

CONSTITUTION OF KENYA REVIEW COMMISSION

**REPORT OF THE WORKSHOP ON DEVOLUTION OF
POWER AND GOOD GOVERNANCE**

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TABLE OF CONTENTS

PART I: EXECUTIVE SUMMARY	4
1.0 Introduction.....	4
1.1 Mandate of the Commission.....	4
1.2 The National Constitutional Conference.....	5
1.3 The Technical Working Committee on Devolution of Power.....	6
1.4 Further Work.....	7
1.5 The expected Output.....	9
1.6 Use of Obtained Output.....	9
PART II: DESIGN AND STRUCTURE OF DEVOLUTION REVISTED.....	10
2.0 Exploring the Issues.....	10
2.1 FUNDAMENTAL THEMES.....	12
2.2 Progress and Gains made in Devolution of Power.....	12
2.3 The Design of the Devolved System of Government.....	14
2.4 Devolution and Participatory Governance.....	17
2.5 Human Capital and Productivity in the Devolved Setup.....	23
2.6 Representation & Local Authorities in the Devolution Design.....	27
2.7 The Structure and Management of Nairobi as the Capital Territory and Metropolitan City.....	32
PART III: FISCAL AND FINANCIAL ASPECTS OF DEVOLUTION.....	37
3.1 Taxes and Revenue Collection.....	37
3.2 Revenue Sharing and Equitable Development	39
3.3 Costing of the proposed devolved system of government.....	42
PART IV: RECOMMENDATIONS.....	48
PART V: Annexures	63
5.1 A- Workshop Programme.....	

5.2 B- List of Participants.....

5.3 C- Papers presented.....

PART I: EXECUTIVE SUMMARY

1.0 Introduction

The making of a new Constitution in any country marks an important watershed in its history. It demonstrates the desire of the people to fundamentally change their system of governance. The process gives the people an opportunity to make a fresh start by reviewing their past experiences, identifying the root causes of their problems, learning lessons from past mistakes and making efforts to provide solutions for their better governance and future development. In Kenya, the primary goal is the establishment of a democratic order in which the rule of law, constitutionalism and the people's participation in public affairs prevails. In the trajectory to democratization, constitutional reform is an imperative- an almost *conditio sine qua non*.

The framework for Kenya's constitutional review process is contained in the Constitution of Kenya Review Act Cap 3A which is "to facilitate the comprehensive review of the Constitution by the people of Kenya." The Act establishes a number of organs for the review process. The main responsibility in the reform process reposes in the Constitution of Kenya Review Commission, which is mandated, to conduct systematic recording of the people's input into the review process and thereof formulate a Draft Constitution and Report to be further debated and adopted by the National Constitutional Conference. This has since been done and the constitution review process is at an advanced stage at the National Constitutional Conference.

1.1 Mandate of the Commission

The Constitution of Kenya Review Commission is mandated to review:

- The place of local government in the constitutional organisation of the Republic and the degree of devolution of power to local authorities (s. 17(d)(vi)); and
- Various structures and systems of government including the federal and unitary systems and to recommend an appropriate system for Kenya (s. 17 (d)(ii)).

The Review Act (s.3) also identifies a number of values and institutional arrangements for the guidance of the constitutional reform process. These values and arrangements raise a number of issues, which require an assessment of the present organisation of government and the desirability of structuring it in such a manner as will fulfill these values and desires of the citizens. The Act, among other things, requires the constitutional reform process to: -

- Promote people's participation in the governance of the country through the devolution and exercise of power;
- Respect ethnic and regional diversity and communal rights including the right of communities to enjoy their culture and express their identities;
- Establish a free and democratic system of government based on good governance and the separation of powers and checks and balances; and
- Promote the accountability of public authorities.

Given these provisions of the Review Act and in justifying devolution, we must balance across other objectives of the review process, also found in s. 3:

- Guaranteeing peace, national unity and integrity of Kenya in order to safeguard the well being of the people;
- Ensuring the provision of basic needs of all Kenyans through the establishment of an equitable framework for economic growth and equitable access to national resources; and
- Enabling Kenyans to resolve national issues on the basis of consensus.

1.2 The National Constitutional Conference

The Commission convened the National Constitutional Conference, Bomas I in April 28, 2003 in which the Report and the Draft Bill chapter on Devolution of Powers were presented to the Conference. Following the ensuing discussion and debate, both the Report and the Draft Bill chapter on Devolution of Powers was found to be inadequate and the Commission was instructed to conduct further research and come up with a better design of devolution in the Draft Bill.

Consequently, the Commission prepared and published a Special Working Document on the Devolution of Powers and a corresponding Draft Bill. Both the Special Working Document and the Draft Bill were tabled in the National Constitutional Conference, Bomas II and was adopted and forwarded to the Technical Working Committee on the Devolution of Powers for discussion, debate, amendment and adoption.

It is expected that the Delegates shall resume the consideration of this Report, alongside the new draft provisions on Devolution of Power during Bomas III. The Committee shall, during the third phase of the Conference, examine and make recommendations on the Design of Devolution of Powers for consideration and adoption by Plenary. This requires some preparatory work to facilitate the deliberations.

1.3 The Technical Working Committee on Devolution of Power

The Review Act requires the Commission to examine and make recommendations on:

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

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

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

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

The Devolution Committee examined the Commission's Report and Draft Bill, the Special Working Document on Devolution of Power and the new draft provisions on devolution as required by the Constitution of Kenya review Act, Cap 3A. Under Regulation 49(1) of the Constitution of Kenya Review (National Constitutional Conference)(Procedure) Regulations, 2003 (hereinafter the Conference Regulations), the Conference is required, on the recommendations of the Steering Committee to appoint Technical Working Committees to consider any issue or theme arising from the Draft Bill, as it may consider appropriate. Accordingly, the Technical Committee on the Devolution of Powers is established pursuant to regulation 49(4) of the Conference Regulations to consider any issue or theme arising from the chapter on the Devolution of Powers and the Commission Report.

1.4 Further Work

The Rapporteurs to the Technical Committee on Devolution decided that further work in the following areas was necessary to assist the Committee and the National Constitutional Conference to fulfill their mandate successfully:

- a. Dissemination of the Special Working Document and the Draft Bill at the constituency level;
- b. Civic education on the two documents on devolution as an instrument of participatory governance;
- c. Facilitation of debate and dialogue through Workshops and Seminars on Devolution of Power;
- d. Further research on critical proposals made in the Draft Bill;
- e. Foreign visits to get first hand information on experiences from countries with devolved systems of government.

Further research was found necessary in the following areas:

1. Objectives of Local Government /Authorities:
 - Its appropriateness as the third level of government;
 - The Functions and Powers to be vested on this level of government;
 - The distinction between the Rural and Urban Authorities as to their functions, roles and spheres of influence;
 - The Electoral System within the Local Authorities;
 - The structural and functional relationship between the Local government, National and the Regional governments;
 - Transitional and Consequential arrangements in regard to Local Authorities.
2. The distribution of powers and functions among the various levels of government.
3. Fiscal and financial aspects of devolution: the distribution of fiscal powers among levels of government.
4. Inter-governmental Relationships and the Institutional framework throughout all the levels of government.
5. The Status and Management of Nairobi as the capital territory:
 - A comparative study on the status and management of the following cities and any others that may inform the Committee deliberations; Berlin, Hamburg and Bremen in Germany and Washington DC in USA;
 - A consideration of existing reports on the Management of Local Authorities;
 - Division of Nairobi into counties;
 - Consultations with identified resource persons.
6. The Concept of Special Units: their Rationale and Feasibility
7. The Second Chamber of Parliament.
 - Membership and Recruitment
 - Tenure
 - Functions
8. The cost of the current structure and system of government as well as the proposed structure. Also consideration of the opportunity cost of continuing with the present system and structure of government.

9. Distribution of functions and finances among the various levels of government and the relationships between and among them.
10. Implementation strategies of the proposed devolution structure.
11. The need for and place of “special status” areas and the functions, powers etc that may be accorded to such areas.
13. The role and functions of the Upper House in relation to devolution

1.5 The expected output

A working document covering the stated needs as well as a consolidation of experiences from foreign visits to inform the deliberations of the Technical Committee on Devolution of Power.

1.6 Use of obtained output

Obtained output would be used to:

- To consolidate the gains so far achieved;
- Create awareness on the proposed devolved system of government;
- To facilitate an audit of the entire Draft Bill with the view of mainstreaming devolution in the entire document;
- Address cost of devolution as requested by some delegates.

It is in this regard that the Commission organized a workshop on Devolution of Power and Good Governance at the White sands Hotel, Mombasa, from 3rd to 7th December 2003 to discuss the above said areas.

PART II: DESIGN AND STRUCTURE OF DEVOLUTION REVISTED

2.0 Exploring the Issues: *Prof. Yash Pal Ghai*

Prof. Yash Pal Ghai informed the Workshop would focus on both horizontal and vertical distribution of power among the institutions and organs of government and their relationships. He then traced the various efforts by Kenya to devolve power, from the Independence Constitution through to the present, including local government reforms and the constitutional process. He noted that the Devolution Committee had made considerable progress in its work.

In discussing devolution, he urged the participants to note that devolution and decentralization were likely to introduce a complex system of government. He urged that the new system and structure should accommodate the country's diversities and ethnicities. He asked participants to make proposals of how effective participation of people in governance would be enhanced and accountability and transparency encouraged at all levels of government. He however cautioned that devolution may result in power being captured by elites, and ethnic-based devolution may fuel ethnic animosities. The proposed structure must therefore guard against increased corruption, bureaucracy and spiraling costs in implementation.

He urged the participants to be clear on what form of devolution Kenyans wanted. The participants would need to consider the number of levels of devolution and the size and number of devolution units. There was also need to clarify whether the units should be totally autonomous or co-operative as these had consequences with respect to representation, power sharing, fiscal and revenue sharing, intergovernmental relationships, among others. He cited the example of Germany with co-operative institutions, where most legislation is made by the national institutions and implemented by the lower levels of government.

Prof. Ghai requested the participants to address the questions of implementation of the proposed devolution structure. Kenyans needed to decide whether devolution should be implemented at once or whether it should be staggered and implemented in stages, as was the case in South Africa. He noted that from experience, it would be very hard to dramatically and abruptly change from a highly centralized system to a devolved system of government.

Finally, he welcomed all the participants to the workshop and expressed hope that the Workshop would make resolutions that would be helpful to enable the Devolution Committee, and the National Constitutional Conference to successfully complete their mandate.

The Role of UNDP: Mr. Ojijo Odhiambo, on behalf of Resident Representative

Mr. Ojijo Odhiambo stated that the United Nations Development Programme (UNDP) had long-standing relationship with the Commission. He said that UNDP wished to be associated with the good work the Commission was doing. In furtherance of the good relationship with the Commission, UNDP saw the necessity of further interrogating certain aspects of devolution and therefore agreed to support the Workshop. He noted that the manner in which power is exercised in all institutions is key to sustainable human development, which is a core mandate of the UNDP. He observed that UNDP was keen on accountability in management as well as devolution of power.

He reiterated that UNDP was committed to supporting the government and the people of Kenya in promoting people's participation in the governance of Kenya through devolution of power. This would greatly improve the quality, delivery, and efficiency of the country's governance structures and processes, while ensuring each citizen contributes fully towards finding innovative solutions to common problems facing the country. He welcomed all participants to the workshop.

2.1 FUNDAMENTAL THEMES

2.2 PROGRESS AND GAINS MADE IN DEVOLUTION OF POWER

PROF. WANJIKU KABIRA

It was noted that, the Commission, based on the views of Kenyans expressed on devolution, on consultations with experts and Lancaster House Conference veterans, on deliberations of a previously organized a seminar on Devolution of power, and on logistical and financial support from The United Nations Development Programme (UNDP), had made far reaching recommendations on devolution. The recommendations were debated upon and supported by Delegates to the National Constitutional Conference. In addition, it was underlined that most delegates at the Conference had expressed support for the district as the focus of devolution. Despite the gains made however, Delegates wanted more rethinking directed to the proposed devolution structure. In this regard, the Commission had refined the proposals on devolution, conducted comparative studies and visited other foreign countries such as Uganda, Rwanda, Ethiopia, South Africa, among others, to consider and learn from their experiences and efforts at devolution.

Prof. Kabira observed that most countries the Commission had visited expressed great interest in the Kenyan Constitution making process. These experiences enriched the second attempt by the commission at devolution. Thereafter, the commission published a Special Working Document on Devolution of power and formulated New Draft provisions on devolution. These were later debated and adopted by the Conference.

Prof. Kabira explained that the Special Working Documents on Devolution of power and the New Draft devolution provisions were committed to the Technical Working Committee on Devolution of power for scrutiny and consideration. The Devolution Committee had subsequently debated, amended and adopted the principles guiding devolution as well as taxation principles that need be included in the Devolution Act. The Committee had adopted the establishment of four levels of government namely National, Zonal, Local Government and Location level; and the creation of eighteen (18) zones

with Teso having special status. Nairobi is proposed to be the capital territory. In creation of the zones, the committee had considered the following factors:

- Viability
- Sustainability
- Comparable territorial size
- Historical and Culture ties
- The protection and welfare of minorities in the units
- Presently existing administrative and political units
- The functions the proposed units are intended to perform
- Economic potential and natural resource endowment
- Efficiency
- Effectiveness
- Biodiversity

Prof. Kabira stated that the Devolution Committee had raised a number of concerns, namely:

- Some locations such as those in North Eastern Province are too big and far removed from the people;
- It was felt that once functions were assigned to the various levels of government, it might become necessary to revisit the resolutions on zoning;
- The constituency was quickly becoming a focus point of service delivery, anchoring for instance, community Development funds, AIDS Committees, Roads and Bursaries Committees, among others. There was need, therefore, to reconsider and possibly bring in the constituency as a level of government;
- It was necessary to clarify the system and structure of government, that is, whether we were devolving within a unitary state, a federal system or a hybrid of the two;

- Delineation of boundaries in particular areas was a thorny issue, for example, the boundaries of Maseno at the border of Western and Nyanza Provinces was contentious;
- There was uneasiness in zoning certain districts such as Mount Elgon and Trans Nzoia;
- There was fear of possible ethnic hostilities in the wake of the zoning.

Further, Prof. Kabira reiterated that the work of the Devolution Committee would greatly impact on the work of the other committees, and had therefore engaged experts to advise on different aspects of devolution. Finally, she noted that the Workshop Report would greatly enrich the work of the Devolution Committee.

2.3 DESIGN OF THE DEVOLVED SYSTEM OF GOVERNMENT

COMMISSIONER MUTAKHA KANGU

Commissioner Kangu began by noting the central role and relevance of devolution of power in the effective and efficient organization of government. In this regard, He noted that the deliberations and discussions of the workshop were intended to refine the Commission's conceptual framework on devolution of power. Specifically, it was noted that:

- The Commission and the National Constitutional Conference, (NCC), had fully supported total devolution of power to facilitate effective participation in governance, service delivery, and the redistribution and equalization of resources;
- Hitherto, four levels of government, namely National, Zonal, Local Government and Locational had been agreed upon but further debate was necessary to determine how best to place and structure the levels and particularly explore the possibilities of bringing the Location level closer to the people by involving villages;
- There was need to identify the specific functions to be performed by each level of government and allocate such functions appropriately;

- The various levels of government should be distinctive, interdependent, co-operative, negotiated and consultative;
- Citing the legislative process in Germany, it was noted that devolution must strive to enhance and nurture consultations and negotiations among and between all citizens;
- The Workshop need clarify the institutional arrangements and intergovernmental relationships between and among the various levels of government;
- There was need to ensure that each level of government was adequately funded to effectively carry out its functions. In this regard, funds would follow functions;
- The participants would also discuss the institutional arrangements for effective revenue management nationally and at all levels of government bearing in mind that the financial power of the State as the power to raise, administer, spend and control and audit revenue;

Commissioner Kangu noted that there was need to distribute taxes and other resources equitably between and among all the levels of government while, at the same time, providing mechanisms for the control and audit of revenue to guard against corruption at all levels of government.

He further underlined that revenue sharing, in the proposed devolution structure, must be based on objective criteria and should not be discretionary. The case of South Africa, which has a Financial and Fiscal Commission that determines the horizontal and vertical revenue sharing at the various levels of government, was cited. It was also noted that while the proposed system of government could, in certain respects, be slow and complex, its benefits would nevertheless be enormous.

QUESTIONS AND ISSUES RAISED

- Devolution should be examined within the context of regional integration and globalization and should take on board changes likely to be occasioned thereby.

- How would the governance system be structured to enhance citizens' participation and consultations in governance?
- Why was there now a shift from the district to the zonal level of government as the focus of devolution?
- The Commission should disseminate the Special Working Document on Devolution of Power and the new draft provisions on devolution in much the same way as the Commission's Report and Draft Bill.
- What system of government should Kenya adopt?
- That other than South Africa, there was on evidence of other successful provincial governments.
- The criteria for creating the levels and units of devolution should be weighted.
- The initial draft chapter on devolution of power had been poorly drafted.
- The proposed devolution structure should be simplified into a chart showing the various levels of government, their functions and the linkages between and among them.
- The proposed devolution structure must beneficially add value to the current system and structure of government and must avoid the pitfalls of the existing system.
- Comparative foreign experiences should be applied to Kenya only after being suitably modified to suit Kenya's local and unique circumstances.
- The Commission should draft new provisions for each proposed devolution scenarios.
- Service delivery should be made accessible and standardized throughout the country.
- What, if any, would be the supervisory role of the National government over the other levels of government?

RESPONSES

Prof. H.W.O. Okoth-Ogendo explained that the purpose of the workshop was a brainstorm to bring further clarity to issues before the Devolution Committee. The Commission would therefore publish the workshop's report as a Conference document to aid the NCC in its deliberations.

Mr. Mutakha Kangu said that having taken the views of Kenyans on devolution, it was incumbent upon the Commission to design a model that best addressed the aspirations of all Kenyans. He noted that presently, there were various parallel systems of service delivery, namely local authorities, provincial administration, and the emerging constituency forum. He observed that the proposed devolution structure would remove the duplicity in systems of service delivery. He noted that various line ministries were undertaking sectoral reforms outside the framework of the on-going constitutional review process. He urged the participants to specify their preferred system of government.

Prof. Wanjiku Kabira explained that the Commission had generated a lot of documentation on the review process generally and devolution of power specifically and this were available at the various Commission Documentation Centers. Finally, she urged the participants to consider devolution within the context of regional integration and globalization.

2.4 DEVOLUTION AND PARTICIPATORY GOVERNANCE

PROF. HANS-PETER SCHNEIDER

Prof. Hans-Peter Schneider began his presentation by noting that the idea of having a devolved government was a brilliant one. However, he felt that it must be properly designed since without a proper design of devolved government the people might not be given a chance to play a useful role in decentralization.

He noted that the principle of subsidiary must be observed, meaning that the centre performs the functions that it does best and the rest are allocated to the most appropriate level. He was of the view that decentralization would ensure that the government was organized and de-congested. He pointed out that the people had the ability to manage their own affairs in structures such as the village. He observed that every local government needs to be self-administrative and independent and for it to be effective resources have to be provided for it.

Prof. Schneider pointed out that the benefits of improved local accountability and incentives include: -

- Citizen participation
- Local service provision
- Local economic development.

Prof. Schneider recommended that there be a constitutional provision enabling people, at the grassroots, run their affairs.

On the proposals in the Draft Bill for devolution, Prof. Schneider noted that the zones seemed to be drawn on ethnic lines. He was of the view that this might cause tensions between the zones. He proposed that the zones be drawn along natural boundaries and that any tensions arising be managed by the zonal government. On the number of zones proposed, he noted that the question to be considered was whether these units were viable and able to perform the functions of a full-fledged regional government. He was of the view that reduction of the number of zones to 9 or 10 zones should be considered.

He also proposed that there be a level to bridge the gap between the community and the location level. He recommended that there be an additional structure of autonomous organization and management at the community level where it would be easy to create cohesion and commitment for common interests. He proposed that the right of self-management of this level should be recognized by the Constitution and specified by an Act of Parliament. He suggested that some of the functions to be performed by the local community would include: -

- Local governance;
- Water (rain catchments, earth dams);
- Agriculture;
- Education (kindergarten, primary school, informal/adult education, vocational training);
- Roads (intra-village roads and tracks, inter-village roads, pass ways, transportation);
- Health (village health volunteer/worker, village pharmacy);

- Sanitation (public toilets, waste disposal, garbage collection);
- Economy (rural markets);
- Others (social security, neighborhood help, youth/sporting facilities).

Prof. Schneider recommended the following: -

- That the Commission considers the setting up of local community councils as citizen organizations;
- That these self-governing organisations be protected by giving them rights to manage community affairs;
- That these structures be used for social, economic and political development.

Prof. Schneider recommended that the provision to be included in the Constitution read as follows: -

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

In his concluding remarks, Prof. Schneider, observed that if the proposal for a special provision for local community management would be enshrined in the constitution, Kenya would make a big step towards tapping the dormant potential of communities and spearheading a development tool demanded by the local Agenda 21 for Sustainable Development.

DISCUSSANT: PROF. WALTER OYUGI

Prof. Walter Oyugi was of the view that there should be a proper design of decentralization. He noted that the principle of Subsidiarity was very important and that each devolved unit should perform what it is best placed to perform. He further noted that decentralization performs the purpose of decongesting the government. He observed that local economic development required participation of the people and collaboration with the political sector and hence the need for a clear structure within which the local community could participate. He however, noted that participation should not be confused with mobilization.

He pointed out that genuine participation involved power sharing in decision-making and this therefore was not only for people but also for the government to be involved in. He was of the view that the people should not be forced to participate in or implement projects they do not support. On the issue that zonal boundaries were ethnic based, he observed that having boundaries based on natural features would receive a lot of resistance from the people.

On the recommendations that there should be another level of government at the community level, Prof. Oyugi noted that indeed, the location level was impersonal and recommended that there should be a structure at the village level.

ISSUES ARISING

- The number of zones should be reduced to about 9 or 10;
- Zonal boundaries should not be based on ethnicity. Instead they should be based on the existing districts;
- Boundaries along ethnic lines do not necessarily create tensions, they in fact reduce them;
- If all communities are given the right to participate in government equally they can live harmoniously. Bad governance is what has caused tribalism and ethnic clashes;

- Ethnicity should not be the main criteria for establishing boundaries. Access to resources should also be considered;
- We do not need to have elected leaders on all levels of government. The example of Uganda was given where out of 5 levels only 2 are elective and the others are administrative;
- There should be a local community level of government based on self-help and self-management. This will mean that the community at the village level can come up with their own traditional ways of initiating projects and implementing them;
- Over the years development and modernization has brought in structures that have caused people to abandon their communities. The local community level will bring people together;
- Kenyans are good at identifying their requirements and even contributing to establish a project. But maintaining the project is normally a problem. When donors pull out projects collapse.
- Kenyans must develop their own initiatives. The Western world is now training Africans to deal with their own affairs rather than running projects for them;
- It is important to specify which specific taxes the different levels of government will levy;
- There should be no duplication of functions at the various levels. Each level should have its own functions;
- The judiciary can be devolved up to village level in the form of customary courts;
- The constituency is in a better position to implement projects at the zonal. Therefore the constituency level should replace the zonal level;
- The constituencies should be maintained as they are today. They cannot be development units because they are under leaders who are elected every 5 years;
- There is need to address the public service aspect in the devolved government. Who will support the government structures to provide services assigned to them? How will people be appointed to various positions under the zonal and county service commissions? It is necessary to establish how administration problems will be solved

RESPONSE

Prof. Schneider observed that in Germany, people were trained to come up with their own projects, manage and maintain them. He pointed out that participation should not be symbolic but the people should be allowed to participate in governance.

On conflict resolution he proposed that conflicts between different units e.g. conflict between zones or between counties could be resolved in either of two ways:

- A constitutional court be established, in addition to the Supreme Court, to deal with these conflicts; and/or
- Mediation procedures and committees can be established to solve the conflicts.

On the issue of tax collection, Prof. Schneider observed that in Germany all taxes were collected by the lander (equivalent of the zone in Kenya). However, he felt that this might not work for Kenya. On boundaries of the zones, Prof. Schneider noted that after the Second World War, the boundaries within Germany were changed and natural boundaries created and that this had worked out well. However, he observed that changing of boundaries might not be a good idea for Kenya.

Prof. Oyugi, in his response, noted that there was need to put in place a mechanism on how the proposed devolution structures were to provide the required services and especially public services. He supported the view that there was need to have a mechanism of conflict resolution at the different levels of devolution.

2.5 HUMAN CAPITAL AND PRODUCTIVITY IN THE DEVOLVED SETUP

DR. WALTER ODHIAMBO

Dr. Walter Odhiambo began his presentation by noting that the Draft Bill proposes to adopt devolution as the cornerstone of the proposed government structure. This, he noted is intended to take development and administration closer to the people. The proposed system is expected to change the way the economy and particularly the functioning of government in very basic ways. He further indicated that the sub-national governments are expected to play much more important roles in the provision of services and that Local officials will also be expected to have more responsibilities and be more accountable to the people.

For a proper functioning of the devolved system he further noted that;

- the civil service requires a correct balancing of the comparative advantages of central and local authority in delivering services;
- it requires that the local governments have the institutional capacity and ability to raise local revenues so they can carry out their role in a way that is prudent from a macroeconomic perspective;
- human resource is a crucial factor to sub-national governments, in order that they may carry out the decentralized powers-especially as it relates to the technical aspects of decentralized functions. This ability hinges crucially on human capital;
- human capital is important as a tax base for both the national and the devolved governments, due to the fact that income taxes constitute a large proportion of total taxes collected by governments.

On the impact of devolution on human capital he noted that the focus is on three aspects: human capital needs of a devolved system; human capital as a tax base; and the likely effects of decentralization on human capital development.

Human capital was defined as the attributes of a person that are productive in some economic context. Which is often referred to as formal education attainment, with implication that education is an investment whose returns are in the form of wage, salary, or other compensation. These are nominally measured and conceived of, as private returns to the individual but can also be a social return.

He noted that decentralization involves administrative changes with implications on human capital. While all the elements of devolution have a strong bearing on human capital, the administrative and the financial aspects were singled as ones that would affect human capacity directly.

He noted the following as challenges of devolution and decentralization on the civil service;

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

Noting that staff shortages at the local level are a critical constrain to decentralization, he explained that the creation of new systems of local governance requires considerable administrative skill and resources. Thus, success in decentralization of human resources would require:

- The creation of a strong legal framework to define responsibilities and standards.
- Clear reporting mechanisms both vertical (with the central government) and horizontally with other government agencies at the same level
- Investing in human capital: The change in roles and responsibilities that decentralization generates brings a demand for new skills. Prominent

among these are financial, human resources, and logistical management skills, as well as competence in advocacy and negotiations.

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

Recommendations

- Decentralization could be used to reduce spatial inequalities in access to basic education health etc., which are crucial for human capital development. However, existing disparities are likely to be exacerbated if decentralization extends to the mobilization of public resources (i.e. revenues as well as expenditure). This follows from the observation that the poorer regions of the country will have correspondingly lower fiscal potential.
- There is a case for an equitable distribution of available resources to avoid disparities in the provision of public services since different regions are differently endowed in terms of natural resources, level of economic activities, land values, etc.
- Regions should be encouraged to take initiatives towards their own development. However, a mechanism should be put in place to safeguard against extreme disparities between regions.
- Inter-governmental fiscal transfers including fiscal equalization payment should be used to achieve horizontal equity and to secure the capacity to provide service delivery especially education, public health and infrastructure of a comparable level countrywide.
- Fiscal transfers should be determined on the basis of objective, reasonable and ideally well-recognized allocation formula. This should ideally not be a secret political formula.
- Fiscal transfers should be stable every year so that sub-national governments can draw up appropriate budgets and programmes, including human capacity building. The allocation formula should be simple and

reliable

- Given the serious disparities in educational opportunities between rural and urban areas, and across regions in Kenya, the enhancement of equity is a major concern. This call for redistributive measures in education policy should be undertaken by the national government.
- The cost of the implementation of the devolved system should be weighed against the benefits that would accrue from devolution and decentralization in general.
- Effective provision of services at all levels of government requires a capable, motivated and efficient staff. Decentralization thus intensifies the need for capable staff and increases the importance of capacity-building programs.
- Regular monitoring is essential for avoiding decentralization-related human resource problems. Such monitoring should be focused on the equity of staff distribution. Monitoring should commence with the collection of baseline data prior to the start of decentralization, and continue as an ongoing-component of local administration. This requires the design and implementation of suitable management processes for ongoing data collection, analysis and interpretation.

2.5 REPRESENTATION & LOCAL AUTHORITIES IN THE DEVOLVED SET-UP

PROF. PETER WANYANDE

Prof. Wanyande began his presentation by highlighting the issues his paper addressed and especially:

- The guidelines on how to recruit members of the different units of government as proposed in the draft bill;
- The guidelines on functions and powers of the different levels of government and their personnel;
- The relationship between the different levels proposed.

He pointed out that in preparing His presentation, he had been guided by the following assumptions: -

- That the justification for proposing devolution of powers had been agreed upon and accepted;
- That there would be 18 zones;
- That there would be no more than four levels of government;
- That all levels, apart from the location level, would have substantive legislative and executive functions;
- That Kenya was going to adopt a parliamentary system of government.

Prof. Wanyande observed that the structure proposed by the draft bill had characteristics of a federal system that are:

- Division of power is paramount and is done through the constitution;
- Equality of the various units of government;
- Any change in the power of any level of government must be done through amendments of the constitution and the Supreme Court of the land mediates any conflict between the levels.

Prof. Wanyande observed that the sharing of power with the lower levels of government had to be done very carefully. He noted that there was a risk of giving too much power to the lowest level so that it does not function, as it should or retaining too much power with the central government that it manipulates the lower levels. He noted, however, that the zonal level proposed in the draft was a very important unit, as it would act as a balance between the highest and the lowest levels of government.

He proposed that the zonal legislature be composed of county representatives as proposed on page four of his paper. These county representatives would be nominated by county council members and be supported by two-thirds majority of all the members of the county council. He proposed that the zonal legislative sessions be presided over by a speaker elected by the zonal legislature.

He pointed out that the importance of the Speaker of the zonal legislature was two-fold:

- He would have enough time to devote to the legislature as compared to the Premier, who would be the chief executive of the zonal administration;
- He would be in a position to account for the zonal legislature on matters pertaining to the affairs of the zonal government.

He further suggested that the use of local languages in the zonal legislature should be considered. He noted that the power and functions of the zonal legislature as laid down on pages 8-10 were not exhaustive and more could be added. He further proposed that there should be a zonal government. The Zonal Premier would be the political head of the zonal cabinet and a zonal civil service. The zonal civil service would be responsible for:

- The implementation of the policies and programmes of the individual zonal government;
- Preparation and implementation of the periodic zonal budget for the activities that fall within the exclusive jurisdiction of the zonal government.

He recommended that the election of Zonal Premier be done directly by the residents of the zone. On the zonal cabinet, Prof. Wanyande proposed that the main function be to coordinate the implementation of policies at the zonal level. He noted that the election of members of the zonal legislature must reflect the cultural component of the zone.

On how to attain the 1/3 representation of women in the legislature, he proposed that there be two election procedures:

- Separate elections for women candidates to fill the minimum number of seats reserved for women in each county within a zone;
- A single election system to be used for both women's reserved seats as well as for the open seats whereby women candidates with the highest votes up to the minimum number of reserved seats would be declared elected for those seats.

On the structure of the county government, Prof. Wanyande noted that direct elections were very important at this level. He pointed out that the County Chairperson should be elected directly and would be the political head of the county government. He proposed that this office be responsible for the implementation of the policies, plans, and enforcement of laws formulated by the county council. The chairperson would oversee the implementation of county government plans and programmes. He proposed that the zonal public service commission appoint the professional county administration.

On the locational government, Prof. Wanyande proposed that each county be divided into locations whereby each location would be further sub-divided into electoral units consisting of villages. Prof. Wanyande noted that in his report he had provided two alternatives to the organization of the location government whereby in the first alternative, only the location level government would be constitutionalised. He, however, recommended the second alternative whereby the location level of government would not be constitutionalized but would be an administratively established structure. He proposed that at this level, there be a location government, headed by a Location Chairperson who would be directly elected.

On the relationship between the different levels of government, Prof. Wanyande noted that though each level of government would have functions exclusive to it, there would also be shared responsibilities requiring a mechanism to ensure that such functions were efficiently done. He suggested that an appropriate Act of Parliament could be established for a coordination mechanism or body to facilitate the performance of such functions. Alternatively, he proposed that a national level regulatory body be formed.

DISCUSSANT: DR. ROY KELLY

Dr. Kelly noted that the purpose of devolution was to improve service delivery, governance and enhance transparency and accountability. He noted that the paper presented proposed that there be direct elections at all levels of government and that the cabinet would hold the chief executive accountable. He also noted that there was a proposal to have a legislature and speaker and also to have a separate professional administration to be appointed by the zonal public service commissions.

On the responsibilities assigned for the zones, counties and locations, Dr. Kelly noted that the cost implication was very important and should be looked into carefully. He observed that it should be considered whether it was necessary to set up the zonal level considering the cost implication or to have the current local government structure remain as it was. He suggested that the rationalization of the county structure could be done and they could perform the functions in the devolved structure. Dr. Kelly observed that it was important to have people involved in the system. He noted that there was need to look carefully at the right approach in providing for a structure below the county government, irrespective of whether it was to be constitutionally or administratively established. Dr. Kelly also felt that the current draft, as was, contained a lot of details, which in his view could be provided for by Acts of Parliament.

ISSUES AND QUESTIONS RAISED

- There is need for a framework, which addresses cross-boundary issues e.g. security;
- Consider improving the current local government before creating new structures;

- There is need to avoid duplication and wastage in the process of devolution;
- Devolution should be created along the existing local structures and the people should be free to create their own structures at the local level;
- There is need to define the specific areas of legislation which the zonal legislatures would deal with;
- Devolution should be structured on the basis of views given by Kenyans;
- What is the role of the cabinet at the zonal level?
- Should we devolve the judiciary in addition to the executive and the legislature in the devolved structure?
- There is need to clearly define under which system of government devolution of powers is going to operate;
- The structure of devolution should not interfere with the current district structure;
- Need to consider the constituency as a level of government in the devolution structure;
- Whether the location should be constitutionalised;
- Participation of the people is a key element of devolution and the proposed structure should allow the people to participate through their own organizational structures;
- Devolution should also reflect de-centralization.

RESPONSE

Prof. Wanyande explained that the assumptions he made when making his presentation and recommendations were based on the documents from the Commission and several meetings he held with members of the Commission. He was of the view that these assumptions were basic principles, which should have been agreed upon apriori. He noted that in structuring devolution of powers there must be a general framework within which to structure the system hence the assumption. He reiterated his opinion that from his study of the proposed structure, it showed characteristics of a federal structure. He noted that there was need to have functions at the national level to unite the people e.g. the judiciary and defense. He suggested that there could be a central police force but some of

its powers be delegated to the local zonal level; for example, have recruitment done at the zonal level. He also felt that there was need to have a cabinet at the zonal level to guide the administration at this level.

Dr. Kelly in responding to the issues raised, observed that although participation of the people was the main purpose of devolution, service delivery was equally important and hence there should be a link between the two. He pointed out that the ministry of local government had tried over the last four years to increase people participation.

2.6 THE STRUCTURE AND MANAGEMENT OF NAIROBI AS THE CAPITAL TERRITORY AND METROPOLITAN CITY

MR. JOHNSON MBUGUA

Mr. Johnson Mbugua began by observing that between the years 1983-88, the Nairobi City Commission ran efficiently due to its structure, which was changed with the coming of multipartism when councilors were appointed as commissioners of the commission and thereby resulting in the beginning of deterioration of the commission. He noted that in order to understand the deterioration of Nairobi, one needed to consider the background of Nairobi as given on pages 1-18 of his report. He pointed out that on page 5 of his report he had noted that the administration, management and services under the City Council of Nairobi have been gradually deteriorating leading to public dissatisfaction and this had not improved to date.

He then proceeded to give background information of the City of Nairobi as contained in his paper as follows: -

- Topography of Nairobi;
- Population of Nairobi;
- Population distribution in Nairobi;
- Physical growth and planning;
- Urban growth;
- Infrastructure: electricity and street lighting;

- Sources of revenue for the city.

He highlighted the main issues and problems facing Nairobi as presented on pages 15-16 of his paper as follows: -

- High rate of population growth and urbanization;
- High demand for land, infrastructure, housing, transport and communication services;
- Poverty and insecurity;
- Inadequate institutional capacity;
- Lack of transparency and accountability;
- High level of centralization of decision-making and low-level community participation;
- Mismatch between resource needs and resources provided for the city council operations;
- Out dated by-laws, regulations, standards and codes;
- Lack of comprehensive plans of action;
- Inadequate co-ordination between national and local policies strategies;
- Poor communication between the local community and their elected leaders.

In his concluding remarks on the background information about Nairobi, Mr. Mbugua observed that the present local government in Nairobi was unable to manage, administer and plan the development of the city and to deliver an acceptable level of services to the residents. He observed that despite the increase in population of the city and its environs, nothing had been done. This, he noted was of great concern to the general public.

Mr. Mbugua noted that devolution of powers to the grassroots and the decentralization of the local government structure in Nairobi, by dividing the City into separate boroughs was very timely. He highlighted the advantages of decentralization of Nairobi by formation of administrative divisions or boroughs/municipalities as:

- Opportunity to improve life outside the dominant urban areas within the city by better distribution of benefits all over the city;

- Smaller units improve speed in service delivery and enhances sensitivity to community needs;
- Better management due to lower staff to management ratio;
- Would improve national solidarity as members of the community would be able to participate and benefit from services provided; and
- There would be better resource mobilization.

Mr. Mbugua then highlighted two models for the division of Nairobi namely, models B and C. In Model B, he proposed that Nairobi be divided into four municipalities which would be formed through a combination of constituencies as explained in pages 22-23 of his report. These municipalities would be Westlands, Kasarani, Langata and Embakasi. The details of each municipality are contained on page 23 of His report.

Model C proposes that the city be divided into four divisions/boroughs/municipalities separated only by well-known roads/highways of Nairobi with the Nyayo House roundabout as the focal point. He noted that in this model constituency boundaries would not be considered. He proposed that the major roads, which would act boundaries, be the following:

- Uhuru highway leading to Westlands, Waiyaki Way and onwards to Naivasha/ Nakuru National Highway;
- Uhuru Highway leading to Mombasa Road and onward to the Mombasa-Nairobi National Highway;
- Kenyatta Avenue leading to Moi Avenue-Muranga Road and onward to Thika Road Highway;
- Kenyatta Avenue up Valley Road to Ngong Road, Lenana High School and up the Railway line to where Kiambu, Kajiado and Nairobi Districts meet.

On the management of Nairobi, he proposed that there be a city council for the whole of Nairobi Known as the Metropolitan City Council whose functions would be to provide services, which are not confined to one borough or cannot be undertaken by one borough. He outlined some of such services as:

- Strategic forward planning;
- Infrastructure development;
- Water, sewerage and solid waste collection;
- Urban transport;
- Ownership of city council property;
- Revenue collection;
- Supervision of Boroughs;
- Financial control.

He further proposed a metropolitan council that would be made up of seven councilors from each borough. He noted that the choice of the Mayor of the Metropolitan City of Nairobi be considered very carefully and that members of the different boroughs hold this position on rotational basis. He also recommended that each borough be modeled on the currently existing structure.

DISCUSSANT: MR. AWORI ACHOKA

Mr. Awori Achoka began by acknowledging that Mr. Mbugua's paper was a good attempt on how Nairobi could be decentralized but noted that this was just the beginning of the debate. He observed that the issue was not just a matter of creating administrative boundaries but also of addressing issues necessitating devolution. He noted that Mr. Mbugua's paper had tackled administrative issues but left out cultural and social issues. He pointed out that the currently existing inequities had been perpetrated since the colonial period and were inherent in the design of the city.

He observed that the process of re-planning and reorganizing the city provided an opportunity for bringing change and determining how best to enjoy the cultural and social values. Noting that Nairobi had no sense of ownership, Mr. Awori was of the view that there was need to transform Nairobi into an African city, designed and managed as a metropolitan/capital city of an African Country. Mr. Awori was also of the view that the role of the citizenry of Nairobi in the governance of the city should be defined and

recognized. He pointed out that there was need for a framework, that would not only provide people with direct control/power over resources but also allow them to partake enjoyments offered by the city.

ISSUES AND QUESTIONS RAISED

- The issue of urban development should be considered. It was suggested that there be specific legislation on urban development;
- How would the areas in the outskirts of Nairobi be connected to the central business district?
- What are the economic and functional linkages in the different levels of government proposed?
- There is need to look at the comparative advantages of each of the proposed models of the division of Nairobi;
- There is need to consider the root of the problems facing Nairobi in the process of trying to solve them;
- What guarantees are there to ensure that the problems facing Nairobi would be solved once the proposed division is done?
- Good leadership is not necessarily a result of high level of education;
- The Commission needs to look further into the issue of urban development;
- In considering the division of the city, there is need to consider and put into account the historical background of the city's development;

RESPONSE

Mr. Mbugua noted that in his report he had recommended the extension of Nairobi to include the suburbs. He also noted that he had recommended the creation of a Local Government Service Commission to manage human resources at all proposed levels of government.

PART III: FISCAL AND FINANCIAL ASPECTS OF DEVOLUTION

3.1 TAXES AND REVENUE COLLECTION

MR. ANDREW OKELLO

He began his presentation by noting that the Independence (1963) devolved structure of government was undone due to a struggle over revenues and general resource sharing and implored the need for a comprehensive fiscal devolution if true devolution were to occur since institutional autonomy is subject to fiscal autonomy. It is therefore crucial to review the provisions of the independence Constitution and assess its successes and failures in order to better inform the current exercise.

He further noted that funds currently being transferred to local authorities are simply inadequate. Revenue sharing and collection should clearly avoid multiplicity of collection, administration or appropriation. The tax system in the devolved arrangement should not undermine sound fiscal principles. The system should avoid tax competition. Mr. Okello noted that the proposed devolved system was affordable without additional taxes on condition that there was efficient and expanded revenue collection.

The tax system should be fair, broad based and feasible. The system should also minimize economic distortions through competition, tax base migration and tax exporting. He pointed out that taxes should provide stable sources of revenue and should be immobile in order to prevent tax-induced movements of factors of production. He underlined the fact that there should be close matching between taxes and expenditure financed therewith, in accordance with the benefits principle. It was noted that the current cost of tax collection was 1.5% of the total revenue collected by Kenya Revenue Authority. If performed at the provincial or local authorities level the collection cost could be as high as 30%.

The limitations of the current tax base

- Administrative constraints e.g. the threshold limit of Value Added Tax is KSh 3M; hence businesses with a yearly turnover of less than the threshold level do not pay VAT. This is significant considering the large informal sector in the economy. Manual systems in tax administration have considerably contributed to corruption hence the need to modernize/computerize the tax administrative system;
- Those earning less than 10,000 per month do not pay income tax hence most Kenyans do not pay tax;
- Excise tax is not broad based i.e. is not charged at the final level of consumption;
- Nairobi alone accounts for 50% of the taxes collected and thus a proper mechanism of revenue sharing should consider this fact.

Recommendations

- Efficient revenue collection and a formula for equitable sharing of the same;
- The local authorities should be left to tax the informal sector;
- A single agency e.g. KRA should be the one mandated to collect revenue;
- Establish a National Revenue Authority that is entrenched in the Constitution;
- The Constitution of Kenya Review Commission should study Local Authorities Transfer Fund (LATF) and borrow from it for the purpose of transfer of funds.

Discussant: Ms. Francisca Maina

- She reiterated the need for the expansion of the tax base and effective and efficient tax collection;
- She urged the Commission to borrow from the experiences of the neighboring countries that have devolved systems in place;
- An Act of Parliament should regulate the sub-national taxation regime with the relevant stakeholders being mentioned in the Act;
- She questioned the rationale of letting Kenya Revenue Authority be the sole tax collecting agency urging for the need of application of the principle of Subsidiarity in tax collection;

- She called for the enhancement of social responsibility in taxation;
- She reiterated the need of learning from LATF in revenue sharing;
- She proposed that property taxes should be handled at the local level citing its use as an instrument for regulating speculative business activities and as a source of revenue for local authorities.

3.2 REVENUE SHARING AND EQUITABLE DEVELOPMENT

MR. N. T.T. SIMIYU

He began his presentation by noting that the current structure is highly centralized. He went ahead to explain how the current budgetary system is carried out and expounded on the weaknesses of the current process.

Weaknesses of the current process

- It is highly centralized and does not seriously address local needs;
- There is a lot of political lobbying by interest and pressure groups;
- There is a lot of room for political influence since the minister for finance and parliament have the final say;
- There is no relationship between regional revenues and expenditures.

Mr. Simiyu proceeded to explain the control of public funds under the current system and noted that the process has a major weakness in that that Permanent Secretary, Ministry of Finance was both the controller and authorizer of spending.

Limitations of the Audit Department

- Lack of independence arising from the fact that funds, to run the department, are sourced from the Ministry of Finance and the Ministry withholds funding if they feel an area should not be audited;

- There is limitation in scope arising from the fact that the current legislation allows them to carry out only accuracy or certification audits rather than efficiency and effectiveness audits;
- Although they report to parliament, when the final report is made to PAC, the person taking action is Treasury whom they audit; hence no action is eventually taken;
- There is no specific time limit for action on reported misappropriations. There is an acute shortage of staff and skills;
- The other limitation is the current position of controller being combined with that of audit.

On the fiscal management, structure and practices under the proposed devolved system Mr. Simiyu explained the roles of the five institutions expected to regulate fiscal resources.

- **National Commission on Government Finance**

He explained that this was to be a policymaking and advisory body. Its role would be to advise both the National and sub-national governments on the appropriate sources of revenue from national resources, and recommend the most equitable revenue sharing proportions both vertically and horizontally on a four yearly basis.

- **Legislative bodies**

These refer to Parliament, zonal and county councils, which have legislative powers. These would pass laws providing for charges, assessment and collection of various taxes to be collected at the respective levels, for the ascertainment of the bases to be charged, for the administrative and general provisions relating to the taxes and for matters incidental to and connected therewith.

- **National Revenue Administration Authority**

It shall be mandated with the responsibility over the collection of all revenues at all levels of government. He proposed that the current KRA should be restructured to take the place of this Authority. He noted that the current manpower and capacity of this authority is centralized with 78% of the tax officers located in only two cities of Nairobi and Mombasa (57% in Nairobi and 21% in Mombasa). He further noted that the current structure of KRA is not based on the devolved structure.

- **Consolidated funds**

All revenue raised by the Authority should clearly be delineated as National, Zonal or Country and should be deposited into the consolidated fund of the appropriate government. The legislative organs of the respective governments would control expenditure from such funds and the Revenue Authority will only release funds on voted expenditures.

- **Audit function**

He further proposed that professionally qualified auditors, as required by the Accountant's Act, should perform the audit function at the National, Zonal and County levels. The Auditor would report to the appropriate watchdog committees of the respective governments.

Discussant: Ms. Grace Masese

She began her discussion by noting that that paper was quiet elaborate. She reiterated that devolution was the only way forward for equitable development and more so as the people of Kenya had made a decision to devolve power. She noted that to have a meaning, devolution should result to sustainable development and meaningful participation in governance and service delivery. The communities should be included in project initiation, implementation and evaluation. She also noted that currently, revenue generation has no influence at all on revenue allocation and expenditure. She underlined the fact that for devolution to succeed maximum dispersal of power should be executed otherwise if the center continued to have considerable power then the gains/benefits that could accrue from devolution would be reversed.

3.3 COSTING OF THE PROPOSED DEVOLVED SYSTEM OF GOVERNMENT

MR JULIUS KIPNG'ETICH

Commissioner Mutakha Kangu on behalf of Mr. Julius Kipngetch presented the paper.

He began the presentation by noting that the government has grown significantly to the extent that it is taking close to 80% of our revenue in salaries, wages and debt obligations. This is due to the increase in the size of the public service through creation of more parastatals, ministries and presidential decrees e.g. creation of commissions and task forces, and unilateral pay increases without a match in productivity. Commissioner Kangu noted that the huge government recurrent expenditure left virtually nothing for public investments, for example, infrastructure. He pointed out that the ministries of Health, Education and the Office of the President consumed most of the resources. He observed that the functions carried out by those ministries could be devolved.

He also noted that the current system of government is centralized and devolved at the same time making it both duplicative and expensive. It was demonstrated that Kenya already has 6 levels of government namely sub location, location, division, district, provincial and the National Government while the proposed system has 4 levels of government i.e. location, district, zonal and national.

He pointed out that the current levels of government were already bloated with staff, which would require downsizing in the devolved system. Further, He noted that the Judiciary would have only one additional unit, a Supreme Court. In the legislature, the additional unit would be Zonal Assembly and the Senate. The District Assembly would be the equivalent of the current local authority. It was also proposed that all members of the legislature at the location, district and the zonal level would be paid as part timers as these are not full time jobs.

It was also noted that fiscal equalization should be pursued as a means of ensuring equitable development across the country. Conditional grants would be utilized to fund regional projects and those of strategic national importance. The national government would exercise financial oversight over the devolved levels of government to ensure fiscal prudence. To achieve the above a National Audit Office would be established to ensure taxpayers receive value commensurate with the revenue collected. A National Statistics Bureau would monitor activities in each level of government and advise the national government on the most equitable methods of resource allocation.

Implementation strategy of the devolved system

Four approaches for managing the transition to the devolved system were outlined, namely:

- Direct method
- Parallel
- Modular/phased
- Pilot

Two approaches were proposed i.e. a piloting of a representative unit(s) for one year to act as a learning ground for the rest of the units and then a phased or modular approach inco-operating the lessons learnt from the pilot phase. This system allows sufficient time for learning, adjustments and full empowerment of the people to manage their own affairs. During the transition period a government of national unity should govern the country.

Special Status Units

It was felt that the idea of granting special status to some districts/location was unwise as no district is fundamentally different from any other. Since the glamour for special status is economic rather than social or cultural, it could be sorted out through proper fiscal equalization mechanisms.

The Relocation of the Seat of Government

Currently Nairobi accounts for nearly 50% of the GDP and hosts about 10% of the national population but lacks the key infrastructure of a modern metropolis. It also suffers from serious social inequities occasioned by rural-urban migration due to centralization of state power and government functions. In this light Nanyuki was proposed as the future capital city for Kenya.

Status of a Capital City

It was noted that in a devolved system of government the Capital City is granted a special status by the constitution and an Act of Parliament is enacted for the management of the capital.

The Case for an Upper House

It was further underlined that the main purpose of an upper house was to check against majoritarian tyranny. In the Kenyan situation the mechanism would dispel the fears of domination of some tribes by others in the governance system. The Upper House would exercise an oversight role over the lower house. The election of members of the upper house would be staggered so as to ensure continuity in government policy and thus provide an institutional memory for the Republic. The upper house would also have power to impeach senior government officials including the President. It would also be a catalyst of a national code for a Kenyan culture, values; and defend the same.

Discussant: Mr. Ndungu Gathinji

- He concurred with the assertion that devolution is a settled issue save for the implementation;
- He implored the need for a strategy for raising more revenue;
- He extolled the seminar on the need to distinguish between good ideas on devolution from practical and implementable ideas;
- He noted that good governance cannot be divorced from financial prudence and that democracy is by nature expensive and as such nearly all governments world over are inefficient. He observed that sustainable development is the heart of

- trans-generational equity. He proposed that a comprehensive study be done on the costing of the current and the proposed devolved system of government;
- More government is needed in certain sectors e.g. security unlike in others;
 - It was noted that the priority is a thorough cleanup of the waste and inefficiency in the current government then the costing of the proposed devolved structure could follow. What exactly do we mean by cost? This could include salaries, office space, pension, cost of redundancies and communication costs;
 - Poverty and democracy cannot co-exist and usually democracy is the loser, hence the need to focus on wealth creation;
 - A proper layout of the proposed organization structure should be set out clearly so that the proper costing is done;
 - The costing team should find out which offices can run out with out pay in order that we may have a cost-effective system;
 - What would be the effect of other zones offering higher/lower salaries?
 - In the Devolution implementation strategy, he noted that two methods stand out; the direct method could be adopted or parallel method for sometime, though expensive.

ISSUES RAISED

- It was unanimous that the issue of devolution is a political question that is already decided, as such the issue is how and when and not why;
- The design of the devolved system should consider and match our annual revenue;
- Rationalisation of the government should go alongside with devolution of power;
- Though democracy is expensive it is essential and cheap in the long run as opposed to autocracy;
- Our jobless and highly trained human resource should be seen as an asset in the devolved scenario rather than as a liability;
- Taxation of idle land was opposed on the view that it would stifle development;

- Centralization has had a huge social, cultural, political and economic cost in Kenya hence this could be alleviated by devolution of powers;
- Centralization of power has been cited as a prelude not only to dictatorship but also colonialism and should thus be remedied;
- Centralization of power and decision-making was blamed for inequitable development;
- Mechanisms be put in place to keep off infighting at the devolved levels of government over resources;
- It was strongly noted that every change has an attendant cost, devolution included. However, it was further noted that in the case of devolution of powers the cost is insignificant and indeed inconsequential in the face of the long-term benefits;
- The Commission and other interested parties should consider the cost of the current centralized government system to the citizenry and should not just dwell on the cost of the proposed devolved system on the government;
- A mechanism should be established to ensure funds meant for lower levels of government get there and money generated at a lower level is not siphoned to any higher order of government;
- In the development of the nation equity is a principal value and hence a framework for its support and promotion should be formulated;
- The Commission should come up with the criteria/index for equalization grants;
- What would be the role of the donors in supporting the devolved levels of government? Would they be free to fund the devolved governments directly?
- The relocation of the capital city has nothing to do with the devolution and is not justified at all;
- The Commission should come up with an implementation framework for devolution;
- Comprehensive study on human capital and skills available should be done;
- The state should be restructured to be an agent of development and not a patron;
- An affirmative action should be carried out on the development of the less endowed regions of the nation;

- A mechanism should be put in place to synchronize the development plans of the regions with the national development plan;
- KRA should be anchored at the national level of government to collect revenue but be decentralized;
- Devolution of powers would minimize mega-corruption in procurement of goods and services for the government;
- The place of the constituency in development should be considered but not as an alternative to local government;
- It was felt that information acquired so far in revenue sharing and cost of devolution should be disseminated to the public;
- Idle land should be taxed to minimize speculative investment;
- The paper on tax collections should be reviewed to include the lower 2 levels of government;
- Community empowerment is at the heart of devolution

RESPONSE

Mr. Nicholas T.T. Simiyu

- On revenue restructuring, he suggested that the Commission borrow a leaf from Bolivia that radically rationalized its taxation regime successfully;
- Cost of change: he suggested that there is an urgent need to cost the current system to identify duplications and then use it as yardstick in costing the proposed devolved system;
- On resource base he noted this was a function of the efficient development and exploitation of the available natural resources;
- He proposed the introduction of a land tax not only to raise revenue but also to curb speculative tendencies;
- Sectoral budgeting is ineffective since funds are allocated to regions regardless of the economic activities and development priorities carried out therein;
- Property rates are a legal issue, which each county will legislate individually.

Commissioner Mutakha Kangu

- On the synchronization of the development plans of the devolved levels of government with the national government's plans, he was of the view that with or without devolution, there was a need for integrated planning. Furthermore, the second level of government would act as a center for the coordination of regional and national development plans;
- External borrowing should be granted to the devolved levels of government under stringent conditions;
- He noted that some areas had developed in terms of the informal sector while others had developed on the formal sector, but since the informal sector was seldom taxed there was need for affirmative action in the form of equalization grants.

PART IV: RECOMMENDATIONS

1. Recommendations on Levels of Devolution

- The location level of government should not be constitutionalized.
- The village should be considered as the lowest level of government as it is closest to the people.
- The constituency as an alternative local government should be considered in the proposed devolution structure.
- It would not be prudent to reproduce the national government structure at the zonal and county government levels to avoid duplication and wastage of resources.
- It may be more appropriate to rationalize the existing local government structure rather than creating new structures.
- If we must have the zonal level it should be purely for co-ordination purposes.
- We should have the village as a fifth level of devolved government or empower people to govern themselves free from constitutional rules.

- The relationship between the constituencies and the levels of devolved government must be clearly established.
- The number of zones should be reduced to increase efficiency in administration and reduce bureaucracy.
- If the zones are done away with, their functions should be carried out by the central government and yet the idea behind devolution is to empower people to participate in governance i.e. bringing power closer to the people.
- Today the local community self-government is very effective at the grassroots level e.g. in resolving disputes. Therefore, this idea should be pursued.
- The organization structure of the devolved system should be defined clearly before costing is done.

2. Recommendations on Functions of Devolved Levels of Government

- There is need to clearly define the functions to be devolved to the lower levels and those that shall remain at national level.
- It would be prudent to allocate functions to the level of government that is most appropriate to perform them.
- A constitutional court or an alternative mediation mechanism should be established to deal with conflicts between and among the various levels of governments.
- National, Zonal and County functions should be legislative, administrative/developmental, judicial and financial.
- The locations should have no legislative functions but should implement national, zonal and county laws.
- As far as the judiciary in the devolved system is concerned, we must ensure that all Kenyans are subject to the same judicial system and at the same time all have equal access to the judicial system.
- We need human capital to be able to decentralize.
- There has been gross human capital inequities and disparities in Kenya e.g. in education and health. Decentralization could equalize these disparities.

- The effect of decentralization on education and health must be considered.
- Failure to involve the people in decision-making is one of the reasons for human capacity disparities.
- There is need to consider how much emphasis should be put on academic qualifications for our leaders.
- Some functions managed at the central government e.g. education can be devolved hence be managed locally thereby increasing efficiency.
- There is need to restructure public service and down size it.
- Certain cadre of officers of the devolved governments should serve on a part time basis.

3. Recommendations on fiscal and financial aspects of Devolution

- Revenue sharing among the various levels of devolved units should be based on objective criteria.
- We should avoid creating parallel systems of service delivery to cut costs.
- There is need for the Commission to audit the cost implications of the functions to be allocated to the proposed levels of devolved government.
- It may be more cost-effective to do away with the zonal government level as the county level of government might very well perform most functions proposed.
- Idea behind the Constituency Development Fund is to ensure that there is at least minimum flow of resources to each and every constituency in the country. It can work alongside devolution.
- The central government has allowed certain areas to suck resources from the periphery thus causing disparities in human capital.
- We need to restructure resources in order to facilitate movement of human capital.
- Kenya has adequate resources but they are not equally allocated to all regions.
- Multiplicity of taxes and of tax collectors should be avoided.
- There should be established a National Revenue Administration Authority responsible for collection of taxes at all levels.
- Government revenue must be distributed equally to all regions.

- Obligation to pay tax must be cultivated in the people. Social responsibility has to be evoked.
- Sub-national taxation should be regulated in terms of an Act of Parliament.
- The mechanisms for the distribution of finances to the devolved levels of government should borrow a leaf from Local Authorities Transfer Fund and seek to improve on it.
- There is need to have specific provisions on how to control the gap between the highest and lowest paid.
- There is need for a comprehensive mechanism to ensure fiscal equalization.
- A cost-benefit analysis of the proposed devolved system should be undertaken.

- **National Commission on Government Finance**

This is a policy-making and advisory body. It should advice both National and sub-national governments on the appropriate sources of revenue from National resources, and recommend the most equitable revenue sharing proportions both vertically and horizontally on a four yearly basis. It is responsible to parliament, and in its activities it should be guided by the proposed best principles and practices. The Bill proposed 7 people inclusive of the chairperson, and should also have a secretariat of about 30 technical and support staff.

- **National Revenue Administration Authority**

The **National Revenue Administration** should have the following features:

- It should be divorced from the Ministry of finance.
- It should have sole powers to raise all revenues at all levels of government.
- It should have powers to control the release of funds to the various governments and constitutional bodies such as the judiciary and parliament.
- It should be delinked from audit.
- It should have operational offices at all National, Zonal and county levels.
- The Authority should be the fourth constitutional organ of the government reporting to parliament.
- The Current KRA should be restructured to take the place of this Authority.

- **Consolidated funds**

All revenue raised by the Authority stated above should clearly be delineated as National, Zonal or country and should be deposited into the consolidated fund of the appropriate government. The legislative organs of the respective governments will control expenditure from such funds and the Revenue Authority will only release funds on voted expenditures.

- **Audit function**

Professionally qualified auditors as required by the Accountant's Act should perform the audit function at the National, Zonal and county levels. The Auditor should report to the appropriate watchdog committees of the respective governments i.e.

- National Auditor should report to PAC
- Zonal Auditors should report to ZAC
- Country Auditor should report to CAC

- For the auditors to function effectively the following conditions should hold.

- They should have their own budget.
- They should **determine the scope of audit** in order to cover both performance and accuracy audits.
- **Prompt action** should be taken on the basis of their report.
- Action on the report should be taken **within six months**.
- There is an acute shortage of staff and skills. Therefore a devolved system will require re-deployment and rationalization of these staff at the respective government levels.

- **The budget process in the devolved system**

Under the proposed system, three annual budgets (National, Zonal and county) should be developed, each composed of recurrent and capital receipts and expenditures, reflecting their respective responsibilities and revenue assignment.

- **National government responsibilities**

The National government should have responsibility for national public services, regulate monetary policy, manage regional equity and national debt obligations, and look at issues pertaining to common markets, national pension schemes and national infrastructure. The specific responsibilities should include:

- National Security (Military and National Intelligence);
- Information and Technology (Broadcasting);
- Office of the president;
- Foreign affairs;
- Tertiary education services (University etc);
- Ministries.

- **National Budget**

The budget should reflect the assigned revenues and responsibilities. Any responsibility passed down to a lower government should be accompanied by the necessary funds.

- **Zonal Responsibilities**

Zonal governments should have responsibility over the following activities:

- Secondary Educations;
- National statistics;
- Local Government Service commission;
- Human Resource Development;
- Trade Industry and Tourism;
- Police, GSU, Prisons and NYS.

- **Zonal Budgets**

Zonal budgets should also reflect assigned Revenues and responsibilities. Any responsibilities passed down to countries should be accompanied by the necessary funds vice versa.

- **County responsibilities**

Counties should have responsibility over the following activities: -

- Livestock development;
- Agriculture;
- Land and settlement;
- Health and sanitation;
- Primary education.

- **County Budgets**

Country budgets should also reflect assigned Revenues and responsibilities.

- **The Role of Ministries in the devolved system**

Individual Ministries should have the following responsibilities, in the devolved system:

- Confine to national priorities and long-term plans;
- Deal with policy matters;
- Offer guidance to devolved governments through offices in each district;
- Standardize public services provided by the local authorities;
- Arbitration;
- Handle international affairs;
- Handle inter district dealings or common services;

- **Proposed additional taxes**

The following additional taxes should be introduced (re-introduced):

- Capital gains tax on transfer of shares and property (currently suspended);
- Tax on idle land;
- Presumptive tax on farm produce (suspended in 2002);
- Inheritance tax.

- **Tax assignment should reflect two broad principles**
 - Fiscal need based on assigned responsibilities and;
 - Efficiency in tax administration-calling for redistributive justice, low collection costs and least distortion in economic activity.

- **National taxes**
 - National Taxes should constitute all those that are **highly progressive**, especially for redistribution purposes. If collected at local levels such taxes would have negative incentives of creating migration between zones and counties;
 - National taxes should also be based on **highly mobile factors** because they distort the locational pattern of economic activity;
 - Such taxes should also be based on **items that are distributed across regional jurisdictions** in a highly unequal fashion. This is necessary to avoid geographical inequities and to prevent allocative distortions that would result from the local taxation of such bases.

- **Zonal taxes**

This level of government is better advised to employ taxes on relatively immobile tax bases. These include:

 - Payroll taxes;
 - Royalties on quarries etc;
 - Dividend.

 - Interest;
 - Water way transport;
 - Road maintenance levy;
 - Taxes on fairs and shows; and,
 - Hospital fees.

- **County Taxes:**

The most appropriate taxes at the county level should be those that in principle do not create potentially distorting incentive for movements among countries.

These are:

- Property rates;
- County court fines;
- Business permits;
- Rent taxes;
- User fees i.e. parking fees, Preservation costs, Hire charges, Billboards, Posters etc;
- Cess;
- Presumptive tax on farm produce;
- Inheritance tax;
- Tax on idle land;
- Gift tax;
- Gain on transfer of property;
- Entertainment/ Casino/ Betting;
- Hotel and Restaurants;
- Tax on Trading income;
- Market fees;
- Death duties;
- Liquor licenses;
- Parking fees.

Zonal Revenue distribution based on 2002/2003 Actual collection

Zone	Gross Revenue Ksh. '000' 100%	National share Ksh. '000' 70%	Zonal share Ksh. '000' 20%	Country share Ksh. '000' 10%
1.	49,025,000	34,300,000	9,800,000	4,900,000
2.	8,651,000	6,000,000	1,700,000	800,000
3.	232,000	160,000	50,000	20,000
4.	464,000	324,800	92,800	46,400

5.	232,000	160,000	50,000	20,000
6.	17,000	12,000	3,000	2,000
7.	26,000	18,000	5,000	3,000
8.	557,000	389,000	111,000	57,000
9.	1,669,000	1,168,300	333,800	166,900
10.	2,504,000	1,752,800	500,800	250,400
11.	835,000	584,500	167,000	83,500
12.	3,215,000	2,250,500	643,000	321,500
13.	3,215,000	2,250,500	643,000	321,500
14.	1,136,000	795,200	227,200	113,600
15.	758,000	530,600	151,600	758,000
16.	2,776,000	1,943,200	555,200	277,600
17.	2,776,000	1,943,200	555,200	277,600
18.	<u>126,983,000</u>	<u>88,881,000</u>	<u>25,396,600</u>	<u>12,698,300</u>
TR	<u>205,071,000</u>	<u>143,466,100</u>	<u>40,992,400</u>	<u>20,488,700</u>

- The zones and counties would retain all zonal and county generated revenue respectively;
- The National Government would regularly route into the Zonal trust fund 60% of its tax revenue after deducting all debt obligations and a contingency provision of 10% of the tax revenue. The remaining 40% would fund National Expenditure requirements;
- There would then be a horizontal distribution between zones from the fund based on zonal population size. At the zonal level 30% would be retained and 30% passed down to the counties on the basis of population size and per capita income. Any surplus at the National level should be passed down in the form of conditional grants. Any external and internal loans by National government to meet its own deficits and those of zones and counties should be channeled downwards as conditional grants.

- **Distribution Formula**

The Revenue raised from National resources should be distributed as follows: using (2002/2003 figures) as an example:

	Total Revenue Collected	205.071 Bl.
Less:	National Debt service	57.6

Contingency fund (10%)	<u>20.5</u>
	<u>78.100</u>
Net National Revenue	126.971

Shared as follows

National Government 40% of 126.9	<u>50.788</u>
Balance	<u>76.182</u>
Zonal Government (pop./per cap.)	<u>38.09</u>
County Government (pop./per cap.)	<u>38.09</u>

• **A comprehensive tax reform strategy be put in place. For this reform to be viable the following should be done:**

- KRA be upgraded to the position of the proposed National Revenue Administration Authority as provided for in the devolved system;
- Its capacity to administer the new tax system be strengthened;
- The authority should take over all revenue collection activities which have been carried out by other agencies i.e. ministries, local authorities etc;
- Tax forms and procedures be simplified to make it possible for individual payers to easily understand and complete their own returns. Return forms not to exceed two pages;
- Tax rates should in all cases be pegged below 25% to encourage voluntary compliance, and minimize distortions in resource allocation;
- A tax amnesty be granted;
- Introduction of a fine ranging from 50% to 100% of the unpaid taxes when tax fraud is committed;
- Provision for jail term for tax fraud;
- Cancellation of registration in public registers when tax fraud is committed;
- Introduction of the penalty of temporary closure of establishments where tax fraud has been committed;

- Provision for interest on delinquent amounts to accrue automatically from the moment the unpaid tax is due, without any need for proceedings of any kind on the part of the tax administration;
- People with temporary business structures or without fixed places of business or illiterate to pay simple flat taxes;
- Taxpayer register PIN numbers should correspond with their ID numbers and business registration number be used as their tax PIN numbers;
- Registered banks to enter into agreement with NRAA as paying point on commission basis. This will reduce the workload of NRAA of receiving payments and processing forms;
- The authority should have very tight control over all accountable documents and forms by use of security checks;
- The Authority should be able to detect tax payers who have not discharged their obligations to file returns and enable the administration to have a criteria for selecting high yield – non-filers and notifying them;
- There should be legislation for demanding partial payments for tax payers who persist on not filing based on the highest return made in the past over the last 24 months;
- Tax MPs allowances;
- There should be a system for reviewing the accuracy of the returns;
- Installment tax payments be encouraged for business income tax;
- Large tax payer unit be strengthened;
- Tax Audits be intensified;
- Tax statistics be prepared and published periodically;
- A proper organization structure and size of staff be rationalized;
- The tax departments be computerized to cope with the flow of data;
- Training of both Administrative staff and tax payers be undertaken on sector basis in the later case;
- Reduce the number of exemptions.

- *The cost of implementing the proposed devolution structure is not significant given the expected benefits.*

4. Recommendations on the Management of Local Governments and Nairobi

- We need to distinguish between rural and urban local authorities and their administration should be considered further;
- We should address social, cultural and political and the role of Nairobi residents when discussing its management as the capital city and not just administrative aspects in isolation;
- The Commission needs to properly consider the role, management and functions of the urban government;
- We should discuss the proposed models of dividing Nairobi into four boroughs to enable the participant's reach a decision on which model to adopt and the functions to assign to the boroughs;
- Out of the 6 models of dividing Nairobi into 4 boroughs that were proposed models A and B were preferred because they don't interfere with the current boundaries;

5. Cross Cutting Recommendations on Devolution

- The purpose of devolution should be clearly defined;
- The Devolution design must attempt to accommodate our various diversities as a nation, including our ethnicity and culture;
- A decision must be reached on the model of devolution desired, whether it be autonomous units, or cooperative government;
- We should decide whether the proposed devolution structure will be implemented at once or gradually;
- Devolution should be geared towards enhancing effective participation of people in governance and enhanced service delivery;
- The private sector, NGOs, the local Community and political organizations must collaborate to achieve local economic development;

- There is need for re-socialization and capacity building for our local communities to build their capacities to accommodate and implement the proposed devolution structure;
- The proposed devolution structure should take cognizance of emerging developments and integration of the East African Community and globalization;
- The Commission should disseminate the Special Working Document on Devolution of Power and the new draft provisions on Devolution, in much the same way as the Commission Report and Draft Bill were disseminated;
- The proposed system of devolution should be clearly defined i.e. whether we are going federal or devolving power within a unitary system or whether we propose a hybrid of the two;
- The criteria used for creation of devolution units should be weighted;
- Proposals on devolution should be consistent with the views that Kenyans gave on devolution;
- We should simplify the proposed structure of government into a chart showing clearly the various powers and functions of the proposed levels of government, and the linkages between and among them and these should be disseminated widely;
- We must ensure standardization and accessibility of resources to all Kenyans;
- Foreign and comparative experiences should be applied only to Kenya's unique circumstances with appropriate modifications;
- The Commission should develop new draft provisions for each new scenario on devolution;
- The Commission should and will prepare a Conference working document of the Workshop's findings and recommendations to aid deliberations at the NCC;
- Only the major guiding principles of devolution should be put into the constitution. The rest should be the subject of subsidiary legislation;
- The assumption that Kenya shall be a parliamentary system of government may be altered by the Conference and should not therefore be the basis of;

- Locations and local communities (villages) should exercise local self-government;
- We should be able to monitor over time the impact of decentralization;
- Instead of trying to improve the western systems we inherited from colonialists we should develop our own African systems;
- Reasons for inequality are ecological/economic viability and also political influence.

6. **Implementation of Devolution**

- Though some suggestions have been given, there's need for more discussions;
- The implementation strategy of the devolved system boils down to two systems: parallel and all-at-once (direct). However, the parallel system would be better though more expensive.
 - A piloting of a representative unit(s) for one year to act as a learning ground for all the other units;
 - Thereafter, incorporating the lessons learned from the pilot, a phased or modular approach, based on the degree of devolution, i.e., where the centre cedes powers gradually over a period of 10 years but in three trenches across the country. During this period a government of national unity should govern Kenya.

7. **Pending Issues**

- A. Management of Nairobi as a capital city.
- B. Alternative to Nairobi as the capital territory.
- C. Management of local authorities.
- D. Management of urban and rural counties.
- E. Ascertaining the actual cost of devolution.

PART V: ANNEXURES

- A. Workshop Programme**
- B. List of Participants**
- C. Papers Presented**