concept and practice of Devolution.

**(c) Commission's recommendations (Commission Report and the First Draft Bill)**

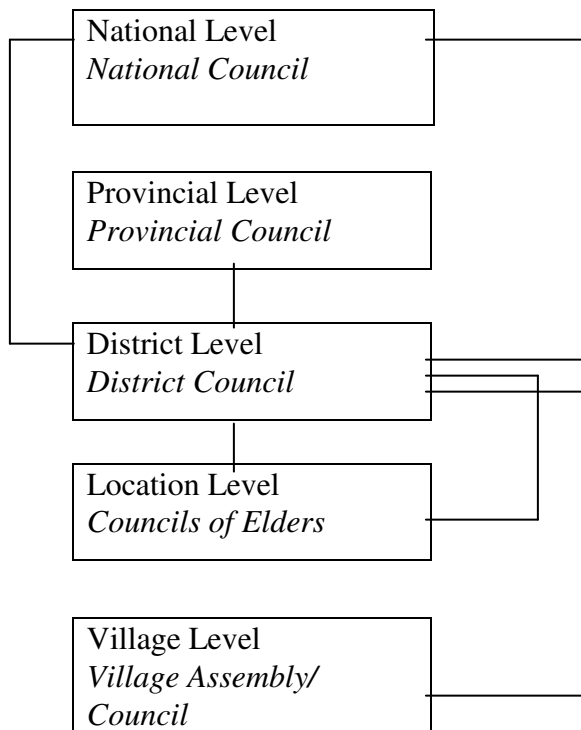
The Commission made the following recommendations on devolution of power:

- (i) On principles of devolution, that**
- a) the model of devolution adopted should reflect a cost-benefit analysis of devolution and what devolution is meant to achieve;
- b) the levels of devolution and the powers to be exercised by the devolved units would be clearly defined by an Act of Parliament;
- c) the model of devolution should reflect the following broad principles:
  - discrete demarcation of the functions and powers within and across the units of devolution in a way that checks power and reduces conflict in its exercise;

- efficient and equitable mobilisation, allocation and management of resources;
- a need to enhance participatory governance and accommodate diversity; and
- including cultural diversity, the needs of vulnerable groups, such as women, children, the disabled, minorities and the marginalized;
- d) the financial arrangements for funding devolved units and for the relationship between the national Government and the unit, including the mechanisms to co-ordinate the interlink between the various levels of government (national, provincial, district and local) fashioned in a way that ensures autonomy and accountability by the devolved units;
- e) the new Constitution should set up transitional mechanisms for phasing out the *status quo* and replacing it with the new order;
- f) there should be an ingrained dispute settlement mechanism;
- g) devolved units are entitled to an equitable share of revenue raised nationally, to enable them to provide basic services and perform their responsibilities;
- h) national Government institutions and departments should be arranged to ensure equitable distribution of resources throughout the country; and the details of the functioning of the different units of devolution would be clearly enunciated in an Act of Parliament.
- (ii) On the structure of devolution, that**
- a) there be a five-tier devolution system involving national, provincial, district, local and village institutions, with the district

- as the principal unit of devolution below the national levels indicated in figure 12b;
- b) separate provisions for urban areas;
  - c) the system of devolution based on elected councillors and elected executives accountable to the councils at each level, characterised by the separation of powers;
  - d) at least one third of the members of each council be women;
  - e) the electoral system to ensure representation of all cultural communities at each level;
  - f) an Act of Parliament to provide for recall of a councillor by voters;
  - g) the village and location to have executive powers only – they shall relate largely to implementation of the policies of the district council, but shall include initiatives of a local nature and settlement of disputes like a small claims court;
  - h) District and provincial councils to have both legislative and executive powers;
  - i) The interests of the provincial and district councils be complementary, not antagonistic; and
  - j) Electoral units be determined by electoral laws.

**Fig. 12b: Proposed Devolution Structure**



**(iii) On functions of units of devolution,**

- a) that village councils would -
- mobilise residents on local issues as the point of contact between the village and the location/wards; and
  - be managed and administered by village elders.
- b) that Locational Councils would -
- enable communities to manage their own affairs; exercise only executive functions in particular,
    - administration at the location level;
    - initiation of development projects;
    - advice to the district council on matters affecting the community;
    - solve disputes like a small claims court;
    - mobilise people around local units;
    - mobilise and manage community resources and development funds and processes; and
    - implement policies approved by the district council to develop the location;
  - be run by a council of village elders, two from each village in the location; the elected representatives shall elect among themselves the chairperson, treasurer and other officials.

The location executive would consist of the councils, officials and the administrator as an *ex officio* member.

There would be a small secretariat to assist the location council to manage its affairs; and

The location administrator would be elected directly by the people, as prescribed by the district council.

- c) that District councils would
- be the principal level of devolution;
  - perform both legislative and executive functions;
  - have as its district council the legislative organ;
  - have an executive organ responsible to the district council; and
  - have power to hire and fire their staff;
  - have power to:
    - formulate policies within their areas of jurisdiction;
    - provide public services and infrastructures;
    - execute development programmes;
    - raise and spend revenue locally by levying taxes, rates and duties;
    - liaise with central authorities; and
    - recruit, retain and dismiss staff;
  - be composed of councillors drawn from the number of wards in the current county councils elected as follows:
    - the councillors to be elected for a term of 4 years;
    - the elections to be conducted by the Electoral Commission of Kenya;

- the candidates must have attained KSCE level education;
  - nomination of candidates to be through political parties, but the provision of independent candidates to apply at this level; and candidates for nomination shall be of the minimum age of 21 years;
  - in principle, be permitted and able to operate under national legislation in concurrent laws, but be authorised to adopt national laws to local circumstances within limits to be laid down in an Act of Parliament. Thus, the content and style of drafting central legislation should allow for modification and implementation by districts;
  - in principle, be the vehicle through which the national government implements policy;
  - in principle, be able to seek assistance from the national Government to discharge their responsibilities;
  - be subject to the jurisdiction of a national ombudsman, the human rights Commission, etc;
  - at their first sitting, elect one of their own as chairperson;
  - be administered by a district governor;
  - the governor to be the political head of the district;
    - elected directly by universal adult suffrage of the entire District for a term of 4 years renewable once;
    - who must be a resident of the respective districts;
    - who is less than 35 years and not more than 70 years old and a graduate from a recognised university;
    - who shall run the affairs of the district with the assistance of persons with appropriate qualifications drawn from the district; the number of persons to assist the governor shall be ten to form a District cabinet; answerable to the people in the District directly; and
    - removable by the electorate or by a vote of no confidence by the council;
- d) that Provincial councils would consist of chairpersons of district councils and other stakeholders; members of the provincial council would determine their chairperson on a rotational basis, have both executive and legislative powers on subjects within their executive responsibilities among which would be to-
- promote co-operation between districts;
  - increase the capacity of districts and facilitate the effective discharge of their functions;
  - co-ordinate issues that affect districts;
  - deal with trans-provincial issues/concerns;
  - manage provincial institutions and resources;
  - plan the province's development;
  - develop and monitor the provincial infrastructure; and

- provide technical assistance to district councils, where necessary;
- (e) that urban councils operate within the district councils in which they are located, although they may be allowed to retain a special administrative mechanism since they are complex ecosystems; and
- (f) That Nairobi shall be treated as the national capital territory and be administered in accordance with an Act of Parliament.

**(iv) On the relationship between District and Provincial Councils**

That they may co-operate in discharging their functions. For this purpose, they may set up joint committees or joint authorities; the majority support of the members of each council shall be necessary for co-operation; cooperation arrangements may be terminated on a majority vote of district councillors.

**(v) On the sharing of natural resources between the District and the Central Government**

That legislation should entitle districts to a substantial share of the revenue from local resources; provisions would be made for allocating a fixed percentage to the communities in whose area the resources are located.

**(vi) On financial arrangements in general, that**

- a) the national Government be responsible for collecting major sources of revenue;
- b) District councils may impose taxes

- c) or levies to be specified in an Act of Parliament;
- c) the national revenue be shared equitably with the district councils;
- d) detailed legislation be enacted providing for -
  - allocation of a fixed percentage to the communities in whose area the resources are located;
  - a ratio for sharing the national resources in district councils' territories;
  - taxes and levies which the district council may impose;
  - financial and accounting procedures of accounts;
  - provision of equalisation grants or grants-in-aid to marginalized communities;

e) Provincial Secretariats funded from the Consolidated Fund, District contribution and revenue raised from provincial utilities;

f) Districts funded by Government grants, Government transfer funds and revenue raised from local utilities;

g) Accounts of devolved funds audited by the Auditor-General; and

h) National revenue shared equitably between districts and the national Government.

**(vii) On intergovernmental relations,**

- a) the national Government would establish a ministry [of devolution/district governments] to deal/liaise with the provincial and district councils.

- b) the State would establish a ministry of devolution to deal/liaise with provincial and district councils;
- c) the central Government's public servants posted in provinces and districts would liaise with district and provincial councils to exchange information and co-ordination of policies and administration;
- d) a district council may be suspended in case of emergencies, war or corruption or gross inefficiency. Except for the first two cases, no council may be suspended unless an independent commission of inquiry has investigated allegations against it and the President is satisfied that the allegations are justified; during the suspension, arrangements for discharging of the District council's functions, as specified in an Act of Parliament, shall be put in place; the authority shall closely liaise with the relevant provincial council; no suspension can last for more than 90 days, during which new council elections must be held if necessary;
- e) the functions and resources to be transferred to district councils be phased out to ensure that councils have the requisite ability; and
- f) no one may hold public or political office in both the central Government and a devolved government.

**(viii) On abolition of Provincial Administration, that**

- a) the provincial administration be

abolished;

- b) the central government may station its officials in provinces and districts to carry out central Government functions.

**(ix) On entrenchment, that**

- a) the devolution structures and levels be entrenched in the Constitution;
- b) the Constitution should list the names of the districts and provinces to which power is to be devolved; and
- c) the already established Boundaries Commission should have power to establish, abolish, create, recreate, align and realign provincial and district boundaries for the purposes of the Constitution;

**(x) On dispute Settlement Mechanisms, that-**

- a) all disputes between district councils, between district council and the provincial council, and between district councils and the national Government be first determined by the High Court; and
- b) the right of appeal lies in the Court of Appeal and the Supreme Court in that order.

## **PART II**

### ***The National Constitutional Conference (NCC) Response to Devolution of Power***

The proposal for Devolution of Power was on the whole supported; although the conference felt that the proposed structure was ambiguous, expensive and difficult to implement. It was urged very strongly for the formulation of viable structures that would be able to promote equitable resource allocation, accountable governance, delivery of services and the empowerment of the people.

#### **(i) Levels of Devolution**

The delegates were considerably in the support of districts as the principal centres of Devolution. Although it was suggested that they would be too many while others were economically challenged. Moreover, it was noted that the proposed structure lacked a clear linkage with the national government. The subject of the legality of existing districts as the basis for the proposed devolution structure was a matter that was the subject of a hotly debated motion. With respect to local government the translation of terms and municipalities to the status of districts was opposed. Some delegates favoured a three-tier devolution structure (location, district and province) while others were of the view that it should be a two-tier devolution structure (location and the district government). It was generally proposed that there ought to be comparable social and economic resources for the proposed units of devolution.

#### **(ii) Functions of Devolved Government**

The conference felt that some of the proposed functions and services including education, environment and agriculture ought to remain in the ambit of the Central Government.

Furthermore, the Draft Bill was not clear on the responsibility for the management of local resources. Some delegates were of the view that District Councils ought to have legislative power devolved to them while others were of the view that the second chamber ought to handle all legislative issues of the devolved government.

#### **(iii) Financial Arrangements**

Some delegates asserted that the Constitution ought to specify the percentage of national resources that ought to go to the district governments: the proposed ratio was between 50 and 60 percent. Others were of the opinion that national resources ought to be distributed amongst constituencies rather than districts. It was proposed that the Auditor General should audit the accounts of the devolved government units. It was also proposed that the devolved government, irrespective of their size, share the Local Authorities Transfer Fund equitably.

#### **(iv) Administration of Devolved Units**

It was proposed that a Local Government Service Commission ought to be established to provide personnel to the devolved units. The Conference also proposed that the draft should specify the tenure, academic and age qualifications for administrators of the devolved units.

**(v) General Principles**

Arising from this debate, the following general principles could be made out from what the delegates said, namely:

- To enhance the capacity of local people of exercise self-governance.
- To enhance participation of the citizens in the governance process since they have been perceived as passive recipients of services.
- To enhance good governance, transparency and accountability.
- To promote democratic practice.
- To ensure equitable distribution of resources.
- To promote efficient and effective delivery of services.
- To enhance equitable development.
- To provide for separation of powers between the center and the local units.
- To check incidences of lack of control of national and local resources, poor service delivery and lack of transparency and

accountability.

- To accommodate and reconcile cultural values and diversity.
- To ensure protection of rights of communities on the basis of participation, accountability and social justice.
- To promote better use of power.
- To promote access to basic needs.
- To take governance closer to the people.
- To promote equality and Human Rights.
- To reduce abuse of power by government and devolved governments.
- To protect minorities
- To promote participatory governance.
- To provide for affirmative action.

Against this background, delegates suggested that the Commission ought to reconsider the devolution chapter.

| <b>Statistics on Devolution Based on Recommendations from the NCC</b> |                         |
|---|-------------------------|
| <b>Proposals on Levels of Devolution</b>                              | <b>No. of Delegates</b> |
| Provincial Government Level   | 1                       |
| District Government Level   | 15                      |
| Locational Government Level   | 1                       |
| Village Government Level  | 1                       |
| Village-district-Province   | 2                       |
| National-Province-District  | 2                       |
| Village-District-Province-Location                                    | 1                       |
| District Location   | 3                       |
| District-National-Locational-Village                                  | 1                       |
| Village-Locational-District   | 4                       |
| Regions-District-Location   | 1                       |
| Lower Levels  | 2                       |
| District-Village-National   | 1                       |



| <b>Statistics on Devolution Based on Recommendations from the NCC</b>   |                         |
|---|-------------------------|
| <b>Proposals on Levels of Devolution</b>                                | <b>No. of Delegates</b> |
| District-Locational-National  | 1                       |
| District-National-Locational-Community                                  | 1                       |
| National-District-Locational  | 1                       |
| Locational-District-Provincial  | 1                       |
| Other views expressed on Devolution during discussion of other chapters | 92                      |

**(vi) Progress made:**

- (a) On the whole, the NCC supported devolution of powers.
- (b) The NCC resolved that the Commission rethinks and improves its proposals on devolution of power.

**PART III**

**Second Attempt At Devolution**

The Commission considered the NCC response to its initial proposals on devolution of power, and constituted a task force to revisit the question of devolution. In considering the issues raised by the National Constitutional Conference deliberations, the Commission considered what other countries have included in their Constitutions in regard to devolution. Studies were carried out with respect to Ethiopia, South Africa, Ghana, Tanzania, Nigeria, Namibia, Canada, Switzerland, Germany and India. The Commission visited some of these countries in its Foreign Trips Programme.

Subsequently, the Commission published the Special Working Document on Devolution of Power and the new draft

provisions on devolution, which proposed, among others that:

- There should be four levels of government, namely National, Sub - National, Local Government and the Location level.
- The third level of the proposed four levels of government should be treated as local government.
- The NCC should choose among three options for the number of units at the second level of government, i.e. 10 units, 13 units or 18 units.
- Nairobi be divided into four local authorities and that Kisumu and Mombasa remain as separate units.
- Principles guiding devolution, matters of taxation and institutional frame-work;
- Design of devolution;
- Linkages to other chapters in devolution.

**Response by Bomas II to the Second Attempt**

The Plenary of the NCC debated and adopted the views of Kenyans, the Commission Report and initial Draft Bill, the Special Working Document on Devolution of Power and new draft provisions on devolution. The Plenary for instance generally supported the proposed principles guiding devolution and the taxation principles for inclusion in the

Devolution chapter. Delegates supported the creation of 18 units at the second level of government and the adoption of four levels of government. These were thereafter the subject of consideration and scrutiny by the Technical Working Committee "G" on Devolution of Power.

#### **PART IV**

#### **Technical Recommendations and decisions on the Report and Draft Bill**

##### **(a) On the Report**

The Committee discussed, amended and adopted the Commission Report and initial Draft Bill, the Special Working Document on Devolution of Power and new draft provisions on devolution. The following Principles of Devolution as contained in the Commission's Main Report and the Special Working Document on Devolution of Powers were adopted. The principles as amended shall in form the drafting instructions on Article 216(1) on the Objects and Principles of devolved government.

#### **General Principles of Devolution and proposed amendments by the Committee**

1. To enhance the capacity of local people to exercise self-governance. *(Adopted without amendment)*
2. To enhance participation of the citizens in the governance process. *[since they have been perceived as passive recipients of services]. Delete section in italics*
3. To enhance good governance, transparency and accountability.
4. To promote democratic practice.

*(Consolidate 2,3 & 4).*

5. To ensure equitable distribution of *(national)* resources. *(insert 'national')*
6. To promote efficient and effective delivery of services. *(adopted without amendments).*
5. To enhance equitable development. *(adopted without amendments).*
8. To provide for separation of powers between the center and the local units. *(Adopted without amendments)*
9. To check incidences of lack of control over national and local resources, poor service delivery and lack of transparency and accountability. *(Adopted without amendments)*
10. To accommodate and reconcile cultural values and diversity. *(Adopted without amendments)*
11. To ensure protection of rights of communities on the basis of participation, accountability and social justice. *(Adopted without amendments)*
12. To promote better use of *(state)* power. *(Insert 'state')*
13. To promote access to basic needs. *(adopted without amendments)*
14. To take governance closer to the people. *(Adopted without amendments)*

15. To promote equality and Human Rights. (*adopted without amendments*)
16. To reduce abuse of power by (*central*) government and (*replace 'reduce' with 'check' and insert 'central'*)
17. To protect (*all citizens and*) minorities. (*insert 'all citizens' & rephrase to include marginalized and indigenous communities*)
18. To promote participatory governance. (*adopted without amendments*)
19. To provide for affirmative action. (*adopted without amendments*).
20. The need to promote peace, internal harmony, indivisibility of the nation, coherence, devolved governments and national unity.
21. Need to promote observance of the rule of law at all levels.
22. Ensure equitable representation of all Kenyans in the *government* and national institutions and processes. (*insert 'government'*)
6. Protection and promotion of cultural, communal, religious, ethnic and linguistic minorities. (*delete 'religious' then merge 4 with 10 above*).
24. Ensure that, *in appropriate cases*, the higher levels of government exercise restraint in favour of the lower levels of devolved government. (*specify the 'in appropriate cases'*).
25. The national government and the government at each level to which power is devolved shall be loyal to the constitution and uphold the national goals, values and principles of the Republic.
26. The national government and the devolved governments shall exercise such power and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of the other governments and shall respect the constitutional status, institutions, powers and functions of governments in the other levels.
27. The level(s) of devolution (*and sub-national units*) shall be entrenched in the constitution. (*Insert 'and sub-national units'*).
28. The principle of viability, sustainability, efficiency and effectiveness of devolved units of the government- based on population, geographic size, historical and cultural ties, economic and natural resources shall be considered in the establishment of units and levels of devolution and review of boundaries between the established units.
29. The *constitutional* powers and functions of the lower levels of government including local authorities and Location government shall be established by the Devolution Act. (*delete constitutional*)
30. The promotion of a safe and healthy environment for the community. (new principle).

## **Principles of taxation proposed for inclusion in the Devolution Act.**

The Committee also considered the question of effective resource mobilization and management. Consequently, the Committee debated, amended and adopted the following principles guiding taxation:

7. Every effort should be made to ensure that the same institution or individual is not over burdened with many different taxes as to make the overall tax burden unbearable;
8. A proper balance should be struck between the services required to be rendered by the devolved levels of government and the revenue mobilised.
9. Every effort should be made to promote corporate investments as the most sustainable source of tax revenue, in order to reduce the burden of taxes on citizens;
10. The principle that the consolidated fund shall be established for each region into which all money received by the Sub-national government must be paid; and that money may be withdrawn from a Consolidated Fund only with a Regional Act;
11. Every devolved level of government is entitled to an equitable share of revenue raised nationally to enable it to provide basic services and to perform the functions allocated to it;
12. Additional revenue raised by the devolved levels of government may not be deducted from their share of revenue raised nationally, or from other allocations made to them out of national government revenue. Equally, there is no obligation on the National government to compensate the devolved levels of government that do not raise revenue commensurate with their fiscal capacity and tax base; (*amend to provide for special help to regions hit by catastrophes, see 12 below*).
13. A Sub-national legislature may not impose taxes, levies and duties including income tax, value-added tax, rates on property or customs duties; and flat-rate surcharges on the tax bases of any tax, levy or duty that is imposed by national legislation, including the tax bases of corporate income tax, value-added tax, rates on property or customs duties;
14. The power of a Sub-national legislature to impose taxes, levies, duties and surcharges may not be exercised in a way that materially and unreasonably prejudices national economic policies, economic activities across sub-national boundaries, or the national mobility of goods, services, capital or labour; and must be regulated in terms of an Act of Parliament;
15. A local government may impose rates on property and surcharges on fees for services provided by or on behalf of the local government; and other taxes, levies and duties appropriate to local government as may be authorized by an Act of Parliament or to the category of Sub-national government into which that local government falls, but no Local Government may impose income tax, value-added tax, general sales tax or customs duty;
16. When two levels governments or more than one level of devolved government

have the same fiscal powers and functions with regard to the same area, an appropriate division of such powers and functions should be made in accordance with national legislation. The division may be made only after taking into account at least the following criteria:

- a) The need to comply with sound principles of taxation;
  - b) the powers and functions performed by each local government;
  - c) the fiscal capacity of each Local Government;
  - d) the effectiveness and efficiency of raising taxes, levies and duties; and
  - e) equity;
1. The principles of universality and equality of tax treatment and of taxation according to economic capacity shall be followed;
  2. The National government shall promote financial equalization among the Regions and when granting subsidies, it shall take into account the financial

capacity of the Regions and the special situation of the Regions;

3. The National and devolved governments when levying taxes and duties shall ensure that the taxes and duties are related to the source of revenue and determined after appropriate studies have been conducted.

**(b) On the draft Bill**

- (1) That there should be four levels of government as follows –
  - the national level;
  - the zone level;
  - the county level; and
  - the locational level
- (2) That Nairobi would be divided into four counties and be managed specially as the Capital Territory.

That there shall be created 18 units at the second level of government and that Teso would have “Special Status as follows:

Unit 1

|              | <b>Area Km<sup>2</sup></b> | <b>Population</b> | <b>Persons/Km<sup>2</sup></b> |
|--------------|----------------------------|-------------------|-------------------------------|
| Kwale        | 8,295                      | 496,133           |                               |
| Mombasa      | 230                        | 665,018           |                               |
| Taita Taveta | 17,128                     | 246,671           |                               |
| Kilifi       | 4,779                      | 544,303           |                               |
| Lamu         | 6,169                      | 72,686            |                               |
| Tana River   | 38,466                     | 180,901           |                               |
| Malindi      | 7,751                      | 281,552           |                               |
| <b>Total</b> | <b>82816</b>               | <b>2,487,264</b>  | <b>30</b>                     |

## Unit 2

|              | <b>Area Km<sup>2</sup></b> | <b>Population</b> | <b>Persons/Km<sup>2</sup></b> |
|--------------|----------------------------|-------------------|-------------------------------|
| Makueni      | 7,966                      | 771,545           |                               |
| Machakos     | 6,281                      | 906,644           |                               |
| Kitui        | 20,402                     | 515,422           |                               |
| Mwingi       | 10,030                     | 303,828           |                               |
| <b>Total</b> | <b>44,679</b>              | <b>2,497,439</b>  | <b>46</b>                     |

## Unit 3

|              | <b>Area Km<sup>2</sup></b> | <b>Population</b> | <b>Persons/Km<sup>2</sup></b> |
|--------------|----------------------------|-------------------|-------------------------------|
| Meru Central | 2,982                      | 498,880           |                               |
| Meru South   | 1,093                      | 205,451           |                               |
| Meru North   | 3,942                      | 604,050           |                               |
| Tharaka      | 1,570                      | 100,992           |                               |
| <b>Total</b> | <b>9,587</b>               | <b>1,409,373</b>  | <b>147</b>                    |

## Unit 4

|              | <b>Area Km<sup>2</sup></b> | <b>Population</b> | <b>Persons/Km<sup>2</sup></b> |
|--------------|----------------------------|-------------------|-------------------------------|
| Mbeere       | 2,093                      | 170,953           |                               |
| Embu         | 729                        | 278,196           |                               |
| Kirinyaga    | 1,478                      | 457,105           |                               |
| <b>Total</b> | <b>4,320</b>               | <b>906,254</b>    | <b>210</b>                    |

## Unit 5

|              | <b>Area Km<sup>2</sup></b> | <b>Population</b> | <b>Persons/Km<sup>2</sup></b> |
|--------------|----------------------------|-------------------|-------------------------------|
| Isiolo       | 25,698                     | 100,861           |                               |
| Marsabit     | 61,296                     | 121,478           |                               |
| Moyale       | 9,390                      | 53,479            |                               |
| <b>Total</b> | <b>96,384</b>              | <b>275,818</b>    | <b>3</b>                      |

## Unit 6

|              | <b>Area Km<sup>2</sup></b> | <b>Population</b> | <b>Persons/Km<sup>2</sup></b> |
|--------------|----------------------------|-------------------|-------------------------------|
| Garissa      | 33,620                     | 319,872           |                               |
| Ijara        | 11,332                     | 72,638            |                               |
| <b>Total</b> | <b>44,952</b>              | <b>392,510</b>    | <b>9</b>                      |

## Unit 7

|              | <b>Area Km<sup>2</sup></b> | <b>Population</b> | <b>Persons/Km<sup>2</sup></b> |
|--------------|----------------------------|-------------------|-------------------------------|
| Mandera      | 26,474                     | 250,372           |                               |
| Wajir        | 56,698                     | 319,261           |                               |
| <b>Total</b> | <b>82816</b>               | <b>2,487,264</b>  | <b>30</b>                     |

## Unit 8

|              | Area Km <sup>2</sup> | Population       | Persons/Km <sup>2</sup> |
|--------------|----------------------|------------------|-------------------------|
| Kajiado      | 21,903               | 406,054          |                         |
| Narok        | 15,098               | 365,750          |                         |
| Transmara    | 2,846                | 170,591          |                         |
| Kuria        | 581                  | 151,887          |                         |
| <b>Total</b> | <b>40,728</b>        | <b>1,084,282</b> | <b>27</b>               |

## Unit 9

|               | Area Km <sup>2</sup> | Population       | Persons/Km <sup>2</sup> |
|---------------|----------------------|------------------|-------------------------|
| Kisii Central | 649                  | 491,786          |                         |
| Gucha         | 661                  | 460,939          |                         |
| Nyamira       | 896                  | 498,102          |                         |
| <b>Total</b>  | <b>2,206</b>         | <b>1,450,827</b> | <b>658</b>              |

## Unit 10

|              | Area Km <sup>2</sup> | Population       | Persons/Km <sup>2</sup> |
|--------------|----------------------|------------------|-------------------------|
| Bungoma      | 2,069                | 876,491          |                         |
| Busia        | 1,124                | 370,608          |                         |
| <b>Total</b> | <b>3,193</b>         | <b>1,247,099</b> | <b>391</b>              |

## Unit 11

|               | Area Km <sup>2</sup> | Population       | Persons/Km <sup>2</sup> |
|---------------|----------------------|------------------|-------------------------|
| Lugari        | 670                  | 215,920          |                         |
| Kakamega      | 1,395                | 603,422          |                         |
| Vihiga        | 563                  | 498,883          |                         |
| Butere/Mumias | 939                  | 476,928          |                         |
| <b>Total</b>  | <b>3,567</b>         | <b>1,798,720</b> | <b>504</b>              |

## Unit 12

|              | Area Km <sup>2</sup> | Population       | Persons/Km <sup>2</sup> |
|--------------|----------------------|------------------|-------------------------|
| Turkana      | 68,388               | 450,860          |                         |
| West Pokot   | 9,064                | 308,086          |                         |
| Marakwet     | 1,588                | 140,629          |                         |
| Trans Nzoia  | 2,487                | 575,662          |                         |
| Mt. Elgon    | 944                  | 135,033          |                         |
| <b>Total</b> | <b>82,471</b>        | <b>1,610,270</b> | <b>20</b>               |

## Unit 13

|               | Area Km <sup>2</sup> | Population | Persons/Km <sup>2</sup> |
|---------------|----------------------|------------|-------------------------|
| Keiyo         | 1,439                | 143,865    |                         |
| Uasin Gishu   | 3,328                | 622,705    |                         |
| Nandi North & | 2,899                | 578,751    |                         |

|              |              |                  |            |
|--------------|--------------|------------------|------------|
| South        |              |                  |            |
| <b>Total</b> | <b>7,666</b> | <b>1,345,321</b> | <b>176</b> |

Unit 14

|              | <b>Area Km<sup>2</sup></b> | <b>Population</b> | <b>Persons/Km<sup>2</sup></b> |
|--------------|----------------------------|-------------------|-------------------------------|
| Kisumu       | 919                        | 504,359           |                               |
| Bondo        | 987                        | 239,780           |                               |
| Nyando       | 1,168                      | 299,930           |                               |
| Siaya        | 1,520                      | 480,184           |                               |
| <b>Total</b> | <b>4,594</b>               | <b>1,523,53</b>   | <b>33</b>                     |

Unit 15

|              | <b>Area Km<sup>2</sup></b> | <b>Population</b> | <b>Persons/Km<sup>2</sup></b> |
|--------------|----------------------------|-------------------|-------------------------------|
| Suba         | 1,055                      | 155,666           |                               |
| Rachuonyo    | 945                        | 307,126           |                               |
| Homa Bay     | 1,160                      | 288,540           |                               |
| Migori       | 2,005                      | 514,897           |                               |
| <b>Total</b> | <b>5,165</b>               | <b>1,266,229</b>  | <b>245</b>                    |

Unit 16

|              | <b>Area Km<sup>2</sup></b> | <b>Population</b> | <b>Persons/Km<sup>2</sup></b> |
|--------------|----------------------------|-------------------|-------------------------------|
| Kiambu       | 1,324                      | 744,010           |                               |
| Thika        | 1,960                      | 645,713           |                               |
| Murang'a     | 930                        | 348,304           |                               |
| Maragua      | 868                        | 387,969           |                               |
| Nyandarua    | 3,304                      | 479,903           |                               |
| Nyeri        | 3,356                      | 661,156           |                               |
| <b>Total</b> | <b>11,742</b>              | <b>3,267,055</b>  | <b>278</b>                    |

Unit 17

|              | <b>Area Km<sup>2</sup></b> | <b>Population</b> | <b>Persons/Km<sup>2</sup></b> |
|--------------|----------------------------|-------------------|-------------------------------|
| Kericho      | 2,111                      | 468,493           |                               |
| Bureti       | 955                        | 316,882           |                               |
| Bomet        | 1,882                      | 382,794           |                               |
| Baringo      | 8,646                      | 264,978           |                               |
| Koibatek     | 2,306                      | 138,163           |                               |
| Nakuru       | 7,242                      | 1,187,039         |                               |
| Samburu      | 21,127                     | 143,547           |                               |
| Laikipia     | 9,229                      | 322,187           |                               |
| <b>Total</b> | <b>53,498</b>              | <b>3,224,083</b>  | <b>60</b>                     |



Unit 18

|         | <b>Area Km<sup>2</sup></b> | <b>Population</b> | <b>Persons/Km<sup>2</sup></b> |
|---------|----------------------------|-------------------|-------------------------------|
| Nairobi | 696                        | 2,143,254         | <b>3,079</b>                  |

Unit 19

|      | <b>Area Km<sup>2</sup></b> | <b>Population</b> | <b>Persons/Km<sup>2</sup></b> |
|------|----------------------------|-------------------|-------------------------------|
| Teso | 559                        | 181,491           | <b>325</b>                    |

## **FACTORS TAKEN INTO ACCOUNT WHEN CREATING THE ABOVE UNITS**

- Viability
- Sustainability
- Comparable territorial size
- Comparable population size
- Historical and cultural ties
- The protection and welfare of minorities in the units
- Presently existing administrative and political units
- The functions the proposed units are intended to take over from the national government
- Economic potential and natural resource endowment
- Efficiency
- Effectiveness
- Biodiversity

### **V) Gains made:**

- That the principles of devolution contained in the Main Report and the Special Working Document on Devolution be adopted as amended.
- The Committee debated, amended and adopted principles guiding taxation for inclusion in the Devolution Act.
- That there shall be established four levels of government as follows:
  - (a) the national level;
  - (b) the zone level;
  - (c) the county level; and
  - (d) the locational level
- That the Country shall be zoned into units at the second level of government:

### **V) Concerns Raised:**

The following general concerns were raised:

- a) Some locations were too big and were perceived to be too far from the people and would therefore not meet the requirement for effective participation by local residents in the lower levels of government and service delivery.
- b) Some members felt that once functions were assigned to the various levels of government, it might become necessary to review the resolutions reached on zoning.
- c) It was noted that the Constituency was already the focus point for service delivery and representation anchoring for instance Development Funds, AIDS Committees, Roads and Bursaries Committee. There was need therefore to consider the constituency as a level of government.
- d) The Committee was asked to clearly state the system and structure of government.
- e) Whether we should retain the unitary system but devolve power within it, or whether we should adopt a federal structure or whether we should retain the unitary system with federal characteristics.
- f) Concerns were raised over the demarcation of boundaries in certain places such as Maseno.
- g) There was uneasiness in zoning some districts e.g. Trans Nzoia and Mt. Elgon

districts.

- h) Anxiety over ethnic hostilities and clashes.

# REPORT ON POSSIBLE DIVISION OF NAIROBI INTO FOUR (4) BOROUGHES AND OTHER RELATED ISSUES

**Mr. Johnson N. Mbugua, Consultant.**

The Terms of Reference were to:

1. Study the recommendations made by the CKRC and the National Constitutional Conference regarding the structures and systems of government, the place and role of local government in the constitutional organization of the Republic and the extent of devolution of powers to the Local authorities, and all other aspects of devolution.

The Consultant will consider the following documents (List not exhaustive):

- The Commission Report and The Draft Bill,
- Technical Appendices (Part Three), New Draft on Devolution Chapter,
- Special working Document on Devolution of Powers,
- The Omamo Report, and
- Action Towards A Better Nairobi Report.

The consultant will also be required to hold consultations with and collect data from various relevant authorities, including but not limited to Nairobi City Council.

Authorities and heads of the various Council departments, Councillors, Kenya Revenue Authority, Nairobi Provincial

Administration etc.

2. Prepare and submit to the CKRC a report on:
  - a) The division of Nairobi into four (4) boroughs/counties taking into account the following factors: demography, geographical size, revenue base and economic activities, infrastructure, communities, viability, sustainability, the protection and welfare of minorities in the boroughs, presently existing administrative and political units, the functions the proposed boroughs are intended to perform, efficiency, effectiveness, etc.
  - b) Provide the following data on each borough: population, geographic size, predominant communities, minorities, and existing infrastructure.
  - c) Powers and functions of the boroughs:
    - Executive power
    - Legislative Power
    - Delegated judicial power.
  - d) Intergovernmental relationships among the boroughs and with the Nairobi Zonal Government:
    - Executive and Legislative power

and functions of Nairobi as a Zonal government.

- Concurrent powers and functions of the boroughs and the Zone government e.g. sewerage, water and education services.
- Is there need for Joint Committees? What functions would they perform?

e) Institutions of Governance

- How many wards should there be in each borough?
- Election of councillors in the wards
- How do we ensure one-third representation of women in the borough legislative and executive authorities?
- How do we ensure representation of Minority Communities in the borough legislative and executive authorities?
- How many locations should we have in each of the boroughs
- Provide the following data on each Location: population, and geographic size.
- Evaluate the NCC and CKRC recommendations on functions of the locations.

f) Qualifications of the Legislative and Executive Officers

- Recruitment of the heads of the respective boroughs
- Role of the borough legislature in recruitment of borough personnel".

**REPORT**

The above terms of reference particularly the one requiring me to consider the division of Nairobi City into 4 (four) boroughs has been

discussed by reasonably large number of persons within Nairobi and its environs including:

Mr. Z. O. Ogongo -P.S., Ministry of Local Government  
 Dr. Malombe -Senior Officer, Ministry of Local Government.

Ms. Thairu -Senior Legal Officer, Ministry of Local Government.

Mr. O. Amaroro -Senior Economist, Ministry of Local Government.

Mr. S. M. Chege -Deputy Secretary - Electoral Commission of Kenya.

Mr. Okumu -Senior Cartographer Electoral Commission of Kenya.

Mr. J. M. Mbugua -Town Clerk, Nairobi City Council.

-More than 50 staff of Nairobi City Council, senior, middle and junior cadre employees.

Councillors (NCC) -A few

Councillors -From the surrounding Districts

Mr. Mohammed Halfani -Chief, Urban Governance Section, *Un-Habitat* Gigiri - Nairobi

More than 200: Professionals, politicians, fanners, Businessmen / Women, clergy, ordinary wananchi and residents of both Nairobi and outlying suburbs.

The following are my findings and recommendations which might not be as comprehensive and detailed as I would have produced had I been given more time. However, should the ideas contained herein in principle be acceptable to CKRC in part or in whole, then either on my own or as a member of a working committee such issues can be considered and reported in greater details.

(When compiling the following preamble which gives salient and pertinent information of Nairobi, I have borrowed and relied heavily on the OMAMO report of 1995 - with of course a lot of updates).

## **PART A**

### **1.0 BACKGROUND INFORMATION ON NAIROBI**

#### **1.1 PREAMBLE ON CREATION OF FOUR (4) BOROUGHES**

IT IS A NOTED fact that the administration, management and services under the City Council of Nairobi have been gradually deteriorating leading to public dissatisfaction. The population of the City has grown from 128,794 in 1948 to the present 2 million. During this period there has been no change in the powers, functions, duties and management structure of the City Council except a very recent attempt at decentralisation of provision of services which does not seem to be having much effect as provision of services has not improved.

In order to understand the current situation in Nairobi and to be able to propose suitable future structure, it is important to trace the historical development of the town. Nairobi township was established in 1899 as a railway depot in order to service the construction of the Mombasa - Kisumu railway line. In 1905, it became the capital of the country with a population often thousand (10,000) people. Nairobi's strategic location, midway between Mombasa and Kisumu, soon attracted administrative, commercial and industrial establishments and it became a major urban settlement. The current population is over 2 million and is expected to grow to over 4 million in the next 20 years. It is necessary therefore, to plan ahead and establish suitable local government organisations which would ensure co-ordinated development and satisfactory service delivery.

#### **1.2 TOPOGRAPHY AND AREA**

The land in Nairobi falls from the edge of the Rift Valley in the West at an elevation of 2,300 metres to 1,500 metres to the east.

The central area is at an elevation of approximately 1,700 metres. To the north-east of the City are areas of undulating grassland, covering rich well drained red coffee soils. To the north and north-west, the high and evenly sloping land is dissected by south east flowing streams that form a series of steep-sided parallel valleys and ridges. To the south and east are grassland plains of poorly draining "black cotton" clays. The northern and western areas have high rainfall while the east and south have low rainfall. The City has a land area of approximately 693 sq. km.

### 1.3 POPULATION

Nairobi became the capital of Kenya in 1905 with a population of ten thousand. Since then, due to its position as a major economic, administrative and social centre, the population has steadily risen to an estimated 2.1 million (1999 census).

The growth of population of Nairobi is summarized in the table below:

|      | <u>Population</u> | <u>%Growth<br/>Rate</u> |
|------|-------------------|-------------------------|
| 1948 | 128,794           | -                       |
| 1962 | 343,500           |                         |
| 1969 | 509,286           |                         |
| 1979 | 827,775           | 6.9                     |
| 1989 | 1,324,435         | 4.7                     |
| 1995 | 1,833,663         | 4.7                     |
| 1999 | 2,067,727         | 4.0                     |
| 2009 | 3,007,130         | 3.5                     |
| 2016 | 3,709,830         | 3                       |

The factors that account for Nairobi's high population growth are rural to urban migration and natural increase. The City attracts population growth as an employment centre offering better opportunities in both formal and informal sectors. The City also provides services to a large population in the neighbouring rural, peri-urban and urban areas of Kiambu, Kajiado, Machakos and Thika districts.

The Report by the National Co-ordinating Committee on Urban Land Use Planning and Development estimated this peri-urban population at 74,884 people in 1989. The population of these three districts in the

same year was:

|          |   |           |
|----------|---|-----------|
| Machakos | - | 689,290   |
| Kiambu   | - | 1,022,522 |
| Kajiado  | - | 149,005   |
| Total    | - | 1,860,817 |

### Population Distribution

The various income groups and communities amongst the City population are not evenly distributed. This is due to the discriminatory policies pursued by the colonial administration, which restricted different categories of population to particular zones, on racial basis. Since independence, there has been substantial change in this policy, leading to change in ownership of the high cost and medium cost housing and consequential adjustment of population distribution. There is still need to ensure a better distribution of residential area for various income groups. A massive immigration of people into the City from various parts of the country has resulted in the development of many unplanned settlements in areas like Pumwani, Korogocho, Mathare Valley, Kibera, Kangemi and Kawangware, to name a few examples. About 65% of Nairobi residents live in these high density/low income areas. 25% of the population lives in the medium density areas, and only 12% in the low density/ high income areas.

### 1.4 PHYSICAL GROWTH AND PHYSICAL PLANNING

The activities that take place in the City have strong effects on Nairobi and its environs, and vice versa. For instance, the subdivisions of land lying on the outskirts of Nairobi have created dependence of the

people there on Nairobi's facilities like water supply, schools, health facilities, etc., and generated commuter traffic into and out of Nairobi. The industrial satellites in Athi-River, Mavoko, Kitengela, Thika, Ruiru, Kikuyu, Ongata Rungai and Ngong also depend on Nairobi for their survival.

The comprehensive planning tool for Nairobi and its environs is the Nairobi Metropolitan Growth Strategy (1973) which covered the period up to the year 2000. This strategy proposed that the development should be encouraged along the following areas:

- Dagoretti, Karen - Langata and part of the eastern area of the City.
- Western area where unstructured informal settlements were expected to develop.
- Urban extension as far as Ruiru, along Nairobi-Murang'a Road.

The strategy for the year 2000 was based on a projected population of 2.3 million. The strategy has been over taken by events due to shortage of housing, leading to increased development of pockets of shanty areas and the expansion and deterioration of the old ones in Mathare and Kibera. Lack of sufficient financial resources and organisational capacity have been the greatest constraints to the effort to ensure planned development.

Over the last 30 years, Nairobi and the environs have been subjected to major industrial and commercial development. There is now a need to plan for a population of over 5 million by year 2020.

## **1.5 URBAN GROWTH STRATEGY**

Nairobi has grown steadily since its establishment as a railway depot in 1899, to

become the largest metropolitan city in Eastern Mica. The first attempts to plan the urban area were made in 1926. In 1948, a master plan for the City was prepared, with a lifespan of 20 years. This plan became obsolete immediately after independence due to the extension of the City boundaries from an original area of 100 sq. km. to the current 690 sq. km. There was also the need to adopt a new set of policies to guide the City's development along nonracial policies and to allow for more population growth. In 1973, a new plan, the Nairobi Metropolitan Growth Strategy was prepared, and the development was expected to be done in accordance with this strategy.

So far, there has not been a uniform integrated legislation to deal with Nairobi City planning. The two institutions in charge of planning, i.e. the City Council and the Physical Planning Department in the Ministry of Lands and Settlement, have not developed an integrated policy and have instead been pursuing conflicting approaches to the city's development. This problem has also been compounded by the fact that the planning responsibilities are themselves scattered in several statutes which are operated by various agencies with little consultation.

Furthermore, the development of Nairobi has not been well organised, and this has lead to

haphazard and unplanned settlements, over-concentration of employment in the central business district and the industrial areas, expansion of unplanned and unserved human settlements, traffic congestion, and environmental pollution in the central and the industrial districts.

Other problems in land use planning have been caused primarily by the administrative



inefficiency in City Hall. The examples of such problems includes:

- i) Construction of Kiosks on road reserves;
- ii) Use of open spaces in the residential and commercial areas as dumping sites like Buru Buru, Eastleigh, Ngara, Umoja, etc.
- iii) Construction of multi-storey buildings in single-storey zoned areas like Umoja, Dandora, Kayole, etc, leading to overstretching of services;
- iv) Allocating public land and open spaces for private development. There have been cases of allocation of road reserves, car parks and public purpose land for private uses;
- v) Lack of a land information data base in the form of an updated land register to help in proper land administration and management; and
- vi) Lack of a clear development control policy, by-laws and enforcement machinery.

There is therefore very urgent necessity for a clear policy on the development and

urban growth strategy for Nairobi up to year 2016.

## **1.6 INFRASTRUCTURE**

### **1.6.1 Water Supply**

Nairobi is served by a piped water distribution system supplying treated water from Ruiru, Sasumua and Chania River, Thika River and Kikuyu springs. These provide approximately at 315,000 m<sup>3</sup>/day. With the completion of the Ngethu Water Works extension the supply capacity was

increased to 515,000 m<sup>3</sup>/day.

The recent completion of Chania III project did, for some time, ensure adequate water supply for the City. However, there is urgent need for the Council to not only improve and extend the distribution system and maintenance, but also to formulate plans to meet future growing demands.

Supplementary ground water sources of supply are as follows:

- Karen - Langata (3500 - 4000 m<sup>3</sup>/day)
- Dagoretti (2500 - 3000 m<sup>3</sup>/day)
- Kitisuru (1500 - 2000 m<sup>3</sup>/day)
- Parts of Eastern extension (1300 - 1500 m<sup>3</sup>/day)
- Industries receive additional water supplies amounting to (3500 - 3700 m<sup>3</sup>/day)

The water supply capacity is hardly adequate to meet the demand up to year 2005 - 2010. There are future plans to tap water from North Mathioya River to Ndakaini by year 2010, but these have to be followed up and implemented in good time.

### **1.6.2 Sewerage System**

The Nairobi Metropolitan Planning Strategies and Sewer Master Plan studies were completed in 1974. Water borne sanitation has not kept pace with the population growth, thus resulting in poor health standards and environmental pollution. Sanitation problems are made worse due to the very high densities in areas not planned for such densities. Kasarani, Langata and other low cost informal housing developed in areas which have not been planned for residential purposes are examples of inadequate sewerage in Nairobi.

At present the City has sewage works

facilities with a total combined capacity of 170,000 m<sup>3</sup>/day. These facilities are inadequate and their provision has not been properly planned. The expansion of the City sewerage system cannot take place in a piecemeal and uncoordinated manner. It is therefore imperative that the Council makes arrangements for the development of a comprehensive sewerage system needed for the City to meet the demand for the next 20 years.

### 1.6.3 Solid Waste Collection and Disposal

The management, equipment and organisation of City Council refuse collection section have deteriorated and the Council refuse tips are completely inadequate and mismanaged, thus posing a danger to the environment and the public. The refuse collection efficiency is less than 50%.

### 1.6.4 Electricity and Street Lighting

The demand for electricity in Nairobi is half the whole country's demand. Almost half of the population of Nairobi especially those in the slums, have no access to electricity. For energy needs the residents depend on oil lamps for light, wood charcoal and kerosene for cooking. Water heating is available for a small section of the population. The main

reasons for non-availability of electricity in low-income areas are related to ability to pay and reluctance of KPLC to provide the service to the informal settlements.

## 1.7 REVENUE AND EXPENDITURE

The following figures are extracts obtained from the Nairobi City Council budget estimates for year ending 30/6/2004 and projections for the financial year 2004/2005. The estimates are for both General Fund and for the Water and Sewerage Department. The estimates reflect healthy financial base for the City and a marked improvement of financial management. I hope the trend continues.

### REVENUE {Based on the Appendices of the Budgets (of the General Fund and Water and Sewerage Department) of NCC attached to this Report}

Estimates for 2003/2004

|                             |                       |
|-----------------------------|-----------------------|
| General Fund Kshs.          | 4,743,000,000         |
| Expenditure Kshs.           | <u>3,889,380,000</u>  |
| Surplus for Year Kshs.      | 853,620,000           |
| Less other Commitments Kshs |                       |
|                             | <u>2,435,000,000,</u> |
| DEFICIT Kshs                | (1,581,380,000)       |

Add improved Revenue Collection Kshs.

1,969,000,000

Net Surplus for Capital development Kshs

**387,620,000**

### **Water and Sewerage Department**

|                         |                      |
|-------------------------|----------------------|
| Revenue Kshs.           | <u>3,000,000,000</u> |
| Total Expenditure Kshs. | 1,188,000,000        |

Pending bills and other debt reduction

421,000,000

Total expenditure including pending bills

1,606,000,000

Net income after recurrent expenditure

1,391,000,000

Less capital expenditure

780,000,000

Surplus to General Reserve Fund

611,000,000

## 1.8 SOURCE OF REVENUE

The main sources of revenue for the City Council are Rents, Water and Sewerage, Rates, and Service Charge.

## 1.9 SECTORAL PROBLEMS

Some of the major issues concerning service delivery are *as follows*:

### 1.9.1 Enforcement

- use of outdated by-laws inadequate tools and equipment;
- inadequate transport, office accommodation, staff housing;
- lack of a proper code of conduct and standing orders *as* those obtained in the Kenya Police Force;
- lack of co-ordination between the Inspectorate Department, Provincial Administration and the Police.

### 1.9.2 Water

- frequent power failure in the City affect the pumping of water;
- incorrect water meter reading resulting from human error or meter readers not visiting properties or inserting fictitious figures;
- issuing of bills late;
- attitude of City Council personnel in the water accounts office;
- failure to repair fast the often excessive leakages from the system.

### 1.9.3 Sewerage

- poor maintenance of plant and equipment;
- illegal connections causing overloading to systems and damage to pipes;
- use of toilet facilities for disposal of garbage;

- blocking of sewers to divert sewage for irrigation purposes;
- health risks in areas not sewered by the sewerage system;
- lack of funds to connect system to areas not connected like the unplanned settlements;
- Illegal development of housing.

### 1.9.4 Roads

- lack of funds to rehabilitate all roads especially those which have outlived their life spans. Potholes repairs are temporary measures;
- acting positions in the Engineering Department are too many and running for long periods;
- inadequate financing;
- roads are inadequate for traffic flows. Future development strategy required.

### 1.9.5 Housing

- severe housing problem is experienced in the informal settlements where 63% of the population in Nairobi lives. There is poor access to basic services such as water, sanitation, solid waste disposal;
- the City Council has no housing policy on respond effectively and creatively to the housing problem.

### 1.9.6 Informal Sector

- Lack of secure land tenure unfavourable and hostile attitude of the City Council exhibited through violent kiosk demolitions, evictions and frequent harassment without any compensation;
- licensing problems;
- lack of organisational structures among informal sector operators;
- uncomfortable working conditions -

along muddy and overcrowded streets in the slums, under very hot sun or rain - in Gikomba consistent fear of harassment by the City askaris water supply:

- Many areas suffer from chronic water shortages Kahawa, Langata, not to mention the pathetic situation in the unplanned settlements in Kibera, Mathare, Korogocho, Mukuru etc. Sanitation and solid waste disposal, especially in the medium and low income areas.
- Electricity and street lighting. This is a severe problem in the unplanned settlements and the older parts of the City where it is non-existent;

#### **1.9.7 Community and Social Services**

- Overcrowding in City primary school classes Lack of equipment and materials in health centres;
- Low morale of staff;
- Lack of adequate playgrounds;
- Moderate budgetary allocations from Council for these services;

#### **1.9.8 Markets**

- Inadequacy and poor location of markets and marketing facilities;
- hawkers nuisance both in estates and City centre of hawkers selling all types of merchandise like foodstuffs, clothes, electric goods, and so on;
- broken down facilities in the markets;
- for instance;
- leaking water pipes, non-functioning toilets;
- piled garbage and unsightly perimeter walls.

#### **1.9.9 Personnel**

- Lack of clear personnel management policies on recruitment, promotions and discipline;
- Lack of a clear cut appraisal system for staff;
- No clear cut policy on training and staff development Absence of a clear staffing norms;
- Conflict of interests and councillor's interference;
- Too many employees at the lower cadres whose existence in the council depends on the political interests.

#### **1.9.10 Main Issues**

The following is a summary of the main issues and problems facing Nairobi:

1. High rate of population growth and urbanisation;
2. High demand for land, infrastructure, housing, community facilities, transportation and communication services;
3. Growing poverty, insecurity, unemployment and homelessness;
4. Inadequate institutional capacity; lack of capability and motivation amongst the staff and councillors;
5. Lack of transparency and accountability in the City Council expenditure and other activities;
6. High level of centralisation of decision-making and low level of community participation and decentralisation;
7. Mismatch between resource needs and resources provided for city council operations;
8. Out-dated by-laws, regulations,

- standards and codes, especially for housing, health, buildings and planning, and inadequate enforcement;
9. Lack of comprehensive plans of action for environment and development;
  10. Inadequate co-ordination between national and local policies strategies, plans of action, programmes and projects; and
  11. Poor communications between citizens (grass root) and the elected/nominated leaders, except during elections.

## **2.0 CONCLUSION**

It is evident from the foregoing and from others surveys and findings carried out by Commission of Enquiries (the Omamo Commission) and other bodies and consultants' that the Nairobi City Council as constituted at present has been unable to manage the City efficiently and effectively. Additionally, the present local government in Nairobi is unable to manage, administer, plan the development of this city and to deliver an acceptable level of services to the residents.

The present population resident within the City boundary is 2,067,727 (1999 Census) population is projected to grow to 3,700,000 by 2016 (low growth rate 3.0% projection) 4,712,000 if the growth rate of 4.7% is assumed and to over 5 million by 2020.

In addition, there are a number of satellite towns on the outskirts of the City. These include Athi River (Mavoko) Ruiru, Kangundo/Tala, Kiambu, Karuri, Kikuyu, Ngong, Ongata Rongai. A large number of people live in these surrounding rural areas

and commute to work in Nairobi. The current population of the satellite towns and rural areas is approximately 750,000. The population increase is expected to continue due to the urbanisation trends in the country. In the last 30 years the City has grown from a population of 350,000 in 1963 to the present figure of 2.10 million. The local government structure, power and functions of the City Council have undergone only minor changes during this period. In recent years the Council has been unable to manage the affair of the City. By the late 1970's the administrative, management and financial problems were beginning to strain the Council's capacity to deliver. The current situation is a cause of great concern to the general public. In 1991 some efforts were made to consider various alternative management systems for Nairobi when the Government appointed a "Working Committee on Zoning of the City of Nairobi into municipalities\_'. The report of the Committee was submitted to the Government in January, 1992. However, no immediate action was taken up to today.

## **3.0 DEVOLUTION OF POWERS**

### **3.1 Criteria for Creation of 'Divisions'**

From the study of the existing conditions in Nairobi, it is clearly apparent that the present local government in Nairobi is unable to manage, administer, plan the development of the City and to deliver the services to the residents.

The devolution of powers to the grass root and the decentralisation of the local government structure in Nairobi, by building the City into separate boroughs is therefore very timely.

In other countries the large city managements have evolved into boroughs/municipalities with separate local government or administrative divisions in order to facilitate:

- i) formation of units which can be managed efficiently;
- ii) creation of physical planning zones based on topography, population distribution, land use and infrastructure maintenance criteria;
- iii) decentralisation of industry, commerce, housing and other services;
- iv) better community participation; and
- v) enhanced democracy at the grassroots level.

### **3.2 Advantages of Decentralisation in Nairobi**

Decentralisation of the activities of the City Council has the following advantages:

- i) Opportunity to improve life outside the dominant urban areas within the City by better distribution of benefits all over the city;
- ii) Smaller units improve speed in delivery of services, personal services and sensitivity to the community;
- iii) Better management over lower ratio of staff to management;
- iv) Will ensure better participation of the community and improve communication with local authority based in the area;
- v) It will improve national solidarity as members of the community will be able to participate and benefit from services provided; and .
- vi) There will be better resource mobilisation.

Experience in other cities all over the world shows that only local government administrative units with population up to 1,000,000 can be viable for management as one local authority and that in most cases the municipality populations do not exceed 250,000. In Kenya, because of low revenue base at present, it is advisable not to create too many additional local government units and to retain one municipality for population up to 1,500,000. For Nairobi the formation of administrative divisions or boroughs/municipalities is necessary for the reasons explained above. In case of Nairobi, the decentralisation would facilitate improvement of municipal services to the residents.

However, arrangements to establish administrative and maintenance divisions will have to be incorporated in the new constitution to cover powers, functions and duties of the individual borough municipal council and the overall Metropolitan City Council of Nairobi.

## **PART B**

### **4.0 ALTERNATIVE PROPOSALS FOR DIVISION OF NAIROBI INTO FOUR (4) BOROUGHS /COUNTIES**

I have considered how Nairobi can be divided, as mandated by CKRC into FOUR boroughs/counties.

I do hereby give 6 (six) alternative models. The first three Models - namely Model A, B and C are based on the existing "boundaries of Nairobi". The other three models - namely

D, E and F are based on my proposed new boundaries for Nairobi. All the models are

based on the formation of municipalities (boroughs) with a combination of one or more, constituencies in order to bring the number to 4 (four) boroughs and to ensure suitable mix of income groups and revenue base and to create an even distribution of revenue.

#### 4.1 Model A

| Constituency           | Proposed Name Municipality | Area ofsq. kms | Population (1999) |
|------------------------|----------------------------|----------------|-------------------|
| 1 Dagoretti/Langata    | Langata                    | 253            | 527,248           |
| 2 Westlands / Kasarani | Westlands                  | 168            | 546,535           |
| 3 Starehe/ Kamukunji   | Starehe                    | 20             | 347,071           |
| 4 Embakasi/ Makadara   | Embakasi                   | 253            | 646,867           |
|                        |                            | <b>694</b>     | <b>2,067,721</b>  |

#### 1. Langata Municipality

Comprising Langata and Dagoretti Constituencies. The proposed municipality will cover an area of approximately 253 sq. kms and have a population of approximately ,248 (1999).The municipality will cover the wards of Laini Sabaa, Sarang'ombe, Nairobi West, Karen/Langata, Kawangware, Waithaka, Riruta, Langata, Kibera, Mugumoini and Golf course. It will cover administrative locations of Uthiru/Ruthimitu, Mutuini, Waithaka, Kawangware, Riruta, Kenyatta/Golf Course, Langata, Karen, Sarang'ombe, Kibera, Laini Sabaa, Nairobi West and

Mugumoini.

The civic centre for the proposed Borough to be located at Karen Shopping Centre and to have three sub-centres located at Waithaka, Kibera, and Nairobi West.

#### 2. Westlands Municipality

Comprising the West lands and Kasarani Constituencies. The proposed borough will cover an estimated area of 163 sq. kms and have a population of approximately 546,535 (1999). It will have the wards' of Kangemi, Kilimani, Kitisuru, Parklands, Highridge, Kileleshwa, Kariobangi South, Korogocho, Utalii/Babadogo, Kasarani, Roysambu, Kahawa, Mathare 4 A and Githurai. It will cover administrative locations of Kangemi, Kitisuru, Highridge, Parklands, Kileleshwa, Kilimani, Kahawa, Githurai, and Korogocho. The Civic centre to be located at KASARANI and the sub-centres to be at Westlands Shopping Centre, Gigiri and Kangemi.

#### 3. Starehe Municipality

The "City Centre" comprising the constituencies of Starehe and Kamukunji to form the proposed municipality of Starehe. The proposed borough covers about 21 sq. kms and has an estimated population of 347,071 (1999). It will have the wards of Ngara, Kariokor, Central, Mathare, Huruma, Muthurwa, Shauri Moyo, Pumwani, Eastleigh North and' Eastleigh South, Kimathi and Uhuru. It will cover administrative locations of Mathare, Kariokor, Ngara, Starehe, Eastleigh,

Bahati, Pumwani and Kamukunji. The present City Hall to be the Civic Centre for Starehe Municipality with the works section being situated at Landhies Nairobi City Council . complex. It will have sub centres located at Ngara, Eastleigh and Uhuru. I propose that the wards of Eastleigh North and Eastleigh South, Kimathi and Uhuru be moved from this borough and be part of the Embakasi or Kasarani Municipality. Additionally, that Upperhill, Statehouse area and Chiromo be made part of city centre. This Municipality of the City Center will be required to provide specialised civic service to the seat of the Government and the central business District of Nairobi

#### 4. Embakasi Municipality

Comprising Embakasi and Makadara constituencies. The proposed municipality has an estimated population of 646,867 (1999) and an area of 253 sq. kms. It will have the wards of Nairobi South, Viwandani, Makongeni, Mbotela, Hamza, Lumumba, Ofafa, Harambee, Embakasi/Mihango, Umoja, Kariobangi South, Dandora 'A', Komarock, Ruai, Njiru/Mwiki, Mukuru, Savanna and Kayole. It will cover the administrative locations of Viwandani, Nairobi South, Makongeni, Maringo, Makadara, Kasarani, Dandora, Njiru, Kariobangi South, Kayole, Umoja, Ruai and Mukuru.

The civic centre to be located at Kayole with sub-centres at Embakasi village, Eastlands Shopping Centre (Buruburu), Dandora and Kasarani.

#### 4.2 Model B

Under this model Nairobi is still divided into four (4) boroughs.

This is based on the formation of municipalities with a combination of one or more constituencies in order to bring the number of boroughs to 4.

The following are the constituency mix proposed:

|   | Name of borough | Constituency                  | Area (sq Kms) | Population |
|---|-----------------|-------------------------------|---------------|------------|
| 1 | Westlands       | Westlands/ Starehe/ Dagoretti | 135           | 592,979    |
| 2 | Kasarani        | Kasarani/ Kamukunji           | 86            | 541,136    |
| 3 | Langata         | Langata/Makadara              | 239           | 484,173    |
| 4 | Embakasi        | Embakasi                      | 233           | 449,433    |
|   |                 |                               | 693           | 2,067,721  |

The data of this model are given on the map attached hereto headed Model B.

**1. Westlands Municipality:** This is to be a combination of Dagoretti, Westlands, and Starehe constituencies. The proposed municipality covers an estimated area of 135 sq. kms, and a population of 592,979 (1999). The civic centre will be at Westlands Shopping Centre and sub-centres at Gigiri, Westlands, Kangemi and Waithaka. Under this municipality a City Centre Sub-Municipality be created to serve the

Central Business District and the seat of the Central Government. The area to be served by this sub-municipality



is the area/Tom the National Museum, down Nairobi river to Machakos Bus depot, up the Nairobi Railway Station including the whole of Upper Hill, KNH, Military headquarters, State House, Chiromo campus and University of Nairobi campuses to be under a special municipal unit Managed directly by City Hall.

2. **Kasarani Municipality:** This will combine Kasarani and Kamukunji constituency.

The proposed municipality will cover an estimated area of 86 sq. kms and a population of 541,136 (1999). The civic centre will be located at Kasarani, with sub-centres at Kariobangi, Eastleigh and Pangani.

3. **Langata Municipality:** Comprising Langata and Makadara constituencies. The municipality will have a population of 484,173 (1999) and will cover an area of 239 sq. kms. The civic centre to be at Langata or Nairobi West with sub-centres at Karen, Kibera and Eastlands Shopping Centre.

4. **Embakasi Municipality:** Covering the entire constituency of Embakasi. The proposed municipality will have an approximate population of 449,433 (1999) and will cover an area of 233 square kilo meters. The civic center to be at Kayole with sub-centres at Embakasi Village and Ruai.

#### 4.3 Model C

Under this model Nairobi will still be

divided into 4 Divisions/Boroughs/Municipalities. In this model current constituency boundaries are not considered. Additionally, it takes consideration of special need and specialised services required for the Central business District cum seat of the Central Government.

I therefore propose to have 4 divisions separated only by well known roads/highways of Nairobi with the roundabout of Nyayo House as the focal point.

The named major roads to be the 'borders' of those boroughs. These borough borders to be:

- (i) Uhuru Highway leading to Westlands to Waiyaki Way and onwards to Naivasha/Nakuru National Highway.
- (ii) Uhuru Highway - leading to Mombasa Road and onward to the Mombasa-Nairobi National Highway.
- (iii) Kenyatta Avenue leading to Moi Avenue - Muranga Road and onward to Thika Road Highway.
- (iv) Kenyatta Avenue up Valley Road to Ngong Road to Lenana High School and up the Railway line to where Kiambu, Kajjido and Nairobi Districts meet.

Any territory between the roads named above to become a municipality/ borough.

- i) **Westlands** municipality- covering Westlands, Muthaiga, Rosslyn, Runda, Spring Valley, Loresho, Upper Kabete U.O.N campus and Lower Kabete, U.O.N campus etc.
- ii) **Dagoretti** Municipality will cover, Kilimani, Lavington, part of Westlands, Riverside Drive, Loresho, Riruta, Waithaka etc.

- iii) **Langata** Municipality to cover Karen, Jamuhuri Estate, Kibera, Langata, Nairobi National Park, Wilson Airport and anything on the southern side of Mombasa Road including Nairobi West, Madaraka Estate etc.
- iv) **Kasarani** Municipality to cover the current Makadara, Kasarani and Embakasi constituencies (almost).

#### **City Centre Sub-Municipality**

Central Business District and the seat of the Central Government which is the area from the National Museum, down Nairobi river to Machakos Bus depot, up the Nairobi Railway Station including the whole of Upper Hill, KNH, Military headquarters, State House Chiromo campus and University of Nairobi campuses to be under a special municipal unit Managed directly by City Hall. This special unit to be under one of the aforementioned municipalities especially under Dagoretti Municipality.

Model C will be as follows and contain the following wards and administrative locations:-

| Municipality/Borough | Population (1999) | Size (Approximate) |
|----------------------|-------------------|--------------------|
| Westlands            | 192,808           | 115.7              |
| Dagoretti            | 290,712           | 39.4               |
| City Centre          | 147,713           | 33.3               |
| Langata              | 286,739           | 219.73             |
| Kasarani             | 1,149,755         | 212.7              |
|                      | <b>2,067,727</b>  | <b>620.83</b>      |

#### PERTINENT DATA – Model C

| Administrative Location          | Ward | Population (1999) | Areas (sq.kms) |
|----------------------------------|------|-------------------|----------------|
| <b>1. Westlands Municipality</b> |      |                   |                |
| (a) Kitisuru                     | -do  | 7,459             | 20.9           |
| (b) Parklands                    | -do  | 11,456            | 4.6            |
| (c) Highridge                    | -do  | 46,642            | 42.3           |
| (d) Kahawa                       | -do  | 31,915            | 14.7           |
| (e) Githurai                     | -do  | 47,865            | 5.1            |
| (t) Roysambu                     | -do  | 27,471            | 28.1           |
|                                  |      | <b>192,808</b>    | <b>115.7</b>   |
| <b>2. Dagoretti Municipality</b> |      |                   |                |
| a) Kangemi                       | -do  | 59,288            | 4.5            |
| b) Kileleshwa                    | -do  | 21,168            | 9.1            |
| c) Uthiru / Ruthimitu            | -do  | 23,016            | 7.9            |
| d) Mutuini                       | -do  | 14,521            | 4.8            |
| e) Waithaka                      | -do  | 19,937            | 5.4            |
| f) Kawangware                    | -do  | 86,824            | 0.4            |
| g) Riruta                        | -do  | 65,958            | 7.3            |
|                                  |      | <b>290,712</b>    | <b>39.4</b>    |

### Sub-Municipality of Dagoretti (Central)

|  |         |                        |             |
|--|---------|------------------------|-------------|
| a) Kilimani                            | -do     | 41,597                 | 16.2        |
| b) Kariokor                            | -do     | 34,190                 | 2.4         |
| c) Ngara                               | -do     | 25,667                 | 2.7         |
| d) Starehe                             | Central | 16,006                 | 2.7         |
| e) Kenyatta Golf Course                | -do     | 30,253                 | 9.3         |
|  |         | <b>147,713</b>         | <b>33.3</b> |
| Population for West lands Municipality |         | 192,808                |             |
| Population for City Centre             |         | <u>147,713</u>         |             |
|  |         | <b><u>340,1521</u></b> |             |

### 3. Langata Municipality

|                            |     |                |              |
|----------------------------|-----|----------------|--------------|
| a) Langata (Karen/Langata) |     | 16,118         | 44.5         |
| Karen                      |     | 9,764          | 27.3         |
| b) Sarang'ombe             | -do | 47,557         | 1.0          |
| c) Kibera                  | -do | 83,687         | 1.7          |
| e) Laini Sabaa             | -do | 52,019         | 0.7          |
| f) Nairobi West            | -do | 42,532         | 23.0         |
| g) Mugumoini               | -do | 35,062         | 125.2        |
|                            |     | <b>286,739</b> | <b>223.4</b> |

### 4. Kasarani Municipality

|            |                 |         |      |
|------------|-----------------|---------|------|
| Kasarani   | -do             | 37,436  | 29.3 |
| Ruaraka    | Utalii/Babadogo | 79,099  | 2.5  |
| Kariobangi | -do             | 71,337  | 5.1  |
| Korogocho  | -do             | 43,802  | 0.9  |
| Dandora    | - Dandora 'A'   |         |      |
|            | - Dandora 'B'   | 110,164 | 4.0  |
| Njiru      | ,Njiru/Mwiki    | 18,045  | 10.2 |

|                  |                               |                  |              |
|------------------|-------------------------------|------------------|--------------|
| Kariobangi South | -do                           | 17,528           | 4.6          |
| Kayole           | - Komarock                    |                  |              |
|                  | - Kayole                      | 98,522           | 3.6          |
| Umoja            | - Savanna                     | 93,254           | 9.1          |
| Ruai             | -do                           | 12,528           | 99.3         |
| M ukuru          | -do                           | 61,956           | 14.4         |
| Viwandani        | -do                           | 59,294           | 11.4         |
| Nairobi South    | -do                           | 36,232           | 2.3          |
| Makongeni        | -do                           | 20,747           | 1.3          |
| Maringo          | - Mbotela/Ofafa               | 28,976           | 1.5          |
| Madaraka         | - Hamza/Lumumba/ Harambee     | 52,182           | 3.6          |
| Eastleigh        | - North / South               | 123,210          | 7.5          |
| Bahati           | - Kimathi                     |                  |              |
|                  | - Uhuru                       | 39,363           | 2.3          |
| Pumwani          | -do                           | 21,164           | 0.5          |
| Kamukunji        | - Muthurwa/ Shauri Moyo       | 18,474           | 1.4          |
| Mathare          | -Mathare/ Mathare “A”/ Huruma | 69,003           | 1.5          |
|                  |                               | <b>1,149,755</b> | <b>212.7</b> |

The above model reflects glaring discrepancies on size and population of municipalities. Kasarani Municipality literally has half the population of Nairobi. This is not surprising as most of the slums are located there and this is where most low income groups resides.

There is merit therefore, should model C be adopted, of dividing this municipality into 2 boroughs. Another solution would be to have four or five large sub-centres for that municipality located at Kasarani, Dandora, Eastleigh and Buruburu.

Due to shortage of time to carry out this research I have not been able to produce revenue sharing figures. This will be worked under separate assignment.

## **5.0 THE FOLLOWING MODELS D, E AND F ARE BASED ON SUB-DIVIDING NAIROBI INTO FOUR (4) DIVISIONS FROM EXTENDED NEW BOUNDARIES FOR NAIROBI**

### **5.1 PREAMBLE**

It is a well known: fact that the surrounding suburbs of Nairobi "LIVE OFF" Nairobi. They depend on Nairobi for a lot of things. Nairobi on the other hand depends on them for labour etc.

It is therefore logical and makes a lot of sense that at this point in time of our National history and while we are re-zoning the whole country, NAIROBI should also be considered for re-zoning and if found necessary, for Nairobi to be enlarged and its boundaries altered.

I am convinced that all the suburbs

surrounding the city of Nairobi should be made part of the Greater Nairobi Metropolitan. By including those suburbs into Nairobi the much needed room for future expansion of Nairobi will be created. More and cheaper land will be available for putting up housing schemes etc.

If re-zoning Nairobi is not done now it will lead to a lot of problems in future as after the new zones come in to effect, those zones next to Nairobi will not be keen in continuing accommodating the wishes of Nairobi. I recall when as Town Clerk Nairobi, when we initiated the Third Nairobi Water Project (Chania HI), people from Muranga and Kiambu were bitter, and they are still grumbling on being displaced (even the graves of their ancestors were uncovered etc) to facilitate provision of water to Nairobi AND NOT TO THEMSELVES!! In future it might not be easy for such an exercise to take place unless the specific benefit is shared equitably with the Nairobi neighbours.

Nairobi also derives a lot of revenue and taxes paid by persons who resides in those Nairobi suburbs. Those suburbs on the other hand do not benefit much from those who live in their suburbs. The beneficiary is Nairobi.

In future Nairobi might require to use land in the surrounding suburbs for putting up trunk roads around the greater Nairobi especially for decongesting the Nairobi traffic. The surrounding suburbs might not be keen to have their land used this way and their people uprooted when to them the beneficiary is Nairobi.

Other points to consider is that those suburbs on their own are not able to put up

adequate infrastructures necessary for a municipality. Those suburbs would benefit more if they become part of Nairobi.

Consideration therefore should be made at this time in the history of our Nation of Re-zoning Nairobi. Nairobi to be enlarged and the surrounding Districts be convinced to surrender portions of their territory to Nairobi. This will be for the benefit of their people and for the Nation as a whole.

With the above in mind, I propose that a trunk road to decongest Nairobi be planned and built going round Nairobi City - say 60 kms from the General Post Office.

**This trunk road might then be the greater Nairobi metropolitan boundary.** Most of the major cities in the world such as Rome etc have such trunk roads going round them.

Such trunk road to be from Mavoko town, to Isinya, up Pipeline road, Kiserian, Ngong, Kibiku, Lusigetti, Rironi, Kiambu Town, Ruiru, Western slopes of Rukenya Hills, Daystar University (Athi River Campus) back to Kenya Meat Commission and Mavoko Town. **Whatever is inside that "circle" to be Nairobi.**

Traffic from Mombasa, Nyeri, Namanga, Nakuru etc. going to other parts of the country will follow those trunk roads and need not pass through City centre therefore decongesting traffic in Nairobi.

With the above in mind and with the idea of dividing Nairobi into four (4) boroughs, I propose the following THREE models for the greater Nairobi.

## 5.2 Model D

This is based on the formation of a borough

with a combination of a few constituencies to which will be added portions of outlying suburbs.

### 1. Langata Municipality

Comprising Langata and Dagoretti constituencies to which will be added Mavoko township, Kitengela, Isinya, Kiserian, Ongata Rongai, Ngong township, Dagoretti forest and Thogoto. The civic center to be at Karen shopping centre with sub centers in all the afore-mentioned Townships and also at Waithaka and Dagoretti Market. It will have a population of approximately 727,248 and a size of approximately 661.9 sq. kms.

### 2. Westlands Municipality

Comprising of Westlands and Starehe constituencies to which will be added parts of Kabete constituency. The civic centre to be at Westlands shopping centre with sub-centres at Kikuyu Town, Wangige, Gachie, Loresho and City Park. It will have a population of approximately 552,470 and a size of 206.0 sq. kms.

A semi-municipality for providing specialized civic services to the Central Business District of Nairobi be under the borough and be established with its own Director and its operations sections based at the Ladhies Road complex of Nairobi City Council.

Some portions of other constituencies including the city centre such as the Upper Hill, State House are\_ Chiromo, Museum Hill be curved out of those constituencies

and be made part of the "City Centre"- Semi-Municipalities of the borough of West lands.

**3. Kasarani Municipality**

Comprising of Kamukunji Makadara and Kasarani constituencies to which will added a few plantations in Kiambaa constituency, Ruiru Township, a number of plantation in Juja constituency. The civic centre to be at Kasarani with sub-centres at Buruburu and Ruiru Township. It will have a population of

approximately 888,570 and a size of 317.5 sq. kms.

**4. Embakasi Municipality**

Comprising of Embakasi constituency to which will be added large tracks of land to the east of Jomo Kenyatta Airport - see map on Model D attached. Civic centre to be at Kayole with sub-centres at Jomo Kenyatta Airport, Daystar University and Komarock. It will have a population of approximately 649,433 and a size of 374.5 sq. kms.

**Model D - SUMMARY**

|           | Name of borough | Constituency  | Area          | Population       |
|-----------|-----------------|---|---------------|------------------|
| <b>1.</b> | Langata         | Dagoretti/Langata/Other outlying suburbs              | 661.9         | 727,248          |
| <b>2</b>  | Westlands       | Westlands/Starehe/and other outlying suburbs          | 206.0         | 552,470          |
| <b>3</b>  | Kasarani        | Kamkunji/Madaraka Kasarani and other outlying suburbs | 317.5         | 888,570          |
| <b>4</b>  | Embakasi        | Embakasi and other outlying suburbs                   | 374.5         | 649,433          |
|           |                 |   | <b>1559.4</b> | <b>2,817,721</b> |

**5.3 Model E**

Under this model division of Nairobi into four boroughs has been considered. It is

based on similar lines and argument with Model D but the constituency Mix is slightly different as follows:-

|          | Name of borough | Constituency                               | Area (sq. Kms approx.) | Population (approx) |
|----------|-----------------|--|------------------------|---------------------|
| <b>1</b> | Langata         | Langata/ Dagoretti/ other outlying suburbs | 706.6                  | 777,248             |
| <b>2</b> | Westlands       | Westland/ Kasarani/                        | 387.3                  | 896,535             |



|          |          |  |               |                  |
|----------|----------|--|---------------|------------------|
|          |          | other outlying suburbs                           |               |                  |
| <b>3</b> | Starehe  | Starehe/<br>Kamkunji                             | 20.9          | 347,071          |
| <b>4</b> | Embakasi | Embakasi/<br>Madaraka/<br>other outlying suburbs | 444.6         | 796,768          |
|          |          |  | <b>1559.4</b> | <b>2,817,721</b> |

### **1. Langata Municipality**

Comprising Langata and Dagoretti constituencies to which will be added Mavoko township, Kitenge1a, Isinya, Kiserian, Ongata Rongai, Ngong township, Dagoretti forest and Thogoto. The civic center to be at Karen shopping centre with sub-centers in all the afore-mentioned Townships and also at Waithaka and Dagoretti market. It will have a population of approximately 777,248. It will have a size of approximately 706.6 sq. kms.

### **2. Westlands Municipality**

Comprising of Westlands and Kasarani constituencies to which will be added parts of Kabete and Kiambaa constituencies. The civic centres to be at Kasarani with sub-centres at Kikuyu Town, Westlands, International School of Kenya, Karuri Township, Ruiru and Githurai. It will have a population of approximately 896,535 and a size of approximately 387.3 sq. kms.

### **3. Starehe Municipality**

Comprising of Starehe and Kamukunji Constituencies. In addition to those constituencies some portions of other outlying constituencies be incorporated to form a "small" municipality mainly to cater for Nairobi Central District. Such special unit to cover Nairobi Central District, Upper Hill, State House and University of Nairobi campuses near City Centre. The municipality will have a population of approximately 347,071 and have a

size of approximately 20.9 sq. kms. The civic centre will be at City Hall while the works will be at landhies. A sub-centre to be located at Pumwani.

### **4. Embakasi Municipality**

Comprising of Madaraka and Embakasi constituencies to which will be added large tracts of land to the east of Embakasi constituency. See map on model E attached hereto. Civic Centre to be at Kayole with sub-centres at Embakasi Airport, Daystar University, Komarock and at Buruburu shopping Centre. It will have a population of approximately 796,867 and a size of approximately 444.6 sq. kms. .

### **5.4 Model F**

The creation of four (4) municipalities within the enlarged Nairobi is based on the same argument pertaining to the one of creating Municipalities given for Model C, which is making the focal point for dividing the boroughs from the roundabout of Nyayo House.

- i) From that point via Kenyatta Avenue - Muranga Road, Thika onwards,
- ii) Uhuru Highway - Waiyaki Way - Naivasha Highway,
- ill) Uhuru Highway - Mombasa Road,
- iv) Valley Road - Ngong road to, Lenana High School.

Those boundaries will create four Divisions (boroughs). A small portion of each division to be curved out from every division to form a "semi- municipality". That semi-municipality to be for providing civic

services to the City centre and to be part of the Dagoretti Borough. Such a centre to be managed independently of the rest of the borough.

Under Model F the Boroughs will be as follows:-

### **1. Langata Municipality**

Covering the area between Ngong road/current Dagoretti/Karen boundary and the New Pipeline road (Kajiado), Uhuru Highway/Mombasa roads. Will cover most of the Langata constituency, Nairobi West, Nairobi National Park, Kitengela, Mavoko, Ongata Rongai and Ngong Townships and all the area inside the new Greater Nairobi boundaries Civic centre to be near the Bomas of Kenya with sub-centres at Karen Shopping centre, Ongata Rongai and Ngong Township.

It will have a population of approximately 376,737 and will cover an area of approximately 669.73 sq. kms

### **2. Westlands Municipality**

Covering the area between Muranga Road, Thika road and Waiyaki Way. Will include, Muthaiga, Runda, Karuri Township, most of Westlands, Lower Kabete in Nairobi, part of the Kabete Constituency and Ruiru Township. The Civic centre to be near Kenya Institute of Administration, Kabete. Sub-centres to be at Kahawa West, Runda and Westlands shopping centre. The population will be approximately 317,808 and will have an area of approximately 235.7 sq. kms.

### **3. Dagoretti Municipality**

Comprising the area between Ngong Road to Lenana High School up the

Railway line and Uhuru Highway up Waiyaki Way / Naivasha Road to the New Nairobi boundary made up of the proposed trunk road. The borough will cover Kilimani area, Lavington, part of Westlands, Riverside Drive, Kangemi, Riruta, Waithaka, some parts of Kikuyu Division (Kiambu District) especially Kikuyu Town area. The civic centre to be near the Previous Blood Riruta Girls School. Sub-centres to be Kikuyu Town, Kangemi and Lavington. The population will be approximately 340,712 and the area will be approximately 79.4 sq. kms.

### **Sub-Municipality**

This to be self-managing but to be under Dagoretti Municipality.

It will cover the area between the National Museum, down Nairobi river up Railway Station, Upper Hill, Military Headquarters, State House, Chiromo campus and Anything in between. It will be managed from City Hall and have its works at Landhies City Council Complex.

### **4. Kasarani Municipality**

Covering the area between Thika road and Uhuru Highway/Mombasa Road. Will cover Kamukunji, Madaraka, Kasarani and Embakasi constituencies, Githurai area Kahawa Sukari, Jomo Kenyatta Airport, Daystar University (Athi River Campus) and all areas inside the new boundary.

Civic centre to be Kayole, with sub-centres of Buruburu, Jomo Kenyatta Airport area and Githurai. It will have a population of 1,274,755 and

will cover an area of approximately  
312 sq. kms

Population data given above for the greater  
Nairobi Metropolitan has been obtained  
from the attached maps obtained in October  
2003 from the Electoral Commission of  
Kenya.

#### **Model F - SUMMARY**

| Borough                                      | Population Size |               |
|--|-----------------|---------------|
| 1. LANGATA                                   |                 |               |
| As Shown under<br>Model B                    | 286,739         | 219.73        |
| From Kajiado North<br>Constituency (part of) | 50,000          | 400.0         |
| From Machakos<br>District (Mavoko)           | 40,000          | 50.0          |
|  | <b>376,737</b>  | <b>669.73</b> |

|    |  |                |             |
|----|--|----------------|-------------|
| 2. | <b>WESTLANDS</b>   |                |             |
|    | - As shown under Model B   | 198,808        | 115.7       |
|    | - From Kabete Constituency   | 50,000         | 40.0        |
|    | - From Kiambaa Constituency  | <u>75,000</u>  | <u>80.0</u> |
|    |  | 317,808        | 235.7       |
| 3. | <b>DAGORETTI</b>   |                |             |
|    | - As shown under Model B   | 290,712        | 39.4        |
|    | - Additional from Kabete<br>Constituency (part of)<br>"City Centre" as under Model B | 50,000         | 40.0        |
|    |  | <u>147,713</u> | <u>33.3</u> |
|    |  | 488,423        | 112.7       |
| 4. | <b>KA SARANI</b>   |                |             |
|    | - As shown under Model B   | 1,149,755      | 212.7       |
|    | - From Thika District (Ruiru area)   | 50,000         | 50.0        |
|    | - From Machakos District<br>(Kathiani and Mavoko)                                    | <u>75,000</u>  | <u>50.0</u> |
|    |  | 1,274,755      | 312.7       |

#### **SUMMARY FOR MODEL F**

| <b>Borough</b>     | <b>Population</b> | <b>Size</b>     |
|--------------------|-------------------|-----------------|
| Langata            | 376,737           | 669.73          |
| Westlands          | 317,808           | 235.7           |
| Dagoretti          | 340,712           | 79.4            |
| City Centre        | 147,713           | 33.3            |
| Kasarani           | 1,274,755         | 312.7           |
| <b>Grand Total</b> | <b>2,457,725</b>  | <b>1,330.83</b> |

Thus the exercise of re-zoning Nairobi will literally double the size of Nairobi from the current 693sq. kms to 1330.83 sq. kms or more:

The sub-municipality of Dagoretti will be City Hall while the works will be at Landless. Size for this sub-municipality to be approximately 33.3 sq. kms. While the

population will be 147,713.

The attached maps obtained from the Electoral Commission of Kenya, in addition to giving population of each location also gives sizes of each location. Additionally please also find attached schedules from the same Commission giving ward names,

locations/divisions and number of voters in each constituency of Nairobi and the surrounding

## **6.0 CONCLUDING REMARKS AND OBSERVATIONS**

I was unable to obtain Revenue figures for the Nairobi suburbs BUT considering the incomes of the residents of those suburbs and the institutions located in those areas I would say that managed properly each borough will have a very strong revenue base for example:-

1. KMC, Cement Factories, EPZ at Mavoko/Kitengela; Ongata Rongai middle income population; Ngong Town etc to be in Langata Municipality.
2. Waithaka Slaughter houses, Academic, Religions and Research giants in Kikuyu Town area, etc as part of Dagoretti Municipality.
3. Wangige Market; Karuri suburb, Githurai suburb etc all with good revenue bases to be part of Westlands municipality.

All those suburbs have something good to offer and a lot of land for future expansion of Nairobi factories and commercial enterprises and residential estates.

THE only drawback for those suburbs is lack of adequate infrastructures, such as roads etc and lack of adequate water source. However, under properly managed municipalities I am confident that those suburbs would thrive.

THE IDEA of enlarging Nairobi might sound far fetched as it might be argued that those suburbs will be the losers in being moved to Nairobi. The answer is NO!. Also

there is a precedent in this, in that Dagoretti Division of Nairobi was part of Kiambu District at independence but was moved to Nairobi. Dagoretti people have been the beneficiaries. Kiambu District was not adversely affected by that move.

Caution here! The By-Laws of Nairobi such as the building by Laws, burying of persons in own shambas or plots, payment of very high land rates, etc will have to be relaxed as they were done by NCC for the Dagoretti people from time of independence to the present.

As indicated earlier in the report, water is a very scarce commodity in and around Nairobi. This item will have to be given serious consideration when deciding on Greater Metropolitan of Nairobi. Sourcing of additional water for Nairobi to be possibly from Mathioya River (Nyeri); Lake Naivasha; bore holes and why not - from Lake Victoria!!

Constituency boundaries will have to be altered, increased or reduced, and be renamed - both for the constituencies in Nairobi and for those of the outline suburbs.

## **6.1 NAIROBI POPULATION (Wrong Figures)**

It is ironic that the National census figure, for Nairobi is incorrect. "Why? The figure reflects the population of Nairobi at night since counting takes place at night. During the day the population of Nairobi has an additional close to 50%. This is so as a lot of people commute daily to Nairobi from the surrounding suburbs for employment and business etc. When we talk of a population of 3 million for Nairobi we should consider that the actual population that Nairobi caters for during the day is 1½ times that figure

which equals over 4.5 million.

## 6.2 CURRENT DATA FOR NAIROBI AT A GLANCE

|                             |             |
|-----------------------------|-------------|
| Size - Land area            | 693 sq. kms |
| Population (1996)           | 1,839,662   |
| (1999)                      | 2,067,727   |
| Administrative Divisions    | 8           |
| Constituencies              | 8           |
| Locations                   | 49          |
| Sub-locations               | 111         |
| <b>NAIROBI CITY COUNCIL</b> |             |
| Elected Councillors         | 55          |
| Council Wards               | 55          |
| Nominated Councillors       | 20          |

## 6.3 OTHER ISSUES TOUCHING ON DEVOLUTION OF POWERS AND GOVERNANCE OF NAIROBI: METROPOLITAN AND ITS CONSTITUENT BOROUGHS METROPOLITAN OF NAIROBI

Nairobi as has been indicated in the draft new Constitution shall be managed in accordance with an act of Parliament. The Act will recognise the status of Nairobi as the Capital territory.

There should be the City Council for the whole of Nairobi which will be the Metropolitan City Council as opposed to the individual Borough Municipal Councils.

The Chief role of the Metropolitan Council will be to provide services that are not confined to one borough and ones that

cannot be undertaken by one borough such as:-

- Strategical forward planning: physical, social, economic and trunk roads. Infrastructure Development: management and operation of metropolitan planning authority.
- Water, Sewerage and Solid Waste Management and Tips, Collection and Environmental health and related services.
- Trunk Roads.
- Urban Transport.
- Hospital - Pumwani Maternity Hospital
- Wholesale Markets.
- Ownership of City Council Property, Repayment of existing loans, sharing of assets.
- Revenue Collection - rates, service charge, license, etc until sharing of revenue amongst the municipalities and its distribution are agreed upon.
- Supervise the smooth! transition and creation of Boroughs and supervise their management until able to operate efficiently on their own.
- Financial controls for functions to be performed by the Nairobi City Council.

The Metropolitan Nairobi City Council should be comprised of the Lord Mayor of Nairobi who should be elected directly by the electorate of the whole of Nairobi. Just as the President is elected by all the voters in the whole country. He will be assisted by the Deputy Mayor who will be elected by an electoral college made up of the councillors of the Metropolitan City Council of Nairobi.

The council should be made up, in addition to the above, of seven (7) councillors from each Borough of Nairobi.

In addition to the seven (7) councillors from

each constituent borough, the metropolitan City Council to have twelve (12) nominated members appointed from the following groups:-

- 1 (one) member Representing rate-payers,
- 1 (one) member Representing Business Community,
- 1 (one) member Representing the Disabled,
- 1 (one) member Representing professionals,
- 4 (four) members Women,
- 4 (four) members Prominent/senior citizens of good repute who should already be community leaders within the City and who can contribute to the well being of running the City.

### 6.3.1 QUALIFICATIONS OF CIVIC LEADERS

1. The Lord Mayor and the Deputy Lord Mayor should be university graduates. or holders of recognized professional qualifications.
2. The Borough Mayor and their Deputies should also be equally qualified.
3. All Councillors should have a minimum of '0' Level academic qualification.

The Lord mayor of Nairobi as has been proposed will be elected directly by the voters in the City of Nairobi. The Nairobi voters will, in electing the Mayor, hold the Mayor responsible for the efficient operation of the whole city. He will be expected by the electorate to take full charge of the whole city. He cannot do so unless he is

empowered to do so.

I suggest, therefore, in order to empower the Lord Mayor to do so and for him to assume full charge of the whole management of the City including the Boroughs for:-

- i) The Lord Mayor to have "veto" power of refusing to approve the election of any borough Mayor whom he is not happy with. This way the borough Mayor will always have to work closely with the Lord Mayor.
- ii) The Lord Mayor or his representative to be an ex-official member of all borough municipalities.
- iii) By a simple majority, the metropolitan city council to have the right to veto any decision of a borough council which they found not suitable.
- iv) For all municipal directors to be reporting to the City Director who in turn will report to the Metropolitan Council and to the Lord Mayor.

The Metropolitan council to be managed by a City Director as opposed to the current title of Town Clerk. The City Director will co-ordinate and implement all the policies of the Metropolitan City Council. He/She will also be Secretary to that Council.

Boroughs Municipal Councils to be self-regulating and to have their own elected Municipal Councillors. In addition to the elected councillors each borough council to have an additional 12 nominated members made up of:-

- 1 member representing Rate payers,
- 1 member representing Business community,
- 1 member representing Disabled,
- 1 member representing Professionals,



4 members representing Women interests,  
4 members representing Senior Citizens  
of clean record  
who already are  
community  
leaders within  
that borough. '

To be creating their own policies and pass  
their own resolutions as to their operations.  
To have a right to legislate their own by-  
laws.

The Borough will be headed by a Mayor  
assisted by a Deputy Mayor. The two to be  
elected councillors but to be elected to those  
positions by an electoral college ,of all  
councillors, both elected and nominated.

Each borough municipality to be constituted  
and operated more in line with the current.  
Nairobi City council i.e. with various  
committees, standing orders etc.

The borough to be headed by a Municipal  
Director who will be its chief executive. He  
will be reporting to the municipal council  
and to the Borough Mayor. He will be in  
charge of the implementation of all policies  
of the Municipal council. His position will  
be more in line with the present Municipal  
Town Clerk. The Municipal Director will  
also be secretary to the borough council.

Each borough will be charged with  
provision and delivery of effective services.  
Such services to include provision of  
housing, schools, health centres, hospitals,  
mortuaries, markets, recreation facilities,  
roads, drainage, refuse collections, town  
planning and Architectural services, town  
inspectorate and basic security etc.

On local security in addition to the security  
provided by the police, I propose that the  
borough inspectorate department in addition

to carrying out its normal duties and  
responsibilities be charged with supervising  
and grooming local vigilant groups who will  
ensure local security against burglars, Mafia  
like cartels, bad elements within the borough  
and to be used to finding out and reporting  
to the authorities any bad elements amongst  
them.

On Judicial powers, I propose that the  
boroughs be allowed some judicial powers.  
They should have judicial officers to the  
level of Resident Magistrates to try cases  
involving petty crimes especially those  
involving breaking of borough/city By-laws  
etc.

The councillors and other local leaders  
should also be involved in quasi-judicial  
matters i.e. they should sit in the court of  
elders to discharge local matters especially  
of reconciling residents who might seek  
arbitration in domestic issues that need not  
go to a court of law.

### 6.3.2 REVENUE

It is clear that the boroughs source of  
revenue are not uniform. Some boroughs  
might have strong revenue base than others.

All Nairobi residents however expect a  
minimum standard of service. As the Central  
Governmental collect taxes from all citizens,  
the Central Government owes its citizens  
provision of basic services. The Central  
Government should therefore remit back  
some of its revenue to local authorities for  
them to be able to provided basic services to  
the wananchi. It is my recommendation that  
a suitable percentage of the central  
government revenue be availed to local  
authorities. The current 5% grant by the  
central government, although welcome, is  
simply not enough.

### 6.3.3 COMMUNITIES AND MINORITIES

The minorities (whoever those may be) have been taken care of in my proposal on the nomination of councillors in both the metropolitan city council and borough municipal councils.

On communities, my observation is that there is hardly any sizeable area or section of Nairobi occupied by one specific community. One might be tempted to refer to the Nubians of Kibera or the Asians of Parklands etc. But this is not correct. For example, Asians now, in addition to Parklands occupy very many other residential areas such as Riverside, Lavington, Kilimani, Kileleshwa, Runda, Gigiri, Pangani etc. Granted there are 'pockets', of some communities in some areas but one cannot claim a certain large area is occupied by one community.

Additionally, even in the pre-dominantly African areas of Nairobi such as Eastlands it will be difficult to find one community in any estate being sole dominant. Kangemi and Dagoretti were part of Kiambu District (Kikuyu Tribe area) but surprisingly there are more LUHYAS there and in Kawangware than Kikuyus!! There are more Luos and Luhyas in Kibera than Nubians!!

Additionally, high income areas such as Lavington, Muthaiga, Runda, Gigiri, Karen etc are sandwiched and are next door to low income areas such as Kangemi, Mathare, Kawangware, Kibera etc. As such, high, low and middle income groups live in the same planning area and must of necessity be grouped together when considering creation of boroughs.

The issue is how they can co-exist and operate harmoniously as one group in a

given borough. The issue is not who is not the predominant community in any given borough-only who is the minority and who is the majority.

My fear and observation is that it is the low income group who will be the majority (as they are in all the Nairobi constituencies), who by the democratic principles of one-man-one-vote, will be electing one of their own as councillors and ultimately be deciding how the revenue and ultimately the whole borough will be ran/managed. YET the low income group contributes-less than 20% of the borough's revenue.

That is why I propose that among the nominated councillors there should be one councillor in each borough council representing the rate payers and business community.

A few women (prominent ones) be nominated into the metropolitan / borough councils to accommodate women interests.

### 6.3.4 WOMEN REPRESENTATIVES

With the democratic principle of **one-adult-one-vote** it will not be democratic to favour one sex when it comes to election.

What is required is for women leaders to conduct an aggressive civic education and persuade their fellow women to be vying for political seats and also for their fellow women to be voting for their fellow women. Also women leaders should obtain funds to be supporting women political candidates. However, as 52% of the population is made up of women there is need for women to have a fair representation in both the borough legislative and executive positions.

To bring this about, as indicated elsewhere, at least one third of nominated borough councillors (4 out of 12) to be women.

Also the Human Resources department of each borough to be mandated to have women occupying not less than one third of the executive positions in their establishment.

### **6.3.5 LOCATIONS**

The CKRC recommendation on the future and function of locational governments are commendable and should be adopted. The question however is who should be the locational administrator? Will it be the elected councillor of that location or another elected

person to head the location? I suggest the later but the role of each should then be clearly defined and should the councillor of that location be not the locational administrator then the councillor should be made a member of the location council.

### **6.3.6 RECRUITMENT OF HEADS OF RESPECTIVE BOROUGHS AND OTHER EMPLOYEES**

It has been established that handling of local authorities personnel from grades 1 to 14 as introduced and enacted under the Local Government Amendment Act (1984) when such personnel functions were transferred from the individual local authorities cum Ministry of Local Government to the Public Service Commission has not worked well at all and have instead created other problems.

A new solution is therefore necessary. The

best one being creation of a Local Government Service Commission to undertake recruitment of staff on salary scales 1 - 9 for all local authorities. All other matters of human resource management including recruitment of personnel on scales 10 - 20, discipline etc to be the sole responsibility of the employing councils. Additionally, each borough to have its own human resources department.

To reduce their permanent workforce, it is felt that each borough should use casual workers if and when they need general extra hands instead of keeping a large work force that is idle most of the time.

The Greater Metropolitan of Nairobi City Director and Directors of Constituent boroughs should be University Graduates or should have professional qualifications especially Certified Public Secretary or its equivalent. It is not necessary for them to be lawyers.

## **6.4 PLANNING OF GREATER NAIROBI**

A body preferably named Nairobi Metropolitan Planning Authority should be established forthwith to plan and implement establishments of new boroughs and also to address all planning and development matters in Nairobi and outlying areas of Kikuyu Division, Ruiru, Mavoko, Kiambu, Karuri and Olkejuado Councils/Districts.

Joint committees are necessary and should be established comprising representatives from all areas to address issues that affect all of them. This might be necessary should Nairobi boundaries be not extended to include parts of Kiambu, Olkejuado, Machakos and Thika Districts.

However, should the outlying areas of Nairobi be made part of Nairobi they will through their borough, participate in the affairs of the Greater Nairobi City Council. In such an occurrence there will therefore be no necessity for a joint committee as all matters of common concern/interests will be resolved at the Greater Nairobi City Council.

### **PART C**

The comprehensive data on Nairobi given below have been extracted from the schedules and maps submitted to CKRC, most of which were obtained in October 2003, from the Electoral Commission of Kenya. I am confident therefore that the data is accurate, and gives a true picture of the current status of Nairobi.

#### **7.1 FEMALE VOTERS - NAIROBI**

It is interesting to note that out of the total 913,630 registered voters in Nairobi only 1/3 (one third!!) i.e. 307,851 are female (women).

This is strange as according to the National census, 52% of the population are women. Resultant upon this imbalance in voter registration, it might be difficult to convince the voters and more so Nairobi local authority(ies) to afford women as a high a number of representation in the local authorities as is desirable. I reiterate what was proposed in Part B of my report that women leaders should carry out aggressive civic education to convince their fellow women to get more involved in politics. As a first step more women should register as voters in Nairobi and the rest of the country.

**NAIROBI - DATA**  
**DIVISIONS - LOCATIONS REGISTERED VOTERS, ETC**  
**WARDS - POPULATION - SIZE**

| <b>Administrative Location</b>      | <b>Size (Location) (Sq. kms)</b> | <b>Population (Location) (1999)</b> | <b>Ward</b>          | <b>Registered Voters (Ward) (2003)</b> |
|-------------------------------------|----------------------------------|-------------------------------------|----------------------|--|
| <b>1. Makadara Division</b>         |                                  |                                     |                      |  |
| <b>Makadara Constituency (001)</b>  |                                  |                                     |                      |  |
| Nairobi South                       | 2.3                              | 36,232                              | Nairobi South        | 17,826                                 |
| Viwandani                           | 11.4                             | 59,297                              | Viwandani            | 22,181                                 |
| Makongeni                           | 1.3                              | 20,747                              | Makongeni            | 12,894                                 |
| Maringo                             | 1.5                              | 28,976                              | Mbetela              | 8,239                                  |
|                                     |                                  |                                     | Ofafa                | 12,017                                 |
| Makadara                            | 3.6                              | 52,182                              | Hamza/Lumumba        | 17,017                                 |
|                                     |                                  |                                     | Harambee             | 17,813                                 |
|                                     | <b>20.1</b>                      | <b>197,434</b>                      |                      | <b>108,140</b>                         |
| <hr/>                               |                                  |                                     |                      |  |
| <b>2. Pumwani Division</b>          |                                  |                                     |                      |  |
| <b>Kamukunji Constituency (002)</b> |                                  |                                     |                      |  |
| Kamukunji                           | 1.4                              | 18,474                              | Muthurwa/Shauri Moyo | 17,172                                 |
| Pumwani                             | 0.5                              | 21,164                              | Pumwani              | 17,832                                 |
| Eastleigh                           | 7.5                              | 123,210                             | Eastleigh North      | 19,724                                 |
|                                     |                                  |                                     | Eastleigh South      | 13,769                                 |
| Bahati                              | 2.3                              | 39,363                              | Kimathi              | 6,474                                  |
|                                     |                                  |                                     | Uhuru                | 10,689                                 |
|                                     | <b>11.7</b>                      | <b>202,211</b>                      |                      | <b>85,663</b>                          |

### 3. Central Division

| <b>Starehe<br/>(003)</b> | <b>Constituency</b> |                |          |                |
|--------------------------|---------------------|----------------|----------|----------------|
| Mathare                  | 1.5                 | 69,003         | Mathare  | 23,943         |
| Kariokor                 | 2.4                 | 34,190         | Huruma   | 18,940         |
|                          |                     |                | Kariokor | 21,546         |
| Ngara                    | 2.7                 | 25,667         | Ngara    | 19,977         |
| Starehe                  | 2.6                 | 16,006         | Central  | 31,691         |
|                          | <b>9.2</b>          | <b>144,866</b> |          | <b>116,097</b> |

### 4. Kibera Division

| <b>Langata<br/>(004)</b> | <b>Constituency</b> |                |                   |                |
|--------------------------|---------------------|----------------|-------------------|----------------|
| Karen                    | 27.3                | 9,764          | Karen / LaLangata | 13,257         |
| Langata                  | 44.5                | 16,118         |                   |                |
| Mugumoini                | 125.2               | 35,062         | Mugumoini         | 12,313         |
| Nairobi West             | 2.3                 | 42,532         | Nairobi West      | 21,675         |
| Kibera                   | 1.7                 | 83,687         | Kibera            | 19,849         |
| Sarang'ombe              | 1.1                 | 47,557         | Sarang'ombe       | 25,885         |
| Lainisaba                | 11.1                | 52,019         | Lainisaba         | 21,764         |
|                          | <b>223.2</b>        | <b>286,739</b> |                   | <b>114,743</b> |

### 5. Dagoretti Division

| <b>Dagoretti Constituency (005)</b> |             |                |                      |               |
|-------------------------------------|-------------|----------------|----------------------|---------------|
| Uthiru/Ruthimitu                    | 7.9         | 23,016         | Uthiru/Ruthimitu     | 7,536         |
| Waithaka                            | 5.4         | 19,937         | Waithaka             | 6,435         |
| Mutuini                             | 4.8         | 14,521         | Mutuini              | 6,048         |
| Riruta                              | 7.3         | 65,958         | Riruta               | 18,839        |
| Kawangware                          | 4.0         | 86,824         | Kawangware           | 21,336        |
| Kenyatta Golf Course                | 9.3         | 30,253         | Kenyatta Golf Course | 24,198        |
|                                     | <b>38.7</b> | <b>240,509</b> |                      | <b>84,392</b> |

## 6. Westlands Division

### Westlands

#### Constituency (006)

|            |             |                |            |                |        |
|------------|-------------|----------------|------------|----------------|--------|
| Kangemi    | 4.5         | 59,288         | Kangemi    | 22,902         |        |
| Kilimani   | 16.2        | 41,597         | Kilimani   | 29,542         |        |
| Kitusuru   | 20.9        | 27,459         | Kitusuru   | 17,067         |        |
| Parklands  | 4.6         | 11,456         | Parklands  | 17,357         |        |
| Highridge  | 42.3        | 46,642         | Highridge  | 1              | 26,362 |
| Kileleshwa | 9.1         | 21,168         | Kileleshwa | 16,241         |        |
|            | <b>97.6</b> | <b>207,610</b> |            | <b>129,472</b> |        |

## 7. Kasarani Division

### Kasarani Constituency (007)

|            |             |                |                  |                |
|------------|-------------|----------------|------------------|----------------|
| Kariobangi | 5.1         | 71,337         | Kariobangi       | 14,385         |
| Korogocho  | 0.9         | 43,802         | North Korogocho  | 17,160         |
|            |             |                | Mathare 4A       | 15,329         |
| Ruaraka    | 2.5         | 79,099         | Utaalii/Babadogo | 21,611         |
| Kasarani   | 29.3        | 37,436         | Kasarani         | 11,800         |
| Roysambu   | 28.1        | 27,471         | Roysambu         | 9,630          |
| Kahawa     | 14.7        | 31,915         | Kahawa           | 12,032         |
| Githurai   | 5.1         | 47,865         | Githurai         | 16,729         |
|            | <b>85.7</b> | <b>338,925</b> |                  | <b>118,678</b> |

## 8. Embakasi Division

### Embakasi Constituency (008)

|                  |      |         |                  |        |
|------------------|------|---------|------------------|--------|
| Embakasi         | 29.3 | 37,437  | Embakasi Mihango | 12,923 |
| Umoja            | 9.1  | 93,254  | Umoja            | 19,045 |
|                  |      |         | Savanna          | 9,196  |
| Kariobangi South | 4.6  | 17,528  | Kariobangi South | 8,329  |
| Dandora          | 4.0  | 110,164 | Dandora 'A'      | 16,820 |
|                  |      |         | Dandora 'B'      | 20,733 |
| Kayole           | 3.6  | 98,522  | Komarock         | 9,051  |

|        |              |                |             |                |
|--------|--------------|----------------|-------------|----------------|
| Ruai   | 99.3         | 12,528         | Ruai        | 5,640          |
| Njiru  | 10.2         | 18,045         | Njiru/Mwiki | 7,139          |
| Mukuru | 14.4         | 61,956         | Mukuru      | 21,229         |
|        | <b>174.5</b> | <b>449,433</b> |             | <b>156,445</b> |

## NAIROBI DATA - POPULATION: VOTERS ETC

### SUMMARY

| Name of Division | Name of Constituency | Size (sq. kms) | Population       | Registered Voters | Number of Locations | Number of Wards |
|------------------|----------------------|----------------|------------------|-------------------|---------------------|-----------------|
| Makadara         | Makadara             | 20.1           | 197,434          | 108,140           | 5                   | 7               |
| Pumwani          | Kamukunji            | 11.7           | 202,211          | 85,663            | 4                   | 6               |
| Central          | Starehe              | 9.2            | 144,866          | 116,097           | 4                   | 5               |
| Kibera           | Langata              | 223.2          | 286,739          | 114,743           | 7                   | 6               |
| Dagoretti        | Dagoretti            | 38.7           | 240,509          | 84,392            | 6                   | 6               |
| Westlands        | Westlands            | 97.6           | 207,610          | 129,472           | 6                   | 6               |
| Kasarani         | Kasarani             | 85.7           | 338,925          | 118,678           | 7                   | 8               |
| Embakasi         | Embakasi             | 174.5          | 449,433          | 156,445           | 8                   | 11              |
|                  |                      | <b>660.7</b>   | <b>2,067,727</b> | <b>913,630</b>    | <b>47</b>           | <b>55</b>       |

Please Note:

|                                 |   |                |
|---------------------------------|---|----------------|
| <b>Male Registered Voters</b>   | - | <b>605,779</b> |
| <b>Female Registered Voters</b> | - | <b>307,851</b> |
| <b>Total Registered Voters</b>  | - | <b>913,630</b> |

## 7.2 DIVISION OF NAIROBI INTO FOUR (4) BOROUGHES

The reasons for dividing Nairobi into four (4) boroughs have been given at great length in part B of the report.

Model B is based on combining a number of Constituency/Divisions to create the various boroughs.

The boundaries of the existing constituencies are, to put it mildly, very confusing. Hardly one person out of the



whole population in any constituency can identify the exact boundary of their constituency.

The boundaries were created for political reasons and no consideration whatsoever was given for ease of identification and ease of administration. The current boundaries cross rivers, major roads, ridges, forests, swamps etc. They do not make any sense or logic.

I propose that should Model B be adopted, then the issue of constituency/divisions boundaries be addressed afresh to enable the government/local residents etc be able to identify with ease the extent of their constituency cum division.

**The norm** that applies world wide, where practicable when creating; COUNTY BOUNDARIES, CONSTITUENCY BOUNDARIES, DIVISIONAL BOUNDARIES, ZONAL BOUNDARIES, BOROUGH BOUNDARIES ETC is taking key topographic features such as rivers, mountains, etc, population distribution, permanent infrastructures such as major roads, railway lines, as such boundaries.

In Nairobi I propose adopting major roads and rivers as constituency/division/borough boundaries for ease of identification.

In addition to ease of identification, the major roads which will form borough boundaries will enable the immediate areas next to those roads develop tremendously. Those far places where the said roads will ultimately lead to will also benefit and develop.

The trunk roads proposed in part B of my report will not only decongest traffic in Nairobi but will open up areas where they

pass and contribute a lot to their development.

The title of borough sounds very English and colonial as such I propose that instead of referring to the Nairobi divisions as boroughs we adopt the Swahili word **MUTAA** – plural - **MITAA**.

We would then have:-

|                    |                      |
|--------------------|----------------------|
| MUTAA wa Dagoretti | (Dagorretti Borough) |
| MUTAA wa Langata   | (Langata Borough)    |
| MUTAA wa Kasarani  | (Kasarani Borough)   |
| MUTAA wa Embakasi  | (Embakasi Borough)   |

Until such time that the rest of the world gets used to "MUTAA" we should, when referring to the MUTAA be giving the English equivalent of the borough. We would then be heading all borough letterheads as (e.g.) MUTAA wa Langata - (Langata Borough)

In Model B - again to remove the Western terminologies I propose that we name the boroughs (MITAA) as:-

DAGORETTI  
KASARANI  
LANGATA  
EMBAKASI

However, to balance the population in each proposed borough under Model 'F' it would be more appropriate instead of taking the roads I indicated as borough boundaries to take the following roads from the focal point at Nyayo House.

1. from Nyayo House - Valley Road

- Ngong Road to Lenana High School.
- 2. from Nyayo House - Kenyatta Avenue - Moi Avenue - Muranga Road- via Aga Khan Hospital- Muthaiga - Limuru Road to Ndenderu etc
- 3. from Nyayo House - Kenyatta Avenue -Moi Avenue - Haille Selassie, Jogoo Road - Outer ring Road - Kangundo Road to Tala

- Town.
- 4. from Nyayo House - Uhuru Highway -Mombasa Road.

Each borough so created would then have a population of between 500,000 and 1 million.

Based on the proposed 'new' borough boundaries for both Model 'C' and Model 'F' we will have the following population distribution.

| <b>Borough</b> | <b>Current Population (1999) Model C Total</b> | <b>Add Population from outlying suburbs (from Model F) Approx.</b> | <b>Model 'F' Total Population</b> |
|----------------|--|--|-----------------------------------|
| DAGORETTI      | 417,866  | 200,000  | 617,866                           |
| LANGATA        | 316,992  | 200,000  | <b>516,922</b>                    |
| KASARANI       | 756,229  | 200,000  | 956,200                           |
| EMBAKASI       | 576,640  | 200,000  | 776,000                           |
|                | <b>2,067,727</b>                               | <b>800,000</b>   | <b>2,866,988</b>                  |

### 7.3 EXPANSION OF NAIROBI

The reasons for proposing Nairobi to be expanded are given under Part B of this report. I am still convinced that Nairobi should be expanded because of the reasons so given. Further more I am convinced that expansion of Nairobi will be for the benefit of the outlying suburbs and not at their expense. In fact it is the other way round - It is those suburbs that will benefit at the expense of Nairobi.

There is a precedent in this issue in that Nairobi City boundaries were extended in 1963 from the original 100 sq. kms to the current 690 sq. kms. There should therefore be nothing wrong in extending the City further after 50 years of the life of the current boundaries.

Granted, there might be some political ramifications but so were there when for example Dagoretti became part of Nairobi in 1963. Other issues to consider among others is Nairobi requires to expand to be able to build those trunk roads so necessary for its survival and well being and also as explained later on in this report for resettling the minorities and disadvantaged.

Finally for making Nairobi manageable to prevent a situation as the one that partook cities such as Lagos etc.

All those in Nairobi and in the suburbs are all Kenyans and the proposed expansion of Nairobi will be for the benefit of Kenyans residing in and around Nairobi. Zonal boundaries should not be the main issue politicians should stop being too touchy about boundaries.

### 7.4 CAPITAL CITIES

Due to time constraint in carrying out this research, I have not studied widely the reasons why a number of capital cities have

been moved. However, I have considered two (2) cities nearer home:-

#### i) **Dar-es-Salaam to Dodoma in Tanzania**

The move was necessary as Dar-es-Salaam had become unmanageable and also it was a sea-port far from some other parts of the country. Dodoma on the other hand was fresh, could be planned a fresh and is centrally situated. Further, the outermost parts of the Republic were equi-distant to each other.

BUT what then happened!!

This year someone said that "**whatever happens in Dar-es-Salaam affects the whole Tanzania**".

One can remove the idea that a Capital City is no longer the Capital, but the reality is that those major former capital cities continue and will continue being the political and economic hub of a Nation.

Tanzania tried to make Dodoma the National Capital but Dar-es-Salaam and Arusha continue being by far the most important towns in that Republic.

In 1996, Management of Dar-es-Salaam had to be addressed afresh because of the importance of that city to Tanzania. That year that City was divided into 3 Boroughs all under a Metropolitan Authority. The City is now running very efficiently.

#### ii) **Lagos to Abuja in Nigeria**

The same arguments applies as well as the scenario of why the move was taken. Abuja might be the political capital of Nigeria, but Lagos continue being the most important City in Nigeria and the hub of everything Nigerian.

The move to Abuja was mainly due to decongestion of Lagos and also as Abuja is Centrally situated.

NAIROBI is centrally situated.

NAIROBI is not so decongested.

NAIROBI has room for expansion with land readily available in the outlying suburbs - whereby we can move some parts of the City from the Central core of the City and hence decongest the City.

NAIROBI can still be saved.

One can propose to move the Capital from Nairobi to another town. The hitch about this is that in addition to the Capital investments required, one has to consider availability of resources such as water, housing, etc.

Additionally, what happens Fifty-years from now. Will that new Capital be not another Nairobi? Shall the New Capital be moved again?

My proposal is save Nairobi, Expand Nairobi, Manage Nairobi better and Not consider moving the Capital.

## 7.5 MINORITIES

In Nairobi and its environs, there are very improvised groups who occupies "pockets" including the 'Waria' near Loresho, 'Rwandees' in Uthiru, Nubians in Kibera, "Gwa Itambaya" - occupied by Somalis near Ruiru Town, "Waria" in Kariobangi, 'Waria' in Runda, "Kikuyus" - occupying a valley between Eastleigh Air Force Base and Uhuru Estate, Malawians in Kiambaa Town-Kikuyu Division etc. All those minority groups should be identified by the Ministry in-charge of Social Services or by the Social Services Department of the Nairobi City Council.

Such groups should be identified, registered and resettled elsewhere by the Central Government preferably by each family been

given a piece of agriculture land and suitable housing. Those who are not Kenyans should be taken to refugee camps or a repatriated back to their country.

In the meantime they should be identified, registered and afforded by the government a forum where they can address their issues.

## 7.6 SLUMS AND SLUM DWELLERS

Slums in Nairobi include the following (although the list might not be exhaustive) settlements:-

Mathare, Kariobangi (part), Korogocho, Kayaba, Mukuru, South B (part), Eastleigh (part), Jericho (part), Imara Daima (near), Soweto, Kibera, Kosovo, Kawangware, Majengo (part), Kangemi (part), Loresho (near), Runda (near), Embakasi (part), Lainisaba, Sarangombe.

All slums should be demolished and those residing there resettled.

Unfortunately, there is no room in Nairobi for resettling all slum dwellers. One of the main reasons for my proposing that Nairobi be extended is that there will be automatic creation of additional space for resettling the inhabitants of Nairobi especially the slum dwellers. Minister Raila's idea a while ago of resettling slum dwellers of Kibera in Kitengela is brilliant and should be pursued. The idea is to put up houses in places like Kitengela, then resettle a percentage of the slum dwellers, then demolish some Nairobi slums, develop with decent houses spaces so created by such demolitions, then resettle some more slum dwellers, then demolish the slums they previously occupied etc. This way, within a reasonable period all slums will be gone and everybody will be properly housed and happy!!.

It will not be humane or politically possible to demolish all the slums in one day without affording alternative dwellings.

Additionally, no way can one construct alternative dwellings without having ample alternative land and space. That alternative space and land is out there in the Nairobi suburbs.

This is one of the very many reasons why Nairobi should expand.

#### **7.7 FUNCTIONS OF THE ZONAL GOVERNMENT i.e. THE METROPOLITAN CITY AUTHORITY**

- Promote co-operation between boroughs.
- Increase the capacity of boroughs and facilitate the effective discharge of their functions.
- Co-ordinate issues that affect boroughs.
- Deal with trans-borough issues/concesus and also with those of outlying suburbs. Deal with trans-provincial issues/concesus.
- Manage Zonal (Greater Nairobi) institutions and resources.
- Plan and coordinate Greater Nairobi development.
- Develop and monitor the provincial infrastructure.
- Provide technical assistance to borough councils where necessary.
- Coordinate the functions of metropolitan planning authority. Responsible for trunk reads.
- Responsible for urban transport.
- Responsible for zonal referral hospitals such as Pumwani Maternity Hospital etc. Ownership of current Nairobi City Council properties, repayment of existing loans, sharing of assets, financial controls and revenue collection - rates, service charge, licenses etc until arrangements for devolution are implemented and sharing of revenue amongst the new boroughs are agreed upon.

Other points on this matter are reported under Part B of this report.

The Metropolitan Nairobi City Council- which should be given a local title such as:-

**"COUNCIL CHA MJI W A NAIROBI"**  
"Metropolitan" sounds too "Western"

The Metropolitan Nairobi City Council to be headed by the "CHAIRMAN" as opposed to Lord Mayor previously proposed under Part B of this report. The Chairman to be assisted by a Deputy Chairman. Both to be among the persons (Councillors) making up the Metropolitan Council.

The Metropolitan Council to be made up of seven (7) councillors from each borough - making a total of 28 Councillors. Those seven to be "nominated" from each borough by an electoral college of each borough made up of all elected borough councillors.

The councillors making up the Metropolitan council to Constitute an Electoral College to 'elect' one of themselves to be the Chairman and to elect a Deputy Chairman.

The councillors will constitute themselves and elect various committee Chairmen more in line with the current Nairobi City Council practice - Le. Create various committees, have standing orders etc. The Chairman will also be the speaker of that Council. The Chairman of the Metropolitan City Council and his Deputy will not have executive powers but will be policy makers and titular head of the Metropolitan.

The Metropolitan Executive to be headed by a professionally qualified person, who will be appointed by the Local Authority Staff Commission. His title to be the Metropolitan Director and be reporting to the Metropolitan Chairman. He will be in-charge of implementing all policies laid down by the Metropolitan Council.

The Metropolitan Director will also be Secretary to the Metropolitan Council. He should be a University Graduate or have a professional qualification especially being a Certified Public Secretary.

The Metropolitan Chairman to have at least an 'O' level academic status as should all councillors.

It should be decided whether the Metropolitan Chairman and his Deputy should relinquish their borough councillorship due to crash of interest. I propose that they should not relinquish their councillorship as doing so will create too many by-elections.

Additionally, it should be decided whether the Chairman and his deputy can be "elected" in the manner indicated above by the electoral college comprised of elected councillors from persons who themselves are not elected councillors i.e. persons outside the said electoral college.

## **7.8 BOROUGH MUNICIPAL COUNCILS**

Borough Municipal Councils should be self-regulating and have their own elected Municipal Councillors.

Borough Municipal Councils to be creating their own policies and pass their own resolutions as to their operations. To have a right to legislate their own by-laws.

The borough council will for all intent and purposes be the peoples' government at the grassroots. It will facilitate the grassroots to feel that they are in-charge of their local authority and have a say and total control on how it is managed.

The Functions of the Borough will be as follows (list not exhaustive).

The Borough Municipality Council will be

for the provision of:-

- Housing,
- Schools,
- Basic health services including health centres, maternity units, hospitals, mortuaries etc.
- Markets,
- Recreation facilities,
- Roads, parks etc.
- Drainage,
- Refuse collections,
- Town planning ,and land use planning,
- Architectural services Town inspectorate,
- Basic security,
- Some judicial powers,
- Legislation as far as it affects borough matters,
- regulations of liquor sales.

Each borough municipality to be constituted and operated more in line with the current Nairobi City Council i.e. with various committees, standing orders etc.

The borough will be headed by a Mayor who will be its Chief Executive Officer. He will be assisted by a Deputy Mayor. The two will be elected by the people directly. The Deputy Mayor (Deputy Chief Executive Officer) shall be the running-mate during elections of the would be Mayor.

Both will be University graduates or with proven professional qualifications. There shall be a Borough Speaker chairing the council legislative who would be the equivalent of the speaker in Parliament.

The Chairperson/Speaker of the Council, however, unlike the Mayor and his Deputy will be elected by the Councillors (who are elected by the people). The Speaker shall preside over Council meetings. He will have a deputy speaker also elected from amongst the councillors. If the person elected a speaker is a councillor he shall relinquish his

post as councillor. However, the Deputy Speaker if a councillor need not relinquish his post as councillor.

The Mayor heads the executive arm i.e. he is the C.E.O and he can also debate at the council just like the President can do in parliament. The heads of departments in each borough shall constitute the cabinet of the borough council; for the cabinet to be linked to the legislature of the borough, the various departmental heads shall be ex-officio members of the council legislature. Such cabinet shall be headed by the C.E.O.

The Deputy C.E.O, who shall be the running mate of the C.E.O., shall be Secretary to the council just like the leader of Government Business (Vice-President) is Secretary to Parliament. The operations of the National Assembly should be replicated at the borough level.

#### **7.9 FURTHER MATTERS TOUCHING ON SHARING OF ASSETS AND LIABILITIES OF NAIROBI CITY COUNCIL**

This is a mammoth task which with due respect should involve a task force not a single consultant.

As I indicated under Part B of this report, a Working Committee should be created to work out the mechanism of sharing assets and liabilities of the current Nairobi City Council.

Additionally, this is one of the task/responsibilities of the proposed Metropolitan City Council of Nairobi.

Finally, this is a very sensitive issue with a lot of political ramifications and requires all stakeholders from all the boroughs to negotiate how the assets should be shared.

#### **7.10 RECOMMENDATIONS**

On the basis of presentation, evidence adduced and my own evaluation, I recommend that:-

1. City of Nairobi be accorded the status of the Capital City and be managed in accordance with an Act of Parliament.
2. Nairobi City boundaries be extended as described in this report.
3. City Council of Nairobi with or without extended boundaries be divided into (4) four divisions on the basis of the proposals contained in the report
  - (i) MODEL B - If subdivision is based on the existing boundaries and if based on existing constituency boundaries.
  - (ii) MODEL C - If sub-division is based on creating new boundaries, and following major roads in Nairobi as explained afresh in Part C of this report.
  - (iii) MODEL F - If subdivision is based on the extended boundaries. However, the roads making the boundaries to be the ones mentioned in Part C of this Report and not the ones mentioned in Part B.
4. A sub-municipality be created under one of the proposed boroughs to be affording specialized civic services to the seat of the Government and to the CBD.
5. Each division of the city to be designated as a separate borough or municipality.
6. Each borough to have 15 to 20 wards/locations depending on their size.
7. Those constituencies and boroughs with western sounding titles be given African

sounding titles.

8. A Metropolitan planning Authority be established for the Greater Nairobi City Council. Should Nairobi boundaries be not extended then such an Authority be established for an area covering 60 kms radius around the city.
9. A Local Government Service Commission be established for handling all local employees staff matters other than those employees employed directly by the employing local authority.
10. Nairobi remains the Capital of the Nation.

## **APPENDICES**

1. Six Maps of Nairobi and its Environs giving Details of the Six Models.
2. Individual Maps of All Constituencies in Nairobi and Surrounding.
3. Electorate Schedules of Nairobi and Surrounding Districts.
4. Budgets for Nairobi City Council for the Financial Years 2003/2004.



## **DEVOLUTION IN KENYA**

**Prof. Peter Wanyande,  
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### **Introduction**

Devolution is a political concept that denotes the transfer of political, administrative and legal authority, power and responsibility from the center to lower level units of government created by the national constitution. In a devolved political system, the lower level units of government to which power, authority and responsibility has been transferred (devolved) are more or less autonomous from each other. They also enjoy autonomy from the center. This means that anyone level of government is not under any obligation to refer to or seek authority from the center in order to make and/or implement decisions that fall within their exclusive jurisdiction.

However, each of these levels of government must recognize that they are part of the larger state. This means in practice that some mechanisms that establish a relationship between the center and the lower level units must be put in place.

Similarly, a mechanism that establishes a relationship between and among the lower level units must also be in place.

Because some issues of public concern will cut across different levels of government the efficient and effective performance of such functions will require the cooperation of the different levels of government. A way to facilitate this cooperation must thus be

identified and spelt out. An appropriate Act of Parliament may be required to spell out how this is to be done. National regulatory bodies may also be established to regulate the performance of some of the cross cutting issues. It is also imperative in this regard that the constitution expressly underscores the need for mutual respect and complimentarily among all the levels of government. Finally, in a devolved system, there may arise a need to allow for variations in policy from one region to another depending on the unique circumstances of the region. In such cases, a national standard may be established by the central or national level government to act as a guide to the regions in implementing those functions for which local variation is permitted.

### **PROPOSED DEVOLUTION OF GOVERNMENTAL POWER IN KENYA**

Kenya is proposing to create four levels of government as follows:

- The National level to consist of two Houses of parliament, namely the Lower House and the Upper House,
- The Zonal level,
- The County level,
- The Locational level.

The paper discusses possible method of recruiting representatives to the proposed levels of government below the national

level. It also discusses the powers and functions of each level of government below the national level and the way in which the different levels of government will relate in the performance of their respective functions.

Four premises guide the discussion on devolution paper. First is that the country will be divided into 18 zones each with approximately equal number of inhabitants or population and that there will be special zones such as Teso. Secondly, that there will be no more than four levels of government as indicated above. Thirdly, Kenya will operate a parliamentary system of government. This is a form of government in which the executive is subordinate to the legislature. The real executive authority in a parliamentary government is vested in the

cabinet whose members are drawn from among the elected members of parliament to which they are accountable. This is to be distinguished from a presidential system of government. In a presidential system the chief executive is constitutionally independent of the legislature. The chief executive is thus not responsible to the legislature for its acts and tenure of office. Instead, he or she is to co-ordinate in power with the legislature. Fourthly, each level of government above the Location government will have a legislative arm and a professional administrative arm.

The discussion draws lessons from Ethiopia, Uganda and South Africa. These countries whose structure of governments is as shown in table 1 below operate a devolved system of government.

**Table 1: Levels of government of selected African countries**

| Levels Of Govt.    | Uganda   | Ethiopia                                      | S. Africa                               | Kenya (Proposed)                      | Remarks |
|--------------------|--|---|---|---------------------------------------|---------|
| National (Level 1) | President.<br>Single-tier<br>Legislature           | Prime<br>Minister.<br>Two-tier<br>Legislature | President.<br>A two-tier<br>Legislature | President.<br>Two-tier<br>Legislature |         |
| (Level 2)          | -  | State (9)<br>Federal<br>Council               | Provincial<br>Legislature               | Zonal<br>Council                      |         |
| Level 3            | District Local<br>Council                          | Zonal   | -                                       | County<br>Council                     |         |
| Level 4            | County Council<br>(Loc. Council IV)                | Woreda,<br>(District)                         | Municipalities                          |                                       |         |
| Level 5            | Sub-County<br>Local Council<br>(Local Council III) | Kebele  |   | Location<br>Council                   |         |
| Level 6            | Parish Council<br>(Local Council II)               |   |   |                                       |         |
|                    | Village Council<br>(Local Council I)               |   |   |                                       |         |

**Table 2: Method of Representation**

| Type of Representation |  |  |  |                |               |
|------------------------|--|--|--|----------------|---------------|
|                        | National   | Level 2                                | Level 3  | Level 5        | Level 6       |
| Uganda                 | 1. President (elected by universal suffrage)                   | Nil. (No Provincial Zone State Region) | 1. Local Government Councils                             | County Council | Sub-County    |
|                        | 2. Parliament (elected by universal suffrage and proportional) |  | 2. District Chairpersons (elected by universal suffrage) |                | Local Council |
|                        |  |  | 3. District Executive                                    |                |               |

| Type of Representation |  |                              |  |                                  |         |
|------------------------|--|------------------------------|--|----------------------------------|---------|
|                        | National   | Level 2                      | Level 3  | Level 5                          | Level 6 |
|                        |  |                              | Committee (nominated by the Chairperson and approved by council) |                                  |         |
|                        |  |                              | 4. Chief Administrative Officer                                  |                                  |         |
|                        |  |                              |  |                                  |         |
| Ethiopia               | 1. Prime Minister (elected by  | 1. State Council             | Woreda (Not established by the constitution)                     | Kebele (Not                      |         |
|                        | House of Peoples Representatives (HPR)   | 2. State Administration      |  | Established by the constitution) |         |
|                        | 2. Council of Ministers  |                              |  |                                  |         |
|                        | 3. President (nominated by the HPR and endorsed by joint Houses.)                  |                              |  |                                  |         |
|                        | 4. House of Peoples Representatives (HPR)(elected by universal suffrage).          |                              |  |                                  |         |
|                        | 5. House of the Federation –HF (elected by State Councils or by state inhabitants) |                              |  |                                  |         |
| S. Africa              | President elected by the National Assembly for a 5-year term                       |                              |  |                                  |         |
| Kenya                  |  | Zonal council<br>Zonal Chief | County Council. Elected by the Party List System                 | Location                         |         |

| Type of Representation |          |  |         |         |         |
|------------------------|----------|--|---------|---------|---------|
|                        | National | Level 2  | Level 3 | Level 5 | Level 6 |
|                        |          | Executive by and proportional<br>Universal Suffrage representation<br>Councilors elected<br>in their counties.<br>Universal suffrage,<br>multiple vote,<br>multiple vote,<br>Proportional<br>representation<br>system (County<br>reps) |         |         |         |
| Remarks                |          |  |         |         |         |

## THE STRUCTURE OF THE PROPOSED ZONAL GOVERNMENT

**A. Zonal Territory.** The country shall be divided into eighteen zones that include Nairobi metropolitan city and special zones such as Teso. Each zone shall have semi autonomous powers vis-à-vis the central government. The boundaries of the Zones shall correspond to the boundaries of the districts that come within each Zone as existing at the time the present constitution comes into force.

### B. The zonal government shall consist of:

(1) **A Zonal Legislature.** The term 'legislature' is preferable to that of 'council' because the former signifies devolution (considerable autonomy) while the latter tends to signify a case of 'de-concentration' and implies that the zonal government is essentially an extension/appendage of the central government. It also emphasizes the legislative functions of this level of government.

Zonal Legislatures will be composed of county representatives nominated by county council members and supported by two-thirds majority of all the members of the county council, provided that at least one-third of each council representative are women. The Zonal legislature sessions shall be presided over by a Speaker elected by the Zonal legislature as in the case of the District Council Speaker in Uganda.

**Note:** The alternative name for the zonal Legislature would be a Zonal Assembly or Zonal Legislative Assembly.

(2) **A Premier.** The political head of the zonal government will be the Premier. This title is used in countries like the Republic of South Africa and Canada. The term is to be distinguished from that of Prime Minister at the national level. The title premier is preferable to that of governor because the later is reminiscent of the colonial governor.

(3) **A Zonal Cabinet.** Each Zone shall have a Zonal Cabinet headed by the Premier. The premier shall nominate members of the Zonal Cabinet for approval by the Zonal Legislature by two-thirds majority vote. The cabinet will be drawn from members of the zonal legislature.

(4) **A Zonal Civil Service.** Each Zonal Government shall have a professional administration responsible for:

- (I) The implementation of the policies and programs of the individual Zonal Government.
- (II) Preparation and implementation of periodic Zonal budget for the activities that fall within the exclusive jurisdiction of the Zonal government.

The Zonal civil service shall be headed by a Zonal Principal Secretary who will be responsible for the day-to-day administration/operations of public services within the Zone. Zonal Civil Servants shall be employees of the Zones recruited through Zonal Public Service Commissions (ZSC) similar to Uganda's District Service Commissions. The ZSC shall be independent of the national PSC.

#### **ELECTION OF ZONAL PREMIER**

(a) The Premier of each Zone shall be elected directly by the residents of the zone from among the candidates nominated by registered political parties or from among independent candidates in accordance with the

relevant provisions of the constitution. The winning candidate has to receive at least 51 percent of the votes cast or else a runoff between the first two candidates shall be conducted. The direct election is preferred because it gives the electorate greater control and influence over the Premier.

(b) The Premier of a Zone shall hold office for a maximum of two five-year terms.

(c) The Premier may be removed from office due to reasons such as mental or physical incapacity or gross misconduct as defined by the constitution and the removal shall be effected through a two-thirds majority vote in the Zonal Legislature. The Premier shall thereupon resign from office to pave the way for the Electoral Commission to organize new elections of Premier in which the outgoing incumbent may also seek reelection subject to other provisions of the constitution.

(d) In the event the position of Premier falls vacant, the Speaker of the Zonal Legislature/ Assembly or a member of the Zonal Cabinet elected by majority vote in the Zonal Legislature shall be the acting Premier until a substantive Premier is elected. An appropriate time limit must be given for this. The rules that apply to the president shall also apply to the premier.

#### **POWERS AND FUNCTIONS OF THE ZONAL PREMIER**

(a) The Zonal Premier shall be the chief

- executive of the zonal government and chairperson of the Zonal Cabinet.
- (b) The Premier shall ensure that the operations of the Zonal Government are in keeping with the provisions of the national constitution.
  - (c) The Premier shall nominate members of the Zonal Cabinet for approval by two-thirds majority of the members of the Zonal Legislature/Assembly.
  - (d) The Premier shall perform the formal opening of new sessions of the Zonal Legislature.
  - (e) The Premier shall be the principal spokesman for the Zonal government.
  - (f) The Premier shall be a member of the Zonal legislature and will be accountable to the zonal legislature/Assembly for the performance of both the Zonal Cabinet and the Zonal government as a whole.
  - (g) The Premier shall give assent to all legislation passed by the Zonal Legislature/Assembly.
  - (h) The Premier shall exercise overall supervision of the operations of the Zonal Civil Service and the implementation of policies, regulations, decisions and directives adopted by the cabinet.

#### **POWERS AND FUNCTIONS OF THE ZONAL CABINET**

- (a) Provide policy leadership to the Zonal Civil Service and coordinate the implementation of such policies.

- (b) Ensure enforcement of law and order within the Zone.
- (c) This will be the responsibility of the zonal police service whose members will be recruited locally.
- (d) Submit legislative proposal to the Zonal Legislature for debate and approval.
- (e) Members of the Zonal Cabinet shall be both individually and collectively responsible to the Zonal Legislature.
- (f) Promulgate such regulations as may be necessary for effective performance of the functions that fall within the exclusive jurisdiction of the Zonal Government within the limits provided by the constitution.

The Zonal Cabinet shall be responsible for the functions that fall within the exclusive mandate of the Zonal Government and will be responsible to the Premier.

#### **ELECTION OF MEMBERS OF ZONAL LEGISLATURES**

Elections to Zonal Legislatures shall be conducted by the Electoral Commission in accordance with the powers and procedures defined for it under the constitution and/or Acts of parliament. Zonal Legislatures shall be composed of a minimum of 16 members and a maximum of 30 and will vary depending on the number of counties within a Zone. The variation shall be based on a formula suggested in the Draft of the Technical Working Group (p.4) that is reproduced below. It is important that the Zonal Legislature and government reflects, as much as possible, the ethnic and cultural diversity of the zone.

| <b>Number of counties within the Zone</b> | <b>Number of Elected Reps from each county within the Zone</b> | <b>Total membership of Zonal Legislature</b> | <b>Minimum Number of Women Reps in Zonal Legislature</b> | <b>Minimum no. of Women Reps from each county within the Zone</b> |
|---|--|--|--|---|
| 2   | 8  | 16   | 6  | 3   |
| 3   | 6  | 18   | 6  | 2   |
| 4   | 5  | 20   | 8  | 2   |
| 5   | 4  | 20   | 10   | 2   |
| 6   | 3  | 18   | 6  | 1   |
| 7   | 3  | 21   | 7  | 1   |
| 8   | 3  | 24   | 8  | 1   |
| 9   | 3  | 27   | 9  | 1   |



- (a) Members of Zonal Legislatures are county representatives. Each county in a Zone constitutes an electoral unit for the purpose of representation to the Zonal Legislature. Candidates for Zonal elections shall be nominated by their respective political parties or from among independent candidates in accordance with the provisions of the proposed constitution governing nomination of candidates - Sec 107(5). However, the actual election can take either of the two procedures.
- (b) Separate election for women candidates to fill the minimum number of seats reserved for women in each county within a zone. Women candidates contesting for women's reserved seats shall not run in the open contest for the rest of the seats (Ugandan Model).
- (c) A single election system shall be used for both women's reserved seats as well as for the open seats. In this system, women candidates with the highest votes up to the minimum number of reserved seats will be declared elected to those seats. Thereafter, any other candidates will be considered in order of the number of votes received, be they men or women (draft constitution model).

The two elections (separate one for women reserved seats and the open contest) will take place on the same day at the same time. This is done mainly to reduce the number of times citizens are called upon to participate in elections.

The above recommendation is guided by the view that too many or too frequent elections can result in election fatigue. It is

also raise the election budget and cost well beyond what the country can afford.

### **ELIGIBILITY FOR ELECTION TO THE ZONAL LEGISLATURE**

Anyone with residence in the county within a zone and satisfies the requirements for election to the House of Representatives shall be eligible to contest for election to the Zonal Legislature. All elected members of the Zonal Legislature shall take oath of allegiance to the constitution and the will of the people they represent.

### **ELECTION OF SPEAKER OF THE ZONAL LEGISLATURE**

There shall be Speaker of the Zonal Legislature similar to the Speaker of the District Council in Uganda. The importance of the position of Speaker is twofold:-

- (a) the alternative person to preside over the sessions of the Zonal Legislature would be the Premier, yet the Premier who is also the chief executive of the Zonal administration would be too busy with other matters pertaining to the Zonal government to be able to devote his/her time to the Legislature.
- (b) The Premier will be required to account to the Zonal Legislature on matters pertaining to the affairs of the Zonal government and this would be impracticable if he or she were also Speaker of the Legislature.

Members of the Zonal Legislature shall elect the Speaker of the House at their first sitting following the election of a new Legislative assembly. Candidates for the

post of Speaker shall fulfill such conditions as would have qualified them for election as members of the national Legislatures. Where a member of the Zonal Legislature is elected Speaker, the member shall relinquish his or her seat before assuming the position of Speaker. A candidate who receives 65 percent of the total votes cast during the election of Speaker shall be declared elected. The Speaker shall occupy the seat for the full duration of the Legislature and may only be removed from office in accordance with the constitution and on grounds such as gross misconduct and incapacity.

### **STANDING ORDERS**

The business of the Zonal Legislature shall be conducted in accordance with the constitution and the relevant Acts of Parliament as well as with Standing Orders that apply to the national legislature or as modified by the Zonal Legislature to suit the interests of the individual Zones.

The possibility of using local languages in the zonal legislature, as is the case in the South African Provincial legislatures, should be considered.

### **POWERS AND FUNCTIONS OF ZONAL LEGISLATURE**

The Zonal Legislature shall be responsible for legislation and policy making in matters over which it has either exclusive or shared jurisdiction vis-à-vis other levels of government. The specific responsibilities shall include the following:

- (a) Oversee the performance of the Cabinet, including the civil service.
- (b) Enactment and amendment of legislation to facilitate the performance of the functions exclusive to the Zonal government.
- (c) Formulate broad Zonal plans, and policies for efficient use of local

resources, provision of services, and establishment of basic infrastructure for development within the constituent counties (county council to fill in detailed plans, budgets and policies as locally appropriate).

- (d) Approval of the budget of the Zonal Government.
- (e) Facilitate and respect the operations of county councils to avoid the possibility of Zonal governments undermining the powers and authority of County Councils.

The powers and functions of the Zonal Legislature in all the above fields shall be clearly spelt and distinguished from the powers and functions of other levels of government, especially the national-level legislature. The Zonal Legislature shall enact laws and formulate plans and policies in all matters that fall within the exclusive functional jurisdiction of Zonal governments. These functions shall include:

#### **(1) Social Services:**

- (a) Education - Secondary and post-secondary levels of education other than university education and specialized national educational institutions that are not to be found in every Zone; institutions like the Kenya Polytechnic, Kenya Science Teachers College, and the Kenya Technical Teachers College, Kenya Medical Training College (MTC).

It would be desirable to ensure that institutions that are currently national in character such as the equivalent of the Kenya Polytechnics and the Kenya Science Teachers College are gradually established in each zone. This should ensure that after some time all zones should have similar educational institutions. A detailed time frame for the exercise should be worked

out.

It is also proposed that a national education policy that allows variations in school curriculum between zones be considered even as a national education system and standard are set and adhered to. That is to say that a zonal specific school curriculum be considered. This is to address the problem of variation in resource endowment between regions, which currently disadvantages the resource poor regions that have to compete with resource rich zones or areas.

- (b) **Healthcare:** Healthcare services presently categorized as Provincial Hospitals and other health institutions at that level other than national healthcare institutions like Kenyatta National Hospital (Nairobi) and Moi Teaching and Referral Hospital (Eldoret).
- (c) **Sports and welfare** (i) development and promotion of sporting activities involving different counties (ii) management of social welfare programs and facilities such as assistance to the youth and " physically and mentally challenged persons.
- (d) **Information and Broadcasting** - Regulation of media agencies both print and electronic, including radio and TV broadcast as well as the production and showing of films and other forms of mass media entertainment.
- (e) **Environmental conservation** - protection of rivers and streams, dams, springs, Game Reserves, forests and wetlands.
- (f) **Construction, rehabilitation and maintenance of class roads** that exclude feeder roads and national highways to be the business of county councils and national government, respectively.
- (g) **Prevention and management of natural and other disasters** within the Zone.

## **(2) Economic Activities**

- (h) Promotion and development of agriculture, livestock keeping and fisheries through planning and coordination of matters such as credit, extension services, veterinary care, and marketing.
- (i) Promote the development of manufacturing and processing industries within the Zone.
- (j) Promote trade and commerce within the Zone.
- (k) Promote co-operative development within the Zone.
- (l) Promote the development of local tourism industry.
- (m) Water.
- (n) Air transport.
- (o) Airports.
- (P) Water transport.
- (q) Motor vehicle registration.

## **(3) Regulatory Functions**

- (r) Land survey, mapping and administration including valuation.
- (s) Urban planning and development
- (t) Supervise police and security services within the Zone.
- (u) Registration of births and deaths.
- (v) Recruitment and deployment of zonal policemen and women. These are to be recruited by the Zonal Police Service to be established in every zone.

## **THE STRUCTURE OF THE COUNTY GOVERNMENT**

- (a) Each county shall be divided into electoral Wards. A County Government shall consist of -
  - (1) an elected Council with an elected Speaker, and Executive Committee headed by an elected County Chairperson,

- (2) a professional administrative body headed by an appointed Chief Administration Officer.

### **CREATION OF ELECTORAL WARDS**

The Electoral Commission of Kenya in accordance with the relevant provisions of the constitution and in consultation with the zonal authority and the Boundaries Commission shall demarcate electoral Wards.

### **ELECTION OF MEMBERS OF THE COUNTY COUNCIL**

- (a) Qualification for election to the County Council shall be similar to the qualification for election to the Zonal Legislature and relevant provisions of the constitution.
- (b) Registered political parties in accordance with relevant constitutional provisions governing elections shall nominate candidates for election to the County Council. There will also be independent candidates.
- (c) County Council representatives shall be elected directly by secret ballot.
- (d) One third of the County Council seats shall be reserved for specially elected women representatives.
- (e) The election of the one-third women representatives shall be conducted separately from among candidates nominated by registered political parties or from among independent candidates participating in the elections.
- (t) A woman candidate may not be nominated to contest for both special and openly contested seats.
- (g) The election of the remaining two-third representatives in the County Council shall be conducted in an open contest whereby parties nominate candidates irrespective of their gender.

Independent candidates may also seek election.

- (h) A candidate with the highest number of votes shall be declared elected in both streams of election.
- (i) County Council representatives shall be elected for a term of five years.

The method of election proposed here is preferable to the party list method because it enables voters to have a more direct control and influence over their representatives. The proposed method of election is proposed because it is simple to understand and is less costly.

### **ELECTION OF SPEAKER OF THE COUNTY COUNCIL**

There shall be Speaker of the Council. Members of the County Council shall elect the Speaker of the Council at their first sitting following the election of a new Council. Candidates for the post of Speaker shall fulfill such conditions as would have qualified them for election as members of the Zonal Legislature.

Where a member of the County Council is elected Speaker, the member shall relinquish his or her seat before assuming the position of Speaker. A candidate who receives 65 percent of the total votes cast during the election of Speaker shall be declared elected.

The Speaker shall occupy the seat for the full duration of the Council and may only be removed from office in accordance with the constitution and on grounds such as gross misconduct and incapacity.

The importance of the position of Speaker is twofold:-

- (a) The alternative person to preside over the sessions of the County Council would be the County Chairperson, yet the Chairperson who is also the chief executive of the County Government would be

too busy with other matters pertaining to the County Government to be able to devote his/her time to all the sessions of the Council.

- (b) The County Chairperson will be required to account to the County Council on matters pertaining to the affairs of the County Government and this would be impracticable if he or she were also Speaker of the Council.

### **ELECTION OF COUNTY CHAIRPERSON**

The Chairperson of the County Council shall be elected in either of two methods:-

- (1) The Chairperson shall be elected by the County Council from amongst its members based on the criterion of two-thirds majority votes. The Chairperson-elect shall consequently vacate his or her seat on the council.

**OR**

- (2) The Chairperson shall be elected directly by the registered voters that are residents of the county from amongst candidates nominated by registered political parties or independent candidates.

Note: The second option is perhaps the preferable one on account of the fact that it gives the electorate more control over the Chairperson.

### **POWERS AND FUNCTIONS OF THE COUNTY CHAIRPERSON**

The County Chairperson shall:

- (1) Be the political head of the County Government.
- (2) Be responsible for the implementation of the policies, plans enforcement of laws formulated by the County Council. The chairperson shall in short oversee the implementation of County government plans and programmes.

- (3) Nominate members of the Executive Committee for approval by two-thirds majority members of the County Council.
- (4) Chair meetings of the Executive Committee of the County Council.
- (5) Responsible for the operations of the administrative arm of the County Council
- (6) Lead negotiations for cooperation with other Counties and other levels of government.

### **APPOINTMENT, POWERS AND FUNCTIONS OF THE COUNTY EXECUTIVE COMMITTEE (CABINET)**

The Executive Committee of the County Council shall consist of the County Chairperson and persons nominated by the County Chairperson and approved by two-thirds majority of the members of the County Council.

The County Executive Committee shall:

- (i) Formulate policies administrative body policies,
- (ii) Ensure enforcement of law and order within the County,
- (iii) Submit legislative, policy and budget proposal to the County Council for debate and approval,
- (iv) Members of the County Executive Committee shall be both individually and collectively responsible to the County Council,
- (v) Promulgate such regulations as may be necessary for effective performance of the functions that fall within the exclusive jurisdiction of the County Government within the limits provided by the constitution for implementation by the County and ensure the implementation of such.

## **POWERS AND FUNCTIONS OF THE COUNTY GOVERNMENT**

County Council shall –

- (1) make and amend by-laws,
- (2) formulate policies, and
- (3) Hold the Executive Committee to account on all matters that are within the limits of its functional mandate.

The specific functions of the mandate will include the following:

### **(1) Social Services:**

- (i) Education: Primary and pre-school education;
- (ii) Healthcare: healthcare services presently categorized as District Hospitals, Health Centers, Dispensaries and Nursing Homes;
- (iii) Sports and welfare (a) development and promotion of sporting activities within the counties (b) management of social welfare programs and facilities such as assistance to the youth and physically and mentally challenged persons (c) maintenance of social and welfare facilities within the county;
- (iv) Information and Broadcasting - Regulation of content of the programs of media agencies, including films screened in cinema halls within the county;
- (v) Construction, rehabilitation and maintenance of all feeder roads and bridges within the county;
- (vi) Provide services such as water, street lighting, refuse disposal in urban centers, electricity, slaughter houses, urban housing, bus terminals, markets, shelter homes, fire and rescue, and community health

extension service.

### **(2) Economic Activities**

- (vii) Promotion and development of agriculture, livestock keeping and fisheries through provision of credit, extension services, veterinary care, and marketing;
- (viii) Facilitate manufacturing and processing industries within the county;
- (ix) Give support to trading and commercial enterprises within, the county Support the operation of co-operative development within the county;
- (xi) Develop tourist attraction projects.

### **(3) Regulatory Functions**

- (xii) Land survey, mapping and administration including valuation
- (xiii) Urban planning and development
- (xiv) Supervise police and security services within the County
- (xv) Registration of births and deaths

## **APPOINTMENT AND FUNCTIONS OF THE COUNTY ADMINISTRATION**

### **(1) Appointment:**

- (a) There shall be a professional County Administration headed by Chief Administration Officer appointed by the Public Service Commission or any other agency to which the ZPSC has delegated such powers.
- (b) Chief officers of the County Administration above a level to be specified by an Act of Parliament shall be similarly appointed by the ZSC or any other agency to which the ZSC has delegated its powers.

- (c) The rest of the staff of the County Administration shall be appointed by a standing Staff Appointments Committee to be constituted in accordance with a relevant Act of Parliament.

**(2) Functions**

The County Administration:

- (a) shall be responsible for the implementation of policies, plans and programs of the County Government.
- (b) shall advise the County Government on policy matters.

**THE STRUCTURE OF LOCATION GOVERNMENT**

- (a) Each County shall be divided into Locations;
- (b) Each location shall be sub-divided further into electoral units consisting of villages. Residents of each village shall elect representatives to the location government;
- (c) In each case the membership of the location government shall reflect the Cultural and linguistic diversity of the location.

The organization of government at the Location Level can take any of two alternatives given below:-

**Alternative I**

**ORGANIZATION OF LOCATION GOVERNMENT**

- (a) The Location level government shall be constitutionally established;
- (b) The Location Government shall consist of Location Council and Committees of the Council, and a Location Secretariat;

- (c) The Location Chairperson shall be head of the Location Government.

**ELECTION OF MEMBERS OF LOCATION COUNCIL**

- (a) The Location shall be divided into electoral units to be called village Wards. The boundaries and number of village Wards shall be determined by the Electoral Commission of Kenya in consultation with the location government and Boundaries Commission in accordance with the relevant provisions of the constitution;
- (b) Each Ward shall elect two representatives (one woman and one man) through direct elections by bona fide residents of the Village Ward. The woman candidate with the highest number of votes shall be declared elected. Similarly, the man with highest number of votes will be declared the winner;
- (c) Registered political parties may either nominate candidates for election to the Location Council OR the election at this level shall not be based on party affiliation. Where political parties are the desired method of nomination, provision shall be made for independent candidates as well.

**ELECTION OF CHAIRPERSON OF THE LOCATION COUNCIL**

- (a) The Chairperson of the Location Council shall be elected either by duly elected members of the Location Council by two-thirds majority votes;

**OR**

The Chairperson shall be elected directly by the residents of the Location. (For the pros and cons of either of these two

methods refer to the section on the election of the County Chairperson).

The Direct method is perhaps the more preferable at this level as it ensures that the electorate has more direct control and influence over the Chairperson.

- (b) The Location Chairperson shall chair sessions of the Location Council. Each committee of the Location Council shall elect its chairperson;
- (c) The Location Chairperson shall be responsible for proper conduct of the affairs of the Location Council and its constituent committees;
- (d) The Chairperson shall be responsible for the implementation of the decisions of both Location Council and its constituent committees.

### **Alternative II**

#### **ORGANIZATION OF LOCATION GOVERNMENT**

In our view, government at the location level should not be a constitutionally established level organ, but an administratively established structure: a Location Committee that will be advisory to the County Councils. The Location Committee shall consist of elected members that reflect the diversity of the population of the location such as clans, sub-clans and ethnic groups. One third of the committee members shall be women. However, representatives of social categories that fail to gain representation through the elections shall be specially nominated to the committee.

#### **ELECTION OF CHAIRPERSON OF LOCATION COMMITTEE**

Each Location shall have a Location Chairperson who will be the head of the Location Committee as well as the

Location Government as a whole. The Location Chairperson shall be elected in either of two methods:-

- (1) Location Committee shall elect the Location Chairperson from amongst its members who shall subsequently vacate his or her seat as an ordinary member of the council. The vacated seat shall subsequently be filled through a by-election. This method is preferable because it is easier to manage, procedurally and less costly. However, it denies the residents of the Location opportunity to take part in the choice of their Chairperson.
- (2) The Chairperson of the Location Committee shall be elected directly by the residents of a Location. This method is preferable because it enables the residents of a Location to directly express their choice of Location Chairperson. A directly elected Chairperson is bound to enjoy higher popular support and legitimacy and will command greater authority and respect.

#### **POWERS AND FUNCTIONS OF THE LOCATION COMMITTEE**

The Location Committee shall:

- (a) Advise the County on matters of interest to residents of the Location;
- (b) Coordinate and manage neighborhood security matters and operation within the Location in liaison with the local police services;
- (c) Ensure peaceful harmonious coexistence of residents of the location;
- (d) Settle and resolve disputes involving residents of the location;
- (e) Mobilize residents to support implementation of the projects and programs of the national, Zonal and County Governments at the Location level;
- (f) The Location Committee shall be



divided into sub-committees, each dealing with a specified issue-area.

It is imperative to note that the government at the local level shall not have legislative powers as such.

#### **LOCATION SECRETARIAT**

This will constitute the administrative arm of the location government.

The chairperson of the location government with approval of the location committee will appoint members of the location secretariat.

#### **RELATIONSHIP BETWEEN THE DIFFERENT LEVELS OF GOVERNMENT**

Each level of government will have functions exclusive to it. This means that the other levels of government must respect this and thus avoid undue interference with the performance of such functions.

There will however be shared responsibilities between different levels of government. These must be clearly identified and spelt out. A mechanism to ensure that such functions are efficiently done must be put in place. One way is to establish through an appropriate Act of parliament a coordination mechanism or body to facilitate the performance of such functions. An alternative way is to establish through an Act of Parliament, a national level regulatory body to manage such functions.

The draft of the technical working group on devolution provides for representatives to the zonal council to be elected directly by the inhabitants of each county within the zone. We concur with this proposal. However, it will be appropriate for Section 220(4)(a) to specify that each candidate for

Zonal Council elections have to be sponsored by a registered political party.

To ensure fair representation, the number of representatives elected by each county be based on the size of the county along the lines used by US in the election of members of the House of representatives. Each county shall, in this case, constitute a constituency for purposes of election to the zonal council. In the USA, membership of the House of Representatives is based on the size of the State.

# **SELF-MANAGEMENT OF LOCAL COMMUNITIES- A BASIC NECESSITY FOR RURAL DEVELOPMENT**

**Prof. Dr. H. C. Hans-Peter Schneider, Consultant.**

## **I Introduction**

With half of the world's population now living in rural settlements, and with the world's population due to grow to 8 billion by 2025, the issue of sustainable local management and development is one of the critical issues for the 21<sup>st</sup> century. National states cannot, on their own, centrally manage and control the complex, fast-moving, cities, towns and villages of today and tomorrow - only decentralized local governments, in touch with and involving their citizens, and working in partnership with national governments, are in a position to do so. Many African states will not have the economic power to reach grass-root levels, especially in remote areas, and to bring them out of poverty. In Kenya over 60% of people live below the poverty line, 80% of them in rural areas. The future of rural settlements is therefore of vital importance, with urban/rural linkages and interdependence becoming key issues for sustainable development.

The effects of economic liberalization and globalization are felt most sharply at local level. Whilst many have benefited from these processes, e.g. via new inward investment into local economies, the growing gap between rich and poor, with increases in absolute poverty levels in many places, has led to growing problems of insecurity, social exclusion and of environmental degradation.

These negative impacts of globalization are felt everywhere, but in particular in developing countries since the Rio Conference on Sustainable Development in 1992. However, many local governments have played a significant and positive role in taking forward the Rio engagements, in particular via Local Agenda 21 processes. In this period, the role of local government as catalyst for development has evolved, with a strong emphasis on partnership with business and civil society. On the other hand, this period has seen conflicts, massive breaches of human rights, and ecological and other natural disasters, in addition to growing social inequality. A large part of the world's population lives without access to even the most basic services.

## **II The Importance of Local Affairs' Management in an International Context**

The constitutional recognition of local government as an order of government in federal countries is a modern phenomenon. The first federal constitutions of the modern era did not include local government as an order of government as evidenced by the constitution of the United States (1787), Canada (1867) and Australia (1901). It was after the Second World War that local self-government increasingly appeared in federal constitutions, often coinciding with the return to democratic rule. The first was the constitution of the Federal Republic of Germany of 1949.

The Spanish Constitution of 1978 focused on the creation of Autonomous Communities.,. Brazil's return to civilian rule was also marked by the extensive protection of local self-government in the Constitution of 1988. While the entrenchment of local government in the 73<sup>rd</sup> and 74<sup>th</sup> Amendments to the Indian Constitution in 1992 was prompted by developmental concerns, the extensive protection of local self-government in the South African Constitution of 1996 was the result of both democratic and developmental objectives. Similar sentiments informed the entrenchment of local government as an order of government in the Nigerian Constitution of 1999.

In most countries there is a wide array of local government institutions but a few communalities emerge. Multi-layered structures are present in most countries.

Distinctions are made between rural and large urban municipalities, investing greater powers and functions in the latter. The functions and powers of local government cover a broad range of areas, reflecting both similar competencies as well as significant differences. Different techniques are used to demarcate the powers. Narrow definition of competencies is, however, increasingly making way for the overall responsibilities of local communities in their areas of jurisdiction. However, there are in most countries role confusions and conflicts over functions. In most countries local government plays an enormous role in fulfilling functions directly linked to the basic needs of citizens. Local authorities are responsible for between 5% and 26% of all the government expenditures as is illustrated in Table 1 below.

**Table 1: Percentage of expenditure by three spheres of government of total government expenditures**

| Country              | Federal/national | State/Province | Local Government |
|----------------------|------------------|----------------|------------------|
| United States (1992) | 54%              | 20%            | 26%              |
| Canada               | 38%              | 45%            | 17%              |
| Australia (1997-8)   |                  |                | 5%               |
| Germany (2000)       | 40%              | 38%            | 22%              |
| India                | 39%              | 39%            | 22%              |
| Spain (1997)         | 61%              | 26%            | 14%              |
| South Africa (2001)  | 38%              | 41%            | 21%              |
| Nigeria              | 74%              | 21%            | 15%              |

While the role of local government in some countries is shrinking, the trend is to increase the role of local communities in the provision of services. Local communities are increasingly seen as the engine for growth and development with more and more

functions being down loaded on them. This places considerable stress on them to finance the increasing expenditures. The financing of local government shows great variation. In a few countries, local government is largely self-sustaining. In most countries,

however, it relies heavily on transfers from other levels of government as the following

table illustrates.

**Table 2: Percentage of total local government income derived from inter-governmental transfers**

| Country              | Income from IG transfers |
|----------------------|--------------------------|
| United States (1992) | 33%                      |
| Canada (1999)        | 19%                      |
| Australia (1997-8)   | 19%                      |
| Germany (2000)       | 75%                      |
| India (1994-5)       | 68%                      |
| Spain (1997)         | 60%                      |
| South Africa (2001)  | 8%                       |
| Nigeria (1999)       | 94%                      |

As far as its own revenue is concerned, communities rely heavily on property taxes and supplementary grants from Central Government. With the increased role of communities as institutions of self-government in the provision of services, sound inter-governmental relations are vital to ensure the proper demarcation of responsibilities, effective cooperation between the different levels of government, and the adequate financing of local government. In this regard, organized communities are playing a critical role in bringing about co-operative government

### **III The Benefits of Improved Local Accountability and Incentives**

#### **1. Citizen Participation**

In theory, decentralization can strengthen and complement the measures to broaden participation in development. Likewise, it can help guard against majoritarian tyranny

and corruption by moving government closer to people and facilitating local definition of issues and problems, especially by minority groups. The contrasting situations of Oaxaca and Chiapas, two of the poorest states in Mexico, provide a telling example of these effects at work. Each has similar resource endowment and development potential and a high percentage of poor and indigenous populations, but the outcomes of antipoverty programs are generally regarded as good in Oaxaca, while neighbouring Chiapas has a bad record. The difference seems to come from the degree of participation in policy decisions and implementation. Oaxaca has a long tradition of participatory mechanisms for indigenous populations and the poor. In Chiapas the denial of such options, coupled with widespread official corruption, has led to poor services and rising tensions, including armed conflict since early 1994.

Where public office is contested and people can participate and decide on representatives

at different levels of government, the number of political choices citizens can make also increases, thus stimulating competition between parties and interest groups. Local participation can also mean greater confidence in and acceptance of policy decisions by constituents. Decentralization can therefore increase local options for policy making while holding local officials accountable for what they do and how they do it.

Recent evidence from Latin America, particularly Colombia, suggests that once local policy makers are held accountable for their actions and made aware that their jobs depend to a large extent on citizens' assessments of their performance, they tend to be much more concerned with the quality of their services and they are urged to run their offices effectively. In Porto Alegre, Brazil, an innovative process of public investment planning and management was launched to mobilize citizen groups to take part in the process of municipal budget formulation. Some 14,000 people were engaged in the budget formulation process through assemblies and meetings. Indirectly, an estimated 100,000 people were linked to "participatory budgeting" through local associations and popular organizations. An evaluation of the project showed that by fostering an active and vocal constituency, the scheme not only generated considerable savings, it also put in motion mechanisms for accountability that were critical for good local agency performance.

## **2. Local Service Provision**

Many central governments have responded to fiscal crisis, the availability of new technologies and citizen concerns by decentralizing service provision, especially in education and health, to local

Government. In many cases, this has given rise to new and often creative arrangements between local communities, NGOs and local businesses. Some recent examples from Latin America and Asia are illustrative. In the 1980s, the primary education system in the state of Minas Gerais in south-eastern Brazil, faced many of the problems common to education systems in developing countries: high repetition rates, low graduate rates and low achievement scores. Contributing to these problems were over-regulated and centralized management, inadequate funding and poorly trained teachers. In the 1990s, a series of measures including autonomy to elected boards in each local school (composed of teachers, parents and even students over sixteen), and grants from central government based on enrolment and special needs, have produced some encouraging quick results: including a 7 percent increase in achievement scores in science, 20 percent in Portuguese and 41 percent in mathematics.

In Teocelo, Mexico, decentralization has created opportunities to organize resources for health in a more efficient way by identifying the population's needs and designing strategies to foster participation through community organization and health education. Coverage of the population increased in both preventive and curative care, the quality of services improved enormously and infant mortality rates fell. In addition, users of health facilities reported that the attitude of health personnel and the quality of services had improved greatly.

## **3. Local Economic Development**

Local private sector participation can also play a crucial role in decentralization, creating incentives at the local level. As evidenced in many countries, including

Germany, entrepreneurs strongly influence the pace of development and property-owning classes, which had command over local resources, exercised considerable pressure on public entities. To spur expansion, private actors and public officials were encouraged to cooperate. Many of these growth processes began on local level, because members of the business community often participated in local parliaments. By promoting their private interests, they most often contribute to the well being of all community members. Local governments that provide and maintain credible frameworks for local economic development promote private investment. This, over time, increases local government revenues and allows more investments in public goods.

The world is full of examples of local governments affecting local economic development and decentralized institutional arrangements contributing to growth. The small cities of Greenville and Spartanburg, South Carolina, have the highest foreign investment per capita in the United States. They are host to 215 companies, from eighteen countries, seventy-four of which are headquartered there. Visionary decision makers with a strong private sector approach to local development have established a solid base of innovative small and medium-size enterprises that employ a workforce whose skills are regularly upgraded.

Despite such encouraging cases, experience suggests that successful decentralization nevertheless needs effective rules for inter-governmental collaboration - in two dimensions, vertically over the various levels and horizontally on the same level. In education, for example, higher levels of government may be needed to prevent fragmentation and to minimize differences

in the quality of education in different communities. Especially on the local level, amongst communities, services could be provided in a cooperative manner since not each and every community can afford all kind of institutions (e.g. a secondary school). In the health sector, the appropriate allocation of responsibilities across levels of government is rarely clear-cut. Immunizations, tuberculosis surveillance, and vaccine storage all need strong effective management from higher levels of government. In addition, localities may not provide the right framework for policy formulation and implementation.

#### **IV Strong Need for Intelligent and Encouraging Solutions**

As the general elaborations above show, there is no generally valid road map, which leads to a generally applicable system of devolution, as also the ongoing debate in Kenya demonstrates. On the one hand, there is the strong desire to devolve and share powers to lower levels, in order to gain the support of people for the benefit of the people. On the other hand, the framework of devolution could create a lot of tensions between the devolved units and it is not free of charge.

##### **1. A Variety of Solutions:**

Intelligent solutions are required in order to:

- Create enabling conditions for broad-based social and economic development;
- Tap the huge resource potential (capital, labour, ideas) most of which lies within grass-root communities;
- Stimulate self-help; i.e. communities must organize themselves, must finance their own development, manage their own development, and

maintain their own development without being dominated or hindered by higher tiers of government.

The state must organize itself in a way that the citizens' ability to organize themselves is stimulated and enhanced.

## **2. Encouraging Incentives for the Devolution of Power**

Encouraging incentives could be:

- Government declares participation of citizens in decision-making, democratic self-determination and self-organization of citizens as a prime strategy for poverty alleviation and pro-poor growth;
- Government encourages the formation of democratic community organizations along traditional lines, well-known to citizens, especially in rural areas;
- Government financially and where necessary, technically supports development activities of such citizens' organizations following prescribed pattern of self-organization.

## **3. The Importance of the Principle of Subsidiarity**

In this context, the principle of subsidiarity plays an important role in local governance; it obliges the state to assist the smaller, subordinate entities (such as local authorities and communities), and it prevents the state from intervening in their tasks, if they can perform them on their own. The main effects of the principle of subsidiarity are:

- Functions that can be performed by the lowest levels, i.e. mostly community or citizen organisations, are left to them.

Where necessary, they are financially supported and monitored by Government. To ensure that such functions are performed, e.g. the construction of a water supply system, Government makes supplementary investment funds available.

- Federations of citizens' organizations are encouraged and made possible for specific supra-community affairs (e.g. secondary schools).
- Functions, which need a higher-level organization, are to be provided by Government.

Subsidiary legitimizes a high degree of decentralization. Local autonomy safeguards the power of decision at the local level for the people and presents itself as an important element of a decentralized distribution of powers.

As an example of decentralization and subsidiary, some figures about the distribution of the budget in Germany: in 2000 the Federal Government spent only 24% of the total public budget.

Equally, the states/Lander spent 24%, the communities spent 18% and the independent social security bodies spent about 34% of the total budget.

To establish a system of devolution based on the principle of subsidiarity needs political action on the various levels of Government. The approach should be based on three pillars:

- Regulations for interaction from the highest to the lowest level (such as the constitution, laws, organizational statutes)
- Goals and functions of each institution on every level of Government

- Consensus-building mechanisms to avoid conflict, legal disputes or even society crisis caused by the different power interest on each level

In devolving powers to lower levels and developing local governance, the existing government set-up must be considered and existing institutions relevant to local affairs should either be used or reformed, especially if they are clearly instrumental for assisting communities and citizens in fulfilling their objectives and needs. The community projects should take into account existing institutions experienced in local affairs. Furthermore, they might address the goals of these institutions and their process of interest representation. These fundamental structures of local politics deal with values and matters of a very concrete nature.

## V Levels of Government

The present proposal for devolving power to lower levels foresees four levels of Government:

- National level
- Zone level (Region)
- County level (District)
- Locational level

### 1. Zone Level

The draft provides for 18 zones in Kenya. It seems that ethnic considerations played an important role in demarcating the zones. In addition, the amount of people living in each zone vary from 400,000 - 2,700,000. The question arises whether these units are actually viable and able to perform the functions of a full-fledged regional government. From an international experience, it is not advisable to draw the boundaries of the zones along ethnic lines.

In order to avoid secessionist tendencies and create economically balanced regions, the borders should be as "natural" as possible (e.g. watersheds, ecological or large economic zones). Under these conditions every regional government has to deal with the needs and expectations of different ethnic groups and to find solutions acceptable to all of them.

In my opinion it should be re-examined whether the number of the zones could not be reduced, for example to 9 or 10 zones, or even less, especially when considering that the zones will have to agree on coordinated policies when challenging the national level's policies. To find a consensus among 9 - 10 members is much easier than among the high number proposed.

### 2. County Level

There seem to be a broad consensus that the present districts should be the main level to which Government functions shall be devolved. Such functions are listed in schedule 8 of the proposed devolved Government structure. However this schedule needs to be revisited, since it is not different from the zone level, which is an unnecessary duplication.

### 3. Locational Level

As far as the Sub-District level is concerned, it seems that there is not clarity about the criteria according to which these units shall be formed.

If it is assumed that a district is the principal unit of Government, serving a population of 100,000 to 900,000 persons, it becomes obvious that between the citizens and their organizations (village or community) at least one other level of Government should be



established, due to the sheer number of people to be served and the territorial distance involved.

These units of Government between community and District level should be created along a formula that guarantees:

- Fairly good communication amongst the population;
- Administration and service provision remains economic (esp. in terms of staffing);
- Fairly good control of service provision by elected representatives (and of citizens' organizations) possible,
- Fairly good identification with development activities possible - most citizens would have a direct benefit from development investments (secondary schools, large water supply systems, inter-village roads, etc.) and could directly contribute to them.

Units complying with such criteria in rural areas would probably be in the range of 3-4 walking hours (20 km) to the service center or 20,000 people, whatever comes first. For urban areas a higher population (e.g. 30,000) could be considered.

On the lower end, for an area wise large district with 100,000 inhabitants, this would probably come to 8-10 locations, depending on the district's size. On the higher end, for a densely populated district with 800,000 inhabitants, some 30-40 locations would have to be created. This formula goes well along the traditional ward as an electoral unit.

If the Locational Council were to perform government functions according to the

subsidiarity principle, the council would have to elect an executive from amongst its members or hire professionals for this task. Whether and how many Government employees are stationed at this level, be they administrative or developmental, depends on the functions devolved to this level.

However, the number of locations suggests that hardly any ministry can afford having an officer stationed in every location. This means, that on that level, the council and its executive members would have to fulfil functions more related to planning, co-ordination, administration, flow of information and the like other than service provision or management of communal projects (although the latter should not be excluded).

The Locational Council could consist of either:

- (a) directly elected members only, or
- (b) directly elected members plus delegates/experts from local communities, or
- (c) only delegates from local community councils (e.g. a man and a woman).

To keep local development initiatives protected from influential, powerful circles ("party politics"), option "c" would clearly be the most optimal one, and it would cost least, especially in terms of election costs. Since local communities would have an interest in sending their "personal" representatives into the Locational council, it could be assumed that this honourable task does not need to be remunerated by the state. Furthermore, with this structure at hand, one could also vest the location councils with the right of self-administration, thus saving one level of Government by transferring certain governmental functions (e.g. registration, tax

collection, information dissemination, licensing of businesses, etc.) to them, under the oversight of the county level government.

#### **4. Local Community Level**

In a devolved system of Government with four levels of government, the lowest level (locations) has to deal with a population of roughly 10.000 to 30.000 people. Amongst those it is nearly impossible to create cohesion and commitment for common interests. Having in mind the average situation in rural African regions, and even remote areas in highly developed countries such as Switzerland, France and Germany, one clearly needs an additional structure of autonomous organization and management. The nature of this structure should not be compared with a normal level of Government, since it would neither be necessary nor affordable. This structure is characterized through its main functions to manage all affairs of local concern at their own responsibility.

At this level, which I would call the local community level, demarcated boundaries should exist which allow the community members to identify themselves with. Their right of self-management of their own affairs should be recognized by the Constitution and specified by an Act of Parliament. This statute will create the legal framework local communities must operate within, including their specific rights and obligations.

The local community could perform the following functions and tasks:

- Local Governance (development planning, financing/taxation/contributions; project implementation, monitoring

and evaluation);

- Water (earth dams, pipe water systems; rain catchments);
- Agriculture (seed/tree multiplication, animal dips, veterinary services, communal land management, natural resource conservation);
- Education (kindergarten, primary school, informal/adult education, vocational training);
- Roads (intra-village roads and tracks, inter-village roads, pass ways, transportation);
- Health (village health volunteer/worker, village pharmacy);
- Sanitation (public toilets, waste disposal, garbage collection);
- Economy (rural banks, rural markets, marketing and other information)
- Others (social security, neighbourhood help, youth/sporting facilities).

The whole community should elect at regular intervals a community council. The community council elects its executive (chairperson and her/his deputy, treasurer and her/his deputy, secretary and her/his deputy). A community constitution regulates the specific tasks of the council and its executive. In principle, the executive carries out the decisions of and reports to the community council who controls the executive.

The executive - in line with the constitution:

- represents and speaks on behalf of the community in all communal affairs;
- suggests development activities to the council after consultation with the whole community; the council approves the budgets for such activities,
- solicits funds from within and from outside the community for undertaking

- developmental activities;
- manages all communal development activities or delegates their responsibility to specific project committees whose office bearers the council elects.

## **VI Recommendations**

From my experience as an international adviser in constitutional matters, I would wish to encourage the Commission and the Special Committee on the Devolution of Powers:

- To consider the setting-up of local community councils as citizen organisations (no government officers to be stationed there, no government allowances for office bearers, no government contributions for administration, but development incentives in form of conditional/unconditional grants, provided certain organizational rules are followed and funding conditions met);
- To protect these self-governing organizations from the government by giving them certain rights to manage community affairs;
- To use these structures for social, economic and political development by giving them certain tasks/obligations to fulfill and by monitoring adherence to

given rules.

The respective provision in the new constitution covering these aspects could be formulated as follows:-

- (1) Local communities shall be guaranteed the right to manage all affairs of local concern at their own responsibility within the limits set by law.
- (2) Associations, federations and networks of local communities, within the framework of their statutory powers and functions, likewise have the right of self-management set by law.
- (3) The guarantee of communal self-management includes the right to levy taxes which accrue exclusively to local communities and to obtain grants from superior levels of Government for undertaking self-managed development activities.

## **VIII Conclusion**

If this proposal for a special provision for local community management would be accepted and enshrined into the constitution, Kenya would make a big step forward in tapping the dormant potential of communities and spearheading a development tool demanded by the Local Agenda 21 for Sustainable Development. More than that, Kenya would in this respect get the most modern constitution in the world.

# HUMAN CAPITAL CHALLENGES OF A DEVOLVED SYSTEM IN KENYA

**Dr. Walter Odhiambo, Consultant.**

## **I. Introduction**

After more than three decades under a very centralized national government, there is a proposal to adopt a policy of regional autonomy. This proposal is contained in the Draft Constitutional Bill, which is currently under discussion. The Bill proposes to adopt devolution as the cornerstone of the proposed government structure. As in many other countries, the policy intends to bring development closer to the people. The proposed system is expected to change the way the economy and particularly government, functions in very basic ways. As part of the change, sub national governments are expected to play much more important roles in the provision services. Local officials will also be expected to have more responsibilities and be more accountable to the people.

A well-functioning public sector requires a correct balancing of the comparative advantages of central and local authority in delivering services. It also requires that the local governments have the institutional capacity and ability to raise local revenues so that they can carry out their role in a way that is prudent from a macroeconomic perspective. Of all the capacities required by sub-national governments, the most crucial is adequate human resource capacity to carry out decentralized powers-especially as it refers to the technical aspects of

decentralized functions. This ability hinges crucially on human capital. Human capital is also important as a tax base for both the national and sub-national government. In most developing countries, income taxes constitute a large proportion of total taxes collected by governments.

The purpose of this paper is to assess the human capital dimensions of the proposed devolved system. The focus is at three levels: human capital needs of a devolved system; human capital as a tax base; and the likely effects of decentralization on human capital development. We attempt in this paper to highlight the potential role of human capital, such as education, might play in affecting the degree of inequality associated with devolution. The paper is divided into five sections. In the next section we provide brief definitions of certain words and concepts that are used repeatedly in the paper. We then examine in section III the broad structure of the proposed system. This is followed in section *N* with a presentation of some human capital related issues and challenges in the proposed devolved system. The conclusions are in the last section of the paper.

## **II Concepts and definitions**

Definition of the main terms and concepts which are used in this discussion and of the different forms that these terms/concepts may take is useful in ensuring clarity. This section attempts to provide such definitions and also provide differences between terms which are used as though they have the same meaning. **Human capital** is the attributes of a person that are productive in some economic context (Webster Dictionary). It often refers to formal education attainment, with implication that education is investment whose returns are in the form of wage, salary, or other compensation. These are normally measured and conceived of as private returns to the individual but can also be a social return.

**Decentralization** refers to the transfer of state/national responsibilities or functions from the central government to sub-national levels of government, or from central agencies/offices to regional bodies or branch offices, or to non-governmental organizations or private concerns. It can be described as the redefinition of structures, procedures and practices of governance to be closer to the citizenry (Mawhood 1993).

Decentralization can take different forms. Some of the most common forms are deconcentration, delegation and devolution. **Deconcentration** is the term used when decentralization takes the form of transfer of functions from the centre to regional or branch offices, since real decision-making is retained at the centre. Delegation is the term used when the transfer of function is to a non-governmental or private sector entity (privatisation), or it could even be to a government agency, over which government exercises limited control.

**Devolution** occurs where the transfer of any

function or responsibility involves both administrative as well as political/decision making. This is usually to a sub-national level of government, which can then be said to enjoy autonomy with respect to the devolved subject/functions. It is worth noting at this point that all the three forms of decentralization involve administrative changes with implications on human capital.

### **III Proposed structure of government with fiscal devolution**

The Draft Bill of the Constitution proposes that the Government will be constituted at four levels: National, sub-national, local government; and the locational level. In this set-up, the four levels of government co-operate, consult and compromise with one another for the common good rather than competing with each other for the individual gain (CKRC, 2002). The Bill recommends that the district be the unit of devolution. The import of this proposal is that what is presently the province is *ipso facto* rendered irrelevant as the local level of government. Article 22 of the Bill elevates cities and municipalities to the same level as districts. Taking the present number of cities and municipalities into account, the result is a total 113 devolution units (3 cities, 43 municipalities and 67 districts).

The Bill proposes to create a structure of between 10-18 principal units of devolution. The regions to form the units are chosen on the basis of: size; economic potentiality; comparable population distribution; cultural homogeneity; present administrative and political units, protection of the welfare of minorities; functions; and intergovernmental relations. The devolution units have already been proposed in the *Special Working Document for the National Constitutional Conference; Report on Devolution powers*.

The determination of the optimal unit for devolution is key and may require further analysis.

The Draft Bill proposes three elements of devolution: political, administrative and fiscal. Political decentralization involves giving citizens and their elected representatives more power in decision-making. Administrative decentralization involves redistribution of authority, responsibility and financial resources for providing services among different levels of government. Fiscal decentralization involves the transfer of authority for taxation and expenditure to sub-national organizations. It proposes that:

- The executive powers of the state be devolved to the 2nd, 3<sup>rd</sup> and 4th Levels of government,
- The legislative powers of the state be devolved to the 2nd. And 3rd levels of government,
- The financial powers of the state be devolved to all levels of government.

While all the elements of devolution have a strong bearing on human capital, it is perhaps the administrative and the financial aspects which affect human capacity directly.

#### **IV The main challenge: Interregional disparity**

In many locations in Kenya, the main factors of production are: land, labour, human capital (education), physical capital, political connections (and good luck). As a country that relies in agriculture, access to land is critical. Fertile land upon which agricultural production depends is concentrated in a few regions in the country. Only 20% of the country is considered arable leaving the rest of the country with only marginal

agricultural activities. Since agriculture is the main activity, inequality in access to arable land led to inequality in incomes and livelihoods in the country. Inequality in incomes especially from agriculture has implications on the ability of different regions in mobilizing own resources for development. There are, at the same time, disparities in physical capital and political connections. Since these are not the focus in this paper we do not discuss them further.

Labour as a factor of production is fairly well distributed throughout the country. In most locations in Kenya there are adequate labour resources required for production. In fact in many locations, the problem is one of excess supply. This is manifested in the high rates of unemployment both in rural and urban areas. This however does not mean that the supply of all types of labour is adequate. Certain skills may actually be in short supply thus constraining the generation of incomes. This leads us to the issue of human capital.

Human capital, which is the subject of this paper, is one of the key factors of production. Investment in education that leads to human capital is recognized as the "engine of economic growth" both at the regional and national levels. Human capital contributes to economic growth in two ways. First, the human capital embodied in human beings increases that individual's productivity, leading to an increase in total production and to economic growth. Second, the human capital embodied in an individual also contributes to the productivity of all the other factors of production as well. Available evidence shows that education, for instance, significantly affects agricultural productivity (see for example Ti1ak, 1994). The evidence shows that an extra year of education may increase productivity with a

magnitude of between 2-4%. Education also influences the selection of technologies of farming. A better-educated farmer may be able to choose a superior technology than a less-educated farmer would, and thus the productivity levels obtained with the new technology may crucially depend on the level of farmers' education.

There are wide disparities in education in Kenya and by implication human capital. These disparities can be attributed to a wide range of factors including socio-political and historical factors. Table 2 below and Appendix Table 1 show some of the dimensions of education disparities in Kenya.

**Table 2: Employment by province and level of education, 1999 (%)**

| Province  | None  | Pre-primary | Std 1-4 | Std 5-8 | Form 1-4 | Form 5-6 | University | Not Stated |
|-----------|-------|-------------|---------|---------|----------|----------|------------|------------|
| Nairobi   | 5.03  | 5.06        | 13.31   | 28.15   | 37.90    | 2.35     | 4.01       | 4.20       |
| Central   | 8.39  | 7.26        | 23.29   | 34.89   | 20.83    | 0.72     | 0.81       | 3.79       |
| Coast     | 29.44 | 8.74        | 19.02   | 24.28   | 14.22    | 0.64     | 0.62       | 3.04       |
| Eastern   | 17.83 | 10.15       | 26.21   | 29.20   | 12.61    | 0.39     | 0.41       | 3.19       |
| N/Eastern | 81.73 | 1.86        | 6.36    | 4.55    | 2.99     | 0.07     | 0.10       | 2.35       |
| Nyanza    | 10.90 | 10.87       | 27.15   | 31.23   | 14.12    | 0.49     | 0.54       | 4.70       |
| R/Valley  | 23.07 | 9.40        | 22.12   | 26.69   | 13.72    | 0.46     | 0.54       | 3.65       |
| Western   | 13.50 | 11.30       | 27.90   | 28.98   | 14.08    | 0.47     | 0.39       | 3.37       |

**Source: Republic of Kenya. 2001**

Inequality in economic development interacts with unequal distribution of human capital, leading to more inequality within regions. Employment (formal), incomes and poverty levels thus differ widely across regions in the country (Table 3). One relative pessimistic implication of the state of affairs is that inequality is likely to worsen with decentralization before it

improves.

The distribution of human capital may change quite slowly, while market institutions and opportunities may change rapidly. Given the current distribution of education, many of the institutional development will disproportionately benefit areas with adequate human capital pools.

**Table 3: Disparities in incomes and poverty in Kenya**

| Province    | Wage Employment (2002) in '000's | Per capita income, 1998 (Kshs) | Absolute poverty (1997) | Human Poverty (2002) |
|-------------|----------------------------------|--------------------------------|-------------------------|----------------------|
| Nairobi     | 425.6                            | 78,644                         | 31.9                    | 34.1                 |
| Coast       | 210.8                            | 18,840                         | 62.1                    | 31.6                 |
| Eastern     | 242.7                            | 15,131                         | 58.7                    | 37.3                 |
| N/Eastern   | 15.7                             | 29,677                         | 63.1                    | 43.1                 |
| Nyanza      | 169.1                            | 14,169                         | 64.0                    | 42.8                 |
| Rift Valley | 381.7                            | 15,251                         | 53.8                    | 36.5                 |
| Western     | 112.2                            | 11,191                         | 53.8                    | 38.5                 |

*Source: Economic Survey 2000, Draft KHDR 2003, Labour Force Survey, 1998/99*

### **Other challenges and concerns for a devolved system in Kenya**

The Draft Bill of the Kenyan Constitution does not explicitly address itself to issues related to human resources/capital beyond the guarantee of human rights such as freedom of association, expression, etc. However there are certain generic implications which are crucial and worth considering pertaining to human capital in a devolved system This section of the paper highlights some.

### **Equity issues**

The impact of decentralization upon spatial disparities in human capital is potentially two-fold. Decentralization can reduce spatial inequalities in access to basic education health etc., which are crucial for human capital development. On the other hand, however, if decentralization extends to the mobilization of public resources (i.e. revenues as well as expenditure), existing disparities are likely to be exacerbated. This follows from the observation that the poorer regions of the country will have

correspondingly lower fiscal potential.

Since different regions are differently endowed in terms of natural resources, level of economic activities, land values, etc. some local jurisdiction will generate more revenue than others and afford their citizens more or better quality services than other.

There is thus a case for an equitable distribution of available resources to avoid such disparities. Equally, there is a case for regions to take initiatives towards their own development. The challenge to decentralize programmes is therefore to devise arrangements which allow each region to undertake such initiatives as they see fit, and to benefit from them, while putting in place mechanisms to safeguard against extreme disparities between groups.

The proposal in the Draft Bill is to adopt some equalization and distribution measures akin to what is used in other countries such as Australia, Canada and Germany and some Asian countries. Several measures are available to ease regional already existing gaps and those caused by decentralization.



Inter-governmental fiscal transfers including fiscal equalization payment can be used to achieve horizontal-equality-to secure the capacity to provide public services of a comparable level of service everywhere in the country. It is very important that the framework of inter-governmental fiscal transfers impact on the extent of the disparity among sub-national levels of government in service delivery especially education, public health and infrastructure.

The design of fiscal equalization system depends in many countries on the political, economic and institutional frameworks. Although these circumstances may be peculiar to each and every country a number features of the system are key:

- Fiscal transfers should be determined on the basis of objective, reasonable and ideally well-recognized allocation formula. This should ideally not be a secret political formula.
- Fiscal transfers should be stable every year so that sub-national governments can draw up appropriate budgets and programmes, including human capacity building
- The allocation formula should be simple and reliable

Given the serious disparities in educational opportunities between rural and urban areas, and across regions in Kenya, the enhancement of equity is a foremost concern. The critical question is how this should be done. There is a vital need for increased resource provision directed towards those regions and for the students who are currently disadvantaged (Women). This call for re-distributive measures in education policy-which can only be fully undertaken by the national government. In the Draft Bill of the Constitutions the central

government is to retain the powers for broad policy formulation and taxation for redistribution and equalization.

### **Cost implications**

A major consideration in changing to a devolved system is the cost implication. It is generally argued that devolved system are likely to lead to a higher wage bill owing to its human resource requirements. In understanding the links between decentralization and the size of the government, it must be realized that the concept of decentralization is complex and involves a variety of dimensions. This as was earlier indicated includes the assignment of expenditure and revenue responsibilities among different levels of government, the degree of political autonomy enjoyed by the lower levels, the nature of transfers and the degree of borrowing autonomy granted by the lower levels of government. All there are likely to generate benefits, which should be weighed against the possible increases in wage bill.

### **Effects on the civil service**

An issue that needs to be addressed is how decentralization will affect the civil service. Effective provision of services at all levels of government requires a capable, motivated and efficient staff. When civil service functions and structures are decentralized, existing bureaucratic patterns must be re-organized as roles and accountability are shifted. Decentralization thus intensifies the need for capable staff and increases the importance of capacity-building programs.

Decentralization is a challenge to the civil service in a number of ways:

According to the World Bank (1999):

- Decentralization changes the location of power and jobs: Movements geographically or across tiers of government is often impeded by issues related to statutes, prestige and labour mobility (World Bank, 1999).
- Decentralization creates new responsibilities for inexperienced actors: Where civil servants are not well equipped in terms of technical managerial skills, decentralization gives sub-national governments more room to fail unless specific steps are taken to build local capacity.
- Decentralization can disperse expertise groups: The need for specialized personnel is related in part to the size of the territory covered by the entity. Below a certain size, it might be counterproductive or cost inefficient to have specialists or technical personnel.
- Transferring human capital: The transfer of human resources to local control is far more complex process than the handover of facilities or equipment. The following categories of issues illustrate the range of decisions that need to be made:
  - Modifying or creating new organizational structures and positions at the central and sub-national levels, and specifying the linkages between them,
  - Revisiting job descriptions and reporting relationships Defining processes for personnel management,
  - Deciding how to reallocate existing staff to new organization structures
  - Transferring personnel records and staff,
  - Dealing with civil servants will not or cannot transfer.

### **Human capacities of local authorities**

Beyond the political tensions involved in decentralizations attempts, there are often significant problems related to the nature of the bureaucracy - its nature, technical competence and resource base. The creation of new systems of local government requires considerable administrative skill and resources. There may be basic problems with respect to personnel needs, attitudes, and training in local government. In Kenya today, staff shortages at the local level appear to be a critical constrain to decentralization in Kenya. Many officers tend to be under qualified for their jobs. There are frequently severe gaps in staffing. Many councils have so many vacancies in top offices-so that one officer might be expected to play one of these tasks over an extended period. The reason why many municipalities are not able to raise good quality personnel is often due to their parlous finances. Local government often lack the resources to attract highly qualified personnel into its ranks. Gross mismanagement of resources, nepotism and corruption in some of the local authorities has only made the situation worse.

### **Building local capacity**

The building of local capacity is one of the most important factors in creating a well-decentralized civil service. The degree of local capacity determines the kind of human-resource management strategies that will be feasible and desirable. Decentralization of human capacity is likely to succeed where sub-national governments have the financial and managerial ability to set competitive compensation packages and salary levels that will attract local talent. Success in decentralization of human resources will

require:

- The creation of a strong legal framework to define responsibilities and standards. The framework should also address issues related to financing and reporting; and determine the type of control mechanisms necessary. Concerns about corruption, lack of accountability and transparency, and questionable ethics have created demands for much higher standards of conduct in the management of public affairs, and for the establishment of more effective mechanisms by which the public can be satisfied about the conduct and probity of public officials.
- Clear reporting mechanisms both vertical (with the central government) and horizontally with other government agencies at the same level.
- Investing in human capital: The change in roles and responsibilities that decentralization generates brings a demand for new skills. Prominent among these are financial, human resources, and logistical management skills, as well as competence in advocacy and negotiations. Investing in staff development at both the central is key in achieving success of decentralization. Training must be practical and firmly focused on the new jobs requirement. It must be wide in scope, involving both central and local managers. It must be continual so that the rapid staff turnover that often accompanies decentralization does not dilute the training efforts. Sub-national levels of government are expected to be responsible for recruiting technical and professional staff for various technical and professional activities. These entities would need to establish technical institutes and village

polytechnics from where to draw personnel.

- Matching of demand and supply of human capital: This is vital to constraints in human capital that may jeopardize delivery of services.

### **Monitoring the impact of decentralization on human capital**

Regular monitoring is essential for avoiding decentralization-related human resource concerns from growing into major problems that can take considerable time and resources to solve. Such monitoring should be focused on the equity of staff distribution. Monitoring should commence with the collection of baseline data prior to the start of decentralization, and continue as an ongoing-component of local administration. This requires the design and implementation of suitable management processes for ongoing data collection, analysis and interpretation.

## **V Conclusions**

While advocating for decentralization/participatory local governance as a model of choice in Kenya, the implications of human capital development must be given due consideration. A devolved system has substantial human capital requirement. The effectiveness and political and economic sustainability of decentralization depends of crucially good management and governance. These in turn depend on human capital. It is our hope that some of the issues and concerns raised should be seen as an alert about the crucial importance of human capital/resource issues in decentralization. The full implications of decentralization for human capital development demand further study and examination.

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### Appendix I: Education Indicators in Kenya

| Education Indicators                          | Year | PROVINCES |        |         |           |         |        |             |         |          |
|---|------|-----------|--------|---------|-----------|---------|--------|-------------|---------|----------|
|   |      | Central   | Coast  | Eastern | N/Eastern | Nairobi | Nyanza | Rift Valley | Western | National |
|   | 1990 | 878534    | 358898 | 1018506 | 34811     | 146565  | 977996 | 123845      | 744164  | 5392319  |
| Primary School Gross Enrolment (Numbers)      | 1999 | 64889     | 79729  | 34707   | 48134     | 50852   | 17864  | 32842       | 38582   | 67608    |
| Primary School (Numbers)                      | 1990 | 1530      | 981    | 3313    | 134       | 216     | 3326   | 3628        | 1736    | 14864    |
|   | 1999 | 1799      | 1121   | 4091    | 175       | 248     | 3806   | 4494        | 1877    | 17611    |
| Primary School Classes (Numbers)              | 1990 | 24070     | 10827  | 32440   | 1094      | 3536    | 32148  | 38212       | 22540   | 164867   |
|   | 1999 | 22176     | 13824  | 37948   | 1333      | 3817    | 36466  | 47708       | 24841   | 188113   |
| Trained Primary School Teachers (Numbers)     | 1990 | 23125     | 6287   | 23129   | 512       | 4020    | 20951  | 2660        | 16777   | 1211461  |
|   | 1999 | 25320     | 10567  | 35454   | 1145      | 4537    | 30586  | 44764       | 22463   | 74836    |
| Untrained Primary School Teachers (Numbers)   | 1990 | 3706      | 3939   | 10918   | 460       | 390     | 11971  | 14219       | 6053    | 51659    |
|   | 1999 | 489       | 721    | 745     | 39        | 20      | 462    | 1874        | 719     | 7069     |
| Primary Schools class Size (Pupils per Class) | 1990 | 36.50     | 33.15  | 31.40   | 31.82     | 41.45   | 30.42  | 32.26       | 33.02   | 32.71    |
|   | 1999 | 39.00     | 27.47  | 29.9    | 36.11     | 39.52   | 27.91  | 30.03       | 33.76   | 31.19    |
| Primary Schools Pupil/teacher                 | 1990 | 32.74     | 35.10  | 29.91   | 35.81     | 33.23   | 29.71  | 30.16       | 32.60   | 31.15    |

|  |             |       |       |       |       |       |       |       |       |       |
|--|-------------|-------|-------|-------|-------|-------|-------|-------|-------|-------|
| <b>Ratio</b>   |             |       |       |       |       |       |       |       |       |       |
|  | <b>1999</b> | 33.51 | 33.64 | 30.50 | 40.65 | 33.10 | 31.76 | 30.72 | 36.17 | 32.26 |
| <b>Primary School Pupil/trained Teachers Ratios</b>      | <b>1990</b> | 37.99 | 57.09 | 44.04 | 67.99 | 36.46 | 46.68 | 46.24 | 44.36 | 44.40 |
|  | <b>1999</b> | 34.16 | 35.94 | 32.01 | 42.04 | 33.25 | 33.28 | 32.01 | 37.33 | 33.56 |
| <b>% Schools Facilities Available-Workshops</b>          | <b>1994</b> | 40    | 40    | 41.5  | 59    | 46    | 18    | 25    | 13    |       |
| <b>% Schools Facilities Available-Home science Rooms</b> |             | 31.5  | 19.7  | 19.4  | 44    | 8     | 23    | 8     | 19.4  |       |

# TAXES AND REVENUE COLLECTION

**Mr. Andrew Okello, Consultant.**

## 1. INTRODUCTION

The world today is living through the age of democracy and decentralization. While democracy has a somewhat longer history, the process of decentralization is a more recent phenomenon. Decentralization is defined in terms of “the degree of independent decision making exercised at the local level” (Bird, 1994). Decentralization has been classified into three types; deconcentration, delegation and devolution.

- Deconcentration is the distribution of decision-making authority among different levels within the central government. In most cases, a representative of the centre is located in the region and supervises local governments and other field officers of the centre.
- Delegation refers to the case where local governments act as agents of the central government.
- Devolution is the transfer of powers from the central government to autonomous local governments.

Deconcentration and delegation involve decentralization of bureaucratic authority in specified functions or services while devolution involves decentralization of political authority. The term ‘decentralization’ is generally applied to devolution of political and economic/fiscal authority.

Any devolution plan must fulfil four prerequisites:

1. It must define the new relationships between the centre, provincial, district and local tiers of the state and within the local tiers itself.
2. It must identify the tier where the devolved local authority is to be located.
3. It must designate the functions/services which are to be devolved.
4. It must draw up a fiscal plan to ensure that institutional autonomy is not cancelled out by lack of fiscal autonomy.

The pros and cons of the proposals contained in the draft constitution should ideally be assessed on the basis of the above four prerequisites. However, this paper will mainly discuss item 4 above. That is, it will review various options for drawing up a tax policy and tax administration plan to support the devolution as proposed in the draft Constitution. Various options will be discussed including a review of arrangements in other countries with the aim of informing the process.

## 2. REVIEW OF THE FISCAL PROVISIONS OF THE INDEPENDENCE CONSTITUTION

This is not the first time that Kenya is attempting to devolve power to regions. Indeed, Kenya was a constitutionally devolved state at independence. Significant power was devolved to regions and

entrenched in the constitution. It is therefore crucial to review the provisions of the independence Constitution and assess its successes and failures in order to better inform the current exercise.

Kenya was divided into eight regions, namely Coast, Eastern, Central, Rift Valley, Nyanza, Western, North Eastern and Nairobi Area. The regions had both legislative and executive authorities, were responsible for provision of a wide range of services at the local level and enjoyed certain tax and financial powers.

Specifically with respect to the tax and financial powers:

- Each region had a Regional Fund and expenditures were legislated by the Regional Assembly in consultation with the Ministry of Finance.
- Regional Assemblies made laws (however powers did not extend to the taxation of bodies corporate, partnerships or persons under the age of 18) with respect to:
  - Taxes on/or relating to the incomes of persons resident within the region.
  - Rates on land or buildings.
  - Poll taxes on persons.
  - Taxes in respect of entertainment.
  - Royalties in respect of common minerals extracted in the region.

In addition, the Independence Constitution entitled regions to certain revenue (shared according to specified proportions) collected by the Central Government as follows:-

- Total tax on motor spirits and diesel oil (whether import/excise duty or sales/purchase tax).
- 32% of tax on other commodities (other than motor/spirit or diesel or agricultural products produced in Kenya).
- Licensing of motor vehicles or drivers of motor vehicles was restricted to regions of usual residence and revenues collected were retained in the region.
- Two-thirds of proceeds exceeding K£100,000 in respect of royalties on the extraction of minerals and mineral oils.

Clearly, the Independence Constitution balanced political devolution with fiscal empowerment. However, for a variety of political reasons, these regional arrangements were dismantled systematically between 1964 and 1969 and the financial arrangement entrenched in the Constitution deleted. However, looking back, this noble idea in the independence Constitution failed as a result of power struggle between the centre and the local levels, power meaning command of scarce resources which certainly includes financial resources.

The Draft needs to be developed further to ensure that there will be no tension created between the centre and the Districts. It needs to specify clearly the services that will be transferred from the central government to local level institutions and relate these with revenues that should flow from central to local levels. As it is now the draft creates additional administrative structures at local levels and transfers some resources to the local level, but it is not clear how these resources will be utilized.



### **3. CURRENT POSITION**

The current constitution does not provide for any form of devolution or make any reference to the Local Government System. Some regions have for a long time supported the re-introduction of some form of devolution and fiscal empowerment to the local levels of governance on the basis that this would provide scope for equity in sharing of national resources. The draft constitution has therefore attempted to address this subject.

### **4. GOVERNMENT REVENUE COLLECTION**

#### **4.1 Background of Revenue collection**

A Government's revenue collection is a crucial assignment that has to be done with diligence, commitment and accountability. This is so because achievement of its goals will be based on the availability of financial resources. The domestic amount of revenue available will determine how far the government can re-direct and stabilise the economy without external resources.

In Kenya, the noble responsibility of revenue collection has since independence been assumed by both the Central and Local Governments. Before July 1995, the Income Tax, Customs & Excise and Sales Tax Departments under the Ministry of Finance collected central government revenue. Since then, revenue collection was centralized and assigned to Kenya Revenue Authority (KRA). In addition, the Authority is mandated to administer all tax laws in the country. Most of the taxes administered by KRA are those that are at national level.

Table 1 below gives a summary of revenue collection for the central and local governments for the past five fiscal years. KRA collects 95% of the central government revenue while other government organs collect the remaining proportion. The local governments' revenue is collected mainly by local authorities while central government transfers to local authorities account for about 23-27% of total local authorities' revenue or a mere 1.4-1.5% of total revenue. The table below provides additional details

**Table 1. Revenue collection in Kenya, 1998/99 – 2002/03 in Kshs. Millions**

|                            | 1998/99        | 1999/00        | 2000/01        | 2001/02        | 2002/03        |
|----------------------------|----------------|----------------|----------------|----------------|----------------|
| <b>Central Government:</b> |                |                |                |                |                |
| KRA                        | 165,166        | 168,185        | 182,609        | 183,428        | 201,695        |
| Others                     | 8,693          | 10,258         | 9,703          | 11,079         | 15,821         |
| <b>Sub-total</b>           | <b>173,859</b> | <b>178,443</b> | <b>192,312</b> | <b>194,507</b> | <b>217,516</b> |
| <b>Local Government:</b>   |                |                |                |                |                |
| Local authorities          | 7,209          | 7,132          | 7,329          | 8,073          | 10,631         |
| Current transfers to LAs   | 3.75           | 1,004          | 2,764          | 3,031          | 3,157          |
| Sub-total, LAs Revenues    | 7,213          | 8,136          | 10,093         | 11,083         | 13,788         |
| <b>Grand Total</b>         | <b>181,068</b> | <b>185,575</b> | <b>199,641</b> | <b>202,580</b> | <b>228,147</b> |

Source KRA and Economic Survey

The cost of collection on the other hand has varied between 1% and the 1.5% of total revenue collection in the last few years. Despite containing the cost of collection at relatively low levels, limited financing has hampered modernization, expansion and realization of the country's full revenue potential.

Most of Kenya's traditional revenue sources and the requisite efficiencies of the revenue collection machinery have already been tapped with success at lower costs. Moving forward, the cost of collection is expected to increase as the KRA braces up to penetrate the untapped revenue potentials i.e. from the informal sector and concealed transactions. Hence the need for increased allocation to KRA in the tune of 2-3% of revenue collection.

#### 4.2 Revenue Collection for the Central Government

##### 4.2.1 Revenue Collection by Kenya Revenue Authority

The following taxes are collected by KRA:

##### Direct Taxes

- Pay As You Earn (PAYE)
- Corporate Income Tax
- Other Income Taxes

##### Indirect Taxes

- VAT
- Import Duties
- Excise Duties

Besides the above revenue items, the Authority collects the following fees, most of which are on agency basis.

- Traffic Fees
- Aviation Revenue
- Air Passenger Service Charge
- Revenue Stamps
- Kenya Bureau of Standards Levy
- Road Transit Toll
- Road Maintenance Levy

##### 4.2.2 Other Institutions Involved in Revenue Collection at the National Level

- *Ministry of Lands & Settlement* - Collects Rent of Land and Stamp Duty Revenue.

- *Ministry of Environment and Natural Resources* - Collects Mining Fees, Royalty on Fuels Wood, Carbon Dioxide Gas, Magadi Soda and Forest Fees.
- *Ministry of Public Works and Housing* – Collects Rent of Buildings, Rent of Government Buildings and Housing.
- *Registrar of the High Court* - Collects Fines and Forfeitures.
- Loan interest and redemption receipts are collected from various Parastatals and paid to the Investment Secretary of the Treasury.
- Other revenues collected under trading licenses and paid to the Financial Secretary to the Treasury include:
  - Hotel and Restaurant licenses
  - Livestock Traders Licenses
  - Liquor Licenses
  - Miscellaneous Licenses
  - Registration of Banks and Financial Institutions

#### **4.2.3 Revenue collection for the Local Government**

At the local level, City, Municipal and County Councils are responsible for revenue collection in their jurisdiction. These are mainly user fees and they include:

- Trading Licenses, e.g. Single Business Permits
- Rent of Buildings
- Cess collected on farm produce
- Rates
- Sale of goods and services
- Service user fees such as water, sanitation, health and education
- Game Park fees, which are collected by Kenya Wildlife Service (KWS) and the

proceeds are shared between KWS and County or Municipal Councils.

## **5. REVENUE SHARING/FISCAL DECENTRALISATION ARRANGEMENT – CASE STUDIES**

### **5.1 South Africa**

The federal financial system in South Africa is better described as a unitary state concept. In 1999/00, for example, the province of KwaZulu-Natal obtained 97.2% of its total revenue from the national government while the balance came from its own resources. Fees collected under the Road Traffic Act, primarily motor vehicle fees, accounted for almost half of the provincial's own revenue.

The constitution of South Africa prohibits provinces from levying personal income taxes, corporate income taxes, value-added taxes, property taxes and customs duties. The constitution, however, allows provinces to levy surcharges on the base of any tax levies by the national government with the exception of corporate income tax, VAT, property taxes and customs duties provided that:

- They do not interfere unduly with national economic policies, economic activities that cross provincial boundaries, or the national mobility of goods, services, capital and labour, and
- They are regulated by an Act of Parliament enacted after consideration of recommendations of the National Department of Finance.

However, it is worth noting that in contrast, local governments especially municipal councils raise a substantial portion (90%) of their own revenues—mostly through bulk purchasing and

retailing of water, electricity, sewerage services, property taxes and other fines and fees. They receive only 11% of their revenues from central and regional transfers.

## 5.2 Ghana

Ghana developed a law that created District Assemblies (DAs) for each of Ghana's 110 districts in the 1980s. The DAs are the sole development and taxing authorities empowered to prepare and approve their budgets, make by-laws and are recognised as corporate bodies. In respect to finance, the central government has ceded some of its revenue raising rights to local governments such as entertainment, casino, gambling, betting, advertisement taxes, registration fees, commercial transport levies and taxes paid by informal sector operators. Local governments also enjoy another huge influx of funds from the constitutional provision - District Assembly Common Fund (DACF) - of at least 5% of nationally collected revenues.

## 5.3 Uganda

In Uganda, local governments are assigned responsibilities for primary, secondary and technical education, health centres and hospitals other than those providing referral and medical training, feeder roads and agricultural extensions. The major source of local revenues in Uganda is the unpopular graduated personal tax, which provides 60-90% of districts' own revenues. Districts own revenues account for about 5-10% of districts total revenues. Additional funding also comes from conditional and unconditional grants from the central governments and donors through the central government.

## 5.4 Canada

Revenue Canada is responsible for collection of the following taxes on behalf of the central government:

- Federal Income Tax
- Harmonized Sales Tax (HST) or the Goods and Service Tax (GST) – This is shared between the central government and the provinces in which the consumption takes place.
- Excise duties
- Import Duties
- Various Customs Fees
- Employee and employer Canada Pensions Plan Contributions
- Employment Insurance Premiums

In addition, Revenue Canada collects the following on behalf of the provinces:

- Personal Income Tax on behalf of all provinces except Quebec
- Corporate Income Tax on behalf of all provinces save for Alberta, Ontario and Quebec
- Alcohol and Tobacco taxes at the border on behalf of some provinces

## 6. AN ANALYSIS OF POTENTIAL TAX INSTRUMENTS TO SUPPORT DEVOLUTION<sup>1</sup>

The relevant criteria in evaluating the suitability of a tax assignment to lower levels of government are, first and foremost, the general principles of a tax system design should not be violated. The detail criteria against which to evaluate provincial taxes can be summarized as:

- The tax system should not undermine national goals of

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<sup>1</sup> The discussion is based on a 1999 study by South Africa's National Department of Finance.

macroeconomic stability and redistribution.

- The tax should provide stable and predictable revenue for sub national governments.
- The tax base should be immobile in order to prevent tax-induced movements of factors of production and also to avoid tax competition driving down revenues excessively.
- The administration and compliance costs of the tax should be minimized.
- The tax should be fair, broad-based and visible in order to enhance accountability.
- There should be a close matching between taxes and expenditure financed therewith, in accordance with the benefits principle.
- Economic distortions through competition, tax base migration and tax exporting should be minimized.

In view of the above, the following taxes can be considered for purposes of sub national governments taxes:

- Excise taxes on certain services may be appropriate, provided that particular attention is given to mobility of the specific tax base and the potential impact on investment. Such a tax would be a levy on the provision of public services such as roads maintenance, which has a relatively immobile tax base.
- Tourism taxes could be a serious contender as sub national taxes but an integrated approach to tourism is required. Tourism taxes are levied on tourism services such as car rentals, game reserves and accommodation.
- Environmental taxes can be levied on consumption and production and could be levied with the objective

of discouraging pollution in production.

- Presumptive taxes on business in the form of business license fees can also be considered but extreme caution is needed to protect against unproductive tax competition.
- Mineral taxes could be introduced on the extraction of minerals in their jurisdiction.

Table 2 in the appendix summarises some of the guidelines developed from the tax assignment literature that need to be adhered to in developing tax instruments for the various levels of government.

For purposes of prudence, sub national taxation should be regulated in terms of an Act of Parliament. The regulatory framework should define the parties to be consulted and set the timing of the process.

## **7. A CRITIQUE OF THE CURRENT TAX SYSTEM**

Before one makes suggestions on possible revenue sharing techniques, it is absolutely necessary that one understands the structure of Kenya's Tax systems. Kenya's tax system is generally characterized by:

- A narrow tax base implying a retrogressive tax system particularly to the few taxpayers. Due to a number of administrative constraints and in order to leave the low-income individuals out of the tax net, VAT and personal income taxes, for example, have taxation thresholds. Excise taxes, on the other hand, are payable at the manufacturer level. What this means is that our tax systems are not broad based. Taxes are therefore realized at various stages of production and it would be impossible to estimate the

taxes attributable to the final stage of consumption.

- Inadequate mechanism to tap the rapidly growing informal sector in a bid to broaden the tax base. The informal sector has continued to grow, albeit at the expense of the formal sector. Kenya currently does not have any special tax legislation for this sector and therefore continues to attempt to tax this sector using formal sector frameworks. Of course, this means that the largest growing sector is largely untaxed. This is a threat to the tax capacity of the country as the informal sector continues to eat into the formal one.
- Due to a number of constraints, mainly financial, Kenya Revenue Authority's coverage in terms of tax administration is restricted to mainly large urban areas. This is despite the fact that Kenya is largely a rural, agricultural and subsistence economy. For example, KRA has 1,671, 611, 201, 148, 103, 100, 47 and 36 members of staff stationed in Nairobi, Coast, Rift Valley, Nyanza, Central, Western, Eastern and North Eastern provinces respectively. The capacity of the authority to effectively collect revenue in all localities of Kenya is therefore severely constrained.
- KRA still relies heavily in manual processes and is not effectively computerized. The necessary reconciliation procedures to effectively allocate revenues raised to actual regions of final consumption, for example, would be impossible.

What this means is that, for now, any attempt to specify in the constitution that certain taxes raised from specific regions be retained in those areas would be extremely unfair. Not that this is not a

good idea, but because our tax system is not broad based and administrative capabilities are thoroughly constrained.

## **8.0 RECOMMENDATIONS TO BE ENTRENCHED INTO THE NEW CONSTITUTION**

### **8.10 Necessary Taxation and Expenditure Power Map**

KRA is only concerned with revenue collection while the expenditure of the revenues collected falls in the docket of other arms of Government. Treasury defines revenue collection policy and KRA only comes in where there is conflict of policy resulting in administrative problems. However, there is a need to properly define the expenditure power map to ensure that it is supportive of revenue collection. To enhance revenue collection KRA needs to promote voluntary compliance, which is in itself dependent on social service delivery by the Government. The lack of essential service provision in the recent past had led to the present apathy to tax paying. On the other hand, the power map required to enhance revenue collection should include:

#### **8.1.1 Entrench Kenya Revenue Authority into the Constitution**

There is no express mention of KRA in the draft Bill. To be able to safeguard the revenue collection function for the present and for posterity, there is need to entrench KRA into the constitution as has been accorded to other revenue dealing institutions such as the Central Bank of Kenya, Controller and Auditor General, etc.

### **8.1.2 Entrench Funding Provision into the Constitution**

The KRA Act stipulates that KRA should be allocated 1.5% of estimated total collections to fund its costs. Although the Authority has operated within this means since its inception, this amount is grossly inadequate to set up the expected efficient machinery to collect and inculcate the practice of paying taxes far and wide, that is, beyond the confines of the salaried employees and the well established persons. Furthermore, due to the budgetary pressure, KRA hardly ever gets the full 1.5% of total revenue collection, thus making it very difficult to enforce additional programs aimed at curbing revenue leakage and tax evasion. Revenue is key to government operations and should never be destabilised because of funding. Therefore, the new Constitution should provide and entrench into the constitution, expressly that KRA would retain 3% of total revenue collected to fund its programmes.

### **8.1.3 Give Security of Tenure to the Commissioner General**

Although the KRA Act provides for protection of security of tenure for the KRA's Chief Executive, (Commissioner General), the commissioners and officers working under them, in practice the protection has been found wanting; for example since its (KRA) establishment (1995) it has had five Commissioner Generals including the incumbent. This means that the last four (4) Commissioner Generals served the Authority for an average of one and a half (1½) years. This situation clearly does not augur well for revenue collection both in terms of continuity and policy implementation.

The Kenya Government had in the past variously expressed the imperative of

reliance on domestic revenue while safeguarding good relationship with our development partners as a means of ultimately attracting Foreign Direct Investment (FDI) as opposed to loans or an acceptable combination of both. This is in recognition of ephemeral nature and conditionality attached to the loans and damage wrought on an economy upon the source of the funds drying up. Moreover lesser reliance on foreign assistance serves to underpin our sovereignty and pursuit of policies, which are favourable to Kenyans.

The Poverty Reduction Strategy Paper (PRSP) 2000 - 2003 last paragraph of page five (5) *inter alia* underscores the need to rely on domestic revenue. Furthermore, Chapter 2 of the NARC manifesto broadly dwells on the crucial role of optimum revenue collection, so as to create space for the private sector, that is, equitably share the domestic resources between public and private sector.

It is for the foregoing reasons that it is strongly recommend that the KRA Chief Executive merits security of tenure under the constitution presently in the making.

### **8.1.4 Expressly State the Commissioner General's Qualification**

KRA, like the rest of Kenyans have in the past witnessed key strategic institutions completely run down by mediocre Chief Executives who lack merit and integrity to shoulder such responsibilities. Given the strategic role KRA performs in the psyche of the Kenyan economy, it is necessary that the new Constitution sets up the criteria to be used in appointing Commissioner General and entrench the same in the constitution as has been done in allied cases of the Governor of CBK, Controller & Auditor General, etc.

### **8.1.5 KRA as the Principal Collecting Agent of the Government**

KRA should be recognized in the constitution as the sole agency for collecting government revenue. Currently, a number of government agencies are also involved in collection of revenue at costs of collection ranging between 15 – 40%. KRA has the comparative advantage in revenue collection and should therefore be enabled to take over collection of all government revenue.

### **8.20 Obligation to Pay Tax**

The Culture of paying taxes has not been cultivated amongst Kenyans. This can be attributed to the global belief that taxes are compulsory levies without a *quid pro quo*. To reverse the trend and generate more resources for public goods, there is need for the constitution to explicitly state the obligation of the Kenyan citizenry to pay tax and the right to demand for services in return. This will ensure transparency and accountability in the provision of services to the taxpayers.

### **8.30 Sharing of revenue**

The central government has assumed many responsibilities for many diverse problems that it no longer has the ability to do anything well. Therefore, it is necessary for it to concentrate on a few things that can only be done collectively and centrally. For instance, those services that will improve the general well being of the country and the general productivity of the economy, but which no local authority would finance unilaterally. This will prevent some local authorities and their special interest constituents from free riding on revenue contributions of other local authorities to the central government by spending on

projects and programmes whose benefits are less than their cost.

To enhance service delivery, there is need for division of governance between different levels of the Government. This will ensure sharing of service delivery responsibilities and taxing powers. This will cultivate healthy competition amongst regions or municipalities since service delivery will be purely based on the amount of revenue collected from the region. An examination of vertical and horizontal imbalances between expenditures and revenues can be done as a measure of the capacity of different levels of government.

Kenya is now a more open and globalize society. It is not possible to accurately classify revenue collection according to regions of origin. For example, majority of import duty collected in Mombasa or Eldoret for that matter is on goods destined to all parts of Kenya. VAT collected on sugar at factory level is attributable to consumption of the same all over the country. How do you apportion revenues to regions of final consumption? Does KRA or any other arm of government have the capacity to do this? The answer is no.

Instead of trying to tie sharing of financial resources to the origin of purchase/consumption and therefore revenue (which is highly inequitable anyway since economic activities are concentrated in a few areas) the Commission should borrow a leaf from the current Local Authorities Transfer Fund (LATF) arrangement which ring fences 5% of total income taxes for distribution to local authorities on the basis of population size and other social and economic indicators. This arrangement can be expanded to accommodate the expanded mandate to Districts.



#### **8.40 Establishing enabling Institutional Framework**

Enhancement of revenue mobilization is dependent on establishment of an enabling institutional framework and arrangements for effective management and governance of public revenue. As proposed in your document this can be looked at under the following headings:

- **Power to raise revenue**

This is currently vested in Parliament, which has delegated the administration to the Ministry of Finance and other Ministries. The Ministries in turn have established relevant revenue administrations. Although under the current constitutional dispensation, these revenue collection modalities have served the country fairly well, some of the revenue collection agents have performed below expectations. In our opinion similar arrangement may be suitable even under the proposed devolved system. However, in order to address some of the shortcomings of the current revenue collection arrangements, there is a need to consolidate revenue collection under one body such as KRA.

- **Power to apply, spend and administer revenue**

As stated in the bullet above, this is also vested in Parliament and delegated to the Ministries. The separation of power to apply, spend and administer (revenue collection) is good for the purpose of checks and balances but it obscures the relationship between payments of revenues by taxpayers and receipt of public goods and services. The latter is considered to be one of the contributing factors to taxpayer compliance apathy. This calls for greater accountability and transparency in public expenditure.

- **Power to budget, control and audit revenue**

The Power to budget and control revenue is vested in the Ministry of Finance but auditing of revenue is vested in the Controller and Auditor General. KRA has in the past experienced two problems with these arrangements. One, the Controller and Auditor General's (C & A G) reports are often received following protracted delay and more often than not they are not acted upon. Secondly, the current dispensation does not provide C& AG with recourse in case his recommendations are not acted upon. This puts revenue at risk.

- **Role of stakeholders**

The roles of different stakeholders, both public and private, need to be clearly pronounced to enable them to participate fully in the revenue collection process. KRA has attempted to do this by developing a taxpayers charter, which spells out the rights and obligations of taxpayers while dealing with the Authority. This needs to be taken further by being enshrined in the legislation, and legislatively and financially empowering KRA to deliver on its promises. In addition, all the stakeholders need to be given consultative fora by KRA and educated on their roles.

#### **8.50 Sources of Revenue**

The traditional sources of revenue are based on income, consumption and trade (both local and international) and user charges. In the foreseeable future, trade taxes are expected to decline hence the need to identify other sources of revenue. These may include:

- Consolidating other revenues currently outside the ambit of KRA such as NHIF, NSSF, CLT, HELB etc.
- Introducing taxes on natural resources i.e. mining, forestry, etc.

- Re-introducing capital gains tax, taxes on idle land, etc.

KRA has the capacity to act effectively as the fundraiser beyond taxation. Indeed, KRA has proved very efficient in the collection of agency revenue on behalf of various public organizations.

## 9. CONCLUSION

As has been mentioned earlier, it is necessary that the new Constitution addresses factors that led to the dismantling of devolution structures contained in the Independence Constitution. Specifically the following issues should be addressed:

- Central Government undermining the Local Authorities' powers to administer their policies via denial of adequate and timely funding of Local Authorities.
- Conflicting sources and methods of raising and administering revenue.
- Uneven distribution of resources.
- Within the context of multi-party democracy, there may be undermining of Local Authorities, which have a majority of people's representatives from other parties, that is, other than the party forming the Central Government.

It is necessary that the Constitution recognizes that revenue collection is the basic foundation that supports the development and stability of a nation and therefore should be jealously guarded in the Constitution.

## APPENDIX

**Table 2 Summary of guidelines for sub national taxes**

| Tax Instrument   | Determination of tax base            | Determination of tax rate            | Tax administration and collection    | Justification of assignment decision   |
|--|--------------------------------------|--------------------------------------|--------------------------------------|--|
| Customs duties   | National                             | National                             | National                             | Tax on international trade   |
| Corporate income taxes   | National                             | National                             | National                             | Mobile tax base and macroeconomic impact   |
| Resources taxes: <ul style="list-style-type: none"> <li>• Taxes on profit and income</li> <li>• Resource rent tax</li> <li>• Royalties, severance tax, license fees, mining leases, mineral property tax,</li> </ul> | National<br>National<br>Sub national | National<br>National<br>Sub national | National<br>National<br>Sub national | Geographically, unequal distribution of tax base<br>-do-<br>Benefit taxes/charges for sub national taxes |

|   |  |  |  |  |
|---|--|--|--|--|
| production or output charges<br><ul style="list-style-type: none"> <li>• Conservation charges</li> </ul>  | Sub national   | Sub national   | Sub national   | To preserve the local environment  |
| Personal income tax   | National   | National   | National   | Re-distributive in nature, mobile tax base and stabilization tool.   |
| Wealth taxes eg capital gains tax net wealth taxes, wealth transfers or capital transfer taxes, inheritance tax and estate duties.  | National   | National   | National   | Re-distributive function of government   |
| VAT   | National   | National   | National   | Border tax adjustments possible under national assignment and it can serve as a potential macroeconomic stabilization tool         |
| Single stage sales tax  | National<br>Sub national                                     | National<br>Sub national                                     | National<br>Sub national                                     | Harmonized rates and therefore lower compliance costs. Tax evasion ripe and high compliance costs.                                 |
| Excise taxes on service industries<br><ul style="list-style-type: none"> <li>• Tourism services</li> <li>• Betting and gambling</li> <li>• Lotteries</li> </ul>                           | Sub national<br>Sub national<br>Sub national<br>Sub national | Sub national<br>Sub national<br>Sub national<br>Sub national | Sub national<br>Sub national<br>Sub national<br>Sub national | Tax base less mobile<br>Sub national responsibility<br>Sub national responsibility<br>Sub national responsibility                  |
| Excises on electricity and water  | Sub national   | Sub national   | Sub national   |  |
| Environmental taxes or other pro-environment market-based instruments:<br><ul style="list-style-type: none"> <li>• Carbon taxes</li> <li>• Petroleum taxes</li> <li>• Effluent</li> </ul> | National<br>National/sub<br>National/sub                     | National<br>National/sub<br>National/sub                     | National<br>National/sub<br>National/sub                     | To arrest global/national pollution<br>Non-compliance high if not collected nationally<br>To arrest interstate and local pollution |

|   |              |              |              |   |
|---|--------------|--------------|--------------|---|
| charges <ul style="list-style-type: none"> <li>• Road congestion tolls</li> <li>• Parking fees</li> </ul> | National/sub | National/sub | National/sub | issues  |
|   | Sub national | Sub national | Sub national | To control local traffic congestion   |
| Motor vehicle registration fees, transfer taxes, annual license fees, driver's license fees etc.          | Sub national | Sub national | Sub national | Internationally accepted as a sub national tax  |
| Business taxes, or license fees in the form of presumptive taxes  | Sub national | Sub national | Sub national | Appropriate on the basis of benefit principle/ideally suited to tax the hard to tax groups such as SME              |
| Property tax or municipal rates   | Sub national | Sub national | Sub national | Immobile tax base/benefit principle   |
| Land taxes  | Sub national | Sub national | Sub national | Immobile tax base/benefit principle   |
| Poll tax  | National/Sub | National/Sub | National/Sub | An approximation for user charges for payment of public services received by individuals in a specific jurisdiction |
| User charges  | National/Sub | National/Sub | National/Sub | Payment for services  |

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# REVENUE SHARING AND EQUITABLE DEVELOPMENT

**Mr. N. T. T. Simiyu, Consultant.**

## 1 INTRODUCTION

### 1.1. Perspective

The theme given to this workshop on Devolution of Power is:

**"Revenue sharing for Equitable Development".**

My attitude throughout the sessions of the seminar will be that a devolved system of government in any country will succeed only if revenue is raised and shared equitably.

In taxation theory "the art of taxation consists in so plucking the goose as to get the most feathers with the least hissing ..." "... and taxes are the price we pay for civilization". By Oliver, Wendell Holmes a US Supreme Court Judge.

His observation illustrates the basic reason why it is necessary to inform the public why they must pay tax because if the goose understood the need to give up some of its feathers and knew the least painful way to perform the removal, it would not hiss as much.

### 1.2. Devolution is inevitable

The public sector is not a monolithic and unified agent; it has a complex structure both horizontally in terms of numerous agencies and vertically in terms of different levels of government. Moreover, it is not static in character; government structure has undergone (and is undergoing) a fascinating process, of evolution. And this evolution is

not by any means a simple unidirectional pattern of change.

The tendencies over the first half of the twentieth century provided some support for centralization as - in many of the industrialized countries - the fiscal role of the central government expanded, dramatically.

But the more recent evolution of the public sector in the second half of the twentieth century shows a trend in the opposite direction dominated by the growing role of provincial and local governments.

More interestingly, new levels of government have emerged to address the growing demands on the public sector. Examples of these are in the U.S., Canada, United Kingdom, Nigeria, South Africa and elsewhere in an effort to coordinate fiscal decision-making between central cities and their suburban communities.

The formation of new levels of government is not limited to lower tiers. We are witnessing in Europe the emergence of a new top layer of government for the European Community.

It is quite clear that the ultimate European "Central Government" will devolve its power to the National States.

The growing complexity of the vertical structure of the public sector casts serious doubt on any simplistic conclusion that it is enough to have greater delegation or

decentralization of government. Evidence is revealing a clear movement towards total devolution of both state power and financial responsibilities.

Fiscal devolution which is the subject of this paper seems to be moving in the direction of a more specialized set of financial institutions to which fiscal responsibilities and instruments are assigned in ways to make the public sector more responsive to the variety of demands placed upon it.

### **1.3. Objective of the paper**

The objective of this paper is to provide a detailed assessment of the proposed fiscal devolution as contained in the draft Bill and to offer some suggestions on some aspects that would strengthen the structure and practices in order to make it viable and more effective in raising revenue and promoting equitable resource allocation, accountable governance, delivery of services and empowerment of the people. Attention is also given to the cost of its implementation.

In order to establish a base for debate concerning the above statements and other aspects of fiscal devolution, this paper is divided in four parts. Part 2 gives the current fiscal management structure and practices, Part 3 examines the fiscal management structure and practices under the proposed devolved system and part 4 considers the allocation of responsibility and Revenue instruments to the devolved structure and revenue sharing. We conclude with recommendations on how to improve and implement the draft proposal with specific reference to options for Revenue generation and Tax Compliance.

A brief comment is in order at the outset on the meaning of the term fiscal devolutions as

employed here. Fiscal devolution refers to a public sector with two or more levels of decision-making. Such a definition is far more inclusive than a narrow political definition that would encompass only systems with formal federal Constitutions.

The point more simply is that fiscal devolution addresses a particular aspect of the public sector: its vertical and horizontal structure. It explores those issues that arise in the fiscal relationships among public decision-makers at different levels of government.

## **2. THE CURRENT FISCAL MANAGEMENT STRUCTURE AND PRACTICES**

The current fiscal structure in Kenya, which is highly centralized, is based on the Exchequer system with one “pot”- the consolidated fund, where all public funds go.

Under this structure, the Kenya Revenue Authority and other agencies are the executive arm of the central government for purposes of raising revenue. Revenue levels are determined by the ministries under the general supervision of Treasury and the ministry of Finance and once legislated, these agencies collect the funds both at the central and local level, which are finally remitted to the consolidated fund.

According to this structure, funds are distributed on the basis of estimated needs specified in ministerial budgets prepared on a centralized basis. Although the budgets obtain district inputs, they do not necessarily reflect fiscal capacities and needs of the districts.

Below is a detailed description of the current budget process.

## 2.1 The budgeting process

The current budgetary process is a highly centralized one involving the following procedures.

I. The budgeting committee is formed by the minister for finance.

II All ministries using their field officers develop budgets along sectors and not districts.

III Sector working groups are appointed covering all ministries as follows:

- The Agricultural and Rural Development sector composed of the ministries of:-
  - Livestock,
  - Agriculture,
  - Lands and settlement,
  - Water and environment.
- The infrastructure sector comprising:-
  - Roads and transport,
  - Public works,
  - Local government.
- The Human Resource Development sector comprising:-
  - Education,
  - Health,
  - Directorate of Personnel Management,
  - Labour,
  - Human Resource, Development.
- Trade, Industry and tourism sector;
- Public, administration sector comprising:-

- Office of the president,
- Home affairs,
- Finance,
- Parliament.

- Public safety law and order comprising:-
  - Police, GSU,
  - Prison,
  - National Youth Service.

- National security comprising:-
  - The Army, and
  - National Intelligence.

- Information and Technology comprising:-
  - Broadcasting.

IV Proposals from stakeholders are submitted to treasury in the form of "resource envelopes";

V Proposals are summarized and debated by the working groups;

VI Treasury and KRA submit income limits;

VII Agreed proposals prioritized by:

- Budget constraints and
- Poverty reduction are consolidated and submitted to the finance minister in the form of a budget proposal;

VIII The Minister for finance may agree, reject or vary recommendations;

IX The proposals are taken to the Attorney General for drafting the Finance Bill;

X The finance bill is printed;

XI The Bill is submitted to parliament in the form of a budget;

XII Parliament approves;

XIII The committee meets for post budget review before implement;

## 2.2. Weakness of the current budgeting process

This process is weak in various ways

1. It is highly centralized and does not seriously address local needs
2. There is a lot of political lobbying by interest and pressure groups
3. There is a lot of room for political influence since the minister finance and parliament have the final say
4. There is no relationship between regional revenues and expenditure

Below are recent statistics showing the actual revenue generated from the current Provinces reflecting provincial revenue capacities.

| Province             | Revenue collection<br>2002/2003 Kshs. MI. |
|----------------------|---|
| Western              | 5,552.5927                                |
| Eastern              | 927                                       |
| Coast                | 57,676                                    |
| North Eastern        | 43  |
| Central              | 1,894                                     |
| Rift Valley'         | 5,565.5                                   |
| Nyanza               | 6,429                                     |
| Nairobi              | 126,984                                   |
| <b>Total Revenue</b> | <b>205,071</b>                            |

Expenditure statistics on the other hand do not reflect provincial classification. Instead, they reflect purpose or function such as general administration, education, defense, health, roads etc. making it difficult to relate provincial revenue capacities with expenditures. There appears to be a deliberate attempt not to relate provincial revenues and expenditures.



Below is a breakdown of expenditure by purpose in the year 2000/2001.

| Line reference                       | 2000/2001         |                     |                 |
|--------------------------------------|-------------------|---------------------|-----------------|
|                                      | Recurrent account | Development account | Total Kshs. MI. |
| <b>General Public administration</b> |                   |                     |                 |
| General administration               | 31,031.2          | 12,617.2            | 43,648.4        |
| External affairs                     | 3,306.9           | 6.8                 | 3,313.7         |
| Public Order and Safety              | 15,692.3          | 288.9               | 15,981.2        |
| <b>Total</b>                         | <b>50,030.4</b>   | <b>12,912.9</b>     | <b>62,943.3</b> |
|                                      |                   |                     |                 |
| Defense                              | 14,202.8          | 0.0                 | 14,202.8        |
| Education                            | 48,840.8          | 770.5               | 49,611.3        |
| Health                               | 14,870.3          | 759.1               | 15,629.4        |
| Social Security and Welfare          | 19.7              | 0.0                 | 19.7            |
| <b>Total</b>                         | <b>77,933.6</b>   | <b>1,529.6</b>      | <b>79,463.2</b> |
|                                      |                   |                     |                 |
| Housing and Community Welfare        |                   |                     |                 |
| Housing                              | 71.6              | 0.0                 | 71.6            |
| Community Development                | 185.4             | 1.1                 | 186.4           |
| Sanitary Service                     |                   |                     |                 |
| <b>Total</b>                         | <b>257.0</b>      | <b>1.1</b>          | <b>258.0</b>    |
|                                      |                   |                     |                 |
| Other Community & Social Welfare     | 1,718.9           | 373.7               | 2,092.6         |
| Economic Services                    |                   |                     |                 |
| General Administration               | 2,974.1           | 11,111.5            | 14,085.6        |
| Agriculture and Forestry             | 5,317.8           | 2,220.8             | 7,538.7         |
| Game and Fisheries                   | 588.8             | 142.1               | 730.9           |
| Mining manufacturing & Construction  | 2,166.3           | 848.9               | 3,015.2         |
| Electricity, Gas, Steam & Waterways  | 1,198.7           | 1,279.7             | 2,478.4         |
| Roads                                | 6,834.1           | 2,624.3             | 9,458.4         |

|   |                  |                 |                  |
|---|------------------|-----------------|------------------|
| Inland and Coastal Waterways                | 0.0              | 0.0             | 0.0              |
| Other transportation & Communications       | 783.7            | 0.0             | 783.7            |
| Other Economic Services                     | 1,261.0          | 11.0            | 1,272.0          |
| <b>Total</b>                                | <b>21,124.5</b>  | <b>18,238.4</b> | <b>39,362.9</b>  |
| Other Services                              |                  |                 |                  |
| Public debt                                 | 79,834.8         | 0.0             | 79,834.8         |
| Transfers to other government organizations | 0.0              | 0.0             | 0.0              |
| Other purposes                              | 6,113.0          | 0.0             | 6,113.0          |
| <b>Total</b>                                | <b>85,947.9</b>  | <b>0.0</b>      | <b>85,947.9</b>  |
| <b>Grand Total</b>                          | <b>237,012.3</b> | <b>33,055.7</b> | <b>270,067.9</b> |

Using the ministry of health statistics for purposes of illustration. The 2000/ 2001 figures show that the actual development and recurrent expenditure was kshs. 15,629,400,000 nationwide.

If this figure was divided equally among the 70 districts each district would have received kshs. 223,277,143. Even if adjustments were made for district disparities the final expenditures would have significantly improved health facilities over the last five years.

### 2.3. Control of public funds under the current system

The Exchequer and Treasury under constitutional authority but within the same ministry of Finance exercise control over the funds.

Once approvals have been granted by parliament, the Controller and Auditor general approves issues from the Consolidated fund and the permanent Secretary acting in the dual capacity as both

controller of Treasury and PS ministry of Finance- issues authority to spend known as Exchequer issues. Based on these, issues the pay master General (PMG) who is also -the Financial Secretary within the ministry of Finance and acting in the dual capacity of Controller of payments authorizes accounting officers to issue authority to incur expenses (AIE) at all levels including Districts.

### 2.4. Limitations of the Audit Department

The audit department is however constrained by a number of factors notable among them being:

1. Lack of independence arising from the fact that funds to run by the department are sourced from the Ministry of Finance and the Ministry withholds funding if they feel an area should not be audited.
2. There is limitation in scope arising from the fact that the current legislation allows them to carry out only accuracy or certification audits rather than efficiency

and effectiveness audits.

3. Although they report to parliament, when the final report is made to PAC, the person taking action is Treasury whom they audit, hence no action is eventually taken.
4. There is no specific time limit for action on reported misappropriations. Cases exist where ten years down the line, Treasury releases memorandums promising to look into reported queries.

Expenditures at District levels are controlled by District accountants who have power over the release of funds and are under strong influence of the District Commissioners.

Local Authorities who raise funds are initially allocated 5% of the revenue and 95% is credited into the consolidated fund and later released to them under LATF arrangement.

The Major weakness noted in this structure is that PS finance is both the controller and Authorizer of spending.

This has led to the lack of segregation of duties and subsequent weakness in the control over spending. Therefore the custodial function is not separated from the authorization function. These are basic to a proper system of internal control.

Subsequent monitoring of expenditure is carried out by the Controller and Auditor Generals department, which is attached to all ministries at provincial levels. There are separate branches dealing with public investments and corporations.

5. There is an acute shortage of staff and

skills because the authorized national establishment is for 1347 audit staff as of August 1 2003 but the filled positions are only 666 translating into an under-establishment of over 50%. On the other hand, the establishment for support staff is 281 but the filled positions are only 166 revealing a shortfall of 30%.

Furthermore all the staff are located only at provincial level, with none at the districts where the actual spending takes place. It is also noteworthy that most of the audit staff do not have Professional Accountancy qualifications.

6. The other limitation is the current position of Controller being combined with that of audit. Since the office authorizes expenditure in the first place, it should not audit its own authorization. This separation is the practice in most countries of the world, and the Kenya arrangement has been criticized in many international forums.

### **3.0. FISCAL MANAGEMENT STRUCTURE AND PRACTICES UNDER THE PROPOSED DEVOLVED SYSTEM.**

The proposed Bill provides for five Institutions to regulate the fiscal resources.

#### **3.1. National Commission on Government Finance**

This is a policy making and advisory body. It should advise both National and sub-national governments on the appropriate sources of revenue from National resources, and recommend the most equitable revenue sharing proportions both vertically and horizontally on a four yearly basis. It is responsible to parliament, and in its activities it should be guided by the

proposed best principles and practices. The Bill proposed 7 people inclusive of the chairperson, and should also have a secretariat of about 30 technical and support staff.

### **3.2. Legislative bodies**

These refer to Parliament, zonal councils and county councils which have legislative powers. These will pass laws providing for the charges, assessment and collection of various taxes to be collected at the respective levels, for the ascertainment of the bases to be charged, for the administrative and general provisions relating to the taxes and for matters incidental to and connected there with.

The proposed Bill has assigned taxation powers to the various levels of government in the Tenth Schedule. The basis for such an assignment should come out quite clearly.

Since conflicts among levels of government are inevitable if the taxes collected at the local level and those at the central level are not properly delineated, it requires therefore, that proper clarification be made of national and sub-national taxes.

### **3.3. National Revenue Administration Authority**

The proposed Bill has recommended the establishment of the National Revenue Administration Authority as the body responsible over the collection of all revenues at all levels of government.

In order for this Authority to operate effectively, it should have the following features:

1. It should be divorced from the Ministry of finance
2. It should have sole powers to raise

all revenues at all levels of government.

3. It should have powers to control the release of funds to the various governments and constitutional bodies such as the judiciary and parliament.
4. It should be de-linked from- audit
5. It should have operational offices at all National, Zonal and county levels.
6. The Authority should be the fourth constitutional organ of the government reporting to parliament.

The Current KRA should be restructured to take the place of this Authority. It is worth recognizing that the current manpower and capacity of this authority is centralized with 78% of the tax officers located in only two cities of Nairobi and Mombasa (57% in Nairobi and 21% in Mombasa) furthermore the current structure of KRA is not based on the devolved structure.

### **3.4. Consolidated funds**

All revenue raised by the Authority stated above should clearly be delineated as National, Zonal or county and should be deposited into the consolidated fund of the appropriate government. Expenditure from such funds will be controlled by the legislative organs of the respective governments and funds will only be released by the Revenue Authority on voted expenditures.

### **3.5. Audit function**

The audit function should be performed by professionally qualified auditors as required by the Accountants' Act at the National, Zonal and county levels.

The Auditor should report to the appropriate

watchdog committees of the respective governments i.e.

- National Auditor should report to P AC.
- Zonal Auditors should report to ZAC.
- Country Auditor should report to CAC.

For the auditors to function effectively the following conditions should hold.

1. They should have their own budget
2. They should determine the scope of audit in order to cover both performance and accuracy audits
3. Prompt action should be taken on the basis of their report
4. Action on the report should be taken within six months.
5. There is an acute shortage of staff and skills. Therefore a devolved system will require re-deployment and rationalization of these staff at the respective government levels.

### **3.6. Allocation of responsibilities and Revenue instruments**

#### **3.6.1. The budget process in the devolved system**

The budget process begins with responsibility assignment among the various levels of government.

Under the proposed system, three annual budgets (National, Zonal and County) will be developed, each composed of recurrent and capital receipts and expenditures, reflecting their respective responsibilities and revenue assignment.

#### **3.6.2. Assignment of responsibilities National government responsibilities**

The National government should have responsibility for national public services, regulate monetary policy, manage regional

equity Manage National Debt obligations, common markets, national pension schemes and national infrastructure. The specific responsibilities should include.

1. National Security (Military and National Intelligence)
2. Information and Technology (Broadcasting)
3. Office of the president
4. Foreign affairs
5. Tertiary education services (University etc)
6. Ministries

#### **National Budget:**

The budget should reflect, the assigned revenues and responsibilities. Any responsibility passed down to a lower government should be accompanied by the necessary funds.

#### **Zonal Responsibilities:**

Zonal governments should have responsibility over the following activities.

- i. Secondary Education
- ii. National statistics
- iii. Local Government Service commission
- iv. Human Resource Development
- v. Trade Industry and Tourism
- vi. Police, GSU, Prisons and NYS.

#### **Zonal Budgets:**

Zonal budgets should also reflect assigned Revenues and responsibilities. Any responsibilities passed down to countries should be accompanied by the necessary funds vice versa.

#### **Count responsibilities:**

Counties should have responsibility over the following activities

- vi. Livestock development

- vii. Agriculture
- viii. Land and settlement
- ix. Health and sanitation
- x. Primary education

1. Confine to national priorities and long-term plans
2. Deal with policy matters
3. Offer guidance to devolved governments through offices in each district
4. Standardize public services provided by the local authorities
5. Arbitrate
6. Handle international affairs
7. Handle inter district dealings or common services

**County Budgets:**

Country budgets should also reflect assigned Revenues and responsibilities Vice Versa.

**The Role of Ministries in the devolved system**

Individual ministries should have the following responsibilities, in the devolved system.

**3.6.3. Assignment of revenue instruments**

**The Current national taxes and their revenue generation potential are as follow:**

| Details                   | Actual Receipts | Estimates      |
|---------------------------|-----------------|----------------|
|                           | 1999/2000       | 2001/2002      |
|                           | Kshs.           | Kshs.          |
| Customs and Excise        | 57,098,114,420  | 62,891,000,000 |
| Income Tax                | 53,317,000,000  | 59,952,000,000 |
| Value Added Tax           | 40,944,209,200  | 56,165,000,000 |
| Other Taxes'              | 1,200,573,293   | 1,073,488,910  |
| Traffic Revenue           | 1,648,654,093   | 1,412,550,000  |
| Land Revenue              | 627,932,360     | 773,275,000    |
| Forest and Mining Revenue | 47,661,050      | 67,840,000     |
| Airport Revenue           | 1,929,503,340   | 2,069,000,000  |
| Aviation Revenue          | 0               | 818,000,000    |
| Investment' Revenue       | 305,033,880     | 3,353,000,000  |
| Rent of Buildings         | 41,418,680      | 544,400,000    |
| Trading Licenses          | 102,432,660     | 134,932,000    |
| Fines and Forfeitures     | 117,408,360     | 358,000,000    |

|                                       |                        |                        |
|---------------------------------------|------------------------|------------------------|
| Loan Interest Receipts                | 256,275,760            | 342,367,070            |
| Loan Redemption Receipts              | 416,273,232            | 620,024,920            |
| Fund Contributions                    | 2,000,000              | 2,000,000              |
| Import, Exports & Essentials Supplies |                        |                        |
| Revenue                               | 2,700,020,000          | 3,785,020,000          |
| Miscellaneous Revenue                 | 1,927,489,672          | 409,002,000            |
| <b>Total Ordinary Revenue</b>         | <b>162,682,000,000</b> | <b>194,771,000,000</b> |

The detailed list of the current national and sub national taxes are as follows.

The current national taxes are as follows:

- Value Added Tax,
- Corporate profit taxes,
- Personal income tax,
- Customs & Excise duty,
- Tax on natural Resources,
- Stamp duty,
- Import Declaration fees,
- Kenya Bureau of standards levy,
- Refinery out put,
- Licenses under transport licensing Act,
- Forest and Mining Revenue,
- Airport revenue,
- Aviation Revenue,
- Investment Revenue,
- Loan interest receipts,
- Loan Redemption receipts,
- Exchange Control receipts,
- Essential supplies revenue,
- Payroll taxes,
- Business registration,
- Court fines,
- Vehicle registration taxes,
- Driving licenses,
- Road maintenance,
- Entertainment tax,
- Casino tax,

- Hotel and Restaurants,
- Liquor licenses,
- Betting,
- Taxes on fairs.

The current local taxes are:

- Business permits,
- Rent taxes,
- Cess,
- User fees,
- Bill boards,
- Preservation costs,
- Hire charges,
- Rates.

### **Proposed additional taxes**

The following additional taxes should be introduced (re-introduced):

- Capital gains tax on transfer of shares and property (currently suspended),
- Tax on idle land,
- Presumptive tax on farm produce (suspended in 2002),
- Inheritance tax.

### **Tax assignment should reflect two broad principles:**

1. Fiscal need based on assigned responsibilities, and
2. Efficiency in tax administration-calling for re-distributive justice, low collection

costs and least distortion in economic activity.

### **National taxes**

National Taxes should constitute all those that are highly progressive, especially for redistributive purposes. If collected at local levels such taxes will have negative incentives of creating migration between zones and counties.

National taxes should also be based on **highly mobile factors** because they distort the locational pattern of economic activity.

Such taxes should also be based on **items that are distributed across regional jurisdictions** in a highly unequal fashion. This is necessary to avoid geographical inequities and to prevent allocative distortions that would result from the local taxation of such bases.

Using current statistics these taxes generate approximately 70% of Gross Revenue or about Kshs. 143.5 B. (2002/2003)

**Zonal taxes:** This level of government is better advised to employ taxes on relatively immobile tax bases. These include:

- Payroll taxes,
- Royalties on quarries etc.,
- Dividend,
- Interest,
- Water way transport,
- Road maintenance levy,
- Taxes on fairs and shows, and
- Hospital fees.

This constitutes approximately 20% of gross revenue or Kshs. 41 billion. (2002/2003).

**County Taxes:** The most appropriate taxes

at the county level should be those that in principle do not create potentially distorting incentives for movements among counties. These are:

- Property rates,
- County court fines,
- Business permits,
- Rent taxes,
- User fees i.e. Parking fees, Preservation costs, Hire charges, Bill boards, Posters etc.,
- Cess,
- Presumptive tax on farm produce,
- Inheritance tax,
- Tax on idle land,
- Gift tax,
- Gain on transfer of property,
- Entertainment/Casino/Betting,
- Hotel and Restaurants,
- Tax on Trading income,
- Market fees,
- Death duties,
- Liquor licences,
- Parking fees.

This constitutes approximately 10% of gross revenue or Kshs. 21 Billion (2002/2003).



Below are the zonal revenue capacities.

**Zonal Revenue Capacities**

| <b>Zone</b> |   | <b>Kshs (Millions)</b> |
|-------------|---|------------------------|
| Zone 1      | The port<br>Tourism<br>Cement<br>Fishing<br>Mining<br>Commerce<br>Manufacturing | 49,025                 |
| Zone 2      | Cashew Nuts<br>Tourism<br>Commerce  | 8,651                  |
| Zone 3      | Commerce  | 232                    |
| Zones 4     | Coffee<br>Tea<br>Commerce   | 464                    |
| Zone 5      | Livestock   | 232                    |
| Zone 6      | Livestock   | 17                     |
| Zone 7      | Livestock<br><br>Livestock  | 26                     |
| Zones 8     | Maize<br>Commerce<br>Fishing  | 557                    |
| Zone 9      | Livestock<br>Livestock  | 1,670                  |
| Zone 10     | Commerce<br>Tea<br>Cereals<br>Dairy<br>Textiles                                 | 2,504                  |
| Zone 11     | Livestock<br>Tourism  | 835                    |
| Zone 12     | Sugar<br>Fishing<br>Textile<br>Commerce<br>Transport                            |                        |

| Zone                 |  | Kshs (Millions) |
|----------------------|--|-----------------|
|                      | Coffee-  | 3,215           |
| Zone 13              | Tea<br>Sugar<br>Commerce   | 3,215           |
| Zone 14              | Coffee<br>Tea<br>Floriculture<br>Dairy<br>Fruits/ vegetables<br>Commerce     | 1,136           |
| Zone 15              | Tea<br>Coffee<br>Dairy<br>Fruits<br>Commerce                                 | 758             |
| Zone 16              | Maize<br>Paper pulp<br>Customs<br>Tobacco<br>Sugar<br>Commerce               | 2,776<br>2,776  |
| Zone 17              | Sugar<br>Customs<br>Commerce   | 2,776           |
| Zone 18              | Manufacturing<br>Commerce<br>Transport<br>Customs<br>Construction<br>Tourism | 126,984         |
| <b>Total revenue</b> |  | <b>205,071</b>  |

**Zonal Revenue distribution based on 2002/2003 Actual collection**

| Zone | Gross Revenue<br>Kshs. '000'<br>100% | National share<br>Kshs.'000'<br>70% | Zonal share<br>Kshs. '000'<br>20% | Country share<br>Kshs. '000'<br>10% |
|------|--------------------------------------|-------------------------------------|-----------------------------------|-------------------------------------|
| 1.   | 49,025,000                           | 34,300,000                          | 9,800,000                         | 4,900,000                           |
| 2.   | 8,651,000                            | 6,000,000                           | 1,700,000                         | 800,000                             |
| 3.   | 232,000                              | 160,000                             | 50,000                            | 20,000                              |

|           |                    |                    |                   |                   |
|-----------|--------------------|--------------------|-------------------|-------------------|
| 4.        | 464,000            | 324,800            | 92,800            | 46,400            |
| 5.        | 232,000            | 160,000            | 50,000            | 20,000            |
| 6.        | 17,000             | 12,000             | 3,000             | 2,000             |
| 7.        | 26,000             | 18,000             | 5,000             | 3,000             |
| 8.        | 557,000            | 389,000            | 111,000           | 57,000            |
| 9.        | 1,669,000          | 1,168,300          | 333,800           | 166,900           |
| 10.       | 2,504,000          | 1,752,800          | 500,800           | 250,400           |
| 11.       | 835,000            | 584,500            | 167,000           | 83,500            |
| 12.       | 3,215,000          | 2,250,500          | 643,000           | 321,500           |
| 13.       | 3,215,000          | 2,250,500          | 643,000           | 321,500           |
| 14.       | 1,136,000          | 795,200            | 227,200           | 113,600           |
| 15.       | 758,000            | 530,600            | 151,600           | 758,000           |
| 16.       | 2,776,000          | 1,943,200          | 555,200           | 277,600           |
| 17.       | 2,776,000          | 1,943,200          | 555,200           | 277,600           |
| 18.       | 126,983,000        | 88,881,000         | 25,396,600        | 12,698,300        |
|           |                    |                    |                   |                   |
| <b>TR</b> | <b>205,071,000</b> | <b>143,466,100</b> | <b>40,992,400</b> | <b>20,488,700</b> |

Allocation of percentages gross Revenue among Zones is based on Zonal Revenue generation capacity as given by KRA on provincial basis whereas apportionment of zonal Revenue among National, Zonal and counties is based on the tax distribution percentages shown above, as reflected in official Rev. est. 2001/2002.

From the zonal distribution table, it is apparent that most zones are not able to meet the assigned responsibilities solely from the revenue generated from the zones. This, therefore, justifies the need to have a national equitable sharing and conditional grant policy, which are unrelated to the zonal revenue generation capacity.

#### **Existing statistical inequalities**

The table below reveals the inequities between Revenue contribution, population size employment differences and the capacity of Revenue and Audit Officers.

| <b>Province</b> | <b>No. of Districts</b> | <b>Population Size</b> | <b>Land Area in Sq. Km</b> | <b>Tax Contribution (Millions)</b> | <b>Wage Employment</b> | <b>No. Of Tax Officers</b> | <b>Audit Officers</b> |
|-----------------|-------------------------|------------------------|----------------------------|------------------------------------|------------------------|----------------------------|-----------------------|
| Nairobi         | 1                       | 2,137,000              | 696                        | 78,061                             | 419,932                | 1671                       | 621                   |
| Coast           | 7                       | 2,491,000              | 82,796                     | 14,307                             | 207,703                | 611                        | 51                    |
| North Eastern   | 3                       | 961,000                | 127,197                    | 43                                 | 15,450                 | 36                         | 10                    |
| Eastern         | 14                      | 4,643,000              | 163,394                    | 927                                | 139,804                | 47                         | 28                    |
| Central         | 7                       | 3,705,000              | 13,220                     | 1,872                              | 240,264                | 103                        | 27                    |
| Rift Valley     | 18                      | 6,991,000              | 182,538                    | 3,669                              | 375,994                | 201                        | 53                    |
| Nyanza          | 12                      | 4,391,000              | 12,546                     | 1,872                              | 167,407                | 148                        | 24                    |
| Western         | 8                       | 3,354,000              | 8,263                      | 3,656                              | 110,543                | 100                        | 19                    |
| <b>Total</b>    | <b>70</b>               | <b>28,673,000</b>      | <b>590,650</b>             | <b>205,071</b>                     | <b>1,677,097</b>       | <b>2,907</b>               | <b>832</b>            |

2001 Actual Gross Recurrent Expenditure Nationally Kshs 122,070,170,100  
Sources:-1,2,3&5 Statistical Abstract – 2001 Rep. Of Kenya

2001 Actual Gross Development Expenditure Nationally Kshs 19,581,211,360 - 4 and 6 KRA  
Report – unpublished-7 Controller & Auditor General Report-Unpublished

Total Expenditure Kshs 141,651,381,460

The Revenue contribution differences are attributed to differences in endowment of the provinces, as shown above.

### 3.6.4. Proposed revenue sharing policy

and bring within the tax net an increased number of taxpayers.

The core of a tax sharing plan is the earmarking of a specified share of the National total take for distribution to zones and counties on some basis, with no strings attached. We are proposing that

1. All zonal and country revenue generated be retained by the zones and counties. Reasons:

- a) This will provide motivation to raise tax at those levels,
- b) It will empower the local people,
- c) It will encourage better collection efforts of the funds they know they will also spend. Evidence already exists in this regard when in the early 80s local authorities and communities were allowed to raise 30% of the funding required to develop and improve cattle dips and received grants of 70%
- d) Furthermore, devolved tax collection will reduce tax evasion

2. The National Government would regularly route into the Zonal trust fund 60% of its tax revenue after deducting all debt obligations and a contingency provision of 10% of the tax revenue. The remaining 40% would fund National Expenditure requirements.

There would then be a horizontal distribution between zones from the fund based on zonal population size: At the zonal level 30% would be retained and 30% passed down to the counties on the basis of population size and per capita income. Any surplus at the National level should be passed down in the form of conditional grants. Any external and internal loans by National government to meet its own deficits and those of zones and counties should be channeled downwards as conditional grants.

## Distribution Formula

The Revenue raised from National resources should be distributed as follows using (2002/2003 figures) as an example:

|       |                         |      |               |
|-------|-------------------------|------|---------------|
|       | Total Revenue Collected |      | 205.071B.     |
| Less: | National Debt service   | 57.6 |               |
|       | Contingency fund (10%)  | 20.5 |               |
|       |                         |      | <u>78.100</u> |
|       | Net National Revenue    |      | 126.971       |

Shared as follows

|                                    |               |
|------------------------------------|---------------|
| National Government 40% of 126.9   | <u>50.788</u> |
| Balance                            | 76.182        |
| Zonal Government (pop. /per cap.)  | 38.09         |
| County Government (pop. /per cap.) | 38.09         |

### Justification of the Ratios:

1. National Government will have devolved more expensive social services to the zones i.e. Education/ Health/ Security etc.
2. National government has been assigned the major revenue sources i.e. VAT, Corporation Tax, Customs and Excise duty etc.
3. The South African experience indicates retention of between 40 and 50% of National Resources.
4. This is in line with the policy of empowering the people and effective resource re-distribution.

Revenue may be generated from the following sources at all levels.

1. Taxation as stated before.
2. Direct investment in government projects.
3. Partnership with private investors through share ownership or joint ventures.
4. Borrowing locally and internationally.
5. Grants from international National and sub-national governments.
6. Donations.
7. Harambee funds.
8. Encouragement of private investor initiative.
9. Cost sharing strategies and service classification.

## 4.0. RECOMMENDATIONS

### 4.1. Options for effective revenue generation and management for equitable development at all levels.

## 4.2. Tax compliance strategies

The current compliance rate is only 40%. This is quite low and is mainly from the following factors:

## **I Under reporting or non-disclosure of income:**

- Traders understate or even fail to record sales, fees or commissions,
- Recording sales, fees or commissions and other income items correctly and off setting them by false entries or falsifying records,
- Phony invoicing schemes,
- Diversion of cash,
- Improper or false deductions,
- Income arising from illegal business such as smuggling not being disclosed.

## **II Delinquent tax return filers**

- Failure to register for income tax purposes.

## **III Money laundering schemes**

From the statistics available, total Revenue in year 2002/3 was Kshs. 205 billion comprising 40% of the potential Revenue. This implies that if the 60% which is currently avoided is raised Kenya would be raising Kshs. 513 billion. This would leave a budget surplus every year, if only proper financial management was put in place.

It is therefore recommended that a comprehensive tax reform strategy be put in place. For this reform to be viable the following should be done.

1. KRA be upgraded to the position of the proposed National Revenue Administration Authority as provided for in the devolved system.
2. Its capacity to administer the new tax system be strengthened.

3. The authority should take over all revenue collection activities which have been carried out by other agencies i.e. ministries, local authorities etc.
4. Tax forms and procedures be simplified to make it possible for individual payers to easily understand and complete their own returns. Return forms not to exceed two pages.
5. Tax rates should in all cases be pegged below 25% to encourage voluntary compliance, and minimize distortions in resource allocation.
6. A tax amnesty be granted.
7. Introduction of a fine ranging from 50%to 100% of the unpaid taxes when tax fraud is committed.
8. Provision for jail term for tax fraud.
9. Cancellation of registration in public registers when tax fraud is committed.
10. Introduction of the penalty of temporary closure of establishments where tax fraud has been committed.
11. Provision for interest on delinquent amounts to accrue automatically from the moment the unpaid tax is due, without any need for proceedings of any kind on the part of the tax administration.
12. People with temporary business structures or without fixed places of business or illiterate, to pay simple flat taxes.
13. Tax payer register PIN numbers should correspond with their ID numbers and

business registration number be used as their tax PIN numbers.

14. Registered banks to enter into agreement with NRAA as paying point on commission basis. This will reduce the workload of NRAA of receiving payments and processing forms.
15. The authority should have very tight control over all accountable documents and forms by use of security checks.
16. The Authority should be able to detect tax payers who have not discharged their obligations to file returns and enable the administration to have a criteria for selecting high yield - non-filers and notifying them.
17. There should be legislation for demanding partial payments for tax payers who persist on not filing based on the highest return made in the past over the last 24 months.
18. Tax MPs allowances.
19. There should be a system for reviewing the accuracy of the returns.
20. Installment tax payments be encouraged for business income tax.
21. Large tax payer unit be strengthened.
22. Tax Audits be intensified.
23. Tax statistics be prepared and published periodically.
24. A proper organization structure and size of staff be rationalized.

25. The tax departments be computerized to cope with the flow of data.

26. Training of both Administrative staff and tax payers be undertaken on sector basis in the later case.
27. Reduce the number of exemptions.

In year 2002/ 2003 customs and Excise department alone exempted or remitted taxes up to the tune of Kshs.17,696,400,000. The largest beneficiaries were:

|                      |         |
|----------------------|---------|
| PCs and judges Kshs. | 6.6M    |
| Returning residents  | 232.2   |
| President            | 64.5    |
| Armed forces         | 1,227.2 |
| Diplomatic goods     | 2,286.8 |
| AFCO                 | 152.7   |
| MPs                  | 152.7   |
| Returning diplomats  | 377.0   |
| University lecturers | 87.0    |
| Olympic team         | 14.8    |
| Kenya police         | 535.4   |

If VAT and Income Tax exemptions were also quantified the total would constitute a significant loss in revenue, which can be avoided.

#### **4.3. Challenges in realizing the goals principles and values in the devolved system.**

1. Legislative approval,
2. Transitional problem - staff re deployment,
3. Resistance to change,
4. Accurate cost/Benefit analysis,
5. System design and documentation,
6. Implementation Timetable,
7. Acquisition of information,
8. Legislative enactment.



#### 4.4. Cost of implementation

|   | <u>OLD</u> | <u>NEW</u> |
|---|------------|------------|
| Ministers/MPs                           | Same       | Same       |
| National Finance comm. with secretariat | NIL        | 30         |
| PCs                                     | 8          | NIL        |
| DCs                                     | 70         | NIL        |
| DOs                                     | 350        | NIL        |
| Chiefs                                  | Same       | Same       |
| Ass. Chiefs                             | Same       | Same       |
| Councilors                              | Over 2000  | 1500       |
| Auditors                                | 1625       | 1700       |
| Tax officers                            | 2907       | 3000       |
| Ministry staff                          | Same       | Same       |
| Office facilities                       | Same       | Same       |
| Equipment                               | Same       | Same       |

Although the above require detailed analysis, a quick review shows that the cost element is not significant.

#### 4.5. Recapitulation

I quote James Buchanan who has suggested that decentralization can serve as a constraint on the undesired expansion of government because - just as competition in the private sector exercises its disciplinary

forces, so competition among different units of government at a decentralized level of government can break the monolithic hold of a large central government. Such competition within the public sector in the context of "inter-jurisdictional" mobility of persons in pursuit of "fiscal gains" can offer partial or possibly complete substitute for explicit fiscal constraints on the taxing power.

# **COST OF GOVERNMENT AND OTHER RELATED ISSUES**

**Mr. Julius Kipng'etich, Consultant.**

## **I. Background**

Since Kenya attained independence, the government has continued to grow significantly to the extent that now it is taking close to 80% in salaries, wages and debt obligations. In 1963, the population of Kenya was 12 million, and the public service was relatively small and was considered one of the most efficient in Africa. The focus of the government then was to Africanize the service as well as the private sector. Because of the general turmoil in many African countries, Kenya was considered by many Western powers as an icon of hope and donors kept pumping resources to sustain our growing expenditure. Indeed, the oil shock of 1973 brought home clearly the folly of some of the programs earlier adopted by government like free education and health care. By the following year, 1974, the government had been forced by circumstances to give loans at university level as part of public sector reform and cost, sharing at other levels. In the 1980's, the prices of Kenya primary exports, coffee and tea, took a nosedive, further diminishing our capacity to sustain a large government.

However, despite this unfavourable scenario, the government continued to increase the size of the public service through creation of more parastatals, ministries and presidential decrees. To make it worse, pay rises were even effected

without being matched to productivity. But the full extent of the mess became apparent

when donors started putting pressure for reform in the early 1990's, to which we did not and the aid taps dried. It is important to note at this stage that donor aid reached the peak in 1991 at \$1 billion. Given that we had built our public service to be so big and donors were underwriting our development portfolio, the 1990' s decade was characterized by paralysis in that government was reduced to paying salaries for public servants who had no tools for work. The stand off with donors therefore, led to a situation where we started building up debt, especially domestic, through treasury bills which rose from Kshs 35 billion to Kshs 221 billion by the end of 2002. The cost of this debt has been about Kshs 30 billion on a yearly basis. The reaction by the government to these challenges has fallen far short of a systemic overhaul in a bid to live within its means. The public sector reform failed and today we have 250,000 teachers and 230,000 civil servants both consuming a direct wage bill of Kshs 3.6 billion and Kshs 3.4 billion per month, respectively. This translates to wage bill of Kshs 84 billion every year. Add the parastatals to this, most of them loss making (even monopolies), and you are talking about a very grim scenario.

## **II. Government Expenditure Pattern**

The main framework of government prioritization of expenditure now places very great emphasis on meeting salaries and wages first, followed by fixed overheads (usually referred to as operation and maintenance) and debt obligations. The total of this is to consume close to 85% of total government revenue. This leaves virtually

nothing for public investment, especially in infrastructure e.g. roads, water, power supply, telephone, rail etc. It is this that will give return to the public as opposed to payment of salaries to public servants with no work to do. The key ministries that consume the greatest resources are:

- Ministry of Education
- Office of the President (Security)
- Ministry of Health

A look at the above functions show clearly that these are functions ordinarily done at the devolved unit but currently shouldered by the Centre. It is also the function that carry the highest bulk of public servants. In built into this is a very high level of inefficiency not exactly evident to the unschooled eye. The following example about the Teachers Service Commission (TSC) will put the point home.

Example:

*Take a case of Kiptabus Primary School in Keiyo North constituency employing 20 TSC teachers. First, the school was built by the parents and the central government send the teachers. For all practical purposes, the school is owned by the parents. If one of the teachers fails to deliver, the parents have no control over the offending teacher, neither is the District Education Officer nor the Ministry staff. TSC will take 3 to 5 years to resolve the issue and most likely reinstate the teacher. If the parents were given the charge for the 20 teachers, and told to decide who to employ, take it from me that the number will be less than what TSC has on the ground and greater democracy and empowerment will be felt on the ground. The lesson learnt is that where there is greater empowerment, there is greater responsibility and people are more judicious about the commitments they make.*

It is a known fact that the current system has created a bloated public service and has led to a situation where, if you are not in Nairobi, you are outside the loop resulting in the current unfavourable situation where 50% of our national wealth is in the city of Nairobi.

Current estimates postulate that half of the public service is totally unnecessary and wasteful, thus a burden to the tax payer. This means a saving of Ksh42 billion on payroll and downsizing of office space. If you consider our public servant/citizen ration of 480,000 to 30 million. It is one of the most unfavourable in the world and much of this burden to the tax payer is dead weight. The federal government is USA has 180,000 public servants against 280 million citizens! If you built in the power of technology and advances in management practice you realize that our public service is poorly structured and subtracts value from the public. In short, the current public service strategy and structure is wrong and misplaced.

In addition, if you look at the debt scenario of the government, it gives you a sad case. The current debt portfolio is Kshs 621 billion, which is 71 % of our GDP of Kshs. 880 billion. This debt was incurred without the express consent of the people, yet future generations will have to pay, without the matching public investments to show. Without a radical surgery of the public service, Kenya may become technically insolvent soon. 60% of our people are below the poverty line of \$1 per day as opposed to 30% at independence. Government failed our people and we must not let them down again.

### **III. The Impact of Proposed System of**

## Government

Before I analyse the proposed system of government, it should be noted that the current system of government is both centralized and dissolved simultaneously. The provincial administration and the local authorities structures are not only a duplication of executive functions but also wasteful. Take the case of Nairobi City Council where there are 3000 council askaris yet the PC has a shortage of policemen. Other examples include:

- Telkom Kenya with 19,000 employees managing 320,000 lines. Compare this to Safaricom, with 1.2 million lines with 450 employees. There are plans to retrench 10,000 employees.
- Kenya Power and lighting Company had peaked at 13,000 employees. Now it has 5,000 workers still delivering the same service.
- Kenya Airways had 4,000 employees prior to privatization but now it wants to reduce to less than 1,500 even with more planes.

The above example serves to illustrate the extent of the bloated nature of the public service and the need to downsize it. This is inspite of the fact that we are so short of policemen. Our current ratio (police/citizen) is 1:850 against a United Nations recommended ration of 1:400. On top of all this, the salary differences between the highest and the lowest is obscene. The highest paid public servant earns Ksh2 million and the lowest is Ksh4 000. (Remember the president of USA earns \$400,000 per annum which equivalent of kshs. 2.7 m per month but whose economy is just \$10 billion - 1,000 times over). It is

obvious our top public servants are excessively paid compared to the size of our economy.

## IV. Implications of Devolved Government

Kenya already has the following 6 levels on the ground. '

- Sub-location
- Location
- Division
- District
- Province
- National

The proposed constitution has four levels: '

- Location
- District
- Zonal
- National

The current levels have staff already and will actually require cutting from the current number. The judicial system will only have an additional unit, a Supreme Court. In the legislature, the additional unit is the zonal assembly and the Senate. The district assembly will be equivalent to the current local authority. Given that the government is already overstaffed by more than 100%, the proposed units in the government are a drop in the ocean. (Remember, we will remove the current duplication between the provincial administration and local authorities).

Further more, as I said earlier, the salaries given to the legislature, top judicial and executive officers is unsustainable. Take the case of parliamentarians who sit the equivalent of 2 days in a week and get Kshs 500,000 salary. This is essentially a part time job and should be paid part time rates (lack of quorum has not ended so the problem of commitment to duty did not lie

in money!). In Ethiopia, all members of the legislature at the location, district and regional level are paid as part timers and we should adopt the same here since these are not full time jobs. At the National Assembly, members should agree a pay cut or work full line instead. In addition, a law should be enacted to put a limit on the difference between the highest and the lowest pay in the public service (in a comprehensive wage policy). This will make it difficult for the top to increase their pay without considering the bottom and overall implications for the total wage bill.

#### V. *Distribution of Finances*

As a general rule, all central taxes (V AT, Income Tax, and Custom & Excise duty) go to the consolidated fund as it is currently. The point of departure is in the mode of distribution. Through fiscal equalisation - the formula that ensures equity across the country. There will also be conditional grants for special projects, especially those that cut across districts/regions or those of national importance. Each district/region will also be allowed to levy taxes as it deems fit (Remember, competition for investors will ensure that they are prudent). The reform/districts will be given strict expenditure guidelines from the Center to avoid waste and maintain fiscal discipline. In short, the country will like a giant multinational and each cost center will have to live within allocated resource limits. The Local Authorities Transfer Fund (LATF) provides a good example of how this will work.

The National Audit Office will focus on value and return to the mwananchi for every cent expended. The National Statistics Bureau will monitor activities in each unit and advice the central government on the

most equitable allocation of resources.

#### VI. **Implementation Strategy of the Devolved System**

Like any change process, the implementation of the new system will take time, energy and visionary leadership to actualize. Generally, there are four approaches in managing transitions, namely;

- **Direct** – the old is abandoned and the new takes over immediately
- **Parallel**- the old and the new run side by side for a while until there is sufficient confidence in the new
- **Modular (phased)** - the arrival of the new system comes in bits/modules and each module runs parallel to the old
- **Pilot** - You experiment with a representative module for awhile to facilitate learning and build experience

I propose two approaches:

A piloting of a representative unit for one year to act as a learning ground for all the other units.

Thereafter, incorporating the lessons learned from the pilot, a phased or modular approach, based on the degree of devolution, i.e. where the Centre cedes powers gradually over a period of 10 years but in three tranches across the country. There is sufficient time to allow for learning, adjustment and full empowerment of the people to arrange their own affairs. I suggest that during this period of transition Kenya be governed by a government of national unity.

## **VII. Requests for Special Status**

The concept of special status arises generally in situations where the unit requesting it is fundamentally different from the unit it wants to join. In Kenya, this situation does not exist and I discourage CKRC from entertaining this route. Each of the 42 tribes is unique in its own right and diversity should be seen as something to cherish and uphold. The glamour for special status is economic rather than cultural or social and once the issue of fiscal equalization is understood and internalized, this problem will end on its own. If you look at the history of special regions around the world, it tends to revolve around issues which are fundamental e.g. China and Hong Kong – Communism vs. Capitalism; Britain and Northern Ireland – religions/ethnic conflict, etc.

It is important to note that special status request by Quebec from Canada was rejected by a referendum although a strong case based on language and culture had been put forward.

The same can be said of Basque Republic in Spain.

## **VIII. The Case for Nairobi not being the Capital of Kenya**

Although this is an emotive issue, it has to be addressed at this opportune moment of great change. Nairobi now has 50% of our GDP and 10% of our total population yet it lacks key infrastructure of a modern metropolis and capital city for example mass transport systems like subways. It also has some of the largest slums in Africa. Over the years it has been badly planned and its growth has tended to be haphazard. If not rescued, it is a city that will kill itself. The Nairobi National Park is perhaps going to be

the first casualty, inspite of its uniqueness as the only natural animal sanctuary next to a capital city.

I have always had a special liking for Nanyuki as a future capital for Kenya for the following reasons:

- Next to Mount Kenya - an icon of Kenya,
- The Equator cuts across it,
- Semi-arid in nature - good for buildings not agriculture (Nairobi is dangerously taking over coffee estates as it expands!)
- Centrally located,
- Just 200 km from commercial hub of Nairobi - build a highway to connect the two cities
- At the confluence of major tribal groupings.

Nigeria provides a good example of relocating a capital city and great lessons to learn.

The overall implications of this move is to help government downsize naturally. For example; the Ministry of Finance will sell off Treasury Building for a sum of about Kshs. 600 million (current market price) and use Kshs. 200 million to build a modern office block in Nanyuki just to fit the smaller Ministry in a devolved system. The rest of the money can be used to retire part of our public debt!

## **IX. Status of a Capital City**

In highly devolved systems, the issue of who “owns” the capital is tricky. If you read the history of Washington DC it comes out clearly that some special status for the City is imperative. Washington DC has the status of a State, but it is not one. It is small compared to say New York or Atlanta and its role is mainly the discharge of government business, while the real business

of the country is elsewhere. London has also a special status and so is Berlin, the new capital of Germany. Special assignments for the capital city assembly will be required for this “joint” ownership. I recommend that the new capital city be given a special status through the constitution and an Act of parliament.

## **X. The Case for an Upper House**

The major purpose of an upper House in parliamentary democracy is to check majoritarian rule at the lower house. In essence, democracies are measured not by how well the majority governs but by the assurances given to the minority. In a country polarized by ethnicity like Kenya, and the general mistrust of the majority, an upper House dispels the fears of other tribes about their place in the equation of governance. In the USA, the Senate has two members from every state irrespective of size, population, geography or wealth. The founding fathers of the USA had reasoned that this was the House to hold America together and act as an oversight to the lower House. In fact, the senators sit for six years and not all the one hundred run at the same time. One-third are eligible for re-election every four years. The logic was to ensure continuity and “country” memory. The

House of Representatives so far hold elections every 2 years and the seats are purely based on population dynamics. I therefore, propose that an upper House be created as the surest way of preserving Kenya as an entity.

The upper House also can serve as a court to impeach high-ranking politicians like the President if they made an attempt to dismember the country and/or generally betray the trust of the country. It will also evolve a national code for Kenyan culture, values, rites and rituals; and defend the same.

## **XI. Conclusion**

I hope the above ideas will help shed light on some of the contentious issues as we embark on the final leg to enacting a new constitution in Kenya. Like a snake, which sheds its skin periodically, Kenya should use this opportunity to reinvent itself, in line with the new government motto of **democracy** and **empowerment**. Kenya has this great opportunity and challenge of becoming the most progressive African state, and lead the overall renaissance of Africa.

## FISCAL AND FINANCIAL ASPECTS OF DEVOLUTION

### Mr. Ndung'u Gathinji, Consultant.

1. Thank you for inviting me to address this distinguished gathering on this important subject. This is the first time that I am appearing before this commission in any capacity and although the invitation came addressed to the Chairman of the Nairobi Stock Exchange, I would like to point out at the outset that the views expressed herein are entirely my own and do not necessarily represent the views of the Exchange or any other organization I am associated with.

from what the accountants consider the logical approach and that is "balancing the books" which put simply means living within one's means. I am not quite sure what Shakespeare had in mind when he said "neither a borrower nor a lender be" but as his business had nothing to do with wealth creation, he was probably right if one wanted peace of mind. Good governance in my dictionary carries with it an obligation for financial prudence.
2. The programme I was sent on Monday indicated that I was supposed to discuss a paper presented by one Dr. Nehemiah Ng'eno but I have to admit that I have neither met him nor seen his paper. Those who invited me later sent me a paper authored by one J. K. Kipng'etich on the "cost of government and other related issues" with the suggestion that I may talk to that paper. As this second paper arrived only 2 days ago, you can surmise correctly that I have not had the time to study it although I have looked at it
3. Nevertheless, this is the topic I intend to speak on not only because it is the paper that is available but also because I consider the topic an important matter for consideration by the Commission. As an accountant I am used to look at matters of finance
4. It would however appear that most developing countries like Kenya, have never heard of the call to live within their means. There is no reason why they should anyway, because living beyond their means is actively aided and abetted by the Bretton Woods institutions who merely lend new loans to countries that are finding it difficult to repay old loans. The new loans are then used to payoff the old loans (with interest of course) and the same scenario is repeated over and over again. This enables those lending institutions to claim that no country has ever failed to repay their loans while all that happens really is that the countries sink deeper into the debt.
5. Some people have attempted to develop the philosophy of trans-generational equity in many forms, the simplest one being what is



commonly referred to as sustainable development.

Something is sustainable when one can keep on doing it over and over again un-aided, and I use the word un-aided deliberately. What condemns the so-called developing countries to a state of permanent under-development is something that is very common in some countries in Asia, where some families are in permanent bondage working to pay off debts, to their landlords. This is ensured though the payment of little or no wages thus eliminating any capacities to accumulate savings to be able to payoff the debt. And so it is that the more developing countries struggle to try to get out of debt the more they sink deeper into debt because the world economy and the terms of trade are so arranged as to operate like a pool of quicksand for most developed countries. The more they struggle to free themselves, the less free they become.

6. That introduction was long, but it needed to be said before proceeding to discuss the cost of government, or more specifically, the type of government that the Commission is proposing to Kenyans. I have to admit that I do not know where or how often, cost has been addressed in the whole constitutional process. I am referring here to how many citizens, observers, experts or commentators highlighted the need to balance the budget as an indication of responsible constitutional government. We know from experience that democracy is expensive but we persist in adopting models from Britain and elsewhere,

of holding elections every five years or so, when there are more affordable models we could copy, without sacrificing any democratic principles. I am amazed for example at how many developing countries borrow money in order to finance elections, but that is another topic.

7. My specific reaction to Kipng'etich's presentation is as follows:-

It is not in fact difficult to see why we are economically backward. We try to live in the 21st century using 15th century budgets, and of course it cannot be done. The reason why we have to depend on 15<sup>th</sup> Century budgets is because we do not have 21<sup>st</sup> Century economies and we therefore earn past century prices for whatever we produce. So I cannot help but be concerned by proposals that on the face of it amount to potential increases in government expenditure without any identifiable increase in productivity and revenues. I am left with the unanswered question, "where is the money coming from to pay for all this?" The constitutional proposal recommended a cost beneficial structure, but all I see are the costs. I do not share Mr. Kipng'etich's unproven statement that because the proposal has fewer levels of government it will therefore be cheaper. It basically ignores the higher number of units in the structure for a start.

8. A proper study is needed to determine what the true cost of the proposed structure would be even before one goes on to carry out a

cost-benefit analysis. As far as I am concerned, the best system in the world is the one we can afford to sustain. Mr. Kipng'etich highlights very well the big burden that public service in Kenya is today. The problem is already here, as thousands of public sector employees go without pay for several months, including the employees at the capital city where most of the country's wealth is apparently concentrated.

9. My concern with the Draft Bill is the power given to the various levels of government structures to spend what will turn out to be inadequate resources. Kipng'etich points out the case of current MPs who recently set the worst example possible of irresponsible, fiduciary governance by awarding themselves extremely high remuneration packages and there is not point in ignoring the fact that this is the kind of leadership we have had in Kenya, and will continue having into the foreseeable future. That is why the cry has been for less, not more governments, although in my view, more not less, government is needed in some sectors e.g. security. According to Mr. Kipng'etich, we are already spending 85% of government revenue on payrolls and debt servicing. Public debt stands at over 70% of GDP. This is the reality, the starting point as it were. To add to this level of expenditure can only be justified by new sources of revenue, and this is nowhere to be seen. The whole devolution exercise is founded on a formula for sharing revenues without any guaranteed sources of such

revenues in a country that is already raising 24% of GDP in taxes - one of the highest rates in the world, and the highest in East and Central Africa.

1. In my opinion, devolution should first be preceded by a thorough clean up of the waste in government expenditure. This calls for massive down sizing to bring the level of public expenditure to match available revenues. Thereafter, we can build a development agenda on this lean structure. Poverty and democracy cannot co-exist, and democracy is always the loser. Poverty in Kenya, while partly due to the lopsided terms of trade to which all developing countries are subjected, is also due to the inappropriate utilization of the revenues actually available. Any proposal that recommends an increase in public expenditure in Kenya today is bound to fail, for the simple reason that it will be unimplementable. That is not to say that it cannot necessarily be done more cheaply.

My fundamental reservation about Mr. Kipng'etich's presentation in this regard is that he sets out the problems of funding the current structure, suggests that it should be reduced, but then goes on to recommend how the proposed structure could be implemented, including the establishment of a new capital, ignoring the impact of the increased attendant costs. A costing exercise must have as its objective, the determination of the actual amount as well as its affordability or financing.

11. But sticking to the structure itself, a costing of it can of course be undertaken but more direction needs to be given in order to limit the number of speculative assumptions there are.

**(a) Organization structure**

A reasonably agreed organizational structure needs to be prepared with clear definitions of the functions and responsibilities of the office holders identified therein. This will enable somebody to determine the personnel requirements for the proposed structure at each level.

**(b) Terms of service**

A decision needs to be taken as to which level of administration can work without pay, but it needs to be borne in mind that even volunteer services have their attendant costs.

It is generally agreed that with the possible exception of members of Parliament and Permanent Secretaries, other levels of the present public service are not adequately remunerated. One will therefore have to choose what level of remuneration to use in costing the model e.g.;

- (i) To use the existing terms of service for the same or equivalent positions;
- (ii) Given the ongoing agitation for new terms, to estimate the likely level of agreement and apply those terms;
- (iii) To seek conformity within East African or similar economies elsewhere and apply equivalent terms.

A major decision to be made here is the level of remuneration to be applied to each zone. If these are different, then there will be differences in the skills levels attracted to each zone with predictable consequences

- (iv) To fix the total administrative budget at its current level but reallocate it in accordance with some specified formula, even if this results in reductions to the remuneration of some existing offices.

**(c) Define Cost**

It is common when considering personnel costs to focus only on salaries and ignore other related costs, perhaps the most common omission being pension costs. In costing any new structure account needs to be taken of:

- (i) Space or occupancy costs (rents).
- (ii) Communication costs.
- (iii) Support services
- (iv) Travel and meeting costs.
- (v) Training costs etc.

**(d) Implementation approach**

Kipng'etich identifies several ways to implement the proposed structure. But they basically boil down to two:

- (i) parallel running, whereby both the old and new structures are co-existing.
- (ii) immediate cut-off whereby the old structure is scrapped and the new one implemented overnight.

Given past experience and available capacities, I suspect that a sudden and immediate switch from one structure to the other may be difficult to accomplish. Parallel running implies double costs.

Regardless of the implementation method adopted, a decision will have to be made on whose shoulders the cost of any redundancies will fall.

It is generally agreed however, that the longer it takes to implement anything the more it will cost. So timing has an impact on costs particularly in the inflationary climates

we live in.

### **Recommendation**

It is obvious that more work remains to be done in this area. But the first thing that needs to be done is to agree on the preferred structure and the preference for particular assumptions.

Only then can the bottom line in terms of shillings and cents be determined. But we must define what we understand by *cost-beneficial or affordable*. And we must keep in mind that after all this is over, somebody will still have to find his/her next meal.

## **SECTION TWO**

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### **REFERENDUM SEMINAR: 7<sup>TH</sup> – 10<sup>TH</sup> DECEMBER 2003 AT WHITESANDS HOTEL, MOMBASA**

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#### **List of Presentations and Presenters:**

1. “The Referendum as an Instrument of Decision Making”, Keynote address by Prof. Okoth-Ogendo
2. “The Referendum Experience in Canada” by Mr. James Girling
3. “Referendum in Uganda” by Mr. Hajj Aziz K. Kasujja
4. “The Referendum Experience in Rwanda” by Mr. Charles Munyaneza
5. “The Draft Referendum Regulations 2003” by Hon. Justice Isaac Lenaola
6. “Comments on the CKRC Draft Referendum Regulations, 2003” by Hon. Abdu Katuntu
7. “Kenya Draft Referendum Regulations 2003: A Discussion” by Mr. Jeffrey Simser
8. “Critique of the Draft Referendum Regulations, 2003” by Mr. Samuel M. Kivuitu
9. “Comments on the CKRC Draft Referendum Regulations 2003” by Mr. Gabriel K. Mukele.

## THE REFERENDUM AS AN INSTRUMENT OF DECISION-MAKING

**Prof. H. W. O. Okoth-Ogendo, Vice-Chairperson of the Constitution of Kenya Review Commission**

1. The referendum is a form of direct democracy, which allows citizens to express their opinion on critical national issues. A referendum, therefore, may either be demanded by the people themselves or called to legitimize decisions made at any level but which have (long or short term) implications for society.
2. Referenda are, generally appropriate on issues which involve fundamental change in social, economic and political arrangements or structures, or which cut across the political or cultural divide. They are not, therefore, appropriate in respect of partisan or minority concerns. Nor is it appropriate for the resolution of complex issues.
- 3 As an instrument of public intervention in major political decision-making, referenda are not common worldwide. Apart from Switzerland where it is common, referenda are extremely rare elsewhere. That rarity also goes for the use of referenda to legitimize, or adopt major regime changes or new constitutional structures. Indeed there cannot be more than five constitutions

out of the more than 190 or so in existence today (France, Denmark, Ireland, Rwanda and Zimbabwe) that have been subjected

*in toto*, to referenda. Even in these limited areas, the nature, content and administration of respective reference have been very different.

4. It is important to note, however, that the use of referenda could be counter-productive. Apart from being an expensive exercise, frequent use of referenda could undermine the institutions of representative government e.g. Parliament, if not carefully designed, can easily lead to majoritarian dictatorship, and can lead to protracted disputes as to their consequences.

The use of the referendum therefore requires caution and careful planning.

5. Jurisdictions which recognize the referendum as an instrument of direct democracy however, must have in place:
  - clear juridical basis to call for it in specific contexts or circumstances,
  - referendum legislation defining how it is to be managed, how the referendum question or questions are to be framed, the criteria for assessing its success or failure, and how the results are to be interpreted,
  - modalities for civic education

prior to the referendum, and

- infrastructure and resources for the management of the referendum.

6. Over the past several months, debate has been raging in the media in this country as to whether the Draft Constitution under discussion should be subjected to a referendum before its acceptance as the basic law of the land. Those pushing for this position argue that this is the only way in which the new Constitution can claim legality and legitimacy. I am not persuaded by this argument and this for several reasons.

7. First, the vast majority of existing Constitutions draw their legality and/or legitimacy from diverse meta-constitutional principles other than referenda. These principles include enactment in accordance with the rules of change specified in existing constitutions; revolutionary action such as coups and insurrections leading to the overthrow of civilian authority; or imposition by a foreign power. The first of these is the more orderly and rational way of conferring legality and legitimacy to new constitutions. It has been used in such diverse political contexts as Trinidad and Tobago in the seventies and South Africa in the nineteen nineties. The second has brought fourth a great which conferred legality and legitimacy to the independence constitutions of former British and French colonies, and to that of Japan.

8. Whereas legality may be a technical matter, legitimacy is ultimately a function of political socialization. A one-day exercise cannot really confer

legitimacy for all time for such a fundamental process as constitution making. Only time and circumstance can do this. To be true legitimate, a constitution must grow and become embedded in the psyche of society. The American Constitution is perhaps the best example of this.

9. Second, there is broad consensus among Kenyans that the present constitution making process should and must be conducted in accordance with the rules of change specified in the current constitution and complementary laws. That constitution makes no provision for a referendum as the final and constitutive act in constitution making. Indeed section 47 is unequivocal that only Parliament can "alter" the status quo. "Alteration" in that section means and includes:-

- amendment,
- modification,
- re-enactment with or without amendment or modification of any provision of the constitution,
- the suspension or repeal of any such provision, and
- the making of a different provision in the place of that provision.

Similar provisions have been used elsewhere to confer legality and legitimacy to entirely new constitutions. It all depends on how the Bill to Alter the constitution is drafted.

10. Third, public consultation on this process has been one of the most comprehensive anywhere. The Constitution of Kenya Review Commission did not only conduct Civic Education on fundamental issues prescribed in the review Act, it visited

all constituencies to take the views of the people. After preparation and publication of its report and draft bill the Commission again went back to the constituencies to disseminate the report and the draft bill. The views of the public on constitutional issues, in general, and the report and draft bill, in particular, have also been analyzed and equally widely disseminated. Indeed many people believe that the December 2002 Elections were in large part a kind of "referendum" on the draft bill. The result, they argue, indicated overwhelming support for the structure of government proposed in that bill which had been in the public domain for more than three months. Should we, they ask, again ask the people to vote on the draft as approved by the National Constitutional Conference? In any event, why call for a referendum when no demand for it has been expressed by the people. I doubt not.

Although it was vigorously argued that a referendum on the whole constitution should be held and that this should have finality, that position was never accepted by the majority of protagonists on both sides of the political divide and certainly not by Parliament. The chequered journey of the referendum issue through Parliament indicates that the substantive content of what is now section 28(1) has not changed. That provision states that:-

the Commission shall, on the basis of the decision of the people at the referendum and the draft Bill as adopted by the National Constitutional Conference prepare the final report and draft Bill.

It is that final report and draft Bill, which will go to the Attorney General for onward transmission to Parliament. In this respect, no amendment to the current constitution is necessary. In fact the original review Act (No. 13, 1997) had no provision for a referendum of any kind. It merely asked the Commission to prepare a final report and draft bill and hand it over to the Attorney General.

11. Should it be agreed however, that a referendum be held as the final and constitutive act of constitution-making in this country, the following requisites will first have to be put in place:-

- the present constitution must be amended to permit this,
- referendum legislation must be enacted, to define the modalities and effects of holding it, and
- infrastructure must be established specifically for this purpose.

12. So what kind of referendum does the Constitution of Kenya Review Act (Cap3A) contemplate? An important thing to note is that in all discussions extending back to 1997, it was always accepted that only Parliament can have the final say on the Constitution.

13. What has changed, however, is the nature of the referendum, which may be held under the review Act. Act No. 5 of 2000 gave the Commission the option either to first submit its report and draft Bill to a referendum or to by pass this procedure altogether and do so directly to the Attorney-General for submission to Parliament. No guidance was given to the Commission on when to make that choice. An amendment Bill published in 2001 however, would have required the Commission to submit the entire report and draft Bill



as adopted by the National Constitutional Conference to a referendum before submission to the Attorney-General and Parliament. Parliament did not accept that proposal. Instead Act No. 2 of 2001 provided that a referendum on constitutional issues would be limited only to questions not carried by two thirds and not opposed by one third or more of all members of the National Constitutional Conference. Issues in respect of which consensus was recorded at the Conference would not therefore be submitted to a referendum. Finally in 2002, (Act No. 3,2002) the review Act was further amended to provide that only questions specifically voted on by a two-thirds majority of "the voting members present" would go to the referendum. That amendment meant therefore that some questions could fail to receive both approval for inclusion into the Draft Bill, and reference to a referendum. The amendment provides no guidance on how the Commission would treat such questions.

14. As the review Act stands now, therefore, the scope of the referendum is very limited. It must be held:
  - only on specific issues voted for that purpose by the National Constitutional Conference,
  - a non-binding, purely consultative basis, and
  - with consequences which do not usurp the authority of Parliament to alter the Constitution under section 47 thereof.
15. This begs at least three important questions:-
  - what is the constitutional value of this exercise?
  - how will the Commission deal

with questions, which fail both to obtain approval for inclusion into the draft and to be referred to a referendum?

- how does the Commission use the outcome of a referendum on any question in the preparation of its final report and draft Bill?

A fourth question arises from the fact that section 27 (7) of the review Act now requires that where a referendum is voted, the Commission must hold it "within one month" of the conclusion of the National Constitutional Conference. Is that practical? There could be other questions.

16. This seminar provides the Commission to respond to these and similar questions, which are bound to arise, should a referendum even in this limited forum were to be held. We also hope that the seminar will equip the Commissioners, who are tasked with managing that limited form of referendum, with the intellectual and practical skills required for that task. It is my expectation that at the end of the seminar clear understanding of the intricacies of that process will have emerged.

I thank you.

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## THE REFERENDUM EXPERIENCE IN CANADA

**Mr. James Girling, M.A., LL.B., M.B.A., Senior Counsel, Ministry of Attorney  
General, Ontario, Canada**

### 1. The History of Referenda in Canada

#### (a) When Referenda Have Been Held

Since 1867, when Canada was established as a self-governing dominion, there have been only 3 federal referenda held nationally, as follows:

|      |   |                               |        |
|------|---|-------------------------------|--------|
| 1898 | - | Referendum                    | on     |
|      |   | Prohibition                   |        |
| 1942 | - | Referendum                    | on     |
|      |   | Conscription                  |        |
| 1992 | - | Referendum                    | on the |
|      |   | Amendment of the Constitution |        |

As can be seen from the dates and topics of the referenda, the Canadian government has rarely used the referendum as a tool to gauge popular opinion. Instead, the legislative and executive decision-making models, together with the election process, have traditionally been used to resolve public policy issues in Canada. It has only been on the rare occasion that the executive has considered a matter to be so important or fundamental to the nature of Canadian society or the political process or of such a high social or moral significance to individual Canadians that it was considered necessary or advisable to consult the public directly on a specific topic. In Canada's case, the use of national referenda have been relatively evenly spread over moral/social, political and constitutional issues. To this extent, Canada's experience is not unlike the global experience where 39.6% of the more than over 1094 referenda that have been held

on a national or sub-national scale between 1791 and 1998, have been held in relation to constitutional issues.<sup>2</sup>

Unlike some jurisdictions where referenda are such a regular part of the political process that they are frequently combined with another voting mechanism such as a general election, Canada's federal referenda have been scheduled on an *ad hoc* basis.

#### (b) How Many Referenda Have Been Held

As indicated above, there have been a total of 3 federal referenda held nationally, but in addition there have been innumerable provincial and municipal referenda held. These referenda have been on a wide variety of topics, usually of concern only to the people of the particular jurisdiction and usually limited in significance only within the boundaries of that jurisdiction (e.g. recall of a provincial member of the legislative assembly, ratification of a land settlement with first nations peoples within the jurisdiction, amalgamation of municipalities). This paper will, however, look at certain referenda which, although not federal or even national in scope, dealt with issues in which the nation as a whole had vital interests. These are the Québec referenda of 1980 and 1995, and the Newfoundland referendum of 1948.

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<sup>2</sup> Gary Sussman, "When the Demos Shape the Polis - The Use of Referendums in Settling Sovereignty Issues" (London School of Economics, n.d.)

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## 2. The Legislative Framework for Referenda in Canada

### (a) Constitutional Structure of Canada

Canada is a parliamentary democracy, both within the federal sphere of influence and within each one of its 10 provinces and 3 territories. Each of those jurisdictions has its own legislative body which is responsible for making of laws relative to its own sphere of influence and authority. The Constitution of Canada is composed of a number of statutes which have evolved over time and most of which originated as British statutes. Since the so-called patriation of the Constitution more than two decades ago, the federal and provincial governments have had full authority to make its own laws, subject to a reservation of a rarely used executive veto.

It has long been recognized, and affirmed by the Supreme Court of Canada<sup>3</sup>, that there is an unwritten, constitutional convention that the federal government must obtain at least a substantial measure of provincial consent before amending the Constitution of Canada in any way that would affect the relationship between the various Canadian jurisdictions. Although this convention does not require that the federal government put amendments to the Constitution to either the provincial legislative assemblies or the populace, in two major, relatively recent instances of attempts to amend the Constitution, the federal government did commit itself to such consultations. The first consultation was based on a ratification process under the so-called Meech Lake Accord whereby each provincial legislative assembly was to have voted on that Accord by 1987, and the second, a national referendum on the Charlottetown

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<sup>3</sup> *Reference Re: Amendment of the Constitution of Canada (Nos. 1, 2 and 3)* (1981), 125 D.L.R. (3d) 1 (S.C.C.)

Accord which was put before the voters in 1992.

### (b) Jurisdictional Issues for the Holding of Referenda

Structured as a federal entity, Canada has a constitution that gives the federal and provincial governments certain jurisdiction over specified areas of authority. Most of these powers are mutually exclusive. Within its own sphere of influence, each government has considerable authority and responsibilities. Each government is premised on a democratically elected system of government where the representatives are responsible and answerable to the voters through the election process. To this extent, Canada is similar to Kenya. Unlike the Draft Bill of the Constitution of the Republic of Kenya<sup>4</sup>, however, the Constitution of Canada has no requirement for the holding of a referendum on constitutional issues or any other matter, neither in the federal nor the provincial spheres of influence. Instead, the power to initiate a referendum usually rests either in a statute specifically designed for the purpose of setting out the process and requirements for a referendum to be held or as a specific provision and process which is part of the legislative scheme with respect to a particular matter.

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<sup>4</sup> In the version of the Draft Bill, dated September 27, 2002, Article 294 would require the ratification of certain constitutional amendments by way of a referendum and paragraph 296(2)(b) would require a certificate of the Electoral Commission that required approval had been obtained in a referendum before the President could assent to the amendment or, in the absence of the President's assent, the Speaker could cause the Bill containing the amendments to be laid before Parliament in order to have the Bill become law.

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(c) **Differences between Canadian Jurisdictions**

**i) Federal**

In 1992, the Canadian Parliament enacted the *Referendum Act*<sup>5</sup> which set out the rules under which the federal Cabinet may, in its discretion, place any question(s) before the voters of Canada as a whole or one or more of its provinces only.

**ii) Provincial/Territorial<sup>6</sup>**

Not all provinces or territories of Canada have referendum legislation, nor do those that do have such legislation necessarily follow the same formula. In some provinces, the referendum legislation is specific to constitutional matters, while others permit referenda to be held on any matter. There are, however, three basic types of referenda legislation, regardless of the details that each might include. They are referenda (sometimes also called plebiscites, depending on whether or not they are meant to be binding), initiatives and recall initiatives. An initiative is a type of referendum which is started by electors within a jurisdiction petitioning the legislative body to introduce and pass a particular Bill or a Bill to accomplish a particular purpose. A recall initiative does not have a legislative objective, rather its petitioners seek to remove an elected member of the legislative body before the expiry of his or her term.

**iii) Municipal**

In Canada, all municipalities are corporate entities, dependent on legislation (usually provincial or territorial) for their legal structure. As such, these municipalities'

ability to hold referenda is strictly limited by their legislated authority and their geographic boundaries. Thus, the subject of municipal referenda tend to be about local governance matters.

**3. Referendum Questions**

**a) The Submission of Referendum Questions**

Under the federal Act (s. 3(1)), the responsibility for submitting a referendum question with respect to a constitutional issue rests with the federal Cabinet. The same is effectively true for the two provinces (*i.e.* Alberta and British Columbia) which have their own requirement of a referendum in advance of dealing with amendments to the Constitution. In the case of the federal Government, the decision on whether or not to submit a referendum to the electorate is a discretionary one and depends on Cabinet's view of what is in the public interest.

**b) The Process**

Under ss. 3 - 6 of the *Referendum Act*, the Government must first give a copy of the proposed text of the referendum question to the Leader of the Opposition, as well as to the leaders of any parties having official party status, each of whom must be consulted about the text. No sooner than 3 days later, a member of Cabinet must then give notice to the House of Commons that a motion will be brought for the approval of the text of a referendum question. The motion is then to be moved and considered by the House on its next sitting day. Within 3 sitting days, the Speaker is required to put every question necessary for the disposition of the motion. Once the motion has been considered and adopted by the House, with or without amendment, the motion is, in turn, sent to the Senate for its consideration. The Senate is

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<sup>5</sup> S.C. 1992, c. 30.

<sup>6</sup> See Appendix A for a list of various referenda statutes in Canada.

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then required to consider the motion within the same time-frame as the House. Any amendment by one of the two Houses of Parliament must be concurred in by the other. Within 45 days of the text receiving the final approval of the two Houses, the Government may issue a proclamation directing that a referendum be held on the question.

**c) The Framing of the Question(s)**

Despite all the consultation and consideration given to the text of the proposed question in the course of its passage through Parliament, it is initially solely within the power of the Cabinet to frame the question(s) in any way that it sees fit. The question is formally framed through the mechanism of proclamation. By virtue of s. 3(3), the question is required to be framed in such a way that it may be answered by either a “yes” or a “no” being chosen on the ballot.

**d) The Experience**

The current means of vetting the question is a clear departure from the means by which referendum questions were previously submitted and framed. In the referenda on prohibition, conscription and the entry of Newfoundland into Confederation, in each case, a special statute was enacted which set out the question specifically. In majority Government situations, this posed no difficulty, but the requirement of three readings of Bills in each House could have delayed the process considerably. Given that referendum questions tend, by their nature, to deal with controversial issues, the period of consultation with the party leaders provides for opportunity to resolve some of the issues related to the wording before the text is presented to the House of Commons and thus allow for the possibility of compromise and consensus.

Similarly, the requirement that the proclamation issue no later than 45 days after the text of the question has been approved by Parliament and that the referendum be held no later than 36 days after the writ is issued ensures both that the question is dealt with expeditiously and that no party or side gets undue advantage from a delay in bringing the referendum question before the public.

The *Referendum Act* of Québec is much like its federal counterpart, except that it is the Premier of the Province who must bring the motion in the case of the text of a referendum question alone (s. 8). This makes the referendum clearly a matter of government priority. A slightly different approach is also allowed that permits the text of a referendum question to be included as part of a Bill which in turn cannot be given Royal Assent until the Bill has been submitted to the voters in a referendum (s. 10). Finally, the Act puts a limit of one referendum on any given topic in any one government mandate (s. 12).

Although there is much to be said for having a single question capable of being answered with a “yes” or “no,” the use of a single question seeking the voter’s support for a constitutional position can have its own risks. In the case of the Charlottetown Accord, put to a vote on October 26, 1992, one commentator referred to it as,

“too large, too complex and too incomplete to be easily “sold” to the population at large. It was a patchwork of pragmatic compromises which seemed to lack coherence or a larger vision. Moreover, the requirement that the package be accepted or rejected in its entirety meant that it was vulnerable to overall public disapproval and defeat, since the rejection of any one major item

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would be tantamount to a rejection of the entire accord.”<sup>7</sup>

The Charlottetown Accord contained six major, distinct policy initiatives<sup>8</sup>, appealing to different constituencies. If the referendum had been structured to give the voters a choice on each of these six items, in other words, six different binary questions, it is an open question whether the Accord would have found sufficient cumulative support to have overcome the opposition that defeated it in its use of a single, aggregated question.<sup>9</sup>

There can be no doubt that the way that the question is phrased will determine the meaning and importance to be given to the referendum. On this point, the Supreme Court of Canada has ruled unanimously that, on the subject of any use of referendum on the issue of Québec sovereignty, “... the referendum result, if it is to be taken as an expression of the democratic will, must be free of ambiguity both in terms of the question asked and in terms of the support it achieves.”<sup>10</sup> Recognising that it might be

facing a referendum on Québec sovereignty which would attempt to give wide scope to the interpretation of the question and the putative authority of the Québec Government to negotiate some vague relationship with the federal Government, Parliament passed the *Clarity Act*.<sup>11</sup> This Act, which acknowledged the right of any province to consult its population by referendum on any issue and to formulate the wording of the question, made it a precondition to any negotiation to the end that a province might cease to be a part of Canada based upon a referendum question that the House of Commons determine that the referendum question represents a clear expression of the will of the population of that province to cease to be part of Canada. Thus a question that merely focuses on a mandate to negotiate was given as an example of something that did not meet that standard, nor would a question that envisions other possibilities. The legislation also provided for other matters to be taken into consideration, including the size of the majority, the percentage of eligible voters participating and other relevant matters.

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<sup>7</sup> Michael B. Steiner, “Improving the process of constitutional reform in Canada: lessons from the Meech Lake and Charlottetown constitutional rounds,” (June 1997) 30 *Canadian Journal of Political Science* 307 - 338, at p. 326.

<sup>8</sup> The establishment of equality between the Senate and the House of Commons, a minimum of 25% of M.P.s to be elected from Québec, provisions for aboriginal self-government, recognition of Québec as a distinct society, more M.P.s and more powers for the provincial governments.

<sup>9</sup> For examples of the wording of referenda and of particular ways that referenda have been posed in the past to provide for multiple questions and multiple answers, see Appendices B and C.

<sup>10</sup> *Re Reference by the Governor in Council concerning certain questions relating to the secession of Quebec from Canada* (1998), 161 D.L.R. (4th) 385 (S.C.C.), at 424

#### **4. The Conduct of Referenda**

##### **a) Responsibility for the Conduct of Referenda**

Whether by specific reference in the governing statute or by implication or practice, all referenda conducted under federal or provincial authority are conducted by the respective Chief Elections Officer, with that officer adapting his or her normal election rules to cover any gaps in procedure. Both the Canada<sup>12</sup> and Québec<sup>13</sup> *Referendum Acts* go

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<sup>11</sup> S.C. 2000, c. 6, given Royal Assent on June 29, 2000.

<sup>12</sup> R.S.C. 1985, c. R-4.7, s. 7

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so far as to provide specifically for the *Election Act* of their respective jurisdictions to be formally adapted and published for the purpose of the holding of referenda.

**b) Restrictions on the Person(s) Responsible for Conducting Referenda**

Chief Election Officers in Canada, whether in the federal or provincial jurisdictions are highly independent and politically neutral individuals, usually constituted as Officers of the House (i.e. appointed by and reporting to the legislative body rather than the governing party). In this role, they are given a fair amount of leeway in making rules for the fair conduct of both elections and referenda. But, even so, there are limits to their discretion. The Supreme Court of Canada has said that, although the Chief Electoral Officer has been given a broad discretionary power to adapt the *Canada Elections Act* for the purpose of carrying out a referendum, this power does not extend to authorise a fundamental departure from the scheme of the *Referendum Act*. “In exercising his discretion, he must remain within the parameters of the legislative scheme.”<sup>14</sup>

**c) The Experience**

With the possible exception of the second Newfoundland referendum (to be discussed later in this paper), the use of the respective *Elections Act* and officers, procedures and structures there-under as the framework within which to carry out a referendum, has proved to be both efficacious and highly suitable. As neutral officers appointed by and responsible to their respective legislative bodies, the Chief Election Officers have all

the skills, experience and tools needed to carry out the tasks and duties associated with holding a referendum. It would appear to be inefficient, to say the least, to set up a parallel structure for referenda when, in almost every function except for the words on the ballot, referenda are virtually indistinguishable from elections.

**d) Other Models**

Although most referendum processes that incorporate the use of election officials in referenda, retain their traditional positions as neutral administrators of the vote, whose primary role occurs only after the referendum question is formulated, one proposal contemplated an earlier function for them. In 1998, the Province of Ontario published a Draft Bill and summary<sup>15</sup> describing a slightly different approach for the role of the Chief Election Officer. In this model, the Chief Election Officer would have had a more active part in the selection of the wording for the referendum question. In this scenario, the Cabinet would give its proposed question(s) to the Chief Election Officer who would advise Cabinet whether or not, based on his or her experience and knowledge of the requirements of the referendum legislation, the proposed question met the requirements of the Act, including that it be clearly worded, concise and neutral. Furthermore, the Draft would have allowed the Chief Election Officer to propose alternative wording in order to meet the requirements of the Act.

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<sup>13</sup> S.Q. 1978, c. 6, s. 45

<sup>14</sup> *Haig v. Canada (Chief Electoral Officer)* (1993), 105 D.L.R. (4th) 577 (S.C.C.), at 596.

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<sup>15</sup> “A Consultation Draft of the Referendum Act proposed by the Government of Ontario” and “A Consultation Draft of the Referendum Act: A Summary” (Toronto: Queen’s Printer for Ontario, 1998).

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## 5. Regulation of Referendum Campaigns

### a) Campaign Period

Canada's *Referendum Act* defines the referendum period to start on the day that the text of the referendum question is approved by the two Houses of Parliament and to end on polling day (s. 2(1)). Although the dates of both the issuance of the writs and the polling day are within the discretion of the federal Cabinet, section 6 of the Act requires that the writ not be issued during a general election nor be dated more than the thirty-sixth day before polling day. Given that the proclamation directing that a referendum be held may not be made more than 45 days after the approval of the text of the referendum question, this means that the referendum period should not exceed a period of approximately 71 days and be no less than 36 days. In the case of the 1992 referendum, on September 15th, the Senate concurred in the adoption by the House of Commons of the motion to approve the text of the referendum question, and the polling date was set down as October 26th, for a total referendum period of 41 days.

Although the Government of Québec held its own referendum on the Accord using the same question and holding its vote on the same day as the federal referendum, it did so under its own legislation. Under that Act, the writs cannot issue before the twentieth day following the date upon which the motion containing the text of the referendum question was approved by the National Assembly and the polling day is required to be at least 28 or 35 days later, depending on the time of year. In no case is there to be more than 60 days between the date of the writ and polling day (s. 14). In effect, as a result of an agreement between the federal and Québec

Governments, their two campaigns were concurrent.

### b) Campaign Participants

Just as with election campaigns, the Canadian and Québec *Referendum Acts* required participants in the referendum campaigns to be registered with their respective Chief Election Officers. There were, however, distinct differences in the two registration regimes. In the federal statute, any person or group intending to incur expenses (e.g. for advertising, holding meetings) in excess of \$5,000 for the purpose of supporting or opposing directly a position during the referendum period with respect to the referendum question was required to be registered as a referendum committee (ss. 2(1) and 13). There was no limit on the number of committees which could be registered. In fact, a total of 241 referendum committees were registered, with 205 supporting the referendum question and 36 opposing it.<sup>16</sup>

In the provincial statute, anyone intending to incur expenses to, directly or indirectly, promote or oppose one of the options submitted to the referendum was required to be registered as an agent with one of the two umbrella groups, known as national committees, which of each was set up to represent one of the options in the referendum (ss. 23, 27 and 33).

### c) Referendum Information

There are two types of information that can be the subject of regulation during referendum campaigns, information about the referendum process and advocacy information. Once again there are distinctions between approaches taken in the federal and Québec

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<sup>16</sup> Chief Electoral Officer of Canada, 1992 *Federal Referendum, A Challenge Met: Report of the Chief Electoral Officer of Canada* (Ottawa: Chief Electoral Officer of Canada, 1994), p. 27.



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*Referendum Acts.* Under the federal statute, the Chief Electoral Officer is required, as soon as possible following the issuance of the referendum proclamation, to inform the public of the referendum question and the manner in which the referendum will be conducted (s. 31(1)). The means by which the Chief Electoral Officer is to inform the public is left in his or her discretion. The statute makes it clear, however, that the type of information that the Chief Electoral Officer is to make available is not to include any argument in support of or in opposition to any referendum question (s. 31(2)).

Under section 26 of the Québec *Referendum Act*, the Director General of Elections (Québec's Chief Election Officer) is required to send a booklet to the electors explaining each of the options in the referendum no later than 10 days before polling day. This text of this booklet is to be prepared by the respective national committees, with equal space being allocated to each option.

Thus, whereas role of Canada's Chief Electoral Officer is restricted to the dissemination of information regarding the referendum process and a simple statement of the referendum question, the role of Québec's Director General of Elections requires that functionary to act as a conduit for the advocacy information of the two competing sides in the referendum. Neither office becomes directly or indirectly involved in an advocacy function on its own, and retains its neutrality throughout.

#### **d) Campaign Advocacy Financing**

##### **i) Amount(s)**

Under section 15 of the federal statute, each referendum committee has its spending limit determined by multiplying the number of electors listed on the preliminary list of voters

for the electoral districts in which the referendum committee proposes to be active by a specified amount of \$0.564 per elector for 1992 and \$0.30 multiplied by a prescribed fraction in the following years. The Québec statute has a similar spending limit formula for each national committee based on \$0.50 per elector (s. 34).

##### **ii) Sources**

Both the federal and Québec statutes restrict the source of contributions to advocates of referendum positions. Under s. 14, the federal statute prohibited registered referendum committees from accepting contributions from an individual who is not a Canadian citizen or a permanent resident, a corporation not carrying on business in Canada, a trade union that does not hold bargaining rights in Canada and foreign governments and agents. There is no limit on the amount of contributions that may be made but, unlike at elections, however, contributions are not deductible from income tax. Every registered referendum committee is required to keep its prescribed accounts and deposits in a recognised bank or other financial institution (s. 15(5)).

Under section 37 of the Québec *Referendum Act*, there are three sources of allowable contributions, individual electors up to \$3,000 in total of all the individual's contributions for the purpose of the referendum (s. 39), amounts transferred from political parties up to an amount calculated by multiplying the total number of electors by \$0.25 per elector, and an equal government subsidy for each side in the referendum (s. 40). The official agent, deputy or local agent is required to pay for regulated expenses only out of a special fund, called the referendum fund, into which the contributions are required to be paid (ss. 36 - 37).

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### iii) Audit and Reporting

Both federal and Québec statutes provide for audit and reporting to their respective Chief Election Officer to ensure that the financial restrictions are followed. Each federal referendum committee is required to appoint a chief agent and auditor in advance of applying for registration (s. 18). That agent is required within 4 months following the referendum polling day to file with the Chief Electoral Officer signed, detailed statements of all referendum expenses and the amount of all contributions, including the auditor's report and the originals of all bills, vouchers and receipts related thereto and the names of persons contributing more than an aggregated amount of \$250 (s. 19).

Under section 44 of the Québec *Referendum Act*, every referendum is governed by the *Election Act* and the Act to govern the financing of political parties as adapted for referenda campaigns. In other words, the reporting and audit provisions for referenda are parallel to those for provincial elections.

### e) Media

In addition to any broadcasting time for advocacy messages for which a person would have to pay and which, therefore, would count as a referendum expense, starting on the eighteenth day before polling day and ending on the second day before polling day<sup>17</sup>, every broadcasting network operator is required to make three hours of prime time broadcasting available free of charge to referendum committees for their messages (s. 21). The time is allocated by the Broadcasting Arbitrator so that equal time is accorded to the two sides in the referendum campaign (s. 22),

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<sup>17</sup> Just as in federal elections, the polling day and the day before polling day are considered to be "black-out" days on which no broadcast or other advertising is to take place (s. 27(1)),

with specific allocations being based on a complex procedure that balances equity with other factors like the representation of regional or national interests. Each of the 61 referendum committees that sought an allocation was required to make a \$500 deposit, which was refunded to those 37 committees that used the time allocated to them.<sup>18</sup>

### f) Affiliation

Although from a practical point of view, politicians have almost always affiliated themselves with one side or another in referenda, the Québec *Referendum Act* is somewhat unique in that it structures its umbrella organizations, the national committees, on the assumption that Members of the National Assembly will self-identify with which side of the referendum question they wish to affiliate themselves through registration with the Director General of Elections and thereby form the provisional or organizing committee for each of the two national committees (s. 23). Other than the same requirement usually found in election or election financing statutes to the effect that the sponsor of any broadcast, published or distributed advertisement for the purpose of supporting or opposing a referendum question (e.g. s. 28 of the federal *Referendum Act*), there is now no other requirement that individuals must publicly affiliate themselves with one side or the other in a referendum campaign.

### g) The Experience

The constitutionality of the Québec *Referendum Act* was challenged by individuals who objected to being forced to register with either one of the two national committees and to the spending restrictions

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<sup>18</sup> Chief Electoral Officer of Canada (*supra.*), p.

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should they not be registered. The case eventually made its way before the Supreme Court of Canada which ruled that the requirement that he be registered with either one of the two national committees infringed his rights of freedom of expression and association. Although the Court acknowledged that the statute's objective of preventing the most affluent members of society from exerting a disproportionate influence in the campaign had merit, the restriction was so onerous as to approach a total ban on the individual's freedom of expression. The Court ruled that a more proportionate approach to promoting the statute's objective would be to limit expenditures of non-registrants to a specified low amount and to prevent persons from pooling their spending in excess of their separate exemptions.<sup>19</sup> As a result of this decision, the Québec Government dropped its charges against those who failed to register during the campaign and introduced amendments to the legislation to remove the requirement that persons be affiliated with either Yes or No umbrella committees. In addition, the amendments included a \$1,000 exemption for spending on referendum campaign, although persons taking advantage of the exemption would be required to produce expense reports.<sup>20</sup>

As noted above, there was a certain degree of complexity to the proposed amendment to the Constitution that was the subject matter of the 1992 Referendum. Although the principles of the Charlottetown Accord had been known since shortly after the Accord was reached on

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<sup>19</sup> *Libman et al. v. Attorney General of Québec* (1997), 151 D.L.R. (4th) 385 (S.C.C.).

<sup>20</sup> Tu Thanh Ha, "Quebec opens door to third parties in referendums," *The Globe & Mail* (May 15, 1998)

August 28th, exactly how the principles would eventually be implemented were not. So despite a technical interpretation of the referendum period as being 41 days in length, for practical purposes, by the time of polling day, the media-attentive members of the public could have been aware for 58 days that they would be called upon to vote on the issue.

The question is, for the degree of complexity and importance of the constitutional amendments involved, including six significant changes, was this enough time for the public to become informed on the issues, assimilate the information and balance the interests at stake and to come to a decision on the issue. Obviously, millions of Canadian voters did come to their own personal decisions by virtue of the way that they voted, but the issue remains would they have made different decisions, if they had had more time to consider the matter. Under the circumstances, at least one commentator believed that "holding the referendum so soon after the Accord was signed left little time for informing and educating the public about its content and rationale."<sup>21</sup>

Others were of the opinion that, although voters are familiar with elections and political parties, referenda are of a different category of activity. Few voters may anticipate a referendum before it is called and therefore have little, if any, pre-existing knowledge of the issues to be decided. In this case, not only were the issues complex and to a degree unfamiliar, but also, at least initially, the positions of the leading actors and opinion-leaders were unknown. As a consequence, the proportion of decisions made during the

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<sup>21</sup> Stein (*supra.*), p. 328.

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campaign was higher than was usually the case during a general election.<sup>22</sup>

Certainly, the referendum was seen as an important event and resulted in a significant number of requests from those seeking more information.<sup>23</sup> But the degree to which any information-seeking or use resulted in better decision-making or retention of or engagement in the issues remains in question. A post-referendum survey shows that 63% of the electorate could name either only one or none of the proposals in the Charlottetown Accord. From this fact, one commentary postulated that many voters needed guidance in the referendum from intervenors to make up for those voters' shortfall of substantive information.<sup>24</sup> In terms of learning in the course of the referendum campaign for the purpose of decision-making, the best-informed 15% of the population showed little evidence of learning, with the next level making the biggest increase in learning. The next two levels of population tended to show smaller gains in knowledge or to come later in the campaign.<sup>25</sup>

The reality is that, regardless of the length of a referendum campaign, there will always be those who will not be fully informed about the issues involved, for reasons as diverse as lack of interest, lack of education, lack of access to informed analysis, lack of understanding, etc.

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<sup>22</sup> Jon H. Pammett and Lawrence LeDuc, "Sovereignty, leadership and voting in the Quebec referendums," *Electoral Studies* 20 (2001) 265 - 280, p. 271.

<sup>23</sup> Stein (*supra.*), p. 328.

<sup>24</sup> Matthew Mendelsohn and Fred Cutler, "The Effect of Referendums on Democratic Citizens: Information, Politicization, Efficacy and Tolerance" 30 *B.J. Pol. S.* 685 - 701, p. 689.

<sup>25</sup> *Ibid.*, pp. 692 - 693.

Indeed, an argument can be made that there are potentially diminishing returns in making a referendum period too long with the result that part of the electorate becomes bored or even irritated by the length of the campaigns, thereby resulting in a lower participation rate.

Studies suggest a certain divide between those who are actively engaged in political awareness generally and those whose level of political awareness is influenced by the opportunity to vote. In one such study<sup>26</sup>, its authors found that the overall decision pattern for the 1992 referendum was typical of a federal election, with 38% making their decision early in the referendum campaign as compared to 33% in the 1988 federal election. Within the last 2 weeks of the referendum vote, 29% were found still to be undecided. It is not clear, however, if the availability of more information would have made a difference for these persons.

Although political leaders are often influential in assisting electors to come to a decision about how to vote, affiliation with a particular party which has a position with respect to a referendum question is not necessarily a guarantee of an elector voting in a certain way. For example, as can be seen in Appendix D, party affiliation with the New Democratic Party was not necessarily an indicator of how the individual elector would vote. Where the elector was affiliated with one of the more political parties which held more dogmatic political positions, however, party affiliation was more indicative of the way that the elector would vote. Conversely, the very fact that some political leaders supported or opposed the Charlottetown

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<sup>26</sup> Lawrence LeDuc and Jon H. Pammett, "Referendum voting attitudes and behaviour in the 1992 constitutional referendum (March 1995) 28 *Canadian Journal of Political Science* 3 - 33, p. 11.

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Accord may have been enough to cause some electors to vote in the opposite way.

## **6. Ballot Papers**

### **a) Responsibility for Printing Ballot Papers**

The responsibility for printing the ballot paper rests with the Chief Election Officer in each jurisdiction. Under the federal *Referendum Act*, the Chief Electoral Officer is required to adapt the form of an election ballot used in general elections in such a manner as, in his or her opinion, will best achieve that purpose (s. 3(4)). In the case of the 1992 referendum, the Chief Electoral Officer arrived at the final form of the ballot with the advice of three political science professors.<sup>27</sup>

### **b) Security Issues**

The ballot paper is printed in approved and supervised plants in advance of the vote and stored in secure facilities in each jurisdiction. In the case of the federal ballot, the ballots were printed simultaneously in 8 regional printing plants across the country after being transmitted electronically to them.

### **c) Form and Language Issues**

#### **i) Political Affiliations**

In neither federal or Québec referenda do party affiliations appear on the ballot. Despite however closely political parties may affiliate themselves with a particular side in a referendum, in Canada there is an implicit assumption that referenda are reserved for matters of importance that transcend party lines and are neutral in any partisan sense. Given the number of parties active in most Canadian jurisdictions, it would be difficult,

at least at the federal level to include each party's identifier on the ballot.

#### **ii) Minority Languages**

Both the federal and Québec governments have routinely produced ballots at both elections and referenda in both French and English, and both jurisdictions' referendum statutes make specific provision for ensuring that the referenda are accessible to First Nations people. In the federal statute, there is a requirement that the Chief Electoral Officer ensure that "the text of the referendum question is available in such aboriginal languages and in such places in those languages, as the Chief Electoral Officer, after consultation with representatives of aboriginal groups, may determine" (s. 3(5)). In the 1992, the referendum question was made available in 37 aboriginal languages, but because some of these were spoken languages only, the text had to be made available in verbal form in some cases. This meant that the text of the referendum question was provided in written and audio-cassette forms in 19 of the languages, in audio-cassette form alone in 14 of the languages and in written form alone in 4 of the languages.<sup>28</sup> The wording of the Québec Act similarly requires the text of the question translated into the dominant aboriginal language and used where polling stations are situated in a native community (s. 21).

#### **iii) Assistance to Voters**

The Chief Electoral Officer attempts, wherever, possible to select locations for polling stations that accessible without the use of stairs. In addition, for the visually impaired, the ballot is designed with large, easy to read print. For those who are blind, the ballot itself was printed with the words

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<sup>27</sup> Chief Electoral Officer (*supra.*), p. 13

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<sup>28</sup> *Ibid.*, p. 14

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“Yes” and “No” marked directly on the ballot in braille. The text of the question was also made available on a separate braille sheet.<sup>29</sup>

**iv) Use of Symbols**

Other than the braille marking noted above, there was no use made of any other type of identifying symbol on either the federal or Québec ballot form.

**7. Voters**

**a) Eligibility Requirements**

Under section 3 of the *Canada Elections Act as Adapted for the Purposes of a Referendum* (“*Canada Elections Act (Referendum)*”), every person who is a Canadian citizen and is 18 years of age or older on polling day is qualified as an elector. Under the *Québec Election Act*, every person who is a Canadian citizen at the time of voting, is 18 years of age or older on polling day and has been domiciled in Québec for at least 6 months before the date on which the writ is issued and continues to be so domiciled, is entitled to vote.

**b) Disqualification**

Although section 4 of the *Canada Elections Act (Referendum)* still includes the provision disqualifying persons from voting who are imprisoned in a correctional institution serving a sentence of 2 years or more, a decision of the Supreme Court of Canada has ruled that such a blanket infringement of the right to vote is contrary to the *Charter of Rights and Freedoms* because of its failure to be proportional to the objectives of punitive measures and the rehabilitation of offenders.<sup>30</sup>

On the issue of the prerequisite of a 6 month domicile in Québec before being entitled to vote in a referendum, the Supreme Court of Canada decided that the plaintiff did not meet that qualification, having been domiciled in the province only 2 months at the time of polling day. Nor did the Court find that, despite meeting all the criteria for eligibility to vote in the federal referendum, the plaintiff was entitled to a vote under that process. It was clear that the plaintiff was ordinarily domiciled in Québec for the purposes of the federal statute, but not for the provincial statute. Section 6 of the federal *Referendum Act* required that qualified electors are entitled to have their names included in the list of electors for the polling division in which the elector is ordinarily resident and to vote in the polling station for that division. In this case, because the individual was domiciled in Québec and the writ of referendum did not extend to Québec, there was no polling station at which the plaintiff was entitled to vote.<sup>31</sup>

**c) Registration**

At present, the federal elections office is maintaining a permanent voters’ list and all that a Canadian citizen who finds him or herself not included on the list for the purposes of either a referendum or election, is to provide proof that he or she is ordinarily resident within a polling area in order to be added to the list.

**d) Voters Abroad**

Provision has been made for the casting of a ballot by Canadians temporarily resident outside of Canada. Under sections 220 - 230 of the *Canada Elections Act (Referendum)*, an elector may vote by applying to be registered and sending a completed special ballot form in the prescribed manner to the Chief Election

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<sup>29</sup> *Ibid.*, p. 13

<sup>30</sup> *Sauvé v. Canada (Chief Electoral Officer)* (2002), 218 D.L.R. (4th) 577 (S.C.C.)

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<sup>31</sup> *Haig v. Canada (Chief Electoral Officer)* (1993), 105 D.L.R. (4th) 577 (S.C.C.)

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Officer so that it arrives no later than 6:00 p.m. on polling day. In order to be registered the individual must at some point have resided in Canada, been residing outside Canada for less than 5 consecutive years immediately before making the application and intend to return to Canada to resume residence in the future. In order to be registered, the elector must also designate the address within Canada where he or she would otherwise be ordinarily resident. Likewise, provision is made for persons in Canada who are away from their ordinary residence to apply for a special ballot in order to be able to vote.

**e) The Experience**

As the Supreme Court of Canada acknowledged in the *Haig* decision, Canadians are becoming increasingly mobile. Although, in that case, it might appear that the plaintiff had no recourse to fulfill his wish to vote, as the Court noted, he did have another option available to him under the federal Act for persons who were away from their place of ordinary residence. In fact, the Act is largely accommodating of such persons as members of the armed forces, persons travelling on business, etc. Whereas it may make considerable sense both from an administrative and credibility basis to require persons to vote at their place of ordinary residence when they are voting for an elected representative for their constituency, the right to vote in a referendum is clearly without that necessary connection to a specific location as logical prerequisite to exercising the right to vote, a reality that was acknowledged in Newfoundland's *Referendum Act* of 1948 which, at subsection 18(2), permitted qualified electors to vote at any polling station in any electoral district if the elector was absent from the place in which he ordinarily and bona fide resided.

**8. Polling**

**a) Form of Polling Used**

**i) Paper**

At present, most polling in Canada, whether in referenda or elections rely on paper ballots.

**ii) Electronic**

Although municipal elections in certain jurisdictions are authorised to use electronic forms of polling (e.g. voting by telephone), there has been little experience with this voting mechanism. Suffice it to say that when it has been tried, it has not universally been without problems.

**b) Location of Polls**

**i) Fixed vs. Mobile**

Most polls in Canada are fixed at one particular location for the duration of the hours of operation. There are, however, a number provisions for the use of mobile polling stations. Under section 125 of the *Canada Elections Act (Referendum)*, however, where a polling division consisting of 2 or more institutions in which seniors or persons with physical disabilities reside is constituted, a mobile polling station may be located in each such institution successively. In such a case, the returning officer is to set the times at which the polls will be open in each location. Another type of mobile polling station is permitted under section 255 to provide polling facilities to inmates of correctional institutions who are confined to their cells or in an infirmary. Under section 206, a commanding officer in the Canadian Forces may make arrangements for a mobile polling station to collect votes from electors who cannot conveniently reach the polling stations established for their unit.

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**ii) Voter Choice**

Generally speaking, voters are registered at the polling station within the polling division in which they are ordinarily resident. With the exception of the provisions for voters outside of their own area, in which case, special applications and special ballots are required, there is little choice available to the voter in terms of where to vote.

**c) Timing**

**i) Hours for Voting**

The hours for voting on polling day and for voting in advance polls are set out in the federal legislation and provide for 12 consecutive hours within which to vote at regular polling stations and 8 hours at advance polls (ss 128 and 171(2)). Polling stations within correctional institutions may be open for a maximum of 11 hours (s. 251(2)).

**ii) Effect of Different Time Zones**

The federal legislation provides for the hours of opening of polls to be arranged to be consistent within each of the 4 different time zones. Due to the differences in time zones, the polls have already been closed for some time on the East Coast by the time that the polls on the West Coast close. It is because of this difference in time that no results in the remainder of the country are released until the polls close on the West Coast so as not to influence voting.

**d) Special Arraignments**

**i) Advance Polls**

Advance polls are, by virtue of subsection 171(2), always held on the 10th, 9th and 7th days before polling day. Whereas an elector once had to declare that he or she was unable to attend the regular poll in order to make use of the advance poll, now any elector may

choose to use the advance poll within his or her own discretion.

**ii) Special Polling Stations: Correctional Institutions**

Special polling stations are set up in correctional institutions to allow inmates to vote. Inmates are, however, allowed to vote only on the 10th day before polling day and only in respect of the electoral district in which the inmate's place of ordinary residence is situated (s. 245(3)). In order to be registered, the inmate who is otherwise qualified to vote must sign an application for registration and special ballot, declaring the location of his or her place of ordinary residence as being either the place of residence which the inmate had before being incarcerated, the residence of a person with whom the inmate has some family connection, the place of his or her arrest or the location of the last court at which the inmate was convicted and sentenced (s. 251(2)).

In 1992, 188 correctional institutions and 27,935 inmates were involved in the federal referendum.<sup>32</sup>

**iii) Canadian Forces Electors**

In order for members of the Canadian Forces to vote in a federal referendum, they must declare their place of ordinary residence, the electoral district for which is the only place where they are entitled to vote (s. 192). The voting period for such electors is the period beginning the 14th day before polling day and ending 9 days before polling day (s. 190), during which period the electors' commanding officer is to provide them with at least 3 hours per day on at least 3 days for the purpose of voting (s. 205(3)). In order to vote, the elector must fill in a ballot and send it to the Chief Electoral Officer by either mail

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<sup>32</sup> Chief Electoral Officer (*supra.*), p. 22



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or the delivery service to be provided by the Canadian Forces, so that the ballot is received by the special voting rules administrator by 6:00 p.m. on polling day (s. 214(1)).

**iv) Overseas**

In addition to an elector who is abroad being able to mail his or her special ballot to the Chief Electoral Officer, he or she may send the sealed envelope to the Chief Electoral Officer by delivering it to a Canadian Embassy, High Commission or Consular Office or to a Canadian Forces base (s. 228).

**9. Voter Thresholds**

**a) Turnout Requirements**

Unlike some jurisdictions in other parts of the world, in Canada there is no law that requires eligible voters either to register or to vote. Similarly, there is no legal requirement of a minimum voter participation threshold for a federal referendum poll to be valid. The existence of a political requirement for a particular minimum may, however, be a different issue.

**b) The Experience**

Although the federal *Referendum Act* has not used a minimum threshold of voter participation as a precondition for the vote to be valid, certain other type of referendum statutes have. In three of the provincial or territorial statutes listed in Appendix A, the framers of the legislation chose to include a minimum voter threshold in order for the resulting vote to have some effect. In the absence of achieving such a threshold, the vote has no effect. This type of precondition is useful in ensuring a high rate of involvement and support for the initiatives on which the vote is held before it can proceed.

As Appendices E and F demonstrate, there is a general downward trend in voter participation in Canada with regard to the various country-wide elections since 1988. But even so, it does not appear that there would be any danger at the moment in adding a minimum voter participation threshold as a precondition to taking action based on any referendum vote. The question remains, what it would add. The only advantage would be for the policy-makers in knowing that a significant proportion of the population had been engaged in the decision-making process. This is potentially useful in extremely controversial matters, but is probably irrelevant as long as current levels of participation remain relatively constant.

As an interesting counter-point to the general decline in voter participation is the level of voter participation in Québec's three referenda, as illustrated in Appendix G. Although it may appear intuitively obvious, the trend suggests that when a critical issue to the voters is placed before them, voter participation will remain high.

**10. Determination of the Vote**

**a) Minimum Threshold of Votes Cast**

As with the issue of minimum thresholds of voter participation, there is no federal *Referendum Act* requirement for a minimum number of votes cast for a particular result to have effect. Again, it is in the provincial and territorial sphere (see Appendix A) where a particular threshold of votes cast is made a precondition to effect.

**b) Effect of Not Reaching Minimum Threshold**

Prime Minister King of Canada lived to see two referenda in which the result was not what he had hoped for. In the first, the 1942

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referendum on conscription, although his Government received its desired authority from the country as a whole to be relieved from the promise that he had made not to invoke conscription for the purpose of raising troops for the Second World War, he felt unable to proceed on the basis of the results of the vote because of the overwhelming opposition in Québec. So, instead, he awaited for two years before invoking conscription. Likewise, he had held the view on the Newfoundland referenda that, despite Britain's position that it would be bound by whatever the referendum results turned out to be, "unless there is something more than a poor majority,"<sup>33</sup> Canada should not admit Newfoundland into Confederation. When, however, the results showed that only less than 53% of the votes cast favoured the Confederation option, he still chose to proceed expeditiously with the admission of Newfoundland as a province in 1949. Had the Prime Minister been bound by minimum thresholds alone, he would have been given less room to manoeuvre on what were delicate political issues.

## **11. Dispute Resolution Process**

### **a) Persons Entitled to Dispute the Process or the Results**

The federal *Referendum Act* permits the Canadian Government to apply for a recount in respect of any electoral district in the country, while the Provincial Government or an elector ordinarily resident in a province to apply for a recount in respect of any electoral district in that province (s. 29(1) and (2)). The Québec Act allows only the chairperson of a national committee to invoke either remedy of applying for a recount or contesting the validity of a referendum (ss. 41 and 42).

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<sup>33</sup> Bryant (*supra.*), pp. 59 - 60.

### **b) Period to Initiate the Dispute**

The applications under the federal law must be made not later than 10 days after the validation of the results have been completed. Under the Québec law, the time for application must be within 15 days of the polling.

### **c) Basis for Dispute**

Under the federal statute, the judge must be satisfied that either votes cast may have been wrongly rejected, counted, added or reported, and that therefore the opinion of the electors in the subject electoral district will be seen to be different than originally reported. Under the provincial law, the Conseil must be satisfied that, if the facts as alleged are true, the total result of the referendum could change.

### **d) Procedures**

The federal Act requires that an affidavit or statutory declaration setting out the facts accompany the application to a judge and that a copy of the application and affidavit or statutory declaration be served on the Attorney General of Canada. In the Québec Act, the applications must be made to the Conseil du référendum for determination.

### **e) Arbiter(s)**

In the federal model, the judge who hears the application is also the person who oversees the recount. In the Québec model, the Conseil is composed of 3 provincial court judges (s. 2) who, if satisfied that the application is justified will assign a judge to undertake the recount. In the case of a challenge to the validity of the referendum, the Conseil will try the claim as if it were a claim under the *Controverted Elections Act*.

### **f) The Experience**

In Canada, judicial recounts are considered a normal part of the voting process and are

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expected to occur at any time there is a slim majority of votes for one side or another in referenda as well as elections. The ability to have a recount performed by a credible, objective and neutral third party is considered to be one of the checks and balances of the electoral process. Judges have traditionally been seen as the proper persons to undertake this role and, by virtue of their place in Canadian society, tend to add credibility to the process and the outcome, regardless of how emotionally charged the vote had become. In no case has a referendum recount resulted in a change in the ultimate result.

## 12. Legal Effect of the Result

### a) Binding versus Consultative Effect

Although neither the federal nor the Québec Act purports that the results of referenda held under them will be legally, as opposed to politically, binding, there are mechanisms within some of the referendum, recall or initiative statutes in other Canadian jurisdictions that do purport to result in a binding effect (see Appendix A). The difficulty that various Commonwealth jurisdictions have had in crafting legislation that would permit referendum questions to be binding is the extent to which the courts have ruled that such attempts have violated fundamental constitutional principles.

In an appeal to the Judicial Committee of the Privy Council (“J.C.P.C.”) on the validity of a Manitoba statute to give binding effect to result of a popular vote on an initiative question, the Court ruled that any attempt to have laws effectively enacted directly by popular vote to the exclusion of the constitutionally mandated role of the Lieutenant-Governor is an impermissible interference with the constitutional structure of the legislative function of an essential part

of government and therefore is unconstitutional.<sup>34</sup> The J.C.P.C. again had occasion to consider the issue of the limits to which referendum results could be made binding in 1922 when the constitutionality of Alberta’s *Direct Legislation Act* was considered by it. Under that Act, an initiative petition requested the passage of a *Liquor Act*. That Bill was presented to the populace in a referendum and, having been given majority support was presented to the Legislature which then passed it in accordance with the provisions of the *Direct Legislation Act* without substantial alteration. The J.C.P.C. ruled that the passage of the legislation in this manner did not interfere with the discharge of the functions of the Legislature and therefore was not ultra vires.<sup>35</sup>

The degree to which the answer to a referendum question may be binding appears to relate to the issue of how much interference there is with the constitutionally mandated function of the essential procedures and functions of the legislative body. If there is no legal requirement on someone to do something as a result of the results of a referendum then, despite what rhetoric may accompanied the posing of the question and the promotion of the referendum process, then the result of the vote is merely consultative rather than binding.

### b) Method of Enforcement of “Binding” Results

One fundamental feature of the provincial regimes under which referendum results are said to be binding is that they are established by statute. In the absence of a statutory or constitutional basis, the issue of whether or

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<sup>34</sup> *In re The Initiative and Referendum Act*, [1919] A.C. 935 (J.C.P.C.)

<sup>35</sup> *The King v. Nat Bell Liquors Limited*, [1922] 2 A.C. 128 (J.C.P.C.)

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not a referendum is binding is moot because it depends on the will and commitment of individuals to bind themselves, a function that depends on their good faith more than it depends on law.

There are basically just two main, generally used formula for making referenda results binding. In the first category are statutes that require action to be taken if a particular outcome in a referendum is achieved. In this category are the following statutes. In British Columbia's *Recall and Initiative Act*, once the Chief Electoral Officer declares an initiative vote to be successful, the government must either introduce the Bill which was the subject of the vote or, if the Bill is a money Bill, request that the Lieutenant Governor recommend the Bill in accordance with the rules for such Bills and the government must introduce it as soon as possible (s. 16). Where, under Saskatchewan's *Referendum and Plebiscite Act*, the Government has initiated a referendum and 50% of the voters who are entitled to vote did so and there is a majority of over 60% of the votes cast for one of the options, the result is considered to be binding (s. 4). The Government is therefore required, as soon as practicable, to take any steps within its jurisdiction to implement the results of the vote, including changing or introducing programmes or policies, or introducing a Bill in the Assembly (s. 5).

In the second category are the statutes that prevent certain steps from being taken unless a referendum is held and certain results obtained. The Ontario and Yukon *Taxpayer Protection Acts* are examples of this category by which certain specified tax increases are made conditional on a referendum on the subject being held and approved. Another example of this category of statute is British Columbia's *Constitutional Amendment Approval Act* that prohibits the Government

from introducing a motion for a resolution of the Legislative Assembly authorizing an amendment to the Constitution of Canada unless a referendum has first been held on the subject matter of the resolution..

The second category is self-enforcing because it prevents certain actions taking place without a referendum authorising them. The first category is essentially unenforceable because it relies on political decision-making, a matter with which the courts are reluctant to interfere.

#### **c) Enforcement Period**

For the reasons mentioned above, despite whatever time-frames may be stated in the first category of referendum requirements, it is highly unlikely in Canada that there is any period within which an elector may force a Government to act to honour its commitment to be bound by a referendum vote, particularly where the legislative process is involved.

#### **d) Persons Entitled to Require Enforcement**

It is apparent that given that the actions of governments are recognised by the courts as involving the political process with which the courts will not interfere, there is essentially no means by which an elector can enforce a so-called binding referendum from the first category. The remedy for the elector is to vote against that Government in the next general election.

One alternative for the enforcement of referenda results would require there to be some other means of initiating the legislative process directly without having to go through Government members, through an

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independent route. But this would first require changes in legislation.<sup>36</sup>

### 13. Social/Political Effect of the Result

#### a) Degree of Resolution of the Issues

In the absence of the establishment of a consensus around fundamental policy issues, it is difficult to say that referenda are necessarily the best means to deal with strongly held, fundamentally opposed issues broadly held in the electorate. In the case of the 1992 referendum, for example, diverse policy issues were artificially bundled into one question and for the most part remain unresolved to date. Similarly, with respect to the 1980 and 1995 Québec referenda on that Province's place inside or outside Confederation, many issues lie dormant only to the extent that the referendum process is expensive and wearing on the participants and on society<sup>37</sup> and because the key proponents of the sovereignty option are unwilling to engage in another round of the referendum process in the absence of "winning conditions" for their point of view. In the absence of a willingness on the part of all participants to accept the outcome of any one referendum as the final outcome on the topic, the referendum process alone will not resolve underlying differing values and beliefs<sup>38</sup>.

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<sup>36</sup> A variant on this approach, with safeguards built in to prevent abuse, was proposed in sections 32 - 34 of "A Consultation Draft of the Referendum Act (Toronto: Queen's Printer for Ontario, 1998), but never proceeded beyond the consultation stage.

<sup>37</sup> Opinion polls conducted by Leger Marketing in 2002 showed that Québeckers were not interested in debating separation, based on results that show 65% of decided voters oppose sovereignty and only 35% favour it. Source: "Canada and the World Backgrounder, Oct. 2002 v. 68, i2, p. S6.

<sup>38</sup> In an Angus Reid Poll conducted on November 1 and 2, 1995 after the referendum, among

#### b) Faith in the Process

The utility of referenda as a means of choosing between policy alternatives has been closely linked in Canada to faith in the democratic process, in other words that the vote will be taken, recorded and reported fairly and accurately. It would be one thing to lose a referendum because the arguments for one side were insufficient to overcome the arguments on the other side, but it is quite another thing to have lost or perceive to have lost because the process was less than fair.

In the Newfoundland referenda, although the National Convention process for Newfoundlander to decide the questions to be put on the referendum picked only two options, neither one of which was Confederation with Canada, the Canadian option was added to the ballot by virtue of it being included by the British-controlled Commission of Government in the Act providing for the referendum. Unlike modern referendum legislation, that Act did not provide for disclosure of referendum financing. As a result, to this day there remain concerns that the pro-Confederation option was clandestinely funded by Canadian political interests.<sup>39</sup> Furthermore, with no independent scrutineers of the final vote tally, with the ballots being burned two weeks after the second, deciding referendum, and with no detailed breakdown of that vote ever being published, suspicion remains in some quarters that the results were improperly reported and perhaps even deliberately so.<sup>40</sup>

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Québeckers, most "Yes" voters were dissatisfied, while most "No" voters were satisfied with the outcome.

<sup>39</sup> John DeMont, "Still mourning after five decades," *Maclean's* Vol. 112, Iss. 11, p. 22 (Toronto: March 15, 1998)

<sup>40</sup> Gwynne Dyer, "Newf Truth" *The Globe and Mail, Focus* (March 27, 1999).

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#### **14. Summary of Lessons from the Canadian Experience**

Referenda are merely tools of consultation with the voters. They are not ends in themselves, nor are they self-contained. In order for a referendum on any topic to be meaningful, regardless of whether its results are to be binding or merely consultative, it must be part of a larger process, one that builds both confidence in the process and the integrity of its results and provides the necessary information and education to the voters so that not only will they want to vote, but also that they will understand the significance of what they are being asked to decide. Any lack of clarity in the question(s) which are being put to the voters or in the degree to which the outcome of the referendum are to be decisive or directive to the persons ultimately responsible for using or carrying out the results will undermine the public perception of the utility of the referendum exercise and the credibility of the political process as a whole of which the referendum is but one part. Sufficient safeguards need to be built in to the process to ensure that all financing is fully and accurately reported and that the tabulation of the final results is verifiable. Referenda need to be recognized as often expensive, lengthy and sometimes adversarial exercises which should only be undertaken where the electorate as a whole is prepared to accept the results, regardless of what they may be.

## Appendix A

### Referendum and Plebiscite Legislation in Canada

| <b>JURISDICTION</b> | <b>LEGISLATION</b>                    | <b>INITIATOR</b>  | <b>SUBJECT</b>            | <b>AUTHOR</b>   | <b>BINDING</b>   |
|---------------------|---------------------------------------|---|---------------------------|---|--|
| Canada              | Referendum                            | Federal Cabinet   | Any constitutional matter | Government after consultation with opposition leaders | No   |
| Alberta             | Election Act<br>Provincial Cabinet    | Any matter  | Cabinet                   | No  |  |
| Alberta             | Constitutional Referendum Act         | Provincial Cabinet following a resolution in the Legislative Assembly   | Constitutional amendments | Yes   |  |
| Alberta             | Taxpayer Protection Act               | Provincial Cabinet prior to introducing a Bill to levy a sales tax  | Sales Tax                 | Cabinet, approved by Legislative Assembly             | Bill cannot be introduced until Chief Election Officer announces the referendum result   |
| British Columbia    | Recall and Initiative Act             | Initiative petition of signatures of a minimum of 10% of voters required from each riding; Recall petition of 40% voters' signatures in riding, if obtained within 60 days. | Any matter                | Petitioners   | Yes, if more than 50% of eligible voters vote in favour and more than 50% of eligible voters in 2/3 of ridings vote in favour. |
| British Columbia    | Constitutional Amendment Approval Act | Government following a vote on resolution in the  | Constitutional amendments | Government  | Yes, no resolution authorizing the amendment of the  |

| <b>JURISDICTION</b>  | <b>LEGISLATION</b>  | <b>INITIATOR</b>   | <b>SUBJECT</b>               | <b>AUTHOR</b>   | <b>BINDING</b>   |
|----------------------|---|--|------------------------------|---|--|
|                      |   | Legislative Assembly   |                              |   | Constitution may be introduced in the Legislative Assembly until a referendum has been held.   |
| Manitoba             | Balance of Budget, Debt Repayment and Taxpayer Protection Act | Provincial Cabinet prior to increasing specified taxes   | Increases to specified taxes | Cabinet   | Yes, no increases to specified taxes unless approved in referendum.  |
| Newfoundland         | Elections Act   | Provincial Cabinet   | Any matter                   | Cabinet   | No   |
| New Brunswick        | Elections Act   | Provincial Cabinet   | Any matter                   | Cabinet   | No   |
| Prince Edward Island | Plebiscites Act   | Provincial Cabinet   | Any matter                   | Cabinet   | No   |
| Quebec               | Referendum Act  | Provincial Premier with the approval of the text by the National Assembly  | Any matter                   | Cabinet or National Assembly by passing a Bill including the text of the question(s). | No, except for Bills requiring ratification by referendum which cannot be given assent until the referendum is held.                     |
| Saskatchewan         | Referendum and Plebiscite Act                                 | Provincial Cabinet may initiate a referendum or Provincial Cabinet or Legislative Assembly or a petition of signatures of 15% of electors may initiate a plebiscite. | Any matter                   | Cabinet, Legislative Assembly or petitioners.   | Referendum is binding if at least 50% of electors vote and more than 60% of votes are cast in the same way; Plebiscites are not binding. |
| Northwest            | Plebiscite Act  | Government   | Any matter                   | Government  | No   |



| <b>JURISDICTION</b> | <b>LEGISLATION</b>      | <b>INITIATOR</b>  | <b>SUBJECT</b>   | <b>AUTHOR</b>  | <b>BINDING</b>   |
|---------------------|-------------------------|---|--|--|--|
| Territories         |                         |   |  |  |  |
| Ontario             | Taxpayer Protection Act | Provincial Cabinet  | Increases to specified taxes                           | Cabinet  | Yes, Bill increasing specified taxes may not be introduced unless referendum held. |
| Yukon               | Public Government Act   | Legislative Assembly by resolution supported by at least 2/3 of members present | Any matter   | Legislative Assembly and Commission  | Whether binding or not to be stated in resolution.                                 |
| Yukon               | Taxpayer Protection Act | Government  | New tax or increase in tax rate under specified taxes. | Yes, unless more than 50% of eligible voters vote against the new tax or increase in tax rate. |  |

## Appendix B

Examples of the Form of Referendum Questions: Opening Words

| <b>Nature of Appeal</b> | <b>Text<sup>41</sup></b>                 | <b>Topic of Referendum</b>  | <b>Date</b>                      |
|-------------------------|--|---|----------------------------------|
| Emotional               | “Do you want ...”                        | Northern Ireland’s poll on whether to remain part of the United Kingdom or join with Ireland. | March 8, 1973                    |
|                         | “Are you in favour of ...” <sup>42</sup> | Canadian referendum on whether or not to prohibit alcoholic beverages.                        | September 29, 1898 <sup>43</sup> |
|                         | “Are you in favour of ...”               | Western Australian referendum on secession.   | April 8, 1933                    |
|                         | “Do you approve of ...”                  | Ireland’s referendum on entering the European Economic Community (“E.E.C.”)                   | May 1, 1972                      |
| Rational                | “Do you think that ...”                  | British referendum on continued membership in the E.E.C.                                      | June 5, 1975                     |
|                         | “Do you agree that ...”                  | Referendum on the future of Ukraine in the context of the break-up of the U.S.S.R..           | March 17, 1991                   |
|                         | “Do you agree that ...”                  | Canadian referendum on  | October 26, 1992                 |

<sup>41</sup> Except as otherwise noted, from Michael J. Bryant, “International Practice Regarding Referendums on Sovereignty,” (1997), 8 N.J.C.L., pp. 53 - 76.

<sup>42</sup> *Prohibition Plebiscite Act*, S.C. 1898, s. 8, from Mollie Dunsmuir, “Referendums: The Canadian Experience in an International Context” (Ottawa: Library of Parliament, Parliamentary Research Bureau, Jan. 1992)

<sup>43</sup> J. Patrick Boyer, Lawmaking by the People, Referendums and Plebiscites in Canada (Toronto: Butterworths, 1982), p. 39.

| Nature of Appeal | Text <sup>41</sup>   | Topic of Referendum  | Date                          |
|------------------|--|--|-------------------------------|
|                  |  | amendment to the Constitution.   |                               |
|                  | “Do you consider necessary...”   | Referendum on the future of the U.S.S.R. in 9 of the 11 republics.   | March 17, 1991                |
| Neutral          | “Do you support ...”   | Referendum on future of Latvia in the context of the break-up of the U.S.S.R..   | March. 3, 1991                |
|                  | [no opening words, merely the forms of government stated, with instructions to choose one option only] | Newfoundland referenda on whether to remain under the administration of a British government commission, return to dominion status or join Canada as a province. | June 3, 1948<br>July 22, 1948 |

## Appendix C

Examples of the Form of Referendum Questions: Multiple Questions and Multiple Answers

|                      | DATE               | TOPIC        | QUESTION(S)  | ANSWER(S)       | RESULTS                          |
|----------------------|--------------------|--------------|--|-----------------|----------------------------------|
| Canada <sup>44</sup> | September 29, 1898 | Prohibition  | “Are you in favour of the passing of an Act prohibiting the importation, manufacture or sale of spirits, wine, ale, beer, cider and all other alcoholic liquors for use as beverages?” | YES:<br><br>NO: | 51.3%<br><br>48.7%               |
| Canada <sup>45</sup> | April 27, 1942     | Conscription | “Are you in favour of releasing the government from any obligation arising out of any past commitments restricting the methods of raising men for military service?” <sup>46</sup>     | YES:<br><br>NO: | 64.1%<br><br>35.9% <sup>47</sup> |

<sup>44</sup> Boyer (*supra.*), pp. 51 - 52. Mr. Boyer notes that only 44 % of eligible voters cast ballots.

|                            | DATE         | TOPIC              | QUESTION(S) | ANSWER(S)   | RESULTS                          |
|----------------------------|--------------|--------------------|-------------|---|----------------------------------|
| Newfoundland <sup>48</sup> | June 3, 1948 | Form of government | [none]      | 1. Commission of Government for a period of five years:<br>2. Confederation with Canada:<br>3. Responsible Government as it existed in 1933 <sup>49</sup> : | 1. 14.3%<br>2. 41.1%<br>3. 44.6% |

<sup>45</sup> Boyer (*supra.*), p. 60.

<sup>46</sup> *Dominion Plebiscite Act, 1942*, S.C. 1942-43, c. 1, s. 3, as quoted in Boyer (*supra.*), p. 56.

<sup>47</sup> By contrast, the voters in the Province of Québec voted 72% against the proposal.

<sup>48</sup> Bryant (*supra.*), p. 60, notes that the participation rates were 88.4% for the first referendum and 84.9% for the second.

<sup>49</sup> *An Act to Provide for Ascertaining at a Referendum the Wish of the People as to the Future Form of Government of Newfoundland*, S.N. 1948, No. 9, s.

2.

|        | DATE             | TOPIC                         | QUESTION(S)  | ANSWER(S)   | RESULTS                  |
|--------|------------------|-------------------------------|--|---|--------------------------|
|        | July 22, 1948    | Form of government            | [none]   | 1. Confederation with Canada:<br>2. Responsible Government as it existed in 1933: | 1. 52.3%<br>2. 47.7%     |
| Canada | October 26, 1992 | Amendment of the Constitution | “Do you agree that the Constitution of Canada should be renewed on the basis of the agreement reached on August 28, 1992?” <sup>50</sup> | YES:<br>NO:   | 45% <sup>51</sup><br>55% |

<sup>50</sup> SI/92 - 181 (P.C 1992 - 2046)

<sup>51</sup> Sources

Referendum Results: Canada: Referendum 92, Official Voting Results, Chief Electoral Officer  
 Québec: Directeur général des élections du Québec (www.dgeq.qc.ca), Tableau synoptique des résultats du recensement des votes:  
 Référendum du 30 octobre 1995, Résultats pour l'ensemble du Québec

|                         | DATE          | TOPIC                    | QUESTION(S)  | ANSWER(S)       | RESULTS            |
|-------------------------|---------------|--------------------------|--|-----------------|--------------------|
| Western Australia<br>52 | April 8, 1933 | Secession from Australia | “Are you in favour of the State of Western Australia withdrawing from the Federal Commonwealth established under the <i>Commonwealth of Australia Constitution Act (Imperial)?</i> ” | YES:<br><br>NO: | 66,2%<br><br>33,8% |

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<sup>52</sup> Bryant (*supra.*), p. 60.

|  | DATE | TOPIC | QUESTION(S)  | ANSWER(S)       | RESULTS            |
|--|------|-------|--|-----------------|--------------------|
|  |      |       | “Are you in favour of a convention of Representatives of equal number from each of the Australian States being summoned for the purpose of proposing such alterations in the Constitution of the Commonwealth as may appear to such Convention to be necessary?” | YES:<br><br>NO: | 42.6%<br><br>57.4% |



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**Appendix D**

## Voting by Party Affiliation

| <b>JURISDICTION</b> | <b>POLITICAL PARTY</b>             | <b>PARTY POSITION</b> | <b>PARTY AFFILIATES VOTING “YES”</b> | <b>PARTY AFFILIATES VOTING “NO”</b> |
|---------------------|------------------------------------|-----------------------|--------------------------------------|-------------------------------------|
| Canada              | Liberal                            | Yes                   | 57%                                  | 43%                                 |
|                     | Progressive Conservative           | Yes                   | 60                                   | 40                                  |
|                     | New Democratic Party <sup>53</sup> | Yes                   | 42                                   | 58                                  |
|                     | Reform                             | No                    | 4                                    | 96                                  |
|                     | Bloc Québécois                     | No                    | 14                                   | 86                                  |
| Québec              | Liberal                            | Yes                   | 79                                   | 21                                  |
|                     | Parti Québécois                    | No                    | 14                                   | 86                                  |

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<sup>53</sup> Plus, 3 Premiers who lead New Democratic Party Governments signed the Accord.

## Appendix E

Participation by Eligible Voters in National Votes (1988 - 2000)<sup>54</sup>  
(Percentage of Eligible Voters by Province and Territory)

|                       | 1988 Election | 1992 Referendum    | 1993 Election | 1997 Election | 2000 Election |
|-----------------------|---------------|--------------------|---------------|---------------|---------------|
| Newfoundland          | 67.1          | 53.3               | 55.1          | 55.2          | 57.1          |
| Prince Edward Island  | 84.9          | 70.5               | 73.2          | 72.8          | 72.7          |
| Nova Scotia           | 74.8          | 67.8               | 64.7          | 69.4          | 62.9          |
| New Brunswick         | 75.9          | 72.2               | 69.6          | 73.4          | 67.7          |
| Quebec                | 75.2          | 82.8 <sup>55</sup> | 77.1          | 73.3          | 64.1          |
| Ontario               | 74.6          | 71.9               | 67.7          | 65.6          | 58.0          |
| Manitoba              | 74.7          | 70.6               | 68.7          | 63.2          | 62.3          |
| Saskatchewan          | 77.8          | 68.7               | 69.4          | 65.3          | 62.3          |
| Alberta               | 75.0          | 72.6               | 65.2          | 58.5          | 60.2          |
| British Columbia      | 78.7          | 76.7               | 67.8          | 65.6          | 63.0          |
| Nunavut <sup>56</sup> | ---           | ---                | ---           | ---           | 54.1          |
| Northwest Territories | 70.8          | 70.4               | 62.9          | 58.9          | 52.2          |
| Yukon                 | 78.4          | 70.0               | 70.4          | 69.8          | 63.5          |
| Total for Canada      | 75.3          | 74.7               | 69.6          | 67.0          | 61.2          |

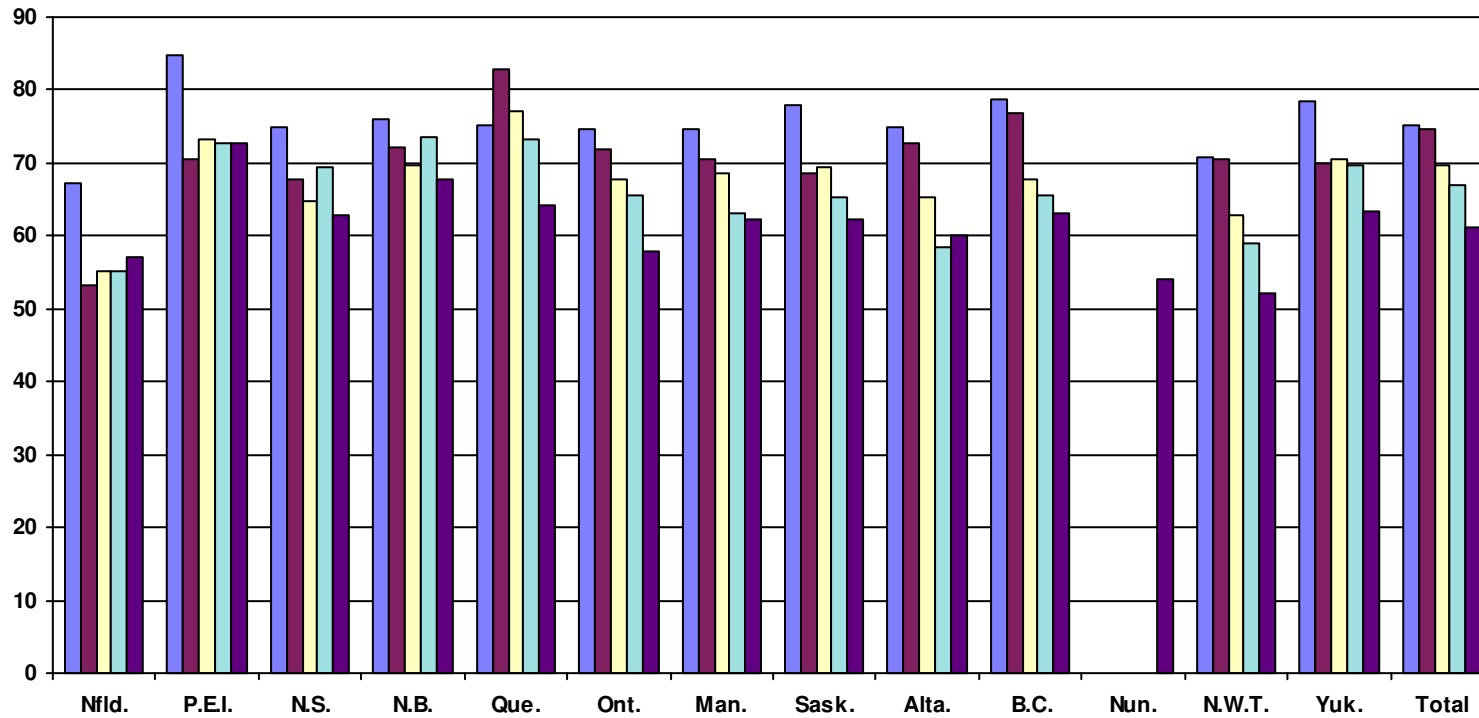
<sup>54</sup> Election Results: Canada: Thirty-Fourth General Election, Report of Chief Electoral Officer, 1988  
Canada: Thirty-Fifth General Election, 1993, Official Voting Results, Synopsis  
Canada: Thirty-Sixth General Election, 1997, Official Voting Results, Synopsis  
Canada: Thirty-Seventh General Election, 2000, Official Voting Results, Synopsis  
Referendum Results: Canada: Referendum 92, Official Voting Results, Chief Electoral Officer  
Québec: Directeur général des élections du Québec (www.dgeq.qc.ca), Tableau synoptique des résultats du recensement des votes: Référendum du 30 octobre 1995, Résultats pour l'ensemble du Québec

<sup>55</sup> Although held under provincial legislation, the Québec referendum was held on the same date and had the same question as the federal referendum.

<sup>56</sup> Prior to the 2000 federal election, Nunavut had formed part of the Northwest Territories. In 1992, a referendum was held in the Northwest Territories on the issue of whether or not the territory should be divided into two separate territories, each with its own territorial government and boundaries. Following a further referendum in 1997 on the form of government, Nunavut became a separate territory and was accorded separate recognition for federal election purposes.

## Appendix F

Participation by Eligible Voters in National Votes (1988 - 2000)  
 (Bar Chart of Percentage of Eligible Voters by Province and Territory)



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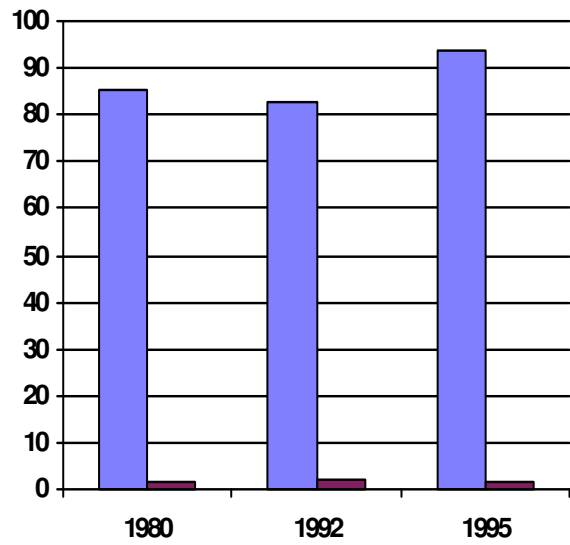
## **Appendix G**

Participation by Eligible Voters in Québec Referenda (1980, 1992 & 1995)<sup>57</sup>  
(Percentage of Eligible Voters)

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<sup>57</sup> Sources: Québec: Directeur général des élections du Québec ([www.dgeq.qc.ca](http://www.dgeq.qc.ca)),  
Tableau synoptique des résultats officiels: Référendum du 20 mai 1980, Résultats pour l'ensemble du Québec  
Tableau synoptique des résultats officiels: Référendum du 26 octobre 1992, Résultats pour l'ensemble du Québec  
Tableau synoptique des résultats du recensement des votes: Référendum du 30 octobre 1995, Résultats pour l'ensemble du Québec

Although the voter participation rate in Québec is higher for referenda than for federal elections, the rate of rejected ballots (1.7% in 1980, 2.2% in 1992 and 1.8% in 1995) was also 3 - 4 times higher than for rejected ballots in all other parts of the country for the 1992 federal referendum, when the average rejection rate was 0.5%.



■ Voter Participation

■ Rejected Ballots

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## THE REFERENDUM IN UGANDA

### Mr. Hajj Aziz. K. Kasujja, formerly of the Electoral Commission of Uganda

#### What is a referendum?

A referendum is a vote taken on an important issue by all the people of a country or part of a country as the case may be. It is one way through which the people may express their view with respect to amendment of Constitutional provisions, government policies or legislations. Unlike in the elections where people vote for candidates or political parties (programmes), in a referendum people vote over issues or questions. A national referendum is held to resolve very important political issues that affect the whole country or part of the country in a fundamental way.

#### Referendum of 1964

The 'lost counties' issue was a long-standing source of dispute between the Kingdom of Bunyoro and the Kingdom of Buganda. The dispute arose from the boundaries defined by the colonial power (Britain) as per the Buganda Agreement of 1900. The disputed area comprised of three counties namely, Bugaya, Bugangazzi, and Buwekula in Mubende district. The people of Bunyoro Kingdom popularly knew these counties as the 'lost counties'.

Throughout the colonial rule in Uganda, Bunyoro never abandoned her claim to recover them. It was Britain's responsibility to solve the dispute before she departed. So it was agreed during the independence discussions that the dispute be referred to the

people of Bugaya and Bugangazzi, where the population of Banyoro were

in majority, to decide by referendum two years after Uganda became independent in 1962.

On the 4<sup>th</sup> of November 1964, a referendum was held in the counties of Bugaya and Bugangazzi to determine whether the people in those particular counties wanted to:

- I. remain part of Buganda Kingdom;
- II. return or be part of Bunyoro Kingdom;
- III. form a separate district

The people of Bugaya and Bugangazzi Counties voted overwhelmingly to be returned to Bunyoro Kingdom. The people's verdict was implemented by the authorities by adjusting the boundaries of the two kingdoms and consequently amended the Constitution of 1962.

This was the first referendum to be held in Uganda even though it was held only in two counties.

#### Referendum of the Year 2000

The second referendum in Uganda was held in the year 2000 to determine the political system that the people of Uganda wished to adopt for the governance of their country.

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The national referendum was held under the following laws:

- I. The Constitution of the Republic of Uganda 1995
- II. The Referendum (Political Systems) Act, 2000
- III. The Other Political Systems Act, 2000
- IV. The Electoral Commission Act 1997
- V. The Parliamentary Elections (Interim Provisions) Statute 1996
- VI. The Referendum Regulations No. 14 of 2000

Article 271(3) of the Constitution of the Republic of Uganda of 1995 provides that during the last month of the fourth year of the term of Parliament referred to in clause (2) of this article, a referendum shall be held to determine the political system the people of Uganda wish to adopt. Clause (4) of this article provides that the Parliament shall enact laws to give effect to the provisions of this article. The Parliament therefore enacted the Referendum and Other Provisions Act, 1999. This Referendum Act was challenged in the Constitutional Court for having been irregularly passed by the Parliament. The Constitutional Court declared it null and void. However, another law, the Referendum (Political Systems) Act No. 9 of the year 2000, was enacted by the Parliament in order to hold the referendum under the Article 271 of the Constitution.

Pursuant to Article 69(2) of the Constitution, another Law, 'Other Political Systems Act 3 of 2000' was enacted by Parliament to accommodate any other democratic and representative political system as maybe proposed by any Ugandan citizen.

In accordance with article 61(b) of the Constitution and Sections 5(1) and 10(1) of the Referendum Act, the Electoral Commission is charged with the responsibility to organise, conduct and supervise elections and referenda.

Under Section 10(2) of the Referendum Act, the Parliamentary Elections (Interim Provisions) Statute of 1996 and any amendment to it or any act replacing it, shall with necessary modifications and so far as, may be necessary and Practical, apply to a referendum as it applies to an election.

In accordance with Section 25(1) of the Referendum Act, the Minister may, with approval of Parliament, by Statutory instrument, make regulations as may be expedient for carrying into effect the provisions of this act. Therefore, The Minister issued the Referendum Regulations 2000 by Statutory Instrument No 14 of 2000. Those Regulations shall apply in relation to the conduct of the referendum for the change of a Political System under Article 271 of the Constitution.

Section 4(2) and (3) the Minister shall refer the matter to the Chief Justice who shall appoint a panel of three Judges to frame the Question in consultation with the sides to the referendum. Any question submitted to a referendum under this section shall be framed so as to enable the voters to make a choice. Before the Minister referred the matter of framing the Question to the Chief Justice, the Electoral Commission in accordance with Sections 5, 6, and 7 of the Other Political Systems Act, called upon any registered voter on the National Voter's Register to submit a petition

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for approval of a Political System mentioned in Article 69(2) within the meaning of Articles 70 and 71 of the Constitution respectively. This was done because the Constitution in Article 69(2) provides for “any democratic and representative political system” as may be proposed.

The Electoral Commission received twelve petitions for approval. These were;

1. Native Federation of Uganda Governance System
2. Compromise Political System
3. The Federal Democratic System
4. The Confederation Political System
5. Communism Political System
6. NEO – Movement System
7. Movement Political System
8. Multiparty Political System
9. Hybrid Political System
10. Liberal Socialist Democracy System of Government
11. Federal/Multiparty Political System (Feparty)
12. The MAS – MIG Political System

However, only two of these satisfied the requirements of the law. The movement political system and the Multiparty political system

Having only two political systems to compete, the Minister referred the matter of framing the question to the Chief Justice as required by the law. The panel of three Judges framed the question and passed it over to the Electoral Commission. The question was framed as follows;

***“Which Political System do you wish to adopt, Movement Or Multiparty?”***

In accordance with Section 5(2) of the Referendum Act, the Electoral Commission, by notice published in

the Gazette, notified the date and the issue in respect of which the referendum was to be held. This was consistent with Article 61(b) of the Constitution and the Section 5(1) of the Referendum Act.

This procedure worked very well. The Parliament had deliberated and endorsed the procedure. Judges are highly respected and known for impartiality. After all, disputes are referred to them for settlement once for all. The question as framed by the Judges was acceptable to all without question.

As stated above Article 61(b) of the Constitution and Section 5(1) of the Referendum Act, the Electoral Commission is responsible to organise, conduct and supervise elections and referenda.

In case of Uganda, Article 60 of the Constitution sets up the Electoral Commission and Article 61 of the Constitution spells out the functions of the Electoral Commission. These are;

- I. To ensure that regular, free and fair elections are held;
- II. To organise, conduct and supervise elections and referenda in accordance with this Constitution.
- III. To demarcate Constituencies in accordance with the provisions of this Constitution;
- IV. To ascertain, publish, and declare in writing under its seal the results of the elections and referenda;
- V. To compile, maintain, revise and update the voter’s register;



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- VI. To hear and determine election complaints arising before and during polling.
  - VII. To formulate and implement civic educational programmes relating to elections; and
  - VIII. To perform such other functions as may be prescribed by Parliament by law.

The Electoral Commission is best suited to handle referenda as it has acquired all the logistics necessary to do the job, and if another body was to be responsible, it would have to use those logistics or duplicate them, which would be very expensive to the nation. If and only if, the Electoral Commission was not trusted, another body would be advisable to oversee or counter check the activities of the commission for the success of the referendum.

According to Article 59(1) and (2) of the Constitution, every citizen of Uganda of eighteen years of age or above, has a right to vote. It is the duty of every citizen of Uganda of eighteen years of age or above, to register as a voter for public elections and referenda. According to Section 11 of the Referendum Act, the persons entitled to vote at the referendum under this Act are persons registered as voters for public elections on the date when voting in the referendum is to take place. To compile, maintain, revise, and update the Voter's Register is one of the functions of the Electoral Commission as per Article 61(e) of the Constitution and also Section 18 of the Electoral Commission Act. Section 19 of the Electoral Commission Act as amended, provides that it is the duty of every citizen of eighteen years of age or above to apply to the Electoral Commission to be registered as a voter

in any one of the following places;

- 1) the place of Origin; or
- 2) the place of residence.

It is the Electoral Commission that registers voters.

Minors and citizens abroad do not vote. For that matter, even the registered voter who is not at his or her place of registration at the time of voting and is within the country does not vote. These are patients in hospitals, sanatoria etc. In order for one to vote in Uganda, he or she has to be physically at the polling station in his or her particular place of registration.

It must be noted that although every citizen of eighteen years of age and above has a right to vote, voting is not compulsory. It must also be noted that Uganda has not yet been able to identify its citizens. Registration of births and deaths is not being enforced. It is not possible in Uganda to tell whether one is dead or migrated to another country. It is absurd that citizens who are abroad or within on national duties do not vote because they are not physically at their places of registration or polling stations. Because of our underdevelopment, many Ugandans are deprived of their right to vote. In many countries, their citizens' abroad vote. In Switzerland, citizens who are abroad or intend to be absent on the polling day, apply to the electoral authorities for the ballot papers to be sent to them (individually) to enable them to vote in advance. The voter marks the ballot paper appropriately and put it in the sealed envelope and sends it to his or her electoral authority. The election authority opens the sealed envelope after the polling is over and counts it together with other votes cast on the

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polling date.

The Electoral Commission under Section 12(b) of the Electoral Commission Act the Commission is empowered to print ballot papers bearing a security mark. Because the Electoral Commission has no capacity to print large quantities of ballot papers, the referendum as well as general elections ballot papers are printed outside Uganda. M/s Smith and Ousman of Britain printed the ten (10) million ballot papers for the referendum of 2000 after winning the tender.

According to section 6(2) and (3) of the Referendum Act, the Electoral Commission, in consultation with the sides of the referendum, selected symbols that were put on the ballot paper to facilitate the exercise of a choice by voters. The symbols that were agreed upon were published in the Gazette and other printed and electronic media. In the Referendum of 2000, the Movement Political System was represented by a symbol of a 'Bus' with people getting onto it. The Multiparty Political System was represented by a symbol of a Bird (Dove) with an olive branch in its beak. The literate voter marked the ballot paper by ticking beside the symbol of his or her choice. The illiterate voter marked the ballot paper with a thumbprint as indicated on the ballot paper ( see the ballot paper.)

The campaigns and propaganda were regulated by Article 271(2) of the Constitution and Sections 5(5), 12, and 13 of the Referendum Act.

If the people of Uganda were to make a meaningful and informed choice in the referendum, it was essential that they were provided by civic education in

advance of the referendum vote. It was also a necessary component that a comprehensive monitoring operation was undertaken to assess whether the process was conducted in line with the Referendum Act. In order to sensitise and educate the Ugandans about the referendum, the Electoral Commission conducted civic education directly through civic educators recruited, one per parish, throughout the country. The Commission also accredited non-Governmental Organizations to supplement the sensitization exercise. The Commission printed materials and literature translated in local languages and circulated widely. Both the Commission and the NGOs used extensively the print and electronic media, radio stations, television stations, daily newspapers, and pamphlets to disseminate civic education messages in both English and local languages.

Any person or group of persons were free to canvass for support of any side in a referendum, and were also free to establish a National Referendum Committee (for each side in a referendum) of not more than twenty (20) members and submit the details of the committee to the Electoral Commission. The duty of the national Referendum Committee was to organise the canvassing at national and local levels for its side, and to appoint agents for the purpose of canvassing, voting, and tallying. Any person or group of persons enjoyed freedom of expression and access to information in the exercise of the right to canvass in the referendum. The Referendum Act required that the Electoral Commission issued guidelines for orderly canvassing and to be complied with by every committee or agent. In order to maintain law and order, the committee or agent of each side in a referendum

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was required to notify in writing the administrative officer and the police of an area not less than seventy two (72) hours before the canvassing meeting or public address, which one wished to undertake took place. The canvassing was, according to the law, to stop twenty four (24) hours before the date of polling in the referendum.

The Referendum Act prohibited the use of a language which was defamatory, or which constituted incitement to public disorder, hatred, or violence. It also prohibited use of any words, slogans, or symbols that could arouse division on the basis of sex, race, colour or ethnic origin, tribe, birth, creed or religion, or other similar divisions. In case of contravention of any prohibited action, the Act prescribed penalties.

In accordance with Section 23(1), the Electoral Commission gave equal facilitation to both sides of the referendum, out of the funds voted by the Parliament. Each side received UShs. 190 million to be accounted for by each side within thirty days after the referendum was held.

Although the Electoral Commission invested heavily in sensitising the people and supplemented by donors to the tune of over US\$ 2.9 million given to NGOs for civic education, there was an outcry that civic education was grossly inadequate and attributed to insufficient personnel and funding. It was noticed that some politicians de-campaigned the referendum itself. The apathy of the electorate was also noticed. Time was not long enough.

The Referendum Act prohibited the use of Government resources during the canvassing, however it was difficult to monitor and restrain some people from the Movement side (from

the Movement Secretariat). There were also cases of intimidation by soldiers, some Government officials, and some individuals on both sides of the referendum. It was also noticeable that the big names in political parties circles did not campaign for the Multiparty Political System. They not only boycotted but also de-campaigned the referendum process. The people who campaigned for the Multiparty System were non-entities, relatively unknown in the political parties of Uganda.

Polling was organized through eighteen thousand (18,000) polling station scattered all over the country. The constitution charged the Electoral Commission with the responsibility to compile, maintain, revise and update the voters register. Section 18 of the EC Act provides that the Commission shall maintain and update on continuing basis, a national Voter's Register that includes the names of all persons entitled to vote in any national or local election. The Commission maintains as part of the Voter's register, a Voter's roll for each Constituency under this Act. The Commission also maintains as part of the voters' roll for each Constituency, a voter's roll for each polling station within the Constituency.

There is a voter's roll for each and every polling station. Each polling station is manned by one presiding officer, two polling assistants, and one election constable – all appointed by the District Returning Officer. For the sake of transparency, most polling stations are in the open grounds. The Polling station is arranged in a rectangular manner and cordoned off with rope and short posts with two openings – one entry and the other an exit. (See the diagram)

When voters arrive at the polling station, they line up with the assistance of the election constable who is also responsible for orderly polling.

**Table 1:**

The Presiding officer sits on Table one and has a voter’s register for that particular polling station and the ballot papers. A polling assistant assists the presiding officer. Around this table are the agents for each side in the referendum. At this table, voters’ names are checked and ticked off as they come to the table one by one. Voters are each given a ballot paper and directed to the second table.

**Table 2:**

At table 2, there is a basin on the table. The voter places the ballot paper in the basin and proceeds to mark the ballot paper accordingly. In the basin, is a ballpoint pen for the literate voter to tick the ballot paper and an inkpad for the illiterate voter to thumbprint the ballot paper.

**Table 3:**

At table 3 there is a sealed ballot box in which the voter pushes in the marked ballot paper.

**Table 4:**

At table 4, there is a polling assistant and an indelible-ink pot in which each voter dips their finger so as not to vote again. At this table, there are agents for each side of the referendum witnessing that each voter dips their finger in the indelible-ink.

These tables are spaced ten metres apart.

According to Section 6(4) of the Referendum Act, voting is by secret ballot using one ballot box at each

polling station for all sides in the referendum. Electronic voting was not used and was not provided for in the law. It is important to note that every voter votes only at the polling station where their names are on the voters’ roll for that particular polling station. Voting in Uganda starts at 7.00 am and ends at 5.00 pm. Ten (10) hours is considered to be enough for the people to vote.

The Referendum Act does not prescribe a minimum turnout. Section 7 of the Referendum act provides that an issue for determination by a referendum shall be taken to be determined by a majority of the votes cast at the referendum. The referendum was determined by a simple majority.

| SIDE          | NO OF VOTES CAST | PERCENTILE |
|---------------|------------------|------------|
| Movement      | 4,322,901        | 90.7%      |
| Multiparty    | 442,823          | 9.3%       |
| Valid votes   | 4,765,724        |            |
| Invalid votes | 148,800          |            |
| Total votes   | 4,914,524        | 51.1%      |

**National Results for the Referendum held on 29<sup>th</sup> June 2000**

The total number of registered voters for the referendum was 9,609,703. Compared with the total number of votes cast for the referendum, there was a big decline in the voter turn out. Some of the reasons for the decline were;

- I. The major political parties boycotted the referendum and de-campaigned it,

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- II. Inadequate voter education due to insufficient funding and personnel,
  - III. Voter apathy because the major political parties boycotted the referendum.

Issues referred to people to determine by means of a referendum should have a minimum turnout and percentage. Otherwise let the issue be determined by the people's representatives in parliaments.

There was no special arrangement made for any category of voters as such. The EC found it convenient to let soldiers vote separately. They did not vote at the same polling station with the civilians if the soldiers' number was more than a hundred voters with their spouses and dependants. If the number of soldiers was less than a hundred, they voted with the civilians and were given priority to vote. Soldiers' polling stations were arranged outside the quarter guard but within the vicinity of the barracks. For orderly voting, the district returning officer appointed two soldiers and two civilians to man the polling stations. The procedure allowed the sides of the referendum to have their agents at each polling station and also to be monitored by independent monitors and international and local observers accredited by the commission. The commission also allowed for special treatment for people with disabilities. The parliamentary elections (interim provisions) statute allowed the people with disabilities to be assisted or helped by anybody who is not an election official even if he or she is a minor, provided he or she is chosen by the person with disability. Mothers who carry babies, expectant mothers, and the elderly are also given priority

in voting. Otherwise the polling procedure is the same.

Sections 5, 6, 7, and 8 of the referendum act refer to the procedure to be followed immediately after the closure of the poll. The presiding officer at the polling station starts counting the votes cast in the presence of the agents of the sides of the referendum and the general public around. The presiding officer records the vote's cast in favour of each side of the referendum and asks the agents of all sides to counter sign the results as required by law. However, the agents may decline to sign or may be absent. The agents' refusal to sign does not invalidate the results. The presiding officer records the reasons for their failure to sign and after that the presiding officer announces the results of the voting for that particular polling station. After the announcement of the results, the presiding officer sends them to the district returning officer for tallying all the constituency results in the presence of the agents and the public if present. The district returning officer announces the results there and then before they are sent to the commission headquarters for national tallying.

Under section 9 of the referendum act, the commission ascertains, publishes, and declares in writing in the prescribed form by the referendum regulations, under its seal, the results of a referendum within forty eight (48) hours from the close of the final polling in the referendum. The referendum act requires the commission to publish the results in the media and as soon as practicable cause them to be published in the gazette. For the purpose of the referendum, the results published in

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the gazette are taken to be the official results of the referendum.

As stated above, the law does require a minimum percentage of voters for a question to be won. A simple majority wins the referendum question. However, section 8 of the referendum act provides that where in a referendum no side obtains the majority provided for in section 7 of the act, the referendum shall be repeated.

According to section 17(1) of the referendum act, any registered voter on the national voters' register, supported by the signatures of not less than two (2) percent of the total number of registered voters in Uganda may petition the high court challenging the results of the referendum. Sub section (2) of the same section 17 gives the only ground on which the results of the referendum may be challenged as non-compliance with the provisions of the referendum act, and where applicable, the parliamentary elections (interim provisions) statute 1996 affecting the results of the referendum in a substantial manner.

After due inquiry under this section of the act, the high court may:

- I. Dismiss the petition,
- II. Declare the published results to be incorrect and declare the correct results,
- III. Order the commission to repeat the polling in any particular place or places,
- IV. Annul the referendum and order a new referendum to be held.

It must be noted that section 17(2) of the referendum act does not confer on the high court when hearing a petition

under this section, power to convict a person for a criminal offence.

The EC and the police received complaints of electoral malpractices by some referendum agents, public servants, individuals, and some government functionaries. The commission resolved all those malpractices reported. However, Semwogerere and Olum, having successfully challenged the referendum and other provisions act 2 of 1999, they challenged the new law, the referendum (political systems) act 9 of 2000. Rwanyarare and Wegulo also challenged the same act. There were six other constitution petitions challenging the holding of the referendum. All these petitions seem to have been overtaken by events. The referendum was held on the 29<sup>th</sup> of June 2000 and the results were in favour of the movement political system.

Considering what it takes to hold a referendum, the result must be binding.

From all practical reasons, holding a referendum was a new phenomenon in Uganda. Ugandans were used to electing candidates and holding a referendum was much more challenging than holding elections. The referendum was held among problems.

The referendum exercise was implemented applying several legislations or laws out of which only three were in place at the time of starting the exercise. These were;

- I. The constitution of the republic of Uganda 1995,
- II. The EC act 1997,
- III. The parliamentary elections (interim provisions) statute 1996.

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Three other laws of particular importance to the referendum were enacted and assented to as late as 9<sup>th</sup> June 2000 while the referendum was held on 29<sup>th</sup> June 2000. These laws were;

- I. The other political systems act 3 of 2000,
- II. The referendum (political systems) act 9, 2000,
- III. The referendum regulations no. 14 of 2000.

These laws caused time constraints. The other political systems act provided for verification of signatures of the supporters of any proposed political system. The signatories did not come to sign in the presence of the commission staff and there wasn't enough time to persuade them to do so.

Funding for the referendum exercise was inadequate and releases did not come in time. Due to this inadequate funding, the civic education exercise delayed. Since the referendum was a new phenomenon, civic education and sensitisation of the population was very important.

Facilitation of the sides of the referendum was also inadequate, particularly to the multiparty political system side. The movement side had the advantage of being in power.

While the commission and the NGOs tried hard to create awareness among the population, the established political parties big guns de-campaigned the referendum itself without being restrained. Those who canvassed for the multiparty side were young and unknown people in the population.

Despite the late enactment of the laws without due consideration to the time

frame, ineffective civic education and sensitisation, inadequate and untimely funding, the referendum was successfully conducted.

Kenya can learn a lot from Uganda's experience in holding a referendum. Laws to enable the implementation of a referendum must be in place well in time to allow the population to understand them.

Uganda's experience can assist the Kenyans to compare and strengthen their laws where necessary for effectiveness. While laws are in place, it would be easy for the planning and budgeting for the referendum. Enough funding must be made available in time for disbursement.

Since Kenyans are used to electing personalities rather than choosing sides, the authorities responsible for the organization and implementation must invest heavily in sensitization and civic education of the population.

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## THE REFERENDUM EXPERIENCE IN RWANDA

**Mr. Charles Munyaneza, Deputy Executive Secretary of the National Electoral Commission of Rwanda in-charge of Electoral Operations, Rwanda.**

Before making a presentation on the "Referendum Experience in Rwanda" mention should be made on the National Electoral Commission of Rwanda; the authority mandated to organize and conduct National Referenda.

The Electoral Commission of Rwanda now three years old is enshrined in the following Legal Instruments:

- The Previous fundamental law under which Rwanda was governed during the transitional period (July 2004 - June 2003).
- Law N° 39/2000 of November, 28th 2000 setting up the National Electoral Commission.
- Chapter five, Article 180 of the new constitution of the Republic of Rwanda which states in part "The National Electoral Commission is an independent commission responsible for the preparation and the organization of Local, Legislative, Presidential and Referendum or such other elections the responsibility for the organization of which the law may vest in the Commission".

### 1. The history of the Referendum in Rwanda.

Because of the nature of the political history of the country, Rwanda has only had two Referenda:

#### The 1961 Referendum:

The first referendum in the country was held in September 1961 to decide on the issue of transforming the country from a **Monarch** to a **Republic**. This followed the 1959 colonial engineered political turmoil. The Referendum was held in circumstances of political and social instability as part of the population had already been forced into exile as refugees in neighbouring countries.

The result of the Referendum was obvious (establishment of a Republic) as the Referendum was flawed and stage-managed. This resulted in "Political Independence" with colonial trained elite stepping into the shoes' of their former masters.

#### II. The Constitutional Referendum of May 26<sup>th</sup> 2003.

The roots of the Referendum that was held in Rwanda in May lies in the Arusha Peace talks of 1993 between the then government of Rwanda and the Rwandese Patriotic Front Liberation Movement. The agreement that was signed provided for a referendum on the new constitution after the transition period. The Arusha



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Peace Agreement was part of the fundamental law of the Republic of Rwanda prior to the coming into force of the new constitution on 4<sup>th</sup> June 2003.

### **III. The framing of Referendum question(s)**

In Rwanda, the framing of the Referendum question was the responsibility of the National Electoral Commission. The Commission framed only one question "ARE YOU IN AGREEMENT WITH THIS CONSTITUTION?"

With a "YES" or "NO" vote. The framed question was presented to the Political Party forum for deliberation and then to cabinet for approval. It so happened that the question framed by the commission was not altered by the other organs it went through.

### **IV Submission of the question(s) to the Referendum**

Having framed the question, the National Electoral Commission submitted it to the electorate to decide on in a referendum held on the basis of Universal suffrage. Prior to the day of the Referendum, the question and voting modalities were sensitized on to the public as will be elaborated on later.

### **V. Referendum campaigns.**

In Rwanda, the issue was mainly explaining to the electorate the contents of the draft constitution passed by Parliament in an effort to

make the public compare the views they had submitted to the constitutional commission in the two years of popular writing of the constitution with the final draft. It was not characterized by opposition campaigns and Propaganda.

The responsibility of presenting the draft constitution to the public fell on the National Electoral Commission as the key player. Other stakeholders included the Constitutional commission, politicians in their contact with the Population, the Civil Society, Educational Institutions and the media to mention a few. Regardless of the mode of constitutional writing, the final constitution should emerge from a participatory sensitization approach.

### **VI. Legibility to vote**

The National Electoral Commission of Rwanda maintains a permanent voters' register as per the law. The registration of voters is done in the **cell**, which is the Lowest Unit of Administration in the Country.

The registration of voters is the responsibility of the National Electoral Commission. Prior to a general election, the commission appoints registration agents across the country. Though the registration is the responsibility of the commission, it does it in collaboration with local government officials whose role is the mobilization of eligible voters.

In Rwanda, the electoral law puts the age limit for voters at eighteen. For the first time in Rwandan history, for the Referendum, Presidential and Legislative Elections Rwandan

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Citizens in the diaspora were registered and voted.

On the whole, the experience the National Electoral Commission of Rwanda got in the registration exercise is that, at it requires sufficient planning of resources both material and human. It also requires adequate time to give chance all eligible voters to register. Also for a successful registration exercise, there is great need of working closely with the Ministry in charge of local government.

The experience of Rwanda with the registration and voting of Rwandan Citizens abroad is that for a country like ours that has few embassies but with Citizens in many countries, it is a difficult undertaking that requires adequate financial resources. For the referendum, it was inevitable that some Rwanda Citizens did not register and therefore did not vote because they could not easily reach Rwandese embassies. Out of 3,863,965 registered voters for the referendum, 7,268 registered and voted in Rwandan embassies.

#### **VII. Referendum Ballot Papers.**

For the Constitutional Referendum in Rwanda, there was a single Ballot Paper. The printing of the Ballot paper was done inside the country by local private printers.

On the Ballot Paper for the constitutional referendum there was a symbol of an **open book** representing the draft constitution. The Ballot Paper was designed in a such way that the voter approving

the draft constitution could put his/her thumb in the space provided adjacent to the open book while the one not, in for the draft could place his/her thumb in the place adjacent to an open space with a word "NO".

#### **VIII. Conduct of the Constitutional Referendum (Polling Exercise).**

In Rwanda, we have not yet reached a stage of using electronic voting. Voting is Physical and Manual both for voters inside the country and in the diaspora.

The electoral law in Rwanda provides that an eligible voter registers and votes in a particular place of this residence.

The law provides for the National Electoral Commission to determine through its electoral instructions and guidelines time for opening and closing of polls. For the constitutional referendum, polling began at seven (7.00 hrs) in the morning and closed at four (4.00 hrs) in the evening.

To quicken the process of voting during the constitutional referendum, the National Electoral Commission in collaboration with the population established **1896 Polling Centers** (Mainly Primary Schools) and **11,630 Polling rooms** (Streams). The guiding principle was to have not more than **500 voters** in one polling room.

#### **IX. Minimum voter turn-out.**

In the constitutional referendum 93.9 % of the 3,863,965 registered voters turn-up to vote which is the equivalent of 3,472,200 voters. Of the 3,472,200

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voters that turned up to vote 3,132,291, the equivalent of 93.2 % voted in favour of the draft constitution. For the referendum to be declared voted in, it required a **50% plus 01 vote**. In case this percentage is not achieved, the law provides for a fresh referendum.

In the constitutional referendum and other elections so far held, the law provides for special consideration for the handicapped. The law allows the blind and those without both hands to be helped to vote by a minor who should be more than fourteen years but less than eighteen. At the polling stations, priority to vote is also given to the sick, the old and expectant mothers. During civic and voter education, the voters are sensitised on all these considerations.

**X. Referendum related dispute resolution procedures**

In Rwanda, the electoral law puts at liberty any Rwandese to contest any part of the referendum process beginning with the registration of voters to the declaration of final results by the Supreme Court.

The procedures for contesting the referendum process starts with lodging a complaint any electoral matter with the National Electoral Commission. Where the contestant is not satisfied with the action taken by the commission, he/she appeals to the Supreme Court for redress.

During the constitutional referendum there was no single contest against any part of the

process. The crew behind is that the voters and the population in general had been involved in the whole process from verifying the voters register, preparing polling stations and counting of votes cast. :'

The result of the referendum is binding to all stakeholders in the political and electoral process both before and after the poll.

**XI. Vote counting.**

In Rwanda the referendum act provides for immediate counting of votes after the closure of polls.

The counting of votes is done in public with tabulation of results on prepared result sheets.

**XII. Overall assessment of the Referendum process in Rwanda and the lessons that can be learnt by Kenya.**

On the whole, the Referendum process in Rwanda was smooth and non-violent. Rwandans both inside the country and the diaspora on 26th May 2003 massively participated in the poll. The country got a new constitution that ended a nine years' transition period on 04<sup>th</sup> June 2003 when it was signed into law by his Excellency the President of the Republic.

A few problems encountered like insufficient funding and short period of the organization of the polls was solved on one hand by calling on individual Rwandans and businesses to cover the financial deficit and on the other by involving many stakeholders in the organization of the polls.

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The few lessons that KENYA can learn from the Rwandan experience include the following:

- Taking a participatory approach by involving the population and other stake holders in the preparation and the conduct of the referendum;
- Special effort should be placed in bringing on board all political forces and organisations recognised in the country to appreciate and support the referendum process;
- Civic Education Programmes should be given adequate time to prepare voters for the referendum. The conduct of these programmes should not be a monopoly of the constitution of Kenya Review Commission or the Electoral Commission of Kenya alone but bring in other actors like political organisations and the Civil Society;
- For a successful conduct of the referendum, the authority in charge should embark on a systematic and sustained information campaign to the public to make it part and parcel of the whole referendum process;
- Security in any electoral process is paramount. The authority in charge of the referendum should work closely with security agencies with emphasis put at defining roles

and boundaries. Security forces should as much as possible not take sides in the referendum but facilitate its smooth running;

- Funding of any election including a referendum is always a problem in almost all developing countries. Where the government cannot support the whole referendum budget and foreign assistance is not forthcoming as it normally happens, the authority charged with the referendum should not just fold its arms. The experience of the National Electoral Commission of Rwanda turning to Local Institutions and the Population as a whole to finance their own referendum could perhaps be considered. The other complementary option is always reducing the cost of the referendum by using local materials and using voluntary polling agents;
- The other Rwandan experience is to make the referendum process easy and accessible to the voters by designing a simple Ballot Paper and establishing as many polling stations as possible to cut short the distances covered by voters to and from polling stations. Cutting distances to polling stations itself, however is not enough without having a small number of voters voting in one polling room (Stream) to avoid long lines of voters;

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- Finally, the accuracy with which the voters register is prepared and managed is paramount to the success of any election including a referendum. Voters register should be prepared or updated in good time and its management made as transparent as possible to avoid suspicion.

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## THE DRAFT REFERENDUM REGULATIONS, 2003

**Hon. Justice Isaac Lenaola, Commissioner of the Constitution of Kenya  
Review Commission, Judge of the High Court of Kenya.**

### **I. Introduction**

The constitution of Kenya Review Commission is by virtue of Section 34 of the Constitution of Kenya Review Act, Cap. 3A generally empowered to promulgate Regulations for the better conduct of its business and that of the review process.

Section 34(2) (c) (a) of the Act specifically provides that the Commission shall make Regulations to prescribe the procedure for the holding of a referendum under Section 27 of the Act. The Proviso to that sub-section however enjoins the Commission to make regulations in that regard in *“consultation with the Electoral Commission of Kenya.”*

The draft Regulations now before you were prepared with due consultations between the committee on Referendum Regulations of the CKRC and the Legal Affairs Committee of the ECK. Both committees subsequently made reports that were discussed by the respective Commissions hence the presence of representatives of the two Commissions in this Workshop for further consultations and discussions before finalization of the Regulations.

### **II. Background to the Regulations**

Section 27(5) of the Review Act in its proviso provides that where the National Constitutional Conference is unable to decide a matter initially by consensus or subsequently by a simple majority or a two-thirds majority, a further vote may be taken under Section 27 (5) and proviso (iii) thereto. If on taking the further vote aforesaid, the conference determines by a two-thirds majority of *“voting members present”* that a question should be submitted to the people of Kenya for determination through a referendum, then the Commission under Section 27(6) of the Act records that decision and submits the question or questions to the people as above stated.

The Act specifically states that the Referendum envisaged by Section 27 **shall** be held within one month of the National Constitutional Conference (section 27 (7) of the Act).

### **III. Issues that emerged during consultations**

During consultations between CKRC and ECK, a number of important questions arose and which had to be answered before drafting of the Regulations could commence.

These included:-

- Time frame for holding the Referendum – is the one-month period envisaged by Section 27(7) of the Act sufficient?

- Civic Education – how long, by whom to be conducted, costs to be incurred and curriculum?
- Personnel - should the personnel be drawn from ECK or elsewhere? Who should be responsible for them?
- Materials - ballot boxes, ballot papers etc. Where to be sourced and cost, format and wording of ballot papers. Who should determine and how?
- Questions for the Referendum – who should frame and what process should be put in place to ensure that they do not mislead voters?
- Campaigns by the sides to the Referendum – should there be a control mechanism? Who should do it and how?
- Voting and counting of votes – how and by whom?
- Eligibility to vote and votes registers – who can vote? What is the age limit? What is a voters register? Based on what criteria and identification?
- What is the threshold for the vote – simple majority? Two-thirds of the vote?
- Should there be regional consideration for the votes? Shall there be necessity for a winning vote to attract some provincial strength?

- Dispute resolution mechanism – through the courts? A different set-up?

More importantly, who should conduct the Referendum?

ECK with its existing machinery or as envisaged by the Act, CKRC?

#### **IV. Highlights of the Regulations**

Guided by the above questions among others, the Committee on the Referendum Regulations with due reference to other jurisdictions that have had referenda, drafted the Regulations under discussion in this workshop.

The Regulations have four (4) main parts and a schedule that contains the Referendum Code of Conduct.

##### **First (1st) Part**

The first part answers and addresses seven fundamental questions or issues:-

In order to be eligible to vote, one must be a registered voter (Reg. 3) and one's name must appear in a Constituency Register prepared by the Electoral Commission of Kenya in General Elections (Reg. 15). To ensure that only Kenyan's vote, an Elector's card is mandatory.

The CKRC shall organize, conduct and supervise the Referendum but may utilize at its own discretion the existing facilities and structures of ECK including the Voters Registers (Regs. 4 and 5).

The question(s) to be submitted to the people through a Referendum shall be framed by CKRC but in doing so, it must be guided by the requirement that the question (s) shall be clear, understandable and such as to enable the voter to make a choice (Reg. 6).

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Since a Referendum is essentially a “Yes” or “No” vote, it was thought that each side should have a symbol to enable a voter make a quick choice with prior civic education on the matter (Reg. 10).

Civic Education would be conducted and facilitated by CKRC as section 17(a) of the Review Act grants that mandate to it (Reg. 11).

Both sides to the Referendum should be allowed the freedom to campaign but there was thought to be a need to register all campaign groups with CKRC to ensure compliance with the Code of Conduct contained in the schedule to the Regulations (Reg. 12).

An important rider to this provision is that requiring that no opinion poll on any issue may be published fourteen (14) days before the voting date to ensure that voters are not unduly influenced.

The CKRC would gazette the question(s) to be put before the people in the Kenya Gazette together with the date of the vote for publicity and information to the people (Reg. 13).

### **Second (2<sup>nd</sup>) Part**

This part relates to the process of voting generally and the important issues therein are: -

- a) That the voting shall be secret – Reg. 16.
- b) The equipment required to vote include ballot boxes, ballot papers, pens, indelible ink etc.
- c) Provision is made in Regulations 18, 19, 20 and 21 for matters of security and entry to polling stations and to ensure

that there is peace, mechanisms for handling acts of riot, lawlessness and postponement of polling in certain circumstances.

- d) Ballot papers are provided for in Regulations 23 and 24 including the questions (s) symbol thereof, serial numbers and counterfoils.
- e) Details as to how exactly one should vote including stamping, verification, identification, use of indelible ink to ensure single voting and penalties for offences arising there from are all in Regulation 24.
- f) Provision is made for assisted voters such as those who are unable to read or write, visually impaired etc. in Regulation 26.
- g) The process and procedure of counting votes including provisions for handling void, rejected or spoilt ballot papers, the sealing of ballot papers – Regulations 30, 31, 32, 33, 34, 35 and 36.

An important point to note here is that counting of votes shall be done at the polling station as soon as voting has come to an end.

- h) Announcement of referendum results – shall be done in public and a clear record of the results countersigned by agents of the sides shall be kept – Regulation 37.

Returns shall thereafter be made to CKRC for announcement of the total national tally – Reg. 38

### **Third (3<sup>rd</sup>) Part**

This part deals with disputes arising out of the Referendum. Care is taken to attempt to limit the issues that may be determined (*“complaints relating to the conduct of the Referendum”* – Regulation 41). The idea is not to open the Referendum to a protracted dispute resolution mechanism. The



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important issues provided for in this part are; -

- a) Establishment of a tribunal known as the Referendum Tribunal to sit, hear and determine disputes. Because of the emotive nature of the Referendum, membership should be subject to consultations with all interested parties to ensure impartially, and independence yet with a measure of inclusivity – Regulation 39.
- b) Application to the Tribunal shall be by way of a Petition – Regulation 40. The Petition shall be filed within fourteen (14) days of the close of voting and announcement of results of the Referendum.
- c) The tribunal may reject a petition summarily if it is frivolous, and vexatious – Regulation 42.
- d) A number of petitions may be consolidated and determined as one if they raise, in the view of the Tribunal, similar issues for consideration.
- e) The process and procedure of calling and taking the evidence of witnesses is similar to that used in courts generally – Regulations 46 and 47.
- f) Once the Tribunal finalizes its work, it sends its report to CKRC which as the body conducting and supervising the Referendum may then decide what to do with the Report – Regulations 49 and 50.
- g) The final decision regarding the vote and result of the Referendum shall then be announced through a gazette notice by CKRC – Regulation 50(4).

#### **Fourth (4<sup>th</sup>) part**

This part has a number of miscellaneous provisions and these include: -

- a) Voting procedures to ensure that patients in hospitals, Kenyans residing abroad, persons with disabilities, expectant mothers, nomads, the aged etc. are able to vote – regulation 51.
- b) Accreditation of observers to be done by CKRC – Regulation 52.
- c) Archiving of documents for good order and record – Regulation 54.

#### **V. Schedule to the Regulations**

The code of conduct binds each side to the Referendum and the government to ensure orderly campaigning, curbing of violence, coercion, intimidation or reprisals prior to and subsequent to the vote in the Referendum.

The code of conduct borrows heavily with certain modification from the code of conduct published by ECK for conduct during General Elections in Kenya.

#### **VI. Conclusion**

As stated elsewhere in this paper, the Referendum Regulations are in the formative stage and require fine-tuning to take into account comments raised in this workshop. There are a number of issues, for example, which the committee requires guidance on.

These are; -

- i) what would be the role of the media and how can it be used to render the process of conducting the Referendum as widely publicised as possible? Should this role or any other if at all, be captured in the Regulations?
- ii) Is there need to control or at least keep track of funds used in the Referendum so that influence of voting patterns through massive use of funds can be curbed? Should this

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- issue be addressed somewhere in the Regulations?
- iii) If CKRC frames questions for the Referendum should there be an approval mechanism by an independent body and if so what should be the composition of that body and how should it be appointed?
  - iv) What should be the membership of the Referendum Tribunal and how should the membership be seen to be inclusive and independent. Should there be a Referendum Tribunal anyway or should the courts handle the matter of disputes?
  - v) Is the time frame of holding a Referendum within one month practical? What should be done if it is not, noting the express provisions of the Act?

These are only some of the issues that may arise during discussions. There may be many more and the committee is quite happy to receive your responses.

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## COMMENTS ON THE CONSTITUTION OF KENYA REVIEW REFERENDUM REGULATIONS 2003

### Hon. Abdu Katuntu (MP), Parliament Of Uganda

The draft Constitution of Kenya Review Referendum Regulations are made under the Constitution of Kenya Review Act. S. 27 thereof requires the KRC to refer a question or questions relating to the review of the constitution to be submitted to a national referendum. I do believe this is principally so because of the sovereignty of the people. All Power and Authority of Government and its organs is derived from the people who consent to be governed in accordance with the laws.

In many countries constitutions provide for referenda where very important issues affecting the constitutional regime are referred to the people. In Uganda, the first referendum was held in 1964 to determine which regime or Authority the people of the "Lost Counties" wanted to belong to. The related referendum was held in 2000 to choose a political system. This as it turned out was Referendum that never was.

Much as a referendum is a form of election, the two are not the same. A referendum result should generally show what the country thinks about a particular issue. That is why, in a legal regime, an issue for determination by a referendum should be taken to be determined in my view, by a majority registered voters and not votes cast at the referendum.

The KR Act provides for the review commission to organise, conduct and supervise the referendum. It is also provided for under clause 4 of the draft regulations. In most countries, electoral commissions are charged with this responsibility. The situation in Kenya could have been peculiar because of suspicion of the electoral commission. This in my view could have been cured by re-organising the commission and appointing Commissioners whose integrity is beyond approach. In Africa we should strive to build institutions that work other than duplicating roles and waste taxpayers money. Clause 4 (b) provides for utilization of the practices and other facilities, including human resources of the electoral commission. I do believe that the task to organise, conduct and supervise the referendum should have been vested in the Electoral commission.

Clause 7, 8, and 9 of the **regulations** would not be necessary because the Electoral commission has its human resources to manage the referendum.

Clause 9(2) Provides for the police Act to be subject to the regulations. An Act of parliament cannot be subject to subsidiary legislation. The neater way to do it is by amending the principal legislation and subject the police Act,

*9(2) Notwithstanding the provisions of the Police Act, a police officer assigned duties during the conduct of referendum shall be deemed to be a referendum official for the purposes of this Act and subject to direction and instruction of the Review Commission.*

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## Determination of colours and symbols under the regulations.

Under the Regulations the Review Commission solely determines the colours or symbols to be used at a referendum. The determination should be democratic and not imposed. Sides to the referendum should be consulted. There could be a possibility of the KRC allotting a symbol or symbols that are not agreeable to the sides.

*10. The Review Commission shall, by notice in the Gazette, allot to every side a distinctive colour and a distinctive symbol for use at referendum in accordance with the provisions of these Regulations.*

## Civic Education Programmes

The Regulations mandate the KRC to formulate and implement civic education programmes relating to referendum. This is possible because the citizens need to be informed about the implementing referendum so that they are able to choose wisely. However civic society is more vibrant with civic education and the KRC may consider accreditation of such organisations.

*11. The Review Commission shall, before the referendum, formulate and implement civic educational programmes relating to the referendum.*

## I. Forming of questions

The interested sides should be consulted during the process of forming questions.

## II. Campaigning for the referendum

The innovation in 12(6) should be applauded. These opinion polls bias and sometimes discourage the electorate. Indeed some could be fake polls aimed at discouraging one side.

*12(6) No opinion poll in respect of the referendum shall be conducted or published within fourteen days before the date of polling in the referendum.*

16(2) is an idle chance. Nobody votes where he is not a registered voter.

Since he cannot appear on the Voter's Register. This certainly excludes those whose names are omitted by mistake.

Clause 17 gives the returning officers unfettered powers to determine the number of ballot boxes as ballot papers, as they consider necessary to a particular polling station. The regulation should be redrafted and give the returning officer some guidelines.

*17. (1) The returning officer shall provide each presiding officer with such number of ballot boxes and ballot papers as the returning officer considers necessary for the effective carrying out of the provisions of these Regulations relating to the referendum.*

Close 18 gives the presiding officer the power of Admission and regulation of the electors. I would encourage the URA the space vote system as it is in Uganda.

Close 20 is ambiguous as leaves room for manipulate. Presiding officers may for example choose to extend polling hours simply because the turn up has been poor.

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Find at to have like "in such manner as he or she thinks sufficient", ... .. practicable moment"

I would strongly agree that ;

- (1) Voting at night should be ruled out by law,
- (2) A presiding officer cannot transfer proceeding to another polling station without the express ... of the returning officer,
- (3) The returning officer should consult with the sides to the referendum communicator with electors.

Clause 21 provides for non-communication amongst electors. This in my view is very drastic as unnecessary. People should be able to great and talk what should be prohibited in campaigning and soliciting for a side.

21. A person other than an referendum officer police on duty shall not except with the authority of the officer, have any communication whatsoever with elector who is in the immediate precincts of, a polling station purpose of voting; but this regulations shall not prevent the companion of an elector with disability from communicating with that elector.

### III. Referendum Tribunal

The regulations establish a Referendum Tribunal consisting of eight persons. This as you realizes in an even number and therefore incase of a deadlock, what happens? This is no provision on who should cast the deciding vote you may consider whether to ... for a "voting chairman" or "a .one"

I wish to observe that:

1. You may wish to seriously think that the tribunal being overwhelmed by petitions because the regulations gives rights to anybody who was entitled to vote.
2. Time for hearing the petitions is limited to 90 days. What happens if the Tribunal 3000 petitioning?
3. The Regulations should provide for the clauses of action it on what grants can Petition.
4. Clause 42 (a) should be amended to provide for a preliminary hearing. The Tribunal should nor reject the petition without hearing the
5. The rules do not provide for the sides to the petition I.e. who the respondents are. The side being complained about and the Attorney General or the KRC should be respondents
- 6 Regulation 43 should provide for grants of jointer parties and consolidation.

In my humble view, these are the means which you should think about. My observation have been in light of my active participation in opposition politics in and my legal practice.

There many electors petitions including petition No 1 of 2001 where President Yoweri Museveni as sued for theft. The judges found for while 2 against. I do believe in Constitution, fair and for they are the pillars of a true democratic society.

Thank you.

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## KENYAN DRAFT REFERENDUM REGULATIONS 2003: A DISCUSSION

**Mr. Jeffrey Simser, Director with the Ministry of the Attorney General in  
Toronto, Canada.**

This paper is being prepared for the Seminar on Referendum and specifically for a panel discussion on Kenyan Referendum Regulations (the “Regulation”) to be held December 9, 2003 in Mombasa, Kenya. This paper will focus on the challenges posed by referendums generally rather than on the Regulation itself. Further this paper recounts, primarily, the Canadian experience with referendums (an appendix on the Australian experience has been added). Herein lies a limitation for both this paper and the author. I cannot pretend to fully understand Kenya and the unique challenges you face. I ask for your indulgence to the extent that I identify issues and techniques that may not fully pertain to the specific context contemplated by the Regulation.

### I. Some Background

While I defer to my colleague, Mr. Girling, and his discussion on the Canadian referendum experience, this paper will make contextual observations which will anchor subsequent commentary. Canada has held three nationwide referendums. The most recent, in 1992, considered constitutional change<sup>58</sup>; notwithstanding active government

support, Canadian voters narrowly rejected the proposal. In 1942 Canadians considered the issue of mandatory conscription into the armed forces during World War II and voted in favour of the government sponsored referendum<sup>59</sup>. In 1898, the government allowed a referendum on the issue of “prohibition” or the banning of alcoholic beverages. Active “temperance” groups supported the referendum but the government of the day took no position. Voters narrowly approved the referendum<sup>60</sup>. There have been numerous provincial and municipal (local) referendums in Canada as well<sup>61</sup>.

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had convened a constitutional conference in the small city of Charlottetown, Prince Edward Island. The government passed enabling legislation, *The Referendum Act*, 1992 c.30 and supported the constitutional proposal during the campaign. This paper will return to both the referendum and the enabling legislation.

<sup>59</sup> The vote took place on April 27, 1942 and 64.1% of voters voted Yes on the conscription issue. Canada at the time had two distinct cultures, French and English; the referendum was designed largely to build a consensus on a military issue with unenthusiastic support in the largely French speaking province of Quebec.

<sup>60</sup> 53% of voters said yes. There were prior and subsequent referendums in my home province of Ontario in 1894, 1902, 1919 and 1921. Ontario has also held many local referendums addressing a broad variety of issues ranging from the fluoridization of water through to the local provision of French language services.

<sup>61</sup> In 1997, for example, Newfoundland voted 72% in favour of a constitutional amendment to eliminate denominational education *Hogan v. Newfoundland*, [1999] NJ No.5 (Nfld SC)

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<sup>58</sup> On October 26, 1992 54.4% of Canadians voted against a constitutional proposal known as the Charlottetown Accord. The federal government

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The whole concept of a modern political referendum was imported into North America from Switzerland. The Swiss introduced the idea of a constitutional referendum into their Cantons in the 1830's. By the 1860's this instrument was expanded into legislative and citizen initiated referendums<sup>62</sup>. In modern Switzerland, a variety of issues are routinely considered by voters in a referendum. Legislators in the American state of South Dakota had visited Switzerland and liked the referendum concept enough to import it into their state law in 1898. Between 1898 and 1918, 19 American states adopted referendum laws. In 1959, Alaska incorporated referendum provisions in its state constitution; since then four states have added similar provisions.

American constitutional change has been produced as a result of referendum activity. Article XIX of the US constitution essentially gave women the right to vote<sup>63</sup>. The push to give women the right to vote came from the suffrage movement, who used referendums and citizen initiative techniques through 56

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<sup>62</sup> A legislative referendum is initiated by elected representatives while a citizen initiated is literally started up at the behest of the voters themselves. This latter form of referendum has also been used for "voter recall"; that is the ability of voters to force an election respecting someone sitting in an elected position. This was most recently used in the State of California where voters replaced the sitting Governor.

<sup>63</sup> The Article states: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of sex". This amendment was proposed by the 66<sup>th</sup> Congress of June 4, 1919 and was declared to have been ratified by 36 of the 48 states on August 26, 1920. A number of states subsequently ratified the amendment, the most recent being Mississippi, who rejected the amendment on March 29, 1920 but ratified is on March 22, 1984.

campaigns in 29 states; 15 states passed referendums. The political pressure created by this direct democracy campaigning led directly to Article XIX. Presently, all US states, with the exception of Delaware, require proposed national constitutional changes to be ratified through a referendum. In addition states have their own constitutions and in 18 states citizens can initiate changes to their constitution through a referendum.

A recent survey suggests that between 1791 and 1998 there were 1,094 referendums held worldwide (this number excludes the United States and Switzerland). The survey also found that the largest category of referendum question, comprising 39.6% of all questions asked, was the constitutional referendum. These questions generally bear on amendments to a constitution or significant electoral reform. In Ireland, Switzerland, Uruguay, Australia and most US states, a referendum vote is a precondition to ratifying constitutional change. As will be discussed below this also true in at least two Canadian provinces. In some instances, the inherently democratic device of a referendum has been in fact used to undermine democracy. One might ask whether recent referendums in Zimbabwe and Venezuela are examples<sup>64</sup>.

Internationally there have been numerous referendums. In the United Kingdom, for example, referendums were used to consider membership in the European Community (1975), Northern Ireland's membership in the United Kingdom (1973), the status of Scotland and Wales (1979 and the issue of devolution in 1997). In 1930, Britain

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<sup>64</sup> Sussman, G *When the Demos Shapes the Polis* (1998) at page 2 published at <http://www.iandrinstute.org/> The referendum device has been used in the past by authoritarian regimes, including Germany and Italy in the 1930's.

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considered but did not hold a referendum on tariff protection. In 1945 Prime Minister Churchill tried to mount a referendum proposal that would have extended the coalition government until the defeat of Japan; he was unable to garner support from the Labour party and abandoned the proposal. Australia requires a referendum to modify their constitution. In the last Century 42 such modifications were proposed although only 8 were actually adopted by a positive referendum result. New Zealand permits the government to organize a consultative and non-binding referendum. Italy has had a referendum procedures since 1945 and voters have cast ballots on a variety of issues (abortion, financing of political parties and even the closing of specific government Ministries<sup>65</sup>). In the Republic of Ireland, a referendum is required for constitutional change; the issues of divorce, abortion and the Maastricht treaty have been so engaged. Newly formed states emerging from the old Soviet block incorporated referendums into their constitutions (examples include Estonia, Belarus and the Ukraine). On November 27, 2003 Taiwan approved a controversial referendum law<sup>66</sup>. I leave it to my fellow panelists to recount the referendum experience in Africa.

## II. Policy Issues Engaged: the Canadian Context

The context for the Canadian models requires a brief bit of history. The Provinces of Quebec and Ontario are situate in the central part of Canada. Political movements in Quebec,

particularly over the past thirty years, have striven to revisit Quebec's place within Canada and at times have sought to remove Quebec entirely from Canada as a political entity (particularly in 1980 and 1995). As a result, there has been considerable constitutional dialogue in Canada and consequential referendums. Referendum law in Quebec (the "Quebec Model") was developed in the context of this debate<sup>67</sup>. In 1990, the federal government and provinces worked on a number of changes to the constitution known as the Meech Lake Accord<sup>68</sup>. That accord was not ratified by all provinces and it essentially failed. Three things did come from that accord. First legislation was passed in two Western Canadian provinces (British Columbia and Alberta<sup>69</sup>) making a referendum a precondition for constitutional ratification; that legislation was not particularly fulsome respecting campaigns and has not been offered as models for this paper. Secondly, Quebec passed legislation on June 20, 1991 mandating requiring a referendum on Quebec sovereignty no later than October 26, 1992. Thirdly, the federal referendum law (the "Federal Model") came into force on June 23, 1992. Subsequent constitutional negotiations led to the creation of the Charlottetown Accord<sup>70</sup> and the Quebec

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<sup>67</sup> And in response to resultant litigation; see for example *Libman v. Quebec*, [1997] 3 SCR 5

<sup>68</sup> Meech Lake is a resort area outside of Canada's capital and was a key location for talks leading to the accord.

<sup>69</sup> Constitutional Amendment Approval Act, RSBC 1996 ch 67 and the Constitutional Referendum Act RSA 2000 c. C-25. These statutes are not canvassed as models for this paper. The British Columbia statute is silent on how a referendum campaign is to be conducted; the Alberta model grafts, at section 6, the general election laws without much thought to detail. As it happens neither statute was used; they were preempted by the federal statute (or rather the federal government passed legislation in reaction to these statutes, depending on one's point of view).

<sup>70</sup> Charlottetown is a small city on Canada's east coast in the province of Prince Edward Island.

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<sup>65</sup> The Ministries of Tourism, Agriculture and Enterprise were terminated in a 1993 referendum.

<sup>66</sup> Should the People's Republic of China attempt to unify Taiwan with the mainland by force, a referendum on national self determination is to be held (AP) *Globe and Mail*, November 27, 2003.



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legislature amended their law to allow a referendum on that Accord to satisfy the referendum requirement. A discussion of the 1992 campaigns will be addressed later in this paper when I look at the form of question and the role of public education.

### III. Whose Side Are You On?

Transparency is a key policy objective of any election administration, whether in a campaign for office or in respect of a referendum question<sup>71</sup>. Voters must have a clear and open process, which is at once understandable and accountable. This is particularly true in respect of constitutional questions. The constitution is the most basic document of the people, codifying their fundamental values and defining their basic institutions. Citizens have a proprietary interest in a constitution that needs to be respected. Canadians have debated this heatedly in the context of constitutional change: how can law makers best consult with the people on this most fundamental form of change. By Canadian constitutional convention, there is no requirement for a referendum<sup>72</sup>. There is, however, a very

strong view amongst some Canadians developed in part around the 1992 discussions, that a referendum is the only effective way of consulting the people properly respecting constitutional change<sup>73</sup>.

I note that the Regulation makes several references to a “side” in the drafting. As I understand it a “side” simply refers to supporters of either the “Yes” or “No” position in the campaign<sup>74</sup>. Each side will be given a distinctive colour and symbol<sup>75</sup>. I understand that section to mean that, for example, all “Yes” supporters would campaign under a common banner (say a green checkmark), whether they be of the government or amongst concerned citizens. In some respects this policy architecture is similar to the Quebec model discussed below. Other models discussed below take a slightly different approach in that they do not approach sides in a binary fashion but rather they engage and regulate diverse and disaggregated participants across the political spectrum. This paper does not recommend one approach over the other, but I would point out one feature of the Canadian approach that is different.

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<sup>71</sup> See for example, Kaplan, *A Guide to Transparency in Election Administration* (2003: International Foundation for Election Systems); *IDEA Code of Conduct for the Ethical and Professional Administration of Elections* (1997: Institute for Democracy and Electoral Assistance, Stockholm)

<sup>72</sup> Constitutional change is made by identical resolutions of the House of Commons and Senate and of the Legislative Assemblies of at least two thirds of the provinces that have in the aggregate at least fifty percent of the total population in the ten provinces: *Constitution Act*, 1982, s.38 (see also *Reference re by Quebec to a resolution to amend the Constitution*, [1982] 2 SCR 793); indeed a unilateral referendum result whereby one province of Canada votes to succeed from the rest of the country would not, in and of itself, bind the rest of the country; it would however compel the

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rest of the country to negotiate with the succeeding province *Reference re Succession of Quebec*, [1998] 2 SCR 2. In *Haig v. Canada*, [1993] 2 SCR 995 the Supreme Court of Canada stated that a referendum was simply a consultative device; municipal referendums were described as a consultative vehicle without a constitutionally enshrined right to vote: *Seimens v. Manitoba*, [2003] SCC 3.

<sup>73</sup> The federal *Referendum Act* 1992 c.30 permits the government to ask a referendum question but does not compel a referendum. Two provinces, fearing that they would be asked to ratify a constitutional question without a referendum, passed laws requiring a vote on questions: *Constitutional Question Act*, RSBC 1996, c.68 and the *Constitutional Referendum Act*, RSA 2000 c. C-25.

<sup>74</sup> The Regulation s.2

<sup>75</sup> *Ibid* s.10

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Oversight of referendum campaigns in Canada centres on campaign finance<sup>76</sup>.

#### IV. The Federal Model

The Federal Model regulates sides not so much by their position (Yes or No) but by the extent of their participation. Specifically, any person or group that intends to spend more than \$5,000 (which converts roughly to 300,000 Kenyan Shillings) in referendum expenses must register as a referendum committee. Expenses are broadly defined (amounts paid, liabilities incurred, the commercial value of goods and services donated other than volunteer labour and so on). While the law appears permissive (a referendum committee may apply for registration... section 13) in fact it is mandatory if anyone plans to spend \$5000 or more on the campaign (section 15). Individuals and groups spending less than that amount are free to campaign without registration. For campaigns registration involves a number of basic requirements (contact information of key individuals, an auditor, an indication of the electoral districts in which there will be a campaign, for example – s. 13(2)). While there is no assignment of colours and symbols, there are restrictions on the name and logo of the committee (cannot be confusing with another committee and cannot be of an existing political party unless the party itself is the committee).

There are provisions respecting campaign finance to consider in the federal law. A

registered campaign committee cannot accept contributions from individuals who are not Canadian citizens<sup>77</sup>, corporations that do not carry on business in Canada, trade unions that do not hold bargaining rights for employees in Canada or foreign governments<sup>78</sup>. There is a formula in the legislation capping the amount of expenses that a referendum campaign may incur<sup>79</sup>. The campaign must file a return on all contributions and expenses along with an audited report<sup>80</sup>.

This report, signed by both the Chief Agent of the committee and the auditor are key accountability provisions. The Chief Agent must file a return within four months of polling day that outlines all expenses and contributions. In addition contributors must be noted. The policy concern addressed here is that the delicate process of a democracy ought not to be subverted by particular groups or interests who happen to have, as their main means of influence, money. Openness through disclosure is seen as a way of addressing that challenge. The Chief Agent and auditor are required to sign off on the report. If the Chief Agent files a false return, they are liable to prosecution. Auditors are professionally licensed and regulated by their professional body<sup>81</sup>. Not only would they be liable to prosecution for a false report, they would face the additional prospect of losing their professional designation. In addition, the legislation compels the Chief Agent to provide the auditor with the information required for the financial part of the return. Failure to so assist the auditor could be the subject of a prosecution. Penalties include fines of up to

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<sup>76</sup> That said, in the 1997 Newfoundland referendum on denominational schooling there were no campaign finance rules. Indeed in the subsequent litigation, the court granted damages to the “No” side of \$135,000 on the grounds that equivalent funding had been given to or spent through the government on the Yes side. See Note 4 above.

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<sup>77</sup> Or permanent residents – s.14(a).

<sup>78</sup> Or agents – 14(d)

<sup>79</sup> The statute sets out a formula based on the number of voters and a fixed rate – 15(2) and (3)

<sup>80</sup> ss. 17 - 20

<sup>81</sup> For example, in Ontario they are regulated under the *Public Accountancy Act* R.S.O. 1990, Ch P.37

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\$5,000 (300,000 Kenyan shillings) and imprisonment of up to five years<sup>82</sup>.

## V. The Quebec Model

In Quebec, “sides” are organized by law into two umbrella groups: one in favour of the proposition and one opposed<sup>83</sup>. This is in contrast to the federal model which contemplates a large number of diverse groups, small and large, campaigning on the question. Each umbrella group, known as a national committee, plays an oversight role throughout the campaign. For example, local authorities wishing to campaign in an election district must have the prior authorization of the national committee<sup>84</sup>. Campaigning is subsidized by the government<sup>85</sup> in addition to funding by political parties (up to \$0.50 per elector) and donors. Individuals are allowed to contribute up to \$3,000 (177,000 Kenyan Shillings). All money is consolidated into a referendum fund; the official agent may use that fund to pay regulated expenses. The Election Act is then amended to address the wrinkles as between a referendum and a campaign for elected office<sup>86</sup>. The Official Agent of the

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<sup>82</sup> The Referendum Act, SC 1992, c.30.

Registration requirements are set out at section 13, contribution rules at sections 14 and 15, penalty provisions are set out at sections 34(1) and (3).

<sup>83</sup> *Referendum Act*, RSQ c. C-64.1

<sup>84</sup> *Ibid* s.24

<sup>85</sup> *Native Women’s Assoc. of Canada v. Canada*, [1994], 3 SCR 627 considered the issue of funding in advance of a referendum campaign. A native woman’s group wanted funding equal to that provided to national aboriginal groups, claiming that the national groups would not represent their perspective. The refusal to fund the group at that level did not violate their constitutional rights.

<sup>86</sup> For example, regulated expenses has a different definition at s. 404 to reflect the dialogue expected around a Yes or No question.

national committee authorizes, in advance, all expenses of the campaign. The Official Agent then reports on their campaign following the referendum. Information in the filing is similar to that called for the federal model. Individuals and groups that contributed over \$200 (11, 700 Kenyan Shillings) must be listed by name and address<sup>87</sup>. The filings must be similarly certified.

The Quebec model was challenged in the Supreme Court of Canada<sup>88</sup>. The Court recognized that by compelling citizen participants into one national committee or the other, the model infringed on freedom of speech. The Court also found that the Quebec model was designed with the highly laudable aim of promoting equality between the options submitted by the government and citizen’s groups. The government had a legitimate policy interest in preventing campaign dominance by society’s more affluent members. In considering the issues, the court found that the concept of campaign finance, as restricted through the national or umbrella committees, was a fair legislative attempt to balance competing interests of free speech and equality among different expressions for the benefit of all. The litigation was brought by an individual who did not feel that he could associate himself with either umbrella committee; the court ruled that to the extent that a citizen could not align themselves with either the Yes or No side in a campaign, the Quebec model was an unreasonable infringement on their right of free expression.

## VI. The White Paper Model

In 1998 a White Paper was issued by the Government of Ontario, but the government

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<sup>87</sup> *Ibid*, s.434

<sup>88</sup> *Libman v. Quebec*, [1997] 3 SCR 5

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of the day never acted on it<sup>89</sup>. Since that time a new government has been formed and the approach endorsed in the White Paper is not endorsed by my current employer in any respect. I offer the approach, however, for two reasons. First, the White Paper discusses policy and legislative techniques. Second, not only did I have the privilege of working with my colleague Mr. Girling on the drafting, we also had an opportunity to consult the public on the White Paper. There are wrinkles in the White Paper that will not be applicable to the Kenyan situation: citizens, for example, could initiate a referendum proposal and have the question put to voters. Some of the drafting techniques were necessarily informed by that possibility.

Any person or group wishing to campaign on a referendum question must register as a campaign organizer. People or groups spending less than \$1,000 (59,000 Kenyan Shillings) are exempt<sup>90</sup>. The campaign organizers must have a chief financial officer and an auditor. Only registered campaigns can accept donations and they are prohibited from accepting money from those not ordinarily resident in Ontario<sup>91</sup>. No person may contribute more than \$7,000 (412,000 Kenyan Shillings) and contributions over \$100 (5,900 Kenyan Shillings) require the registration of contributor information (donor's name and address). Campaign expenses are

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<sup>89</sup> *A Consultation Draft of the Referendum Act*, Queen's Printer, 1998 followed a previous document, the *Final Report on Referenda*, A Report of the Standing Committee on the Legislative Assembly (1997), 1<sup>st</sup> Session, 36<sup>th</sup> Parliament, 46 Elizabeth II.

<sup>90</sup> There are specific provisions to prevent campaigns from being combined to defeat the threshold – section 20.

<sup>91</sup> *Ibid*, s. 21

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limited by a ceiling or maximum amount that can be spent<sup>92</sup>.

Accountability is ensured in two ways. First auditors are professionally regulated (as with the Federal model) and reliance is placed on that. Secondly, there are penalties for violating the law, including prison terms of up to one year. Thirdly there are fine provisions: individuals convicted can be fined up to \$25,000 (1,471,373 Kenyan Shillings); corporations and trade unions are liable for fines of up to \$100,000 (5,885,453 Kenyan Shillings)<sup>93</sup>.

## VII. What is the Question?

Constitutional questions are invariably complex and engage a variety of issues. In 1995, Quebec held a referendum on the following question:

Do you agree that Quebec should become sovereign, after having made a formal offer to Canada for a new economic and political partnership, within the scope of the bill respecting the future of Quebec and of the agreement signed on June 12, 1995?

Many commentators felt that the question was intentionally misleading and deceptive. Professor Dion (later a federal cabinet minister) called this “a question aimed to win and not to be clear.” He believed that the question was only about the sovereignty of Quebec. Polls published prior to setting the question indicated that a straightforward question (should Quebec leave Canada?) would fail by a 60:40 margin. The poll also showed some appetite among voters for

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<sup>92</sup> Generally \$0.40 per voter or 23.5 Kenyan Shillings; provision is made for additional spending in remote Northern parts of the Province - s.25. Contribution rules are discussed at ss. 21 and 22.

<sup>93</sup> S.34

revisiting Quebec's deal within Canada<sup>94</sup>. Therefore, the construction of the question left the voter with sovereignty as a passing and brief matter, and the sense that a new partnership with Canada was the priority<sup>95</sup>. The voters narrowly rejected the proposal with 50.58% of the votes<sup>96</sup>. Had the referendum vote gone the other way, many in Quebec and in Canada would no doubt have criticized its' legitimacy as a consultative device<sup>97</sup>. Particularly given that the question followed an even more confusing referendum question from 1980<sup>98</sup>.

In response, the federal government brought a constitutional reference before the Supreme Court of Canada<sup>99</sup> and following the court's decision passed the

Clarity Act<sup>100</sup>. That statute responds specifically to the problems raised by the wording of the Quebec question. Where a province proposes a referendum question on secession, the federal Parliament is required to debate the wording of the question. Specifically parliamentarians are required to determine:

...whether the question would result in a clear expression of the will of the population of a province on whether the province should cease to be part of Canada and become an independent state."<sup>101</sup>

To address the second part of the Quebec question (asking voters whether Quebec should negotiate a new deal with Canada), the Clarity Act prohibits such negotiation where the referendum question is unclear<sup>102</sup>.

## VIII. Multiple Questions:

I note that the Kenyan Regulation permits multiple questions to be asked. There is a longstanding concern in American referendum law around the issue of "logrolling". Logrolling is the practice of combining multiple questions into one, usually starting with a popular proposition and then burying an objectionable proposition within that<sup>103</sup>. The 1995 Quebec referendum is one example of this technique. The polls show that only forty percent of voters will respond favourably to secession; a higher percentage of voters were disposed to renegotiating Quebec's place within Canada. The latter proposition was given prominence in the text of the question. One school of thought then encourages the use of "single issue" questions.

<sup>94</sup> Monahan, P Constitutional Law (2<sup>nd</sup> Ed) Chapter 6

<sup>95</sup> Warwick, L *We The People: Jacques Parizeau Unveils Quebec Referendum Question* (1995: 108:38 Maclean's Magazine 12

<sup>96</sup> See, for example, the Canadian Centre for Research and Information on Canada website at [http://www.cric.ca/en\\_html/guide/referendum/referendum1995.html](http://www.cric.ca/en_html/guide/referendum/referendum1995.html)

<sup>97</sup> Indeed there was a federal court reference, partially in reaction to that kind of concern: *Reference re: the Succession of Quebec*, [1998] 2 SCR 2

<sup>98</sup> The text of which read: The Government of Quebec has made public its proposal to negotiate a new agreement with the rest of Canada, based on the equality of nations; this agreement would enable Quebec to acquire the exclusive power to make its laws, administer its taxes and establish relations abroad - in other words, sovereignty - and at the same time, to maintain with Canada an economic association including a common currency; any change in political status resulting from these negotiations will be submitted to the people through a referendum; ON THESE TERMS, DO YOU AGREE TO GIVE THE GOVERNMENT OF QUEBEC THE MANDATE TO NEGOTIATE THE PROPOSED AGREEMENT BETWEEN QUEBEC AND CANADA?" 59% of voters rejected this question.

<sup>99</sup> Op Cit note 38

<sup>100</sup> SC 2000, c.26

<sup>101</sup> Ibid s.1(3)

<sup>102</sup> Ibid, s.2

<sup>103</sup> See for example *Pierce County v. State of Washington* (2003) at

<http://www.metrokc.gov/kcsc/rulings/i776final.htm>

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A government needs to plan for the effects that can be created by multiple questions. If Question A and Question B are put on the ballot, what is the effect of a No vote to Question A and a Yes vote to Question B? Is B predicated on a Yes vote to A? Or can they exist independently? If they can exist independently, is there a problem if both A and B get a Yes vote (e.g. are they meant as an either/or proposition?)<sup>104</sup>. The Australian experience in Appendix 1 may be illuminating in this regard.

Voter fatigue is another issue engaged by a multiple question ballot. Some studies suggest that as voters go through the ballots (Question A, Question B and Question C) participation drops off. That is to say there is a tendency to have a higher response rate to the first question and a diminishing response rate to the subsequent questions. The field is not entirely settled on the point<sup>105</sup>. However, in designing a multiple ballot consideration has to be given to the legitimacy issue: if there is a high turn out for the first question and low response to subsequent questions, will that undermine the overall legitimacy of the referendum?

## **IX. The Importance of Voter Education**

In Canada's 1992 referendum, the question was short:

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Do you agree that the Constitution of Canada should be renewed on the basis of the agreement reached on August 28, 1992? Yes or No?

An observer unfamiliar with the vagaries of Canada's history at the time might draw two conclusions from this question. First, the question appears to be relatively neutral<sup>106</sup>. Second, and more importantly, the observer might ask: whatever does the question actually mean?

71.8% of eligible voters went to the polls on the question noted above and 54.3% of voters said No<sup>107</sup>. There was a vigorous and informed debate in Canada at the time of the referendum. The government took an active role, publishing fact sheets and position papers (attached as Appendix 2). The government was surprised by voter take up of the papers, which were made available in a number of institutions like the Post Office. In addition, the Referendum Act required radio and television broadcasters to make free time announcements on behalf of referendum committees<sup>108</sup>.

Under the Quebec referendum law, the chief electoral officer is required to produce a single booklet for use by voters. The booklet explains the options under the referendum. The national committees (one for the Yes and one for the No) establish, in an equal amount of space, text explaining their position on the issue. Not later than 10 days before the holding of the poll, the book must be sent to electors<sup>109</sup>.

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<sup>104</sup> See the two related questions on Scotland, Note 54 below.

<sup>105</sup> Polhill, *D Are Coloradans Fit to Make their own laws?* (1996), 8 Independence Institute 96 disputes studies that point to ballot fatigue, although Polhill is an obvious proponent of referendum and his disputation tends to be anecdotal rather than statistical.

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<sup>106</sup> The use of the word "renewed" might be the only objection.

<sup>107</sup>

[http://www.cric.ca/en\\_html/guide/referendum/referendum\\_charlottetown.html](http://www.cric.ca/en_html/guide/referendum/referendum_charlottetown.html)

<sup>108</sup> *The Referendum Act*, s. 21

<sup>109</sup> Referendum Act (Quebec) s.26

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## X. What Result is Sought?

Belgium has only held one national referendum. Following the Second World War, voters were asked whether King Leopold ought to be reinstated as their monarch. There was a vigorous campaign. In the end, 57% of voters favoured reinstatement. Problems surfaced after the vote. When the results were broken down, a majority of the Walloon population opposed the return of the king; the king was perceived to be a Flemish leader; tensions between the two communities rose. Eventually the king abdicated in favour of his son, Crown Prince Baudouin and tensions dissipated over time<sup>110</sup>.

The Belgium example raises a delicate issue. A referendum is a vehicle through which consultation with the people can occur. A referendum campaign is an opportunity to air views and explore issues. Voter education is one way to develop an understanding of issues and their implications. There is a place for

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<sup>110</sup> Sussman, G *When the Demos Shapes the Polis* (1998) at page 17 published at

<http://www.iandrinstitute.org/> King Leopold had, in the 1930's, changed Belgium's foreign policy; the country had been aligned with France, but adopted a neutral stance. After the 1940 invasion by Nazi Germany, the King, against the advice of his Cabinet, surrendered. After the war, Parliament exiled him to Switzerland; politicians accused the King of cooperating with the Nazis and showing fascist tendencies. In the referendum he received 72% of the Flemish vote, but Walloon areas and Brussels voted against his return. The government of the day, a Catholic/Liberal coalition collapsed when the Liberals withdrew following the vote. There were protests and in Antwerp, 15,000 dockworkers walked off the job. In July 1951 the King abdicated in favour of his son Badouin, who ruled until his death in 1993. See:

<http://news.bbc.co.uk/onthisday/hi/dates/stories/march18>

regulations that ensure a fair campaign and question. The referendum vote, however, is only the culmination of the process. In and of itself, it won't build consensus. In fact, the Belgium example offers the possibility that the vote will exacerbate pre-existing tensions if key sections of society, notwithstanding the overall vote, do not support the proposition advanced.

One way to address this challenge is to require more than a simple plurality of votes to achieve a binding result. This has been done in a few ways. In Belgium, Liberal members of the government coalition argued in 1950 that the King should only be returned where the vote was positive in a majority of areas; when their argument failed, the coalition collapsed. In the 1979 votes on the devolution of Scotland and Wales, the government required a minimum voter turn out; even though more than 50% of voters endorsed the referendum, they were not able to obtain the requisite voter turn out and the referendum failed<sup>111</sup>. This type of device might give opponents of an issue the incentive to boycott the vote. A second device is the double majority device used in Australia. Not only do you need more than 50% of the national votes, you need a majority of the States (at least 4 of 6) to vote in favour. This has made it very difficult to pass a referendum (only 8 of 42 have succeeded since 1901).

When Canada considered constitutional reform in the early 1980's, one version of the proposed package permitted constitutional change through referendum. The provinces were largely opposed to this provision and it was dropped from the

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<sup>111</sup> Scotland voted in favour by 52% but only 32.9% of voters turned out; Wales voted 80% against devolution. In 1997 74.3% of Scots voted Yes to the proposition "I agree there should be a Scottish Parliament" and 63.5% in favour of "I agree that a Scottish Parliament should have tax varying powers."

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package that ultimately went forward in 1982<sup>112</sup>. In the late 1980's there were further discussions, over a period of three years, on constitutional changes that ultimately were never ratified. There was widespread dissatisfaction amongst voters about that process: they stood by while elected representatives struggled with the ratification issue; voters felt they did not have a voice in the matter. When another package came forward in 1992, the voters were given a voice through a referendum. While a referendum is not required to amend Canada's constitution<sup>113</sup>, practically constitutional change is unlikely to be successfully advanced without a referendum.

## **Appendix I:**

### **The 1999 Constitutional Referendum in Australia**

This appendix recounts the Australian use of referendum in 1999. The example did not fit comfortably in the narrative of the main paper, but I thought the experience would be helpful to those thinking about the Regulation. The Australian constitution guarantees that it may only be changed through a referendum<sup>114</sup>. Before a referendum question can be put to voters, it must first be passed by both Houses of Federal Parliament or passed twice in either the House of Representatives or the Senate. The

referendum must be held no sooner than two months and not later than six months after passage of the resolution. For a referendum to succeed, it must achieve a double majority: that it must achieve a national majority plus pass in a majority of states (e.g. 4 of 6). The double majority requirement has made it difficult to pass a referendum: in the 42 votes since 1901, only 8 have passed. Further, 5 votes achieved a national majority but not a majority of states.

In 1999 the government consulted on a proposal to make Australia a republic. To gain consensus, a constitutional convention was held in Canberra, the capital, from February 2 to 13 in 1998. One half of the delegates<sup>115</sup> to the convention were elected, through a mail in ballot procedure; the remainder were appointed by the government. Three issues were presented to the convention:

- (a) Should Australia become a republic?
- (b) Which republic model should be presented?
- (c) What should the time frame be?

After two weeks of discussion, the convention approved an in-principle resolution that Australia should become a republic and recommended a model to be brought forward. Legislation was passed<sup>116</sup> that would replace the Queen (and Governor General) with a President and add a preamble to the constitution.

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<sup>112</sup> Monahan, P *Constitutional Law* (2<sup>nd</sup> ed)

Chapter 6

<sup>113</sup> The formula is essentially identical resolutions of the House of Commons and Senate and of the Legislative Assemblies of at least two thirds of the provinces that have in the aggregate at least fifty percent of the total population in the ten provinces: *Constitution Act*, 1982, s.38

<sup>114</sup> s. 128 The Constitution, Statute of Westminster Adoption Act, 1942, Australia Act, 1986

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<sup>115</sup> 76 delegates were elected from 690 nominated candidates by 46.93% of eligible voters: The Australian Electoral Commission at [www.aec.gov.au](http://www.aec.gov.au) has excellent background materials on that referendum and the author has used them liberally to construct this appendix.

<sup>116</sup> Constitution Alteration (Establishment of Republic) Act, 1999 and Constitution Alteration (Preamble) Act, 1999



The referendum itself was governed by a separate statute<sup>117</sup>. The Australian Electoral Commission was given a public education role in distributing a pamphlet through direct mailing, on the internet and so on. That pamphlet contains two statements created by elected representatives, one from those supporting the proposition and one from those opposed. Each side was given the ability to forward their position in 2,000 words or less<sup>118</sup>. As two questions were being asked, the Electoral Commission was to place each question on a separate ballot paper, each with its own colour<sup>119</sup>. Groups and individuals spending \$1,000 (55,743 Kenyan Shillings) were required to file returns with the commission. Details of donations of \$200 (11,000 Kenyan Shillings) or more had to be reported. The federal government was authorized to spend money on public education activities leading up to the campaign. The Electoral Commission also advertised as part of a public information campaign, spending \$7 million (390,000,000 Kenyan Shillings).

The ballots, coloured buff and mauve respectively, clearly indicated the questions were independent of each other and the results of one did not affect the other. The voters were asked if they approved:

#### ***Constitution Alteration (Republic) 1999***

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*A PROPOSED LAW to alter the Constitution to establish the Commonwealth of Australia as a republic with the Queen and Governor-General being replaced by a President appointed by a two-thirds majority of the members of the Commonwealth Parliament.*

#### ***Constitution Alteration (Preamble) 1999***

*A PROPOSED LAW to alter the Constitution to insert a preamble.*

There was a high turn out of voters (95.1%), although in Australia it is an offence not to vote in an election. The Republic question was rejected nationally by 54.87% of voters; the Preamble question was rejected nationally by 60.66% of voters.

#### **Appendix 2:**

#### **Canadian Background Materials: the 1992 Referendum.**

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<sup>117</sup> The Referendum (Machinery Provisions) Act 1999 replaced a 1984 statute. There are laws on the books from 1906 (Senate Elections), 1909 (State Debts), 1928 (State Debts), 1946 (Social Services) and 1967 (Aboriginals) each applying different techniques to running a referendum.

<sup>118</sup> Ibid, s. 8 In this campaign, with two questions, the booklet was 72 pages long.

<sup>119</sup> Ibid s.11

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## CRITIQUE OF THE DRAFT REFERENDUM REGULATIONS, 2003

**Mr. Samuel Kivuitu, Chairman, Electoral Commission of Kenya.**

### **I. Voter registration and eligibility of voters**

True sections 27 and 34 of the Act confer on the CKRC some powers to hold a referendum in respect of some disputed and unresolved issue or issues it does not seem to expressly require that the decision at issue be taken by *registered voters or persons qualified in anyway* as is assumed in the proposed definition of the proposed Regulations and firmly stated by proposed Regulation 3. This seems to correspond with position of the election of the President under the present Constitution which makes no reference to the registration or qualifications who vote for him or her (cf section 32 and 34 on MPs). This raises the questions as to whether CKRC has the power to make *registration of a person as a voter* a condition for participating in a referendum. Is the power to make Regulations restricted to the extent that the authority empowered to make them, unless expressly empowered or the power can be implied by necessary implication, cannot make such a substantial restriction – substantial because number of Kenyans a chance to exercise a right for which the Act was made. Yet it appears sensible that people who decide such important issue(s) as will be in the referendum

must be mature enough to appreciate what they are doing.

Perhaps the provision of the Age of Majority Act contains the provision to rely on. The question will be how a person proves he/she is of that age of majority. Once again that opens the door to non-Kenyans to vote. That cannot be desirable. Kenyans must decide on their Constitution. That is so where they are deciding a specific preference on a matter of such importance that it could not be resolved by the delegates. One can find support to this view by noting the intention of the parliament when it passed the Act i.e. the fact that it requires delegates to be Kenyans. So how do we establish that a mature person is a Kenyan? National document issued under the Registration of Persons Act and the Citizenship Act to the effect that a person is a Kenyan citizen may be the only proof. Finally, does the law allow elders/neighbours to affirm/attest that a person is a Kenyan? It is done in a number of African countries I have visited. It is put into use in the border districts so as to provide proof of a person's right to an ID card. Why is it not relied on otherwise for this purpose?

Foregoing submissions indicate that this author is not happy with the proposal that the eligible voters must, of necessity, be registered voters. The voters' registers can be one source of

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the information but it seems to the author that that it may deny some mature Kenyans the right to vote. Besides, the voters' register is still inaccurate - although so is the register of persons. The voters' registers is inaccurate essentially because Kenyans do not exercise their right to inspect them when given the chance. Will they do so this time! Even if they do, the sole use of the registers will deny many Kenyans this important right – especially if they have not registered as voters but hold ID cards on Kenya passports. The upshot of it is that the voters' registers can be used and all the suggestions on their inspection etc followed but this author proposes a wider perception as well.

## **II. Framing of the question**

Obviously this will depend on the nature and complexity of the question. But the question must be clear and easy for the voter to understand and take his/her decision thereon. It must be explicit and unambiguous. A ballot paper can contain a number of questions. An issue can be split into a number of a question effort being made to ensure that, that multiplicity of questions will not confuse the voter. But the preferable practice would be one question per ballot paper otherwise the counting will become unnecessarily contentious. And the question should not appear suggestive of one answer only. It should not be such as to invite suggestions.

This particular exercise will call for experts and may need wider consultation – with delegates and organized groups like political parties and civil society. The object is to enhance the form's acceptability.

The proposed Regulations do not seem to consider this matter at all. Yet in the author's view it will contribute considerably to the success and credibility of the whole exercise. It will certainly require wide explanation to the people.

## **III. Referendum personnel**

The CKRC can decide to make use of the existing election personnel or train its own or have a mixture of the two. Indeed CKRC has “stolen” a lot of Electoral Commission of Kenya's (ECK's) qualified and able staff in the past and these together with other election CKRC officials can form the backbone of the personnel. These can then train other junior staff. The ECK has some guidelines which can be used (if found acceptable) to select and train all these categories of people. ECK avoids newspaper advertisements for vacancies because (a) the number of applicants is likely to overwhelm its ability to interview them properly and (b) for the presiding officers (in charge of polling stations) and their clerks, the ECK advertises in the public offices and religious institutions and public markets in the local areas concerned. It considers the latter method valid and defensible because these officers are thereafter employed to work in their areas with minor precautionary measures put in place. These measures have had deterrent effect on the way they conduct themselves and how they work.

As regards their remuneration that is CKRC's responsibility but ECK can offer some guidelines.

## **IV. Campaign and propaganda**

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Campaign should be taken through radio etc by the CKRC in a structured manner. If you allow politicians to carry out the exercise the true reasons for differences will never be told. The disagreement will be exaggerated or distorted. It will not be a wonder to hear “the past regime” blamed for the issue simply to influence the voters conditionally.

If that is not possible, i.e. if CKRC is afraid of being put on bad light then it must cause very strict rules governing the campaign and the propaganda to be used including CKRC’s right to monitor the exercise and to reject unacceptable methods or propaganda. May be it should have power to “permanently restrain” a person from campaigning. It may be necessary for CKRC to have the right to issue rejoinders and explanations. It will be necessary for CKRC to have some coercive power capable of swift usage.

Finally is there really time to campaign and propaganda given the short time the Act provides for the referendum?

#### **V. Referendum ballot papers and symbols**

What is stated earlier on the form of the question is relevant to the form of the ballot paper. Obviously there must be ballot papers which carry the question. That should be all. CKRC’s insignia or Kenya Government’s insignia should be enough.

There are 50 registered political parties in Kenya. All would like to have their party symbols on the ballot paper. What really will that be for? The voters will not be voting for their party. This is not an ordinary referendum where parties have disagreed over a

matter of the implementation of some policy. It is an issue or they are issues concerning a national constitution yet to be made. They are not supposed to favour one person or section of people. They are for all the people at all times. Party issues really have no room to play. Or they should be discouraged. To do this they should be no where on the ballot paper. Because of their huge number they are bound to confuse the voters. Because they have no bearing to the issue they are useless. And finally they can only be emotive, an aspect of life which should never be allowed in the constitution making.

#### **VI. Polling and poling agents**

There seems no harm that the election procedure be followed. There is plenty of knowledge and literature around about these.

#### **VII. Vote counting**

It should be carried out at established polling stations plus whatever else. The rest can follow the current election procedure ending with the results being finally remitted to the Chairman of CKRC who could then announce them. Thereafter the procedure is laid down under the Act.

#### **VIII. Determination of victory and defeat questions**

As stated above the victory or defeat of the question having been determined the CKRC’s Chairman **must** make the appropriate announcement. The law will then follow.

#### **IX. Referendum petitions**

These should only be restricted to recount by the Courts. It should never open the entire process. But whoever

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wants to challenge or dispute any state of the process should be free to go to Court. It will be a silly Court which will stop a process of this nature and magnitude when all preparations have been done and all that remains is polling. In that case there should be room for appeal to a higher Court.

All legal proceedings must be finalized expeditiously.

There should be room for the CKRC itself to direct a recount by a different team or itself if the request is made immediately the count or tallying is done.

There should be a time limit for the recount whether by Courts or under CKRC.

#### **X. Finally**

The CKRC may find the exercise divisive since it arises from their differences. If the law allows it ECK is ready and willing to carry out the exercise in a fair manner. Even the Judiciary can do it but then who will hear and determine the justifiable disputes?

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# THE CONSTITUTION OF KENYA REVIEW REFERENDUM DRAFT REGULATIONS, 2003

**Mr. Gabriel Mukele, Vice-Chairman, Electoral Commission of Kenya.**

## 1. Introduction

The draft regulations were drafted in consultation with the Electoral Commission of Kenya under Section 34(2) (d). I was not directly involved but I am bound by the views given by the Commission. That does not bar me from expressing personal views on the draft regulations under consideration.

## 2. My Comments.

The comments are as follows:-

Regulation 2 “Act” means the National Assembly and Presidential Elections Act. It is my considered opinion that there was no need to produce the whole set of regulations for the referendum. The Constitution Review Act would simply have adopted the electoral regulations under the National Assembly and Presidential Elections Act and proceeded to fill the gaps to meet the needs of the peculiarity of the referendum. That would not have offended Section 34 (1) and (2) (d) of the Constitution of Kenya Review Act. The Act will go with the end of the process. It is true that the current Kenya Constitution does not provide for referenda activities by the Electoral Commission but the Constitution Review Act would have filled that gap. The Electoral Commission has the facilities and the know how to facilitate the making of choice by the electorate. Its being closely associated with the process would have saved the country a lot of expense and time. Regulations 3,4,5 etc may not be enough. “side” is defined and used throughout the

regulations. It needs discussion to bring out the proper picture when issues arise on the ground, for example under Regulation 10.

Regulation 4 The circumstances of the process might not be conducive for the Review Commission to recruit and train the staff to man all polling stations without the help of the Electoral Commission.

Regulation 6(2) This is vague. It should state what it is meant to be e.g. simple and clear language.

Regulation 9(2) This is good on the face of it but in practice, they are loyal to the police command structure. They can refuse to arrest and or prosecute.

Regulation 12(1) “or on similar structure” could open the door for mischief and or illegal activities. In (1) a committee is mentioned but in (3) it is national, is it to be local or national? In (4) should have reference to the schedule where the code of conduct is found and it is not just “code of conduct”, it is “referendum code of conduct”.

Regulation 16 (2) This is looked at with 18(2), the issue will be national and subject to the availability of registers of voters, people could vote anywhere where they are. Was this considered?

Regulation 17(3) (d) Seals are expensive yet will not be used again. The booths too are expensive and they do not have compartments as envisaged in 3(f) though

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this is in the regulations under the National Assembly and Presidential Elections Act, they need not be there.

Regulation 19 (1) Elsewhere in the regulations, gender has been taken into account e.g. Regulations 18(2), 20(1), and 30(3) hence the need for “his/her”.

Regulation 19(6) This could be used but limits the power of the Presiding Officer and defeats the activities the Regulations seek to enforce.

Regulation 21 The word “an” in the first line should be deleted and the second comma in the second line should be removed.

Regulation 24(2) This is another heavy expense and mix up with the Electoral Commission marking.

Regulation 25(2) There should be a proviso to facilitate the well informed voters being given all the ballot papers on different issues without having to go through the process outlined in (1).

Regulations 26 The problem comes when voters do not come with assistants. This is also the problem with the current electoral regulation. There is need to be clear on this e.g. to allow the Presiding Officer to put a mark of the choice of the voter.

Regulation 28 Electors’ cards are expensive. It is difficult to understand why the Constitution Review Commission should have their own cards for purely this exercise. In (2) (b) we know it is in existing electoral rules but the word “shall” makes it mandatory. The process could be abused

and this is what political parties rejected on the eve of the 2002 general election.

Regulation 30(2) Replace the letters “as” with the word “the”. Under (6) what are these clerks for if the Presiding Officers are the reliable officers of the Review Commission with activities stated in Regulation 31.

Regulation 32 (1) a break of 30 or so minutes could be useful if the officers have been working without a break from 6.00am to 6.00pm.

(2) Needs clarification as to what staying overnight means. The same applies to Regulation 33(3).

Regulation 35 (1) Will there be candidates? The word “finally” could be left out. Regulation 36(3) too uses the word “candidate”.

Regulation 38(3) This needs clarification

### **Petitions**

Regulation 39 The people to constitute the tribunal appear too many. It is not stated as to how they will decide, by majority? Can some send representatives e.g. (b) and (c). Why not leave this to those legally trained or we have lost confidence in all of them.

Regulation 51 This is a hot issue in the country and within the Electoral Commission. A flawless procedure needs to be set up.

Regulation 54 (1) Does the Review Commission have facilities for storage? There can be mischief under 54(2) in that an appeal could be filed in the tribunal and parties proceed to look for or destroy

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evidence. No access should be allowed once the petition is filed unless it is by the order of the tribunal that will facilitate attendance by the representatives of the sides interested.

**Schedule**  
**Referendum Code Of Conduct**

Paragraph 6 (N) refers to an election.

Paragraph 8(b) It is not easy to understand who these office bearers are. How does one

prohibit a side?

Paragraph 9 I see no need of going to the High Court. The issues should go to the tribunal dealing with Appeals. The tribunal sitting need not be continuous. It should be set up before the referendum is held and can deal with these aspects.

Paragraph 12 Priority basis does not mean much. Time limit should be specified and reference to election should be taken out



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## SECTION THREE

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### JOINT CONSTITUTION OF KENYA REVIEW COMMISSION/ELECTORAL COMMISSION OF KENYA WORKSHOP ON THE REFERENDUM: 13<sup>TH</sup> – 16<sup>TH</sup> JUNE 2005 AT LEISURE LODGE, MOMBASA

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#### **List of Presentations and Presenters:**

1. “The Road Towards the Referendum” by Mrs Abida Ali-Aroni
2. “Overview of the Referendum in the Constitutional Review Process” by Prof. H.W.O. Okoth-Ogendo
3. “Comparative Referendum Experiences” by Dr. Mosonik arap Korir
4. “The Referendum in General” by Mr. Kihara Muttu
5. “The Referendum Law: A Review of the Constitution of Kenya Review (Amendment) Act 2004 and Referendum Regulations” by Mr. Samuel Kivuitu
6. “The Mandate of ECK under the Constitution of Kenya Review (Amendment) Act 2004” by Mr. Gabriel Mukele
7. “Logistics for Monitoring the Conduct of the Referendum” by Dr. Mohamed Swazuri
8. “Approaches to Civic Education and Voter Education for the Referendum: Challenges Facing CKRC And ECK” by Dr. Charles Maranga

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## THE ROAD TOWARDS THE REFERENDUM

### Mrs Abida Ali-Aroni, Chairperson, Constitution of Kenya Review Commission

#### THE EXPECTATIONS OF THE WORKSHOP

Chairman, Electoral Commission of Kenya,  
Distinguished Commissioners, Electoral Commission of Kenya,  
Distinguished Commissioners, Constitution of Kenya Review Commission,  
Staff of the Electoral Commission of Kenya,  
Staff of the Constitution of Kenya Review Commission,  
Dear Friends,  
Distinguished Ladies and Gentlemen,

On behalf of the Constitution of Kenya Review Commission, I am pleased to welcome you to this workshop. The Constitution of Kenya Review Commission has had a long desire to have this workshop with the Electoral Commission of Kenya but due to various exigencies, we were unable to have it earlier. We are glad that this long awaited meeting is taking place. As you

are all aware, the Two Commissions formed a sub-Committee that has engaged severally. The Committee felt that we needed a workshop whose objectives would be *inter alia*: -

- to discuss the mandate of the Two Commissions as contained in the Constitution of Kenya Review( Amendment) Act 2004;
- to discuss the existing law and

agree on the way forward in terms of the said law;

- to deliberate on Rules and Regulations for the Referendum;
- to discuss areas of mutual interest and cooperation especially in regard to civic and voter education; and,
- to discuss the mobilization of the people and the necessary the necessary logistics

The Constitution of Kenya Review Commission expects this meeting to help our Two Commissions to strike the chord for working together as a team in this most important exercise. I will later on in my presentation consider approaches to teamwork building, but I would like at this early stage to urge participants to spend the next two days in frank and open discussions so that a common approach to referendum issues may find favour in the Two Commissions. This commonality of approach will become the foundational stone upon which our interactions in the coming months will be built on.

The road to constitution making has not been a very easy one as you all know. It is one that has cost lives, time, resources and opportunities. Therefore, the referendum to be facilitated in the next few months is a historic event of tremendous importance to our country. It is a fulfillment of a dream that our people have held for many years and in which they have borne a dauntless struggle. We must make sure the

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referendum succeeds so that we may bring honour and peace to those of us who have fallen along the way of the struggle: so that we might inspire the lives of the present generation: and so that we might bequeath those after us, a legacy of prosperity and a nation at peace with itself.

I therefore urge all of us here today to recognize the privilege in which we stand, the gravity of the issues that we are dealing with, and to be inspired by this privilege and honour bestowed upon us.

### **THE CONTEXT OF THE REFERENDUM: PERSPECTIVES FROM THE CONSTITUTION OF KENYA REVIEW COMMISSION**

In discussing the legal framework for the referendum, there may be wisdom in the two Commissions considering some important themes in the process, some of which have received the attention of the Review Commission in recent deliberations.

#### 1. The ‘wholeness’ of the referendum process

The referendum process is an integrated whole and although the Two Commissions may have distinct roles to perform, these roles should be performed harmoniously and in complementarity rather than in competition to each other. It would therefore be necessary for the Two Commissions to work as a seamless team and to synergize their activities.

Frequent and structured consultations between the Two Commissions should be put in place to address the common challenges of the process. At this juncture,

I wish to re-assure our brothers and sisters at the Electoral Commission of Kenya of our outmost respect and regard towards them. We may have failed to exhibit this in the course of the process. However, this has been our position nonetheless.

#### 2. Limitations in changing the law

One cannot but appreciate that the existing law covering the last phase of the process is far from perfect. At the Review Commission, after lengthy deliberations, we have resolved to move the process forward by taking advantage of the opportunities created by the said law and to meander through the shortcomings (if any) to enable our country achieve this long awaited constitution.

Proposals for substantial legal changes are likely to introduce controversy in the referendum process and to needlessly prolong it further.

#### 3. The political mood

Constitution making is a political exercise of grave legal consequences. As such therefore, cognizance should be taken of the fact that the country, dithering from protracted political intrigues has decided to move on and finalise the Constitution. I am of the humble view that the Two Commissions should concentrate on the opportunity created by the political goodwill to make their preparations and finalize the process.

#### 4. The time factor

The period within which a number of activities are to be executed is short and requires careful and elaborate planning.

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The Two Commissions should utilize the available time in laying strategies that would enable them to efficiently and professionally perform their respective mandates. I propose that a time specific action plan to deal with the outstanding issues between the Two Commissions should be adopted and followed to the letter.

### **C. THE WAY FORWARD FOR THE TWO COMMISSIONS**

In my considered opinion, our two Commissions need to work as a team in order to discharge the national duty ahead of us. We have no choice! Let us forgive each other for any past mistakes, omissions or commissions. Let us together consider the best possible way to discharge our respective mandate. Let us assist each other by consulting and advising each other where necessary. Lets us complement each other where we can. Let us not blame, accuse or focus on weaknesses.

Together we must see how: -

- (i) we can have a frame of mind and heart that seeks to put the national interest above all others;
- (ii) seek solutions based on mutual agreement;

- (iii) build a relationship based on mutual trust; our engagement at the moment is based on low or no trust at all. Let us build a relationship built on mutual trust and respect;
- (iv) Build confidence in each other;
- (v) cooperate rather than appear to be in competition with one another;
- (vi) seek the totality rather than the dichotomy of things (strong/ weak, win/lose, big/small, power-based and opposing position /principle); and,
- (vii) let us remember that the alternative that arises from consultations is the better and higher alternative.

This workshop and the entire constitutional review process is part of the tremendous learning opportunity that we who have been part of the review process have had. It is in this spirit that the challenges that will confront the two Commissions in their respective responsibilities should be taken. This referendum is the first for our country and the two Commissions should seek to set a legacy for the future. To set this legacy, we must be courageous, patriotic and faithful in discharging our respective tasks.

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## OVERVIEW OF THE REFERENDUM IN THE CONSTITUTIONAL REVIEW PROCESS

**Prof. H.W.O. Okoth-Ogendo, Vice-Chairperson, Constitution of Kenya Review Commission**

1. One and a half years ago, at a venue not far from here, I had occasion to speak at a workshop at which many of those here today were present, on the topic “the Referendum as an Instrument of Decision-Making.” Arising from the state of the law at the time, there was uncertainty about whether or not a referendum would be resorted to at some point in the constitutional review process. The workshop aimed at arming participants with an understanding of the nature of a referendum with a view to aiding them in the choices would need to be made as the review process proceeded.
2. It fell to me on that occasion to interrogate the nature and suitability of the referendum as an instrument of decision-making, and the extent of its use globally for that purpose. Today, thanks to the Ringera Ruling in *Timothy Njoya and Others – Vs – the Constitution of Kenya Review Commission and the National Constitutional Conference (the Njoya Case)* the referendum is a *fait accompli*. The referendum discourse has moved on from the nature and types of referenda and their suitability. Choices on each of these questions have already been made vide the Constitution of Kenya Review (Amendment) Act (Act No. 9 of 2004).
3. Today, in giving an overview of the changing fortunes that have characterised this device of referendum in the review process. I find that there is a lot I have to repeat from my last address. But that I will come to that later in my address.
4. The device of the referendum has been the subject of several amendments in the course of the history of the constitutional review process. This “now you see it, now you don’t” phenomenon is a reflection of the changing fortunes of the different interests in the never-ending battle over control or influence on the final decision on the new Constitution. It is the debate over who, between Parliament and “Wanjiku” should have the final say on the Constitution.
5. The original Review Act; the Constitution of Kenya Review Commission Act, 1997 (No.13 of 1997) did not provide for a referendum. The Act achieved the remarkable feat of being amended even before it came into operation. Although it was assented to on 7<sup>th</sup> November 1997, its operation was not commenced until one year later in December 1998, after, thanks to widespread concerns that the constitutional review process envisaged under the original Act would be greatly controlled by the executive arm of

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Government, extensive amendments had been made to the Act; vide the Constitution of Kenya Review Commission (Amendment) Act (No. 6 of 1998)

6. The 1998 Act provided for important decisions of the National Forum to be arrived at by a two-thirds majority of the members where there is no unanimity. The chairperson of the Commission was to then forward the draft Bill as adopted by the National Forum to the Attorney- General for introduction to the National Assembly. It remained unclear in what form and under what procedure the National Assembly would dispose of the draft Bill. Parliament however was to be the final decision maker.

7. In 2000 the referendum made its first appearance vide the Constitution of Kenya Review (Amendment) Act, 2000 (No.5 of 2000). The new section 28 now provided that the after the National Conference, the Constitution of Kenya Review Commission would consider the draft Bill as adopted by the Conference and on the basis thereof finalize its report and the draft Bill. The Commission was then given discretion to decide either to submit the report and the draft Bill to the Attorney-General or to decide to refer the draft Bill to a decision of the people of Kenya and seek their approval of the draft Bill in a national referendum. No guidance was given to the Commission on the exercise of that discretion. But an approval of the draft Bill in the referendum was not the end of the matter as thereafter, draft Bill was then still to be tabled before the National Assembly by the Attorney-General.

8. The Constitution of Kenya Review (Amendment), Act (2001), (No. 2 of 2001), provided that any question on a proposal for inclusion in the Constitution was to be carried by at least two-thirds of the members of the Conference; and if the proposal was not supported by a two-thirds vote, but was not opposed by one-third or more of all the members of the Conference, a further vote would be taken subject to regulations prescribed by the Commission. In an example of bad drafting, the Act then provided for a referendum “in the absence of consensus.” The Commission was then to prepare a final report and draft Bill on the basis of the decision of the people at the referendum and the draft Bill as adopted by the National Conference and submit to the Attorney-General for presentation to the National Assembly.

9. The Constitution of Kenya (Amendment) Act, 2002 (No.3 of 2002) amended the Act to provide that for a question to go to the referendum it had to have failed to receive the support of two-thirds of the members of the National Conference present and voting for inclusion in the Constitution, but to have received the support of two-thirds of the members of the Conference present and voting to be submitted to the referendum. This was probably an impossible condition, as it would require members of the Conference opposed to a particular question as being unsuitable for inclusion in the Constitution, to then support the same question to go to referendum and therefore risk the possibility that their position would be defeated. At the time of my last address, this was the state of the law.

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10. Not surprisingly, the National Constitutional Conference did not submit a single question to the referendum. Every question for inclusion in the Constitution was in fact passed with the requisite two-thirds majority of members present and voting. In accordance with the Review Act as it then stood, the Commission should have prepared its final report and draft Bill and submitted the same to the Attorney General for presentation to the National Assembly for enactment. It did not happen. The reasons for this are many and are by now well-known to everyone. They are also outside the scope of my presentation.

11. The common denominator of all the provisions relating to the referendum in the various amendments to the Act was that they provided for an optional and non-binding referendum. All the provisions on the referendum were predicated on the understanding that the constitutional review process could not bring in a new constitutional dispensation otherwise than through the instrumentality of section 47 of the Constitution of Kenya.

12. That position changed with the ruling of the High Court in the *Njoya Case* to the effect that the sovereign right to replace the Constitution vests collectively in the people of Kenya and shall be exercisable by the people through a referendum. The High Court therefore made a referendum a *sine qua non* for the replacement of the Constitution with a new Constitution as opposed to the optional referendum provided for by section 27 of the Act. The Court further ruled that section 47 of the Constitution (relating to the

alteration of the Constitution) could not be invoked by Parliament to replace the Constitution and that Parliament's powers were limited to amendments to the Constitution and could not as a matter of constitutional principle extend to the replacement of the Constitution.

13. The most significant difficulty occasioned by that Ruling is that it displaced the basic premise on which the Review Act was predicated, which was that Parliament would have power under the Constitution to enact the product of the constitutional review process. It also made mandatory a device (of referendum) not known to the Constitution.

14. The *Njoya Case* was followed soon after by the enactment of the Constitution of Kenya Review Amendment Act, 2004 (No 9 of 2004) (*the Consensus Act*) providing that a referendum be held to ratify the proposed new Constitution and also the procedure for the holding of the referendum. We are meeting here today to plan for the referendum in terms of that Act.

15. In my last address, I had argued that the review process had to be conducted in accordance with the rules of change specified in the current Constitution and complementary laws. I pointed out that the Constitution makes no provision for a referendum as the final constitutive act in constitution making and that section 47 is unequivocal that only Parliament can "alter" the status quo. I further argued that if it should be agreed that a referendum be held as the final constitutive act of constitution making

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the following requisites had to be put in place-

- The present Constitution had to be amended to permit this;
- Referendum legislation had to be enacted to define the modalities and effects of holding it; and
- Infrastructure had to be established specifically for the purpose.

1. Clearly the *Njoya Case* determined that the referendum be the final constitutive Act of constitution making. Thereafter the Consensus Act addressed only the last two points I had urged. The issue of the amendment of the Constitution to accommodate the referendum and the transition from the current Constitution to the new Constitution was not addressed. I note however, from the programme that issues of the referendum legislation will be substantively addressed in a later session.

2. To conclude the overview, let me at this juncture say only, that a proper understanding of the present legal position relating to the referendum requires, at the minimum, an appreciation of-

- The current Constitution;
- The Ringera Ruling; and
- The Consensus Act

1. As I indicated earlier, I seek indulgence now to re-visit some of the views I advanced in my previous address on this device of referendum because they remain valid now as then.

2. A referendum is a procedure through which citizens consciously accept or reject changes from one instrument of

governance to another through voting. The voting is usually a choice between “yes” or “no” to accept or reject the proposed instrument.

3. As an instrument of decision-making, a referendum is a form of direct democracy that allows citizens to express their opinion on critical national issues. Philosophically, it is contemplated that direct participation by the citizens on virtually all matters of governance would reveal the general will of all, and that the referendum is the best means of determining the general will of all. Further, that the way of determining the general will is by a simple majority rule.

4. It is important to note that though referenda are not unique and their use has been growing in recent times, they are not common except in some countries like Switzerland where a referendum is held often. Universally only six constitutions (France, Denmark, Ireland, Rwanda, Uganda and Zimbabwe) have been subjected in *toto* to a referendum worldwide.

5. Generally, a referendum is called in matters that involve fundamental change or which cut across the political and cultural divide or upon which broad citizen agreement is required for legitimacy. But the issue of legitimacy need not be overemphasized. The vast majority of existing Constitutions draw their legitimacy from diverse meta-constitutional principles other than referenda. These principles include enactment in accordance with the rules of change specified in existing constitutions; revolutionary action such as coups and insurrections leading to the



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overthrow of civilian authority; or imposition by a foreign power. A one-day exercise cannot really confer legitimacy for all time for such a fundamental process as constitution making.

6. I cautioned then and I repeat now that a referendum if not well managed could be counter-productive. Apart from being an expensive exercise, frequent use of referenda could undermine the institutions of representative government e.g. Parliament, or lead to majoritarian dictatorship. It can also lead to protracted disputes as to its consequences. This is an especially real danger if there are questions of legality or constitutionality. More importantly, and as the recent referenda in France and the Netherlands have shown, the result may be heavily influenced by irrelevant factors operating on polling day.

7. A referendum tends to be a verdict on the performance of the Government of the day as on the day the vote is taken. Voters may choose “yes” or “no” to the new Constitution depending on the side favoured by the Government and as a sign of approval or disapproval of the performance of the Government or its role in the constitution making process – regardless of their true feelings on the issue at hand. This could have disastrous results.

8. The success of a referendum requires close attention to be paid to the following logistical issues;

- An unassailable constitutional and legislative framework for conducting referendum;
- Finances;
- Framing of questions;
- Civic education for referendum;
- Referendum campaigns;
- Eligibility to vote;
- Voter registration;
- Referendum personnel;
- Referendum ballot papers;
- A legitimate minimum voter turnout;
- Transparent interpretation of referendum results; and
- Credible dispute resolution mechanisms.

1. Finally, for the referendum to be successful: -

- People must see the need of the process.
- Integrity of the process.
- Neutral process. Administration has to be neutral
- Open free and fair campaigning.
- Access to the media, .
- Clarity in the question put to the people and the choice to be made.

This workshop provides an excellent opportunity for the Constitution of Kenya Review Commission and the Electoral Commission of Kenya to consult so as to ensure that the referendum is successfully held and that its results faithfully reflect the wishes of the people of Kenya.

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## COMPARATIVE REFERENDUM EXPERIENCES

### Dr. Mosonik arap Korir, Commissioner, Constitution of Kenya Review Commission

#### I: THE HISTORY OF REFERENDA

##### 1. Switzerland

- Place of origin of the concept, being used in some cantons since the 16<sup>th</sup> Century.
- Idea of constitutional referendum introduced into the cantons in the 1830s.
- By the 1860s, the instrument was extended into legislative and citizen-initiated referendum.
- Has had 297 referenda since becoming a federation in 1848.
- Is the nation that has held the largest number of nationwide referenda – accounting for over ½ of all national referenda ever held.
- A constitutional vote is a precondition for constitutional change and must be approved by a majority of those voting and of cantons.

##### 2. USA

- Legislators of South Dakota imported the concept into their state following a visit to Switzerland.
- Between 1898 and 1918, 19 other states adopted referendum laws followed by

Alaska in 1959 and 4 more states since.

- Referendum activity has led to constitutional change, e.g. adoption of Article XIX of the US Constitution resulting from the struggles of the Suffrage Movement.
- Presently, all states (except for Delaware) require proposed national constitutional changes to be ratified through referendum.
- In 18 states citizens can initiate changes to their state constitutions through referendum.
- The USA has not used national referenda.

##### 3. Canada

- Became a self-governing dominion in 1867, since when there have been only 3 federal referenda held nationally:
  - 1898 – on Prohibition;
  - 1942 – on Conscription;
  - 1992 – on Amendment to the Constitution.
- There have been numerous provincial and municipal (local) referenda on various local matters, e.g. recall of provincial legislators, land issues involving the First Nations, or amalgamation of municipalities.

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- The Quebec referenda of 1980 and 1995 were of vital interest for the whole of Canada, although not federal or national in scope.
- 4. The United Kingdom**
- Referenda have been used to consider:
  - Northern Irelands' membership in the UK (1973);
  - Membership in the European Common Market/Community (1975);
  - The status of Scotland and Wales (1979);
  - The issue of Devolution (1997).
- 5. The Republic of Ireland**
- The draft constitution was approved by the people at a plebiscite held on 1<sup>st</sup> July, 1937.
  - The constitution provides for 2 kinds of referendum – “the constitutional” and “ordinary”.
  - A referendum vote is a precondition to ratifying constitutional change. And a bill amending the constitution must be submitted to a referendum only after passing both Houses of Parliament.
  - Between 1937 – 2004, referenda have taken place on a total of 28 proposals to amend the constitution: 21 were approved; and 7 were rejected.
- 6. Italy**
- Has had referendum procedures since 1945 and voters have cast ballots on a variety of issues, including abortion, financing of political parties, and even the closing of specific ministries.
- 7. France**
- The constitution requires constitutional amendments to be approved first by Parliament, and then by either a referendum or a 3/5 majority of the 2 legislative houses together.
  - The President, on the proposal of the government, can call a referendum on any bill dealing with government organization or a treaty affecting government institutions.
- 8. Denmark**
- The constitution allows ? of members Parliament to petition for a referendum on a bill within 3 days of its final passage.
  - There are provisions for referenda on constitutional amendments or changes to the voting age.
  - Legislation that delegates power to an international authority must be approved by either a 5/6 majority of Parliament or by a simple majority, with a majority of voters in a referendum.
  - The law also allows Parliament to adopt a law providing for a non-binding

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referendum on any topic as a way of consulting the people.

## 9. Spain

- The constitution provides for referenda on constitutional amendments if requested by 1/10 of the members of either chamber of Parliament.
- A consultative referendum can be called by the government on political decisions of special importance.
- Referenda have been held:-
  - in 1976, when the province of Andalusia was dissatisfied at the pace of talks with the central government,
  - in 1986, on whether Spain should remain a member of NATO.

## 10. Belgium

- Has had only one national referendum – whether King Leopold should be reinstated as monarch after the Second World War.
- 57% of voters favoured reinstatement, leading to tensions between the Walloon (anti -) and Flemish (pro -) communities.
- One way to avoid such a challenge may be to require more than a plurality of voters to achieve a binding result – e.g. considering the vote also in the majority of areas.

## 11. Australia

- The Australian constitution provides that it may only be changed through a referendum (Sec.128: The Constitution, Statute of Westminster Adoption Act, 1942, Australia Act, 1986).
- For a referendum to succeed, it must achieve a double majority: a national majority, plus pass in a majority of states.
- This double majority requirement has made it difficult to pass a referendum: in the 42 votes since 1901, only 8 have passed - with 5 votes achieving a national majority, but not a majority of states.
- In 1999, a referendum was held to make Australia a republic. There was a high turn out of voters (95.1%).
- The Republic question was rejected nationally by 54.87% of voters.
- The Constitution Alteration (Preamble) 1999, which was a proposed law to alter the constitution to insert a preamble, was absolutely rejected nationally – by 60.66 of the voters!

## 12. New Zealand

- The government may organize a consultative and non-binding referendum.

## 13. Uruguay

- A referendum vote is a precondition to ratifying constitutional change.

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**14. Venezuela**

- “The inherently democratic device of a referendum has been in fact used to undermine democracy”. [Jeffrey Simsere]

**15. Countries of the former USSR**

- These newly-formed states have incorporated referenda into their constitutions, e.g.;
  - Ukraine;
  - Belarus;
  - Estonia.

**16. Taiwan**

- On 27<sup>th</sup> November, 2003 it approved a controversial referendum law on the topic: “Should the People’s Republic of China attempt to unify Taiwan with the mainland by force, a referendum on national self-determination is to be held”.

**17. The European Common Market/Community**

- In respect to entry, referenda were held in several countries
  - Norway (rejected 1972);
  - Denmark (approved 1972);
  - UK (1975).

**18. Rwanda**

- The first referendum was held in September 1961 to decide on the issue of transforming the country from a monarchy to a republic following the turmoil of 1959.

- The referendum was held in circumstances of political and social instability, as part of the population had already been forced into exile as refugees in neighboring countries.

- The second referendum was held on 26<sup>th</sup> May, 2003 and had its roots in the Arusha peace talks of 1993 between the then Government of Rwanda and the Rwandese Patriotic Front Liberation Movement.

- The Arusha Peace Agreement that was signed provided for a referendum on the new constitution after a transition period, and was part of the Fundamental Law of the Republic of Rwanda prior to the coming into force of the new constitution on 4<sup>th</sup> June, 2003.

**19. Uganda**

- On 4<sup>th</sup> November, 1964 a referendum was held in the “Lost Counties” of Bugaya and Bugangazi to determine whether the people in those counties wanted to:

- remain part of the Buganda Kingdom;
- return or be part of Bunyoro Kingdom;
- form a separate district.

- The people of Bugaya and Bugangazi counties voted overwhelmingly to be returned to Bunyoro Kingdom.

- NB: It had been decided during the independence negotiations that this dispute would be decided by referendum after Uganda became independent in 1962.

## 20. Summary:

- A recent survey suggests that between 1791 and 1998 there were 1,094 referenda worldwide (excluding the USA and Switzerland).
- The survey found that the largest category of referendum question, comprising 39.6% of all questions asked, was the constitutional referendum.
- However, there cannot be more than 5 (five) constitutions out of the more than 190 or so in existence today (France, Denmark, Ireland, Rwanda and Zimbabwe) that have been subjected in toto, to referenda.

## II: CONDUCT OF REFERENDA:

### (A) The Legal Framework for the Referendum

#### 1. Switzerland:

- The Swiss constitution, based on the concept of direct democracy, relies heavily on the referendum process. All alterations to the federal constitution must be approved by referendum.
- Constitutional amendments can be initiated by 50,000 citizens, but historically it has

been difficult to induce the electorate to accept a popular initiative.

- Constitutional amendments, however initiated, must be approved by a majority of the voters, and by a majority (8) of cantons.
- Referenda can also take place on an ordinary law when 30,000 citizens or 8 canton governments demand that a law be subjected to a referendum within 90 days of publication. In this case, only a simple majority of voters is required to abrogate the law.

#### 2. Canada

- The constitution has no requirements for referendum on constitutional issues or any other matter, whether at the federal or provincial level,
- the power to initiate a referendum is either by a specifically designed (referendum) statute or as part of some other legislative scheme.
- In 1992, the Parliament enacted the Referendum Act to enable the federal cabinet to place any question to the voters at either the federal or provincial level.
- There are three types of such legislation:-
  - referenda or plebiscites;
  - initiatives;
  - recall initiatives.

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However, not all provinces or territories have referendum legislation.

- The municipalities' ability to hold referenda is strictly limited to local government matters.

### 3. **Rwanda**

- The constitutional referendum of 26<sup>th</sup> May, 2003 was based on the following laws:
  - The fundamental law under which Rwanda was governed during the Transitional Period (July 2003 – June 2004);
  - Law No. 39/2000 of 28<sup>th</sup> November, 2000 setting up the National Electoral Commission;
  - Chapter Five, Article 180 of the constitution.

### 4. **Uganda**

- The national referendum of 2000 was held under the Constitution of the Republic of Uganda 1995, subsidiary legislation and Referendum Regulations).

## (B): **Responsibility for Conduct of Referendum**

### 1. **Canada**

- All referenda conducted under federal or provincial authority are conducted by the respective Chief Elections Officer.

### 2. **Rwanda**

- The National Electoral Commission of Rwanda.

### 3. **Uganda**

- The Electoral Commission is charged with the responsibility to organize, conduct and supervise elections and referenda.

## (C) **Voters**

### 1. **Canada**

#### (i) Eligibility

- every person who is a Canadian citizen and is 18 years of age or older on polling day is qualified as an elector;
- every person who is a citizen of Canada at the time of voting, is 18 years of age or older on polling day, and has been domiciled in Quebec for at least 6 months before the date of the vote and continues to be so domiciled, is entitled to vote.

#### (ii) Disqualification

- those serving a prison sentence of 2 years or more (but: NB Supreme Court's decision)

#### (iii) Registration

- Permanent Voters List in the Federal Elections Office.

#### (iv) Voters Abroad

- a special ballot may be sent to reach the Chief Elections Officer by 6.00 p.m. on

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polling day, provided application for registration was made.

- This particularly applies to members of the armed forces and persons travelling on business.

(v) Assistance to Voters

- Via selection of locations for polling stations that are accessible without stairs.
- Large print of ballot for the visually impaired.
- Braille for the blind, etc.

**2. Rwanda**

(i) Eligibility

- Age limit of 18 years.

(ii) Registration

- Permanent Voters Register compiled by the National Electoral Commission in collaboration with local government officials who do mobilization of voters.

(iii) Voters in Diaspora

- Citizens in the diaspora were registered and voted through Rwandan embassies: 7,268 out of a total of 3,863,965 registered for the referendum from outside Rwanda.

**3. Uganda**

(i) Eligibility and Registration

- Every citizen of 18 years or above has the right to vote and the duty to register as a voter for public election and referenda.
- The Referendum Act stipulated that those eligible

to vote must be registered as voters by the date voting in the referendum takes place.

- Every citizen has the duty to register in either the place of origin or of residence.

(ii) Disqualification

- Registered voters not at their place of registration but are within the country may not vote.
- Patients in hospitals and sanatoria do not vote.

(iii) Citizens Abroad

- These do not vote.

**(D) The Referendum Question(s)**

**1. Canada**

- The responsibility for submitting a referendum question with respect to constitutional issues rests with the federal cabinet.
- The government must first give a copy of the text to the Leader of the Opposition and to the leaders of other official parties who must be consulted.'
- Then a motion must be brought to the House of Commons for adoption before consideration by the Senate.
- The question is required to be framed as "YES" or "NO" (NB: The Clarity Act, 2000).

**2. Australia**

- Before a referendum question can be put to voters, it must first be passed by both



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Houses of Federal Parliament or passed twice in either House of Representatives or the Senate.

**3. USA**

- There is a long standing concern in American referendum law around the issue of “logrolling”. This is the practice of combining multiple questions into one, usually starting with a popular proposition and then inserting an objectionable proposition within that.
- There is need to plan for the effects that can be created by multiple questions.
- Voters’ fatigue may issue from a multiple question ballot.

**4. Uganda**

- Under the Referendum Act, the minister was to refer the matter to the Chief Justice to appoint a panel of 3 judges to frame the question in consultation with the sides to the referendum who had been contacted by the Electoral Commission.

**III OTHER ISSUES RELATING TO THE REFERENDUM**

(E) Referendum Campaigns and Information

(F) Education on the Referendum and Languages

(G) Referendum Ballot Papers and Symbols

(H) Polling and Related Issues

(I) Financing

(J) Dispute Resolution

(K) Effects of the Results, etc.

**(IV) REFERENCES**

CKRC: Report of the Workshop on The Referendum held on 7<sup>th</sup> – 10<sup>th</sup> December, 2003 at Whitesands Hotel, Mombasa.

**(V) ACKNOWLEDGEMENTS**

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Hon. Justice Isaac Lenaola

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## REFERENDUM IN GENERAL

### Mr. Kihara Muttu, Commissioner, Electoral Commission of Kenya

A referendum is a vote taken on important issues by all the people of a country or part of it. It is one way through which people may express their views with regard to government policy or proposed legislation.

A “referendum” therefore means a referendum or other poll held, in pursuance of any provision made by or under an Act of Parliament on one or more questions specified in or in accordance with any such provision; and a “question” includes proposition, (and “answer accordingly includes response).

Unlike in an election where people vote for candidates or political parties, in a referendum they vote on issues or questions.

You will find that more often than not, referendums are held to resolve political, economic, social or cultural issues in which the people are deeply divided. The issues may be of national or may be affecting a section of people in that country.

Nearer home, there was a case in point in Uganda in 1964 where a referendum was held regarding the “lost” counties. The people of the then Buyaga and Babangaizi counties were given a chance through a referendum to decide whether to remain under the then Buganda Kingdom, join the Bunyoro Kingdom, or become a separate district. They opted to revert to the then Bunyoro Kingdom.

Under the normal circumstances, you will find that many national constitutions provide for holding of a referendum.

See the following:-

- In Canada, a mainly English speaking country, a local referendum is periodically carried out in the French speaking Quebec, to determine whether it should secede or remain a province of Canada.
- In 1986 Spain’s membership to the North Atlantic Treaty Organization (NATO) was put to a referendum.
- In 1975, Great Britain solved its problem over membership of the then European Community (now European Union) by holding a nationwide referendum.
- In 1999, a referendum was held in Egypt to determine whether President Hosni Mubarak should be given another term as President of that country.
- In Australia, constitutional amendments must be endorsed through referendum. In November 1999, a referendum was held to decide whether Australia should remain a monarchy or do away with the status of British Queen as head of state. Majority chose to remain under the monarchy. So it goes as people in East Timor voted in

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a referendum in 1999 to become independent from Indonesia.

Referendum can be initiated in different ways but all dependent on the provisions of the law as set out by the particular country.

### **Referendum period**

Between date of order (laid before Parliament) and date of poll

### **Wording of referendum**

May be specified by subordinate legislation or Commission may be consulted on the wording of the referendum question before draft is laid before Parliament.

Thus, the “referendum question” means the question or questions to be included in the ballot paper.

### **Participants:**

Naturally, there must be the “permitted participants”, in relation to a particular referendum thus depending on the circumstances, it could be a registered party, registered voter aside, and an individual etcetera.

Where there are two only possible outcomes in the case of a referendum, the Commission may in relation to any of those outcomes designate permitted participants as representing those campaigning for the outcomes in question.

### **Uses:**

Political referendums are essentially concerned with major questions of policy change about which views may be strongly divided. It is important therefore that their conduct should be

accepted by both electorate and parliament as being efficient and fair.

However, referendums cannot provide panacea for major political problems, but can significantly assist governments before controversial legislation is introduced which also gives legitimacy to new policies after legislation have been enacted.

Referendums are not a threat to Parliamentary sovereignty. It is therefore open to governments and parliaments to set up referendums as primary legislation or alternatively, to enact a special referendum Act to cater for the conduct of referendums.

Referendums nationwide have been used in most of the democratic countries in the world except perhaps a few like India, Israel, Japan and US.

In most cases referendums have been used to solve a particular crisis or perhaps endorse a new constitution.

- Thus, the government used it in France to endorse, legitimize and entrench Maastricht treaty in 1992.
- It can be used when a government has committed itself to a referendum in a manifesto like in New Zealand, in electoral reform in 1992.
- When there is a legal mandate as the only means of constitutional change.
- A constitutional provision may empower citizens to demand a referendum to pass judgement on a given Act.

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## **Framework**

Need for rules and guidance for the conduct of the referendums is implicit. A key element in the conduct of referendums is to ensure the way they are run is independent of any party interests.

Guidance should be drawn up dealing with organizational, administrative and procedural matters associated with holding a referendum. Established guidelines should include fixed rules for some matters – e.g. organization of the poll, election machinery and counting. The most important factor for these rules and their applications will be whether they are direct responsibility of an independent body.

Responsibility for the conduct of referendum should be given to an independent body. Public confidence in the neutrality of the conduct of a referendum is essential if the result is to be accepted as legitimate particularly where the government is pledged to a specific outcome.

The functions of such an independent body should be:

- Advising on the wording of the question
- Liaising with and acting as moderator between campaign groups
- Acting in an ombudsman role to deal with any complaints
- Monitoring balanced access to broadcast media
- Providing public information

- Supervising organization of each polling station
- Counting and declaration arrangements

A permanent electoral commission exists in most Westminster style of democracies. Such commissions typical have responsibility for the administration and conduct of both elections and referendum.

Referendums need Parliamentary approvals such as defining people eligible to vote

Status of referendum either mandatory e.g. legitimize constitutional change or advisory.

## **The Question**

Words chosen must be few and simple. The wording should be accepted as objective and fair in other words the wording must be short and simple.

## **Campaign**

Notice of referendum should allow sufficient time for adequate public debate

## **The Poll**

- Similar to what obtains in an election allow full public debate for the issues
- Normal voting hours
- Vote counted and declared at the polling station

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# THE REFERENDUM LAW: A REVIEW OF THE CONSTITUTION OF KENYA REVIEW (AMENDMENT) ACT 2004 AND REFERENDUM REGULATIONS

**Mr. Samuel Kivuitu, Chairperson, Electoral Commission of Kenya**

## 1. Preliminary

1.1 This paper discusses the law concerning the expected referendum on whether to ratify or not to ratify a new Constitution of Kenya when will be. It will attempt to describe briefly the respective roles the Electoral Commission of Kenya (ECK) and the Constitution of Kenya Review Commission (CKRC) will play in this programme. Both Commissions have distinct operational roles but I believe a fair and objective person would on consideration of the overall objective coming out of the Act is to afford Kenyans an opportunity to approve or disapprove a Constitution for their country. Consequently, towards that end, our separate roles do blend so that, together, the two Commissions would assist Kenyans to carry out their sovereign right freely and meaningfully. The two Commissions, thus, have on the overall consideration a common but sacred task. I believe it is a task we must embrace together as sisters and brothers. I submit we owe it to our fellow and dear Kenyans to have to bear with us that consideration at all times.

1.2 In my view the legal regime governing this exercise is not the best. There ought to have been a Referendum Act or some law of that sort which could vest the necessary powers and obligations to whatever persons or

entities and define these in a clear manner including their manner of exercise or discharge. Instead we have law which, in my view as a litigation lawyer, may invite lawsuits. The language at times is either unclear or capable of abuse or may appear to contradict with the Constitution of Kenya, for there is an operational Constitution of Kenya. Nevertheless we in the ECK have agreed to tread carefully through these laws despite all these weaknesses and do our best to oblige Kenyans. We will not stand on their way whatever the circumstance.

## 2. The Objective according to the Act

The title of the statement which introduces the relevant Act of Parliament reads as follow:-

“An Act of Parliament to amend the Constitution of Kenya Review Act to provide for participation of the people of Kenya in the making of a new constitution through the National Assembly and a referendum and to provide for certain other matters”.

That statement is clear enough from that object that:

- (a) the people of Kenya are expected to participate in the making of a new Constitution;
- (b) the Constitution will be made through the National Assembly; and

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(c) a referendum.

Ordinarily one would expect the participation of the people to be limited to the referendum. Unless you regard Members of Parliament as people of Kenya it is not easy to see how Kenyans generally can participate in the National Assembly. The object should have emphasized the referendum more than the National Assembly. It is the people who are expected to make the new Constitution and not the National Assembly. The point I am making is that the drafters of this law and even the National Assembly seemed like they wanted to vest the Constitution making to Parliament in preference to the people of Kenya according to that objective, which in legislative drafting, determines the purpose of the enactment.

### **3. Principal Role of Electoral Commission of Kenya (ECK)**

The Act may have made provisions for other matters but it is clear that the entire purpose of passing it was to provide for the holding of a referendum. That appears partly in the object and more specifically in section 28 of the Act. And since section 28 places the responsibility of holding the referendum on the Electoral Commission of Kenya (ECK) it appears only fair that this paper should commence with reference to ECK.

Under the Act the relevant parts are the principal object, sections 5 (i.e. part IV) and 8. It is significant to read the title to part IV which reads as follows:-

“THE MAKING OF A NEW  
CONSTITUTION”

At no other place in the body of the Act do those words in that emphatic manner appear except at the preamble or principal object. It must mean that that is the part which provides for the making of the new Constitution. And that is the part which involves essentially the ECK in this process. Under it are listed sections 26, 27 and 28 A – (it is in the amended version from the principal Act, namely the Constitution of Kenya Review Act).

Section 26 is significant. It provides a preamble to sections 27, 28 and 28A. It:-

- (a) recognizes the sovereign right and power of the people of Kenya to replace the Constitution; and
- (b) states that the provisions of sections 27, 28 and 28A are enacted to facilitate these people in their exercise of this sovereign right and power.

Discussions on section 27 will be done later. They concern the timeframe within which the Kenyans must exercise their sovereign right and power and that will be dealt with as a separate subject.

The responsibility of holding the referendum is placed on the ECK by section 28 in very unambiguous terms. ECK is directed by the law to hold the referendum “*to give to the people of Kenya the opportunity to ratify the proposed new Constitution*” The subsection 28(2) specifies the question, namely, “*whether they are for or against the ratification of the proposed new Constitution*”. Usually elections are said to be held. But they rarely, if ever, are said to be held by ECK or any such an authority. According to Oxford

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Advanced Learner's Dictionary the meaning of that kind of "hold" is given as "to cause to take place". That meaning seems to fall very well with what the import of the entire section 28 is, i.e. that the ECK shall cause a referendum to take place so as to enable the people of Kenya to express their preference for or against the ratification of the new Constitution. For ECK to perform this function it must make preparations, plans and arrangements which will facilitate these people of Kenya to exercise this sovereign right and power, e.g.

- (a) Oversee the implementation of these preparations, plans and arrangements. (You may call these mechanisms and procedures); and
- (b) Supervise the entire process from preparations to the end.

And finally section 28A directs that the ECK shall publish the results of the referendum in the Official Gazette. This provisions when read together with section 28(3) which provides that "the proposed new Constitution shall be ratified by a simple majority of the votes cast at the referendum" and the rest of the section 28 it appears clearly obvious that it will be the responsibility of the ECK to count the votes and announce the results of the count for purposes of the referendum. In the light of these provisions it is submitted that it is the ECK, solely, which shall be responsible for the conduct of the referendum. It will therefore have, besides many other duties, to do the following:-

- (a) design and acquire the ballot papers;
- (b) acquire the required in the right quantitie referendum materials from ballot boxes to stationery;

- (c) decide on the referendum infrastructure including locating and designing polling stations;
- (d) recruit, appoint, train and designate referendum officials;
- (e) provide logistics and transport to the referendum effort;
- (f) count the votes;;
- (g) announce the referendum results;
- (h) arrange for the security of the ballot papers, of the referendum officials and of the entire process; and
- (i) manage and supervise the entire referendum process from the announcement of its date to the completion of the permitted litigation.

#### 4. Right to Vote

Section 28(4) reserves the right to vote in the referendum to the registered voters. Voters are registered by ECK under section 42A (a) of the Constitution and the National Assembly and Presidential Elections Act (Cap 7) and Regulations made there under. The Local Government Act (Cap 265) and Rules made under it provide for registration of voters for purposes of local government elections i.e. elections for local authorities. The same Act, i.e. Cap 265, allows for simultaneous registration of those voters with those registered under Cap 7. Consequently ECK carries out the registration of voters for presidential, parliamentary and local government elections together but hereafter creates electoral rolls or lists specifically for local government elections. Thus all voters registered for these elections will be eligible to take part as voters in the referendum.

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5. **What will be voted for in the Referendum**

Section 27, 28 and 28B are clear as to what will be the subject of the ratification and therefore the referendum. Clearly it will be the product of the Bomas Draft constitution after it has been duly amended by the National Assembly. There seem to be no room for other so called draft constitutions to come up with the referendum under the Act.

6. **Civic Education and Voter Education**

There has never been a clear distinction between civic education and voter education. ECK has never bothered to restrict itself when conducting voter education.

Sections 17 and 28(7) of this Act grants to CKRC the power to conduct and facilitate, coordinate civic education to support the referendum. The ECK has power to promote voter education at all times (see section 42 A of the Constitution). It is trite law that the fact that CKRC has been granted the power to facilitate and coordinate civic education cannot *ipso facto*, take away the constitutional power granted to ECK as aforesaid. In any case please see sections 123 (13) and 124 of the Constitution. There could be a conflict between the two legal provisions. This is a matter which requires mutual discussion.

7. **Observation and Monitoring of the Referendum**

Section 4 of this Act (which amends the Principal Act) provides that CKRC shall:-

- (c) monitor the conduct of the referendum under section 28”.

Under the National Assembly and Presidential Act this Act does not provide for observation of the referendum. Indeed this is only reference it makes to “monitoring” of the referendum. No definition is given to this term. From the definition in the Oxford’s dictionary its meaning could include supervising or overseeing the process. This contradicts directly section 41 (9) of the Constitution which provides thus:-

“In exercise of its functions under this Constitution the Commission shall not be subject to the direction of any other person or authority”

I wish to refer to section 42A and 124 of the Constitution.

Section 42 A provides that:-

- (d) promoting voter education through out Kenya;
- (e) such other functions as may be prescribed by law”.

The Constitution of Kenya Review (Amendment) Act, 2004, which grants monitoring powers to CKRC falls under “(e)” above. It must abide by section 124 of the Constitution. to the extent that it contravenes or contradicts that section 42A(e) of the constitution it is null and void.

This is an area where ECK holds very strong views. There may be others who do so on outside the two Commissions. The two Commissions should discuss this dilemma in a mature and patriotic



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manner and in the best interests of the people of Kenya.

## **8. Timelines**

The time lines for the holding of the referendum are set out under section 27(1) of the Act. These are programmed in the following manner -

- (a) Section has to become operational first. That means it will be enacted by National Assembly and assented to by the President of the Republic. For all we know, all that was done;
- (b) Within the first 90 days after the section came into operation, i.e. after assent was given:
  - (i) the National Assembly must debate the Bomas Draft Constitution i.e. the zero Draft together prepared by the report which is CKRC in that respect;
  - (ii) the National Assembly must submit to the Attorney General the Bomas Draft Constitution with Assembly's recommendations only on the contentious issues which the Parliamentary Select Committee on Constitution Review had identified and recommended that they be approved by the National Assembly.
  - (iii) whilst the National Assembly considered the Draft Constitution it can initiate measures so as to facilitate and promote a national consensus on the contentious issues which were mentioned earlier. This may be in what took place in Naivasha.

But all these matters must take place within the first 90 days.

- (c) Once the Attorney General receives the Draft Constitution from the National Assembly he/she has 30 days within which he/she must publish the proposed new constitution with such amendments as were approved by the National Assembly. This would seem to mean that the contentious issues which previously formed part of the National Assembly will somehow disappear which may be completely or reappear in another form e.g. as amendments.
- (d) When the Attorney General publishes the new Constitution as above then within the following 30 days the ECK must hold the referendum to ratify the proposed new Constitution.

From the foregoing the maximum period allowed by the Act from the day the Act became operational to the day the referendum is held is 150 days. We know the date when the Act became operational. It would appear that the Naivasha Accord was part of the initiatives or consultations by the National Assembly to create a national consensus. There also seem to be in existence, in the National Assembly, a consensus committee, which may or may not mean that national consensus has been reached. But the 90 days period is still running, irrespective.

Nevertheless the National Assembly reserved for itself the right to extend all these timelines under section 37 of the Act. That then means 150 day's time limit can be extended by the National Assembly if it so decrees.

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Right now it is not possible with any certainty to fix the date when the referendum will be held. The proceedings before the National Assembly have or have not commenced for all I know and hence I am not certain that the initial period of 90 days has or has not begun.

### **9. Campaign period**

The Act does not state who will be the contestants in the referendum. Indeed under sections 26 and 28 the contestants can only be identified as the people of Kenya. The Act does not confer on any person or entity the power to decide this issue until at the counting. Section 28(5) cannot be stretched to support the existence of such power. Hence in the making of the referendum Regulations this is a matter which will have to be borne in mind. Indeed, it is my conviction that the Regulations cannot be used to create sides except in the design of the ballot paper. But may be same leeway or escape route will be found under the Interpretation and General Provision's Act.

Section 28 applies to the referendum process the provisions of the National Assembly and Presidential Elections Act and the Election Offences Act (Cap 6). The first Act is applied *mutates mutandis*. This gives the ECK a very broad discretion. It is the kind of discretion which attracts litigious people. I expect such people to become a real bother.

This application of these two Acts of Parliament means that ECK will be in some control over the electoral conduct of the canvassers of either view.

However, it will not be easy to deal with political parties under this head – i.e. within the ambit of the provisions of the Electoral Code of Conduct

(Forth Schedule). The place and role of political parties in the referendum process is omitted completely. It may require some uneasy stretching of the Act to rope them in.

### **10. Legal Challenge of the Process**

The Act anticipates that after the results of the referendum are published there may be litigation challenging the conduct of the result of the referendum under sections 28A and 28B. The challenge must be in the High Court and in the form of an application. It must be filed within 14 days after the publication of the referendum results in the Official Gazette. And the applicant or applicants must deposit Kshs. 5 million with the High Court, within seven days of the filing the application. If no application is filed within the stipulated duration or the applicant(s) fail to deposit the money then the published results of the referendum become final. But while the application is pending in the High Court the published results of the referendum shall remain in abeyance until the application is determined by the High Court.

The Attorney General and the ECK must be given notice of the application within 7 days if it is filed. Then the applicant must inform the rest of the world through a notice published in Kenya Gazette within fourteen days of the filing of the application.

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There will be three judges appointed by the Chief Justice to hear and determine the application-except applications related to procedure or jurisdiction will be heard by one judge.

The Judges have powers to:-

- dismiss the application
- declare the published results incorrect;
- order ECK to repeat polling in any place or places; and
- annul the result of the referendum and order a new referendum to be held.

The Court can only order a referendum to be annulled if it is satisfied that the law applicable to the process has not been complied with and such non-compliance has materially affected the referendum result. This section seems to go further than section 12(7) of the Constitution which restricts interference of Courts to excess or abuse of Jurisdiction or authority. It is an area which can form fertile ground for litigation.

## **11. Referendum Regulations**

Referendum Regulations have yet to be finalized by the ECK. Under section 34 of the Principal Act as amended by section 8 of this Act the power for

making the Regulations is vested on the ECK. However it must consult CKRC and the Parliamentary Select Committee on Constitution Review. This issue of consultation can be construed as interference with ECK's constitutional mandate and hence offending section 41(9) of Constitution without coming within section 124 (7) of the Constitution. Once again this could be a source of litigation. But the ECK is ready and willing to consult within fraternal limits.

The draft Regulations will be ready soon. They will have to be seen by the plenary of the ECK first before they are transmitted to CKRC and the Parliament Select Committee.

Referendum Regulations are not likely to depart too much from Election Regulations. Some of the areas which call for serious and careful consideration will be:-

- design of the ballot paper; and
- whether it is necessary to identify definitely the opposers and supporters of the ratification before the count is carried out.

There may be other areas for special consideration.

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## **THE MANDATE OF ECK UNDER THE CONSTITUTION OF KENYA REVIEW (AMENDMENT) ACT 2004-**

**Mr. Gabriel Mukele, Vice- Chairman, Electoral Commission of Kenya**

### **1. INTRODUCTION**

This topic would easily overlap with the workshop topic, “Referendum Law Act of the Constitutional of Kenya Review (Amendment) bill 2004 and the draft regulations” covered by ECK Chairman. However it is harmless to repeat in part what the Chairman may have stated.

The majority of Kenyans have not heard of referenda. It is interesting to note that referenda have been carried out in neighbouring countries like Uganda and Rwanda who have specific legislation on the issue but Kenya has none.

There is no reference to referenda in the Kenya Constitution or any legislation covering elections. Referenda legislation is provided for in the Constitutions of many countries. In Uganda, under article 61 (b) of the Constitution and section (1) of the Referendum Act, the Electoral Commission is charged with the responsibility to organize, conduct and supervise elections and referenda. We have such provisions in England, Canada, Australia and many other countries. Ideally, there should be a permanent law to deal with the referenda and plebiscites. The law we are dealing with in this exercise goes off the statute books on completion of the project. Thus, section 36 (1) of the Constitution of Kenya Review (Amendment) Act 2004 states –

“this Act shall expire when the Commission is dissolved”, yet Kenya has many issues on which leaders and the population are divided. It would be proper to take some of the dividing issues to the people/voters.

### **2. EXISTING ELECTORAL LAW**

Kenya has reasonably good law on elections and referendum is basically an election. It is not a choice of political parties or individual candidates, it is a choice by the electoral between opposing political views, often with the Yes or No answers. The Kenyan electoral law is set up mainly in the Constitution and the National Assembly and the Presidential Election Act. It is common knowledge that written Constitutions provide for how they are amended or replaced. This is the case with section 47 of the Kenya Constitution that provides for the alteration thereof. The word “alter” as provided in the Collins Wordfinder means inter alia, adapt, amend, change, modify and transform. Section 3 of the said Constitution highlights the supremacy of the Constitution. It states:- “This Constitution is the Constitution of the Republic of Kenya and shall have the force of law throughout Kenya and, subject to section 47, if any other law is inconsistent with

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this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void”.

The mandate of the Electoral Commission under the Constitution starts with section 5 on page 6 of the Constitution. The section provides for the election of the President of the Republic of Kenya. Sections 41 to 43 provide the basic electoral law and set out the Electoral Commission as the only body with the mandate to carry out elections. The Commission’s independence is enhanced with the protection of the office of Commissioners and the Commission’s decisions as stated in section 41 (9). The responsibilities of the Commission are outlined in section 42A with the marginal note put as “Conduct of Elections”. The ECK is responsible for inter alia (d) promoting voter education throughout Kenya. Section 42 A (e) provides for such other functions as may be prescribed by law. That law of course will be void if it contravenes section 3 above and by extension the Electoral Commission can ignore it if it directly encroaches on the independence of the Electoral Commission.

Apart from reference to the courts of law that hear disputes on results, the administration of the election in the country is exclusively the work of the Electoral Commission. Our courts have usually never directed the Commission to repeat an election as stated in section D(1), ( c) & (d) of the Constitution of Kenya Review Act.

Section 3 of the National Assembly and Presidential Elections Act provides for the appointment of the staff of the Commission. Section 17A states:-

“ The Electoral Commission shall have the overall conduct of elections under this Act and shall give general directions and exercise supervision and control thereof and take the necessary measures to ensure that the elections are transparent, free and fair”. This is the mandate of the Electoral Commission.

### **3. THE MANDATE OF THE ELECTORAL COMMISSION UNDER THE CONSTITUTION OF KENYA REVIEW (AMENDMENT) ACT 2004**

Some of the provisions of the Act would be caught up with section 3 of the current constitution. The Act has been enacted by the Parliament, the supreme law making body of the Republic and unless the contrary is shown, the Electoral Commission has duty to implement the law as it is.

The provisions of section 28 of the Act are specific and are as follows:-

***28(1) Within ninety days after the Attorney-General publishes the proposed new Constitution under section 27(3), the Electoral Commission shall hold a referendum to give the people of Kenya the opportunity to ratify the proposed new Constitution.***

- (2) The question upon which the people shall vote in referendum shall be whether they are for or against the ratification of the proposed new Constitution.

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- (3) The proposed new Constitution shall be ratified by a simple majority of the votes cast in the referendum.
  - (4) The person who may vote in the referendum are the persons who are registered to vote in elections to the National Assembly.
  - (5) The National Assembly and Presidential Elections Act shall apply, with necessary modifications, with respect to the conduct of the referendum, subject to the regulations under section 34(3).
  - (6) The Election Offences Act shall apply with respect to the referendum as though it were an election within the meaning of that Act.

Thus with the mandate clearly given, the Electoral Commission has to look at the following aspects of the referendum:-

- (i) The register of voters has to be revised and be in place as it forms the basis the choice by the people. It is an elementary rule of the electoral process that no election can be free, fair and transparent without a good register.
- (ii) There must be officers to carry out the exercise. As most of the Electoral Commission election officials are hired on temporary terms, work must start with the hiring process.
- (iii) The logistics must be worked out and put in place for the exercise.
- (iv) The election materials must be assembled in time. In accordance with section 28(2), the Electoral Commission has no role in framing the important issue of the question to be taken to voters.
- (v) The Electoral Commission has to make rules in accordance with section 34 of the Act.
- (vi) The funds must be available early to facilitate the preparations for the same.
- (vii) Voter education is a constitutional obligation for the Electoral Commission of Kenya.

#### **4. GROUNDWORK**

Getting down to the ground, the ECK as a neutral body that arbitrates between opposing views would have to look at the following -

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- (a) The wording of the question or questions which would be explained to the people.
  - (b) The handling of campaigns by the opposing groups.
  - (c) Conflict resolution.
  - (d) The monitoring and access to the media.
  - (e) Providing public information and giving a balance to opposing arguments.
  - (f) Carrying out and supervising actual polling.
  - (g) The counting, the declaring and gazetting of results.

## **CONCLUSION**

The mandate of the Electoral Commission under the law is clear. Time is of the essence. Let this workshop decide on where the two Commissions can work together without infringing the provisions of the basic law of the land, the Constitution. Where such problems arise, solutions can easily be found e.g. the CKRC can carry out civic education but when it comes to voter education and the conduct of the referendum, they can come in as observers. The problem is that the Parliamentary Select Committee which is to identify contentious issues of the constitution and get the approval of Parliament has not been involved in the joint meetings of the two Commissions. However, let this workshop thoroughly examine the law and the time frame for the process. Problems, if any, can be solved in accordance with the existing law.

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## LOGISTICS FOR MONITORING THE CONDUCT OF THE REFERENDUM

**Dr. Mohamed Swazuri, Commissioner, Constitution of Kenya Review Commission**

### 1.0 Introduction

The referendum is one of the five organs of the review process. The others are the Commission, the Constituency Constitutional Forum, the National Constitutional Conference and the National Assembly. These are provided for by Section 4 of the Constitution of Kenya Review Act, Cap. 3A.

The reasons for holding the referendum and its genesis from the Ringera Ruling of 2004 is now common knowledge to all those who have been closely following the review process.

The national referendum will mark the final and concluding stage in the constitution review process. It will give an opportunity to Kenyans to exercise their primordial powers in ratifying or rejecting the proposed new constitution.

### 2.0 Mandate for Monitoring of the Referendum

According to the Constitution of Kenya Review (Amendment Act of 2004) Section 28, the Electoral Commission of Kenya shall hold a referendum to give the people

of Kenya the opportunity to ratify the proposed constitution. Holding a referendum involves a process from voter registration, issuance of national identity cards, to civic education on the draft constitution, voter education, campaigning and eventually casting the ballot.

The responsibility of monitoring the conduct of the said referendum has been given to the CKRC by Section 17(f) of the Amendment Act. Monitoring of the referendum is essential for a number of reasons –

- (i) it will be the first time ever in Kenya for such an event to be held, hence will pose new challenges to the organizers, voters and all interested parties,
- (ii) it will test the capacity of the organizers in ensuring that the exercise is held within the provisions of Section 5 of the Review Act, i.e. accountability, accommodation of diverse views, openness, fairness etc.



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(iii) it will set precedent for future referenda

(iv) authorities concerned shall be able to learn from the experience, mistakes and any other relevant observations from the referendum exercise.

Monitoring tools should be aimed at establishing whether the following functions have been achieved –

- preparedness of polling stations and referendum officials,
- participation of as many Kenyans as possible in the voting,
- free and fair casting of votes,
- accurate counting of votes,
- creating a climate free from violence or intimidation.

Monitoring will aim at establishing whether the review process, and specifically the referendum, has met the above objectives. The best that monitors can do is to observe what is going on, record their observations and analyze their report at the end. The results of this analysis, as explained above, will give an insight into what happened during the referendum, and also offer lessons for improvement in subsequent referenda in the future, if any.

### **3.0 Anticipated Stages of the Referendum Process**

While the ECK may have already determined the referendum roadmap, it is expected that some of the following stages/activities may be relevant in the exercise –

- i. Sensitization of the people on the contents of the draft constitution and the process involved (civic education for the referendum),
- ii. Sensitization of the people on the need to and the importance of taking part in the referendum,
- iii. Sensitization of the people on the procedures of voting (voter education),
- iv. Participation of would-be voters in acquiring national identity cards,
- v. Acquisition of voters' cards and/or renewal/replacement of the same,
- vi. Designation and location of polling stations,
- vii. Identification and recruitment of necessary staff for all these activities,

- viii. Training of all the personnel mentioned in 7 above,
- ix. Campaigning for or against the referendum,
- x. Preparation, inspection and transport of referendum materials,
- xi. Casting of votes on the polling day(s),
- xii. Counting of votes,
- xiii. Announcement and publication of the results of the referendum,
- xiv. Challenge, if any, of the result of the referendum in the High Court,
- xv. Generally, providing for an enabling environment for free and fair voting during the referendum.

remaining activities, enough time has to be allocated and accurate timing factored in.

- (b) Activation and reactivation of the necessary infrastructure for the monitoring:

This includes the CKRC District Coordinators and the net work of the provincial administration. With prior consultation and consent from ECK, coordinators of the ECK may also be contacted. These can be used even in monitoring voter registration and the location of polling stations.

- (c) Recruitment of relevant staff and personnel by all organs involved in the referendum:

e.g. election monitors, trainers, civic education providers, voter education providers etc. Adequate time for advertising and short listing is essential.

- (d) Developing of training manuals and materials for each level of training:

This may involve hiring of consultants as these materials are required in the shortest time possible.

**4.0 Logistical Requirements for the Above**

- (a) Time, in terms of adequacy and timing of activities, is necessary if the above activities have to be monitored:

Given that some of the stages have either been completed or are underway, the CKRC can be said to be late/behind in discharging its mandate. For the

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(e) Testing of the above materials:

For adequacy of content, effectiveness in understanding compliance with the law. Pilot runs will have to be done in some areas.

(f) Training of the various cadres of personnel:

This may be both at CKRC head office and either at district, provincial or constituency level. Given the large number of participants likely to be involved, this exercise may be sub-contracted to consultants. Booking for training venues has to be done in advance and the time and timing decided upon.

(g) CKRC Commissioners have to both offer civic education and monitor civic education being offered by other providers, for the referendum. Time, cost, transport, equipment have to be availed, inspected and put in motion. The same can be done for voter education by ECK.

(h) Installation of high frequency radio communication:

Equipment will be necessary at CKRC headquarters. The same can be linked up with other radio communication systems on the ground.

(i) Provision of maps and possible routes to polling stations will be of use for those who will visit such stations. An elaborate paneling and roll-out plan has to be designed well in advance, given the size of the country.

(j) Supply and purchase of necessary stationery, equipment and tools for all these activities have to be done early to avoid last-minute purchases and disappointments.

(k) Development, testing and approval of monitoring tools and barometers. These can be in terms of check lists designed to include –

- quality and quantity of activity, service and personnel,
- time taken to accomplish specific tasks,
- cost involved vis-à-vis estimated budget,
- effectiveness and satisfaction of the public in taking part in an activity,

- 
- extent of coverage of the activity,
  - measure of turn-out in actual numbers against expected totals,
  - accessibility and knowledge of the country.

- (1) Finally, resources in form of finances need to be availed because all the logistics mentioned require large sums of money. They can be from the government allocation and also from willing donors. CKRC should explore possible funding for these activities.

## **5.0 Mobilizing for Monitoring of Referendum**

For effective monitoring, close coordination between officers on the ground and CKRC head

office will be critical. An all-inclusive approach is needed and several partners need to be involved. Adequate knowledge and experience with the draft constitution should be a minimum requirement though other parameters could be developed by the Commission.

## **6.0 Monitoring by other Organizations**

The monitoring of the referendum will be conducted mainly by the CKRC, though several international organizations are expected to carry out the same task. This is normal for exercises of such great magnitude and of historical significance. Local organizations including NGOs, professional organizations and religious groups will also participate.

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# APPROACHES TO CIVIC EDUCATION AND VOTER EDUCATION FOR THE REFERENDUM: CHALLENGES FACING CKRC AND ECK

**Dr. Charles Maranga, Commissioner, Constitution of Kenya Review Commission**

## 1. Introduction

This presentation sets out some discussion points for the two Commissions regarding: -

- a) Interpretation of the mandates of the two Commissions in the conduct of civic education and voter education for the referendum.
- b) Monitoring the conduct of the referendum [Section 17(f)].
- c) Assumptions on the possible variance of civic education and voter education for the referendum:-
  - the objectives;
  - content and
  - conduct.
- d) Collaboration challenges and opportunities facing the two Commissions in fulfillment of the referendum mandates given lack of clear demarcation lines between civic education and voter education in the referendum process.

We should discuss the mandates of the two Commissions in terms of civic education/voter education noting the following:

### (i) **Mandates**

The Constitution of Kenya Review (Amendment) Act, 2005 is the legal framework that provides for the complementary roles and apportioned responsibility to both the Constitution of Kenya Review Commission (CKRC) and the Electoral Commission of Kenya (ECK). The Act sets the parameters for a consultative engagement between the two Commissions in effecting the referendum.

#### (a) CKRC Mandate

Section 17(e) of the Act mandates the CKRC to “conduct and facilitate civic education to support the referendum under Section 28 of the Act.” Section 28 (7) mandates CKRC to “facilitate and coordinate civic education on the referendum”.

In addition, sections 17(a) and (24) of CAP 3A provide that the CKRC shall promote, conduct and facilitate civic education during the entire period of the Review Process in order to stimulate public discussion and awareness of constitutional issues. The issues at hand are:-

- the proposed new constitution; and
- the referendum.

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(b) ECK Mandate

Section 28(1) of the Act provides that the ECK shall hold a referendum. ECK does also have the originating constitutional mandate to carry out voter education under the National Assembly and Presidential Elections Act. (CAP 7).

(ii) ***Complementing Mandates***

- The two Commissions need to work together because they have complementary mandates. Sections 17(a) and (24) provide that the CKRC will continue to provide civic education in the entire period of the Review Process. Section 28(1) states: "*Within 90 days after the Attorney-General publishes the proposed new Constitution under Section 27(3), the Electoral Commission shall hold a referendum to give the people of Kenya the opportunity to ratify the proposed new Constitution.*"
- During the 90-day period, the CKRC will, therefore, be coordinating, promoting, facilitating and conducting civic education for the referendum. Consequently, the two Commissions need to agree on the practicalities for realizing this mandate.

2. **Definitional Assumptions of Civic Education and Voter Education**

The following interpretative assumptions about civic education and voter education in relation to the referendum need discussion and agreement on whether:-

(a) civic education should only concern itself with the objectives of:-

- creating awareness, and
- imparting knowledge and skills
- to enable Kenyans to make informed choices at the referendum.
- coordination, monitoring and evaluation for the provision of civic education for the referendum.

(b) Voter education should target information dissemination on the referendum process, explaining:-

(i) information about referendum activities particularly:

- what a referendum is (what will be voted for or against in the referendum);
- how it will work;
- registration of voters;
- the meaning of the vote and outcome.

(ii) Activities during the referendum:

- targeted information dissemination, relaying messages on the 'how-to' mechanics similar to what is done during General Elections;
- Referendum campaigns;
- Education on the Referendum;
- Languages to be used;
- Polling and related issues:-
  - Where to vote;
  - How to vote (marking the ballot);

- The ballot paper's features; and
- Funding.

(iii) The referendum question:

- the phrasing of the question.

(iv) *Resolution of disputes during and after the vote.*

### **3. Approaches to Civic Education and Voter Education**

The two Commissions may want to consider adoption of either of the following two scenarios -

Scenario (a):-

A broad definition of civic education that encompasses voter education which implies that -

- Civic education on the proposed new Constitution and the referendum will integrate all the definitional assumptions in (4.0) above and;
- The two Commissions will then develop a joint/collaborative structure in the delivery of civic education and voter education as one exercise.

This would require joint task force between the two Commissions to develop the collaboration, networking, structure and logistics, including:-

- The adequacy of financial resources and their apportionment;
- Human resource requirements;
- The demands on the capacities of the two commissions;

- Developing a joint programme that covers civic education and voter education;
- Phrasing (wording) the referendum question;
- Setting organizational, administrative and procedural rules;
- Settling the issue of eligibility to enable civic education to create public confidence in the referendum.

**Scenario (b):-**

Separate conceptions for Civic Education and Voter Education which implies:-

- Division of labour where CKRC and ECK, each handling the different aspects of civic education and voter education on the basis of their comparative advantages.
- This also needs a joint task force between the two commissions to define the areas of jurisdiction in terms of collaboration and networking, structures, logistics and timeframes.

However, this option faces the following challenges:-

- Development of separate curricula and other materials resulting in high costs.
- The diversity of literature, leading to mixed messages.
- Differences over jurisdictions and the legal mandates.
- The need to allocate separate time-frames within the 90-days for dissemination activities for -

- Civic Education.
- Voter Education.
- Interest-based campaigns.
- Actual voting day.

#### **4. CKRC Civic Education Programme**

The following activities are being undertaken by the CKRC in preparing for the referendum. In preparing to implement its mandate, the CKRC's interpretation is that:

- The objective is to educate the public on the contents of the proposed new Constitution to enable them to vote on the draft Constitution from an informed position.
- Civic education will be carried out by the CKRC itself and in partnership with other civic education providers (CEPS).

#### **5. Preparation**

CKRC:

- Has developed a standard civic education curriculum for the referendum.
- Is finalising materials for a source book and training manual.
- Will develop other complementary materials, e.g. pamphlets, fliers, billboards, etc.

#### **6. Methods of dissemination**

- CKRC Infrastructure.
- CEPs.
- The Media.

#### **7. Challenges**

- Designing the criteria for partnerships with CEPs on facilitation and monetary implications.
- Budgetary needs for materials production.
- Physical logistics for dissemination.

#### **8. Monitoring and Evaluation of the Referendum**

The issues that emerge under this include -

- The time-frame for monitoring and evaluation of the referendum. When does it start?
- Developing a conducive partnership framework between the CKRC and the ECK.
- Human resource requirements.
- The capacity demands on CKRC to ably carry out the responsibilities.
- Considerations on outsourcing the service.
- The financial requirements.
- The accreditation and role of observers and independent monitors.