SPECIAL WORKING DOCUMENT FOR THE NATIONAL CONSTITUTIONAL CONFERENCE

REPORT ON DEVOLUTION OF POWERS

PREPARED BY THE COMMISSION AND APPROVED FOR ISSUE AT A STEERING COMMITTEE MEETING HELD ON 19TH AUGUST, 2003

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FOREWORD

The Constitution of Kenya Review Commission is pleased to publish this Special Working Document on Devolution alongside that on Culture for the National Constitutional Conference, to stimulate and assist the discussions during the Conference. The Commission has published five such working documents:

Working Document I	-	Summary of Key Recommendations of the Commission
Working Document II	-	Compendium of Public Comments on the Draft Bill
Working Document III	-	Annotated Version of the Draft Bill
Working Document IV	-	An Outline of Legislation which will Require Enactment, Revision or Repeal
Working Document V	-	Independence Constitution

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).

The Commission working through the Task Force on Devolution and Special plenary sessions has prepared this particular volume. The Task Force on Devolution comprised the following members:

Prof. Wanjiku Kabira	–	Co-convener
Mr. Mutakha Kangu	–	Co-convener
Dr. Githu Muigai	–	Member
Ms. Kavetsa Adagala	–	Member
Mrs. Alice Yano	–	Member
Bishop Bernard Njoroge Kariuki	–	Member
Dr. Andronico O. Adede	–	Member
Dr. Mosonik arap Korir	–	Member
Dr. Charles Maranga Bagwasi	–	Member
Hon. Dr. Phoebe Asiyo	–	Member
Mr. Isaac Lenaola	–	Member
Dr. Mohammed A. Swazuri	–	Member
Mr. Riunga Raiji	–	Member
Mr. Ahmed Issack Hassan	–	Member
Prof. Yash Pal Ghai	-	Ex Officio
Prof. H. W. O. Okoth-Ogendo	-	Ex Officio
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Secretariat

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Mrs. Jacqueline Obiero	–	Assistant Programme Officer

Mr. Stephen Mukaindo	–	Assistant Programme Officer
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Ms. Rukia Abdikadir	-	Assistant Programme Officer

We, as Commissioners are pleased to release this working document to the public for perusal and discussion.

No. Name:

1. Prof. Yash Pal Ghai, Chairman
2. Prof. Ahmed Idha Salim, 1st Vice–Chair
3. Mrs. Abida Ali-Aroni, Vice–Chair
4. Prof. H. W.O. Okoth-Ogendo, Vice–Chair
5. Dr. Mohammed A. Swazuri
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14. Ms. Nancy Makokha Baraza
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20. Mr. Riunga Raiji
21. Mr. Ibrahim Lethome
22. Mr. Keriako Tobiko
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26. Mr. Domiziano Ratanya
27. Dr. Andronico O. Adede
28. Hon. Amos Wako, Attorney–General – *ex officio*
29. PLO-Lumumba, Secretary – *ex officio*

SUMMARY OF THE DEVOLUTION REPORT

1.0 INTRODUCTION

This summary report presents the major issues raised in the main report covered in this report. The Conference, during its first phase, requested the Commission to review this chapter and re-consider some of the proposals that were made in the draft Bill. This report is divided into five parts:

1. The context for revision of the draft, which is based on the views of the delegates of the National Constitutional Conference;
2. Principles guiding devolution, matters of taxation and institutional frame-work;
3. Design of devolution;
4. Linkages to other chapters in devolution.
5. Devolution of power experiences from countries visited.

2.0 MAIN ISSUES RAISED AT THE NATIONAL CONSITUTIONAL CONFERENCE

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.

2.1.1 Levels of Devolution

The delegates were considerably in the support of districts as the principle 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.

2.1.2 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 armpit 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.

2.1.3 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.

2.1.4 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 and academic and age qualifications for administrators of the devolved units.

2.1.5 General Principles

Arising from this debate, a number of general principles may be deciphered 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 over 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. The following are the main recommendations of the Commission.

3.0 PRINCIPLES GUIDING DEVOLUTION

3.1 GENERAL PRINCIPLES

In considering the issues raised in deliberations at the National Constitutional Conference, it would be important to look at what other countries have included in their Constitutions as their guiding principles for devolution. In this regard, studies have been carried out with respect to Ethiopia, South Africa, Ghana, Tanzania, Nigeria, Namibia, Canada, Switzerland, Germany, Kenya, United States of America and India. The Commission proposes that the following principles should be included in the Draft Bill to fill the existing gaps:

1. The need to promote peace, internal harmony, indivisibility of the nation, coherence and National unity.
2. Need to promote observance of the rule of law at all levels.
3. Ensure equitable representation of all Kenyans in the national institutions and processes.
4. Protection and promotion of cultural, communal, religious, ethnic and linguistic minorities.
5. Ensure that, in appropriate cases, the higher levels of government exercise restraint in favour of the lower levels of devolved government.
6. 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.
7. 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

8. The level of devolution shall be entrenched in the constitution.

9. 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.

10. The constitution powers and functions of the lower level of government including local authorities and village government shall be established by the Devolution Act.

3.2 PRINCIPLES OF TAXATION AND INSTITUTIONAL FRAMEWORK

3.2.1 Taxation Principles

The Commission proposes that the following principles guiding taxation be debated in plenary and in the technical committee in order to help the Conference come up with sound proposals on taxation at all levels of governance.

- 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;
- A proper balance should be struck between the services required to be surrendered by the devolved levels of government and the revenue mobilised.
- Every effort should be made to promote investments as the most sustainable source of tax revenue, in order to reduce the burden of taxes on citizens;
- 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;
- 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;
- 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;

- A Sub-national legislature may 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;
- 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;
- 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;
- When two Local 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;

- The principles of universality and equality of tax treatment and of taxation according to economic capacity shall be followed;

- 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;

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.

3.2.2 Institutional Framework for Taxation

The Commission proposes that a ***Revenue Mobilisation Allocation and Fiscal Commission*** be established, whose functions shall be as follows: -

i. To monitor the accrual to the disbursement of revenue of the consolidated funds
ii. To review from time to time the revenue allocation formulae and principles in operation to ensure conformity with changing realities
iii. To settle disputes relating to the financial arrangement between the National and Regional governments
iv. To advise the Salaries and Remunerations Commission to determine the salaries in relation to the revenues collected.
v. To advise the national government and the Regional Government on fiscal efficiency and methods by which their revenue can be increased
vi. To discharge such functions as are conferred on the Commission by this constitution or any Act of Parliament.

4.0 DESIGN OF DEVOLUTION

4.1 LEVELS OR ORDERS OF GOVERNMENT

- Comparative studies indicate that most developed countries have three levels of government.

- Taking into account the need to bring the government closer to the people we propose a reduction of the number of levels of government from five to four.

- These levels are:
  - the National Level.
  - the Sub- National Level.
  - the Local Government Level; and
  - the Locational level.

4.2 THE PLACE AND ROLE OF LOCAL GOVERNMENT

- We propose that the third level of our proposed four levels of government should be the one that will be treated as local government.
- We also propose that this level of government should be at the current district level.
- We propose that the local government should recognize the two categories of rural and urban local government but be restricted to:
  - Cities as the urban category;
  - Districts as the rural category.

4.3 LOCAL GOVERNMENT

- The draft proposes the District as the principal level of devolution.
- The draft also proposes that the cities and municipalities be given the status of Districts as devolved units.
- Currently, there are:
  - 3 Cities;
  - 43 Municipalities;
  - 67 Districts;

  Making a total of 113 units of devolution.
- Comparative studies indicate that the United States of America with 51 states is the devolved system with the highest number of units at the sub-national level of government. The majority have below 20 units. Our neighbours in

Uganda started with 36 Districts which were later increased to 46, and finally to 56. But they are now considering reducing the number having found many of them not viable.

- We recommend that cities and municipalities should not have the status of principal units of devolution which we have located at the sub-national level of government.
- The Commission proposes that all the District Councils as envisaged become the local authorities in the draft and that all townships and municipalities operate under district councils/local authority.
- We further propose that Nairobi be divided into four local authorities and that Kisumu and Mombasa remain as separate units.

4.4 SUB-NATIONAL UNITS

Taking into account these comparative studies and the factors discussed in the next part, we propose to the Conference three options as follows:

OPTION 1 WITH 10 UNITS

Current District	Area [sq. kms]	Population
Unit 1		
Kwale	8,295	496,133
Mombasa	230	665,018
Taita Taveta	17,128	246,671
Kilifi	4,779	544,303
Lamu	6,167	72,686
Tana River	38,466	180,901
Malindi	7,751	281,552
	82,816	2,487,264

Unit 2		
Makueni	7,966	771,545
Machakos	6,281	906,644
Kitui	20,402	515,422
Mwingi	10,030	303,828
Mbeere	2,093	170,953
Meru Central	2,982	498,880
Meru South/ Nithi	1,093	205,451
Meru North	3,942	604,050
Tharaka	1,570	100,992
Embu	729	278,196
	57,088	4,355,961
Unit 3		
Isiolo	25,698	100,861
Marsabit	61,296	121,478
Moyale	9,390	53,479
Samburu	21,127	143,547
Laikipia	9,229	322,187
	126,740	741,552
Unit 4		
Garissa / Ijara	44,952	392,510
Mandera	26,474	250,372
Wajir	56,698	319,261
	128,124	962,143

Unit 5		
Turkana	68,388	450,860
West Pokot	9,064	308,086
Marakwet	1,588	140,629
Trans Nzoia	2,487	575,662
Keiyo	1,439	143,865
Baringo	8,646	264,978
Koibatek	2,306	138,163
Uasin Gishu	3,328	622,705
Nandi	2,899	578,751

	100,145	3,223699

Unit 6		
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

	52,037	3,388,603

Unit 7		
Kisii Central	649	491,786
Gucha	661	460,939
Nyamira	896	498,102
Homa Bay	1,160	288,540
Kisumu	919	504,359
Kuria	581	151,887
Migori	2,005	514,897
Rachuonyo	945	307,126
Siaya	1,520	480,184
Suba	1,055	155,666
Bondo	987	238,780
Nyando	1,168	299,930

	12,546	4,392,136

Unit 8		
Kiambu	1,324	744,010
Thika	1,960	645,713
Muranga	930	348,304
Maragua	868	387,969
Nyandarua	3,304	479,903
Nyeri	3,356	661,156
	13,220	3,724,159

Unit 9

Bungoma	2,069	876,491
Teso	559	181,491
Lugari	670	215,920
Busia	1,124	370,608
Kakamega	1,395	603,422
Vihiga	563	498,883
Butere/Mumias	939	476,928
Mt. Elgon	944	135,033
	8,264	3,358,776

Unit 10

Nairobi	696	2,143,254

OPTION 2 WITH 13 UNITS

The first option can be modified to create a total of thirteen principal units of devolution. This would be achieved by creating an additional unit out of units 5 and 6, another one out of unit 2 and yet another out of unit 7 as follows.

Unit 5

Turkana	68,388	450,860
West Pokot	9,064	308,086
Marakwet	1,588	140,629
Trans Nzoia	2,487	575,662
Keiyo	1,439	143,865
Baringo	8,646	264,978
Koibatek	2,306	138,163
	93,918	2,022,243

Unit 6		
Uasin Gishu	3,328	622,705
Nandi	2,899	578,751
Kericho	2,111	468,493
Buret	955	316,882
Bomet	1,882	382,794
	11,175	2,369,625

Unit 11		
Kajiado	21,903	406,054
Narok	15,098	365,750
Trans Mara	2,846	170,591
Nakuru	7,242	1,187,039
	47,089	2,129,434

Unit 2		
Makueni	7,966	771,545
Machakos	6,281	906,644
Kitui	20,402	515,422
Mwingi	10,030	303,828
	44,679	2,497,439

Unit 12		
Mbeere	2,093	170,953
Embu	729	278,196
Kirinyaga	1,478	457,105
	12,409	1,858,522

Unit 7		
Kisii Central	649	491,786
Gucha	661	460,939
Nyamira	896	498,102
	2,206	1,450,827

Unit 13		
Homa Bay	1,160	288,540
Kisumu	919	504,359
Kuria	581	151,887
Migori	2,005	514,897
Rachuonyo	945	307,126
Siaya	1,520	480,184
Suba	1,055	155,666
Bondo	987	238,780
Nyando	1,168	299,930
	10,340	2,941,309

OPTION 3 WITH 18 UNITS

Current District	Area [sq. kms]	Population	Representation to the National Council
Unit 1			
Kwale	8,295	496,133	
Mombasa	230	665,018	
Taita Taveta	17,128	246,671	
	25,653	1,407,822	4
Unit 2			
Kilifi	4,779	544,303	
Lamu	6,167	72,686	
Tana River	38,466	180,901	
Malindi	7,751	281,552	
	35, 825	1,502,889	4

Unit 3

Makueni	7,966	771,545	
Machakos	6,281	906,644	
Kitui	20,402	515,422	
Mwingi	10,030	303,828	
	44,679	2,497,439	6

Unit 4

Mbeere	2,093	170,953
Meru Central	2,982	498,880
Meru South/Nithi	1,093	205,451
Meru North	3,942	604,050
Tharaka	1,570	100,992
Embu	729	278,196
	12,409	1,858,522

Unit 5			
Isiolo	25,698	100,861	
Marsabit	61,296	121,478	
Moyale	9,390	53,479	
Samburu	21,127	143,547	
Laikipia	9,229	322,187	
	126,740	741,552	3

Unit 6		
Garissa	44,952	392,510
Ijara		
	44,952	392,510

Unit 7		
Mandera	26,474	250,372
Wajir	56,698	319,261
	83,172	569,633

Unit 8		
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	
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	81,227	1,475,237	4
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Unit 9			
Keiyo	1,439	143,865	
Uasin Gishu	3,328	622,705	
Nandi	2,899	578,751	
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	18,618	1,748,462	4
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Unit 10

Kericho	2,111	468,493	
Bureti	955	316,882	
Bomet	1,882	382,794	
Nakuru	7,242	1,187,039	
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	12,190	2,355,208	5
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Unit 11			
Kajiado	21,903	406,054	

Narok	15,098	365,750	
Trans Mara	2,846	170,591	
Kuria	581	151,887	
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	40,728	1,094,282	4
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Unit 12

Homa Bay	1,160	288,540	
Kisumu	919	504,359	
Migori	2,005	514,897	
Rachuonyo	945	307,126	
Siaya	1,520	480,184	
Suba	1,055	155,666	
Bondo	987	238,780	
Nyando	1,168	299,930	
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	9,759	2,791,582	6
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Unit 13

Kisii Central	649	491,786	
Gucha	661	460,939	
Nyamira	896	498,102	
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	2,206	1,450,827	4
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Unit 14

Kiambu	1,324	744,010	
Thika	1,960	645,713	
Muranga	930	348,304	
Maragua	868	387,969	
	3,082	2,125,996	5

Unit 15

Nyandarua	3,304	479,903	
Nyeri	3,356	661,156	
Kirinyaga	1,478	457,105	
	8,138	1,598,164	4

Unit 16			
Bungoma	2,069	876,491	
Busia	1,124	370,608	
Teso	559	181,491	
Lugari	670	215,920	
Mt. Elgon	944	135,033	
	4,342	1,408,935	4

Unit 17			
Lugari	670	215,920	
Kakamega	1,395	603,422	
Vihiga	563	498,883	
Butere/Mumias	939	476,928	
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	4,021	1,949,841	4
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Unit 18		
Nairobi	696	2,143,254

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Except for Unit 3 and Unit 11, which shall have at least two (2) women representatives each, all the other Units shall have at least one (1) woman representative each in accordance with the one – third (1/3) Gender representation principle.

4.5.1 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
- The intergovernmental relations both vertically with the national government and at the lower levels and horizontally with other devolved units.

4.6 DISTRIBUTION OF FUNCTIONS

- Four aspects of state power namely; the executive power of the state, the legislative power of the state, the judicial power of the state and the financial power of the state are identified.
- We propose that the executive power of the state be devolved to the 2nd, 3rd and 4th levels of government.
- We further propose that legislative powers of the state be devolved to the 2nd and 3rd levels of government.
- We further propose that the financial power of the state be devolved to all the levels of government.
- Finally, we propose that the judicial power of the state be retained at the national level subject to the establishment of traditional courts as provided for under Article 185(3) of the Draft Bill.

4.7 DISTRIBUTION OF THE FISCAL AND FINANCIAL POWER OF THE STATE

- Three aspects of the financial power of the state are identified, namely:

    - the power to raise revenue;
    - the power to administer revenue;

- the power to spend revenue.

- These three aspects may be devolved in different ways.
- The need for equalization is recognized and the design takes into account this need.
- The power to raise major taxes such as income tax, VAT, customs and excise and corporation tax should be assigned to the national level of government since these are the resources that can be used for equalization purposes.
- Devolved units must also be given power to raise revenue from certain identified taxes.
- Provision has to be made on how the division of the revenue raised at the national level has to be done and the factors to be taken into account. This division has to be both vertical among the different levels of government and the horizontal among the units at different levels of government.
- Some institution must be put in place to handle fiscal and financial maters.

4.8 INTERGOVERNMENTAL RELATIONS AND THE INSTITUTIONAL ARRANGEMENTS

- The necessity for intergovernmental relations is recognized.
- The need for intergovernmental institutions is recognized. The following are identified as such institutions:
    - The second chamber of parliament; and
    - The Supreme Court.

5.0 LINKAGES WITH OTHER CHAPTERS OF THE DRAFT BILL

Linkages have been identified with the following chapters and some suggestions made in the document:

- The chapter on Sovereignty of the People and the Supremacy of the Constitution.
- The chapter on the Republic dealing with the Constitution of the State.
- The chapter on the National Goals, Values and Principles.

- The chapter on the Bill of Rights.
- The chapter on the Representation of the People.
- The chapter on the Legislature.
- The chapter on the Executive.
- The chapter on the Judiciary.
- The chapter on Land.
- The chapter on Environment and Natural Resources.
- The chapter on Public Finance and Revenue Management.
- The chapter on Public Service.
- The chapter on Defence and National Security.

PART II

PRINCIPLES OF DEVOLUTION

1.0 Background to the Devolution Proposals in the Draft Bill.

The Devolution question is not only one of the Concepts the Review Act mandates the Commission to look at, but is also, one of the mechanisms that recent constitutional documents, all over the world, are presenting as a mechanism to deal with the rising demands by the people. These demands include distribution of state power and self-governance, participatory approaches to governance and development and the broader question of cultural identity.

Definition of Terms

Devolution is the practice in which the authority to make decisions in some spheres of public policy is delegated by law to sub-national levels of government. It entails transferring governmental or political authority to the regional/local units. Devolution is a political device for involving lower-level units of government in policy decision-making matters that affect them.

Devolution addresses the question of policy divergence, by allowing for innovativeness and creativity of the people. Devolution brings in more to the process of public policy formulation and implementation. It opens the space, and accommodates regional preferences and diversity. It also provides a framework for better management of resources and delivery of services. Devolution has different perspectives:

- It is a response to demands of ethnic groups and minorities for a bigger share in the governmental process;
- It has been seen by others as a policy to accommodate /consolidate ethnic, regional, and religious diversity;
- Some see it as a means of protecting ethnic interests and identities;
- Others conceive it as a mechanism for promoting good governance, separation of powers, multiplying checks and balances, efficiency and effectiveness in service provision, transparency, accountability and the people's participation in the governmental process;
- Others view it as a strategy for reconciling large-scale political organizations with ethnic, linguistic and historical diversity.

There are a number of principles and guidelines that ought to inform the design and working of such structures of Devolution. The following is an outline of the background work done by the Commission before formulating the proposals presented in the Draft Constitution. The issues discussed here focus on principles that guide the design of devolution presented in the draft Bill.

1.1 Principles of Devolution in the Independence Constitution

The Commission considered the importance of the independence Constitution and its efforts in the area of devolution. The Commission organized a workshop on the Independence Constitution and Devolution and consulted the Lancaster House Veterans on this issue. These included **F.R.S De Souza, Hon. George, G. W. Nthenge, Hon. Joseph Martin Shikuku and Hon. J. J. M Nyagah, Hon. John Keen, Hon. Dr. Taitta arao Towett, Hon. J.T. Otiende, Hon. Achieng Oneko, Hon. Robert Matano, and Hon. Dr. Julius Gikonyo Kiano.**

It was noted that the Independence Constitution was the result of intense and considerable discussions especially in regard to the system of government. The design of government was particularly influenced by the concerns of the Africans with KANU in favour of a centralised system, while KADU, *representing the interests of "smaller nations", strongly proposed a system in which the minorities would be protected and secured from domination by the bigger nationalities.*

As a consequence, the two major principles of the Independence Constitution were parliamentary democracy and *devolution of power as an instrument of minority protection.* Thus the structure of government resulting from the Constitution composed of the national government, a system of 8 semi-autonomous regions as well as an elaborate system of local government. The following principles of devolution may be discerned from the Independence Constitution:

- To promote social and economic development throughout the regions;
- To ensure equitable distribution of national and local resources throughout the regions;
- To promote peace, order and good governance of the regions;
- To provide essential services to the people effectively and economically;
- To facilitate co-operation between Central and Regional Governments;
- To ensure equitable distribution of resources in all the regions;
- To protect and promote the interest and rights of minorities.

The devolved government structure of the Independence Constitution was gradually eroded through several constitutional amendments effectively introducing the present structure of a centralized government with an elaborate system of Provincial Administration**.**

1.2 Expert Consultations on Devolution

The Constitution of Kenya Review Commission organized a Seminar 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. Among the resource persons included **Prof. Ron Watts, Richard Simeon, Dr Peter Wanyande, Prof. Walter Oyugi, Mr. Julius Kipng'etich, Dr. Christina Murray, Dr. Gerrishon K. Ikiara, and Kiraitu Murungi**, The following were raised as important considerations in determining the structure and designw of devolution:

- The nexus between *devolution* and *democrac***y** and *public participation*; the link between *devolution* and *good governance; effective and efficient service delivery; accountability; community empowerment; effective government***,** or policy-making and the ability to *manage ethno- cultural* diversity**;**
- *The democratic criterion* for justifying devolution, that it increases the quality of democracy by bringing government closer to the people;
- The need to *enhance participatory governance* and opportunities for participation;
- The need to promote efficient and equitable mobilization, allocation and management of resources;
- The need to manage and resolve conflict and accommodate diversity including cultural, ethnic and linguistic diversity, the needs of vulnerable groups such as women, children, the disabled, minorities, and the marginalized;
- The need to promote popular capacity to enhance responsibility and accountability of public authorities and officials;
- The need to establish additional checks and balances on the exercise of power;
- The efficiency or effectiveness perspective, by ensuring that development and implementation of policy programmes meet the challenges of development;
- The need to improve service delivery by allowing for careful consideration of local needs, and encouraging invention and innovation;
- The need for an equitable framework for economic growth and development and access to national resources;
- The need to promote fundamental human rights and freedoms including the right to own property, and freedom from discrimination;

- Strategies to give effect to the principle of subsidiarity, by ensuring that functions are performed efficiently by smaller and lower bodies and restraint by the central government in arrogating itself functions of lower levels of government;
- Questions of design that would give effect to the principle of affirmative action and good governance and national unity.

These principles that would guide devolution were considered by the Commission but not before the Commission collected the views from the public.

1.3 The Views of the People on Devolution

The views of the people on the question of devolution were expressed in different ways. In many cases the Commission had to decode these concerns and wishes to name what they wanted done in the new Constitution. 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 powers 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 on 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, with key officials to be 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 a Senate.

There were considerable submissions made to the Commission reflecting the need to reorganize the administration of the Country. The concurrence of opinion was towards decentralisation and the strengthening of local administration. Several models for decentralisation were suggested, namely, federal and/or *majimbo* system(s) or decentralisation on the basis of regional units as well as centralization to local government. The Commission also received various proposals on the structure of the devolved Government.

1.4 Initial Commission's Recommendations on the Principles and Objectives of Devolution.

The Commission sitting in Mombasa, having taken into consideration the views of the people as well as the Independence Constitution and experts' suggestions generally made the following proposals: -

General

i) That considerations on devolution should take into account Kenya's experience especially the 'Majimbo' debate since independence;

ii) That to ensure the report 'speaks to the people' it should analyse the suggestions and fears of the people with respect to devolution and suggest ways of diffusing those fears;

iii) That recommendations should reflect a cost-benefit analysis of devolution in Kenya (what devolution is meant to achieve);

iv) That the levels of devolution and the distinct powers to be exercised by the devolved units be clearly defined;

v) That the models of devolution should reflect the following broad principles:

- The discrete demarcation of the functions and powers within and across the units of devolution in a way that ensures checks on power and reduces conflict in the exercise of power;
- The efficient and equitable mobilization, allocation and management of resources;
- The need to enhance participatory governance and accommodate diversity including cultural diversity; the needs of vulnerable groups such as women, children, the disabled, minorities and marginalized groups;

vi) That the question of financing the devolution units and the methodologies of sharing of resources be carefully developed;

vii) That proper mechanisms to co-ordinate the intergovernmental relations (the linkage between the various levels of the national, provincial, district and locational governments) should be included in the report;

viii) That transitional mechanisms as regards the facing out of the *status quo* and its replacement with the new order be clearly elaborated;

ix) That there should be an ingrained dispute settlement mechanism;

x) That devolved units should be entitled to an equitable share of revenue raised nationally to enable them to provide basic services and perform their responsibilities;

xi) Arrangements of national government institutions and departments to ensure equitable distribution of resources throughout the country;

xii) That the details of the functioning of the different units of devolution shall be clearly elaborated in an Act of Parliament.

2.0 Devolution Debate by the National Constitutional Conference

The debate on Devolution at the National Constitutional Conference was multidimensional and crosscutting. Implicit and explicit comments were made in relation to the principles guiding the design of devolution, with a proposal that the principles should be factored in the design of devolution. The Daily summary statistics of delegates' contribution to the debate were as follows:-

Chapter	**Date**	**No. of contributors**	**Points of order**	**Total**
Chapter Ten Devolution	22nd May 2003	34	16	50
	23rd May 2003	35	13	48
	26th May 2003	36	11	47

Statistics on Devolution Based on Recommendations from the NCC			
	Levels of Devolution	**No. of Delegates who proposed**	
	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	
	District- Locational- National	1	
	District- National- Lacational- Community	1	
	National- District-Locational	1	
	Locational-District-Provincial	1	
	Other Views expressed on Devolution during discussion of other chapters	92	

The following is a distillation of the main issues raised in the debate: -

a) **Generally**

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.

b) **Levels of Devolution**

The delegates were considerably in the support of districts as the principle 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.

c) **Functions of Devolved Government**

The conference felt that some of the proposed functions and surfaces including education, environment and agriculture ought to remain in the armpit 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.

d) **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.

e) **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 and academic and age qualifications for administrators of the devolved units.

f) **The Boundaries Commission**

The Conference felt very strongly that the Constitution ought to provide for an independent Boundaries Commission to determine, define and review the boundaries of the units of Devolution.

Arising from this debate, a number of general principles may be deciphered: that is, the devolution structure ought: -

- 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 over 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.

2.1 Gaps Identified and proposed recommendations

In considering the issues raised by the National Constitutional Conference deliberations, it would be important to look at what other countries have included in their Constitutions as their guiding principles for devolution. In this regard, studies have been carried out with respect to Ethiopia, South Africa, Ghana, Tanzania, Nigeria, Namibia, Canada, Switzerland, Germany and India (***See Appendix A***), and it is now proposed that the following principles should be included in the draft Bill to fill the existing gaps:

1. The need to promote peace, internal harmony, indivisibility of the nation, coherence and National unity.
2. Need to promote observance of the rule of law at all levels.
3. Ensure equitable representation of all Kenyans in the national institutions and processes.
4. Protection and promotion of cultural, communal, religious, ethnic and linguistic minorities.
5. Ensure that, in appropriate cases, the higher levels of government exercise restraint in favour of the lower levels of devolved government.
6. Ensure that, in appropriate cases, the higher levels of government exercise restraint in favour of the lower levels of devolved government
7. 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.
8. The national government and the devolved government 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 government in the other levels.
9. The level of devolution shall be entrenched in the constitution.

10. 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.
11. The constitution powers and functions of the lower level of government including local authorities and village government shall be established by the Devolution Act.

2.2 Recommendations on Taxation

- There shall be a ***Revenue Mobilisation Allocation and Fiscal Commission*** whose functions shall be as follows: -
    i. To monitor the accrual to the disbursement of revenue of the consolidated funds
    ii. To review from time to time the revenue allocation formulae and principles in operation to ensure conformity with changing realities
    iii. To settle disputes relating to the financial arrangement between the National and Regional governments
    iv. To advise the Salaries and Remunerations Commission to determine the salaries in relation to the revenues collected.
    v. To advise the national government and the Regional Government on fiscal efficiency and methods by which their revenue can be increased
    vi. To discharge such functions as are conferred on the Commission by this constitution or any Act of Parliament.

Further research was conducted on how various countries have dealt with taxation principles in their constitutions in the context of devolution **(see *Appendix B)***. Proposals arising therefrom that are of legislative character should be expressed in a Devolution Act in the terms of attached hereto (**See *Appendix C***)

2.3 Seventh Schedule

Taxation Powers of the National Government

1. The National Government shall have the power to: -
    - Levy and collect taxes, customs duties and other dues on import and export goods. .
    - Levy and collect income sales tax,
    - Levy and collect taxes from winners of the National Lottery and other prizes of a similar nature.
    - Levy and collect taxes from incomes on transportation by air, rail and by sea.
    - Determine the rent of, levy and collect tax from houses and other property owned by the Regional Government.
    - Determine and collect fees from licenses issued and services provided by organs of the Regional Government.
    - Levy and collect national stamp duties.

Taxation Power of the Regional Governments

1. The Regional government levies and collects tax on: -
    - Income from employment from employees of the state government and other organization.
    - Determine and collect land use fees.
    - Levy and collect agricultural tax from individual farmers who are not members of an association of farmers.
    - Levy and collect income and sales tax from individual traders within the region
    - Levy and collect tax on transport on waterways within the region.
    - Levy and collect tax on houses and other property owned by private persons situated in the Region and determine rent of houses and other property owned by the Regional Government.
    - Levy and collect tax on income from employment, income and sales tax from public enterprises owned by the regional government.

- Without prejudice to the provisions on concurrent income, levy and collect income tax, royalties and land lease fees from mining undertakings:
- Determine and collect fees from licenses issued and services provided by its government organs.
- Determine and collect royalties from forest products.

Concurrent Taxation Powers

The National and the Regional governments have power to: -

- Jointly levy and collect tax on income from employment, income and sales tax from public enterprises established jointly by the National and Regional Governments.
- Jointly levy and collect income and sales tax from business organizations and dividends of shareholders.
- Jointly levy and collect income tax and royalties on big mining, petroleum and gas operations.

Taxation powers of the Local government

The local government has power to levy, charge, collect and appropriate fees and taxes in accordance with laws enacted by the parliament. This fees and taxes consist of: -

- Rents
- Royalties
- Stamp duties
- Personal graduated tax
- Cess
- Fees on registration
- Licensing and any other fees and taxes that parliament may prescribe.

3.0 Principles of Devolution and the Devolution Design – A Checklist.

- How do we achieve shared rule at the centre and self rule in the devolved levels?
- What is the structure, distribution and degree of co-operation between different levels?
- Are the devolution units viable, sustainable, efficient and effective? Are they based on population, geographic size, historical and cultural ties, economic and natural resources?
- Do we have a clear definition of the UNIT to which power is devolved?
- Has the need for a balance between the powers of devolved government and indivisibility and internal harmony been achieved?
- Have we taken care of the less endowed units?
- What are the mechanisms for settlements of disputes?
- What are the governance structures for each level of government and how do they relate to each other?
- Have we ensured complimentarity of the functions of the various levels of government?
- Have we made provisions for region specific policies e.g. (livestock policy in North Eastern regions/country, or lake region fisheries policy) policies according to local needs and preferences?
    - What provision have we put in place to facilitate access to basic needs i.e. food, shelter, clothing, basic healthcare, security, education, skills training, legal services, housing?
    - Will the design facilitate equitable distribution of resources while promoting greater productivity of individuals and communities?
    - Will the Design promote greater participation of the people in their own governance, mobilization of resources and decision-making?
    - Will the Design promote social, political, economic and cultural lives of the people, moving towards self –actualisation?
    - Will the Design ensure greater participation of women, minorities and other marginalized groups in all aspects affecting their lives? Will/ the Design recognize the rights of the marginalized and minorities as Human Rights?

- Will the design ensure equitable representation of people at all levels of devolution?
- Will the design ensure power is as close as possible to the people?
- Does the design promote co-operation between devolved units?
- Is there clear linkage between devolved governments and the national government?
- Should every Kenyan have a right to buy property anywhere?
- Is the equalization principle factored in the design?
- Is the design informed by cultural richness and distinctiveness?

4.0 Linkages between the Principles of Devolution and other Chapters of the Draft Bill

Preamble

- The Preamble needs to reflect and capture the principle of self –governance as the foundation of Devolution.

Chapter 1- Sovereignty of The People and Supremacy of the Constitution

This Chapter needs to reflect the following: -

- That the organs of the devolved government are part of the structures that the people delegate their power to govern.

Chapter 2- The Republic

- This chapter needs to reflect the presence of devolution

Chapter 3-National Goals, Values And Principles

- This chapter also needs to reflect the presence of devolution

Chapter 5 – The Bill of Rights

This Chapter needs to reflect the following Principles:-

- This Chapter ought to be clearly commit the devolved Government to the responsibilities of the 'State' referred in the Bill

The content of the right s of minorities

Chapter 6 – Representation of the People

The chapter needs to reflect the following Principles:-

- The principle of the need to devolve power to the people, and to consolidate democracy and the participation (involvement) of people in all processes as actors and benefactors
- This chapter ought to reflect on the management of elections of the devolved government.

Chapter 7– The Legislature

The Chapter needs to reflect the following principles: -

- Principle of representation of regional interests in the senate.
- Principle of restraint of the federal government in favour of the lower levels of government.
- Principle of restraint of federal government (must seek authority from Upper House).

Chapter 8 – The Executive

- This chapter deals with the national executive. The chapter on devolution has factored vertical devolution of executive power to the devolved government.

Chapter 9 – Judicial and Legal System

This Chapter needs to reflect the following principles:-

- The Principle of reasonable effort to settle disputes by means of mechanisms and procedures, and must exhaust all other remedies before approaching courts for legal action.
- The principle of total devolution i.e., devolution of all the organs of government.

Chapter 11- Lands And Property Rights

- The Chapter ought to be amended to reflect some proposals for local ownership and control of regional land and devolution/decentralization of the Commissions to regions in line with the principle of devolution of national Commissions

Chapter 12- Environment And Natural Resources

- The Chapter ought to be amended to reflect decentralised environmental management and devolution/decentralization of the Commissions to regions in line with the principle of devolution of national Commissions

Chapter 13- Public Finance and Revenue Management

- The Chapter ought to be amended to reflect devolution/decentralization of the Commissions to regions in line with the principle of devolution of national Commissions
- Competences in taxation by the national and devolved governments

Chapter 14- The Public Service

This Chapter ought to reflect the following principles:-

- The chapter on devolution provides the power of devolved governments to appoint and disappoint their staff.
- The Principle to facilitate the decentralization of central government powers and the location of central government institutions and department away from the capital territory to ensure equitable distribution of resources in all the provinces
- This Chapter needs to reflect principle of the need to devolve power to the people, and to consolidate democracy and the participation (involvement) of people in all processes as actors and benefactors
- The principle to promote peace order and good governance of the
- The principle of the need to devolve power to the people, and to consolidate democracy and the participation (involvement) of people in all processes as actors and benefactors.

Chapter 17- Leadership and Integrity

- The definition "public officer" needs to include officers elected or working within the devolved Government

Chapter 17- Constitutional Commissions

- The Chapter ought to be amended to reflect devolution/decentralization of the Commissions to regions in line with the principle of devolution of national Commissions.

Chapter 19- Interpretation of the Constitution

- Include definitions that reflect the presence of devolved Government. For example, the Term "Executive" refers to the National Executive, the Provincial, District, and Locational Administrators, etc.

APPENDIX A

Principles of Devolution in Selected Countries

ETHIOPIA

- The principle of the promotion of the identities of the nationalities and the integration of communities
- The principle of self-determination for the nationalities including the right to govern themselves and to develop their own culture and language;
- The principle of entrenchment of the regions;
- The principle of participatory approach to development;
- The principle of equality of distribution of resources and opportunities and affirmative provisions for less developed regions;
- The principle of concurrent and exclusive taxation and revenue powers;
- The principle that all taxation measures shall be preceded by extensive research.

SOUTH AFRICA

- Government is constituted as national, provincial and local spheres of government, which are distinctive, interdependent and interrelated;
- Principles of co-operative government and intergovernmental relations- all levels of Government are expected to observe the following;
  - Preserve the peace, national unity and the indivisibility of the Republic;
  - Secure the well-being of the people of the Republic;
  - Provide effective, transparent, accountable and coherent government for the Republic as a whole;
  - Be loyal to the Constitution, the Republic and its people;

- Respect the constitutional status, institutions, powers and functions of government in the other spheres;
- Not assume any power or function except those conferred on them in terms of the Constitution;
- Exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere; and
- Co-operate with one another in mutual trust and good faith by
- Fostering friendly relations;
- Assisting and supporting one another;
- Informing one another of, and consulting one another on, matters of common interest;

  - Co-coordinating their actions and legislation with one another;
  - Adhering to agreed procedures; and
  - Avoiding legal proceedings against one another.
- The Principle of reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must exhaust all other remedies before it approaches a court to resolve the dispute.

GHANA

- The principle of the sovereign will of the people
- The principle of entrenched provision to protect the Regions
- The principle of subservience to the general principles of state policy
- The principle of co-ordination
- The principle of sound financial base with adequate and reliable resources
- The principle of efficiency and effective control of affairs
- The principle of accountability
- The principle of popular elections for the councilors
- The principle of devolution of some National Commissions
- The principle of the guarantee of the traditional rulership

TANZANIA

- The principle of entrenchment
- The principle of total devolution i.e., devolution of all the organs of government
- The principle of subservience to the national principles and policies
- The principle of the need to promote unity and national dignity
- The principle of the need to devolve power to the people, and to consolidate democracy and the participation (involvement) of people in all processes.

NIGERIA

- The principle of entrenchment
- The principle of absolute devolution
- The principle of the need to ensure that the exercise of power by the states does not prejudice the existence and investment of the Federal Republic
- The principle of a democratically elected local government system
- The principle of the cultural, communal and religious diversity and the encouragement of cultural integration (unity in diversity)
- The Principle of subservience to the fundamental objectives and directives principles of State policy
- The principle of concurrent and exclusive authority.

NAMIBIA

1. The principle o multiculturalism in the determination of boundaries
2. The principle of a delimitation Commission to determine boundaries from time to time
3. The democratic principle in the constitution of the devolved units
4. The Principle of delegation in the exercise of power.

CANADA

1. Principle of representation of regional interests in the senate
2. Principle of separation of powers (executive responsibility to regional assemblies)
3. Protection of linguistic minorities
4. Preservation and enhancement of multicultural heritage
5. Principle of equalisation of regional disparities
6. Principle of absolute autonomy (each province has its own constitution)

SWITZERLAND

1. Principle of co-operative government
2. Principle of peaceful resolution of disputes (between the Cantons)
3. Principle of participation in decision making at the federal level
4. Principle of consultation and disclosure of all government actions that affect the interests of the devolved government.
5. Principle of restraint of the federal government in favour of the lower levels of government
6. Principle of financial equalisation and need based allocation of resources.
7. Principle of shared foreign policy relations
8. Principle of autonomy of local government
9. Principle of absolute autonomy (Cantons have their own constitutions)
10. Principal of entrenchment
11. Promotion of cultural and linguistic diversity (Support of plurilingual Cantons)

GERMANY

1. Principle of republican, democratic and social government based on the rule of law
2. Principle of self governance of communities
3. Principle of viability of regional units – based on size, capacity, regional, historical and cultural ties, economic expediency, and the requirements of regional policy and planning.
4. Principle of entrenchement.
5. Principle of shared foreign policy relations
6. Principle of representation of regional interests in the senate
7. Principle of restraint of federal government (must seek authority from Upper House-Bundesrat)

INDIA

1. Principle of equality of opportunity
2. Principle of protection of minorities
3. Devolution of all organs including the judiciary
4. Lowest levels of devolutions. Principle of Devolution to the lowest level of government(village)
5. Principle of affirmative action for scheduled minority tribes and castes
6. Principle of self governance by urban areas
7. Restraint of the federal government
8. Peaceful settlement of disputes
9. Principle of co-ordination between states
10. Devolution of national Commissions
11. Right to determine official language of the regions
12. Promotion of cultural diversity and traditional rulership
13. Principle of entrenchment

APPENDIX B

How selected countries have dealt with Taxation Principles in the context of devolution.

SOUTH AFRICA

Provincial Revenue Funds

There is a Consolidated Fund for each province into which all money received by the Regional government must be paid, except money reasonably excluded by an Act of Parliament. Money may be withdrawn from a Consolidated Fund only -
(a) in terms of an appropriation by a Regional Act; or
(b) as a direct charge against the Consolidated Fund, when it is provided for in the Constitution or a Regional Act.

National sources of Regional and Local government funding

Local Government and each Region -
(a) is entitled to an equitable share of revenue raised nationally to enable it to provide

basic services and perform the functions allocated to it; and
(b) may receive other allocations including from National government revenue, either conditionally or unconditionally.

Additional revenue raised by Regions or municipalities 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 Regions or municipalities that do not raise revenue commensurate with their fiscal capacity and tax base. A region's equitable share of revenue raised nationally must be transferred to the province promptly and without deduction**.**

A Region must provide for itself any resources that it requires, in terms of a provision of its regional constitution that are additional to its requirements envisaged in the Constitution

Regional taxes

A regional legislature may impose -
(a) taxes, levies and duties including income tax, value-added tax, rates on property or customs duties; and
(b) 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.
The power of a Regional legislature to impose taxes, levies, duties and surcharges -
(a) may not be exercised in a way that materially and
unreasonably prejudices national economic policies, economic activities across provincial boundaries, or the national mobility of goods, services, capital or labour; and
(b) must be regulated in terms of an Act of Parliament, which may be enacted only after any recommendations of the Revenue and Mobilisation Allocation and Fiscal Commission.

Local Government fiscal powers and functions

A Local Government may impose -
(a) rates on property and surcharges on fees for services provided by or on behalf of the local government; and
(b) if authorised by National legislation, other taxes, levies and duties appropriate to local government or to the category of local government into which that local government falls, but no Local Government may impose income tax, value-added tax, general sales tax or customs duty.

The power of a Local Government to impose rates on property, surcharges on fees for services provided by or on behalf of the Local Government, or other taxes, levies or duties -
(a) may not be exercised in a way that materially and unreasonably prejudices national economic policies, economic activities across municipal boundaries, or the national mobility of goods, services, capital or labour; and
(b) may be regulated by National legislation.
When two Local Governments have the same fiscal powers and functions with regard to the same area, an appropriate division of those powers and functions must be made in terms of 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.

National legislation envisaged in this section may be enacted only after organised local government and the Revenue and Mobilisation Allocation and Fiscal Commission have been consulted, and any recommendations of the Commission have been considered.

SWITZERLAND

Principles of Taxation

(1) The general principles of taxation, particularly the circle of taxpayers, and the object of the tax and its calculation, shall be established by statute.
(2) To the extent that the nature of the tax allows it, the principles of universality and equality of tax treatment and of taxation according to economic capacity shall be followed.
(3) Interregional double taxation is prohibited.

Harmonization of Taxes

(1) The National Government establishes principles on the harmonization of direct taxes of the National Government, Regions and Local Government; she takes into account the efforts of the Regions to harmonize their taxes.
(2) The harmonization extends to the duty to pay taxes, the object of taxation, its period, and procedural and criminal law on taxation. Harmonization does not cover tax scales, tax rates, and tax-exempt amounts.
(3) The National Government may issue regulations against arrangements granting unjustified tax advantages.

Financial Equalization

(1) The National government shall promote financial equalization among the Regions
(2) When granting subsidies; it shall take into account the financial capacity of the Regions and the special situation of the Regions

ETHIOPIA

Taxation Powers of the National Government

2. The regional Government shall have the power:
    - To levy and collect taxes, customs duties and other dues on import and export goods.

- Levy and collect tax on income from employment, from the employees of the regional Government and international organisations.
- Levy and collect income sales tax, tax income from employment from public enterprises owned by the Regional Government.
- Levy and collect taxes from winners of the National Lottery and other prizes of a similar nature.
- Levy and collect taxes from incomes on transportation by air, rail and by sea.
- Determine the rent of, levy and collect tax from houses and other property owned by the Regional Government.
- Determine and collect fees from licenses issued and services provided by organs of the Regional Government.
- Levy and collect national stamp duties.

Taxation Power of the Regional

2. The Regional levies and collects tax on: -
    - Income from employment from employees of the state government and other organization.
    - Determine and collect land use fees.
    - Levy and collect agricultural tax from individual farmers who are not members of an association of farmers.
    - Levy and collect income and sales tax from individual traders within the region
    - Levy and collect tax on transport on waterways within the region.
    - Levy and collect tax on houses and other property owned by private persons situated in the Region and determine rent of houses and other property owned by the Regional Government.
    - Levy and collect tax on income from employment, income and sales tax from public enterprises owned by the regional government.
    - Without prejudice to the provisions on concurrent income, levy and collect income tax, royalties and land lease fees from mining undertakings:

- Determine and collect fees from licenses issued and services provided by its government organs.
- Determine and collect royalties from forest products.

Concurrent Taxation Powers

The National and the Regional government have power to: -

- Jointly levy and collect tax on income from employment, income and sales tax from public enterprises established jointly by the National and Regional Governments.
- Jointly levy and collect income and sales tax from business organizations and dividends of shareholders.
- Jointly levy and collect income tax and royalties on big mining, petroleum and gas operations.

Principles of Taxation

- The National and Regional 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.
- The National and Regional Governments shall ensure that the levying of taxes is not detrimental to their mutual relations and that they are proportionate to the services provided.
- Neither the National nor the Regional governments shall have the power to levy taxes on each other's property unless such taxation is levied on an organization established for profit.

U.S.A

- No tax or duty shall be laid on articles exported from any region

CANADA

- In each Region, the legislature may make laws in relation to the raising of money by any mode or system of taxation in respect of: -
    - Non-renewable natural resources and forestry resources in the province and the primary production therefrom, and
    - Sites and facilities in the Region for the generation of electrical energy and the production therefrom.
- Whether or not such production is exported in whole or in part from the Region, but such laws may not authorize or provide for taxation that differentiates between production exported to another part of Canada and production not exported from the Region.

NIGERIA

- The president upon the receipt of the advice from the Revenue Mobilization Allocation and Fiscal commission tables before the National Assembly proposals for revenue allocation from the consolidated Funds and in determining the formula, the National Assembly takes into account the allocation principle especially those of population, equality of Regional, internal revenue generation, land mass, terrain as well as population density.
- Provided the principle of derivation be constantly reflected in any approved formula as being not less than thirty per cent of the revenue accruing to the Consolidated Fund directly from any natural resources
- Any amount standing to the credit of the state in the Consolidated Funds is distributed among the Nationals and Regional government and the Local government in each Region on terms prescribed by the National Assembly
- Any amount standing to the credit of the Regions in the Consolidated Funds is distributed among the Regions on such terms prescribed by the National Assembly
- Each Region in respect of each financial year pays to the federation an amount equal to such part of the expenditure incurred by the National

government during the financial year of the purpose of collection of taxes or duties.

- Under an act of the National Assembly, tax or duty is imposed in respect of any matter specified in item D of part II of the second schedule of this constitution. The net proceeds of such tax or duty is distributed among the Regions on the basis of derivation and according to:

  - Where such tax or duty is collected by the government of the region or other authority of the region
  - Where such tax or duty is collected by the National Government or other authority of the National Government.

UGANDA:

- No tax is imposed except under the authority of an Act of Parliament
- Where an act of parliament confers powers to any person or authority to waiver or vary tax imposed by the law that person or authority shall report to parliament periodically on the exercise of those powers.
- There is a consolidated fund into which all revenues or other money raised or received for the purpose or ion behalf of, or in trust of the government
- The Local government has power to levy, charge, collect and appropriate fees and taxes in accordance with laws enacted by the parliament. This fees and taxes consist of: -

  - Rents
  - Royalties
  - Stamp duties
  - Personal graduated tax
  - Cess
  - Fees on registration
  - Licensing and any other fees and taxes that parliament may prescribe

Parliament provides that:

- Taxes collected by the Local Governments should be paid to the consolidated fund
- The Local Government will retain for the purposes of its functions and services a special proportion of the revenues collected for or on behalf of the government from the district

REVENUE MOBILIZATION ALLOCATION AND FISCAL COMMISSION

Functions

1. Monitor the accrual to the disbursement of revenue of the consolidated funds
2. Review from time to time the revenue allocation formulae and principles in operation to ensure conformity with changing realities
3. Advises the national government and the Regional Government on fiscal efficiency and methods by which their revenue can be increased
4. Discharges such functions as are conferred on the commission by this constitution or any Act of Parliament.

APPENDIX C

Principles of taxation proposed for adoption in a Devolution Act.

It is further proposed that: -

- 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;
- A proper balance should be struck between the services required to be surrendered by the devolved levels of government and the revenue mobilised.
- Every effort should be made to promote investments as the most sustainable source of tax revenue, in order to reduce the burden of taxes on citizens;
- 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;
- 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;

- 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;
- A Sub-national legislature may 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;
- 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;
- 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;
- When two Local 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;

- The principles of universality and equality of tax treatment and of taxation according to economic capacity shall be followed;
- 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;
- 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.

PART III

REDESIGNING DEVOLUTION IN THE DRAFT CONSTITUTION

INTRODUCTION

The National Constitutional Conference seemed to overwhelmingly approve the idea of devolution of power and the principles on which it should be based. The principles set out in Articles 213 and 214 of the draft are a good starting point. These principles, however, require some refining to enable them fully capture and render the governance philosophy underlying the entire draft. This notwithstanding, the delegates were completely dissatisfied with the design of devolution proposed by the draft. They therefore wanted devolution redesigned.

Before delving into the design questions, a few general comments may be necessary. To begin with, attempts at devolution of power in Kenya should be seen within the

context of global trends in governance that are putting a lot of emphasis on decentralisation. Within these global trends, the talk is now about globalisation with localisation. Worldwide, the concept of governance is being subjected to a lot of scrutiny with a view to improving it. Some scholars talk in terms of a silent revolution sweeping the globe. It is believed that this silent revolution is slowly but gradually bringing about rearrangements that embody diverse features of supra-nationalisation, confederalisation, decentralisation, provincialisation and localisation. Nevertheless, it is further argued that the vision of a governance structure that is slowly taking hold through this silent revolution is the one that indicates a gradual shift from unitary constitutional structures to a federal or confederal form of governance for a large majority of people. It implies that we are likely to move from a centralised to a globalised and localised world. The role of the central governments in such a world would change from that of a managerial authority to a leadership role in a multi-centered government environment. The culture of governance is also slowly changing from a bureaucratic to a participatory mode of operation, from command and control to accountability for results, from being internally dependent to being competitive and innovative, from being closed and slow to being open and quick, and from that of intolerance for the risk to allowing freedom to fail or succeed.

Because of these trends, all forms of devolution, decentralisation and or localisation are being tried by different countries that would like to solve some, if not most of their governance problems. The major challenge for contemporary constitution-making therefore, is the making of the correct choice in terms of the form and extent of devolution to adopt, as well as the institutional and infrastructural design that can effectively deliver the desired results.

Generally, the common structural characteristics of a more successfully decentralised political system, and which feature in most successful systems are as follows:

- Two or more orders or levels of government with each having sovereignty over and acting directly on their citizens;

- A formal constitutional distribution of legislative and executive authority and allocation of revenue resources among the two or more orders of government ensuring some areas of genuine autonomy for each order;

- Provision for the designated representation of distinct regional views within the national policy-making institutions, usually provided by the particular form of a national second chamber;

- A supreme written constitution not unilaterally amendable and requiring the consent of a significant proportion of the constituent units;

- An umpire (in the form of courts or provision for referendums) to rule on disputes between governments; and,

- Processes and institutions to facilitate intergovernmental collaboration for those areas where governmental responsibilities are shared or inevitably overlap.

A clear understanding and appreciation of some of these characteristics from a comparative perspective will be quite useful in our attempts to redesign devolution in the draft Constitution.

However before the design issues are addressed, it is important to first put the term devolution in its definitional context or perspective. This is best done by being able to draw a clear distinction among three terms: deconcentration, delegation and devolution. This is important to avoid mistaking deconcentration and delegation for devolution. According to Jennie Litvack, Junaid Ahmad and Richard Bird, in their '*Rethinking Decentralisation in Developing Countries'* these terms are distinguished in the following manner:

> *'One widely used distinction is among deconcentration, delegation, and devolution. Deconcentration occurs when the central government disperses responsibilities for certain services to its regional branch offices. This does not involve any transfer of authority to lower levels of government and is*

unlikely to lead to the potential benefits or pitfalls of decentralisation. The 'decentralisation' that has occurred in many unitary countries is actually deconcentration, since independent local governments (which are legally accountable to local constituents) do not exist and local field offices of the central government are simply used to improve the efficiency and effectiveness of service delivery. This is the case in many East Asian countries and, until recently, was the rule in Eastern European countries. Deconcentration can also exist for some functions in federal countries when the central government maintains a strong interest in ensuring delivery of a particular service.

In contrast, the central issue for both delegation and devolution relates to the balancing of central and local interests. Delegation refers to a situation in which the central government transfers responsibility for decisionmaking and administration of public functions to local governments or semiautonomous organizations that are not wholly controlled by the central government but are ultimately accountable to it. These organizations usually have a great deal of discretion in decision making. This form of decentralisation can be characterised as a principal-agent relationship, with the central government as the principal and the local government as the agent. From this perspective, the main design issue is to ensure that the self-interested agent (the local government or semi-autonomous organization) faces incentives that induce it to act as closely as possible in accordance with the wishes of the principal (the central government).

Finally, devolution, a more extensive form of decentralisation, refers to a situation in which the central government transfers authority for decisionmaking, finance, and management to quasi-autonomous units of local government. Devolution usually transfers responsibilities for services to municipalities that elect their own mayors and councils, raise their own revenues, and have independent authority to make investment decisions. In a devolved system, local governments have clear and legally recognized geographic boundaries over which they exercise authority and within which they perform public functions.'

Taking the definition and distinctions above into account it becomes clear that Kenyans are not looking for a deconcentration because this has been tried before but without success. The failed District Focus for Rural Development was a form of deconcentration. Neither are they looking for delegation. The widely discredited provincial administration is a form of delegation. Kenyans are asking for devolution, hence, the need to design and structure devolution in a manner that will not merely amount to deconcentration nor delegation.

ORDERS OR LEVELS OF GOVERNMENT

Among the characteristics of a proper devolved system of government mentioned above, is the fact that the system would organize its governance around two or more orders or levels of government, with each having its own area of sovereignty over, and acting directly on its citizens. In the premises, the first design question one must address is that of the total number of orders or levels of government to create.

The draft Constitution proposes a total of five levels of government: the national, provincial, district, locational and village. One could argue that with the national level of government being the one devolving authority and power to lower levels, the remaining four are therefore the devolved levels of government. But this is rather misleading. In a proper system of devolution, it is not one level of government that devolves or donates some of its powers to other levels, since this will merely be delegation. Instead, it is the national constitution that clearly distributes functions, allowing each level of government to have a certain measure of genuine autonomy in certain matters. The emphasis is then placed on a shift from a concept of a single central source of authority to one under which there are two or more levels of government that enable a country to combine elements of shared rule through common institutions and regional self-rule for the governments of the constituent units at the second or third levels of government. The creation in the Constitution and allocation of functions directly by the Constitution to each level of government gives to each level of government some measure of protection against interference by other levels of government.

The question one needs to ask at this level is whether the proposal to create five levels of government is reasonable. Five levels may seem to be on the higher side for various reasons. One, the draft seems to have unwittingly abolished the concept of local government and subsumed all the local authorities in to some of the proposed devolved units. The cities and municipalities are given the status of districts and elevated to the level of principal units of devolution. On the other hand, the towns and urban centres are given the status of locations and elevated to the level of locations as devolved units. The problems of trying to do this will come out clearly in the next part of this paper.

Secondly, the creation of five levels of government will create a problem of trying to create very many institutions for intergovernmental relationships. The more the levels of government one has the more the institutional and infrastructural arrangements for intergovernmental relations you need.

The ideal approach therefore would be to provide for three levels of government only. These are:

- level one – national;
- level two – sub-national/Provincial/Regional; and
- level three – local,

the main levels being the national and the sub-national. But in each one of the units created at the second level of government, a third level of government is created in the name of local government. At this level, provision must be made for local government in all its different forms, i.e. rural local government and urban local government.

A quick look at the arrangements in a number of countries discloses that this approach is what is applied in most of those countries. For instance, the South African 1996 Constitution provides for three "spheres of government', namely; the national, the provincial and local. Chapter 6 of the Constitution makes very elaborate provision

about the provincial level of government while chapter 7 dwells on the concept of local government. Chapter 7 creates local authorities that are referred to as municipalities. In recognition of the fact that different types of local authorities may require different management and governance arrangements, Article 155 creates municipalities of three different categories.

Article 155 in this regard states as follows:

"*Establishment of municipalities*

155 (1) There are the following categories of municipality:

(a) ***Category A:*** *A municipality that has exclusive municipal executive and legislative authority in its area.*

(b) ***Category B:*** *A municipality that shares municipal executive and legislative authority in its area with a category C municipality within whose area it falls.*

(c) ***Category C:*** *A municipality that has municipal executive and legislative authority in an area that includes more than one municipality.*

(2) National legislation must define the different types of municipality that may be established within each category.

(3) National legislation must-

(a) *establish the criteria for determining when an area should have a single category A municipality or when it should have municipalities of both category B and category C;*

(b) establish criteria and procedures for the determination of municipal boundaries by an independent authority; and

(c) subject to section 299, make provision for an appropriate division of powers and functions between municipalities when an area has municipalities of both category B and category C.

A division of powers and functions between a category B municipality and a category C municipality may differ from the division of powers and functions between another category B municipality and that category C municipality.

(4) The legislation referred to in subsection (3) must take into account the need to provide municipal services in an equitable and sustainable manner.

(5) Provincial legislation must determine the different types of municipality to be established in the province.

(6) Each provincial government must establish municipalities in its province in a manner consistent with the legislation enacted in terms of subsections (2) and (3) and, by legislative or other measures, must-

(a) *provide for the monitoring and support of local government in the province; and*

(b) promote the development of local government capacity to enable municipalities to perform their functions and manage their own affairs.

(7) The national government subject to section 44, and the provincial governments have the legislative and executive authority to see to the effective performance by municipalities of their functions in respect of matters listed in Schedules 4 and 5, by regulating the exercise by municipalities of their executive authority referred to in section 156(1).

Germany follows the same route and provides for three orders of government; the national , lander and local authorities operating under the name of communes. Unlike South Africa which has two separate chapters in the Constitution dealing with provinces and municipalities, the German Basic Law deals with local authorities in one Article in the chapter on the Federation and the Lander. This is done by way of protecting the right to local self-government. Article 28 in this regard states as follows:

Article 28 [Federal guarantee of Lander constitutions and of local self-government]

(1) The constitutional order in the Lander must conform to the principles of a republican, democratic, and social state governed by the rule of law, within the meaning of this Basic Law. In each Land, county, and municipality the people shall be represented by a body chosen in general, direct, free, equal,

and secret elections. In county and municipal elections, persons who possess citizenship in any member state of the European Community are also eligible to vote and to be elected in accord with European Community law. In municipalities a local assembly may take the place of an elected body.

(2) Municipalities must guarantee the right to regulate all local affairs on their own responsibility, within the limits prescribed by the laws. Within the limits of their functions designated by a law, associations of municipalities shall also have the right of self-government according to the laws. The guarantee of self-government shall extend to the bases of financial autonomy; these bases shall include the right of municipalities to a source of tax revenues based upon economic ability and the right to establish the rates at which these sources shall be taxed.

(3) The Federation shall guarantee that the constitutional order of the Lander conforms to the basic rights and to the provisions of paragraphs (1) and (2) of this Article.

The 1998 Swiss Constitution similarly provides for three orders of government: the national, cantonal and local authorities referred to as municipalities. Like the German Basic Law, the Swiss Constitution deals with local authorities by way of guaranteeing their autonomy within the limits of cantonal law. Article 50 states the following:

(1) The autonomy of the Municipalities is guaranteed within the limits fixed by cantonal law.

(2) In its activity, the Confederation shall take into account the possible consequences for the Municipalities.

(3) In particular, it shall take into account the special situation of cities, agglomerations and mountainous regions.

The Finnish reviewed Constitution also follows the same route of three orders of government: the national, the regional and local authorities called municipalities. The position obtains in Canada, Australia and United States of America.

However, taking into account the need to bring government closer to the people we recommend four levels of government with the fourth level coming below the local government level at the location.

THE PLACE AND ROLE OF LOCAL GOVERNMENT IN THE DEVOLUTION STRUCTURE

As already pointed out, Article 220 of the draft Constitution describes the district as 'the principle level of devolution of powers'. Article 222, on the other hand, elevates cities and municipalities to the status of districts and towns and urban centres to the status of locations. This provision creates a number of problems both at the operationalisation and functional level:

(1) The provision seems to impliedly abolish the concept and present structure of local government and subsumes the local authorities into the proposed structure of devolution – either as districts or locations.

(2) The provisions fail to recognise and distinguish the concept of rural local authorities from that of urban local authorities.

(3) The provisions also fail to address the problematic issue of determination of boundaries of the urban local authorities vis-à-vis those of the neighbouring rural districts. It has been argued by some scholars for example that '*because of suburban settlement and economic expansion, [cities] tend to transgress their boundaries substantially into the areas of their surrounding regions … This creates a situation in which city states are to a large extent living at the expense of their neighbours.'*

In Kenya, this is obviously an existing problem. For instance, it is difficult to identify Nairobi's boundaries. On the ground, Jomo Kenyatta International Airport is perceived to be part of Nairobi but administratively it is in Machakos District. Similarly, Athi River and Kitengela are perceived to be part of the wider Nairobi yet they fall administratively within Machakos and Kajiado Districts. The same can be said of Ngong Township and Ongata Rongai Township.

The question then remains, if cities and municipalities and other urban local authorities are elevated to the status of districts and locations, will their boundaries be

fixed or will they keep shifting as they expand? If they shift, what impact will that have on the neighbouring devolved units?

The draft therefore failed to clearly state the role of local authorities in the proposed structure of devolution and as proposed in part I above, local authorities must be distinctly provided for as the third level of government.

In doing so, a clear distinction must be made between the management and governance of rural local authorities and that of urban local authorities. In South Africa for example, the Constitution clearly identifies three categories of local authorities (Article 155). Article 50(3) of the Swiss Constitution also distinguishes cities from agglomerations and mountainous regions.
The present Kenyan structure recognises the following local authorities:

(i) the cities;
(ii) the municipalities;
(iii) the townships; and
(iv) the county councils.

It may be advisable to do away with the concept of townships and retain only cities, municipalities and rural councils along the lines of the current county councils. The reason for this is that multi-levels of local authorities always impact on the sharing of resources at the local level. However, care should be taken to ensure that people are able to be effectively served by the lowest level of government; it should not be too far from them. This may necessitate re-thinking this of question where to place local government to reduce the distance from the people.

The question of how to protect the authority and independence of local authorities either within the Constitution or national legislation must be addressed.

NUMBER OF UNITS TO BE CREATED AT THE SUB-NATIONAL LEVEL OF GOVERNMENT

In terms of the proposed three levels of government, the sub-national level is the principal level of devolution.

Article 220 of the draft Constitution identifies the district as the principal level of devolution. Article 222 elevates cities and municipalities to the same level as districts. The result is that taking the present number of cities, municipalities and districts into account, the total number of the principal level of devolution would be 113 made up as follows:

(i) cities – 3
(ii) municipalities – 43
(iii) districts - 67

The determination of the question of the total number of units of devolution at the sub-national level of government calls for some reflection on the factors to be taken into account. On this issue of factors a leading scholar has made some very instructive observations. Uwe Leonardy in his '*Demarcation of Regions: International Perspectives'* identifies a number of factors.

First, he lays down a general rule that says that the more comparable the constituent units are in size, institutional structure, administrative capacity, economic viability and financial strength, the more stable the system will be as a whole. He then particularises some of these factors with caution here and there about the inherent dangers in the following manner.

A system comprising only two units, he warns, is obviously too exposed to forces that could destroy it. Such system is open to the risk of degenerating into bipolar politics leading to disintegration as in the recent case of Czechoslovakia. A system consisting of three units would also suffer from the same dangers of disintegration. This normally has the problem of using one of the units as a balancing factor, a task that proves to be quite difficult as has been the case in Belgium. A system of four units on the other hand, would be exposed to double risk. One, two of the four units could easily, permanently gang up against the other two, particularly if they have the strength of numbers. Alternatively, all the

four units may find it easy to gang up against the central government thus threatening the existence of national unity. Leonardy therefore recommends five or six units as the minimum for a viable devolved system of government.

As regards the maximum, he observes that there is no general rule available but warns of the real danger of having too many constituent parts. In his view, this may lead to the temptation to divide and rule at the national level. Although the maximum number may be hard to define specifically, a figure like the fifty states in the USA may be too many.

Leonardy, however, does suggest that in determining a viable devolved system a proportion is to be observed between the total territorial size and the number of the constituent units. 'The larger the entire territory, the greater the number of tolerable regions or states that can comprise the [devolved] system.' He cites Germany with a relatively small territorial size of about 540,000 square kilometres and a total of 16 devolved units as a particularly bad example of disproportion between territorial size and number of devolved units. He also warns against the concept of elevating urban areas, i.e. cities, to the status of devolved units. This is because the logic of suburban settlement and economic expansion, almost always dictates that such urban units tend to encroach into the areas of neighbouring regions. Therefore, these urban units would tend to disturb the economic equilibrium of the greater area in which they are situated and complicate the financial equalisation arrangements in the country as a whole. Finally, any attempts to define their boundaries too narrowly would inhibit their own natural tendency for economic expansion.

In order to establish a viable devolved system, it is necessary to avoid glaring inequalities in the following areas:

- the political, economic and financial potential of the respective units;
- the potential of one or several units to dominate the national level;
- the power of the national government to dictate to the devolved units in respect of co-financing of the weaker units at the expense

of the stronger ones – thus encouraging 'corruptive' as opposed to 'co-operative' devolution.

Leonardy asserts that in the demarcation of devolved units, *'ethnic factors will inevitably play a role … but they should certainly not play the dominating role …'* Furthermore, in any devolved system of government the task of achieving political balance between ethnic groups should not be a task for the central government alone, *'but it should to a considerable extent be partially fulfilled also by and in the regions themselves.'* Leonardy continues to propose that the role of the devolved units in handling this issue should be *'in the very nucleus of the design of devolution in any country in which ethnic problems are a substantial part of the historical and political burden to be carried.'*

It is necessary to emphasise that the design of devolution must encourage an appreciation of the regional character of the devolved unit rather than the ethnic identity of its population per se. In these circumstances, devolution should not impede but encourage the freedom of movement of labour, goods, services and capital. Secondly, minority rights in the devolved units must be protected through appropriate constitutional mechanisms at the local, sub-national and national levels.

At the comparative level, a distinction must be made between systems of devolution that are purely federal or quasi-federal and those that may be characterised as decentralised. For the federal and quasi-federal countries, the following evidence emerges: America has 51 states, Germany has 16 Lander, Austria has 9 Lander, Belgium has 3 regions, Brazil has 26 states, India has 25 states, Canada has 10 provinces, The Republic of the Comoros has 4 Islands, Ethiopia has 9 provinces, Malaysia has 13 states, Nigeria has 36 states, Pakistan has 4 provinces and 6 tribal areas, South Africa has 9 provinces, Spain has 17 autonomous regions, Switzerland has 26 cantons and the United Arab Emirates has 7 Emirates.

For the merely decentralised systems, the following evidence emerges: Antigua has 2 Islands, Cameroon has 10 provinces, China has 22 provinces, Columbia has

23 departments, Fiji Islands has 2 ethnic communities, Ghana has 10 regions, Georgia has 2 autonomous regions, Indonesia has 27 provinces, Italy has 15 ordinary regions, Japan has 47 prefectures, Namibia has 14 regions, Netherlands has 11 provinces, Papua New Guinea has 19 provinces and Sudan has 6 regions.

At the national level, the independence constitution at Article 91 divided the country into the Nairobi Area and seven regions, namely,

(a) The Coast Region;
(b) The Eastern Region;
(c) The Central Region;
(d) The Rift Valley Region;
(e) The Nyanza Region;
(f) The Western Region; and
(g) The North-Eastern Region.

Under the same Constitution, the country was divided into the following districts:

(a) The Coast Region
    1. The Tana River District
    2. The Lamu Districst
    3. The Kilifi District
    4. The Kwale District
    5. The Mombasa District
    6. The Taita District

(b) The Eastern Region

    7. The Marsabit District
    8. The Isiolo District
    9. The Meru District
    10. The Embu District
    11. The Kitui District
    12. The Machakos District

(c) The Central Region

13. The Kiambu District
14. The Thika District
15. The Fort Hall District
16. The Nyandarua District
17. The Kirinyaga District
18. The Nyeri District

(d) The Rift Valley Region

19. The Turkana District
20. The Samburu District
21. The West Pokot District
22. The Trans Nzoia District
23. The Elgeyo-Marakwet District
24. The Baringo District
25. The Laikipia District
26. The Nandi District
27. The Uasin Gishu District
28. The Kericho District
29. The Nakuru District
30. The Narok District
31. The Kajiado District

(e) The Nyanza Region

32. The Central Nyanza District
33. The South Nyanza District
34. The Kisii District

(f) The Western Region

35. The Bungoma District
36. The Kakamega District
37. The Busia District

(g) The North-Eastern Region

38. The Mandera District
39. The Wajir District
40. The Garissa District

The Independence Constitution was subsequently amended and all references to the regions and the districts deleted. The present Constitution therefore only makes reference to the power of Parliament to create new districts (Section 123). On the basis of these amendments, the regions were renamed provinces and 27 new districts created as of December 2002, making a total of 70 as follows:

NAIROBI

1. Nairobi

RIFT VALLEY PROVINCE

2. Baringo
3. Keiyo
4. Uasin Gishu
5. Nandi
6. Marakwet
7. Trans Nzoia
8. Turkana
9. Samburu
10. West Pokot
11. Buret
12. Kericho
13. Laikipia

14. Nakuru
15. Koibatek
16. Bomet
17. Transmara
18. Narok
19. Kajiado

NORTH EASTERN PROVINCE

20. Garissa
21. Ijara
22. Wajir
23. Mandera

COAST PROVINCE

24. Mombasa
25. Kwale
26. Kilifi
27. Malindi
28. Tana River
29. Lamu
30. Taita

EASTERN PROVINCE

31. Moyale
32. Marsabit
33. Isiolo
34. Meru North
35. Meru Central
36. Tharaka
37. Meru South
38. Embu
39. Mbeere

40. Mwingi
41. Kitui
42. Machakos
43. Makueni

CENTRAL PROVINCE

44. Nyandarua
45. Nyeri
46. Kirinyaga
47. Maragua
48. Muranga
49. Thika
50. Kiambu

WESTERN PROVINCE

51. Malava-Lugari
52. Kakamega
53. Butere/Mumias
54. Vihiga
55. Mt. Elgon
56. Bungoma
57. Teso
58. Busia

NYANZA PROVINCE

59. Siaya
60. Rachunyo
61. Kisumu
62. Homa-Bay
63. Migori
64. Suba

65. Kuria
66. Kisii
67. Nyamira
68. Bondo
69. Nyando
70. Gucha

This notwithstanding, there is controversy about the creation of these additional districts as exemplified by the judgement of the High Court in the Michuki case.

At the National Constitutional Conference the debate on the issue of the principal unit of devolution revolved around the dichotomy of either the province or the district. A great number of delegates who spoke favoured the district as the principal unit of devolution, while others felt that the province should be retained for policy formulation and coordination of the districts. However, there were some who argued that the Lancaster House Constitution model was very good and should be given a try. Others, without being specific on either district or province emphasised the need to create units that are viable.

The beginning point to resolving this question of the principal unit of devolution is to move away from the dichotomy of province and districts and focus on how to establish viable units of devolution and identify the factors to be taken into account in doing so.

In this connection, a close analysis of the comments made by the delegates indicates a number of concerns that ought to be taken into account when determining the principal and number of units for possible devolution of powers. For instance, many who spoke in favour of districts lamented their marginalisation in the wider provinces. Others felt some of the provinces were too large to serve their interests.

Therefore, in determining a viable principal unit of devolution in Kenya, one must take into account the following factors:

(i) clearly the unit must not be too large in terms of territorial size;

(ii) it must be potentially economically viable in terms of the common economic activities and revenue base;

(iii) comparable population distribution and status of the devolved units;

(iv) cultural homogeneity, harmony and integration, taking into consideration ethnicity and historical factors;

(v) presently existing administrative and political units;

(vi) the protection and welfare of minorities in the proposed units;

(vii) the functions the proposed devolved units are intended to take over from the national government;

(viii) the intergovernmental relations both vertically with the national government and at the lower levels and horizontally with other devolved units.

RECOMMENDED OPTIONS

It is proposed to create a structure between ten, thirteen or eighteen principal units of devolution as follows:

OPTION 1 – 10 UNITS

Current District	Area [sq. kms]	Population
Unit 1		
Kwale	8,295	496,133
Mombasa	230	665,018
Taita Taveta	17,128	246,671
Kilifi	4,779	544,303
Lamu	6,167	72,686
Tana River	38,466	180,901
Malindi	7,751	281,552
	82,816	2,487,264
Unit 2		

Makueni	7,966	771,545
Machakos	6,281	906,644
Kitui	20,402	515,422
Mwingi	10,030	303,828
Mbeere	2,093	170,953
Meru Central	2,982	498,880
Meru South/ Nithi	1,093	205,451
Meru North	3,942	604,050
Tharaka	1,570	100,992
Embu	729	278,196
	57,088	4,355,961

Unit 3

Isiolo	25,698	100,861
Marsabit	61,296	121,478
Moyale	9,390	53,479
Samburu	21,127	143,547
Laikipia	9,229	322,187
	126,740	741,552

Unit 4

Garissa / Ijara	44,952	392,510
Mandera	26,474	250,372
Wajir	56,698	319,261
	128,124	962,143

Unit 5

Turkana	68,388	450,860
West Pokot	9,064	308,086
Marakwet	1,588	140,629

Trans Nzoia	2,487	575,662
Keiyo	1,439	143,865
Baringo	8,646	264,978
Koibatek	2,306	138,163
Uasin Gishu	3,328	622,705
Nandi	2,899	578,751

	100,145	3,223699

Unit 6

Kericho	2,111	468,493
Buret	955	316,882
Bomet	1,882	382,794
Kajiado	21,903	406,054
Narok	15,098	365,750
Trans Mara	2,846	170,591
Nakuru	7,242	1,187,039

	52,037	3,388,603

Unit 7

Kisii Central	649	491,786
Gucha	661	460,939
Nyamira	896	498,102
Homa Bay	1,160	288,540
Kisumu	919	504,359
Kuria	581	151,887
Migori	2,005	514,897
Rachuonyo	945	307,126
Siaya	1,520	480,184
Suba	1,055	155,666
Bondo	987	238,780

Nyando	1,168	299,930
	12,546	4,392,136

Unit 8

Kiambu	1,324	744,010
Thika	1,960	645,713
Muranga	930	348,304
Maragua	868	387,969
Nyandarua	3,304	479,903
Nyeri	3,356	661,156
Kirinyaga	1,478	457,105
	13,220	3,724,159

Unit 9

Bungoma	2,069	876,491
Teso	559	181,491
Lugari	670	215,920
Busia	1,124	370,608
Kakamega	1,395	603,422
Vihiga	563	498,883
Butere/Mumias	939	476,928
Mt. Elgon	944	135,033
	8,264	3,358,776

Unit 10

Nairobi	696	2,143,254

OPTION 2 – 13 UNITS

The first option can be modified to create a total of thirteen principal units of devolution. This would be achieved by creating an additional unit out of units 5 and 6, another one out of unit 2 and yet another out of unit 7 as follows.

Unit 5

Turkana	68,388	450,860
West Pokot	9,064	308,086
Marakwet	1,588	140,629
Trans Nzoia	2,487	575,662
Keiyo	1,439	143,865
Baringo	8,646	264,978
Koibatek	2,306	138,163
	93,918	2,022,243

Unit 6

Uasin Gishu	3,328	622,705
Nandi	2,899	578,751
Kericho	2,111	468,493
Buret	955	316,882
Bomet	1,882	382,794
	11,175	2,369,625

Unit 11

Kajiado	21,903	406,054
Narok	15,098	365,750
Trans Mara	2,846	170,591
Nakuru	7,242	1,187,039

	47,089	2,129,434

Unit 2

Makueni	7,966	771,545
Machakos	6,281	906,644
Kitui	20,402	515,422
Mwingi	10,030	303,828
	44,679	2,497,439

Unit 12

Mbeere	2,093	170,953
Meru Central	2,982	498,880
Meru South/ Nithi	1,093	205,451
Meru North	3,942	604,050
Tharaka	1,570	100,992
Embu	729	278,196
	12,409	1,858,522

Unit 7

Kisii Central	649	491,786
Gucha	661	460,939
Nyamira	896	498,102
	2,206	1,450,827

Unit 13

Homa Bay	1,160	288,540
Kisumu	919	504,359

Kuria	581	151,887
Migori	2,005	514,897
Rachuonyo	945	307,126
Siaya	1,520	480,184
Suba	1,055	155,666
Bondo	987	238,780
Nyando	1,168	299,930
	10,340	2,941,309

OPTION 3 – 18 UNITS

Current District	**Area [sq. kms]**	**Population**	**Representation to the National Council**
Unit 1			
Kwale	8,295	496,133	
Mombasa	230	665,018	
Taita Taveta	17,128	246,671	
	25,653	1,407,822	4
Unit 2			
Kilifi	4,779	544,303	
Lamu	6,167	72,686	
Tana River	38,466	180,901	

Malindi	7,751	281,552	
	35, 825	1,502,889	4

Unit 3

Makueni	7,966	771,545	
Machakos	6,281	906,644	
Kitui	20,402	515,422	
Mwingi	10,030	303,828	
	44,679	2,497,439	6

Unit 4

Mbeere	2,093	170,953	
Meru Central	2,982	498,880	
Meru South/Nithi	1,093	205,451	
Meru North	3,942	604,050	
Tharaka	1,570	100,992	
Embu	729	278,196	
	12,409	1,858,522	4

Unit 5

Isiolo	25,698	100,861
Marsabit	61,296	121,478
Moyale	9,390	53,479
Samburu	21,127	143,547

Laikipia	9,229	322,187	
	126,740	741,552	3

Unit 6

Garissa/Ijara	44,952	392,510	
	44,952	392,510	3

Unit 7

Mandera	26,474	250,372	
Wajir	56,698	319,261	
	83,172	569,633	3

Unit 8

Turkana	68,388	450,860	
West Pokot	9,064	308,086	
Marakwet	1,588	140,629	
Trans Nzoia	2,487	575,662	
	81,227	1,475,237	4

Unit 9

Keiyo	1,439	143,865	
Uasin Gishu	3,328	622,705	
Nandi	2,899	578,751	
Baringo	8,646	264,978	
	18,618	1,748,462	4

Unit 10

Kericho	2,111	468,493	
Bureti	955	316,882	
Bomet	1,882	382,794	
Nakuru	7,242	1,187,039	
	12,190	2,355,208	5

Unit 11

Kajiado	21,903	406,054	
Narok	15,098	365,750	
Trans Mara	2,846	170,591	
Kuria	581	151,887	
	40,728	1,094,282	4

Unit 12

Homa Bay	1,160	288,540	
Kisumu	919	504,359	

Migori	2,005	514,897	
Rachuonyo	945	307,126	
Siaya	1,520	480,184	
Suba	1,055	155,666	
Bondo	987	238,780	
Nyando	1,168	299,930	
	9,759	2,791,582	6

Unit 13

Kisii Central	649	491,786	
Gucha	661	460,939	
Nyamira	896	498,102	
	2,206	1,450,827	4

Unit 14

Kiambu	1,324	744,010	
Thika	1,960	645,713	
Muranga	930	348,304	
Maragua	868	387,969	
	3,082	2,125,996	5

Unit 15

Nyandarua	3,304	479,903	

Nyeri	3,356	661,156	
Kirinyaga	1,478	457,105	
	8,138	1,598,164	4

Unit 16

Bungoma	2,069	876,491	
Teso	559	181,491	
Lugari	670	215,920	
Mt. Elgon	944	135,033	
	4,342	1,408,935	4

Unit 17

Busia	1,124	370,608	
Kakamega	1,395	603,422	
Vihiga	563	498,883	
Butere/Mumias	939	476,928	
	4,021	1,949,841	4

Unit 18

Nairobi	696	2,143,254	5

*
Except for Unit 3 and Unit 11, which shall have at least two (2) women representatives each, all the other Units shall have at least one (1) woman representative each in accordance with the one – third (1/3) Gender representation principle.

DISTRIBUTION OF FUNCTIONS TO EACH LEVEL OF GOVERNMENT

Under the draft Bill, Article 221 enumerates the functions of the provincial level of government. Article 230, on the other hand, empowers Parliament to enact legislation giving detailed provisions for the functions of devolved authorities. Article 227 allocates functions to the national and district governments by reference to Schedule 7. Schedule 7 has three lists of exclusive and concurrent powers at the two levels of government.

At the National Conference the delegates found the above provisions wanting. Therefore the need to re-examine the issue of intergovernmental power-sharing. To do this, a quick comparative analysis of the generally recognised principles and approaches to distribution of functions in a devolved system is useful. In this regard the views of a leading Canadian scholar, Prof. Ron Watts may be instructive. Prof. Watts in discussing this issue points out that the main aim in most devolved systems is to combine shared-rule with self-rule. In the circumstances, he lays down a general rule that says that the more the degree of homogeneity within a society the greater the powers that are allocated to the national level of government, and the more the degree of diversity the greater the powers that are assigned to the constituent units of government.

Prof. Watts points out therefore, that in the distribution of functions in a devolved system, certain general principles must be taken into account.

(i) A proper balance must be maintained between the independence and interdependence of the national and sub-national levels of government. This kind of arrangement produces a system of government that has a certain measure of

interlocking relationships between the different levels of government. A good example in this regard is the German system.

(ii) There is need to distinguish the approaches that are common in systems. These may be regarded as integrative and those that are devolutionary. In a system that emerged in an integrative manner, through previously independent units coming together, the distribution of functions involves those distinct units giving up some of their powers to the national level of government. Where therefore a power is not expressly given by the Constitution to the national level of government that power remains and resides with the sub-national government.

On the other hand, systems that emerged in a devolutionary manner by way of a previously unitary system being divided into a number of sub-national units, the allocation of functions is by way of powers being taken from the centre to the sub-national level units. In such circumstances, where any power is not expressly allocated by the Constitution to the sub-national units, that power remains and resides with the national level of government.

(iii) The need to appreciate the relationship between the distribution of legislative and executive powers. In some systems the approach is to say that generally, each level of government is assigned executive responsibilities in the same fields for which it has legislative powers. This ensures that each level of government has authority to implement its own legislation.

(iv) In other systems like Germany, the more commonly administrative or executive responsibilities do not coincide with legislative authority. Instead more legislative authority is assigned to one level of government i.e. the national level while the administration of such legislation, which is more of an executive function is assigned to another level of government, i.e. the sub-national. This therefore emphasises uniformity of legislation but with variations at the sub-national level in terms of implementation.

(v) The need to identify the various forms of distribution of powers that categorises the powers in the form of:

- Exclusive powers;
- Shared and or concurrent powers; and
- Residual powers.

The concept of exclusive powers involves the assignment by the Constitution of certain powers to a certain level of government exclusively. The national level may be assigned certain power in which the sub-national levels cannot interfere. Similarly, the sub-national level may also have its own exclusive area in which the national level cannot interfere. This reinforces the autonomy of the level concerned.

The concept of concurrent powers involves the idea of joint tasks and or overlaps in terms of jurisdiction. There may be many cases in which a certain aspect of an issue is assigned to the national level of government while another aspect of the same issue is assigned to the lower level of government. For instance, certain aspects of education may fall under one level and others under another level. A good constitutional design in this case must clearly specify which level of government will prevail in the event of conflict between the two levels of government.

The concept of residual powers refers to those powers that are not expressly assigned by the Constitution to either level of government. It should be possible to know in which level of government such powers reside. In this case, it is important to note that the greater the enumeration and assignment of powers by the express provisions of the Constitution the less significant the issue of residual powers. Therefore to avoid the conflicts that quite often arise when a determination has to be made about residual powers, a good constitutional design should seek to expressly enumerate and assign most of the powers in and by the Constitution.

(vi) Finally, there is need to make a good choice regarding the best style of rendering the constitutional provisions. In some constitutions, the style used is that of annexing lists that contain powers assigned to various levels of government. In others, the approach is to specify these functions in the substantive clauses of the Constitution.

At the comparative level, the general trend in most countries has been to assign to the national level of government powers in the areas of foreign or international relations, defence, the functioning of the economic and monetary union, major taxing powers for purposes of redistribution and equalisation and inter-regional transportation. On the other hand, the sub-national levels of government are usually assigned powers in the area of social affairs such as education, health services, social welfare, labour services, and maintenance of law and security and local government. But it is important to note that some of these social services fall in the area of shared tasks.

There are countries that have also moved towards allowing sub-national levels to have some minimum power in the area of international relations, particularly in the arena of making of treaties that affect the sub-national units.

DISTRIBUTION OF THE FISCAL AND FINANCIAL POWER OF THE STATE

As emphasised in other parts of this document, the success of a devolved system of government in any county depends a great deal on the manner in which the devolution is designed. Most importantly, on how the area of revenue sharing is designed. Indeed, it is possible to assert that the real power sharing that can positively impact upon governance lies in fiscal devolution. The challenge therefore is a successful design in this area of fiscal devolution.

To achieve success in this area, one needs to first thoroughly and clearly understand certain general principles that have been identified by a number of leading scholars.

The need to recognise and emphasise the importance of the sharing of financial resources among the different orders or levels of government in a devolved system of government is important and stems from a number of reasons:

(i) Financial resources are important to each level of government as they enable or constrain governments in the exercise of their constitutionally assigned responsibilities, particularly legislative and executive. Responsibilities should not be given without the accompanying means necessary for the effective discharge of the

responsibilities. This may suggest the need to match means to the responsibilities. In some countries they say funds must follow functions.
This being the case, it is very important that the area of shred tasks or responsibilities be handled very carefully.

(ii) Taxing and expenditure powers are important instruments for effecting and regulating the economy. In this regard, it is important to emphasise the need to maintain a proper macroeconomic equilibrium.

Financial resources play a very important role in distribution and ensuring a balanced development of the country. For this reason a design of fiscal devolution that will address the problem of fiscal imbalances is extremely necessary. Imbalances must be addressed at two different levels:
(i) The vertical level under which different levels of government ought to be allocated resources in a balanced way. The vertical imbalances arose when constitutionally assigned national and sub-national government revenues do not match their constitutionally assigned expenditure responsibilities. Two reasons are at the root of these kind of imbalances. First in most places the major taxing powers are assigned to the national level of government because these are closely related to the development of customs union and more broadly to an effective economic union, while some of the most expensive expenditure responsibilities such as health, education and social services are usually assigned to the sub-national governments since they are the best level at which particular and peculiar regional circumstances can be taken into account.

Secondly, it has been realised that no matter how careful the original designers of the devolved system may attempt to match the revenue resources and expenditure responsibilities of each level of government, over time, the significance of different taxes changes and the costs of expenditure vary in unforeseen ways. Good examples are income and consumption taxes. Consequently, there is always need to build in processes through which these imbalances can be adjusted from time to time.

(ii) At the second level, there are horizontal imbalances. These occur when the revenue capacities of different constituent units at the sub-national level vary so that

they are not able to provide their citizens with services at the same level on the basis of comparable tax levels. In addition, to the question of revenues, there can also be inter-regional imbalances on the expenditure side due to the differences in the expenditure needs of the different constituent units because of variations in socio-demographic characteristics of their populations such as population dispersion, urbanization, social composition and age structure and the cost of providing services affected by such factors as the scale of public administration and the physical economic environment. These horizontal imbalances also need to be addressed in the devolution design.

Due to the need to correct these imbalances, devolved systems normally have arrangements for financial transfers from one level of government to another. Since national levels of government normally control the major tax sources, most adjustments involve transfers from the national level of government to the sub-national units of government. The main aim is normally to remove both vertical imbalances by transfers that take the form of tax shares, unconditional block grants or specific-purpose conditional grants, and to remove horizontal imbalances by assisting poorer units.

Conditional transfers are those that have attached to them conditions that influence how the money is spent. These kind of transfers have been criticized since they normally undermine the autonomy of the sub-national units of government especially where such conditional transfers constitute a high proportion of the transfers and hence a significant portion of the total revenue for the sub-national governments. As a remedy to this, it has been suggested that unconditional transfers which take the form of whether set percentages of certain national level tax proceeds or unconditional block grants be used.

One important aspect of the effort to correct the imbalances is the role of equalisation transfers of finances. In many places, the importance of equalisation finances or transfers lies in the need to ensure that all citizens within the country are able to access comparable services at reasonably comparable tax rates. According to Prof. Watts, in all but the German case, equalisation is achieved by redistribution among the regional units of government effected by national transfers to poorer regional units

of government. Germany, he points out, is unique in providing constitutionally for inter-state transfers to cover a substantial portion for adjusting horizontal imbalances.

In designing the sharing of finances, it is important to distinguish among three different aspects of the financial power that ought to be shared, namely:

(i) the power to raise revenue,
(ii) the power to administer revenue; and
(iii) the power to spend revenue.

The power to raise revenue involves the identification of which level of government has power to determine, through legislation, when and at what rates should certain taxes be imposed upon the citizens. The level that does this may not necessarily be the level to which these taxes accrue. The accrual question falls in the domain of the power to spend revenue.

Generally, governments raise revenue through the following ways:

(i) Taxation of their citizens.

In most devolved systems, according to Prof. Watts, the major taxing powers identified are customs and excise, corporation taxes, personal income taxes and various sales and consumption taxes i.e. VAT. To ensure an internal customs and economic union, most countries assign the customs and excise taxing power to the national levels of government. Corporate income taxes are also often assigned to the national level of government. The reason for this is that corporations in earning their income tend to cross the boundaries of their internal regional units and the location of their headquarters may not necessarily reflect the geographical sources of their income. There are however certain taxation powers that are normally shared between two different levels of government: usually in areas of concurrent jurisdiction. A good example is personal income tax which may be more directly attributed to location of residence rather than work.

On the other hand, there are scholars such as Jennie Litvack, Junard Ahmad and Richard Bird who in distributing the revenue raising power seek to draw a distinction

between taxes on mobile factors such as corporate and personal income taxes, value added taxes on international trade which, for reasons of economic and administrative efficiency are normally assigned to the national level of government and taxes on immobile factors such as land and real estate taxes as well as users charges which are normally assigned to the sub-national level of government. The adoption of this distinction for use in Kenya may call for some adjustments, given that there are large disparities in the landed property values.

These scholars further observe that because the national government plays a large role in achieving distribution and stabilization goals, its is more logical for it to be responsible for progressive or redistributive taxes such as those on wealth and personal income, as well as taxes that are sensitive to economic fluctuation such as corporate income taxes and taxes on natural resources and any other taxes that are related to national objectives.

These scholars have given a number of reasons why such major taxes should be assigned to national as opposed to sub-national levels of government. One, as already pointed out on the issue of macroeconomic equilibrium, there is normally the need to ensure an adequate degree of internal tax harmonization and coordination to preserve the internal common market. A contrary approach that allows sub-national levels of government the power in some of these major taxes would easily lead those governments to engage in inefficient tax competition and undesirably inter-jurisdictional tax exporting. Inter-jurisdictional tax exporting involves producer regions exporting taxes to consumer regions.

It is also important to note that tax-sharing arrangements under which sub-national governments receive a fixed percentage of certain national taxes collected in their jurisdictions are also unacceptable as they create undesirable incentives for tax exporting and bias national tax policy in the direction of raising taxes that do not have to be shared. As a consequence, in most countries the tax rates are normally set by the national level of government and the sharing rate is often applied uniformly throughout the country.

(ii) Production by engaging in business

Quite often, governments engage in the operation of public corporations and enterprises, the profits of which may and should serve as a source of governmental income. In addition, central banks all over the world are run as state properties and make profits that should ideally form part of governmental income. In may devolved systems this source of revenue is normally open to both levels of government. But there is also need to have mechanisms for the vertical sharing of the income, particularly that from corporations run by the national level of government.

(iii) Public borrowing

Governments can also raise revenue through borrowing both domestically and internationally. Public borrowing as a source of revenue, is in most federations open to both levels of government. However, foreign borrowing in some cases, most notably Austria, India and Malaysia is assigned exclusively to the national level of government. In other places however, even sub-national levels of government are given some foreign borrowing power. Where this is allowed it is normally important to exercise a great deal of caution and subject this power to very stringent limitations and controls. Those who support this approach argue that allocative efficiency and inter-generational equity often require that long-lived investment projects, especially those that will increase productive capacity, and that will benefit even future generations, be financed by borrowing rather than relying solely on current public savings or transfers from above. What then becomes important is to design a system that distinguishes between good borrowing and strictly guards against bad borrowing.

A number of mechanisms for limiting and controlling borrowing by sub-national governments have been suggested. They include limiting such borrowing to financing for capital expenditures or investments as opposed to financing recurrent expenditure, limiting debt service to a maximum percentage of current revenues, or requiring prior approval of national government for borrowing.

A more fundamental approach suggested is to remove the institutional problems that give rise to unsustainable sub-national borrowing. This focus might include re-assigning revenues and expenditures to provide sub-national governments with some

sources of revenue with which to finance local expenditures, revising the transfer system, introducing transparent, timely, and reliable reporting systems and establishing a stable, accepted periodic review process. Equally important would be to ensure transparent reporting by and regulation of the financial sector – particularly as it relates to borrowing by sub-national governments.

As compared to the power to raise revenue, the power to administer revenue on the other hand, involves identification of the level of government that has the power to collect revenue. It is important to note that the level of government that is assigned the power to raise revenue need not be the one that has the power to collect revenue. One level may legislate for revenue but another may be the one to collect that revenue. A constitution can therefore draw a very clear distinction between the power to administer that revenue. Such a constitution may have distinct provisions dealing with each of these two areas. The German Basic Law is a good example in this regard. For instance Article 108 distinctly deals with the power to administer revenue in the following manner:

Article 108 [Financial administration]

(1) Customs duties, fiscal monopolies, taxes on consumption regulated by a federal law, including the turnover tax on imports, and levies imposed within the framework of the European Communities shall be administered by federal revenue authorities. The orgnanization of these authorities shall be regulated by a federal law. The heads of intermediate authorities shall be appointed in consultation with the Land governments.

(2) All other taxes shall be administered by the revenue authorities of the Lander. The organization of these authorities and the uniform training of their civil servants may be regulated by a federal law requiring the consent of the Bundesrat. The heads of intermediate authorities shall be appointed in agreement with the Federal Government.

(3) To the extent that taxes accruing wholly or in part to the Federation are administered by revenue authorities of the Lander, those authorities shall act on federal commission. Paragraphs (3) and (4) of Article 85 shall apply,

provided that the Federal Minister of Finance shall take the place of the Federal Government.

(4) Where and to the extent that execution of the tax laws will be substantially facilitated or improved thereby, a federal law requiring the consent of the Bundesrat may provide for collaboration between federal and Land revenue authorities in matters of tax administration, for the administration of taxes enumerated in paragraph (1) of this Article by revenue authorities of the Lander, or for the administration of other taxes by federal revenue of taxes whose revenue accrues exclusively to municipalities (associations of municipalities) may be delegated by the Lander to the municipalities (associations of municipalities) wholly or in part.

(5) The procedures to be followed by federal revenue authorities shall be prescribed by a federal law. The procedures to be followed by Land revenue authorities or, as provided by the second sentence of paragraph (4) of this Article, by municipalities (associations of municipalities) may be prescribed by a federal law requiring the consent of the Bundesrat.

(6) Financial jurisdiction shall be uniformly regulated by a federal law.

(7) The federal government may issue general administrative rules which, to the extent that administration is entrusted to Land revenue authorities or to municipalities (associations of municipalities), shall require the consent of the Bundesrat.

In this manner one level of government may serve as agent of another level in terms of the power to administer revenue. This approach may help to address the vexing question of sub-national levels or units of government not having the necessary capacity to administer revenue.

The power to spend revenue involves the accrual question. As already pointed out one level of government may have the power to raise revenue but with the constitution making provision for the accrual of that revenue to another level of government. This involves the sharing of revenue once it has been raised among different levels of government for their use in discharging their constitutionally assigned responsibilities.

Prof. Watts in this connection observes that broadly the distribution of expenditure powers to each level of government often corresponds to the combined scope of the legislative and administrative responsibilities assigned to each. He hastens to point out however that one, where the administration of a substantial portion of national legislation is constitutionally assigned to the sub-national governments as in Switzerland, Austria, Germany, India and Malaysia the constitutional expenditure responsibilities of the sub-national governments are significantly broader than would be indicated by the distribution of legislative powers taken alone. Two, the expenditure requirements of different areas may vary. For instance, in relative terms health, education and social services are higher cost functions by comparison with functions relating more to regulation than the provision of services. Three, in most devolved systems the spending power of each level of government has not been limited strictly to the enumerated legislative and administrative jurisdictions. Governments have usually been taken to possess a general spending power which sometimes governments use to perform functions that may not have been expressly assigned to them.

The Design Question on Finance

The Kenyan draft Constitution attempts to address these questions of fiscal devolution in Articles 224, 225 and 226. Looked at against the background of the above general principles, it becomes obvious that these clauses are not adequate. They have missed out on quite a number of issues. The articles do not identify and distinguish all the three aspects of the financial power, namely; the power to raise revenue, the power to administer revenue, and the power to spend revenue. They also do not identify and distinguish all the sources of governmental revenue namely; taxation, production and borrowing. The concept of national resources and how they are shared is rather confusing. The concept of equalization grants being paid only to the marginalized districts is also confusing and misleading. The composition of the Commission on Local Government Finance does not seem to include representation of the devolved governments. The concept of local government is also misplaced in our concept of devolution.

These problems obviously necessitate a second attempt of designing a proper system of fiscal devolution. To achieve this, one must first recognize the need to make decisions on all the three aspects of the financial power mentioned above. Which of the three aspects of the power should be more decentralized and which one more centralized? To be able to make effective and informed decisions on those three aspects, one will need to first determine the question of the philosophy of governance that we have settled for. At the comparative level Germany has settled for a governance philosophy that seeks to secure uniformity of living conditions for all citizens wherever they are in the territory. Article 72 of the Basic Law when addressing the question of concurrent legislation refers to this philosophy in the following manner:

> *(1)On matters within the concurrent legislative power, the Lander shall have the*
>
> *right to legislate so long as and to the extent that the Federation has not exercised its legislative power by enacting a law.*
>
> *(2) The Federation shall have the right to legislate on these matters if and to the extent that the establishment of equal living conditions throughout the federal territory or the maintenance of legal and economic unity renders federal legislation necessary in the national interest.*

Similarly article 106 when dealing with apportionment of tax revenue at sub-article (3) refers to the philosophy of uniform living conditions in the following manner:

> *Revenue from income tax, corporation tax and turn-over tax shall accrue jointly to the Federation and the Lander (joint taxes) to the extent that the revenue from income tax is not allocated to the municipalities pursuant to paragraph (5) of this Article. The Federation and the Lander shall share equally the revenue from income tax and corporation tax. The respective shares of the Federation and the Lander in the revenue from turnover tax shall be determined by federal legislation requiring the consent of the Bundesrat. Such determination shall be based on the following principles:*

> *(1) The Federation and the Lander shall have an equal claim to funds from concurrent revenue to finance their necessary expenditure. The extent of such expenditures shall be determined with due regard to multi-year financial planning.*
>
> *(2) The financial requirements of the Federation and the Lander shall be coordinated in such a way as to establish a fair balance, to avoid excessive burdens on tax-payers, and ensure uniformity of living standards throughout the federal territory.*

Canada adopted a governance philosophy that is similar to the German one but renders it such that in addition to capturing the concept of a welfare state that seeks to reduce disparity in opportunities, it enjoins the government to ensure that all Canadian citizens are given reasonably comparable public services at reasonably comparable tax rates. This philosophy of governance is entrenched in the Constitution, which at section 36 deals with "*Equalization and Regional Disparities*" and provides as follows:

> *(1) Without altering the legislative authority of parliament or of the provincial legislatures, or the rights of any of them with respect to the exercise of their legislative authority, parliament and the legislatures together with the government of Canada and the provincial governments, are committed to-*
>
> *(a) promoting equal opportunities for the well-being of Canadians;*
>
> *(b) furthering economic development to reduce disparity in opportunities; and*
>
> *(c) providing essential public services of reasonable quality to all Canadians.*
>
> *(2) Parliament and the government of Canada are committed to the principle of making equalization payments to ensure that provincial governments have*

sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation.

The primary impetus behind this governance philosophy in both Germany and Canada was the general belief that the general population, regardless of their territorial position, had essentially undifferentiated demands and expectations regarding their social conditions. Uniformity therefore becames a powerful norm permeating all relationships between, and actions of both orders of government.

Inherent in this German and Canadian philosophy of governance are a number of things worth noting.

(i) The concept of mutual assistance and solidarity among citizens generally and the various constituent units in particular - The units that have a high monetary capacity become willing to assist those with a low capacity. This indeed, is the very basis of the concept of both vertical and horizontal equalization. In the case of horizontal equalization monetary transfers from units with high capacity are made to those with low capacity.

(ii) The concept of insurance on the part of the richest regions - The basis and motivation for these horizontal equalization transfers is the need to insure for the future. This is because the fluctuations in the economic dynamics are sometimes very unpredictable. Sometimes regional economic circumstances can rapidly change, particularly with new technologies, so that regions that hitherto had high revenue capacity switch places with those which had low capacities. Regions initially perceived as poor may suddenly discover some hidden lucrative natural resources like oil. On the other hand international prices for commodities coming from richer regions may collapse and lead the region into economic ruination. As a result equalization could be considered by regions with higher capacity as an insurance against a future reversal of their economic position.

(iii) The concept of redistribution of resources as an overall value in the governance processes - The reality in most countries is that differentials in

the natural endowment of natural resources, historical factors such as imbalanced past investment and development policies, fluctuations in the economic dynamics and in the commodity prices and disparities in the revenue capacities among different regions of a country will always be with us. As such a governance philosophy that seeks to secure uniformity of living conditions or seeks to provide the citizens with comparable public services at comparable tax rates, cannot achieve this unless it seeks to reduce some of these disparities through redistributive mechanisms. Indeed, it is refreshing to note that the United Nations Development programme (UNDP) reports have sought to redefine development in a more multi-dimensional way that takes into account dimensions of human welfare and distribution.

(iv) The concept of equalization when seeking to achieve uniformity of living conditions for all citizens through redistribution - Equalization is the best mechanism that has so far been developed. Because of this Germany and Canada have highly developed financial equalization mechanisms. Similarly, Australia and Switzerland have also developed and keep reviewing their equalization mechanisms. Many other countries too have elements of equalization in the decentralized systems. South Africa and Uganda are also in the process of developing equalization mechanisms. The reality therefore is that to successfully design fiscal devolution based on this kind of governance philosophy, one must first seek to clearly understand this concept of equalization. We shall come back to this at a later stage.

Because of this governance philosophy, these countries have found out that less decentralization or devolution of the power to raise revenue with more decentralization or devolution of the power to spend revenue works very well. For this reason the national level of government is assigned the taxing power in the areas of the major taxes such as, income tax, corporation tax, value added tax and customs and excise which are then used for equalization purposes by way of distribution to the units at the sub-national level through all manner of transfers. The national level of government raises the revenue but that revenue does not

wholly accrue to it. It accrues both to it and the units at the sub-national level. The reason for doing this is to avoid increasing rather than reducing the disparities among the regions.

On the other hand, the governance philosophy adopted and traditionally emphasized by the United States of America contrasts sharply with this German and Canadian philosophy. The American philosophy emphasizes the autonomy of the states and the freedom and liberty of the states and individuals to do as they please. The autonomy and individual initiative of the states are regarded as higher values.

Inherent in this governance philosophy is the concept of competition in its very unhindered form leading to massive disparities among not only the individual citizens but also among the states. This philosophy has no room for the concepts of mutual assistance and solidarity, insurance, distribution and equalization. Indeed the Americans have not developed any serious mechanisms for financial equalization. They, for the first time, tried to formally introduce equalization only in 1972. But they later abolished it for the states in 1981 and for the cities in 1986.

Because of this philosophy of the autonomy of the states the route taken is to assign functions to each state and then require each to raise its own revenue that can enable it to discharge its responsibilities. Under this approach, there is more decentralization of the power to raise revenue than the power to spend. This kind of approach may lead to extreme competition that may destabilise the necessary economic stability and equilibrium. This approach ignores the reality of some states having a higher tax base than others. In such circumstances, securing uniform living conditions would lead to high disparities in the tax rates. No wonder it is common to find some American states that are extremely rich while others are very poor. It is easy to record a very high national per capita income in a country where very few are extremely rich while the majority are poor.

An Approach for Kenya

In order for Kenya to make a determination about how to devolve the three aspects of the financial power of the state namely the power to raise revenue, the power to administer revenue and the power to spend revenue, she must first determine which one of the these two governance philosophies it wants to or has settled for. This choice will have to be informed by a clear understanding and appreciation of the history and past we are coming from. A clear understating of our problem and what we are seeking to achieve through devolution should assist in making a clear choice. It is a given fact that we are coming from a past of huge disparities in the development of the country, in terms of infrastructure, provision of services and income. For instance, whereas Nairobi has only 7% of the countries population, its GDP is 47% of the country's total GDP. It is also a given fact that to date we still follow the traditional restrictive definition of development which thinks in terms of per capita income without taking into account the redistributive dimension. To the extent that even in Nairobi where 47% of the GDP is found, the majority of the population is found in slums where they are languishing in poverty. The percentage of the Nairobi population that earns the greater part of that 47% is very small.

The cause of these disparities can be traced back to the governance, development and investment policies of our past governments, both colonial and post-colonial. The colonial government's governance, development and investment policies were aimed at serving the markets back home in Britain and white settlers in Kenya. They were not meant to serve the general Kenyan populace. Since the markets back home and the white settlers were interested in certain sectors of the economy only as opposed to other sectors, the investment policies targeted the development of these identified sectors. The other sectors of the economy which were not of interest to the markets back home and the white settlers were not candidates for investment and development. Secondly, since most of these sectors were agriculture based, land being the platform upon which agriculture is based was targeted in these policies. It was zoned in terms of agro-ecological zones or areas. Some areas were identified and zoned as high potential, some as medium potential and others as low potential. At the political and governance level, African natives were pushed out of the high and sometimes medium potential zones to pave way for white settlers. At the development and investment level,

policies and resources for development and investment in terms of infrastructure were deliberately directed at these identified white zones. The result was that by the time the colonialists were leaving upon attainment of independence, regional disparities that required correcting had already been entrenched.

Secondly, the low potential areas which were turned into African reserves to which the African natives were pushed, were only useful in the development and investment project as places for sourcing cheap labour. This labour once produced and prepared in whatever manner would be uprooted and taken to the high and medium potential areas for use for the benefit of the markets in Britain and the white settlers in Kenya. With the Christian missionaries in these low potential zones as mediums for the preparation of this labour into more subservient and loyal labour, once ready the labour would then be moved to the high and medium potential zones to serve the interests of the mentioned few. In effect, this was a cause of further disparity in the sense that these low potential zones were robbed of and denied their best portion of human resources. A perception was then created of low potential areas being merely grounds for the production and preparation of labour while the other areas were the consumers and users of labour. Migrations from these low potential to high potential areas in search of employment set in.

However, our independence government, rather than seek to reduce these disparities, put in place governance, development and investment policies that helped to increase the disparities. Sessional Paper 10 of 1965 on *"African Socialism and its Application to Planning in Kenya"* which seems to have been completely mixed up and confused in terms of vision vis-à-vis application clearly shoes that our government either knowingly or unknowingly adopted the colonial governance, development and investment policies that had started the entrenchment of the regional disparities. Paragraph 133 on "*Provincial Balance and Social Inertia"* states as follows:

> "*One of our problems is to decide how much priority we should give in investing in less developed provinces. To make the economy as a whole grow as fast as possible, development money should be invested where it will*

> *yield the largest increase in output. This approach will clearly favour the development of areas having abundant natural resources, good land and rainfall, transport and power facilities, and people receptive to and active in development. A million pounds invested in one area may raise net output by 20,000 pounds while its use in another may yield an increase of 100,000 pounds. This is a clear case in which investment in the second area is the wise decision because the country is 80,000 pounds per annum better off by so doing and is therefore in a position to aid the first area by making grants or subsidized loans."*

It is clear from this Sessional paper that our independence government did not only adopt the colonial development and investment policy but also perfected the policy by extending the concept of zoning beyond land, to cover even people. High, medium and low potential people in terms of their receptiveness to and activeness in development were identified and this played a major role in deciding where and where not to invest.

Further, our government adopted and perfected the colonial policies that had encouraged the migration of human resources from low potential to high potential areas or regions. They even invented a weird concept of developing the people without necessarily developing the environment in which they live. How this is possible is difficult to comprehend. Paragraph 134 of the Sessional Paper provides as follows:

> *"The purpose of development is not to develop an <u>area</u>, but to develop and make better off the <u>people</u> of the area. If an area is deficient in resources, this can best be done by-*
>
> *(i) investing in the education and training of the <u>people</u> whether in the area or elsewhere;*
>
> *(ii) investing in the health of the <u>people</u>; and*
>
> *(iii) encouraging some of the <u>people</u> to move to areas richer in resources; and of course*
>
> *(iv) developing those limited resources that are economic.*

> *With education and training and some capital, the people of a province can make the best of limited resources. If the potential for expansion is small, medical services, education and training will qualify the people to find employment elsewhere."*

It is not any wonder therefore that the rural urban migration by trained and skilled human labour has increased, thus suffocating the resources in the urban centres while at the same time denying the rural people, who spent a lot of time preparing this labour, access to the professional services some of them render. With these kind of policies in place, one can understand why raw materials have to be ferried from the production areas to be processed in Nairobi. These policies have encouraged and enabled Nairobi to pull all manner of resources from the periphery to itself, hence increasing the regional disparities. It becomes easy therefore to understand why Nairobi with 7% of the population has 47% of the GDP.

Clearly, therefore, we are a country strapped in huge regional development and investment disparities. As such, we desperately and urgently need policies that can correct these disparities. This need should therefore inform the governance philosophy we adopt.

A closer scrutiny of Sessional Paper 10 of 1965 indicates that as early as 1965 we had settled for a governance philosophy similar to that in Germany and Canada. The Sessional Paper in its elucidation of the concept of African Socialism propounds a governance philosophy that seeks to put in place a welfare state. It emphasises that the government was to change from a policy of developing our resources for others as had been the case in the colonial days to a development of natural and human resources for the benefit of the people of Kenya and the concept of a mutual responsibility by society and its members to do their very best for each other with the full knowledge and understanding that if society prospers its members will share in that prosperity and that society cannot prosper without the full co-operation of its members. At paragraph 11 the paper also notes that:

> *"The state has an obligation to ensure equal opportunities to all its citizens, eliminate exploitation and discrimination, and provide needed social services such as education, medical care and social security."*

The defining factors of African Socialism in the Sessional Paper seemed to adopt a vision and philosophy that is more redistributive as opposed to the American philosophy of extreme competition of naked capitalism. At paragraph 133 already referred to above, the concept of the government using profits made in high potential areas to give grants or subsidised loans to low potential areas was referred to. But paragraph 135 is more specific in this regard. It states that:

> *"If these ends are to be achieved, however, it is necessary for the Government to develop a formula for grants-in-aid and educational and health allocations that take into account the needs and incomes of each province and district. Thus, the Government must ensure that all the people of the country have a minimum provision for the essential welfare services. A policy of making education, training and health facilities available to all the provinces on the same financial terms means that the people of the less developed provinces are penalized simply because they are already poor."*

Clearly, therefore, Kenya in terms of African socialism adopted a governance philosophy similar to that of Canada and Germany. The problem over the years, however, has been our inability to find a proper formula to be used in governance to give a practical effect to this philosophy. First, as already pointed out, the Sessional paper was caught up in contradictions between the vision and philosophy of African socialism on the one hand and the formulation of a formula to make this philosophy practical on the other hand. A good example can be found in paragraph 133 which determines that government resources, including borrowed money should be invested in high potential areas for purposes of making quick and high profits. Thereafter, the low potential areas to be helped by way of grants or subsidised loans. No formula for such grants was given. But what is worse is the suggestion that the low potential areas be given subsidized loans. Why should they be given subsidized loans instead of free grants? After all, the initial investment in the high potential areas

> was not made as a loan to the area. And if the sources of the money was a foreign loan, the whole country would be participating in the repayment thereof. Why would low potential areas be saddled with a second loan from its own government?

Secondly, although paragraph 135 talks of "grants-in-aid" and educational and health allocations taking into account the needs and incomes of various provinces and districts, evidence on the ground clearly shows that for the entire period Kenya has been independent, no formula for equalization financing for poorer provinces has ever been developed.

Thirdly, when in the 1980s the government introduced the concept of "District Focus for Rural Development," no formula for sharing resources among the Districts and taking into account the need for equalization was put in place.

Finally, the recent concept of a constituency Development fund of shs. 20 million is also lacking in terms of a formula that takes into account the need for equalization. Before this Constituency Development fund, there was the constituency road Levy.

The problem with both the District Focus and the constituency development fund approaches is that these are development and investment approaches that are devolution oriented. They can work well in a devolved system as opposed to a centralized system. The main distinction lies in the fact that, in a devolved system, one first distributes functions before distributing revenues to match those functions. Each level of government is assigned functions either exclusively or concurrently with another level of government. The allocation of revenues is therefore meant to enable the level of government to discharge its constitutionally assigned functions. In the Kenyan case an attempt is being made to impose devolved ideas and strategies on a basically centralized system. In the case of the District focus, planning functions were passed on to Districts but with no accompanying revenues to enable them implement the plans they come up with. Secondly there was no clear co-ordination and distinction between the role of the Districts vis-a-vis that of the line ministries of the national level. In the case of constituency road levies and the Development funds, there is no clear definition and allocation of development functions to a unit called a

constituency, yet funds are being allocated to it. In our current constitutional arrangements, a constituency is a unit for political representation in parliament, and not a unit for development purposes to which budgetary allocations can be made. In fact ideally our budgetary allocations are made to line ministries and not to geographical units. It therefore becomes difficult to draw a distinction between the development programmes that should be funded by the constituency development fund and those that should be funded by the relevant line ministries. When you have a ministry for roads, how does its functions in a constituency relate to the constituency road levy? How are the functions to be shared out? This is just a tip of our planning, development and investment confusion. It shows how urgently we need a very well thought out and designed system of devolution of the financial power of the state. This being the case Kenya should go for less decentralization of the power to raise revenue but more decentralization of the power to spend revenue. However, the success of this will heavily depend on our clearly understanding the concept of equalization and being able to come up with a workable formula in this regard.

Understanding Equalization

A successful design of an equalization formula for Kenya would obviously benefit from a clear understanding of the concept and comparative experiences in other countries that have used the mechanism in their own governance systems. As already pointed out, equalisation is necessitated by both vertical and horizontal imbalances. At the vertical level, imbalances in the allocation of functions and revenues may create a need for equalization. The national level of government may have a higher taxing power yet have lesser functions as compared to the sub-national levels of government. At the horizontal level, different sub-national units may have different fiscal capacities for delivering public services to their residents.

These differences can arise from both the expenditure and revenue sides of the budget. With respect to expenditures, the need for public services of different types can differ across sub-national units because of different demographic makes-ups of the units populations i.e. high population density and or scattering and topography in addition, costs of provision of services can differ.

On the revenue side, different units may have different tax capacities due to differing tax bases. Differences in economic development industrial specialization central versus peripheral position, and availability of natural resources normally give rise to such disparities.

At the economic level, the economic position and opportunities of different devolved units may differ. Opportunities for regional growth and local development may be very different between the members devolved units. For example some units may have higher revenues owing to their geographical position or to their raw material resources. Peripheral regions and regions without marketable natural resources may have lower tax bases. As a result, revenue-raising capacity of the jurisdictions may vary widely and put in danger the provision of public services at a desired minimal national service level.

At the cost level the issue of economies of scale in the production of public services may also present problems of imbalances. Some units may not be able to attain a sufficient threshold of production capacity, for example because the population is scarce (in a valley or a remote region) or is spread over a large territory.

Finally, differences in unit costs of production of local public services may also present problems. Local geographical conditions and topography may raise the costs of producing and delivering local public services i.e. the construction and maintenance of roads, bridges, tunnels, water and sewer pipes. In peripheral or mountainous regions as in Switzerland, the absence of economies of scale and higher unit costs of production can combine, making things even worst. A good equalization formula must therefore take into account all these factors.

The success of a financial equalization formula also depends on the institutional framework in which it operates. The constitution must make provision for a specific institution that has the mandate to determine the equalization questions and the grants that must be given from time to time. Several options in this regard present themselves.

(i) the national government alone may be empowered to determine these questions. This approach negates the very idea of devolution since it normally affords the central government an opportunity to destroy devolution by denying the devolved units finances they need to perform their functions. The collapse of the independence majimbo has been blamed partly on such arrangements. This normally happens – particularly when the central government is in the hands of persons not interested and committed to devolution.

(ii) The second alternative is to set up a quasi-independent body, such as a grants commission, whose purpose is to design and reform the system as is the case in Australia, India and the Republic of South Africa. This approach is said to be prone to more ideal solutions rather than pragmatic approaches. Such body could be divorced from politics or be representative of both the national level of government and the devolved levels of government.

(iii) The third alternative is to use national-sub national committees to negotiate the terms of the system as is done in Canada.

(iv) The fourth alternative is to have a joint intergovernmental cum inter-legislative commission such as the Finance commission in Pakistan and

(v) The fifth alternative is an intergovernmental legislative body such as the upper house of the German Parliament. The last three systems are said to be good since they allow for explicit political inputs from the jurisdictions involved, and therefore likely to opt for simple and feasible but less than ideal compromise solutions.

At the comparative level, we propose to look at the approaches of some of the countries that have developed good equalization mechanisms. These include Australia, Canada, Switzerland, Germany, and South Africa.

Equalization in Australia

Australia is a federal state with six states plus two territories which were given their status in the 1970s and 1980s. Although the constitution does not make any

specific provision for equalization, it does make some provision about vertical sharing of resources. S. 87 in this regard provides that: -

> *"During a period of ten years after the establishment of the commonwealth and thereafter until the Parliament otherwise provides, of the net revenue of the commonwealth from duties of customs and of excise not more than one-fourth shall be applied annually by the commonwealth towards its expenditure. The balance shall in accordance with this constitution, be paid to the several states or applied towards the payment of interest on debts of the several states taken over by the commonwealth."*

On the other hand section 96 talks about grants of financial assistance to states in the following manner: -

> *"During a period of ten years after the establishment of the commonwealth and thereafter until the Parliament otherwise provides, the Parliament may grant financial assistance to any state on such terms and conditions as the Parliament thinks it fit."*

The question of whether or not some of such terms and conditions would touch on the question of equalization was left to parliament. This notwithstanding Australia has been lauded as the first country to develop an equalization mechanism among states. As a result of a series of conventions and referendums in the six ratifying colonies, the commonwealth of Australia, in 1933 created a mechanism for distributing grants from, the commonwealth to the states; a mechanism that has been widely admired. Because of the threat by western Australia to secede from the commonwealth due to the huge losses it was suffering as a result of the commonwealths introduction of common tariffs, a commonwealth legislation was enacted for the establishment of a statutory grants commission that would report to the Governor General on any application by a state for financial assistance under S. 96 of the constitution.

As a result of this legislation, a commonwealth Grants Commission (CGC) was established in 1933. The commission's initial mandate was to consider a states application for financial assistance and made recommendations. Such applications would normally be made on grounds that the state has a financial disability. For along time the commission has adopted an interpretation of financial disability that fluctuates between a restrictive and a liberal approach. The contest among the two schools of thought was one, whether in determining a states financial disability the C.G.C was supposed to examine the conditions in that state only or whether it could also have a comparative approach by looking at the conditions in other states. Secondly, whether disability should be restricted to revenue capacity by looking at the states revenue capacity or whether it can be extended to the question of needs which will require a look at the actual costs of delivering services in the state concerned.

The commissions second report which adopted the restrictive approach argued that "the only ground for … assistance is the inability to carry on without it ... Some states are certainly in serious financial difficulties. It must be made possible for them to function as states of the commonwealth at some minimum standard of efficiency." This restrictive approach argued that the CGC should enquire explicitly only into conditions in the claimant states and not do any comparisons with other states.

The liberal approach on the other hand argued for a more egalitarian approach that looks at more factors than just the conditions in the claimant states. In 1936 the equalitarian formula ran as follows:

> *"Special grants are justified when a state through financial stress from any cause is unable to efficiently discharge its functions as a member of the federation and should be determined by the amount of help found necessary to make it possible for that state by reasonable effort to function at a standard not appreciably below that of other states."*

The most recent pronouncement of this egalitarian approach stated that:

> "*Each state should be given the capacity to provide the average standard of state-type public services, assuming it does so at an average level of operational efficiency and makes an average effort to raise revenue from its own sources."*

The liberal egalitarian approach has finally won the day and an elaborate formula that takes into account all manner of factors has been developed. Indeed, this formula has made Australia the most egalitarian country in this area of equalisation grants. These factors include:

(i) The fiscal or financial capacity of the state to deliver services. This is normally based on the needs of each state.
(ii) The cost of delivering services in the state taking into account things like demography, climatic conditions and land terrain. Under this, calculations of expenditure relativeness and expenditure needs among the states must be taken into account.

The revenues that are available to the Commonwealth for purposes of the equalisation grants are the customs and excise, the income tax, corporation tax and a Commonwealth Goods and Services Act (GST) which is the equivalent of value added tax (VAT) which was introduced in 1998. Taking into account these factors a formula has been developed which runs in the following sequence:

(i) The revenue from the Goods and Services Tax (GST) is shared out on an equal per capita basis.
(ii) A needs adjustment calculation is then done along three aspects of revenue, expenditure and the special purpose payments. The following table shows how this works out.

Contributions of needs to grant shares, 2002-03(all entries are AUD per capita)

	NSW	Vic	Qld	WA	SA	Tas	ACT	NT

Per cap share of GST pool Needs	a	1848	1848	1848	1848	1848	1848	1848	1848
Adjustments:									
Revenue	b	-156	69	63	-225	336	579	272	48
Expenditure	c	-48	-338	-69	357	29	457	340	6320
SPPs	d	33	27	29	-176	-4	-10	-20	-465
Total	e=b+c+d	-172	-242	23	-43	361	1026	283	6003
Grant entitlement	f=a+e	1676	1606	1871	1805	2209	2875	2131	7851
Relativity	g=f/a	0.906	0.868	1.012	0.976	1.194	1.554	1.152	4.245

To understand the table, it is helpful to read it first across and then down. Row a shows the mean per capita amount available from GST, after costs of collecting it have been deducted. Row b is the CGC's calculation of the states' revenue disabilities. A positive sign implies a positive disability. As expected, two of the three donor states have negative signs (NSW because of a buoyant housing market and WA because of mineral wealth, both of which create healthy tax bases). The most unexpected number in this row is the high positive disability of the ACT, which is a high-income area. The reason is constitutional. Under the Constitution (s. 114), the States and the Commonwealth may not tax one another's property. As the largest employer and property-holder in ACT is the Commonwealth, the territory's payroll and property tax base is to that extent disabled.

Row c of the table summarises the Commissions' heavy lifting. It is the end product of an extremely detailed process of examining the cost of delivering public services, and the quantity of services required to enable each citizen of each State to be provided with public services to the level of the average of similarly placed citizens in all States. The Commission is at pains to insist that it compares like with like. In all states the quality of public services enjoyed by remote rural dwellers is below that enjoyed by city dwellers. The comparability exercise is not designed to produce equality of access and of services for all citizens of Australia, but only to ensure that a rural citizen of NT has comparable outcomes to a rural citizen of NSW, and an urban citizen of NT to an urban citizen of NSW. This row therefore gives huge per capita weighting to NT, and shows significant positive disabilities in WA (remote) and Tas (small and poor).

The next row (row d) is to compensate for the effects of SPPs. A negative sign means that the State receives above average SPP payments per capita; a positive sign means that it receives below average SPP payments per capita. Row e is simply the sum of the three above, and it gives the net difference for each State from an EPC distribution. From this are derived the absolute (row f) and relative (row g) per capita payments to each State.

Equalisation in Canada

Canada is a federal state with ten provinces and three territories. The Federation dates back to the 1867. Canada mooted the idea of equalisation in 1940, but was introduced as part of the tax-sharing arrangements in 1957. In 1982 the concept of equalisation was put into the Constitution at Section 36(2) which states that:

> "Parliament and the Government of Canada are committed to the principle of making equalisation payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation."

On the basis of this Canada has developed an equalisation formula that is based on legislation that is adjusted from time to time. The equalisation legislation is renewed every five years to take into account the changing circumstances. Under this programme there are three main transfers that are made by the Federation to the provinces.

(i) The Canada Health and Social Transfer (CHST), which supports provincial health care, post secondary education, and social assistance and social services. This is a block funded transfer that gives the provinces enhanced flexibility to design and administer social programs and to allocate funds among social programs according to their specific priorities. It consists of both cash and tax transfers. A tax transfer occurs when the federal government reduces its tax rates to allow provinces to raise their tax rates by the same amount. Under this transfer, all provinces and territories are given identical per capita CHST entitlements, to enable them to provide equal

support for health and social services to all Canadians, no matter where they live. An equal per capita distribution takes into account the population in each province.

(ii) Equalisation transfers, which provide less prosperous provinces with federal money to assist them provide and services to their residents. Equalisation payments are unconditional and receiving provinces are free to spend the money as they wish. In conjunction with the CHST, they play a significant role in helping provinces maintain and improve the quality of public services, including health care.

The transfers are calculated according to a formula set out in federal legislation. Provinces with revenue-raising capacity below a set standard receive equalisation transfers from the federal government to bring their per capita fiscal capacity up to the standard. The formula goes as follows:

- The revenue-raising capacity of each province (or fiscal capacity) is measured by examining its ability to raise revenue from more than thirty sources (or tax bases) including personal, income tax, corporation income tax, sales tax, property tax and many other sources – assuming it is average tax rates for each source.
- The standard measures the fiscal capacity of the five middle income provinces i.e. Quebec, Ontario, Manitoba, Saskatchewan and British Colombia.
- Equalisation payments are then made to raise the less prosperous provinces up to the standard required.

However, when a qualifying province's fiscal capacity declines or increases relative to the standard due to a slowdown in its economy or economic growth equalisation transfers are adjusted accordingly.

Equalisation payments are subject to a "ceiling" or "floor" provisions. The ceiling protects the federal government from unaffordable growth in payments, while the floor protects each province against any large annual decline in its payments. Equalisation estimates are also updated twice annually as new and better data become available reflecting economic developments and their impacts on provincial revenues.

(iii) Funding for the territories based on a Territorial Formula Financing (TFF). This is a transfer to the territorial governments which recognises the higher costs of providing public services in the north. The territories have a specifically designed federal funding program reflecting the higher costs of providing public services in the north, the rapid growth in population in this part of the country, the less developed economic bases from which to raise revenues, and their vast land mass and small population. The program also protects the territories against any serious downturn in their own revenues.

In addition to these three major transfers, Canada has many other transfer programs under which the federal government transfers funds to provinces. These include official languages and education, grants in lieu of taxes to municipalities, disaster financial assistance arrangements, as well as the following programs administered by the department of finance.

(a) A fiscal stabilisation program which was introduced in 1967 and is used to compensate provinces if their revenues fall substantially from one year to the next due to changes in economic circumstances. Declines in revenue caused by changes in a provincial tax policy or tax rates are not stabilised. A province is only eligible for stabilisation payments if economic conditions cause its revenues to decline in excess of five per cent in one year.
(b) Provincial personal income tax revenue guarantee program. This revenue guarantee program protects provinces that participate in tax collection agreements from major revenue reductions caused by changes in federal personal income tax policy. If during the cause of one year a federal policy change reduces the provinces personal income tax revenues by more than one per cent of the basic federal tax in the province, then the province becomes entitled to compensation.
(c) Statutory subsidises which have been operational since 1867.

Equalisation in Switzerland

Switzerland is a small federal country comprised of 26 cantons and "half-cantons". Its first measures of fiscal equalisation were introduced in 1938. The financial

package under this equalisation arrangements were abandoned several times until 1957. Eventually, the principles of fiscal equalisation were written into the constitution in 1958. Article 135 of the Constitution provides in this connection as follows:

> *(1) The Confederation shall promote financial equalisation among cantons.*
> *(2) When granting subsidies, its shall take into account the financial capacity of the cantons and the special situation of the mountainous regions.*

The cornerstone of the Swiss system of equalisation is the fiscal capacity indicator, on which equalisation funds are distributed – or not – to the cantons. The fiscal capacity indicator takes into account the following factors:

(i) Elements concerning the per capita national income of the cantons which is weighed at 0.3 of the total index;
(ii) The cantonal potential tax receipts per capita from various tax sources which is weighed at 0.3 of the total index;
(iii) The inverse of calculated tax burden, which is weighed at 0.2 of the total index;
(iv) Elements approximating the costs of accomplishing tasks, i.e. cantonal specific expenditure requirements, which are weighed at 0.2 of the total index. This last element concerns especially the mountainous cantons that face additional burdens for accomplishing tasks due to their geographical situation, and cantons which are scarcely populated.

Up to three major transfers are given in terms of equalisation:

(i) Conditional grants: Under this matching funds are distributed to the cantons as incentives for the accomplishment of certain tasks or as an indemnity for spill over effects. They are composed of two elements: a basic rate (for example 10% of the costs and an equalisation supplement up to 50 % of the costs. The equalisation element varies from canton to canton according to fiscal capacity.
(ii) Revenue sharing: The revenue sharing scheme includes an equalising element. The federal government gives part of its tax receipts to the cantons, and part of those receipts are distributed amongst the cantons according to their fiscal capacity. The

taxes involved are the direct federal tax, the withholding tax, the excise on petrol and motor fuel, and part of the national bank profits. For example, the federal government transmits 30% of the receipts of the federal direct tax to the cantons. Out of the 30 percentage points 13 are distributed according to fiscal capacity, while the remaining 17 percentage points are distributed according to the derivation principle.
(iii) Cantonal contributions to federal social security expenditures: Under this the cantons contribute to the federal expenditures for social policy i.e. old age/ survivors insurance, disabled pension scheme, unemployment allowances and family allowances, according to their fiscal capacity.

In addition to this it is noted that there are up to 40 conditional grant programs that have an equalisation element using various equalising formulae.

This Swiss equalisation schemes are quite complex and as a result reform efforts are being made. The reforms have proposed disentangling of tasks and financing, inter-cantonal co-operation and costs compensation, a new type of vertical co-operation and financing, a new horizontal equalisation scheme and extra federal funding for cantons facing additional charges.

Equalisation in South Africa

South Africa through the 1993 interim constitution and finally the 1996 final constitution has adopted a devolved system of government. The system is based on three spheres of government; the national sphere, the provincial sphere and the local sphere. At the provincial level the country is divided into nine provinces. The constitution deals with the question of sharing revenue and equalization using a language that talks in terms of equitable shares and allocations. Article 214 of the final constitution states as follows regarding this issue: -

"1. Equitable shares and allocation of revenue

214 (1) An Act of Parliament must provide for –

(a) the equitable division of revenue raised nationally among the national, provincial and local spheres of government;

(b) the determination of each provinces equitable share of the provincial share of that revenue; and

(c) any other allocations to provinces, local government or municipalities from the national government's share of that revenue, and any conditions on which those allocations may be made.

2. The Act referred to in subsection (i) may be enacted only after the provincial governments, organized local government and the Financial and Fiscal Commission have been consulted and any recommendations of the Commission have been considered, and must take into account -

(a) the national interest;

(b) any provision that must be made in respect of the national debt and other national obligations;

(c) the needs and interests of the national government, determined by objective criteria;

(d) the need to ensure that the provinces and municipalities are able to provide basic services and perform the functions allocated to them;

(e) the fiscal capacity and efficiency of the provinces and municipalities;

(f) development and other needs of provinces, local government and municipalities;

(g) economic disparities within and among the provinces;

(h) obligations of the provinces and municipalities in terms of national legislation;

(i) the desirability of stable and predictable allocations of revenue shares; and

(j) the need for flexibility in responding to emergencies or other temporary needs, and other factors based on similar objective criteria."

To advise on some of these matters and the formulation of a formula for the sharing of revenue, the constitution at articles 220, 221 and 222 establishes a Financial and Fiscal Commission. According to the Financial and Fiscal Commission Act of 1997, the Commission is supposed to act independently. It acts as a consultative body for,

and makes recommendations and gives advice to, organs of state in the national, provincial and local spheres of government on financial and fiscal matters. It may do so either at its own initiative or on request of an organ of state. The Commission in trying to formulate a formula is working towards a system of sharing that incorporates an equalization element. Separate calculations of each provinces needs and resources are made and built into the overall, equitable share. Profs. Christina Murray and Richard Simeon in their paper, "*South Africa's financial constitution, towards better delivery*? Say the following in this regard;

> *"Dividing the pie among the provinces, and determining the equitable share for each is driven by the stark reality of massive disparities not only among races and classes in South Africa, but also among provinces. The goal of sharing is thus to achieve a significant measure of equalization. To achieve this extensive effort has, been devoted to developing formulae that fully take into account both provincial needs and their resource capacities. The division is based on the demographic and economic profiles of the provinces. It includes an education share, a health share, a social security share, a basic share linked to the provinces population, a backlog component (related to provinces relative under development), an economic activity component (a proxy for provincial tax revenue) and an equally divided institutional component (based on the need to develop provincial management capacity). The result is that the division, in the words of the national Department of Finance, has a strong equity component recognizing the needs of poorer areas. This is especially evident in the backlog component, which recognizes the need to develop infrastructure in rural areas by taking into account each provinces share of the rural population. Three of the poorest provinces (Eastern Cape, Kwanzulu-Natal and Northern provinces) together take up over 60% of the backlog component of the provincial equitable share".*

In addition to the equitable share, the national sphere of government also gives to provinces some conditional grants.

The Division of Revenue Bill begins with a vertical division of revenue among the three spheres of government and then follows with a horizontal division among the provinces on the one hand and the municipalities on the other. The following table shows the vertical Division of revenue for the fiscal years 1998/1999, 1999/2000, 2000/2001 and 2001/2002.

Vertical Division – 2000/1

R million	**1998/99**	**1999/00**	**2000/1**	**2001/2**
Total budget expenditure	**229.9**	**233.5**	**251.5**	**266.7**
Less:				
Debt service costs	49.8	46.5	49.5	51.0
Contingency reserve	3.5	2.0	2.0	2.0
Resources to be divided	**176.7**	**185.0**	**197.9**	**207.7**
National equitable share	82.1	88.7	95.8	100.8
as a percent	*46.5%*	*47.9%*	*48.4%*	*48.6%*
Of which				
National departments	70.7	76.1	83.1	87.8
Conditional grants to provinces and local governments	11.4	12.6	2.7	13.0
Provincial equitable share	92.1	94.4	100.2	105.2
as a percent	*52.1%*	*51.0%*	*50.6%*	*50.6%*
Local government equitable				

Share	2.5	1.9	2.0	2.1
as a percent	*1.4%*	*1.0%*	*1.0%*	*1.0%*
Addendum				
Provincial allocations include conditional grants	103.4	106.0	111.8	117.1
Local government share include conditional grants	2.5	2.8	3.0	3.2

The table clearly shows that a greater percentage of revenues the national sphere of government is empowered to raise, is spent by the provinces. For all those years the national sphere has a percentage that ranges between 46% and 48%. But it is important to note that this percentage includes a sum that eventually goes to the provinces and local governments as conditional grants. The high spending power is vested in the provinces.

On the other hand the following table shows the horizontal Division of revenue for the fiscal year 2000/2001 among provinces.

Horizontal Division – 2000/1

R million	Equitable share	Conditional grant	Total	% of equitable share	% of conditional grant	% of total transfer
Eastern Cape	16 452	1 332	17 784	17.4%	10.9%	16.7%
Free State	6 408	857	7 265	6.8%	7.0%	6.8%
Gauteng	14 235	2 971	17 206	15.1%	24.3%	16.1%
KwaZulu Natal	18 894	2 234	21 128	20.0%	18.2%	19.8%
Mpumalanga	6 423	570	6 993	6.8%	4.7%	6.6%
Northern Cape	2 302	180	2 482	2.4%	1.5%	2.3%

Northern Province	12 626	1 068	13 694	13.4%	8.7%	12.8%
North West	8 009	658	8 667	8.5%	5.4%	8.1%
Western Cape	9 059	1 782	10 841	9.6%	14.6%	10.2%
Unallocated	0	590	590	0.0%	4.8%	0.6%
South Africa	94 408	12 242	106 650	100.0%	100.0%	100.0%

It is interesting to note that whereas Northern Cape receives a total of 2,482 billion rand, Kwazulu-Natal receives a total of 21,128 billion rand. And this, inspite of the fact that Kwazulu-Natal is an opposition zone.

This, together with the differences in the figures, clearly show that resources are not shared out on the basis of political exigencies but instead on the basis of objective criteria that takes into account the needs of each province and its level of development.

INTERGOVERNMENTAL RELATIONSHIPS AND THE NECESSARY INSTITUTIONAL AND INFRASTRUCTURAL FRAMEWORK

A successful design of intergovernmental relationships and the institutional and infrastructural framework for the same in a devolved system requires a prior understanding of the concept of intergovernmental relationships and why they become necessary in a devolved system. According to Professor Ron Watts, overlaps and interdependence in the exercise by governments of their power in devolved systems are inevitable and therefore demand that different levels of government treat each other as partners in the governance project and process. For this reason extensive consultation, negotiation cooperation and coordination between governments are required.

Secondly, in the course of these overlaps and interdependence as well as partnership, disputes among governments often arise and require institutional arrangements for resolution.

Thirdly, there are a number of devolved systems in which there is a constitutional requirement that a considerable portion of national legislation be administered by the sub-national unit governments. In such circumstances, the need for consultation, negotiation, co-operation and coordination between the different levels of government becomes higher.

Fourthly, in the fiscal area, the inevitability of both vertical and horizontal imbalances necessitate equalization arrangements and transfers that require extensive consultation, negotiation, co-operation and coordination.

Fifthly, where there are concurrent functions or powers assigned to different levels of government, flexibility and adjustment among the governments concerned become necessary. Similarly, neighbouring units, due to spill-over effects or shared resources, need to consult each other from time to time.

Sixthly, the nature of party politics are such that differences between different levels of government often arise. There are many times in devolved systems when government at the national level may be controlled by one political party while those of sub-national level are controlled by a different party. Quite often this causes strains that call for flexibility and adjustment.

Because of all this a good constitutional design ought to make provision for intergovernmental relationships and for institutions through which such relationships can be handled. In this regard a distinction needs to be made between competitive and co-operative devolution. In either case, mechanisms for intergovernmental relationships are required. If one goes for competitive devolution, disputes will often arise, whose resolution will have to be through mechanisms of intergovernmental relationships. On the other hand if one goes for cooperative devolution, extensive consultations and negotiations will be necessary to avoid disputes; calling for mechanisms of inter-governmental relationships.

Good examples of co-operative systems are Germany and South Africa. Germany's federal system is co-operative in nature and it puts in place what may be called, a system of negotiated and consultative government. A system in which decision-making on a lot of issues involves both the national and the sub-national levels of government in negotiations and consultations at very many different levels. For instance, between the national government and the sub-national level. But other times between two or more units at the sub-national level. This system has created what has been called an interlocking system of government.

South Africa on the other hand followed the German model and has put in place a system referred to as "co-operative government". In both systems success lies in the careful design of mechanisms of intergovernmental relationships.

Generally, intergovernmental relations have two dimensions. One is that of relations between the national level and unit governments. The other is that of inter-unit relations. Within each of these dimensions, relations may commonly involve all the constituent units, regional groupings of units, or be bilateral i.e. between the national government and one regional unit or between two regional units.

In a number of countries there is no provision for formal mechanisms and institutions for intergovernmental relations. As a result, informal mechanisms are adopted on an ad hoc basis. These include direct communications between different levels of government. Sometimes ministers, officials and representatives of different governments communicate with each other informally, even by telephone.

However the majority of countries use a combination of both informal and formal mechanisms. At the formal level provision is made in the constitution and other legislation for institutional arrangements for this purpose.

INSTITUTIONAL FRAMEWORK

As noted above a number of countries use constitutions and legislation for the creation of institutions that are involved in intergovernmental relations. The institutions created include the following:

(i) Second Chamber of Parliament

Many federal systems have a bicameral legislative system. This is to ensure that the legislative power is shared not between two institutions at the national level but between the devolved levels of states. The second chamber is therefore created merely as an infrastructure within which the devolved or sub-national level of government is enabled to participate in legislation at the national level. The second chamber therefore is normally representative of the units at the devolved level. In this manner, legislative decision making at the national level is a shared, negotiated and consultative process between the national level of government and the sub-national level of government on the one hand and among the different units of the sub-national level on the other. The second chamber in most countries has absolute or suspensive vetos or both. This clearly shows that the regions normally have a major role to play at the national level.

In terms of composition, recruitment and functions the following comparative evidence is available.

(i) The United States of America has a senate in which the states have equal representation, regardless of their size in terms of territory, population and the economy. Since 1913 the senators are directly elected by way of simple plurality. The senate has an absolute veto. But committees representing both the senate and the House of Representatives are used to resolve disputes.

(ii) Australia also has a senate in which the states have equal representation. The senators are elected directly through proportional representation. The senate has an absolute veto which is followed by double dissolution of both houses and Joint sittings.

(iii) Canada has a senate in which there is equal regional representation for groupings of provinces. However, the senators are not elected but appointed by the federal government. Because of this the Canada senators do not have much credibility as spokespersons for regional interests. The senate has an absolute veto.

(iv) Austria has a Bundesrat whose members are elected by state legislatures. Respresentation among states is weighted, the range being 12 – 3. It has suspensive veto but may be overridden by simple majority in the lower house, the Nationalrat.

(v) Germany has a Bundesrat whose members are ex-officio delegates of state governments. Representation is weighted and linked to votes which run from 3, 4, 5 up to 6. The states have block votes which can however be overridden by a corresponding lower house majority. But it has an absolute veto on any federal legislation affecting state matters. This comprise 60% of all legislation. Provision for mediation committees is also made.

(vi) India has a council of states (Rajya sabha) whose members are elected by the state legislatures. There is also a small number of additional special representatives. The representation is weighed with a range of 86-12. there is provision for a veto which is resolved by a joint sitting of the two houses of parliament.

(vii) Belgium has a senate comprised of 40 senators directly elected; 21 senators indirectly elected by Linguistic community councils and 10 co-opted senators. There is variable representation specified for each unit. The senate has equal competence with the House of Representative on some matters but others the House of Representatives has an overriding power.

(viii) South Africa has a national council for provinces (NCOP) in which provinces represented equally by a delegation headed by the premier of the

provinces one The delegation includes six permanent delegates selected by the legislature of the province and three other special delegates who may rotate according to the issue under discussion.

In the area of intergovernmental fiscal relations, some kind of commission is normally put in place to assist in the determination of the formula to be used in sharing revenues. We have already noted the case of Australia where there is an independent Commonwealth Grants Commission. South Africa has an independent Financial and Fiscal Commission (FFC) established under the 1997 intergovernmental Fiscal Relations Act. The FFC has a chair and deputy chair, nine members nominated by the provinces, two by organized local government, and nine other persons.
In other places, such commissions are supplemented or substituted by intergovernmental committees. For instance, in South Africa there is an independent Intergovernmental Forum (IGF) which brings provincial premiers and national ministers together on a quarterly basis to discuss policy. It is supported by a Technical Intergovernmental Committee (TIC) made up of senior officials. There is also the Forum for South African Directors General (FOSAD). The provincial ministers of finance also meet regularly as the Budget Council. There are several other ministerial forums.

In Germany, there is provision for a conference of the Heads of Government of the Federation and the Lander. They are held between the Federal Chancellor and the minister, president or governing mayors of the Lander several times a year.

In other spheres other than finance, the German system has the Conference of Party Leaders in the Bundestag and the Lander legislatures. For inter-parliamentary co-ordination, there is the conference of parliamentary presidents of the Federation and the Lander. At the Lander level, the conference of ministers - presidents is provided for.

In the area of resolution of disputes the role of a constitutional court or a supreme court. In establishing a constitutional or supreme court in a devolved system, two approaches may be followed, one approach is to treat a supreme court purely as part of the Judiciary as a supreme constitutional organ. In this event, the constitutional or

supreme court is assigned jurisdiction in a manner consistent with the judicial function of the state. This will obviously be restrictive as the court will not be required to play a major role in intergovernmental relations, since it is not supposed to play a major role in the policies of the state.

The other approach is to treat the Constitutional or Supreme Court as both part of the Judiciary as a supreme constitutional organ and a separate and independent supreme constitutional organ. In this case the assignment of jurisdiction to the court is broad since the court is supposed to play a major role in the intergovernmental relations in the system. The court is normally given jurisdiction to resolve disputes among other supreme constitutional organs and among different levels of government. In this event the court plays a major role in the politics of the state since some of the conflicts among the different supreme constitutional organs and the different levels of government will be mainly political. Viewed from this perspective, the advisory jurisdiction our draft assigns to the Supreme Court presents no problem, contrary to the views expressed by a number of delegates at the conference. Germany's constitutional court takes this second approach.

LINKS BETWEEN DEVOLUTION AND THE OTHER CHAPTERS OF THE CONSTITUTION

The question of Links between the structure and design of devolution and the other chapters of the constitution is a very important one. Truly, devolution will impact on very many aspects of the constitution. But looking at the draft as it is now, the devolution chapter stands alone while the other chapters are also stand alone-chapters that have nothing linking them to devolution. The effort to link the two must be perceived in terms of mainstreaming devolution in the whole constitutional document. It must run through all the chapters of the draft. This effort can benefit from the approaches used in constitutions of other countries. In some of them devolution is addressed in the earliest chapters of the constitution that deal with the constitution of the state.

For instance, the South African 1996 Final constitution address devolution in chapter 3 which appears to be the constitutive chapter entitled co-operative government. Article 40 of this chapter states in this regard as follows: -

> *"Government of the Republic*
> *40 (1) In the Republic, government is constituted as national, provincial, and local spheres of government which are distinctive interdependent and interrelated.*
>
> *(2) All spheres of government must observe and adhere to the principles in this chapter and must conduct their activities within the parameters that the chapter provides".*

Article 41 then follows with what are titled as principles of co-operative government and intergovernmental relations. Reading through these principles, one clearly sees that they are principles about devolved governments.

On the other hand the 1998 constitution of Switzerland deals with the question of the system and structure of government in the first chapter of the constitution referred to as Title 1 on General provisions Article 1 addresses this issue by stating the units or cantons that form the Swiss confederation.

> *"The Swiss people and the cantons of Zurich, Berne, Lucerne, Uri, Schwyz, Obwald and Nidwald Glarus, Zug, Fribourg, Solothurn, Basel-Land, Schaff-hausen, Appenzell Outer Rhodes and Apenzell Inner Rhodes, St. Hall, Grisons, Aurgau, Thurgau, Ticino, Vaud, Valais, Neuchafel, Geneva, and Jura form the Swiss confederations."*

Article 2 then deals with the issue of the purpose of the confederation while article 3 addressed the sovereignty of the cantons in so far as it is not limited by the federal constitution.

There are however other countries which start addressing the issue of devolution right in the preamble of the constitution. A good example in this regard is the German Basic law which states the following in the preamble.

> *"Conscious of their responsibility before God, and humankind, Animated by the resolve to serve world peace as an equal part of a united Europe, The German people have adopted, by virtue of their constituent power this Basic Law. The Germans in the Lander of Baden-Wurtemberg, Bavaria, Berlin, Brandenburg, Bremen, Hamburg, Hesse, Lower Saxony, Mecklemburg-Western Pomerania, North-Rhine/West Phalia, Rhineland-Palatinate, Saarland, Saxony, Saxony-Anhalt, Schheswig-Holstein and Thuringia have achieved the unity and freedom of Germany in free self-determination. This basic law is thus valid for the whole German nation."*

Taking these experiences in to account one may then look at some of the parts of our draft constitution with a view to recommending ways of mainstreaming devolution.

THE PREAMBLE AND CHAPTER ONE: SOVEREIGNTY OF THE PEOPLE AND SUPREMACY OF THE CONSTITUTION

A look at the preamble clearly shows that devolution is not mentioned anywhere. Chapter one which deals with the sovereignty of the people and the supremacy of the constitution, does not also incorporate the devolution idea. Article 1(2) which indicates that the people shall exercise their sovereign power either directly or through their democratically elected representatives could be rephrased to recognise the fact that the concept of democratically elected representatives applies at all levels of devolved government.

Article 1(3) on the other hand seeks to allocate the sovereign authority of the people horizontally to the legislature, the executive, the judiciary and the constitutional commissions. To mainstream devolution in this concept, we must allocate the people authority both vertically and horizontally. We must vertically allocate the people's authority to all levels of government before we allocate it horizontally to the four mentioned areas. Article 2 which deals with the supremacy of the constitution may also be rephrased to clearly indicate that the supremacy of the constitution applies at all levels of government. Article 2 (2) in particular could be rephrased to read that the constitution "binds all authorities at all levels of government and persons throughout

the Republic". Article 2 (4) could also be rephrased to subject laws made at the lower levels of government to the constitution. Article 3 which deals with enforcement of the constitution may also be expanded to allow the bringing of an action by a level of government. Finally article 5 which states the laws of Kenya must recognise the laws enacted at the devolved levels of government.

CHAPTER TWO: THE REPUBLIC

Chapter two which deals with the Republic, currently addresses the issue of the constitution of the state only. To mainstream devolution, it will be proper to use the chapter to constitute both the state and the government. This could be done by borrowing from the language of South African article 40(1) which constitutes government as national, provincial and local spheres of government which are distinctive interdependent and interrelated. This language constitutes government at all the devolved levels.

Secondly, Article 7 which deals with territory could be changed borrowing from article 1 of the Swiss constitution and the preamble of the German constitution, both of which list the units at the sub-national level as being the ones that constitute or form the state. As such this chapter of our draft can list all the units we create at the sub-national level. The alternative is to follow the South African approach which mentions the provinces in chapter six dealing with the provinces.

Articles 9 and 10 of the draft which deal with both language and religion may need to be reconsidered to put them within a devolution context. This will require that we identify and distinguish between the official languages at the national level of government and what may be official languages at the devolved levels of government. Religion and religious practices may also be dealt with in a varying manner taking in to account the different cultures and practices of different devolved units.

CHAPTER THREE: NATIONAL GOALS, VALUES AND PRINCIPLES

Chapter three dealing with the national goals, values and principles also needs to be recast to capture the concept of devolution and the principles thereof as well as the

governance philosophy that devolution aims at giving effect to. In particular, the question of financial equalisation. Throughout the various parts of Article 14, it would be advisable to put obligations on all the levels of government instead of putting them on the Republic which sounds a BIT general. We would rather talk of the national government and the devolved levels of government than of the Republic. In this regard, article 41 of the Swiss constitution dealing with social goals may be instructive. Article 41(1) talks of:

> *"The confederation and the cantons shall strive to ensure that, in addition to personal responsibility and private initiative, ……."*

and article 41(2) talks of

> *"The confederation and the cantons shall strive to ensure that every person shall be insured against the economic consequences of old age, disability, illness, accidents, unemployment, maternity, orphan-hood and widowhood."*

CHAPTER FOUR: CITIZENSHIP

The chapter on citizenship will require some rethinking, particularly when it comes to the distribution of the power to grant citizenship and to issue identification documents to the citizens. This power may need to be shared between the national level of government and the devolved levels of government.

CHAPTER FIVE: THE BILL OF RIGHTS

The Bill of Rights chapter may need to be recast as to provide an opportunity for the protection of minorities within the devolved units. There may be need to capture the concept of group rights. The articles that deal with the binding effect of the constitution and the Bill of Rights must also extend to cover devolved authorities. For

instance, article 72 which deals with application of the Bill of Rights may need to be recast. Article 72 (1) in particular may need to be rephrased to read something like: -

> *"The Bill of Rights applies to the interpretation of all law and binds all legislative, executive, and judicial authorities and all organs and agencies of the state at all levels of government and all persons."*

CHAPTER SIX: REPRESENTATION OF THE PEOPLE

Rethinking a number of issues in the chapter on the representation of the people may be necessary. For instance, there is need to decide whether the same electoral system must be used at both the national and devolved levels. Secondly, should the qualifications to vote and to stand for office be the same across the country or should devolved units be allowed some level of discretion to, through their own legislation, determine some of these matters. Should elections at both the national level and the devolved unit levels be held at the same time or can they be separated? Even at the devolved unit level, should all the devolved units hold elections at the same time or can they be separated. In Germany for example, the Landers hold their elections at different times.

The concept of political parties must be recast within the context of devolution. It has to be determined whether or not it is proper for the draft to insist on the national nature of political parties. Supposing one wants to establish a party whose operations are limited to a region and to participation in politics at the devolved unit level only?

CHAPTER SEVEN: THE LEGISLATURE

On chapter seven which deals with the legislature also needs to be done to incorporate the devolution concept. First, at the conceptual level, the chapter should start by not talking of the institutional arrangements i.e. the institution of the legislature, but of the functional and power arrangement s i.e. the legislative power of the state. This will require a definition of the legislative power of the state and provisions on how that

power is to be shared vertically among the national and the devolved levels of government.

This vertical sharing provides devolved units at the sub-national level of government with an opportunity to participate in the legislative policy making function of the state at two different levels. First, each of the devolved units is assigned legislative power and functions allowing it to legislate laws in certain clearly identified areas, for application in its own territorial area and on its own citizens or persons within its own territorial area.

Secondly, all the devolved units at the sub-national level are allowed to share and participate in legislative policy decision making at the national level. They are allowed to have a say in the making of the laws that apply to the entire country. This is meant to allow the various regions to input in what become national laws.

Once the principle that legislative decision making at the national level is to be shared between the national and the devolved levels of government has been stated, the constitution can then move to the institutional question and create the national institutions that constitute the infrastructure through which the two different levels of government share and participate in this legislative decision making. In this approach the lower house therefore becomes the institutional infrastructure through which the national level of government participates, while the upper house becomes the institutional infrastructure through which the devolved levels participate. It is for this reason that second chambers in devolved systems draw membership from the representatives of the devolved units.

A look at the Swiss, German and South African constitutions may serve to illustrate some of these issues. The Swiss constitution in the chapter on *"Relationship between the confederation and the cantons"* deals with participation in Federal decision making at article 45 in the following manner:

> *"45(1) In the cases foreseen by the Federal constitution, the cantons shall participate in the decision making process on the federal level, in particular in federal legislation.*

45(2) The confederation shall inform the cantons timely and fully of its plans, it shall consult them if their interests are involved."

Article 46 then makes provision for the implementation of Federal Law by the cantons in the following manner:-

"46(1) The cantons shall implement federal law in conformity with the constitution and the statue.

(2) The confederation shall leave the cantons as large a space of action as possible, and shall take their particularities into account.

(3) The confederation shall take into account the financial burden that is associated with implementing federal law by leaving sufficient sources of financing to the cantons, and by ensuring an equitable financial equalization."

Finally, Title 5 of the constitution which deals with the establishment of Federal authorities at chapter 2 addresses the issue of the legislative Federal authority. Article 148 organises the legislatures in the following manner: -

"148 (1) subject to the rights of the people and the cantons, the Federal Parliament is the highest authority of the confederation.

(2) It has two chambers, the House of Representatives and the Senate, which have equal powers."

On composition and elections, article 149 provides for a House of Representatives comprising 200 members elected directly by the people according to the system of proportional representation. On the other hand article 150 provides for a senate "of 46 delegates of the cantons." This are delegates who come as representatives of the cantons.

The German Basic law on the other hand deals with the question of sharing the legislative power at the national level in chapter IV on the Bundesrat. Article 50 provides in this regard that;

> *"The Lander shall participate through the Bundersrat in the legislative process and administration of the Federation and in matters concerning the European Union."*

Article 51 follows with the question of composition and recruitment of the Bundersrat as follows:-

> *"51 (1) The Bundesrat shall consist of members of the Land governments which appoint and recall them. Other members of their governments may serve as alternatives.*
>
> *(2) Each Land shall have at least three votes, Lander with more than two million inhabitants shall have four, Lander with more than six million inhabitants five, and Lander with more than seven million inhabitants six votes.*
>
> *(3) Each Land may delegate as many members as it has votes. The votes of each Land may be cast only as a block vote and only by members present or their alternates."*

Chapter VII then deals with the question of Federal legislation, allocating legislative jurisdiction between the Federal level of government and the Lander level of government in terms of both exclusive jurisdiction of the Federal level and that of the Lander level and concurrent jurisdiction. The articles under this chapter clearly specify the areas in which each level of government has legislative authority.

The 1996 south African constitution addresses the question of the sharing of the legislative power by taking into account double vertical sharing of the power. Article 43 of chapter 4 of the constitution which is entitled "the legislative authority of the Republic" provides as follows:-

"43 In the Republic, the legislative authority –

(a) of the national sphere of government is vested in Parliament as set out in section 44;

(b) of the provincial sphere of government is vested in the provincial legislatures, as set out in section 104; and

(c) of the local sphere of government is vested in the municipal councils as sent out in section 156."

On the other hand Article 42 entitled composition of Parliament addresses this question of legislative authority in the following manner:

"42 (1) Parliament consists of –

(a) the National Assembly; and

(b) the National Council of Provinces.

(2) The National Assembly and the National Council of provinces participate in the legislative process in the manner set out in the constitution.

(3) The National Assembly is elected to represent the people and to ensure government by the people under the constitution. It does this by choosing the President, by providing a national forum for public, consideration of issues, by passing legislation and by scrutinizing and overseeing executive action.

(4) The National Council of provinces represents the provinces to ensure that – provincial interests are taken into account in the national sphere of government. It does this mainly by participating in the national legislative process and by providing a national forum for public consideration of issues affecting the provinces."

Taking these experiences in to account it becomes very clear that devolution will necessitate a reconfiguration of the chapter on the legislature. The chapter will have

to clearly set out the sharing of the legislative power among the national and the other levels of government on the one hand and the sharing of the legislative power at the national level between the national and the sub-national levels of government. The aim is to allow the sub-national level of government to participate in legislation at the national level. If the second chamber of Parliament is reconfigured from this perspective, then it becomes easy to see how very necessary it is in a devolved structure.

Secondly, the title of the chapter may itself have to change from "The Legislature" to "The Legislative power of the State."

CHAPTER EIGHT: THE EXECUTIVE

Like the Legislature, we need to reconfigure the executive power of the state. In doing so, questions arise whether this aspect of state power should be shared horizontally only, or both horizontally and vertically. This question takes us back to the issue of assignment of functions which is done along the lines of the four aspects of state power; namely, the Legislative power of the state; the Judicial power of the state; the executive power of the state and the financial power of the state. Devolution normally involves the devolving of some or all the four aspects of state power. When a specified aspect of this state power is devolved then you talk of vertical sharing of that particular aspect of state power. As such, it becomes necessary to provide for the necessary institutional arrangements of the devolved Levels of government for exercise of the devolved power. If you assign executive functions to devolved levels of government, then you must of necessity talk of vertical sharing of the executive power of the state. In this event a good constitutional design must recognize and clearly provide for this executive power sharing. Unfortunately oxthodox constitution-making does not seem to pay any attention to this question. Constitutions in many devolved countries clearly assign a lot of executive functions to the devolved levels of government but when it comes to structuring the executive they address it as if all executive power is vested in the national Level of government. Some constitutions such as the German one, allocate a lot of legislative functions to the national Level but obligate the devolved levels to do the implementation of those legislations. Yet when addressing the executive, the constitution does not expressly

mention that there is vertical sharing of the executive power. For instance, the German Basic Law has a chapter dealing with the Federal Government in which there is no mention of vertical sharing of the executive power. On the other hand the South African constitution has a chapter on "The President and National Executive which does not in anyway suggest such vertical sharing. If anything article 85 shifts from the Language of the Chapter title which seems to be restricted to the national executive excluding the devolved executive and infact starts talking of vesting of the executive authority of the Republic without recognition of the need for the vertical sharing. The article entitled "Executive authority of the Republic" States as follows :-

> *"85 (1) The executive authority of the Republic is vested in the president.*
> *(2) The President exercises the executive authority, together with the other members of the cabinet by –*
> *(a) Implementing national legislation except where the constitution or an Act of parliament provides otherwise;*
> *(b) Developing and implementing national policy;*
> *(c) Co-ordinating the functions of departments and administrations,*
> *(d) Preparing and initiating legislation; and*
> *(e) Performing any other executive function provided for in the constitution or in national Legislation."*

Although the constitution assigns to the provinces and municipalities a lot of powers to implement national legislation article 85 (2)(a) categorically assigns the power to implement national legislation to the president and the cabinet. It does not mention anywhere the executive authority of devolved Levels to implement legislation. One may correctly argue that this is covered by the phrase "except where the constitution or an Act of parliament provides otherwise". But why not expressly mention the devolved levels as sharing in this aspect of the executive authority? Left as it is, the article could be interpreted as suggesting that the devolved levels implement legislation as agents of the President and the cabinet. This would then amount to delegation and not devolution. Article 85(2) (b) which vests the executive power of developing and implementing national policy in the President and the cabinet seems to contradict the principles of cooperative government which emphasise that the three

spheres of government "are distinctive, interdependent and interrelated" and as a result require them to consult and negotiate on matters of common interest. Development and implementation of national policy is a matter of common interest which can not be exclusively vested in the president and the cabinet. similarly, article 85 (2) (d) vest in the president and the cabinet executive authority of preparing and initiating legislation" and ignores the fact that other parts of the constitution have allowed the National Council of provinces to initiate some bills and that devolved levels of government are assigned some legislative powers which include the power to prepare and initiate bills.

It is also important to note that a number of constitutions having failed to clearly indicate the vertical sharing of the executive power of the state go a head to assign executive functions to the devolved Levels of government and even establish executive institutions at these levels to exercise this executive power of the state. For example, under the German Basic law, each Lander has a cabinet headed by a minister president. On the other hand the South African constitution has a chapter on provinces which establishes an executive council headed by a Premier in each province to exercise the executive authority of the province.

Taking these matters into account, it is important to mainstream devolution in the chapter on the executive by reconfiguring the chapter to take into account the following matters :-

(a) A clear recognition of the vertical sharing of the executive power of the state and a constitutional rendition that avoids a confusion such as has been discussed above.

(b) An establishment of some institutions through which the executive institutions at the devolved level can, through consultation and negotiation participate in executive decision-making at the national level of government. These would be institutions akeen to the second chamber which as proposed is supposed to provide the infrastructure through which the devolved levels of government share and participate in legislative policy and decision making at the national level.

(c) At the level of horizontal sharing of the executive power of the state at the national level, involving the creation of the offices of president and prime minister, the need to involve the second chamber of parliament in the recruitment of the prime minister. The draft currently provides that the president proposes a name to the national Assembly, which may approve or reject the name. It is important to note that if we adopt a second chamber along the lines of the German Bundesrat and the South African National council of provinces, giving the upper house some role to play in approving the appointment of the prime minister would be a wise thing to do. This is because in Germany, and in South Africa the difference between the two houses is that whereas the lower houses are elected by universal adult suffrage either directly and or through proportional representation, to represent the citizens directly, the upper houses are elected or appointed by the executives and or the legislature of the Lander in Germany and the provinces in South Africa to represent the collective interests of the Lander or provinces concerned. Secondly, whereas the members of the lower houses vote in the houses on the basis of their personal conscience, those of the upper houses are delegates of the Lander or provinces they represent and vote on the collective instructions of those Lander or provinces. For this reasons it would be reasonable to allow the supper house to play a role in the appointment of the prime minister since the votes in that house, as we have noted, are votes of the regions represented and not of the individual members as is the case in the lower house.

CHAPTER NINE: JUDICIAL AND LEGAL SYSTEM

Two very important questions present themselves for consideration.

(i) Should the Judicial power of the state also be devolved and if so to what extent? The draft points in the direction of non-devolution of the Judicial power of the state comparative studies also indicate that this is the one power that is better managed from the center but deconcentrated to the devolved levels. Uganda has devolved this power including criminal jurisdiction and reports from there indicate that the

approach could lead to a breakdown of the rule of law. Reports indicate that judicial tribunals at the lowest devolved levels are conducting criminal trials and sentencing people even without keeping any court records.

But on the other hand the Kenyan people in their views to the commission suggested that they would like elders to be involved in the settlement of disputes including land disputes and probate and administration of estates of deceased persons at the local level. This would call for a reconfiguration of the judicial power of the state to see whether certain aspects could be devolved and what controls to put in place to avoid the Ugandan fiasco.

(ii) The role of the proposed supreme court. As noted in the part on intergovernmental relationships, the question is whether the supreme court should be configured merely as part of the judiciary as a supreme constitutional organ or both as part of the judiciary as a supreme constitutional organ and as a separate supreme constitutional organ. When configured as purely part of the judiciary as a supreme constitutional organ the supreme court is assigned jurisdiction in a manner consistent with the judicial function of the state. This is normally restrictive as the court is normally not supposed to play a major role in the intergovernmental relations, since it is not supposed to play a major role in the politics of the state.

On the other hand, when configured as both part of the judiciary as a supreme constitutional organ and also a separate and independent supreme constitutional organ, the assignment of jurisdictions to the court is normally broad since the court is supposed to play a major role in the politics of the state. Indeed in a devolved system of government the court normally plays a major role in the intergovernmental relations since it becomes the main forum to which disputes involving different levels of government and different supreme constitutional organs are taken for resolution. In this event the supreme court is normally assigned jurisdiction under two major categories.

(a) Restrictive jurisdiction that is consistent with the judicial power of the state; and

(b) Broad jurisdiction under which the court is treated as a supreme constitutional organ and therefore allowed to play a role in politics. In exercise of the jurisdiction the court may perform what may amount to legislative functions as well as executive functions of policy making and policy implementation. In this circumstances, there are instances in which such a court is assigned original and final jurisdiction. There are matters which can only originate and end in such court. Matters that cannot under whatever circumstances be handled in any other court.

Two good examples are the German Federal constitutional Court and the South African constitutional court. Article 93 of the German Basic Law confers these two types of jurisdiction upon the Federal constitutional court. It states as follows:-

"93 (1) The federal constitutional court shall rule:

1. *on the interpretation of this Basic Law in disputes concerning the extent of the rights and obligations of a supreme federal institution or other institutions concerned who have been vested with rights of their own by this Basic Law or by the rules of procedure of a supreme Federal institution;*

2. *in case of disagreement or doubts as to the formal and material compatibility of federal or Land Legislation with this Basic Law or as to the compatibility of Land Legislation with other federal legislation at the request of the Federal Government, a land government or one third of the members of the Bundestag;*

2a. *in case of disagreement as to whether a law meets the requirements of paragraph (2) of Article 72 on request from the Bundesrat or the government or the parliament of a land;*

3. *in case of disagreement on the rights and obligations of the Federation and the Lander, particularly in the implementation of federal legislation by the Lander and in the exercise of federal supervision;*

4. *on other disputes involving public law between the federation and the Lander, between Lander or within a land, unless recourse to another court exists;*

4a. *on constitutional complaints which may be filed by anybody claiming that one of their basic rights or one of their rights under paragraphs (4) of Article 20 or under Article 33, 38, 101, 103, or 104 has been violated by a public authority;*

4b. *on constitutional complaints by municipalities or associations of municipalities alleging violation of their right of self-government under Article 28 by a (federal) law; in case of violation by a land law, however, only where a complaint cannot be lodged with the land constitutional court;*

5. *In the other cases provided for in this Basic.*
(2) The Federal Constitutional Court shall also rule on any other cases referred to it by Federal legislation."
On the other hand Article 167 of the South African constitution confers on the Constitutional court both categories of restrictive and broad jurisdiction. Article 167 (3) (4) (5) (6) and (7) provide in this regard as follows:-

67 (3) The Constitutional court –

(a) Is the highest court in all constitutional matters;

(b) may decide only constitutional matters and issues connected with decisions on constitutional matters; and

(c) makes the final decision whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter.

(4) Only the constitutional court may –

(a) decide disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers or functions of any of those organs of state;
(b) decide on the constitutionality of any parliamentary or provincial Bill, but may do so only in the circumstances anticipated in section 79 or 121;

(c) decide on the constitutionality of any amendment to the constitution;

(d) decide that parliament or the President has failed to fulfil a constitutional obligation; or

(e) *certify a provincial constitution in terms of section 144.*

(5) The constitutional court makes the final decision whether an act of parliament, a provincial Act or conduct of the president is constitutional, and must confirm any order of invalidity made by the supreme court of Appeal, a High Court or a court of similar status, before the order has any force.

(6) National legislation or the rules of the constitutional court must allow a person, when it is in the interests of Justice and with leave of the constitutional court –

(a) to bring a matter directly to the constitutional court; or

(b) to appeal directly to the constitutional court from any other court.

(7) A constitutional matter includes any issue involving the interpretation, protection or enforcement of the constitution."

In other parts of the constitution the president of the constitutional court is the one to preside over the National Assembly when it is electing the President of the Republic.

From the above two experiences, it is clear that in a devolved system, there are certain policy and political questions that are resolved through either a constitutional or supreme court in their capacities as supreme constitutional organs. As such devolution has to be mainstreamed into to the chapter on the judiciary to capture some of these matters.

CHAPTER ELEVEN: LAND AND PROPERTY AND ENVIRONMENT AND CHAPTER TWELVE: NATURAL RESOURCES

These two chapters will also require to be configured in the context of devolution. This may be best done by way of assignment of functions to different levels of government. One needs to identify which land and environment matters should be assigned to which level of government. It is important to note that many Kenyans in general and the delegates in particular were very concerned that although agriculture plays a major role in our economy there is no mention of agriculture in the draft constitution. Not even in the chapter on Land and Property and that on the Environment and Natural Resources. Perhaps the approach under the Swiss Constitution may be instructive in this regard. The Swiss constitution has, under chapter 2 on the powers of the Confederation and the cantons a section on the economy. Under this section on the economy, there are various Articles that deal with the following matters:-

- Principles of economic order;
- Private economic activity;
- Competition policy;
- Consumer protection;
- Banking and Insurance;
- Monetary policy;
- Policy on Economic Development;
- Foreign trade;
- Supply of essential Goods and services;
- Structural policy;
- Alcohol
- Gambling and
- Weapons and military material.

Article 104 on Agriculture in particular provides as follows :-

> *" 104 (1) The confederation shall ensure that agriculture contributes substantially by way of a sustainable and market-oriented production*
>
> *(a) to the secure approvisionment of the population;*

(b) to the conservation of national resources and the upkeep of rural scenery;

(c) to a decentralized inhabitation of the country.

(2) In addition to the measures of self-help that may reasonably be expected from agriculture and, if necessary, in derogation of the principle of economic freedom, the confederation shall promote farms cultivating land.

(3) It shall conceive the measures in such a way that agriculture may fulfil its multiple functions. Its powers and tasks shall particularly be the following;

(a) It shall complement agricultural revenues by direct payments, to secure a fair and adequate remuneration for the services rendered, provided that compliance with ecological requirement is proven;

(b) It shall promote by way of economic incentives, forms of production which are particularly close to nature and friendly to the environment and the animals;

(c) It shall legislate on the declaration or origin, quality, production and processing methods for foodstuffs;

(d) It shall protect the environment against pollution due to excessive use of fertilizers, chemicals and other auxiliary substances;

(e) It may encourage agricultural research, counselling and education and subsidize investments;

(f) It may legislate on the consolidation of rural property.

(4) To these ends it shall invest dedicated funds from the agricultural field and general federal funds."

Taking this in to account one may even consider combining the chapter on Land and Property with that on Environment and Natural Resources into one chapter called the economy. Under such chapter some of the matters handled under the economy in the Swiss constitution may be covered. In addition land may be covered under the economy to emphasise its role in our economy. Similarly the environment and Natural Resources may also be covered from the economic perspective.

CHAPTER THIRTEEN: PUBLIC FINANCE AND REVENUE MANAGEMENT

In mainstreaming devolution in the chapter on public finance and Revenue management the chapter has to be reconfigured to take into account the following issues.

1. The need to address the question of the principles of taxation. A number of delegates have raised this issue saying that the draft seems to give the state unlimited taxing powers. A look at Article 127, of the Swiss constitution dealing with principles of taxation may be quite instructive. The Article provides as follows: -

> *"127 (1) The general principles of taxation, particularly the circle of taxpayers and the object of the tax and its calculation, shall be established by statute.*
>
> *(2) To the extent that the nature of the tax allows it, the principles of universality and equality of tax treatment and of taxation according to economic capacity shall be followed.*
>
> *(3) Inter-cantonal double taxation is prohibited. The confederation shall take the necessary measures."*

On the other hand Article 128 on direct taxes seeks to limit even the percentages of the tax to be imposed in certain cases. The Article provides as follows: -

> *"128 (1) The confederation may raise a direct tax:*
>
> *(a) of at most 11.5 percent on the income of natural persons;*
> *(b) of at most 9.8 percent on the net profit of legal entities;*
> *(c) of at most 0.0825 percent on the capital and the reserves of legal entities.*

> *(2) In establishing the tax scales, the confederation shall take into account the burden of direct taxes on the cantons and the municipalities.*
>
> *(3) The effect on natural persons of the shift into higher tax brackets due to inflation shall be periodically equalised.*
>
> *(4) The cantons shall assess and collect taxes. Three tenths of the gross tax yield shall fall to the cantons, at least one sixth of this amounts shall be used for financial equalisation among cantons.*

Article 129 takes the issue of principles further by addressing the issue of harmonisation of taxes among the cantons.

2. The second issue that the chapter needs to address is the devolution of the financial power of the state. All the three aspects mentioned earlier in this document must be addressed. On the aspect of the power to raise revenue, there is need to recognise that it is proposed to assign some taxing powers to the devolved levels of government. As such the approach of Article 244 of our draft which vests all the taxing powers in Parliament is misleading. The legislative bodies at the devolved levels will certainly have some taxing powers. This is because the revenue raising power assigned to the devolved levels of government can only be exercised through the legislatures of the devolved units.

3. The concept of a consolidated fund provided for in articles 245 and 246 of our draft needs to be reconfigured to take into account devolution. If the devolved levels of government are assigned some power to spend revenue, each of those units must have some kind of consolidated fund into which their sources of revenue pour and which will be subject to audit processes. A good example in this regard is the South African constitution which provides for both a National Revenue Fund and Provincial Revenue Funds. Article 213 provides for a National Revenue Fund in the following manner: -

"213 (1) There is a National Revenue Fund into which all money received by the national government must be paid, except money reasonably excluded by an Act of Parliament.

(2) Money may be withdrawn from the National Revenue Fund only:

(a) in terms of an appropriation by an Act of Parliament; or

(b) *as a direct charge against the National Revenue Fund, when it is provided for in the constitution or an Act of Parliament.*

(3) A province's equitable share of revenue raised nationally is a direct charge against the National Revenue Fund."

Article 226 on the other hand provides for provincial Revenue Funds in the following manner:-

"226 (1) There is a provincial Revenue Fund for each province into which all money received by the provincial government must be paid, except money reasonably excluded by an Act of Parliament.

(2) Money may be withdrawn from a provincial Revenue Fund only -

(a) in terms of an appropriation by a provincial Act; or

(b) as a direct charge against the provincial Revenue Fund, when it is provided for in the constitution or provincial Act.

(3) Revenue allocated through a province to local government in that province in terms of section 214 (1), is a direct charge against that provinces Revenue Fund."

4. The chapter must also be reconfigured to be very clear on the sources of revenue for both the National level of government and all the devolved levels of government. All the sources such as taxation, production and borrowing must be clearly identified and assigned to each level of government.

5. Article 249 of our draft needs to be reconfigured to take into account the need to assign devolved levels of government some borrowing powers and the controls necessary to ensure prudent financial management.

6. The chapter also needs to address the issue of the vertical and horizontal sharing of certain revenues among the different levels of government and different units at each level. The article in this regard may also identify the factors to be taken into account. Article 214 of the South African constitution which handles this subject in terms of "equitable shares and allocations of revenue" may be instructive to formulating our own principles in this regard.

7. The clauses on the Financial year estimates and Appropriation Bill need to be reconfigured to take into account devolution. The chapter must take into account budgetary arrangements and processes that provide for budgets at all levels of government that have been assigned some power to spend revenue. Such provision must lay down the principles to be followed by all levels of government. A good example that can be a guiding approach in this regard is Article 215 of the South African constitution which deals with National, provincial and municipal budgets. It states:-

> *"215 (1) National provincial and municipal budgets and budgetary processes must promote transparency, accountability and the effective financial management of the economy, debt and the public sector.*
>
> *(2) National legislation must prescribe -*
>
> *(a) the form of national, provincial and municipal budgets;*
> *(b) when national and provincial budgets must be tabled; and*
> *(c) that budgets in each sphere of government must show the sources of revenue and the way in which proposed expenditure will comply with national legislation.*
>
> *(3) Budgets in each sphere of government must contain -*

(a) estimates of revenue and expenditure, differentiating between capital and current expenditure;
(b) proposals for financing any anticipated deficit for the period to which they apply; and
(c) an indication of intentions regarding borrowing and other forms of public liability that will increase public debt during the ensuing year."

8. The chapter must also address the question of Treasury controls by laying down the necessary expenditure controls and the necessary procurement principles that must be observed by all levels of government that have power to procure public goods and services. Articles 216 and 217 of the South African constitution may be instructive in this regard.

9. Article 257 of our draft which seeks to establish an economic and social council may need to be merged with Article 225 which seeks to establish a commission on Local Government Finance. The two should be merged and be replaced by only one commission along the lines of the South African Financial and Fiscal Commission – whose mandate is not restricted to advising the national level of government only but extents even to advising the other levels of government on Financial and fiscal policy matters. At the moment Article 257 is rendered in a manner that does not recognise devolution, hence its functions do not extend to the devolved levels of government.

10. The chapter may also need to address the question of the power to administer revenue. This may involve the separation of the power to raise revenue from the power to administer revenue. This separation can help in ensuring that levels of government that do not have capacity to administer revenue may be assigned power to raise revenue but have a national revenue body administer or collect the revenue on their behalf as an agent. Article 108 of the German Basic Law is a good example in trying to draw such distinction. It provides as follows: -

"108 (1) Customs duties, fiscal monopolies, excise taxes subject to federal legislation, including import turnover tax, and levies imposed within the framework of the European communities shall be

administered by federal revenue authorities. The organisation of these authorities, shall be regulated by federal legislation. The heads of intermediate authorities shall be appointed in consultation with respective land governments.

(2) All other taxes shall be administered by land revenue authorities. The organisation of authorities and the uniform training of their civil servants may be regulated by Federal legislation requiring the consent of the Bundesrat. The heads of intermediate authorities shall be appointed in agreement with the Federal Government.

(3) to the extent that taxes accruing wholly or in part to the Federation are administered by Land revenue authorities, the latter shall act on behalf of the Federation. Paragraph (3) and (4) of Article 85 shall apply, the federal minister of finance being substituted for the Federal Government.

(4) Federal legislation requiring the consent of the Bundesrat may provide for cooperation between federal and land revenue authorities on matters of tax administration, in the case of taxes covered by paragraph (1) of this Article for administration by land revenue authorities and in the case of other taxes for administration by Federal revenue authorities where and to the extent that this considerably improves or facilitates the implementation of tax laws. The administration of taxes from which accrues, exclusively to the municipalities (associations of municipalities) may be delegated by the land revenue authorities wholly or in part to the municipalities (associations of municipalities)."

CHAPTER FOURTEEN: THE PUBLIC SERVICE

The chapter on public service must also take into account devolution. It has to be reconfigured to take into account public service at the national level and the devolved levels. This chapter needs to reconsider the following issues: -

1. Principles and objects of the public service and whether they apply to the national level of government only or also apply to the devolved levels of government. The South African constitution takes the route that applies such principles even to the devolved levels of government. Article 195 (2) deals with this issue in the following terms: -

"195 (2) The above principles apply to -

(a) administration in every sphere of government;
(b) organs of state; and
(c) public enterprises."

2. Whether the constitution should provide for a single national public service commission or also provide for public service commissions at the devolved levels of government? The example of the South African constitution which provides for only one public service commission at the national level to serve the entire Republic may be worthy looking at. Article 196 (1) provides in this regard that

"There is a single public service commission for the Republic"

However because of this the composition of the public service commission includes representatives of the provinces. Article 196 (7) in this regard provides that:-

"The commission has the following 14 commissioners appointed by the President:

(a) five commissioners approved by the National Assembly in accordance with subsection (8) (a); and
(b) one commissioner for each province nominated by the premier of the province in accordance with subsection (8)(b)."

3. It must be determined whether or not the country shall have common and uniform public service terms and conditions of service in all the devolved units. On this issue the South African constitution only says that the terms and conditions of employment in the public service must be regulated by national legislation. In practice, the terms seem to be different and there are those who are pushing for reforms that should harmonise the terms.

4. The constitution must address the question of ensuring payment of pension to all public servants. The South African constitution address this issue in terms that say that *"employees are entitled to a fair pension as regulated by national legislation."* In practice however, employees are entitled to transfer their pension contributions from one devolve unit to another or from one level of government to another, if one changes jobs.

5. The role of the devolved levels of government in the recruitment of the members of the public service needs to be addressed. The South African constitution gives the provinces some role in terms of Article 197 (4) which provides as follows: -

> *"197(4) Provincial governments are responsible for the recruitment, appointment, promotion, transfer and dismissal of members of the public service in their administrations within a framework of uniform norms and standards applying to the public service."*

6. The sharing of positions at the national level of government. In this regard a look at chapter (viii) of the German Basic Law on implementation of Federal legislation, and Federal administration may be quite useful. However one article in chapter two of the constitution may be directly useful on the issue of public service. Article 36 entitled "staff of federal authorities" provides as follows –

> *"36 (1) Civil servants of supreme federal authorities shall be drawn from all Lander on a proportionate basis. People employed by other federal authorities should as a rule be drawn from the land where those authorities are located.*

(2) Military service Laws shall, inter alia, take into account both the division of the Federation into Lander and the regional ties of their populations."

All this issues should also be raised and answered in terms of the articles dealing with the correctional services.

CHAPTER FIFTEEN: DEFENCE AND NATIONAL SECURITY

This may involve a separation of Defence from internal security. If this is done the police may take into account devolution arrangements while the military may be left at the centre. However even with the military devolution may have to be taken into account when it comes to recruitment.

Article 36 of the German Basic Law which talks of proportionate distribution of positions in supreme federal authorities may be useful in this regard.

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