DEVOLUTION OF POWER IN KENYA

I. INTRODUCTION

Constitutionally Kenya is a unitary state with a system of government characterized by two features. First, although the doctrine of separation of powers is ingrained the Constitution vests all the powers in the central government. For practical purposes there are six levels of government namely sub-locational, locational, division, district, provincial and national. The five lower levels have no specific constitutional or statutory functions and are not just absolutely subordinate but they operate entirely on the directions of the national government. Moreover, the six levels of governance perform only executive functions.

The second feature of the current system of government is that the Constitution rests in the President a lot of powers without effective checks and balances. As the clamour for constitutional reforms gathered momentum in mid 1990s, lawyer Pheroze Nowrojee wrote an influential paper (See Nairobi Law Monthly No. 63 October 1996) in which he, inter-alia, advanced five reasons why the Constitution of Kenya must be reviewed. Two of these reasons were a) because the checks upon a Kenyan President are now extremely weak, and b) because there is now total concentration of power in only one individual office. In his own words: "No office should be without some checks, however little or much power it exercises. But to keep on increasing the power in an office, which is already without checks, is to compound an already huge problem, and to geometrically increase the likelihood of misgovernment and have done with the office of the president. We have removed all checks and then increased the amount of power in the President and concentrated almost all Executive power wholly within that office."

From a textual standpoint the excessive powers of the President are traceable to several provisions of the current Constitution. First, section 4 makes the President the Head of State and Commander-in Chief of the armed forces of the Republic of Kenya. Secondly, Section 14 secures the President from civil and criminal liability during his tenure in office. Thirdly, Section 16 empowers the President to appoint Ministers and their assistants without consulting anyone else. Fourthly, Section 23 of the Constitution vests executive authority of the Government of Kenya in the President. Fifthly, section 24 gives the President untrammeled powers, of constituting and abolishing offices for the Republic of Kenya including making appointments to any such office and terminating any such appointment. Sixthly, section 27 empowers the President with the prerogative of mercy. Seventhly, section 30 vests legislative power of the Republic in the Parliament of Kenya, which shall consist of the President and the National Assembly. Eighthly, section 59 empowers the President to prorogue and dissolve Parliament at any time. Ninthly, section 60 empowers the President to appoint the Chief Justice. Tenthly, section 83 constitutionalizes the president's broad powers to declare a state of emergency and to detain people. Finally, sections 108, 109 and 110 empowers the president's to appoint the commissioner of Police, Attorney General and the Controller and Auditor General.

Cumulatively these powers confers upon the President vast legal and political power and prestige. They are humus for dictatorship indeed this has been the Kenyan experience. And as Pheroze Norwojee further observes that Kenyans can do nothing practically if a President were to engage in wrongful or tyrannous conduct. He writes:

He cannot be charged in criminal proceedings, (s.14, Constitution of Kenya), or be sued in a civil court until he has left the Presidency, (Ibid). Hid conduct cannot be raised in Parliament. (Standing Orders). He cannot be summoned to attend Parliament to answer Question Time. (S.52, Constitution). No vote of confidence can be passed against him. Such a vote can only be passed against the Government. (S. 59, Constitution). Even if such a vote is passed the President does not have to resign. He can choose instead to stay on and dissolve parliament instead! (S.59(3), Constitution). He can stand again in the resulting general election. He cannot be impeached. There is no such provision in our Constitution. He cannot be freely criticized outside Parliament in public. Critics can be charged with causing a breach of the peace. Or threatened with anon existent offence called "insulting the President". There are limits to how much he can be corrected through the press as the printer's presses can be broken and disabled by the Police without any hearing being held. No political meeting can be held to address the electorate on his conduct because that needs a licence from himself, via his subordinates. (The Public Order Act). He may not like being called to order by the Church. In which case, Bishops will be threatened with physical injury and worse. Within his own Party there may be no tradition of encouraging debate or dissent. Civil society and no-politicians may not associate together to correct his wrong doing as they will be refused registration as a society or an NGO. (Societies Act and the NGO Act). Public opinion cannot emerge and gather nor express itself on that conduct as there is a monopoly of the radio, and of television channels, and all other applicants are denied licences or access. The 5-yearly check of elections can be controlled through an Electoral Commission that is not independent and through manipulated voting registers and through the non-issuance of Identity Cards.

In the short version of its report, the Commission rightly observes: "The main message which came to the Commission from the people – and came loudly and clearly – is that the current Constitution gives the President far too much power."

The draft Constitution prescribes a system of government in which powers are devolved both vertically and horizontally. In many ways the devolved system of government is proposed as an antidote to concentration of powers in central government which has been a feature of Kenya's constitutional arrangements since it became a British colony in 1920. Such concentration of powers has made government in Kenya easily prone to authoritarianism. Has accentuated political and economic polarization along racial and ethnic lines. Devolution of powers is therefore recommended as an additional reason to help in managing social diversity. Prof. Ronald Walts writing on how power sharing through various models of federal institutions, has observed:

> The pressure for smaller self-governing political units has risen from the desire to make governments more responsive to the individual citizen and to give expression to primary group attachments – linguistic and cultural ties, religious connections, historical traditions and social practices – which provide the distinctive basis for a community's sense of identity and yearning for self-determination. Given these concurrent dual pressures throughout the world, it is not surprising that more and more peoples have come to see some form of federal political system combining a shared government for certain specified common purposes and autonomous action by governments of constituent units for purposes related to maintaining their regional distinctiveness, as allowing the closest institutional approximation to the multinational reality of the contemporary world. In such a context, the objective of federal political system is not to eliminate diversity but rather to accommodate, reconcile, and manage social diversities within an overarching policy.
>
> The need for such a reconciliation was accentuated at the end of the twentieth century by the increasingly global economy, which has unleashed economic and political forces strengthening both supranational and local pressures at the expense of the traditional nation-state. Global communications have awakened desires in the smallest and most remote villages around the world for access to the global marketplace of goods and services. As a result, governments have been faced increasingly with the desires of their people to be global consumers and local citizens at the same time. Tom Courchene has called this trend "glocalization" (Courchene 1995). Thus, the national-state is proving both too small and too large to serve all the desires of its citizens. Because of the development of the world market economy, self-sufficiency of the nation-state is widely recognized as unattainable and nominal sovereignty is less appealing if it means that, in reality people have less control over decisions that crucially affect them. At the same time, nation-states have become too remote from individual citizens to provide a sense of direct democratic control and responded clearly to the specific concerns and preferences of their citizens. In such a context, federalism with its different levels of government provides a way mediating the variety of global and local citizen preferences.

It bears noting that the division of Kenya into eight provinces is one of the last vestiges of an ill-fated experimentation with a peculiar trend of federalism known as majimboism between 1963-1966. After the seven regions were stripped of their constitutional powers they were renewed provinces and to date they continue to provide institutional form for the exercise of governmental powers at the local levels.

In proposing abolition of the current provincial administration system the draft Constitution had heeded one of the most popular demand in Kenya over the past two decades for the simple reason that this cadre of civil servants presents the day-to day face of dictatorship and political repression. The draft Constitution proposes to replace the hated provincial administration with an entirely new system in which people will not only

have a say in their governance but will also participate at various levels and stages of decision-making. The proposed system recognizes the need to devolve the powers of the central government and the proposals seek to address two related it demands for local government reform.

First, the proposed structure of devolved governments seeks to meet the needs for public administration at the grassroots and regional levels. Secondly, the proposed structure seeks to respond to public demand for revival of regional government run by administrators elected by the people and for the singular objective of addressing local concerns.

In practical terms the proposed structure of devolved governments will be created upon the ruins of the provincial administration and the current local government system as established under the Local Government Act Chapter 265 Laws of Kenya. Chapter ten of the draft Constitution which deals with devolution of powers is at once the most revolutionary part and the one most likely to undermine its efficacy and viability of the constitutional order it proposes. This Chapter effectively re-establishes a majimbo system of government but by making districts rather than provinces the principal level of devolution of powers, it succeeds in doing so without rearing-up the ugly head that ***majimboism*** represents in the psyche of many Kenyans.

Yet precisely because the proposed structure of devolved government is based on districts established over the years to serve essentially majimboists political needs. It will not be long before Kenyans realize the system for what it really is: district based majimboism. Before examining in detail the proposed system two points should be noted in passing.

First, the proposed system is really a compromise between those who supported re-introduction of majimboism and those who limited their demands to limitation and devolution of the powers of the central government. Secondly, the governmental system proposed in Chapter Ten of the draft is a conscious effort to entrench democracy but it raises concerns on whether it will be viable in the long-term considering that some of the existing districts simply will not be able to finance it and the more affluent districts might not be willing to "subsidize", as it were, democracy in the poorer regions of the country.

The draft Constitution (as modified by Bomas talks) is proposing to create four levels of government as follows:

a) The National level to consist of two houses of parliament, namely the Lower House and the Upper House.

b) The Zonal level (Region) – It is proposed that Kenya be divided into 18 zones – This will mean that instead of having eight provinces, Kenya will now have 18 zones but it bears noting that all the zones have been created within boundaries of existing provinces. In other words it is more accurate to say that existing provinces have been divided into several zone than to say Kenya has been divided into 18 zones.

c) The County level (District) – Not a single existing district is proposed to be abolished and none so far has been proposed to be created. At the time of writing, the broad consensus is that the present districts should be the main level to which government functions shall be devolved. Such functions are listed in schedule 8 of the proposed devolved Government structure.

d) The locational level – so far there is neither consensus nor clarity about the criteria according to which these units shall be formed.

II. A CRITICAL ANALYSIS OF THE PROPOSED DEVOLVED GOVERNMENT

The term "devolution" is commonly used to refer to those situations in which a previously unitary state distributes power to other territorial units. Simply defined devolution is a practise wherein the authority to make decisions in some spheres of public policy is delegated by law to sub-national territorial assemblies. Thus devolution entails a transfer of governmental or political authority in which the powers of the constituent units determined by legislation rather than by the Constitution. In theory and practise devolution can occur in both a federal and unitary system of government. So long as a mechanism is put into place to mediate and facilitate transfer of power, responsibilities and resources from the central government to democratically elected entities or units. The significance of the latter observation is that there exists no logical or necessary connection between devolution of powers and the need or urgency for adoption of a federal, regional or quasi-federal system of government. Dr. Peter Wanyande, a political scientist defines devolution as follows:

> Devolution is a political concept that denotes the transfer of political, administrative and legal authority, power and responsibility from the center to lower level units of government created by the national constitution. In a devolved political system, the lower level units of government to which power, authority and responsibility has been transferred (devolved) are more or less autonomous from each other. They also enjoy autonomy from the center. This means that any one level of government is not under any obligation to refer to or seek authority from the center in order to make and or implement decisions that fall within their exclusive jurisdiction.
>
> However, each of these levels of government must recognize that they are part of the larger state. This means in practice that some mechanisms that establish a relationship between the centre and the lower level units must be put in place. Similarly a mechanism that establishes a relationship between and among the lower level units must also be in place.

Devolution may occur for obvious reasons. In India, Nigeria and Ethiopia, for example, devolution usually minorities, for a bigger share in the affairs of the State, which they

considered they could not achieve in a unitary State. In Kenya, the proposal to demarcate the country into 18 zones ponders to similar rationale because ethnicity appears to have been the predominant consideration in demarcating them. In a sense therefore it appears ethnic diversity of the degree that requires special governmental authority has been created or presumed to exist in order to justify the peculiar design of devolution embodied in the draft Constitution.

Section 3 of the Constitution of Kenya Review Act (Cap 3A) hereinafter referred to as "the review Act" provides:

3. The object and purpose of the review of the Constitution is to secure provisions therein

a) guaranteeing peace, national unity and integrity of the Republic of Kenya in order to safeguard the well-being of the people of Kenya;

b) establishing a free and democratic system of Government that enshrines good governance, constitutionalism, the rule of law, human rights and gender equity;

c) recognizing and demarcating division of responsibility among the various state organs including the executive, the legislature and the judiciary so as to create checks and balances between them and to ensure accountability of the Government and its officers to the people of Kenya;

d) promoting the peoples' participation in the governance of the country through democratic, free and fair elections and the devolution and exercise of power;

e) respecting ethnic and regional diversity and communal rights including the right of communities to organize and participate in cultural activities and the expression of their identities;

f) ensuring the provision of basic needs of all Kenyans through the establishment of an equitable frame-work for economic growth and equitable access to national resources;

g) promoting and facilitating regional and international co-operation to ensure economic development, peace and stability and to support democracy and human rights;

h) strengthening national integration and unity;

i) creating conditions conducive to a free exchange of ideas;

j) ensuring the full participation of people in the management of public affairs; and

k) enabling Kenyans to resolve national issues on the basis of consensus.

It may be strongly argued that the objects and purposes contained in paragraphs, a),d), e), f), h), j) and k) required the Constitution of Kenya Review Commission, hereinafter referred to as "the Commission", to inquire into ways of formulating a system of government that would enhance power-sharing along vertical and horizontal levels of government. It is however interesting to note that one of the functions of the Commission under Section 17(v)(ii) was to "examine the various structures and systems of government including the federal and unitary systems and recommend an appropriate system for Kenya.

Yet a careful analysis at the draft Constitution and the Commission's main report reveal the Commission is overly enthusiastic for devolution under some sort of federal model. The Commission is yet to make an attempt to consider how devolution would look like and operate under a unitary system of government. This criticism is particularly significant because in most of the 20th century devolution along federal lines has taken ethnic lines owing to demands by groups whose real interest is ethnic self-determination as opposed to using federalism as a device to manage diversity. In its main report the commission notes this trend as follows:

> Modern instances of devolution are almost always examples of accommodating and consolidating ethnic, regional, linguistic or religious diversity, as in Bosnia-Herzegovina, the Russian Federation, Puerto Rico and USA, Spain and the Philippines, and the recent recognition of autonomous aboriginal areas in Canada. In these instances, sometimes power is devolved to geographical areas to safeguard ethnic and cultural interests and identities. Devolution is thus seen as the response to the multi-ethnic or multi-nationality character of the national population, an attempt to retain intact the sovereignty and unity of the state.
>
> In these situations, the aim has not been to eliminate diversity, but rather to accommodate, reconcile and manage it within an overarching harmony and unity. This suggests, that many federal political systems by reconciling the need for a large-scale political organization with the recognition of ethnic, linguistic or historically derived diversity, have the advantage of a closer institutional approximation to the multi-national reality of the contemporary world.
>
> Apart from these broad considerations it has been argued that, by dispersing power to different levels, devolution promotes good governance, enhances separation of powers, multiplies the incidence of checks and balances and enhances bureaucratic effectiveness, transparency and accountability of governmental power.

In its urging endorsement of devolution the Commission to its credit is conscious of disadvantages attendant to devolutions. There are four main disadvantages associated with devolution. Firstly, far from fostering national unity, devolution can indeed promote localism, ethnic and racial xenophobia and undermine the sense of nationgood. It may also inflate religious and cultural diversities apart from compounding the marginalization of the minority of minorities.

Secondly, devolution can lead to decentralized authoritarianism and despotion instead of taking good governance and provision of services to the people. This is because mere fact of devolution does not automatically lead to effective check-and-balance denies against abuse of power, corruption and mal-administration. Thirdly, devolution may lead to transfer of powers and responsibilities to units without the administrative, financial, human or bureaucratic resources to carry out their functions. N such a case devolution becomes a net liability.

Finally, poorly designed devolved government may translate into costly duplication of governmental functions plus attendant inefficiency and strengthen the powers of the bureaucracy thereby weakening the systems of accountability. Moreover, the unjustifiable multiplication of machineries and processes of intergovernmental consultations may result in government rigidity and the accompanying resource and opportunity costs.

In the last analysis what really matters in the devolution process is that each country should have a clear view of its peculiar circumstances and objectives it wishes to accomplish. There is no ideal model of devolution. That said, we hasten to add that the system of devolution prescribed by the draft Constitution is controversial not so much an ideological grounds but because of its contradictions and conceptual weaknesses. As the late Dr. Crispin Odhiambo noted during the first session of the National Constitution Conference popularly known as Bomas I, chapter 10 of the draft Constitution is wrong because it collapses ideas and principles that are mutually exclusive in theory and practise. In his words:

> Mr. Chairman, if we do not agree on this Chapter, then the entire Constitution is null and void and that is why we must agree on this Chapter in a manner that can enable us to enjoy those rights and our sovereignty in the most effective manner possible. Mr. Chairman, the title of the Chapter is also wrong, is wrong because this thing is supposed to be dealing with the Structure and Systems of the Government. From there is when we can talk about. Because once we know the Structure and Systems of Government that we want is when we can know whether we need a Bicameral System, what type of Executive System we want, what type of Judicial Systems we want, how we are going to control and mange our land and resources. We will also know how we are going to control to protect our environment, how we are also going to distribute our resources and so forth.
>
> If we do not now the Structure and Systems of Government, we cannot and we shall not define those other things realistically and correctly. That is why, Mr. Chairman, we must first and foremost situate this Chapter in the correct position that it deserves. Then secondly, we must change the title to actually reflect what it is supposed to be doing, namely, the Structure and the System of Government. I say that because the use of the concept of the term Devolution in this Chapter is the most confusing and most misleading and it has been used here severally

without even an attempt from your Chair to correct it. Mr. Chairman, the concept or the term Devolution as you have correctly defined here simply means the delegation of powers from the Central Government of the National Government to Local or constituent units through an Act of Parliament or Legislation.

Now, that is totally different from Federalism or Federation which on the other hand states that it is the separation powers between the Nation Government and constituent units through a Constitutional Act, Mr. Chairman. Now, once your have known that then your must understand, Mr. Chairman, that the cardinal or the principle difference between Devolution and Federalism is that in the one case of Devolution, power is delegated through an Act of Parliament, whereas in Federalism it is distributed through a Constitutional Act.

The result of the devolution model in the draft Constitution is that it proposes creation of a hybrid system of government based on several divergent and conflicting ideas. The proposed hybrid system will be based on ideas of choice *majimboism* regionalism, federalism, and provincial based unitarianism.

III. STRUCTURE AND CONSTITUTION OF DEVOLVED GOVERNMENT – RELATIONSHIP BETWEEN THE DEVOLVED UNITS

The draft Constitution tabled by the Commission to the National Constitution Conference (NCC) proposed that power be devolved to the following levels: village, location, district and province. During the second session of the NCC, popularly known as Bomas II, delegates express support for the proposal for devolution of power but they took exception to the proposed structure in the draft bill which they feel was ambiguous, expensive and difficult to implement. To address the concerns of delegates the commission constituted a sub-committee of the Commission to revisit the chapter on devolution. The said sub-committee produced a **Report on Devolution of Powers** which was presented and discussed by the conference in the plenary sessions before being adopted as a working document by the Technical Committee on Devolution of powers. The immediate effect of this report is that it implies various modification of the draft Bill which will be adverted to in this paper as need arises. In particular the report of the subcommittee proposes that the following principles should be included in the draft Bill to fill the existing gaps:

1. The need to promote peace, internal harmony, indivisibility of the nation, coherence and National unity.

2. Need to promote observance of the rule of law at all levels.

3. Ensure equitable representation of all Kenyans in the national institutions and processes.

4. Protection and promotion of cultural, communal, religious, ethnic and linguistic minorities.

5. Ensure that, in appropriate cases, the higher levels of government exercise restraint in favour of the lower levels of devolved government.

6. The national government and the government at each level to which power is devolved shall be loyal to the constitution and uphold the national goals, values and principles of the Republic.

7. The national government and the devolved governments shall exercise such power and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of the other governments and shall respect the constitutional status, institutions, powers and functions of governments in the other levels.

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

9. The principle of viability, sustainability, efficiency and effectiveness or devolved units of the government – based on population geographic size, historical and cultural ties, economic and natural resources shall be considered in the establishment of units and levels of devolution and review of boundaries between the established units.

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

Concerning the structure of devolved government the commission recommended the reduction of the number of levels of government from five to four. These levels are:

- the National level
- the sub-National or Regional Level
- the Local Government Level
- the Locational Level

Local government is proposed to be at the current district level and that the two categories of rural and urban local government but be restricted to cities as the urban and districts as the rural category. The draft bill proposes the district as the principal level of devolution and that cities and municipalities be given the status of Districts as devolved units. Currently Kenya has 3 cities, 43 municipalities and 67 districts. Accordingly if the proposals in the draft Bill see the light of day Kenya will effectively have 113 units of devolution.

The devolved units at the four levels shall be constituted through elections but the details of how this will be done will be contained in the proposed Devolution Act. Article 214 of the draft bill provides:

(1) Subject to the Constitution

a) the structure of devolved authorities is, based on democratic principles and the separation of powers;

b) legislative or policy making or supervisory councils and executive authorities are elected;

c) executive authorities are accountable to elected councils;

d) members of councils and the executive can be recalled by registered voters; and

e) at least one third of members of councils are women.

The precise relationship between the devolved units is difficult to discern until the proposed Devolution Act is amended. However, the draft Bill and the report adverted to above contains a general framework within which the devolved units will interact. In particular this general framework relates to functions and powers of the devolved units. The foregoing notwithstanding Article 227 of the draft Bill which revolves to intergovernmental relations between the devolved units provides:

(1) The powers of the National Government are contained in List I, the powers of Districts are contained in List II, and the concurrent powers are contained in List III in the Seventh Schedule.

(2) A ministry of the National Government shall maintain liaison with the District and the Provincial Governments.

(3) Public servants who are posted to provinces and districts shall liaise with the Provincial and District Governments for the purpose of exchange of information and co-ordination of policies and administration.

(4) The public servants referred to in clause (2) shall be posted after consultation with the Provincial and District Governments.

(5) A District Government may be suspended in an emergency or in case of war or for gross inefficiency or corrupt practices or failure to comply with the Code of Conduct applicable to District Government.

(6) Except in the case of an emergency or war, a District Council shall not be suspended unless an independent commission of inquiry has investigated the allegations against it and the President is satisfied that the allegations are justified.

(7) During a suspension under clause (5) arrangements shall be made for the performance of the functions of the District Government as specified in an Act of Parliament, and the authority charged with the responsibility of implementing the arrangements shall liaise with the relevant Provincial Council.

(8) A suspension under this Article shall not extend beyond a period of ninety days, during which period new elections for the Council shall, in appropriate circumstances, be held.

It will be noted that owing to the changes proposed by the report on devolution and subsequent debate in Bomas II and III powers of the National Government and District Government enumerated in the Seventh Schedule of the Bill might have to be reformulated. Accordingly, an exhaustive discussion of how the division of powers will affect intergovernmental relations should await conclusion of Bomas III or at the very least the publication of the report of the Technical Committee on Devolution of Powers.

As regards the general functions of the devolved units the Commission proposes four things. First, that executive power of the state be devolved to all the levels of government. Secondly, that legislative powers of the state be devolved to the regional and district levels of government. Thirdly that the financial power of the state be devolved to all the levels of government. Finally, that the judicial power of the state be retained at the national level subject to the establishment of traditional courts as provided for under Article 285(3) of the Draft Bill.

Article 230 of the Draft Bill contemplates the enactment of a Devolution Act to give effect to the principles and objectives of devolution and other details regarding powers, functions and intergovernmental relations of devolved units. The said Article provides:

(1) To give effect to the principles and objectives of devolution and other provisions of this Chapter, detailed provisions for the structure, powers and functions of Devolved Authorities and their relationship with the National Government shall be contained in an Act of Parliament.

(2) That Act of Parliament shall be enacted or amended only by the votes of an absolute majority of the members of each housed of Parliament.

(3) The Act –

a) shall provide for the division of legislative and executive powers between the National, Provincial, District, Location and Village Governments;

b) may provide that the power to make laws on a matter is with one government and the power to implement it with another government or governments;

c) shall provide for a list of concurrent powers on which it may specify matters on which the laws of Parliament shall prevail over the laws of a District Council and matters on which the laws of a District Council shall prevail over the laws of Parliament, in case of conflict;

d) may provide for delegation of functions of one level of government to another and shall specify the conditions for the transfer and recall of the powers;

e) may specify that legislation passed by Parliament should contains provisions for its adaptation to local circumstances by a District or a Province;

f) shall provide for the settlement of disputes between different levels of government and between governments at the same level of governments;

g) shall specify that in the resolution of intergovernmental disputes attempts shall first be made at mediation and negotiations for a settlement;

h) shall establish the mechanism and criteria for the allocation of funds to Provinces, Districts, Locations and Villages:

i) shall ensure that one-third of the composition of the Province, District, Location and Village councils shall be women;

j) shall require appropriate constitutional commissions and constitutional office holders to establish offices in every District over a specified period;

k) may provide for constitutional commissions and constitutional office holders to recommend to the President that an inquiry be held to determine whether there are grounds for the suspension of a devolved government on the basis that the devolved government has failed to discharge its functions fairly, honestly or efficiently in accordance with the Constitution or the Act;

l) may provide for a phased transfer of powers, functions and resources to devolved government bodies on the basis of satisfying clearly prescribed criteria showing appropriate capacity to discharge the functions and powers;

m) may specify that the cost of salaries of Councillors and Administrators shall be met from revenues raised directly by the devolved government;

n) may require Devolved Governments to have rules and mechanisms for the protection of minorities and the promotion of their rights and interests;

o) may specify special measures for the development of marginalised areas; and

p) shall specify the maximum and minimum size of membership of councils and executives of devolved governments.

To conclude this section the writer recommends that the reader should bear in mind that at the time of this writing many of the issues discussed above are still being debated and final agreement is yet to be made.

IV. DEVOLUTION AND AFFIRMATIVE ACTION

Since democracy implies majority rule and given the tendency of concentration of powers in the hands of powerful elites modern constitutions have had to confront the problem of how to protect the rights and interests of social minorities and marginalized groups. The Bill of Rights offers the classical framework for doing so. However the Bill of Rights in itself is inadequate because experience shows its efficiency depends on access to courts and capacity of the judiciary give redress to problems of justice many of which border on politics thereby impugning their justiciability.

The implication of this reality is that the Bill of Rights offers rather inadequate and elusive safeguards for minorities and marginalised groups. Accordingly, modern democracies have realized that other mechanisms to protect their rights and interests must be found. Given that modern government tend to concentrate powers in fewer and fewer hands – usually the Executive branch of government – usually the Executive branch of government – sharing power with minorities and marginalised groups is one of the best ways of empowering them. In acknowledgement of all this, the draft constitution bill proposes to decentralize government powers and functions. Simply defined decentralization refers to geographic or territorial transfer of authority, whether by deconcentration of administrative authority to field units of one department or level of government, or by political devolution of authority to local government units or special

statutory bodies. Hence the core idea in the concept of decentralization is the distribution of state powers between the centre and the periphery.

In the chapter on Devolution of Powers women and ethnic minorities are implicitly identified as special groups in need of constitutional protection and affirmative action. The central theme of devolution is really the protection of minorities and marginalised groups as argued elsewhere in this paper. This section deals with how the principles of devolution in the Draft Bill seeks to foster and promote affirmative action.

Affirmative action is a deliberate policy or programme that is a deliberate policy or programme that seeks to remedy past discrimination by increasing the chances of the affected to participate in what they were previously denied. The object of affirmative action otherwise known as positive discrimination – action otherwise known as positive discrimination – is to enhance the participation of marginalised groups in decision-making and implementation and make a difference in the political climate and culture.

Article 214(1) promotes affirmative action for women by requiring that one third of members of devolved units are women. This requirement is additional to Article 106 which, among other, things, provides for election of thirty women to the National Council, the proposed upper house of Parliament Article 106 provides:

(1) Elections for the National Council shall be held –

a) For seventy members, on the basis of single member constituencies; and

b) Thirty seats, for women candidates, on multimember constituencies representing provinces of Nairobi.

(2) For the purposes of elections under clause (1)(a) the constituencies shall be based on Districts (including Nairobi).

(3) For the purposes of elections under clause (1) (b), the seats shall be distributed as follows –

a) four women representing each province; and

b) two women representing Nairobi

(4) in the elections under clause (3), every voter may vote for only one candidates, in the case of provincial seats, who are among the four top, and in the case of Nairobi seats, those who are among the two top, shall be elected.

It bears noting that Article 107 proposes for equitable way of electing members of the National Assembly, the Lower House of Parliament. Article 107 provides as follows:

(1) Elections to the National Assembly shall be based on the Mixed Member Proportional System in which two hundred and ten members shall be elected on the basis of single member constituencies and ninety members shall be elected on the basis of list of candidates submitted by political parties contesting the elections.

(2) The constituency members shall be elected on the basis of plurality of votes.

(3) The distribution of seats on the party list shall be made in such a way as to achieve the highest degree of proportionality, among the parties.

(4) Before a general election is held, each political party contesting the election for constituency based members of the Assembly shall prepare and submit to the Electoral Commission a list of persons nominated by that party for election by proportional representation.

(5) Each list shall –

a) rank the nominees in order of priority of nomination;

b) alternate between women and men in the priority of the nominees;

c) take into account the need for representation of the disabled, youth and minorities; and

d) reflect the national character.

(6) All the votes cast in the republic in a general election for constituency members of the National Assembly shall be totalled according to party affiliation.

(7) Parliament shall provide the method of allocation of seats on the basis of the party lists for the purposes of clause (3) of this Article.

V. DEVOLUTION OF POWERS – THE CHALLENGES OF ACCOUNTABILITY AND DEMOCRACY

There is a necessary and critical link between democracy and accountablity on the one hand and decentralization on the other hand. First, Professor Apolo Nsitambi has argued that democratization is a process of putting in place systems, structures and practises of government which answer the following: freedoms…. Free and fair elections… and accountable administration." Secondly, the ***raison d'etre*** of decentralization is the distribution and division of power, responsibilities and resources between central,

regional and local governments with the aim of dealing with governance issues in an effective manner. The ultimate objective of devolving state power is to develop a democratic system of governance and an adequate provision of basic services.

In practical terms this symbiotic relationship implies two things. First, that the existence of democratic institutions at the grassroots or local levels is vital to the growth of democracy at the national level. Secondly, the craving for and development of local and regional government are historically a response to authoritarianism on the part of the centralized state. In its administration Main Report the CKRC underscores the fact that "due to frequent failings by unitary or centralized systems manifested by increased marginalisation of minority groups, abuse of power, inequitable distribution and mismanagement of national resources, there have been calls in the last two decades to decentralize government powers and functions." This argument is buttressed by Prof. Richard Simeon as follows:

> The democratic case for decentralized governance is well known. It makes possible government closer to the people, increasing opportunities for participation, promoting a closer fit between citizen preferences and policy results, giving citizens a wider arrays of forms in which to participate, and so on."

Yet when all is said, decentralization, like political pluralism and economic liberalization, is no panacea to the problems of authoritarianism and mismanagement of resources. The mere fact that a government is closer to the people is no guarantee of its efficacy, let alone accountability to the people. Government at any level is susceptible to corruption by the politicians, abuse of power mismanagement of resources and downright tyranny. What decentralization helps is, at least theoretically, to increase the people's access to government and opportunity to be involved and participate in matters that specially affect them. India for example, has experimented with decentralization of state power for more than half a century and scholars are of the views that the people's representatives at virtually every level of government easily become a new class of professional politicians and them into parasites on society and gegin to live on their ministerships membership of legislatures, et cetera sublash C. Kashyaf. An Indian constitutional lawyer has commented:

> It has come to be believed widely that the system has led to and nurtured an axis between the businessman, the politician, the civil servant, the police and the criminal. For the new breed of professional politicians, national interest is the last priority. Power for its own sake or for personal ends has become the supreme value. Those in government remain so occupied in the struggle for sheer survival that they have not time for serving the people. Populism has acquired respectability. Hypocrisy and sycophancy have attained the status of national characteristics. In this atmosphere, there seems to be no escape from admitting that the system has failed to deliver the goods and meet the needs of the nation and satisfy the urges and aspirations of the people and that, therefore, a comprehensive review of institutions, and functions is urgently called for.

> Looked at from another angle, the foundational norm of any democratic constitution is that sovereignty vests in the hands of the people. Today, there is a widespread realization among the aware citizenry that the sovereignty of 'we the people' stands grievously eroded by the way the political system and public administration have been operated for the last fifty years. We are dismayed with the way the voice, interests, quality of life and dignity of the individual citizen have been relegated to the lowest priority in the scheme of things. Still, some scholars and politicians go on repeating parrot-like that there is nothing wrong with the political system and no need for any rethinking as the fault for the failure lies with the people. They forget that the present breed are the products of this system, the system is not an end in itself – it is only a means for achieving public weal. If the system fails to deliver, people cannot be changed or imported to suit the needs of the system, the system has to be modified or replaced to match the character and meet the needs of the people.

What has happened in Indian could easily happen in post-devolution Kenya. Indeed, the commentary of the Indian lawyer equally descriptive of the situation in Kenya and other countries. The notion that devolved government is all virtuous is a dangerous fallacy borne of a simplistic understanding of political society and human nature. More often than not, devolutions of powers and functions begin from the presumption that there would be greater involvement of and participation by people in deam-making and operations of local and regional ties of government. Seldom does this hope turn into reality and popular participation remains largely symbolic but local and regional politicians can say and do so much in the name of their constituents in the same that politicians at the national level speak and act in the name of the people. Amongst other factors democracy in and accountability of devolved governments suffer from the following limitations:-

i. Lack of knowledge on the part of the people which disables them from meaningful participation in decision-making.

ii. Lack of support for the ideology of popular participation by government.

iii. The absence of an institutional framework for meaningful participations and

iv. In most practising democracies, people power is confined to various forms of popular control over government rather that popular participation in government.

Given the above-mentioned limitations conscious efforts must be made to ensure democracy and accountability of devolved government to prevent devolved units from replicating dictatorship and corruption associated with centralized government. In other works there is need for checks and balances to ensure devolved units do not become costly means of decentralizing authoritarianism, corruption and abuse of power. Viewed

against backdrop of the Draft Bill and the constitution review debate in Kenya there are at least six feasible ways or methods of achieving that objective.

1. **The Structure of Devolved authorities should be based on democratic priniples and separator of powers**

This means at least two things. First, the legislative and executive authorities of devolved units will be constituted democratically, i.e. through elections of officials. Secondly, no organ or branch of the devolved units should be responsible or in control of functions that offend the doctrine of the separation of powers. On this point it will be quickly noted that the proposed devolution of powers in Kenya will not affect the judiciary. This means that devolved governments in Kenya will essentially be a two-arm government as opposed to the traditional separation of powers among three arms of government.

2. **Limitation of Powers of Devolved Government**

In Kenya the draft Constitution specifies in the seventh schedule the list of powers of central government devolved units and a third list of concurrent powers. This means that the powers of devolved governments are delimited ***a priori*** and the envisaged Devolution Act will contain other limitations. This is good because absolute power, as the famours dictum says, corrupts absolutely.

3. **Financial and Administration Supervision of Devolved Units by Independent Bodies.**

Apart form fostering accountability through democratic composition of the organs of devolved government the involvement of independent bodies is key to the realization of this ideal. Article 225 of the Draft Bill seeks to do precisely that. It provides:

(1) A commission on Local Government Finance shall be appointed every four years. It shall consist of six members, three of whom are appointed by the National Council and three appointed by the National Government.

(2) The Commission shall advise the National Government and the devolved governments on the distribution of grants to the devolved councils.

(3) Grants include –

a) Unconditional grants, based on the criteria of population and geography and any other relevant factors;

b) Conditional grants, based on the criteria approved by Parliament; and

c) Equalization grants paid to marginalized districts.

(4) The Provincial Secretariat is funded by the National Government.

(5) The Auditor-General shall audit the accounts of the devolved governments.

4. **Political and Administrative Oversight or Supervision of Devolved Units by the National Government**

In virtually every country where state powers have been devolved the residual powers lies with the central government. Resort to this powers in given circumstances is necessary to ensure that law and order prevails and must importantly to ensure the perpetuation of the nation-state. Towards this end, Article 207 of the Draft Bill provides:

(1) The powers of the National Government are contained in List I, the Powers of Districts are contained in List II, and the concurrent powers are contained in List III in the Seventh Schedule

(2) A ministry of the National Government shall maintain liaison with the District and the Provincial and District Governments.

(3) Public servants who are posted to provinces and districts shall liaise with the Provincial and District Governments for the purpose of exchange of information and co-ordination of policies and administration.

(4) The public servants referred to in clause (2) shall be posted after consultation with the Provincial and District Governments.

(5) A District Government may be suspended in an emergency or in case of war or for gross inefficiency or corrupt practices or failure to comply with the Code of Conduct applicable to District Government.

(6) Except in the case of an emergence or war, a District Council shall not be suspended unless an independent commission of inquiry has investigated the allegations against it and the President is satisfied that the allegations are justified.

(7) During a suspension under clause (5) arrangements shall be made for the performance of the functions of the District Government as specified in an Act of Parliament, and the authority charged with the responsibility of implementing the arrangements shall liaise with the relevant Provincial Council.

(8) A suspension under this Article shall not extend beyond a period of ninety days, during which period new elections for the Council shall, in appropriate circumstances, be held.

5. **Prohibition Against Holding Elective Office at national and devolved levels**

Article 228 of the Draft bill emphatically states: “A person shall not hold a public or an elective office at the same time in both the National Government and a Devolved

Government. There are two reasons for this prohibition. First, for any person to hold a public or elective position at two levels of government is obviously insmical to accountability and good governance and in certain circumstance if could offend the doctrine of the separation of powers. Secondly, the prohibition will help to foster co-operation among governments at various levels. This would be difficult if any person is in a position of agitating and re-agitating issues at various levels of government.

6. **Enactment of a Devolution Act**

Article 230 of the Draft Bill requires Parliament to enact a devolution Act to give effect to the principles and objectives of devolution. Through the said Act Parliament will have opportunity provide for effective and feasible ways of promoting democracy and accountability of devolved governments.

VI. COST OF DEVOLVED GOVERNMENTS AND RESOURCE MANAGEMENT

Under the existing Kenya Constitution the Executive Branch of government is virtually responsible for all matters of finance since Parliament plays a nominal, largely ceremonial, role in the preparation and implementation of the budget and revenue management. This state of affairs has given successive governments a lot of leeway to manipulate public funds for political reasons. Development funds have, for instance, been withheld from areas received as politically hostile to the Government of the day. The basic thrust of Chapter 13 of the draft Constitution is to ensure that matters of finance and development will not be held hostage to the politics of the day. Article 263 lays down the principles and objects of public finance and revenue management as follows:

The primary object of the public finance and revenue management system of the Republic of Kenya if to –

a) Ensure efficient and effective generation of revenue for the purposes of promoting and safeguarding the well-being of the people of Kenya;

b) Enhance the participation of people, communities and civil society organizations in public finance management;

c) Ensure equitable sharing of national and local resources throughout the Republic, taking into account the special provisions for marginalized areas;

d) Ensure the equitable division of revenue raised nationally among national, provincial and district and local levels of government;

e) Ensure that in allocation and distribution of national revenue adequate consultation is conducted, and recommendations from various levels of government and sectors are considered; and

f) Ensure that the budgets and budgetary processes promote transparency, accountability and the effective financial management of the economy, debt and public sector.

A peculiar feature of the draft is that it transfers the powers of the Minister responsible for finance to the Prime Minister but no explanation is given for this change. Unless the implication is that the Prime Minister shall be the minister for finance it is difficult to see the merit of the proposed change. On a brighter note, under the new Constitution parliament will exercise real powers in matters of public finance and revenue management. These powers include:-

a) Considering and approving financial year estimates and fiscal and monetary strategic plan and may propose improvements or alterations thereto which shall be incorporated into the plan within thirty days.

b) Powers to approve the appointment of the Board of Central Bank of Kenya which shall consist of the Governor, the Deputy Governor and other members.

c) Powers to approve the appointment of a Controller of Budget who shall, inter-alia, ensure that public money is spent as Parliament intended.

d) Power to approve the appointment of the Auditor General.

It bears noting that for the first time the Constitution seeks to govern the government's power to borrow. This is important because so often the country gets a raw deal from creditors. The matter is dealt with by Article 249 which states as follows:-

(1) Subject to the Constitution, the Government may borrow from any source.

In addition to the foregoing Articles 224 and 226 have a bearing on the matters under review in this section. The said Articles provide as follows:

224 (1) The National Government is responsible, in accordance with Act of Parliament, for the collection of the major sources of revenue.

(2) Districts may impose taxes or levies under the authorities on an Act of Parliament.

(3) The national revenue be shared equitably between the National and Devolved Governments.

226 (1) Districts shall be entitled to a substantial share of the national revenue from local resources and for the allocation of a fixed percentage to the communities in whose areas the resources are generated.

(2) The revenue from national resources shall be shared equitably between the Districts and the National Government.

(3) The manner of distribution of revenue shall be set out in an Act of Parliament.

The question on cost of government is a recurrent theme in all countries whether they are ranked as developed or developing. In Kenya the question has since the early 1990s been controversial for two reasons. First, debate on the cost of government tends to centre on the size of the public service with the result that retrenchment of civil servants seems to be the core of the controversy. Secondly, the publication and ongoing debate of the Draft Bill heralds the replacement of the current centralized system of government with a devolved system that many analysts believe will have far-reaching cost implications. Currently Kenya spends, close to 80% of its budget on recurrent expenditures and meeting its debt obligations.

Kenya spends 84 billion shillings to pay its 250,000 teachers and 230,000 civil servants. The immediate implication of this grim reality is that Kenya simply does not have money to invest in infrastructure development and capital expenditure that are crucial for sustainable economic development. One analysts dramatizes the point as follows:

> Current estimates postulate that half of the public service is totally unnecessary and wasteful, thus a burden to the tax payer. This means a saving of Kshs 42 billion on payroll and downsizing of office space. If your consider our public servant/citizen ration of 480,000 to 30 million. It is one of the most unfavourable in the world and much of this burden to the tax payer is dead weight. The federal government is USA has 180,000 public servants against 280 million citizens! If you built in the power of technology and advances in management practice you realize that our public service poorly structured and subtracts value from the public. In short, the current public service strategy and structure is wrong and misplaced.
>
> In addition, if you look at the debt scenario of the government, it gives you a sad case. The current debt portfolio is shs. 621 billion, which is 71% of our GDP of shs. 880 billion. This debt was incurred without the express consent of the people yet future generations will have to pay, without the matching public investments to show. Without a radical surgery of the public service, Kenya may become technically insolvent soon. 60% of our people are below the poverty line of $ 1 per day today as opposed to 30% at independence. Government failed our people and we must not let them down again.

It is indeed against this background that the controversy over the proposed system of devolving state power should be seen. The criticism that the Draft Bill is obsessed with the power given to the devolved units to spend what will turn out to be inadequate resources is valid. Despite the rhetorical fidelity to the principle of putting into place a cost beneficial system of government the Draft Bill is more conspicuous by its potential

to increase government expenditure than its ostensible benefits to Kenyans. During a seminar on Devolution organized by the by the CKRC in December, 2003, Mr. Ndung'u Gathinji, an accountant, criticized the proposed devolution structure in two respects:-

> It would however appear that most developing countries like Kenya, have never heard of the call to live within their means. There is no reason why they should anyway, because living beyond their means is actively aided and abetted by the Bretton Woods institutions who merely lend new loans to countries that are finding it difficult to repay old loans. The new loans are then used to pay off the old loans (with interest of course) and the same scenario is repeated over and over again. This enables those lending institutions to claim that no country has ever failed to repay their loans while all that happens really is that the countries sink deeper in the debt.
>
> Some people have attempted to develop the philosophy of trans-generational equity in many forms, the simplest one being what is commonly referred to as sustainable development. Something is sustainable when one can keep on doing it over and over again un-aided, and I use the word un-aided deliberately. What condemns the so-called developing countries to a state of permanent under-development is something that is very common in some countries in Asia, where some families are in permanent bondage working to pay off debts, to their landlords. This is ensured though the payment of little or no wages thus eliminating any capacities to accumulate savings to be able to pay off the debt. And so it is that the more developing countries struggle to try to get out of debt the more they sink deeper into debt because the world economy and the terms of trade are so arranged as to operate like a pool of quicksand for most developed countries. The more they struggle to free themselves, the less free they become.

The question of cost of the new constitution is a theme that cuts across the entire Draft Bill. The proposed Second Chamber of Parliament, regional assemblies and constitutional Commissions and offices will certainly increase the cost of running government considerably. What is not certain is their contribution to efficacy of government particularly concerning promotion of economic development. It should also be noted that the inclusion of social and economic rights in the new constitution will increase pressure on government to derive and so there is a direct nexus between cost and efficacy of the coming constitution order.

VII. LEGISLATIVE FRAMEWORK AND PROPOSALS FOR A MODEL DEVOLUTION ACT

1. INTRODUCTION

The Draft Constitution Bill, as subsequently amended by the ongoing National Constitution Conference (NCC) proposes a devolved system of government with four levels namel:-

i. the National level

ii. the Sub-National or Regional Level

iii. the local Government or District Level; and

iv. the Locational Level.

Article 230 of the Draft Bill envisages that Parliament will enact legislation to give effect to the principles and objectives of devolution. As stated elsewhere in this paper the chapter on devolution is fairly complicated, contradictory and defective in significant way. Above all, the NCC is still going on so that the exact nature of devolution of state power in Kenya are hard to tell at the time of this writing. Given these shortcomings it is practical difficult, if not impossible, to generate a mode Devolution Act. However, in this Section we seek to provide a model of the framework and proposals on devolution based on the Draft Bill and the CKRC's Report on Devolution of Powers.

2. FRAMEWORK OF MODEL DEVOLUTION ACT

The Act should contain a preamble broadly setting out the principles and objectives of devolution and the purpose of enacting the Act. The preamble should also set out the vision and aspirations of the people and in particular recognize the sovereignty of the people as the basis for devolution of state powers.

PART I PRELIMINARY

This part should provide for the short title of the legislation on devolution and a section on interpretation to define the meaning of the key words and phrases used in the Act.

PART II- REGIONAL GOVERNMENTS

CHAPTER 1 – REGIONAL EXECUTIVE

1) This chapter should designate the person(s) and title/name of the authority in whom executive power of the regional government is vested in. for purposes of this Section we shall suppose such person or authority shall be known as the regional chief executive (RCE)

2) This chapter should provide for ways or methods of appointing or electing the RCE, his terms of office and the qualification and condition for holding the said office. Provision for the powers, functions and privileges of the RCE should be made including the oath or affirmation the RCE must make or subscribe before entering upon his office.

3) There should be provision for a Council of Ministers to aid and advise the RCE and setting out its powers, functions and privileges. The modalities for the appointment or election of the Council of Ministers should be stipulated. It is

prudent to make provision for appointment of an Auditor-General for the Region to advise the regional government on legal matters.

CHAPTER 2 – REGIONAL LEGISLATURE

1) This Chapter should provide for the composition of the legislature and state whether the RCE will be a member, and if so, how he will relate to the legislature. The number of members of the regional legislatures should be stipulated. Provision on how the regional legislatures will discharge the functions and powers specified in the Constitution should be made.

2) The Chapter should contain provision for duration of regional legislatures and the qualification for membership. Provisions on when and by whom the regional legislatures shall be summoned should be made including provisions on prorogation and dissolution of the regional legislatures. Provision should also be made on whether the RCEs will have the right to address the regional legislatures and send messages with respect to a Bill then pending in the legislature or otherwise.

3) The Chapter should make provisions for the appointment or election, of the Speakers and Deputy Speakers of the regional legislatures. Their powers and privileges should be provided for. It should be provided how the Speaker or Deputy Speaker may vacate his office, resign or be removed. Provision should be made for other staff of the regional legislatures.

4) The Chapter should make provision for how the regional legislatures shall conduct their business and provide for the powers, privileges and immunities of regional legislatures and their members.

CHAPTER 3 – REGIONAL HIGH COURTS

The Draft Bill provides for a united court system but there is nothing to prevent creation of regional High Courts with additional jurisdiction to deal with laws enacted by regional legislatures.

1) Provision should be made for establishment of a High Court in (as opposed to for) each region. The Act should confer jurisdiction to such High Courts in respect of laws made by regional legislatures. Ideally the regional High Courts should be headed by a regional head appointed by the chief Justice of the nation.

2) The Act should specify the powers of the High Courts in the regions with respect to laws made by the National Parliament on the one hand and the laws made by regional legislatures on the other hand. Of greater importance the Act should specify the powers of such High Courts with respect to conflicts between the

National Government and Regional Government arising from exercise of powers and functions enumerated in the Constitution.

PART III DISTRICT AND LOCATIONAL GOVERNMENTS

Ideally, district and locational governments should not have judicial or statutory legislative powers. Thus legislative powers should be limited to making subsidiary legislation upon delegation by regional assemblies and by-laws concerning matters of local nature and import.

1) The Act should provide for the powers and composition of district and locational governments, including the mode of their election. It should provide for the duration of such governments and their powers, authority and responsibilities.

2) Of greater significance the Act should make elaborate provisions on the powers of district and locational governments to impose taxes, levies and fees and the procedure doing so it should make provide for the audit of accounts of District and Locational Governments.

3) The Act should make provision for the application of laws made by the National Parliament and the respective regional assemblies and how disputes arising from enforcement of such laws will be adjudicated.

PART V – RELATIONSHIP BETWEEN THE NATIONAL GOVERNMENT AND THE REGIONAL GOVERNMENTS

CHAPTER I – LEGISLATURE RELATIONS

1) The Act should recognize the sovereignty of the National Parliament by making an express provision recognizing the power of Parliament – subject to the Constitution – to make laws for the whole or any part of the territory of Kenya. The Act should similarly state that subject to the Constitution a regional legislature may make laws for the whole or any part of the region.

2) The Act should empower Parliament to provide for the establishment of certain additional courts for the better administration of laws made by Parliament or if any existing law with respect to a matter enumerated in the National List under the Constitution. It should also be provided that Parliament has exclusive power to make any with respect to any matter not enumerated in the concurrent list or Regional List. Such power shall include the power of making any law imposing a tax not mentioned in either of those lists.