

POLITICS OF CONFLICTS AND LONG RANGE PLANNING

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1. THE END OF INNOCENCE

In a basic sense, Kenya is at crossroads. The socio-political framework which carried us from independence is no longer sufficient to guarantee recovery from the present depression and future growth. This insufficiency has led to some basic conflicts. It is the argument of this paper that these conflicts must be resolved to enable us to tackle other long range growth issues. If we do not tackle the long range issues now, we shall continue to be trapped in the miasma of underdevelopment and increasing poverty leading to more conflict.

In the first twenty years or so after 1963, there was "satisfaction" over both local and national leadership and conflict over political leadership did not engender large scale violence. The political elite, fragmented into tribal units by the colonial state's ban on organizing national political parties, did appear to be unified in the commitment to independence. Save for the "Shifta" secessionists and the Land Freedom Army, the bulk of their followers were also unified in accepting independence and its benefits. Elites and non-elites also shared in the hope for a better future. After all, they had "their" government. They could go out and get land. They could send their children to school. These children in turn would get jobs. They could even go to formerly closed districts. What they could not do, their sons would achieve for *mburi yi mbere*.

This was not just idle hope. It was driven by an expanding economy. Although the 'political kingdom' was first sought by nationalism, part of what was to be added was a growing economy. In 'What Kanu Offers You', published at the beginning of our nationhood, it is boldly stated that the objective of independence was to fight ignorance, disease and poverty. It is a fact that the first years of independence saw significant growth.

The current development plan states; "during the first decade of independence....per capita incomes (were) growing at 2.6 percent per year.....Between 1980 and 1989, the average growth rate of per capita income was only 0.4 percent and between 1990 and 1995 the rate was a negative 0.3 per cent per year. **RAPID AND SUSTAINED PER CAPITA INCOME GROWTH HAS REMAINED AN ELUSIVE TARGET. SINCE 1980 THERE HAS BEEN VIRTUALLY NO CHANGE IN THE LIVING STANDARDS OF KENYANS.**" (emphasis added.)

The use of GDP is controversial for it masks many inequities. However, we present GDP data to make a simple point that the economy was expanding during the initial years and stagnated in the later periods. Ikiara and Killick, in *Papers on the Kenyan Economy*, point out that from independence to 1978, the constant price GDP was growing at the average rate of 6% annually, and further, that given that the average population growth for the period was 3.5%, the per capita growth rate was 2.0%. There are studies showing growing regional inequity even as early as the first decade of independence. However, Ikiara and Killick concluded that for the first fifteen years despite the inequities building up, conditions in most rural areas were still improving.

The GDP growth rate was 5.0% in 1979, Moi's first year of rule, but it dropped to 3.9% in 1980, rising to 6.0% in 1981 and dropping to 0.8% in 1984. It was 5.5% in 1986. By 1990 it was 4.3%, 2.3% in 1991, 0.5% in 1992, 0.2% in 1993, 3.0% in 1994 and 4.9% in 1995.

If the first fifteen years showed a growing economy, the next eighteen were dismal. Part of the dismal performance can be traced to two variables in the late seventies. The first is government deficits,

primarily driven by the expansion in public service employment and the second oil shock, and second, the 'coffee boom', a euphemism for the smuggled Uganda coffee when that country was in chaos in the late seventies. These variables were also coupled with the expenditures by KANU political factions related to succession. The 1982 coup attempt can be understood as a continuation of these faction-based struggles.

The initial economic expansion was primarily based on improving agricultural production. Most Kenyans and academics who have written about this period emphasize the contribution of the takeover of the white-highlands. Yet recent scholarship points out that the most important expansion in agriculture took place away from there and in the areas formerly called either trust lands or crown lands. It is in the interface areas of the various ethnicities that there was dramatic expansion in opening new land. If the white-highlands were about seven million hectares, it is possible that the trust lands and crown lands were about four times that. True they were not as productive as the white-highlands but one should note that it is not all the white-highlands which were productive. Significant parts of the white-highlands were zone four and thus ranches.

Between 1961 and 1970 the Million Acre Scheme and other less formal settlement schemes had settled more than 500,000 Africans (4% of the national population) on 1.5 million acres. This was about 4% of the nation's agricultural land. At the same time, the government ensured that the emerging political and bureaucratic elite got land in the highlands, initially Z plots, the plots zoned to include the farm house which were significantly bigger than the plots allocated to ordinary allottees but later in other forms. Between 1965 and 1970, another million acres passed on to the elite as large scale farms. The elite therefore got about as much land as the poor allottees! By 1975 the remaining 40% of the European mixed farms would pass on to Africans as settlement schemes, but 60% would be passed on as large scale farms bought by the elite for themselves or as proxies for their poor! By 1984, there were 4,192 large scale farms covering 2,177,092 hectares (5,442,730 acres) according to the CBS.

Expansion to the so called empty lands, created as buffer zone between the various ethnicities by the colonial regime, is found in all the provinces. It is more dramatic in the semi-arid districts where very large chunks of land were left as hunting blocs. Studies on land in Kenya have concentrated on the land in the white-highlands generally ignoring the expansion to the so-called crown lands which offered opportunities for some ethnic groups as discussed by Mbithi and Barnes in *Spontaneous Settlement Problem in Kenya*. They show that between the 1962 and 1969 censuses, 13% of the national population moved. Central, Western and Eastern Provinces were undergoing net out-migration. The provinces with net immigration were Coast and Rift Valley. For Coast Province, the bulk of migrants came from Machakos, Kitui, Kisumu, Kakamega and Siaya. Immigrants into Rift Valley were mainly from Kiambu, Nyeri, Muranga, Kakamega Bungoma, Kisumu, Siaya, and Kisii.

These inter-district and inter-province flows were not the only migrations. Within districts there were major movements. The Kamba exploded out into Eastern Kitui, Makueni and Yatta. The Embu expanded into Mbeere and Gachoka. The Meru moved towards Isiolo, the Griama into the areas north of the Sabaki, the Duruma towards Taita and the Digo towards Tanzania. In the pastoral districts, areas which had been zoned to keep the Somali out of contact with the Borana, Bajuni, and Orma and the Samburu out of contact with the Turkana, Eastern Pokot and Borana were widely peopled. As a consequence, districts like Isiolo, Lamu and Tana River began to have conflicts over natural resources use in livestock production. Again, within districts like Tana River, Somali encroached on the grazing areas of the Orma. Interior settlers were placed in Lake Kenyatta in Lamu and in other settlements along the Tana. The Turkana and the Pokot overlapped in their districts at different times. The Pokot lost some of their wetter areas to settlers from elsewhere, especially in Kapenguria division. So did the Maasai in areas like Mau, Transmara, Ngong and Loitokitok.

One should also note that some tribes did not really get a chance to expand significantly to their Crown Lands or the "white-highlands" abutting them. Among these are the Taita, whose "white-highlands"

were privatized by members of the national elite from without and some ranches by local land buying companies dominated by some local elites. The bulk of their crown land had become Tsavo National Park in 1948.

None of these intra-district and at times inter-ethnic movements and settlements has been adequately studied, for the district boundaries subsumed the trust and crown lands. However, the point one wants to make is that the expansion into the white-highland and repossession of crown lands expanded crop and livestock production and stemmed land hunger until the eighties when land again became a conflict-triggering issue. It was then a short step to the ethnic clashes of the 1990 driven by ethnic entrepreneurs.

Yet under the economic expansion lurked the destabilizing growth of the population. In 1948 Kenya's population was 5,405,966. In 1962 it was 8,636,263 and grew to 10,942,705 by 1969. By 1979 it was 15,327,061 and by 1989 it was 21,443,636. In *Searching for Land Tenure Security*, Mighot-Adhola writes: "Only about 20% of Kenya's land is considered to have high or medium potential for farming or intensive livestock production ... Kenya has one of the highest agricultural population densities in the world when its agro-climatic potential is taken into consideration." The problem is not just overall densities but also that the high densities in the high potential areas have led to landlessness and further that population has spilled from the high density areas to marginal lands so much that currently more than 25% of the national population is currently in fragile ASALs. Further, given that most of the population is rural (90.1% in 1969, 84.9% in 1979 and 82% in 1989) and depends on agriculture, clearly acquiring land for economic survival as well as ontological reasons, was already a problem in the eighties. Ayiemba and Oucho in *The State of Population in Eastern and Southern Africa*, calculate that there was only 0.10 hectare of cropland per capita by 1990.

The expanding economy died by the mid eighties. The demographic cluster time bomb continued to explode in different parts and times depending on the food availability and fertility histories of the local communities. Hope has diminished so much that lack of it is part and parcel of the Budget in 1998.

The rest of this paper will discuss SIX conflict areas needing immediate political and policy attention to facilitate regeneration of hope and social tranquillity and EIGHT areas needed to spur a different growth than what propelled us to the present. The six conflict areas are: 1. Fragmented Political Elites and Followership. 2. Land. 3. Education. 4. Water. 5. Pastoral Grazing and 6. Security.

2. FRAGMENTED POLITICAL ELITES AND FOLLOWERSHIPS

By 1969, the single party was institutionalized to end those differences which had emerged within the national political elite. Those who had attempted to bring policy differences, mainly land and socialism, to national focus, the Odinga wing of KANU, were banned or imprisoned. Mboya, perceived as a potential challenger, was eliminated. From then to 1992, one can therefore talk of a "unified" but cowed national political elite. One cannot talk of a unified followership for the very process of creation of a single party with only one policy tendency ensured that followership was fragmented. The political elite appeared to be unified only because it did not allow organizational diversity whether it was based on ideology, as JM tried, or on ethnicity. This is the organizational reality until the onset of multi-partism in the nineties.

Ironically multi-partism for its part has led to fragmentation of the elite. At the simplest level, some elite members left KANU to create other parties. That is not all. Some of the parties have attempted to create ideological political following. Yet all parties seem to be trapped by the basic building blocs of the

society, ethnicities. This phenomena may be explained from two perspectives. First, perhaps it is simpler to mobilize ethnics. Chinua Achebe wrote a long time ago that what most African communities seek is their eyes and ears at the capital. Perhaps there is a grain of truth in this. Second, perhaps it is simpler for members of the political elite to mobilize their ethnic brothers and sisters on the basis of the recent history of the single party state and what it did not deliver to particular ethnicities. This again is suggested by Achebe who implies that the only value for an ethnic member of the political elite is to deliver to the group. This argument has begun to be called the role of the ethnic entrepreneur i.e., a person who mobilizes his ethnic group for particular profits, mainly to themselves as opposed to the group. Mobilization can range from innocuous organizing to actual ethnic war.

Whatever the reasons for the political elite fragmentation, it is clear that the various political parties have followerships in particular ethnicities. Perhaps it will take time and a lot of organizational effort to make the parties truly national, defined as having significant following and shared power across many ethnicities without being dominated by one. One does not see that any of the current parties have created organizations which assure cross ethnic followership, leadership and shared power.

The problem though is not just the political elites. It is also the followers. True they were fragmented when their eyes and ears were ignored, imprisoned, banned or killed by the single party state. They also have traditional values that militate against following leaders from other ethnicities. "Why would you follow an uncircumcised boy!" one hears. "Why would you follow somebody who chases livestock!", another refrain. "Why would you follow a man wearing a skirt!", as variation. "Would you follow a camel herder?" Why follow some mshenzi who only digs?" The permutations are endless from this perspective. Such traditionalist views, mainly perpetuated by ethnic entrepreneurs, keep us from making true national political parties.

Political parties are instruments of collecting people of particular persuasions, usually ideological or policy, to try and capture state power. In our case it may be that we only see them as instruments for assuring that our ethnicity captures state power. This is not likely to contribute to the democratization of society and the national polity, for in questing for the ethnic group to capture state power we can oppress the ethnics. Therefore, it behooves the national elite (note, not national political elite) to educate Kenyans to the fact that ethnic-oriented political parties are dangerous for they are more than likely to lead to competition over control of the state by ethnic groups without worrying about democratization at the local or national levels as Mahmood Mamdani argues in *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism*.

The most important action to assure that political parties do not become instruments of ethnic entrepreneurs is to require that all political parties show representation of more than one ethnic group in the key national organs, office bearers, the governing council and the national executive committee or their equivalents. All party constitutions should prohibit ethnic agitation as a matter of course and have provisions for denying party leadership to any of their politicians who agitate on ethnic grounds. Absence of this clause should be grounds for their being denied registration. Further, we should, as part of both the national constitution and national security laws, prohibit as a matter of course ethnic agitation by parties and individuals. If they are ministers, the law on their appointment should specify that they should be fired on the basis of such agitation. Controlling ethnic agitation should be one of the issues treated in our revision of the Constitution. It should get prominence for if we do not curb the activities of the ethnic entrepreneurs, we shall be condemned to ethnic violence like some of our fellow Africans or our Balkan friends.

3. LAND CONFLICTS

The basic problem with land is that we Kenyans overvalue it. Since we have occupied most of the land which was supposedly empty during the colonial period, we continue endless litigation of it. In our attempts in the past to manipulate land for elite advantages, we created different laws for different communities. For the pastoralists in semi-arid areas, we created group ranches which have become no more than accumulation vehicles for the elites of those communities. For the coastal strip, we have left its law in limbo so that we can occasionally shift some of the land to some individuals as patronage. For the pastoralists in the arid districts, we have not even attempted to bring the land under modern law, thereby allowing us to occasionally privatize bits of it which are important for tourism or fish farming. These favored areas are essentially pastoralists' survival areas.

In many areas where land adjudication was initiated, we have not completed it, for to do so would mean that patronage for the local elites and their appendages from the national bureaucracy would end. Some districts have waited for title deeds for thirty years or more! We are told that the reason the system of issuing title deeds is so slow is the production of adjudication maps. We can map all the adjudication areas in one year if we use the available satellite mapping technologies for which there is even a whole department of the government with experts in this process. Such mapping will finish the corruption of the adjudication officers.

Since we created a land administration mess, we flip flop about the institutions which handle land cases. Initially such cases were being handled by elders. This is on the whole irrelevant for some of the contested areas do not belong to one tradition and thus elders operate on different assumptions. Besides, since ultimate grievance settlement in law is based on modern law, what do they know of it? Is using elders not just another step of increasing the costs of litigation? Witness the problems where it is pastoralists interfacing with agriculturists.

Rural land law should be unified, probably all under the freehold system. It will also enable men and women to get title deeds to use in financing their operations. This is important for delaying title deeds is condemning some communities to non-participation in the national credit system which is almost entirely based on producing titles.

Title to land is property. Property is constitutionally protected. Indeed it was the major constitutional issue negotiated during the independence constitution making. If we are not to change the constitution in this regard, we need to stop playing with titles to land for it is the only major property owned by the bulk of our people. Besides, we have created a national credit system almost solely depended on having title to land. In ethnic clash areas, titles have been revoked and new ones issued for the same pieces of land. Politically this is not on for it seeks to transfer wealth illegally from one community to the other. That is not all. To invalidate title deeds in one area is to cast suspicion on the whole land system which backs almost all national credit systems. It is also to generate continuous conflict given the attachment to land found in all communities. If we end up with title deeds which cannot be honored for there are double issues, we threaten not just the few owners of the titles but the national credit system.

The other major issue of land is the idea that some lands belong to some ethnicities and others should not be there. Whereas all ethnicities can claim to have been dominant in some areas, it is not clear what advantage pure ethnic areas offer in the future. If our main objective is to create a Kenya where we all contribute to its building, we have to be systematic and allow Kenyans to move all over the country and

make their contributions wherever they settle. We have to protect whoever moves outside their ethnic areas, for if ethnics can only contribute to their ethnic areas, we shall be de-developing.

There is no point in putting provincial administration and elders in the administration of land. We should clean the ministry and departments and let formal law handle all land problems. If formal land law is inadequate, we should revise its principles now that we are revising the constitution and enact whatever is necessary to facilitate all Kenyans being handled fairly and competently when they have land problems.

There are individuals who hold large tracts of agricultural land and who do not use it for productive agricultural purposes. This in itself has become a source of conflict, for more often than not the tracts have been acquired illegally or inequitably. Those who need agricultural land for survival will increasingly stake claims to such lands. To deflect incipient conflict on this, we should seek to get this land transferred to those who can use it, for we are short of food at existing technology.

To force owners of such idle land to sell to others who need it for subsistence or commercial food production, we should institute a land tax on all land above 5 hectares in zones 2 and 3. This is usually land referred to as high potential. In zone 4 lands, there should be a tax on all land above 20 hectares. In zone 5 the tax should be on all pieces above 100 hectares. In zones 6 and 7 we should tax all pieces above 500 hectares. The rate of taxation should be punitive enough to force idle land to be sold or used. Since we are now revising the constitution, we should make land tax on agricultural land one of the new items to be included.

4. EDUCATION CONFLICTS

Eradication of ignorance was one of the objectives of the first independence government. Education seemed to be the pathway not only to formal employment but also to improving the standard of living of particular individuals and their families. Although the state invested in the expansion of education, the process was iniquitous as only the more developed areas could establish Harambee schools, as David Court discusses in *Politics and Public Policy in Kenya and Tanzania*. Some currently argue that education has become fool's gold, first, because of the cost to households, second because and also since many educated people cannot get jobs.

According to the Eighth Development Plan, for the period 1963 to 1995, primary school enrolment grew by 5.7% annually. Secondary school enrolment annual growth on average was 9.5% and university enrolment on average grew by 13.6% annually. There was explosive growth in the numbers of schools during the first decade of independence. Primary schools increased more than seven fold. Secondary schools increased thirty two fold. This growth is not repeated in the subsequent decades. Overall primary school enrolment increased just slightly over six fold between 1963 and 1995. Enrolment in secondary schools has increased twenty fold and university enrolment has increased one hundred and fifty fold! Whereas these are spectacular growths, lately there has been a drop in the age cohorts attending school, especially after the hyper-inflation triggered by the deviant fiscal practices related to the 1992 elections. The subsequent economic down turn has made education unattainable for significant numbers.

Several points are worth making. First, if the bulk of the population was illiterate at independence, the population is now highly literate and thus open for mobilisation/manipulation through mass media. The 1989 census reports literacy as 73.4%. The second point is that educational opportunities were availed to the wider public for the first and second decades and this was part of the hope for a better life. This is no longer so. As a result, access to education, especially national high schools and post-high school institutions, is politically contested. It is handled as patronage by state bureaucrats, including university administrators. Witness the

current squabbles about the district rankings on primary school results, reported in all media. The third point is that educational enrolment growth rates have also slowed in the recent past again due to the dismal economic performance. As cost sharing bites, access to education will be denied the poor. Fourth, only about a quarter of the high school age cohort is getting educated. This in the long term will become a limiting factor to our industrialisation for high school literacy and numeracy are requirements of industrial labour.

In the literature on conflict, it is not clear what the impact of education is in terms of either generating or reducing conflict and the attendant violence. In the literature on development, it is generally argued that an educated public contributes to development, not just as labour, but also as a thinking and participating public. The assumptions are that educated people break away from primordial prejudices and can interact with "strangers" comfortably and thus contribute to nation-building and democratisation. In this framework, education minimises potential for conflict against the "strangers" for it encourages tolerance. However, given the fact that the literate are also more mobilisable by mass media, it is conceivable that ethnic demagogues can mobilise them. State controlled media can also be used to mobilise sections of the population against others. Some argue that this happened during the ethnic clashes related to the 1992 elections and the 1997 ones. Witness how the radio was used for ethnic cleansing in Rwanda.

Education therefore seems to be a double edged sword as far as conflict containment is concerned. However, from the point of view of creating a multiethnic nation it is worthwhile to introduce specific curricula to cover democratisation at all levels. It is also important that access be made more transparent especially to post-primary institutions. Here again, there is a case to be made for identifying the ethnicity of whoever gets into these institutions for it is only by doing so that we can debate rationally whether some communities are benefiting more than others and thus defuse potential conflicts over access.

Finally, it should be clear to all and sundry that one way of improving our economy is to export the manpower we have developed and who do not get employed in the country. Such a strategy will contribute to our well being as well as contributing to the development of our neighbors. We should begin to pursue such strategy aggressively if for no other reason than the fact that armies of unemployed are tinder for political agitation.

5. WATER CONFLICTS

Although conflicts over water resources have not yet become full blown, we are already seeing beginnings of conflicts in the Ewaso Nyiro North Basin, Ewaso Nyiro South Basin, Nyando Basin, Yala Basin, and Athi and Tana River Basins. It is hypothesised that the next ten years will lead to open clashes over water rights. In the Nyiro basins, the issue is simply irrigation over pastoral livestock water. In the Ewaso Nyiro North, the expansion of horticulture has meant that there is no water downstream for livestock. More significantly, the Lorian Swamp, a survival area for livestock during extreme droughts, is not even getting recharged. In the long term, livestock losses during droughts will increase thereby further marginalising the pastoralists. The same argument is being made in the Ewaso Nyiro south basin.

Nyando and Yala Basins present problems of both access and control. If flooding is to be controlled, these rivers need to be dammed at the high grounds. Some politicians from the lower areas seem to oppose this for they argue that they are not sure the water so dammed will be reticulated to the lower areas to support irrigation other than being used by the ethnicities in the highlands. What keeps us from doing both? Why should we let the ethnic entrepreneurs poison plans which could lead to improving the material conditions of both the high and low lands? The purely technical parameters of flood control and utilisation of the water demand that the dam(s) be on the high ground. We should be able to enforce that without some ethnic chauvinists interfering.

The Athi and Tana River systems are actively polluted by the coffee and horticulture chemicals used by producers on the Eastern Highlands and cotton producers in the Eastern ASALs. Athi is also seriously polluted by the City of Nairobi. The Athi is still a major supplier of water to the tourism industry and the coastal urban

and rural areas besides being the major source for significant parts of Ukambani. The Tana system is very seriously polluted by Thika town. The levels of pollution are serious enough to attract interest, not just of the communities but also environmentalists. This year there was a private members question on the same in Parliament. Yet there is no national programme to address this issue of the active poisoning of people and livestock in the basins. The communities who depend on water from the Athi system are sensitised to the problem of water pollution and soon will begin to agitate against getting poison from other communities.

The other source of conflict in water rights is the taking of water and water generated power by urban areas without supplying the rural areas with water or electricity. Nairobi is the major culprit. We are now told that it has exhausted the potential of the upper Athi system and the next supplies will have to be based on inter basin transfer; from the Tana system to the Athi system where Nairobi is based. The next dam(s) will be on the Mathioya River. Two issues can be raised about the favouring of urban areas. One is about equity. The classic case on this is the Ndakaini community which was left out of the development of the last Nairobi supply. Less noticed is Nal Turesh, developed to supply Machakos, later extended to Kajiado but at all times ignoring the Masai and Kamba rural communities living in the region where the pipeline passed. This has been made more unpalatable politically when the water has been diverted to flower growing at the expense of the urban areas and even a university located in its supply area. The mess within this project was so extensive that the Athi River Export Processing Zone had to get water from Nairobi. One could also use the example of water for power generation in Turkwell. It not only changed the river regime, denying downstream pastoralists their survival grazing, but also provided no water or electricity to the downstream communities. The same point can be made about the power dams on the Tana system. Witness how vocal local communities and environmentalists have opposed the new Mutonga dam proposals from this equity point of view. Witness that the people displaced by Kiambere dam have never been resettled. Their case has become the classic citation of building power dams and ignoring local communities as discussed by Catherine Caulfield in *Masters of Illusion: The World Bank and the Poverty of Nations*. The second problem area is ecological. Inter basin transfers of water will no doubt change the ecology of the two rivers. More polluted water, sewage really, will flow into the Athi, to be drunk along its length and the urban coastal areas between Malindi and Mombasa. Less water will flow into the Tana, with increased pollution and dire impacts on its delta ecology which is of significance to production for the people of the basin.

There is urgent need for a national long range water plan which will have to include pollution control. Some basic water resources data have been collected under a variety of donor projects. Some of the outputs were misleading for they offered the data as national water master plans! What is lacking is relating the collected data to current production, pollution, ecological and equity concerns so as to develop action plans for supplying both rural and urban areas. There is need to support community based planning of water resources on basin basis. So far the water resources studies and development plans have been from the top with little participation by local communities let alone bringing regional stockholders in catchment basins together to deliberate and find solutions to use conflicts. These issues are the next major political issues in these communities and politicians from the regions better pay attention to their explosive nature.

6. PASTORAL GRAZING CONFLICTS

The interface between primarily agricultural areas and pastoral areas generate conflicts based on grazing resource use. The conflict is basically between those who want to take part in crop agriculture and tourism and those interested in livestock agriculture. The key conflictual areas are to be found in Tana River District where the riverine areas are contested (Hemsinger 1992), Kajiado, Narok and Transmara, (Kituyi 1990) Turkana, (Helland 1987) Kitui/ Mwingi, (O'Leary 1984) West Pokot, Elgeyo Marakwet, Baringo (ASAL Policy 1993) Samburu, (Wamba ASAL Development Project 1987) Isiolo, Laikipia, Garissa and Marsabit. (Gauff 1996) These are all arid and semi-arid lands. These are the lands with exploding populations because of high growth rates and net in migration. This type of conflict is most clear where there is irrigation agriculture in dry districts like Turkana, Isiolo, Laikipia, Garissa etc. It is less clear but perhaps has more impact where agriculturists find some relatively wetter areas in the pastoral districts and cultivate them. Such patches are usually the survival grazing areas of pastoralists and as they are taken away from pastoral production, they speed up the

marginalisation of the pastoralists. Clear conflicts along these lines exist in Laikipia, Isiolo, Kajiado, Samburu, Baringo, Turkana, West Pokot, Tana River, Kwale, Mandera, Wajir and Garissa.

This problem has in the past been seen as a problem of alien agriculturists. In the future it will not be easy to dismiss it as such for many ex-pastoralists now eke out a living in marginal crop agriculture. To see the problem as tied to aliens is also to miss the rapacity of the pastoral ethnic elites who, more than the aliens, privatise the more favoured areas and get out of pastoralism into ranching or crop agriculture. The best examples are found in Samburu, Kajiado and Narok where local elites zoned for themselves private ranches whilst still being the major livestock keepers in the group ranches. In Narok they have got into wheat and maize. In Samburu, some are into wheat. In most of the other dry districts, private ranchers are the in thing. Only the poor remain pastoralists.

Conflict over grazing rights across state boundaries is also intensifying and is usually masked under cross border raiding. In North-western, Northern and North-eastern and South-eastern and, to a limited extent, Southern and South-western Kenya, local populations move to neighbouring countries in search of grazing. When droughts break, Kenyan pastoralists raid the neighbours to restock as they collapse back to their normal grazing lands. These patterns have held since the droughts of the seventies and eighties. They have been accelerated by the ethnic entrepreneurs who agitate their people to raid for commercial reasons as opposed to the traditional raiding.

There are serious conflicts between pastoralists and agriculturists in all the main river systems passing through pastoral lands. Probably the most acute is on the Tana where there also is conflict among different pastoralists. As large scale development projects like the Tana Delta Irrigation Project and delta fish farming come on stream, conflicts will be increased. On rivers like the Ewaso Nyiro North, the downstream pastoralists are not getting water, for irrigation upstream is getting the bulk of it. In Turkana, riverine forests, used as drought survival areas, are now settlements as drop out pastoralists seek to eke out a living as agriculturists.

Pastoralists get a raw deal on the use of their water and higher potential lands. In the name of equity, this should be reversed by assuring them access to these resources as long as the national economy does not offer them other sources of livelihood. Since their areas are becoming over-populated and their carrying capacity at existing technology has been passed, it is important that resources for the development of these communities be found, and soon. The alternative is for them to go to war. The guns will flow upstream for the future generations of pastoralists will want the good things of life which increasingly they argue are found in the highlands. That kind of conflict we do not deserve.

7. SECURITY CONFLICTS

It is not usual to think of security as a source of conflict. Yet when the state deliberately initiates violence against its citizenry, logically one has to see this as conflict needing resolving for in classical political science, the justification for the state controlling the means of violence is that it will protect the citizens. Since the nineties, pastoralists will argue that it is since independence, the citizenry demand security but the state provides insecurity by means of clashes. These have been in all the provinces but mainly concentrated in the Rift Valley. This kind of conflict is extremely expensive in political and economic terms.

In 1987 and 1998, we showed that we did not understand the cost of insecurity perpetuated in parts of the Rift Valley at the beginning of the decade. In the earlier period, we had experimented with ethnic cleansing at fantastic cost to the economy of the province and adjoining districts in Western and Nyanza provinces. We pretended there was no cost for there were political objectives which clearly those in power were interested in, to destabilize the Kikuyu in the diaspora first and secondarily to give the

Kalenjin populations command over the assets owned by the other ethnicities in the province whilst also giving them control over the politics. How else can one explain that the ethnic killings have gone on for more than seven years without their being stopped by the state? How come nobody was ever prosecuted for the so called clashes?

In any case, in the last two years, insecurity in the coastal region has been triggered, initially at Likoni. Subsequently it has taken different forms in different places. The current -mid-1988- fashion is to raid police stations. Most Kenyans believe that those in control of the state also had a hand in it. Again, there must have been a political objective at the outset, to ensure that some interior ethnicities do not control the politics of some coastal constituencies. The current permutations only serve to further document that once one is on the ethnic cleansing escalator, peace is not easily restored for others appropriate the violence for their own ends. To argue that hooligans are raiding police stations and it is not ethnic is to miss the point, just as to argue that it was stock raiders who continued in the Rift Valley after 1993. Simply put, if the powers that be initiated ethnic cleansing, others took the opportunity to deepen it beyond the immediate objectives the initiators had dreamed about.

As happens where irrational political decisions are made by ethnic entrepreneurs, the permutations of triggering insecurity are extremely costly in economic and political terms. Politics first. The impact of the ethnic clashes in Rift Valley and adjoining districts, the large scale cattle raiding by organized "armies" and the clashes at the Coast have contributed to the ethnicisation of politics. We should therefore not be surprised that by the last elections there was more ethnic polarization than in any other previous election. This is so inspite of attempts by parties to campaign outside their ethnic areas. We have climbed on the ethnic escalator and it will cost us dearly to figure how to get off it in terms of political organizing.

The impacts of insecurity are more dramatically clear in terms of the economy. Kenya tourism industry has dropped to less than a tenth of what it has traditionally been. Tourism is not only a key sector in the national economy but the national political elite invests in it significantly. It is to be hoped that the personal losses to the political elite will assist them in thinking through the high cost of self inflicted insecurity through ethnic cleansing. They did not appear to lose in economic terms in the earlier clashes in the Rift Valley. They have lost a great deal of money in the clashes at the Coast.

In thinking about managing insecurity, we should not only concentrate on the economic impacts on tourism. We should also pay attention to the decline in economic activities where ethnic cleansing took place. What has been the economic impact of clashes on, say, Kapenguria or Nakuru towns and their hinterlands? What is the economic impact of the large scale raiding in Samburu and Keio? What is the cost in terms of lack of teachers in districts like West Pokot, Isiolo, Samburu? In economic terms, how long will Nakuru take to recover its economic activities?

The other side of insecurity is driven by dismal economic performance nationally. Government statistics show clearly that about half of the national population lives below the poverty line. Why should we then be surprised if stealing, killing over property within families and business partners etc. are increasing? Why should we be surprised if members of the elite barricade themselves in Nairobi and other urban areas to avoid being slaughtered in their rural homes? These are the fruits of insecurity.

Security related to land holding has been compromised by the canceling and re-issuance of titles to lands which belonged to ethnic groups cleansed from some areas. This is not just a violation of constitutionally protected personal rights but also of property rights. Both are guaranteed by the constitution. It

complicates our ability to develop all parts of the republic, for who is to take a chance outside their ethnic areas given the losses incurred in all clash areas?. It also limits our ability to attract foreigner investors, who we are constantly begging to come and invest. Who is to invest in a country which cannot even protect the personal and property rights of its own people? If one does not think this is a serious point, check the impact of targeting Chinese in the economies of Indonesia and Philippines this year. Closer to home, what was the impact of Amin cleansing Uganda of Asians?

8. CONFLICT RESOLUTION NOW AIDS LONG RANGE PLANNING

Even after these conflict areas are addressed, there is need to get back to a national growth strategy to support the teeming population. Minimizing conflict on the six areas will only address short term concerns. Growth is a long term concern. Again we must break with our past where our post-independence growth was essentially driven by expansion of agriculture in the white-highlands, the trust lands and crown lands. Growth will not be driven by utilization of agricultural production for its value added is not enough for the whole population which has grown tremendously since 1963. In our circumstances, future growth can only be driven by services and light manufacturing. Towards this kind of growth there are EIGHT areas needing attention now to set up a platform for future economic well being These are 1. Energy 2. Telecommunications 3. Banking and Insurance Industry. 4. Information Technology Industry 5. Greater Horn of Africa Road Infrastructure 6. Light Manufacturing Industry 7. Land Sea and Air Transport 8. Trading beyond Uganda and Tanzania

9. ENERGY FOR INDUSTRY AND BETTER LIFE

Modern economies depend on electricity. Assuring enough electricity supply to industry and the population in general is therefore mandatory to industrialization. Lack of it and brown outs increase the cost of our national production. Thus we are not competitive. There are many sources of electric power but the one with the least unit cost is hydro generation as opposed to thermal, geothermal, nuclear and solar generation. The primary issue in Kenya's attempt to provide electricity is that the national hydro generating potential, the cheapest form of energy, is limited.

According to a consultant's report baptized national energy master plan, we should by now be exhausting our hydro generation potential. We have not followed that plan. We have failed to raise the funds to exhaust the existing hydro capacity. The energy sector is murky now for given past failures in bringing hydro generation on stream, we have resorted to thermal generation, which is more expensive, to fill in the shortages. Lately, we even have allowed private individuals to invest in thermal generation. Whereas some have argued that these steps towards privatization of the sector are positive in the long term, the question remains why did we not demand that those private investors help us first with hydro generation whose unit costs are cheaper?

We have significant potential for geothermal. It is, relative to hydro and some forms of thermal generation, a very expensive source for many industrialized nations have never gone that route and thus the technology for exploiting geothermal is owned by a few countries and fewer companies. These problems basically lead one to conclude that geothermal should not be our main energy source focus.

The bulk of our rural population has no access to electricity. If we are serious about industrialization and reducing the use of plant-derived energy sources, the mainstay energy for the bulk of our people-- for they impact negatively on the environment-- we will have to make electricity available to rural

populations. This will enable some kind of production to take place in the rural areas so that the bulk of the population is not depended on agriculture only. This should assure us not only of increased production but also an expanding consumer base. However, that electricity supply must be relatively cheap. Our toy rivers cannot produce cheap hydro electricity. It is strictly a problem of scale. Therefore we should recognize this fact and buy hydro generated electricity from Uganda or Tanzania or as far afield as the Congo river system for they have cheap potentials they will not exhaust in the long term.

Since the fifties we have bought power From Uganda. There have been ups and downs on this . Some argue that the decision to develop our hydro generating capacity, although not enjoying the economies of scale of power dams say on the Nile, Congo or Ruvuma systems, was based on the POLITICAL JUDGMENT of how Uganda could interfere with supplies to us. That is one side of the argument. The other side is for us to realize that building/buying into dams built in the Ruvuma, Nile and Congo river systems will assure us of long term supply of relatively cheap energy because of economies of scale. We should therefore be negotiating with these countries to find ways of separately or jointly investing in power dams in those countries. A corollary to this is that we have to forget the petty and personalistic politics of presidents in the region where we have used power supplies to score points. It is to the mutual interest of all the countries to develop this resource.

Over and above investing in power dams in the region, a more imaginative strategy, which we can implement immediately, is to connect the Eastern Africa and Southern Africa power grids so that we can buy power from wherever there is surplus to reduce brown outs which limit our industrial production. This idea was worked on long time ago by South Africans long range strategists who as a result got involved in the financing and construction of Cabora Bassa in Mozambique. They did not stop there. The current South Africa perspective is to connect all systems up to Gabon and to develop the massive hydro generating potential of the Congo river system. The objective is to get cheap energy for industry. True , it will initially be for South African industry first but in the long term the other countries will also benefit. The secondary objective for the South Africans is get involved in financing, design, construction and servicing the building of the various dams and related infrastructure. This will generate jobs for their economy. We should be competing with them for these for we have the personnel needed in most of the work. What we lack is large scale organization of the consulting firms and financing institutions. This should be opportunity to build them up. At the same time, during construction, we should also seek to get our people employed in the dams for when we build construction capacity, we can sell it. Egypt earns significant amounts of money internationally from its construction firms. So does China as most of you know for Chinese firms are now called in Kenya the construction firms of the political elite.

The first steps have been taken on buying power from one neighbor. What is required now is serious commitment to the idea of getting involved in the build up of cheap hydro power in the region so as to assure ourselves long term supply as well as getting significant numbers of our people and firms employed in the build up of the sector.

We will need to address the problem of fuel wood now. It provides about 60 percent of the nations primary energy requirement. It is estimated that by 2010 the country will be short of 23 m. tonnes of fuelwood annually. Most of the fuelwood is found in the semi-arid lands. Its increasing exploitation will lead to serious land degradation over and above the shortfall. Further, as more population moves to the urban areas, 25% by 2000 and 50 % by 2025!, supplies will become extremely expensive and perhaps not even available. Current policy assumes that the fuelwood substitute for the poor will always be paraffin. The paraffin solution, as substitute for fuelwood, may not be adequate for its supply could be problematic. We have to find other substitutes like gas to replace wood and charcoal in cooking. In the region there are some potentials. Tanzania has significant amounts of natural gas. Should we not begin to discuss with her a relationship which will enable us to expand the utilization of gas both in urban and

rural settings as a substitute for fuelwood? Should we not also begin to discuss with Tanzania and Sudan supplies of petroleum products, especially paraffin, now? Should we not be looking for sources of coal in the region? Is it possible to start piping gas to urban houses? All these hard questions need to be satisfactorily answered now if industrialization is not just a nightmare. The issues are essentially problematic in the political sense and not the economic or financing sense for many consultants have plans for the solutions: the political will is lacking.

10. TELECOMMUNICATIONS INDUSTRY .

The telecommunications sector is the second most important sector if we are to become a service economy for it reduces society's operations costs drastically. Telecommunications are also important in molding a people together for they increase the level of interaction. Classical political science argued that the growth of communication infrastructure, sea going ships, canals, railways, roads and newspapers, was the most important contributor to the growth of European economies and the peculiar democratic institutions which came out of those economies. These forms of communication increased interactions between peoples. This generated trade initially and later industrialization. At the same time, from national perspectives, increased interaction developed national foci and thus values, including values about governance.

Currently, telecommunications have replaced these earlier forms of assuring increased interactions. They are not only supposed to play this role in national settings but also in the global perspective for the service industries which drive growth cannot be locked in national boundaries. KCB is aware of this argument for its commercials now talk about linking a rose farmer to the international markets through the use of computers and telephony so as to guarantee him an income. Yet one would argue we have not as a nation internalized how critical telecommunications are to our future existence.

We Kenyans like to brag that we have more phone per capita than most African countries. Although this is true, it misses the point. First how many of them work a hundred percent all year round? Two, the density we have achieved is nowhere near what is required by industrial society. Three, because of the encapsulated nature of those who manage the industry, we are trapped in a technology which is not only out of date but whose unit cost is high per unit of service. The reasons are various. Among them are reliance on copper wire, unsystematic service, high overheads and lack of automation for cost controls. When these are coupled with the uninformed debate that communication needs a parastatal to assure us of national security in telecommunications, as if we cannot assure ourselves of communication security with modern equipment, we end up limiting the use of telecommunications for development. Fourth, our neighbors are already in satellite telephony in a big way. Even Somalia, without a government, is now in satellite telephony!

The important national question is to separate national telecommunication security needs from ownership. This way, we will be able to get other actors into the sector to service development needs over and above generating the cash to invest in the growth of the sector. In the past, we created ICDC to protect a niche to nationals in trade. If the fear is foreigners, why not create a private ICDC owned by Kenyans to dominate the field?

However, there are sub-policies and actions which need to be addressed and immediately in the public domain. The first one is to go into fiber optic for land based systems as opposed to the copper wire systems. The second one is to explore new wireless technologies for they will cut out a lot of investment and maintenance costs. These are issues KPTC should address now. Investment funds for these should

come out of savings by making the corporation efficient and effective. KPTC does not have to await privatization to effect these. At the same time, as a country we should be involved in the new satellite systems which are set to revolutionize telecommunications. Here the strategy should be to open up dialogue with the many varied corporations and to insist that Kenyans are clear players. Public institutions should have a role to play in this also. For example, the Ministry of Education and Manpower Development should become a major player if its commitment to distance learning, school and individual based, is to become a serious national approach to retraining the nation completely every few years to cope with industrialization. Again the policy generation idea should be to put those sectors of society with vested interests together to plan the future. There is no way we are to set up national training and retraining programs unless we can solve the telecommunications access to the whole nation. Conversely, unless Kenyans design the future of telecommunications, we will not be able to use it for our own development, for the international companies will essentially be interested in peddling these bits of telecommunications which they have developed to suit their industrialized societies.

11. INFORMATION TECHNOLOGY INDUSTRY.

Current GOK policy is hostile to the whole information technology industry. First, because of misguided notions that computers take work away from people, we tax computers heavily, supposedly with the objective of keeping people employed. Consequently, we are not investing in IT. It is estimated that we sell less than 3,000 computers a year. Although some in the sector expect sales to grow, we are still way behind. Not only do we tax computers, we have yet to factor them into our educational system. Practically none are found in the public primary schools. In the public high schools, where PTAs are interested, a smattering of computer clubs are found. Less than one percent of all high schools offer the subject. Further, we have not set standards for commercial computing training and as a result, fly by night schools exploit those who know the importance of the sector and want to buy the knowledge without state assistance. Overall, whether in public or private sector, we do not even understand the importance of the technology for if we did, there would be more than the ten thousand internet connections existing now.

What must be done? First, Government needs to openly state that IT is an important sector of growth. This will erase the past mis-informed comments about reducing jobs. Second, the Ministry of Finance needs to reduce taxes on the sector particularly for those Kenyans who are going into assembly of computers and other related equipment. If we protect car assembly, we should be double protecting computing and related fields for the divisibility and spread of the technology is greater than car assembly. Entry is easier and in the long term its impact is much greater than a vehicle assembly plant if one calculates employment or income generation. Third, the Ministry of Education should introduce computing as a subject at all levels of education. It does not have to await a national electric grid, for they can be operated with a few solar panels. The Ministry of Education should set standards for private computer training schools, for too much money is lost by exploitative and not particularly useful training in the sector. KPTC should assist the sector by upgrading telephone transmission by installing fiber optic cables or modern wireless transmission between towns and in areas of large densities so as to reduce data transmission costs as well as investigating other transmission technologies coming on stream in the industry. Finally, we should create our own Silicon Valley to design and adopt available technologies to our own situations. Investments in this should be tax exempt so that we can build a large service industry related to IT.

A final comment is in order. It globally is a technology of the young. Witness the service providers in IT in the country. They are as young as their international counterparts. It also is a fact that we are beginning to get young Kenyans operating at the international cutting edge of the technology. Some are now processing data for large international companies. Others are working on Internet. Some are

modifying mechanical controls in production to electronic controls. Given all this, it is possible that this sector can expand tremendously. Of course we have to facilitate its growth by improving its back up infrastructure- essentially the work of KPTC, which is not being done. The limitations are the controls KPTC has on transmission and its antiquated telephone system. These increase costs to those who want to expand the sector. We should force KPTC to modernize for it limits other technology driven growth.

12. BANKING AND INSURANCE INDUSTRY

Our geographical location gives us an advantage in becoming a significant banking and insurance center. We have already taken the most important step towards realizing this by putting into practice that anybody can hold any currency in the banking system. What needs to be further done is to create tax havens for banking and insurance industry. We can put these in the EPZ framework so that such funds do not impact on our currency. Towards that end, the banks operating here could be allowed to put their tax haven operations in the banking and insurance EPZs.

With regard to manpower in this sector, regionally we have a comparative advantage in manpower in banking, insurance and law. In the past we have also attracted some large international firms in these sectors. Although some divested, with the right climate we can expect them to come back and expand operations here. Mauritius has taken steps to become a banking and insurance center but its growth is limited by availability of manpower. The issue is simply whether we allow these industries to grow here by making the necessary legislation to give them tax havens. Our primary interest will be the employment they will generate. Secondly we will be targeting some of these funds to be invested in our open economy for proximity should breed familiarity with investors. It is the same investors who look for tax havens who also control the masses of international investment funds which are country less.

If we are to industrialize and create a vibrant service sector, banking and insurance growth is mandatory to produce the investment funds. We should take the internationally available opportunities of attracting what is called hot money for it travels the globe without permanent location. If we come up with investment proposals to fund energy, telecommunications and infrastructure in the region, we should be able to attract some of this money to be invested in the region. However, those with this kind of money demand high levels of personal security. Johannesburg is finding out that lack of personal security is very expensive in terms of keeping those with money in its region. Again the demand of this sector is that we provide adequate security to our people first and to them second. Car high jacks and house break ins are deadly to investment. Remember though, the desperate poor will do both.

13. LIGHT MANUFACTURING INDUSTRY.

We established light manufacturing as part and parcel of the import substitution strategy of the colonial and post colonial periods. Lately, we have tried to expand it by manufacturing in bond and export processing zones. On the latter, we have spent a lot of public money establishing an export processing zone in Athi River. That investment is yet to be recovered. We can speed up the process by attracting local companies in telecommunications and IT. The Mombasa EPZ seems to be caught in local politics. Other private EPZs are found in Nairobi and Nakuru. Yet we did not establish these zones at our export points namely Kisumu, Homa Bay, Busia, Lokichoggio, Lamu, Moyale, Mandera, Isbania, Namanga, Lunga Lunga, Mandera and Liboi. True some of these are of limited value for there is no power, labor etc. but can we not deliberately establish these as export growth nodes and ensure that the necessary power and other back up facilities are there. Is there a case to be made for licensing private EPZs in these and other export nodes? In an earlier period, we offered tax investments to businesses which located outside Nairobi. Can we use this mechanism to stimulate light manufacturing at the periphery?

One area of light manufacturing needs some major attention. This is biotechnology based industries. Biotechnology offers a very large menu. In Kenya presently, some university based laboratories are producing plants with biotechnology techniques. These plants-- bananas, vegetables, flowers, pyrethrum etc.,-- are of superior quality and would make a major contribution to Kenya's agriculture. Other food crops, particularly those of the arid and semi-arid areas, need biotechnology attention. Equally important is to develop new fruit strains and types for national and export market. Some of the materials developed in the laboratories lend themselves to large scale expansion by going industrial. Kenyan industrialists have not yet invested much in it. The academics who have the technology cannot afford to invest in the sector. Can we negotiate a support grant system for them to commercialize a lot of what they have ready now.? Can we attract venture capital into this sector?

Yet perhaps the greatest contribution by biotechnology can be in the manufacture of assorted bacteria and viruses which are important in both food and medicine production. For example nitrogen fixing bacteria can be produced to replace fertilizer in our farming systems as has happened in Brazil and Cuba. So can some bacteria for breaking down urban waste. Some bacteria have been bred to produce desired medicines.

This is not a particularly complex technology and we should be able to make entry into it especially if we can favor the sector from a financing and taxing point of view, for many of the Kenyans who have the skills to get into it are not the Kenyans with masses of capital. This, again,-- like opening up the IT sector,-- will enable those with skills but not capital to begin businesses which will not only employ more people but also in the long term generate high level incomes for the country.

14. GREATER HORN OF AFRICA ROAD INFRASTRUCTURE.

If one looks at the road infrastructure in the wide Horn of Africa, one is still struck by the lack of connectivity between the countries, first. Second, one is struck by the spine nature of the road system, essentially one major road transecting the state with short feeder roads towards its periphery but not linked systematically to the other countries feeder roads. Third, one is struck by the sea orientation of all infrastructure. In short, it was built for colonial extraction and its basic logic has not been challenged by all infrastructure development since then. Systems of extractive infrastructure do not contribute to regional development. Connectivity between countries is needed when the objective is to get all high potential regions to become drivers for their hinterlands be they in the same country or not.

Perhaps the best example is South Western Ethiopia, a region of surplus food which if it were connected to the dry parts of North-western Kenya and Northern Uganda by good roads could become the key driver of food self sufficiency in those regions. This would not only be beneficial to the Ethiopian farmers who would get better prices for their produce but it would also benefit the people of the dry areas by getting cheaper food than they get from their countries' internal networks.

Recently ,everybody is talking about roads. However, what is being discussed is not any where near what must be. The issue is not just the Mombasa-Kampala axis. It is also an international standard road access to Ethiopia, Sudan, Zaire and Somalia. These are the roads necessary to increase inter-regional trade. There reason manufactured goods are so expensive in the peripheral areas is because of the bad road infrastructure to the regions. This means that consumers are exploited. It also means that manufacturers cannot increase their throughputs and thus reduce prices. For the states it means less revenue.

Unfortunately, since the seventies the development industry of the West, --- whether it is in the bilateral, multilateral or ngo sectors, ---has for more than thirty years argued against infrastructure, mainly in the name of ecological parameters or benefiting elites. We on this continent swallowed that warped argument and forgot to link our roads regionally to assist in the general development of all the countries. Some of us in Kenya, involved in arguing for better roads to the ASAL regions, suffered humiliation during those years. Only NORAD was deviant enough to finance the Kitale Lokichoggio road thanks to consultants who argued for its long term impact on the development of the dry Northwest and regions beyond..

For Kenya to realize its regional role as the main manufacturing center, it must ensure that roads connecting it to Ethiopia, through Moyale, Kibish and Mandera are developed to tarmac international standard. Its road connection from Lamu to Kismayu, Liboi to Baidoa are important for trade with Somalia and onward to Djibouti. They should be brought up to the same standard. The Isbania, Namanga, Taveta and Lunga Lunga connections to Tanzania should be upgraded and maintained to the same standard. So should be the Eldoret, Kitale, Lodwar, Lokichoggio connection to Southern Sudan.

The Mombasa-Nairobi-Kampala-Eastern Zaire road has been discussed. It is expected that this road will be rehabilitated in parts collectively by the Kenyan and Ugandan state. Yet current discussion does not seem to include building this as the major road in the region. It should be built up to four lane level with internationally accepted axle loads (90 ton), for we now know that any specifications below this will lead to collapse in one or two years as all the constant repairs and re-building of roads during the past thirty years have taught us. If state budgets cannot afford to finance such construction, it may well be that this road should be privatized and those who construct it allowed to recover their costs by charging under either build, own and operate or build operate and transfer schemes.

15. LAND, SEA AND AIR TRANSPORT INDUSTRY

The issue here is simply that we have to get a strategy which will create *inter alia* a major trucking industry, efficient sea and air ports as well as the back up services for lack of vibrancy in this sector adds to our manufacturing, trade and consumer costs not to speak of limiting our potential for growth.

On trucking, several points need to be made up front. First, nationally we do not have enough long distance trucking capability. The evidence is simply that trucks from as far as South Africa are competing with our fleet and winning contracts for the Sudan run. A few years ago, when there was work for UNISOM in Somalia, the long distance trucks again came from without our borders. It is true that in the eighties, as Kenya and Ethiopia were simultaneously confronted with drought and trucking demand rose, Kenyan transporters build up their fleets. However, since then, the capacity has eroded, mainly because of our poor roads. The sector has not been profitable enough to replace the trucks, again basically because of our heavy maintenance costs. The banks who lend into the sector have very large non-performing loans as a result.

The second point then is that our long distance trucking transport capacity will not be built up or become competitive unless we can build up the road infrastructure. Third, we need to reduce costs of acquisition of trucks by establishing local assembly of the same. Since we have a plethora of types, the approach should be to choose one or two types, make a deal with the companies making them for local assembly, and then tax all other models out of the market. This will have two effects. It will reduce purchase and spares costs. It will also ensure that proper maintenance knowledge is encapsulated in the country. Third, we need specialized training in all aspects of transport, logistics planning, maintenance and even

driving. Those who laugh at the last point should note that when the South Africans contract to truck for UN into Southern Sudan, they put two drivers into each truck and operate the truck twenty four hours. They are thus able to make three trips whilst Kenyan trucks make one on the Mombasa-Southern Sudan runs. With this kind of scenario, they can afford to under bid our truckers.

On air transport, we have already perhaps the largest fleet of small aircraft in black Africa. However, we do not have the intermediate transports. Again it is South African and overseas companies which compete for jobs which call for intermediate air transport. Very limited number of Kenyan companies have built up this capacity. Clearly there is room here for the companies in light aircraft to expand. They argue that their expansion is limited by the large operating costs (fuel, licenses and parking fees) the state demands of this sector.

The privatized national airline does not seem to know or care about its potential role in the transport sector other than just air passengers. This is something the government should discuss with it for locally based air transport will become a major issue in assuring our expanded trade in the region. Again the policy framework for this should be changed. Since that kind of transport will be for export, investment into it should be supported by a tax and fees structure. National air transport capability can also be built up if the armed forces can acquire some capacity primarily not for their own use but to be contracted. This will also earn them some money as is the case in several African countries. Again institutionally, we can make these investments part of the EPZ formula.

On sea transport, there is no reason why we cannot build up sea capacity for regional trade. However, the key issue in this area is our running of the port of Mombasa in a professional way. To date we have a mishmash of strategies. They range all the way from appointing mzungu managers because they are not thieves like Africans, to using it for political patronage. At the same time we want to privatize the most profitable sections- container depot. We need a clear strategy in the national interest. Elements of such a strategy should include *inter alia* include making the port an EPZ. This would be desirable from both manufacturing and shipping point of view. Second, we Kenyans can run a port. Even if we privatize it, there should be a limit to how much foreign control we are willing to accommodate. At best, any foreign control should be a joint venture with local investors and the government in some capacity, not necessarily dominant. Reasons, first security, and secondly as a long term investment, for sea ports are some of the best cash cows around. Witness Amsterdam historically, Rotterdam and Singapore currently.

We need to expand our port for dry dock work, ship construction and chandelling. These will not only have significant linkages to the wider economy but also can become major employers. Already pleasure boat building is becoming a significant activity. We should not only encourage it, but negotiate with companies in this sector elsewhere where labor costs are prohibitive to relocate here. The logic is the same as we use in EPZ recruitment. We should also shoot for a share of the large scale ship construction industry only after we solve our energy problems.

Ship based tourism , usually called cruising, is set to grow dramatically world wide. There has been Kenyan entry into this but there are problems at the port which limit its growth. International companies complain about the quality of services and costs. Chandelling is too expensive compared with Mauritius, South Africa etc. We should solve these and expand the industry by coupling the cruising with animal based tourism for which we have comparative advantage. Those Kenyans who have entered the market should not gate keep it, for there is room for many more Kenyan to go into joint ventures with overseas operators. This keeping of some Kenyans from entering the market has become an issue with overseas investors in the sector. Again, like at the port, we should get political cronies out of the management of the sector.

A major bottleneck shared by the various components of the transport sector is corruption. It adds significant costs to transporters be they truckers or ship owners as plant lies idle or is charged irrelevant costs. This we are capable of solving if we have the will.

Our geographical location gives us some structural advantages in terms of building this sector. We have not exploited enough for we do not appreciate the point that the natural transport hub of the region is here. To recognize that is the first step. The second is to relate to our sister states to ensure that they use our capacity as is while we are improving it. We should reduce the operating costs for the truckers, shippers and airline operators by creating efficient, non-corrupt support infrastructure not just at the ports but also within the policing and supervising institutions. Authorities which have oversight powers on these sectors should be cleaned out as a matter of course. We have the potential to become a major trans-shipment center.

It goes without saying that one of the major costs to transport is fuel. We do not have national sources yet. We need a strategy therefore to get cheaper fuel. We can start by reducing taxes in the sector. However, in the long run, we have to build up supply reliability and reduction of unit costs by a mixed strategy of pipeline transport, modernized refining and negotiations with our immediate neighbors (Tanzania, Southern Sudan and Somalia among others) with proven reserves for cheaper supplies in the long term.

16. TRADE BEYOND UGANDA AND TANZANIA.

For coffee, tea, horticulture and floriculture our major trading partners are in Western Europe. Is there no niche for us in the Middle East, Asia and North America? Why should they be buying our products from middlemen in Europe? Is there a case to be made for industrial imports from the less developed countries of Asia and Latin America other than Western Europe and Japan where the bulk of our industrial imports are from?

The bulk of our oil and oil products are from the Middle East. Given that Tanzania and Sudan are going to be important producers, do we have systems in place to replace our traditional suppliers or to negotiate down the prices? Even if the regional producers do not sell at lower prices than the traditional suppliers are there other geo-political reasons why we should shift and buy from the region?

Tourism is going to continue being an important sector in international trade. Clearly we have in the recent past mis-invested in it by starting clashes which have led to its near collapse. I think the lesson was learned by those who started the clashes for they are also major investors in the sector. In terms of the overall industry what should be our strategy; mass tourism or specialized tourism or a mixture of both? Do we also keep it exclusive for hotel owners or should we find ways of diversifying to family based tourism as many Caribbean states have done? Should we just sell sun sand and animals or can we sell culture also as in Thailand and the Caribbean? Should we not market more in the NICs, Eastern Europe and the rest of Africa?

Yet perhaps the most important aspect of our international trade is to accept that we can become the suppliers of light manufacturing and services to the region. This should go hand in hand with being sensitive to Uganda and Tanzania so we do not get accused as in the past of dominating their economies.

KENYA'S CURRENT CONSTITUTION - MAKING INITIATIVE: SOME THOUGHTS

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A. INTRODUCTION

Kenya's Constitution dates back to independence in 1963, except that it has been considerably amended over the years and its essential character today is quite different from what it was originally. Most of the amendments, and especially those of the 1960s, had a governmental origin and sought in the first place to consolidate the authority of the Executive in the constitutional set-up. The more recent amendments, especially those of the 1990s, have largely been governmental responses to demands by parliamentarians and by ordinary members of civil society. The latter category of changes have taken place in the context of pressures for drastic constitutional change; and it is this issue that lies at the centre of this paper, namely, what is the exact kind of change being demanded? And further questions arise: Has the Constitution gone rusty in the thirty-five years that it has been in place? Is it reform that is being proposed, or is it rejection? What principle underlies such demand? What is the sensible way ahead?

B. THE CONSTITUTION AND THE PEOPLE

A constitution carries the most basic principles of law which relate to a nation's main political arrangements. Such political situations include governance orientations, as well as the public power schemes that the people have accepted, acquiesced in, or been subjected to. Where such public power arrangements have broadly been accepted, the outstanding problems of politics become mainly those of a technical and

rather limited kind. Where the people have acquiesced in such arrangements, again the unresolved issues of politics are in essence limited, because there is no major quarrel with the power dispensations. Where the people have been subjected to a putatively unpopular public power dispensation, on the contrary, a major problem of politics exists which persistently cries out for new political arrangements, with attendant constitutional dispensations.

Such an analysis, it must be cautioned, begs one fundamental factual question: Is there a *united people*, politically aware and knowledgeable of its rights ---- which has by an overwhelming voice expressed its support for or opposition to the operative governance arrangements? This question is readily answered in the affirmative, in the case of a largely secular national community homogenised through urban living, universal education and shared working conditions in a market-driven economic system. In such a situation the dominant values are largely agreed, and common attitudes to governance, thus, in large measure prevail. Therefore, in such a condition it can easily be said whether the constitutional order is "good" or "bad", in terms of its social welfare contribution. It follows that constitution-making, in such a condition, is likely to be a fairly straightforward exercise.

Where a country lacks social homogeneity, as is the case with most developing countries which have not fully become part of the market economy built around the production of standard goods and services and around urban living and international

trade (with their attendant cultures nurtured by access to universal education and association with political modernism), the factor of *one people* passing judgement on crucial governance options, will tend to be missing, or in short supply. In these conditions, the critical issues in constitution-making may not exactly reflect what "the people" may think or what -- with the attendant risk being that a constitutional order may be put in place that is not truly informed by the social or economic needs of the people. A constitution made in such circumstances will certainly be a reflection of the interests of those elite groups who brought it about. The lesson in this regard is that, elite groups who seek to put in place new constitutions should ensure the existence of an *open and verifiable procedure* for incorporating the genuine expectations of "the people".

How is a constitution originated? The answer to this question depends on the social, economic and political background of a particular country. For the older countries the evolution of whose governance structures was profoundly shaped by major economic revolutions that urbanized their societies and established universal market - place systems, the constitutions have, in a fundamental sense, been evolutionary in character, entailing the faithful reflection in governance structures of situations and relationships already dictated by social forces flowing from the emergent economic dispensations.

The classic example is the British Constitution, which evolved over many centuries and even today is not, for the most part, reduced to the written script. The British Constitution is mainly found in broad conventions, practices and usages. The spirit of these conventions is regarded as sacrosanct, and any infringement of them will not be tolerated by the overwhelming proportion of the people.

The origination of such a constitution follows a more - or - less pre-ordained process; and it is hardly necessary at all to know who forms the instigating force behind the constitution-making initiative. The constitution is, in reality, made common-law style, by lots of anonymous persons, institutions, etc. In this sense, constitution-making in Britain is unlikely to be a particularly controversial subject.

In "revolutionary" constitution - making, by contrast, there are active agents who work to shape the course of history. These persons inevitably hold perspectives that may be self-seeking in orientation, and on this account, broad - based agreement is hard to come by , and the resulting constitution may thus not be durable and may require frequent reform.

C. KENYA'S CONSTITUTION IN HISTORICAL PERSPECTIVE

Most African countries attaining independence in the late 1950s, in the 1960s and 1970s had to adopt what may loosely be described as the "revolutionary constitution", as the foundation of their governance systems in the ensuing decades.

The making of such constitutions came through ceremonies convened to terminate the colonial political order, and to replace it with a new dispensation. To the question, who was responsible for the creation of these constitutions, the answer, quite naturally, is that it was the slim elites of nationalist men and women who had been nurtured in the colonial era. During this earlier period, literacy and levels of education, for the bulk of the population, were extremely low, and only such a puny elite could have been effectively involved in the enlightened business of constitution-making. One must acknowledge, however, that the elite did have a clear mandate from the less knowledgeable majority, to work towards the establishment of a new constitutional order.

It also must be acknowledged, at the same time, that the constitutional dispensation which came with independence, in its essential features, was by no means the brainchild of the African elites alone. In the case of the former British colonies, most of the independence constitutions were, indeed, modelled on the British Constitution. The major popular concern at the time was attainment of independence, rather than the securing of an original kind of constitutional document. Governance arrangements are rarely founded on abstract notions; they are, in virtually all cases, founded instead upon experience, pragmatics and political reality. The Westminster Export Model Constitution offered the most practical framework for the transfer of power to Kenyan nationals; and thus Kenya's 1963 Constitution was the handiwork of the British government working with the Kenyan political elite.

One must acknowledge this reality and recognise its positive elements, as one proceeds to rethink and re-work Kenya's Constitution today. Was it a 'good' Constitution that Kenya adopted in 1963? Was it a "bad" one? Such questions are today of little significance. All that is necessary is to recognise that the 1963 constitution represented a vital step in the country's evolution as an independent African state. That Constitution supplied the crucial institutions that set the country afoot in independent statehood.

In 1964 Kenya moved the next logical step in its constitutional dispensation, of shedding off the "Dominion" link with the British Crown, and became an African Republic. This was a quite positive development in institutional maturation for a free Kenyan people.

Kenya's Constitution as at 1963 and 1964 provided for a complex set of institutions, and most significant in this respect was the semi-federal (majimbo) system which took the form of seven Regions, with their Regional Assemblies and their public services. The Constitution also provided for a bi-cameral legislature at the national level, as well as for several national staff commissions for different aspects of the public service. It is not clear whether the financial implications of such overlapping institutional arrangements had been taken into account; but it needs to be recognised that the national economic status was not so robust as to be able to support an infinite proliferation in governance bodies.

The multiplicity in public institutions under the 1963 and 1964 constitutions was clearly intended to serve the cause of *controlled government*, with minimal abuses of power. Such control was seen to inhere not only in the design of the legal and administrative arrangements, but also in the political dimension of public life as manifested by the interplay of political parties outside and inside the National Assembly.

The decade running from the date of independence was marked by many changes to the Constitution, with the result that by 1970, Kenya was a one-party state, with a single chamber of Parliament and a much scaled - down institutional base for autonomous constitutional agencies. This decade may be regarded as the watershed period in the flowering of power concentration in the hands of the Executive, in post-independence Kenya's entire historical profile.

The historical continuum from 1970 up to 1992 was certainly marked by a constriction in space for political activity -- and thus for the exercise of civil rights linked to political liberty -- and, of course, by the consequent dominant presence of the Executive in the constitutional power arrangements.

The whole period from 1964 to 1997 has been marked by piecemeal changes to the Constitution, to provide for momentary power - shift demands, whether emanating from government (as was mostly the case), from parliament, or from civil society.

The effect is that, today, the Kenyan Constitution is essentially in *patchwork form*, and it clearly calls for a professionally conducted review and re-enactment.

More, however, is being sought. Calls are being made for a re-orientation of the Constitution, involving a restructuring of its power arrangements. A question may be posed as to whether a wholly new dispensation is being sought and, if so, how such a demand would be explicable.

D. IS IT A QUEST FOR A RATIONALISED CONSTITUTION, OR FOR A NEW CONSTITUTIONAL DISPENSATION?

In a new constitutional dispensation, the vital interests shaping the power structures would have to be reconsidered in something of a bargain - and - renegotiation forum. Such an undertaking would, no doubt, be proceeding on the basis that there are crucial parties whose interests have never been represented or have been seriously under-represented, in the Constitution, and that the Constitution has always been an ill-conceived or an oppressive instrument of governance. So, it would be being argued that there is a case for re-working the entire structure of the Constitution and coming up with a radically different document.

Rationalisation of the Constitution, by contrast, is a *reform initiative*, that is, the rectification of those aspects of the governance scheme which thirty-five years of

experience have shown to be unsatisfactory. In that process a more careful professional assessment of the Constitution would also be done, to the intent that the document be freed of any potential contradictions, and rendered more technically sound and artistically accurate and right.

The latter course more readily commends itself than the former. It is quite obvious, for instance, that the Constitution should be a rational and coherent document, from the juridical standpoint. This would facilitate tasks of interpretation, whether by the courts or by the Speaker of the National Assembly, in relation to such issues for decision - making as may come before them. Therefore the Constitution, in view of the many piecemeal amendments to which it has been subjected over the years, does require a rationalising review process.

Parallel to such technical rationalisation should run a substantive review process which relates the Constitution's power allocation scheme to governance lessons received over the last thirty - five years.

Reform along these two paths is unlikely to cause much hardship to Kenya's people. These people have a history that bears certain landmarks. One of those landmarks may be the colonial governance system prior to independence. Another may be the attainment of independence, the euphoria accompanying the attainment of independent statehood, and the realisation of greater civil liberties under the

Independence Constitution. Yet another may be the changing character of parliamentary representation, with the constitutional changes of the first post-independence decade. Another landmark may be the one - party system that prevailed in the country from 1969 to 1991. Another will probably be the return to multipartyism in 1991, and the current commitment to pluralism in the mode of political organization.

To all people, *history is second nature*; nobody can shed off the historical reality that has shaped and influenced his or her strife, thinking and progress in the various social welfare domains -- cultural, economic, political, intellectual, etc. Therefore, the genuine practical case for governance reforms, for virtually all Kenyan people, revolves around their actual historical experience in the last thirty-five years. It follows that meaningful change, for the Kenyan people, is not change designed to be "radical" and resting on purely theoretical calculations of "right" and "wrong". For these people, *change*, for the most part, is change in terms of *reform and rationalisation*. Constitutional change, therefore, for most people, will mean no more than change to reform, to improve, and to rationalise.

Obviously this will be different from claims for a new constitutional dispensation. Such claims are bound to rest on hypotheses built out of theoretical argument, or founded on the unique political interests of particular political platforms; but it will not be possible to stretch such standpoints to cover the social-welfare concerns of the

general population of Kenyans.

It should be noted that the primary interest of the Kenyan people in securing a reformed constitution will rest upon certain broad social welfare issues. In any country, citizens do expect governance systems to secure values such as equity, justice, peace and tranquility. The attainment of these ends, it is to be noted, is intimately linked to the management of public welfare issues, in particular economic and social welfare. Therefore, the critical issues underlying the procedural arrangements and juridical logistics of the constitutional order are: (i) access to economic sustenance; (ii) equity in the distribution of economic resources; and (iii) social empowerment for a better quality of life.

The realisation of the objects above - mentioned is a function of power allocation and power management. These, therefore, are at bottom, the ultimate concerns of a constitution. Hence a constitution establishes the most crucial public institutions, defines their functions, and allocates them powers. The constitution, then, must address the issue of the relationships among the various organs thus established, and must deal with checks and balances. There will be no ideal checks and balances that apply to all countries. Appropriate checks and balances for any particular country will depend on the social and political experiences of that country, the broad outlook of its peoples, that country's moral ethos, and its fundamental policy goals.

What are Kenya's primary policy goals? These must be considered in the context of the country's essential survival needs, and in particular its economic status.

Kenya's largely - agricultural economy does not attract sufficient value - added (because of the inherent limitations of agricultural wealth), to be able to cater fully for the welfare needs of a growing population (which currently stands at nearly 30 million). The country thus must work towards industrialization, trade and the development of marketable services. The desirable governance system, therefore, is one that frees of unnecessary impediments the national capacity for the conception of policy and programming, in the interests of industrial and related development.

Thus, constitutional reform in Kenya should be guided by such practical concerns, as it addresses current institutional and power arrangements. In this regard the Constitution, in its reformed character, should underline values such as prudent utilisation of resources, technological growth, professional management of institutions, public participation in major decisions affecting public interests, openness and accountability.

E. CONSTITUTIONAL REFORM: THE WAY AHEAD

The constitutional reform process needs to address both the technical - legal, as well as the policy - related issues. A careful study of the Constitution in its present form

indicates the need for rationalisation in certain important areas. These include: (i) the respective roles of the President and the Public Service Commission, in relation to engagement and dismissal of officers in the public service; (ii) the position of the Court of Appeal in the judicial hierarchy, in relation to constitutional interpretation; (iii) the management of the foreign affairs power of the state; (iv) the status of emergency powers; (v) the concept of collective cabinet responsibility in a scheme of multi-party politics; (vi) the law of citizenship in relation to sex discrimination; (vii) the procedure of enforcement of the fundamental rights provisions; (viii) tribunals investigating misconduct on the part of judges; (ix) procedure of appointment of Puisne Judges and Judges of Appeal; (x) procedure of nomination for nominated members of parliament; (xi) the provision regarding a confidence vote in the National Assembly; (xii) the content of the fundamental rights provisions.

As regards the broader issues, the constitutional reform process should start by considering whether it is necessary to have a preambular statement of directive principles. Thereafter, consideration should be given to the power structure provided for in the Constitution; the definition of roles entrusted to appointees; functions of particular organs of governance; public finance; accountability on the part of appointees and public agencies; the ideal length of the Constitution, and the issues that should be reserved to judicial interpretation; locus standi in relation to the general enforcement of the Constitution; procedures of accession and succession to high offices of state; etc.

Some of these matters are of a technical character, and thus soliciting the public's views on them may prove difficult. It will be desirable that the Constitutional Review Commission should formulate simple questionnaires addressing the several areas of concern, and should communicate the specific questions to members of the public who will state their preferences in clear, specific responses. On the basis of such consultations it will be possible to determine the popular position on the respective constitutional issues; and the popular opinion should then guide the Commission in the formulation of a draft Constitution.

THE PARLIAMENT AND MEDIA IN KENYA: AN ASSESSMENT OF THEIR NEXUS AND ROLES IN THE DEMOCRATISATION PROCESS

BY CRISTOPHER MULEI*

1.

By way of Introduction - The Germination and Growth of the Mustard Seed

Both the Parliament and the Media need each other; indeed, their symbiotic relationship has established historical antecedents.

The coinage of the term "the Fourth Estate" is evocative of the emergence of an institution whose influence and impact of a country's body politic. At the time, the daily press in Britain was seen as ranking in importance to the other national estates, namely, the Lords Spiritual, the Lords Temporal and the Commons. Edmund Burke, the articulate English statesman, orator, and political thinker and writer, is credited with first referring to the reporters' gallery in the House of Commons as the fourth estate.

In 1766 Burke became M.P. and till 1790 was one the inspirers of a revived Whig party (today the Liberal Party). His speech to the electors of Bristol in 1774 stands as the classic statement of the relation of a Member of Parliament to his constituents before the development of rigid party discipline. Burke's major interests included the emancipation of the House of Commons from the influence of George III, and freeing India from the misgovernment of the East India Company.

The word "estate" is derived from the Latin word (status) and French (etat) and literally means the condition of circumstance of standing of a person or a class of persons. Accordingly, the original estates of the realm "or the three estates" were the major groups in the same condition, namely, the barons or peers, or Lords Temporal, the clergy or Lords Spiritual, and the commons. In short, the three estates were the status - groups of the mediaeval Parliament in Britain; to the number was added the press.

Both Parliament and the media share a common podium in terms of the four freedoms - the four aspects of freedom mentioned in a declaration of objectives made by President F.D. Roosevelt in a message to the United States Congress urging support for the Lend Lease Bill, during World War II, namely, freedom from want, freedom of worship, freedom of speech and expression, and freedom from fear.

The Parliament is of course of an earlier vintage than the press. The former's antecedents can be traced to Iceland over a thousand years ago. In the summer of

930 all the chieftains and their representatives in that island nation met on the Almannagja.

This first - all island assembly, the Althing, passed laws, settled disputes, and gave judgments. It was the world's first democratic parliament, and Thingvellir ("the plain of the assembly") became Iceland's most sacred Landmark.

The Witenagemot in Anglo - Saxon England was the nearest to what we understand by the term parliament. It was the supreme council of the nation and comprised the King, earldormen, the King's thegns, bishops, abbots, and generally the leaders of the people. It could depose the King for misgovernment, elect the King, though preference seems to have been given to the children born to the King after his accession and to a person recommended by the late King, and had a share in all government. Along with the King it enacted laws, levied taxes, made war and peace, appointed ealdormen, bishops and officers of state and sometimes acted as a supreme court both in civil and criminal cases. After the Norman Conquest in 1066 it was replaced by the Norman King's magnum concilium. The word parliamentum as meaning a deliberative body was used in 1247, but for a while thereafter was sometimes used of sessions of the King's council and of assemblies of the magnum concilium.

The bicameral Parliament of today's Britain is therefore the direct descendant of the old assemblies of the King's Court which medieval mornachs summoned for the purpose of discussing affairs of state. The old assemblies were in the strict sense parliaments, or, as that word implies, talking shops. Their basis was feudal and hereditary. From the thirteenth century onwards, as the fendal revenues became inadequate for the needs of the state, the King gradually developed a practice of summoning representatives of local communities or countries (the Commons) to whom they could explain the need of money and from whom they could get agreement about various impositions on the community. The commons assembly became gradually more self - conscious and confident, and was eventually not just a body supplementary to the gathering of feudal Lords, but a separate body with its own claim to be heard. Clearly, a fissure of differences separated by the two bodies, a rivalry which was ended by the Settlement Act of 1688. From that period onwards, two basic principles have survived: (i) there must be regular elections, and (ii) the King (or the Queen) can do nothing of which Parliament disapproves. "Parliament" in this sense has come more and more to mean in effect the House of Commons alone. The scope and effectiveness of its power to control the executive have all along been greatly influenced by the extent to which its majority in turn has been identified with the people it is supposed to be controlling. But the procedural forms have been built up on the assumption that the control is real.

Meanwhile, the two Houses had claimed various privileges both for themselves collectively and for their members: members' freedom from arrest in Parliament - time, and freedom of speech in the assembly, go back to the 15th century.

Procedural Forms developed, and were embodied in standing orders, some of which, with various resolutions and speakers rulings, provided the only basis of some of the most important elements of the constitution.

Substantial changes in procedure in the House of Commons have been made since 1966, but they have not altered the essential purpose of the standing orders, which involves striking a balance between two opposites: to allow adequate discussion of all aspects of public affairs, and yet at the same time to enable ministers to put their business through without undue delay.

It is at the backcloth of this progression of Parliament as the watchdog of the Constitution, that this institution was imported to Kenya, a story which goes back to the British occupation of Kenya between 1895 and 1920, and thereafter. As we shall see, it was at first mainly a bumpy affair; but the notions of the Parliamentary democracy (sprinkled with notions of presidential democracy) did coalesce so that today Parliament has come to occupy a very central role in the lives of the people of Kenya.

Montesquieu's concept of a legislative assembly, separate and distinct from the Executive (and also Judiciary), may have been derived in part from his observation of eighteenth - century Britain, but even then the British Parliament's functions were better described by Aristotle's term "deliberative", and the same is still true today: the same is, to a great extent, the position in Kenya.

2.

Parliament Comes to Kenya

The early Parliament in Kenya was by no means a replica of the British one; this was so because colonial rule was not about introducing democracy in the country, but about oppression and exploitation. This was notwithstanding the fact that the United Kingdom practised democracy at home and was afterwards a signatory to the Universal Declaration of Human Rights of 1948 which in its preamble proclaims the recognition that "the inherent dignity"... and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."

As we have seen, the holding of regular democratic elections is the cardinal feature of the establishment of a Parliament. However, in the Kenyan case, it was not until 1957 that Africans, the majority were allowed, for the first time to exercise franchise, and even that a limited one based on such criteria as property and education. This was under the Lyttelton Constitution wherein the six African nominated Members of the Legislative Council (LegCo) were replaced by eight African Elected Members. And up to 1961, the Speaker of the legislative body was still appointed by the Governor: before that, that is at the early stages, the Governor was himself the chairman of LegCo.

Nevertheless, the historical antecedents of Parliament have not amounted to nought; far from it. First, and a paradoxical phenomenon at that, the institution became the most visible forum for the democratisation process: indeed, the very gate through which the aspirations of the colonised were channelled through. From the point of view of procedure and practice, most of the notions and principles on the working of a Parliament were evolved during the nascent years.

It has been a long journey - from the iron corrugated structure (looking very much like

a primary school classroom unit) in Whitehouse Road (today Haile Selassie Avenue) where the first meeting of Kenya's Legislative Council in 1907, to the more elaborate present Parliament Buildings, the first phase of which was completed in 1954, and the second in 1963.

As the first Speaker of the House of Representatives, (and later of the merged National Assembly), the late Humphrey Slade, notes in his useful little book, The Parliament of Kenya, notes, basically the Standing Orders adopted by the National Assembly, are still very similar to those of the former Legislative Assembly of Kenya, which in turn followed the pattern of the British House of Commons. This is true today notwithstanding some changes in the Standing Orders over the years; the chais remains the same.

Enter Sir Humphrey:

"... Ceremonial proceedings and dress, (albeit not actually prescribed by Standing Orders, remain much the same as in the House of Commons. However, the Speaker's and Clerk's scribes are now coloured instead of being black. Also, by way of distinction, Clerks no longer wear wigs, and the Serjeant - at - Arms wears a military style of uniform instead of Court dress."¹

After the second Lancaster Conference in 1963, transition towards political independence was put on top gear and in 1963, the year of Self - Governance ("Madaraka"), the Legislative Council was replaced by a National Assembly, consisting of the Senate and the House of Representatives. Each House elected its own Speaker: Muunga Chokwe was the Speaker of the Senate, and Humphrey Slade, the Speaker of the House of Representatives.

After an amendment to the Constitution effected in December 1966, both Houses were merged into one House and created 41 new Constituencies to be represented by the same number of existing Senators. The National Assembly sat for the first time as one House on 5 February, 1967.

The Role of the National Assembly

Slade has correctly laid down the role of Parliament as follows:

- (a) The making of laws;
- (b) The approval of taxation, borrowing and expenditure by the Government;
- (c) The election of a President whenever a vacancy in that office occurs otherwise than as the result of Dissolution of Parliament, or when the consequent General Election fails to produce a President;

- d) The termination of a President's appointment by a resolution of "no confidence; and
- (e) The regulation of its own procedure, subject only to the express provisions of the Constitution.

There is also the important role of overseeing delegated legislation. These are what one can call technical functions of Parliament. There are also other functions whose fulcrum is the democratic ethos, or national democratic ethic.

There is what Slade calls the "critical function" of Parliament. He elaborates:

"There is, However, another very important function, not expressly mentioned in the Constitution, though implied by the collective responsibility of Government to the National Assembly; which is known as the critical function of Parliament. That is the function of criticising and advising the Government and seeking and receiving from the Government explanations of what it is doing or cannot do, and why. It is by this critical function, exercised both by way of formal Question and in the course of the debate on Motions by the Government or by private Members that the Government and the people of the country are kept in touch with one another. It provides what His Excellency Kenyatta has described as "a bridge between the Government and the people" (emphasis added); helping the Government to hear and understand, through Members of Parliament, the troubles, doubts, and reactions of those whom they represent, and helping those same Members to hear and explain to their constituents the problems and the policies of the Government. No democratic government can govern well, or even continue as a government at all, without being constantly aware of the needs and anxieties of the people, and maintaining their confidence; and though administrative officers also have a large part to play in that respect, Parliament with its critical function, exercised by the chosen representatives of the people, is the principal instrument whereby that is achieved."²

There is also the additional function of promoting what Slade terms the "national spirit". He expounds:

"Yet another function of Parliament, outside any express provision of the Constitution, is the devel

opment and maintenance of a national spirit. Not only does the Parliament provide a focus for national pride and a forum for expression of national opinion; it also serves to unite the people of the country. People living in different parts of the country, remote from each other in varying climatic conditions and with different customs and traditions, know little of each other; and that tends to create mutual suspicions and misunderstandings between them, which militate against any feeling of national brotherhood. Where, however, their chosen representatives are given the opportunity of frequent meeting and discussion, as they are in Parliament those representatives at least develop mutual understanding, respect and confidence among themselves, even if they disagree; and, through their guidance, passing on this experience, a sense of national unity is gradually developed, and will thereafter be maintained, among the people."³

From the foregoing, it is clear that Parliament is one of the greatest protectors of the rights of wananchi so that it occupies an important place in promoting good governance, accountability and transparency. It is also charged with the onerous role of promoting and protecting the constitutional safeguards of the fundamental rights and freedoms of the individual. In this regard, it is supposed to be the leading upholder of the Constitution. After all, a constitution is the framework of norms and practices which define and regularize the management of political relationships.

3.

The Might and Role of the Media

Modern newspapers represent the development of people's desire to communicate with their neighbours. This same desire led to the development of language. The earliest news stories were spread by word of mouth. Battles and other important events were depicted in picture writing on the walls of caves. Then some written languages and news was spread by the written word.

In the time of the Roman Empire, news of the government was posted in a series of public announcements called Acta Diurna ("Acts of the Day"). These may have been the earliest form of the newspaper. Early commercial news was spread by letters between merchants. The letters were copied by professional scribes and sent to clients throughout the empire.

A similar system existed in China as early as the 7th century A.D. These systems, however, reached only a small part of the population. Until the invention of printing, the general public was largely ignorant of the great news of the day.

After the invention of printing, pamphlets and single sheets announcing specific events began to appear. Probably, the first of these to appear regularly was a German

publication, Avisa Relation oder Zeitung. It was published in 1609.

What is now considered to have been the first English newspaper was founded in 1622. It was called the Weekly Newes.

Strangely, the appearance of the media was not a welcome thing for those holding the reins of power - from the Queen to Parliament, and Government departments. Free speech was subversion at early stages of the media - a "dangerous" thing to engage in. Throughout the seventeenth century, control and licensing of the press were continued, but the licensing of the Press came to end in 1694 when the controlling Act expired and was not renewed. Thereafter control of the Press was effected by prosecutions for treason, seditious libel, and similar offences, and governments relied more on meeting attacks and criticisms by publishing their journals and pamphlets.

The major stumbling block was the crime of sedition whose definition is an omnibus one. The convoluted definition runs: "The crime of doing acts, or speaking and publishing words or publishing writings capable of being a libel, in each case with the intention to bring into hatred and contempt or excite disaffection against the Queen or the government and constitution of the United Kingdom, or either House of Parliament or administration of justice, or to excite the Queen's subjects to attempt, otherwise than by lawful means, the alteration of any matter in Church or State by law established, or to incite persons to commit any crime in general disturbance of the peace, or to raise discontent and disaffection amongst Her Majesty's subjects or to promote feelings of ill will and hostility between different classes of those subjects."

The thrust of the above provisions is very much part of Kenya's legal system. Seditious libel is provided for under the country's Penal Code and so is criminal libel. The latter is a virtually extinct yet dangerous common law offence in England. In the United Kingdom, newspapers are required to register their titles and the names, occupations, places of business and places of their proprietors. However, unlike in Kenya, there is no discretion to refuse registration which is intended as a source of information as to the paper's owners rather than a means of censorship.

The reason for these hurdles are to discourage the dissemination of truth; the thwarting of the right to know and knowledge which accompanies it. As everyone knows knowledge liberates, a fact which many a political leader are only too aware.

The sensitivity to the ventilation of truth by the media is more pronounced with regard to the electronic media - the radio and television.

The radio did not make its debut on a wide scale until after 1915 and its impact was stupendous. Its effectiveness as an effective instrument of propaganda during the Second World War; Hitler, under the magnetic influence of that master propagandist, Joseph Goebbels, made sure that six million radio sets were given to the German people so that they could listen to their Fuehrer.

Then came the television which was first widely used from 1939 onwards. It has

taken the world by storm and is today the most used medium of communication in the developed world. The media industry is being transformed by the new technology. In broadcasting for example, greater diversity has already been opened up by satellite and cable transmission; and at the dawning of the digital era there are major implications not only for sound and picture quality but also for choice and range of services. The Internet is among the most far-reaching of recent developments in electronic communications. It plays a new and increasingly important role in the provision and dissemination of information and entertainment. Truly, the world is fastly becoming a "global village", the term coined by the celebrated Marshall McLuhan.

Whichever way one looks at it, the Press is the most extensive and important medium of mass communication. Thus the way the mass media are used is of critical importance: on the one hand is the danger of the use of the media as a propaganda machine, especially by those in power, and at the other of the spectrum is the danger of the media being used by its owners (and the practitioners - the gate-keepers and the news gatherers)⁴ in the style of a "New Despotism". At the end of the day, a reality emerges, to wit: The Press in the country (as indeed is the case in most countries) tends to uphold the existing distribution of power and to hinder rather than help any programme of wide-scale social change. That is why the press faces a real challenge at the onset of the constitution making process in the country.

The new developments in the new political landscape (some as a result of the IPPG⁵ package) have brought to the fore the basic democratic position: that is, all broadcasting, whether of vision or of sound alone, must by law maintain strict impartiality between the main political parties, impliedly, both between and during elections, although the former situation ought to have been spelt out in no uncertain terms.

The danger of course is to interpret impartiality so narrowly as to lead to a failure to educate or inform, and that avoidance of controversy too easily becomes an implicitly partisan defence of the status quo.

Both the print and electronic media do not exist solely to give information to the public and to influence or mould public thought. The two types of media are also supposed to serve the vital functions of expressing public opinion and of articulating public discontent.

The Press in particular performs an indispensable service in these respects. Indeed, it is probably safe to say that no strong current of opinion or discontent can long exist without reflection in the press on the air - although the more far-reaching or unorthodox criticisms of society are, the longer they will probably have to wait and the more support they will have to receive before they will be given adequate attention.

4. The Uneasy Relationship between Parliament and Media

The early years in England witnessed hostility between Parliament and the media

(mainly print media); the same was the position between the White settler - owned Press and the colonial LegCo. The press was prickly as it felt the colonial administration was not making the necessary steps towards the establishment of "White Highlands" in the country. The East African Standard, for example, was a veritable voice of the settlers and accordingly, lambasted the colonial LegCo, which later had elected White MPs, as a "bumbling" institution. Unlike in colonial America, where legislatures did punish breachers of parliamentary privilege, a crime closely resembling, if not synonymous with, sedition, but technically, they relied on contempt citations that could generally be purged with a profuse and abject apology.

The most influential of nineteenth century American against the gagging of the press dissenters may have been Thomas M. Cooley, an erudite Michigan judge writing in the last quarter of the period. He flatly rejected the English common law of seditious libel. Public men, said Cooley, ought to expect searching, even libelous, criticism of their character, habits and mental and moral qualifications.⁶ "The evil likely to spring from the violent discussion," he wrote, "will probably be less, and its correction by public sentiment move speedily, than if the terrors of the law were brought to bear to prevent the discussion."⁷ And John Daly Burk, editor of New York's Time Piece, in a July 4, 1798, editorial wrote that only wicked governors of men dread what is said of them.

Contempt of Parliament

The British Bill of Rights 1688 states that the "freedom of speech and debates of proceedings in Parliament ought not be impeached or questioned in any court or place outside Parliament". Hence Members of the House of Commons and the House of Lords are guaranteed immunity against court proceedings concerning statements in Parliament, Parliamentary committees, or Parliamentary reports. Such statements are privileged when repeated by the press. MPs' statements outside Parliament are not privileged. This rule has been used in the past to protect publication of potentially libellous allegations or to reveal information classified under the Official Secrets Act.

Whilst MPs' statements are protected from court proceedings, Parliament can impose disciplinary sanctions. The Speaker of the House disallows discussion on certain topics.

The Houses of Parliament have the power to punish members or outsiders for Contempt of Parliament. This is an ill - defined offence expressed as directly or indirectly impeding either House in the performance of its functions including bringing the House into contempt. Publications which "bring the House into odium, contempt or ridicule or lower its authority" can constitute contempt.

Both Houses possess power to imprison or to banish members or outsiders from their precincts. The House of Lords has power to fine. Trial for contempt of Parliament involves a total lack of procedural guidelines, judgment by a partial tribunal and no right of appeal to the courts. In the past the powers have been used against newspapers which criticized the conduct of MPs. The offences have fallen into dis

use and no - one has been imprisoned since 1880. If they were to be revived and any serious punishment imposed, it is doubtful whether they would withstand the scrutiny by the European Court of Human Rights.

The British Parliament used to be all impotent so that its decisions were not challengeable or reviewable in any way. As a matter, there is an English case decided in 1701 which gave credence to this viewpoint, in a language which, alas, did not seem very well chosen. Lord Chief Justice Holt had this to say in the particular case, that is City of London V. Wood:

"An Act of Parliament may not make adultery lawful, that is, it cannot make it lawful for A to lie with the wife of B, but it may make the wife of A to be the wife of B and dissolve her marriage with A."

The much - avowed omnipotence of the British Parliament is today a boast of the past; after accceding to the Treaty of Rome in 1972, certain powers of Parliament have been clipped so that, for example, the British Parliament cannot pass a piece of legislation abridging the fundamental rights and freedoms.

The Kenyan Position

The applicable Act of Parliament is the National Assembly (Powers and Privileges) Act which came into effect on 22 April, 1972. The purpose of the Act is "to declare and define certain powers, privileges and immunities of the Members of the National Assembly; to secure freedom of speech in the National Assembly; to make provision relating admittance to and conduct within the precincts of the National Assembly; to give protection to the persons employed in the publication of the reports and other papers of the National Assembly..."

No civil or criminal proceedings shall be instituted against any member for words spoken before, or written in a report to, the Assembly or a committee, or by reason of any matter or thing brought by him therein by petition, Bill, resolution, motion or otherwise.

The Speaker is also charged with a general responsibility for preservation of dignity and order, and for the comfort and convenience of the Members and Staff of the National Assembly, within Parliament Buildings. For these purposes, he has power to make orders concerning the admission and conduct of strangers within the Buildings (breach of which can be punished by prosecution in a Court of Law), and a Code of Conduct for Members (breach of which can be punished by the National Assembly).

Under Section 7 of the National Assembly, (Powers and Privileges) Act, no stranger shall be entitled, as of right, to enter or remain within the precincts of the National Assembly. The term "stranger" as defined under the particular piece of the legislation means any person other than the Speaker, a Member of the Assembly or an Officer of the Assembly. Technically, an MP who has been expelled from the precincts of Parliament Buildings on account of infringing the decorum and good order of the House is to all intents and purposes during the period of the punishment.

A stranger illegally remaining within the precincts of Parliament commits an offence punishable by a fine of Shs. 500 or to imprisonment for a term not exceeding three months, or both fine and imprisonment.

The nearest that the National assembly can exercise powers of a court in accordance with usage of the House of Commons seems to be under section 20 of the National Assembly (Powers and Privileges) Act. The section deals with questions relating to evidence and production of documents before the Assembly of Committee. It would seem that a contempt of Parliament engendered by either refusal to give evidence, or refusal to produce documents, can be tried in the old method where Parliament in Britain would not hesitate in sending somebody to the Tower of London.

However, as regards contempt of Parliament through publication, the National Assembly has no power to try and imprison the culprits. Section 23 indicates that the matter will be seized of a court of law.

The section states:

A person who -

- (h) publishes any false or scandalous libel on the Assembly or its proceedings; or
- (i) speaks words defamatory of the Assembly or its proceedings, shall be guilty of an offence and liable, on conviction, to a fine not exceeding Shs. 2,000 - or imprisonment of up to 12 months, or both fine and imprisonment.

It is this lacuna (that is in the view of those who wish to see Parliament to be a court of law but outside the confines) which made Zambia change its constitution to accommodate this very iniquitous form of inquisition.

The Zambian Case

In February 1996, the editors and a columnist of The Post were found guilty in absentia of contempt of Parliament after one of them had written articles attacking the Vice-President and other MPs for criticizing a decision of the Supreme in which the Court had found Section 5 of the Public Order Act to be unconstitutional. Three days later, they were summoned before the National Assembly to be informed of the nature of their punishment. The three refused to appear before the National Assembly and a few days later commenced judicial review proceedings⁶ challenging the findings and decision of the House.

They went into hiding pending the hearing of their application to the High Court. But leave to apply for judicial review was refused the next day, whereupon they immediately appealed to the Supreme Court, which set the date for hearing the matter ten weeks ahead. As they could not remain in hiding all that time, the two editors decided to surrender themselves to the National Assembly while the columnist remained in hiding. By this time the Speaker of the National Assembly had issued a warrant

directing the Inspector - General of Police to arrest the three and have them detained at any prison in Zambia until they showed " contrition for their conduct" or until a further motion of the House.

An application for habeas corpus⁹ was made before the High Court on their behalf, and after hearing the application the court ordered their release. However, although the court ordered their release, the presiding judge failed to address several cardinal issues, one being whether or not the Zambian National Assembly has the power to send anyone to prison.

The fact that the National Assembly itself issued a judgment and punishment for contempt of Parliament violates Article 14 of the International Covenant on Civil and Political Rights which states that: "In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."¹⁰ The National Assembly is not a tribunal established by law, and can be in no way be considered independent or impartial or able to give a fair hearing when acting as a judge in its own cause.

However, although the High Court left the matter of jurisdiction of the National Assembly hanging in the air, the matter was taken over by politicians in power who flexed sinews of repression. A constitutional amendment¹¹ was effected with speed and alacrity to the effect that the Zambian Parliament shall enjoy the same technically obsolete powers traditionally vested in the British House of Commons - that is in more specific terms trying and imprisoning those who dare to tread on its might. This is a certainly a retrogressive course of action which Kenya usefully do without.

The Barring of Daily Nation From Covering the Proceedings of Parliament

On June 28, 1989, Parliament barred reporters from the Nation Group of Newspapers from covering the proceedings of the House indefinitely. The period was to stretch to almost a month.

The historic measure was taken against the newspaper group through a motion of censure moved by the then Deputy Speaker, Mr Kalonzo Musyoka.

The motion, which formed part of the day's order of business read: "That with accordance with the provisions of the Standing Order number 1970, this House resolves that representation by the Nation Group of Newspapers be excluded from the Press gallery for an indefinite period."

The House had to interrupt its business to accommodate Mr Musyoka's motion. It was scheduled to debate a motion on the financial statement. This debate is normally not interrupted and must run for seven consecutive days. When it is interrupted, provision must be sought by a Minister.

The procedural motion seeking leave of the House to debate Mr Musyoka's motion was moved by the then Vice - President and Minister for Finance, Prof George Saitoti, who was the leader of Government business. In the Chair was Mr Moses Arap Keino.

The allegations seemed unfocussed and clearly not immediate. Amongst the allegations were the claim that the Daily Nation had gone out of its way to scandalise the reputation of MPs". Another accusation was that the Nation Group " lacks patriotism and respect for the House". Also there was a general allegation that " there was a deliberate attempt to divide Kenyans using the mass media - and especially the Nation Group - and set them off against the Government". A number of previous stories, some of them with no bearing on Parliament were also cited.

Mr Kalonzo cited one article headlined " Members fail to liven debate on Budget", charging that it had scandalised the Members by suggesting that their contributions to the Budget debate were poor.

The Speaker gave free rein on the debate with some unsubstantiated information filtering through without being stopped right in the tracks.

This mapping of relations between Parliament and the Fourth Estate should be prevented at all costs for it is in the end counterproductive.

5

Forging Closer Links: The Challenges Ahead

The Osmotic Dependence

Without Parliamentary proceedings, the media are bound to be anaemic in their coverage of news for debates in Parliament are a drama in itself, not to be missed.

As for the Honourable MPs, they need, indeed cherish, publicity. In the hilariously written book, Esprit de Law by Anthony Nicholson, there is character, a Miss Mae West who tells a reporter:

"Say something nice about me if you can;
Say something about me if you must
But for God's sake say something about me."¹²

Many an MP, although they will readily admit this, have very much in common with Miss Wert.

Journalists are not necessarily descendants of Lucifer. The fact of the matter is that the House has at different times been graced by the presence of former scribes. It is often forgotten that the Founding Father of the Nation, Mzee Jomo Kenyatta, was himself a journalist at one time of his chequered life; two others of the famous

Kapenguria Quintet were also journalists during their formative years in the nationalist struggle for independence, namely: Paul Ngei and Achieng Onyango. For years, Kenyatta was the editor of Mwigwithania ("The Reconciler")

True, there is need for responsibility on both sides: there is need for sprucing hedges on both camps.

Parliament has to sharpen its liberal streak and develop shock absorbers against criticism from the press. We can take a leaf out of the American experience.

In the US, Congress has implied contempt power that "rests upon the right of self-preservation, that is, the right to prevent acts which ... inherently obstruct ... the discharge of the legislative duty ..." Congress apparently has used this power only to punish the refusal to provide evidence it has demanded. It has not used this power to punish the disclosure of the confidential information. Thus Congress is reluctant to chill press freedom.

The US Supreme Court has now recognised that the First Amendment's protection of speech carries with it some basic public right to information and confers some degree of protection on journalists seeking news. The First Amendment value being protected is not so much the interest of someone in expressing himself as the interest of the public in benefiting from unfettered discussion of the activities of public officials and figures.

And needless to state, it is a legal axiom in the United States that public officials are supposed to take more flak, by way of criticism, than private individuals. This is so in order to give effect to the First Amendment's function "to encourage ventilation of public issues."

The press itself can not behave like an unruly wild beast; there are duties and obligations to discharge. Writers, printers and publishers, as well as those who operate in the electronic media are subject to general legal rules of wide application, notably the law of copyright, libel and slander, obscenity, official secrets, contempt of court, contempt of parliament, and the like, which impose control by way of possible civil or criminal liability after publication or broadcast.

It is the failure to observe the necessary benchmarks on the part of the media that friction is bound to occur in relationships with other institutions and individuals. Lack of proper training is also a handicap. The latter, rather than malice might have been the backcloth of the warning by the Speaker of the Seventh Parliament that the media risked community contempt of Parliament. The other limb is of course misreporting.

However, despite some difficulties, Press coverage of the Parliamentary proceedings, by and large, remains quiet informative and educative. But to re-rephrase Tennyson, the poet, "so little done, so much to do". After all, humility is the best plank to improvement and advancement.

Public Opinion and Accountability

Parliament, which consists the President of Kenya and the National Assembly was once described by the late President Kenyatta as the supreme instrument of the State". Accordingly, it is imperative that the institution truly belongs to the people. The words of the late Slade are apt here:

"The Parliament is a national institution, which represents and belongs to the people of Kenya; and it is both the right and duty of every citizen to be well acquainted with its history, its composition, its powers and duties, and its activities".¹³

These words have been reinforced by a similarly pithy statement by the Speaker of the Peoples' Assembly of the Federal Republic of Ethiopia. Addressing a galaxy of participants including Parliamentarians and Speakers across the length and breadth of the continent of Africa in April 1996, Dawit Yohannes remarked:

"... Parliament should not only enact laws, but it should also be seen while enacting laws. Its deliberations and processes should be open and transparent. In a democratic country, parliament is no place for deals, behind closed door, and people's business in parliament should be seen to be done publicly, with the open participation of those who may have an interest in any business pending before parliament or those who may be affected by it."¹⁴

One of the duties of a democratic government - and it is not always an early one to discharge - is to estimate the reaction of the public opinion to proposals under consideration and the extent to which those reactions should influence Government policy. A wise government would not wish to bring itself into sharp conflict with predominant public opinions or, unless the public interest really required otherwise, with informed bodies of opinion entitled to respect and consideration.

In many ways, the parliament and the media are Siamese twins; accordingly, they need to help each other in their existence as credible institutions.

There should be more informal interaction whereby journalists and parliamentarians create a solid rapport with Cabinet Ministers, Chief Whips, and both the Leader of Government Business and the Leader of the Official Opposition give insights into the state of the nation, as is done in Britain, even if some of the information is embargoed through a gentleman's agreement. There should also be a Press Office at with the National Assembly Secretariat where briefings on some rulings and the calendar of the business of the House, amongst other things, are ventilated. More interactions like this workshop also help towards bringing down the walls which separates the two estates.

And each institution should articulate the rights of the other, for this means promoting an overall common good. At this time when we are at the threshold of constitu

tion making process, an orchestrated approach to the democratisation process is certainly salutary all round.

There is also the other aspect; that of enhancing the image of each side. Parliament should not only be concerned about privileges, but also about Standards - so that ethical principles are brought to bear by having a Standards and Principles Committee. To be also closer to the people. Parliament might consider doing away with some of the pomp and paraphernalia such as the wig for the Speaker and the Mace.

As for the Press, there should be a self-regulation machinery to arrest irresponsible journalism.

At the end of the day, we are really talking about the right to know on the part of wananchi. That is why, for example, live broadcasts of debates in the August House are very overdue. But more fundamentally, there should be a Freedom of Information Act, which would give members of the public an enforceable right to access, subject to specified exemptions, to documents in the possession of the Government Ministries and statutory authorities and other public bodies.

An assessment of the effectiveness of an institution must involve not only judgments about the actual performance of that body but also an understanding of the functions it is intended or might be expected to perform. It really depends on what you expect.

Thus much of the criticism of both Parliament and the media may in part reflect a failure to appreciate what roles the two institutions may reasonably be expected to perform - what might be called mistakes in perceived functions.

The point here is that we should not make the two institutions beasts of burden by overburdening them with all kinds of expectations; as human institutions, they have had their ups and downs. However, the guiding star is the search for justice.

Shared Values

By its very nature, a society can only be a society as long as there is some kind of consensus - a collection of shared values. The key to this definition is the word shared. For a society to remain cohesive, for a government to be capable and willing to protect the rights of all its citizens, there must be certain shared values. The most basic tenet of any constitutional society is the shared belief that by virtue of being citizens of a state, all persons are equal in the eyes of the law. Thus, we can identify the constitutional state as being one in which the rule of law prevails. This is what the Parliament and the media in the country should aspire to, and so should be the other lovers of democracy who constitute the bulk of Kenya's society, the wananchi. The law is never arbitrarily applied in the constitutional state, and the only coercion exercised by government is guided by the procedural guarantees and restraints.

The pillars of the rule of law are constitutionalism and a democratic political culture.

The rule of law is a concept of the utmost importance but having no defined, nor

readily definable, content. It implies the subordination of all authorities, legislative, executive, Judicial, and other to certain principles which would generally be accepted as characteristic of law, such as the ideas of fundamental principles of justice, moral principles, fairness and due process. It implies respect for the supreme value and dignity of the individual.

In any legal system, the rule of law implies limitations on legislative power, safeguards against abuse of executive power, adequate and equal opportunities of access to legal advice and assistance and protection, proper protection of individuals and group rights and liberties, and equality before the law.

Concepts central to a collective political culture are tolerance and trust. Consensus can never be absolute. There are certain to be disagreements based on class, ideology, religion or ethnicity in any society. A societal consensus must embrace an "agreement to disagree" based on the assumptions that other citizens have a right to different views and that the political process is a legitimate forum for resolving disputes resulting there from.

With a light touch

To lovers of publicity, and this category is heavily populated by politicians, there is need for caution: too much of it is apparently a harmful.

Benjamin Disraeli, at one time British Prime Minister (and later Lord Beaconsfield) had this to say of the effects of the said overdose:

"The world talks too much of the powerful sovereigns and great ministers; and if being talked about made one powerful, they would be irresistible. But the fact is the more you are talked about, the less powerful you are."

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ENDNOTES

1. Humphrey Slade, The Parliament of Kenya (East African Publishing House, 1967), p.43.
2. Supra., p.35
3. Ibid. , p.36.
4. "Gate keeper" is the appellation given to the person in the media who is at the door of the opinion process. He is the news editor of a broadcast station, the

managing editor of a daily newspaper, the editor of a news agency or the advertising manager of any communications medium. To reach an audience, an idea must get past him.

5. The inter parties Parliamentary Group which coalesced on the eve of the 1997 general elections for the purpose of effecting some minimum constitutional, legal and administrative reforms.
6. Thomas M. Cooley, Treatise on the Law of Torts (Chicago 1879), p.218.
7. Cooley, A Treatise on the Constitutional Limitations (Da Capo ed., 1972), p.429.
8. Judicial review: the doctrine of judicial review empowers courts to review laws passed by the legislative body and to declare them to be unconstitutional and thus void. It also allows the courts to review actions taken by the executive branch and to declare them to be unconstitutional.
9. Habeas corpus: A order by the High Court directing a person to be brought before a court or judge, especially so that the court may ascertain whether his detention is lawful. (The term is derived from the opening of the Latin writ, literally: you may have the body).
10. The Covenant is a treaty and not a mere declaration. Many countries (which are members of the United Nations, including Zambia and Kenya) are State Parties.
11. Constitutional Amendment of 1996, Republic of Zambia.
12. This book is a gem of humour and witticism, written by a non - lawyer for both lawyers and non - lawyers.
13. Slade, The Parliament of Kenya, p.7.
14. Dawit Yohannes (Speaker of the Peoples' Assembly of the Federal Democratic Republic of Ethiopia) in his Opening Address in Parliamentarians and The Sustenance of Political Liberalization in Africa (being Summary Report and Papers of an International Conference jointly organised by the Africa Leadership Forum and The Economic Commission of Africa, Addis - Ababa 5 - 7 April, 1996), pp 73 - 74.

THE POPULATION DYNAMIC AS A CONSTRAINT TO DEVELOPMENT IN KENYA

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THE POPULATION DYNAMIC AS A CONSTRAINT TO DEVELOPMENT IN KENYA

I. INTRODUCTION

I.1: Kenya had about 29 million people in 1997, and these were increasing at about 3.5 per cent per annum. This rapid population growth rate has led to a relatively youthful population, high population densities in the country and serious strains on the nation's resources and its ability to meet the needs of the people. This paper discusses the implications of the rapid population growth on development potential and prospects in Kenya in the next millennium. It considers the impact of rapid population growth on the availability of resources for development, the provision of basic social services such as education and health care, implications on the quality of life in the urban environment and the country's prospects for realising sustainable economic growth and development.

The Population Scenario

I.2: The 1979 and 1989 population census put the country's population at 16.2 and 23.2 million respectively. This represents an increase of 43 per cent over this intercensal period and a growth of about 3.6 per cent per annum. The rate of growth which was about 2 per cent per annum in the 1940s accelerated to a peak of about 4 per cent per annum in the late 1970s said to have been among the highest population growth rates in the world.

I.3: This high population growth rate was caused by declining mortality in conjunction with high and constant fertility. However, during the 1980s fertility began to decline rapidly, leading to a falling growth rate to about 2.6 per cent per annum in 1996. This implies a population of some 28.3 million in 1996 and a doubling time of about 27 years. It is projected that the growth rate will decline to 2.2 per cent per annum, which will give a population of 31.2 million by the year 2000 and to about 1.4 per cent per annum, implying about 37 million people by the year 2010.

I.4: Population density increased from 19 to 37 persons per sq. km. in 1969 and 1989 respectively. Very low population density areas include about one third of the country's rural districts with below 10 persons per sq. km., comprising mainly of the Arid and Semi-Arid areas in Kenya. These are areas of high temperatures and very low and extremely erratic rainfall. While most districts showed an increase in population density of between 30 and 40 per cent between 1979 and 1989, some showed substantial increase. For example the density in Narok increased by 69 per cent, 85 per cent for Laikipia, 71 per cent for Kajiado and 50 per cent for Isiolo. This means that there has been rapid increase

in population density in the ASAL districts, so much that the population now exceeds the carrying capacity of the land in these areas.

Age Structure

1.5: Most of Kenyans are young with about half (49%) under 15 and about 60 per cent under 20. The elderly (65 years and over) are few, being about 2.2 per cent of the total population in 1989. This youthful population has given rise to high dependency ratios of 105 per 100 active persons in 1989. This has resulted in resources being diverted more to consumption and consequently less savings and investment, which does not augur well for the country's ability to attain self-sustaining economic growth and development in the near future.

Population Projections

1.6: Population projections play a vital role in planning for future economic and social services and political requirements. These include health services, education facilities and employment opportunities, etc., all geared towards improvement of the standard of living of the people.

1.7: Population projection which include the effects of the AIDS pandemic indicate that AIDS will reduce the country's population by about 1.0 million by the year 2000, 2.0 million in 2005 and by between 3.0 and 4.0 million in the year 2010. These reductions are not solely due to excess deaths but also to a decrease in the number of births because of the death of women who would otherwise have born children.

1.8: Males will increase from 14.1 million in 1996 to 18.8 million in 2010 while females will rise from 14.2 million to 18.6 million over the same period. Primary and secondary school age population will respectively rise from 6.5 and 2.9 million in 1996 to 6.8 and 3.1 million in the year 2000 to 7.3 and 3.3 million in the year 2005 and to 7.5 and 3.6 million in 2010. The labour force aged between 15 to 64 will rise from 14.7 million in 1996 to 16.9 million by the year 2000.

II. POPULATION DYNAMICS AND THE RESOURCE BASE

II.1: The country covers some 683,000 sq. km., 98 per cent of which is land and the rest is under water masses. The population density has risen sharply, from about 10 people per square kilometre in 1962 to 27 in 1979 and 51 in 1997. The resulting pressure on the available land has led to population loads beyond the land's carrying capacity. Much of the country (75%) is either arid or semi-arid with sparse water resources. For example, Kenya has very few permanent rivers (e.g., tana River and Athi River), and most of them

are reduced to mere trickles or dry river beds during severe droughts. In the wetter medium and high potential areas of the country such as the Central, Rift Valley and Western provinces human activities have led to extensive deforestation and destruction of many water catchments.

Forest Resources

II.2: Forests cover some 17,500 sq. km. or about 3 per cent of the total land area in Kenya. However, deforestation is proceeding at about 100 sq. km. per annum, which is threatening the country's meagre forest estate. Deforestation and the concomitant disruption and destruction of water catchments and drainage systems has caused the drying up of streams, wells and dams, and the reduction in the yields of aquifers. The resulting stiff competition for the dwindling water supplies has resulted in serious ethnic conflicts in the country in which lives have been lost, many people maimed and even more displaced from their land and rendered refugees in their own country. For example, serious clashes erupted between the indigenous Maasai and the migrant ethnic groups in Narok District in 1993. The main reason for the clashes was that the migrant communities had destroyed the water catchments in the area, especially around Maela and Enosupukia, resulting in the drying up of rivers and dams on which the Maasai and their livestock depend. This had made life intolerable for the Maasai so that they wanted to drive out the migrant communities from their land. It can therefore be expected that rapid population growth will bring unbearable pressures to bear on the country's natural resources especially in the rural areas thereby inviting increased incidents of ethnic conflicts and generalised insecurity and instability.

Water Resources

II.3: The diminishing water supply situation in Kenya is increasingly being felt in the main settlement areas especially the major urban centres. For example, during the 1996/97 drought many households all over the country had to trek long distances to get water. The demand for water in this country has been increasing very fast due to: Rapid population growth, Rapid urbanization, Increasing reliance on irrigation and Rising demand for water for industrial purposes. Hence in most places there is significant excess or unmet demand for water which manifests itself in the form of acute shortages. The situation is aggravated by poor management of available water resources. For example, it is estimated that 30 per cent of the treated water available in Nairobi is lost through leakages and other forms of misuse. The same situation applies to other urban centres in the country. Rapid population growth will make the situation more grave.

II.4: In 1990 the amount of internal renewable water available per Kenyan was about 600 cu. m. This compares unfavourably with a situation in either Tanzania or Uganda (2,000 cu. m. and 3,600 cu. m. respectively), or in the United States of America (USA), where it

was about 9,900 cu.m. per annum, or over 16 times the Kenyan figure! However Despite the fact that Kenya is seriously deficient in fresh water resources, the water use rates in the country are very high compared to those in the region in general. For example, between 1980 and 1989 Kenyans were withdrawing 7 per cent of their fresh water resources yearly while Tanzanians were withdrawing only 1 per cent. In 1990 only about 2 per cent of the arable land in Kenya was irrigated, compared to 10 per cent for the USA.

II.5: In the 1970s Kenya declared that safe drinking water would be made available to all by the year 2000. Though this is a noble goal, it is not likely to be realised. Currently about 52 per cent of Kenyans do not have access to safe drinking water. This is comprised of 60 per cent of the poor and 47 per cent of the non-poor. Rapid population growth not only increases the proportion of the poor in the country, but also makes it difficult to provide safe drinking water to the populace.

III. THE PROVISION OF SOCIAL SERVICES

III.1: The population is youthful, with almost half of the people (49%) being below 15 years old. This has been the case since 1979 and consists of those who should be in primary and nursery schools as well as those not yet in the school-going age. Those over 65 years old (i.e., retiring from productive engagement) were only one per cent in 1979 and this proportion had risen to about 3 per cent by 1989. These two groups (i.e., the very young and the very old) comprise the dependants in the total population. Thus almost half of the population falls under this category, which places enormous burdens on the labour force. The dynamics of demographic transition indicate that the proportion of the aged in total population will increase over time and that of the very young diminish. Therefore, in the not so distant future most of the population dependent on the labour force will consist of the elderly.

Education

III.2: In 1997 Kenya had some 5.7 million children in primary schools, 0.7 million in secondary schools and about 90,000 in post-secondary educational institutions. This leads to heavy expenditure on education. For example, education accounted for about 17 per cent of total government expenditure in 1997. This proportion is expected to rise in 1998 due to the hefty increase in teachers' salaries in 1997. The process will continue in the foreseeable future. Thus rapid population growth will continue to strain budgetary resources as Kenyans scramble to acquire education.

III.3: Although Kenya had made significant strides in raising the literacy rates among the people by the early 1990s compared to other Sub-Saharan Africa countries, the burden of the burgeoning population is limiting the countries ability to achieve the desired goal of

literacy for all as in the Developed Countries (DCs). For example, the mean years of schooling by 1992 were only 2.3 in the country. The pupil/teacher ratio dropped from 34 in 1970 to 31 in 1991 in the primary schools taken as a whole, indicating that the pupils increased at a faster rate than the supply of teachers. This has been one of the causes of deteriorating quality of education in the country.

Health Care

III.4: The health care system is stretched to the limit. The public health facilities are plagued by shortages of drugs and dressings, medical equipment that is not functioning, shortage of medical personnel, among others. As a result long queues of patients have become commonplace in these facilities. In 1997 Kenya had only 50,000 beds and cots in its hospitals, or about 580 people per bed. In addition there were about 5,000 registered doctors and dentists, or 5,800 people per doctor. These are indications of inadequate capacity to provide health care services to the population in general, and is a result of rapid population growth. This problem is compounded by the onset of the AIDS pandemic, affecting mainly the productive age groups (20 to 50 years). It is now estimated that over half of the hospital beds in the country are occupied by patients with AIDS-related medical problems! The low health status of the population and the country's inability to meet the health services needs of the rapidly rising population are among the prime causes of the low life expectancy in the country, and general ill health.

IV. POPULATION GROWTH AND THE HIV/AIDS PANDEMIC

IV.1: Although the prevalence level at which the HIV infection is going to stabilise in Kenya is not known, it has been observed that it is increasing very rapidly in most areas of the country. Using conservative projections, the National AIDS/STD Control Programme (NASCP) has estimated the future HIV prevalence based on the assumption that adult prevalence rates all over Kenya will increase from 6.7 per cent of the adult population in 1994 to 10 per cent by the year 2000 and then stabilise at that level. Although there is a possibility that the eventual rate could be higher. Given these projected HIV prevalence levels, the number of infected people would rise from about 1.0 million in 1995 to more than 1.8 million by the year 2000 and to 2.0 million by the year 2005. Thus the number of new AIDS cases each year resulting from these infections would increase to about 240,000 in the year 2000, or about 4,600 new AIDS cases per week. The cumulative number of AIDS deaths would reach 1 million by the year 2000 and to more than 2 million by the year 2005.

Economic Costs and Impact of HIV/AIDS

IV.2: The economic costs and impact of HIV/AIDS on the Kenyan society has two dimensions: Health Care costs and costs on the general economy (i.e. on the agricultural industrial and service sectors).

(a) Health Care Costs:

- Total annual health care treatment costs for persons with HIV and AIDS of all age groups will grow eight-fold from 1.4 billion KShs. in 1990 to KShs. 11.2 billion in 2010. Some hospitals in Kenya estimate that patients with AIDS occupy more than 50 per cent of the available hospital beds. By 2010 the demand for HIV/AIDS hospital days would represent 185 per cent of MoH inpatient capacity.
- Assuming that the health budget keeps up with inflation and population over the twenty year period the costs of meeting the high estimate of the demand for HIV/AIDS treatment in the public sector would grow from an estimated 17 per cent of the health budget in 1990 to 79 per cent in 2010.

(b) Impacts on Various Economic Sectors:

- The value of lost production in agriculture in 1995 (KShs. 296 million) was about 33 per cent higher than losses in the service Sector (KShs. 222 million) and 4.5 times higher than industry's losses (KShs. 66 million). By the year 2010 the agriculture loss (KShs. 2.2 billion) will be 15 per cent higher than the combined industry and service Sector Losses (KShs. 1.9 billion).
- The loss in work days due to HIV/AIDS in agriculture was 45,000 person-years in 1990. It will be 127,000 in the year 2000 and 329,000 (2.1% of total agriculture years) in 2010. The service sector suffers a loss of 43,000 person-years in the year 2010.

(c) Impact on Household Income

- The HIV/AIDS epidemic has profound impacts on the welfare of households. During the first year in which the household struggles with AIDS and experiences the death of one adult it loses 49-78 per cent of its income. The net effect in the second year represents 95-167 per cent of household income. This effect occurs even without consideration of funeral

costs (which can be significant) and considers no other costs but those of AIDS treatment.

(d) The Impact and Implications of HIV/AIDS on Urban and Rural Areas

- The total cost of production loss and health care treatment in rural areas is on average 1.5 times the cost of urban areas through the year 2000. Rural costs rise to 2.2 times urban costs in 2010 under the higher estimate as increasingly higher numbers of rural people are afflicted by AIDS. By 2010 about 77 per cent of all AIDS cases will be in rural areas.

V. LABOUR FORCE AND EMPLOYMENT

V.1: According to the 1989 population census 9.3 million (66%) of people aged 10 years and above were economically active; 48 per cent of these were females, while 82 per cent were in rural areas. The total working population (in gainful employment) in 1989 was 8.6 million, accounting for about 61 per cent of the population aged 10 years and over; 83 per cent of these were in rural areas. When analysis of employment is restricted to wage and non-wage earners, then only 32 per cent of the labour force was in wage employment, while 61 per cent were non-wage earners mostly working in family holdings.

V.2: It is currently estimated that at least 0.5 million young people join the labour market annually. However, due to economic stagnation in recent years, the economy has been able to generate less than 50,000 wage employment opportunities per annum. The remaining 90 per cent join the army of the unemployed or the informal sector or subsist as non-wage employees in family establishment. The high rate of population growth will aggravate the situation so that in future the proportion of the potential labour force experiencing open unemployment will rise. The majority of the people will suffer underemployment or disguised unemployment especially in the informal sector. In general the labour market will be characterised by desperation and destitution.

VI. THE FOOD SITUATION

VI.1: The country is finding it increasingly difficult to produce adequate food for its people. Food shortages are becoming increasingly frequent and acute, and many Kenyans survive on famine relief. It is estimated that by 1994 about one third of Kenyans were living below the Food Poverty Line, and that this proportion has been rising. Rapid population growth is aggravating the situation since food production has been growing at a lower rate than the population. This raises the Malthusian spectre in Kenya.

VII. POPULATION GROWTH AND URBANISATION.

VII.1: In Kenya an urban centre is defined as that settlement with at least 2,000 people. Although Kenya is one of the least urbanised countries in Sub-Saharan Africa, urbanisation in the country has been rapid. The share of urban population in total population rose from 5 percent in 1948 to 25 per cent in 1992. The urban population grew at about 7.7 per cent per annum between 1980 to 1992 and it is expected to grow at about this rate into the next millennium. This means that early in the 21st Century most Kenyans will be living in urban areas.

VII.2: Nairobi's share of national population was 6.2 per cent in 1989. The city's population has been growing very fast partly because of its primacy in the country and its persistent importance as the primary destination of rural-urban migrants. On the other hand Mombasa accounted for 2.2 per cent of the national population. Its growth was a result of rural-urban migration and a steadily expanding, economic base as a result of the tourism industry.

VII.3: The proportion of the total population living in urban areas is rising fast and is expected to reach 25 per cent of the total by the year 2000. This will reach about 50 per cent by the year 2025! Currently Kenya's urban centres are unable to cope with such rapid population growth. Due to grossly inadequate resources available to municipal authorities infrastructure is very inadequate and what is available is in a deplorable state due to poor maintenance. Most roads in urban areas are pork-marked with huge pot holes, water shortages are rife, sewage facilities are either lacking or not functional, garbage is hardly ever collected and residential areas are in deplorable state with piling human waste. It is expected that in the near future (some two to three decades to come) urban Kenya will not only be overcrowded but will be an environment not fit for human habitation.

VII.4: Since 1974 when the Graduated Personal Tax and general grants were abolished in Kenya, local authorities service delivery has been declining largely due to the mismatch between rising expenditures and falling revenues. Municipal revenue bases have been falling while urban population and poverty has been growing. Since local authorities can no longer service their capital development debt, their credit rating is down meaning that they cannot borrow to undertake any project. In addition local authorities can only depend on central government funding because of the large outstanding loans to the Local Government Loans Authority (LGLA).

VII.5: Lack of qualified staff, political interference and low pay has resulted in mismanagement of Municipal functions and unnecessary expensive services. The public administration through the District Development Committees (DDC) has also interfered in

the administration, employment and distribution of financial resources and tenders. Municipal councils planning and implementation decisions are subject to ministerial (MOLG) and District Commissioner's approval. Since the advent of the multi-party system, these issues have been very controversial. In Kenya councillor leadership quality has been low because most of them lack functional education, and leadership training and management experience. Given this scenario it is therefore little wonder that the local authorities service delivery is declining.

VII.6: The overall picture of urban governance in Kenya projects a systemic crisis. Municipal systems are not only failing to meet the demands of rapid population growth within a context of poverty and marginalization, but their own basis of sustainability are also in jeopardy. They are generally weak institutions with little economic, political and ideological power, and limited in their autonomy, authority, legitimacy and management capacity. The Kenya experience has revealed instead, that despite the marginality and structural weaknesses of the non-state regimes, a large part of urban socio-economic life takes place within this sphere. When disaggregated into its constituent elements namely, NGOs, CBOs, private sector, civil society and informal sector, it confirms the prevalence of multiple regimes in the governance of urban development. Indeed, the perceptive observation that, "all that is urban is not municipal" succinctly captures the institutional landscape of urban development in Kenya.

VII.6: Cities are therefore at the crossroads between economic development activity and human settlements development or social welfare, that is, between economic growth and human development. In this context, it can be argued that urban policy is crucial in the creation of an enabling economic environment which strengthens social policy within supportive legal and institutional frameworks.

VIII. CONCLUSION

VIII.1: Therefore, there is need to come to grips with the population dynamic in Kenya. Investigations should be undertaken on how it impacts on resource availability and use, the environment and the country's ability to provide adequate sustenance for all citizens.

VIII.2: Parliament should therefore be supportive of policies that aim at reducing the rate of population growth in the country. Funds should be made available for such programmes as family planning and birth control. The ultimate objective should be to ensure that Kenya has just the number of people it can provide for adequately given its carrying capacity and the expectations of the people.

THE INFLUENCE OF THE CHANGING SOCIAL STRUCTURES AND VALUES
ON POLITICAL AND ECONOMIC DEVELOPMENT IN KENYA

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THE INFLUENCE OF THE CHANGING SOCIAL STRUCTURES AND VALUES ON POLITICAL AND ECONOMIC DEVELOPMENT IN KENYA

INTRODUCTION

This presentation about the shared life experiences and preoccupations of people of Kenya focussing on some of the important social changes and their influence on the political and economic development. There is also an attempt to identify some of the factors that contribute to the changes in the social structures and values. It is common knowledge that everything is subject to change and also that change is inevitable. However, what is uncertain about change is whether it is planned or spontaneous, is its direction, rate and consequences (Preston, 1982)

The people of Kenya have experienced massive social changes that are associated with development in the modern world, cumulative and sometimes conflicting efforts in nation building and the individual and collective struggles for socio-cultural, political and economic survival. Historically, the people of Kenya belonged to formerly autonomous pre-colonial ethnic communities that did not fall under the authority of any one indigenous state.

However, the establishment of modern Kenya, first as a British colony and later as a nation institutionalised racial and ethnic labels and boundaries that continue to influence the political and economic life in the country. While there has been the dominance of sectarianism including regionalism that often concides with ethnicity, kinship, religious differences, social divisions between the rich and the poor, educated and the unschooled, there has also been concurrent developments and countervailing processes that challenge these sectarian tendencies. These developments and processes include changing social structures and related values, beliefs and practices

which in turn contribute to the changes in the political and economic spheres.

THE CHANGING SOCIAL STRUCTURES AND VALUES.

The generally preferred definition of social structure is the enduring, orderly and patterned relationships between elements of a society. These include social relationships between individuals, social groups and network of social roles. Other elements of social structure include social systems and institutions such as the family which are seen as being necessary because they are functional requisites in society (Parsons, T., 1964). While values are part of culture which is a larger organisation of customs, beliefs, norms and values (LeVine, 1984).

There are many factors/sources that contribute to the changes that are taking place in the social structures in the Kenyan society. Some of the important factors include population growth, modernisation, industrialisation, urbanization and the development of a capitalist society.

POPULATION GROWTH

The Kenyan population has increased out of proportion with the other aspects of society such as employment and wealth creation and the development of both social and physical infrastructure.

As table 1 shows, the total population has increased from 16.2 millions in 1979 to an estimate of 27.5 million in 1995 and is projected to increase to 31.9 million by year 2001. An important characteristic of the population is that the majority are in the dependent and youthful categories. Another important characteristic of the population is that it is increasingly becoming urbanised. As shown in table 1 in

1979, 2.3 million people lived in urban areas increasing to 3.9 millions in 1989 and is projected to rise to 7.4 millions in 2001. In addition, it likely that there is a similar number of people, if not higher, who live in the peri-urban areas. These are the people living in the communities bordering urban areas and others where changes have taken place altering traditional social life and subsistence, especially on the advent of agriculture with modern ways of life such as christianity and economic activities such as trade and general commercialisation of services.

Table 1: Indicators of Kenya's Population Structure and Projections.

| | 1979 census | 1989 census | 1995 census | 2001 census |
|---|----------------|----------------|----------------|----------------|
| Total Pop (Mn) | 16.2 | 23.2 | 27.5 | 31.9 |
| Growth rate % p.a | 3.9 | 3.4 | 2.9 | 2.5 |
| Average pop. density density (per sq.m | 26.0 | 37.0 | 43.0 | 49.9 |
| Urban pop. (Mn) | 2.3 | 3.9 | 5.3 | 7.4 |
| Total Fertility rate | 7.8 | 6.7 | 5.4 | 4.8 |

Source: GoK, 1997.

There are many consequences of rapid population growth . First, there is the emergence of a large portion of the population whose members operate outside the direct control of the family and the ethnic communities. These are the millions of people consisting of children, youth and adults who have moved into the new space that has been created by the modern society or nation. This is a

multidimensional space with physical, socio-cultural, economic and political alternatives that are available outside the family and the ethnic community.

Traditionally, the African family was at the center of a wide network of relatives who had strong social and reciprocal relationships which were an expression of the dominant social values of mutual and collective responsibility and assistance among members in traditional societies. The family, clan and the local community also had virtue control of its members since they were the custodians of the heritage of the community, including the control of the means of livelihood and cultural identity. They also controlled the territory and exercised authority and power through social relationships and groups such as the elders who were treated with great respect and also protected by strong cultural values and beliefs. For example, the elders had the sacred role to pray for the intervention of the supernatural powers during calamities.

In addition, cultural identity was acquired by assimilation of the individual into the values, beliefs and practices of the group through social mechanisms such as the family, rituals and ceremonies. Inevitably, the cultural identity thus acquired only reflected the culture of that particular ethnic community.

These traditional social structures and related values, beliefs and practices have been greatly weakened and in many cases destroyed. For example, freedom from the control of the family and the informal socio-cultural groups such as the age sets over their members have greatly contributed in the creation of new social, political and economic subcultures with new values and role models. There is plenty of evidence that the majority of the people are placing personal interests before the communal needs. It is therefore possible to argue that the majority of the people, particularly the youth are more realistic and rational in

their response to the contemporary political and economic challenges. Besides, they are have intergrated with global culture of music, dress and behavior.

MODERNISATION

The process of modernisation and the related experience with westernisation has been another major force in changing social structures and the system of values and beliefs. The general direction of change has been the weakening if not total replacement of the collective and communal values with the individualistic values. Today, peoples actions are increasingly being determined by personal considerations rather than the realisation of needs of others be they relatives or neighbours.

Some of the most active agents and forces have been institutions such as the school, church, mass media, the place of work and changing social and economic roles. For example, the school and the work place promote the culture of merit and other modern values and social practices while the church and the media stand for the freedom of worship and self-expression. These values and their manifestations continue to challenge the traditional systems of authority and offer more attractive alternative models of socio-cultural, political and economic life most likely because of their perceived potential in solving problems or the association with the western civilisation.

The majority of the people have been exposed either directly or indirectly to the modernising values and believes that are found in these institutions. For example, as shown in table 2 below, about two thirds of the employed population have also some level of formal education while slightly over a half of them have more than five years of schooling.

Table 2: Percentage Distribution of the Employed Population by Level of Education and Rural-Urban Residence

| Level of Education | Kenya | Rural | Urban |
|--------------------|-----------|-----------|-----------|
| None | 33.7 | 37.8 | 13.9 |
| Std. 1-4 | 15.3 | 16.7 | 8.6 |
| Std. 5-8 | 31.9 | 31.6 | 33.4 |
| Form 1-5 | 16.9 | 12.4 | 36.8 |
| Form 5-6 | 1.3 | 0.8 | 4.0 |
| University | 0.7 | 0.3 | 2.9 |
| Not stated | 0.5 | 0.5 | 0.4 |
| Total | 100.0 | 100.0 | 100.0 |
| Number | 4,485,999 | 7,096,656 | 1,462,224 |

Source: Bahemuka, J.M. et al, 1998.

The modern religions such as Christianity and Islam and other beliefs including atheism and devil worship have provided an alternative to traditional religious ways thus further undermining the traditional basis of associational life. The influence of these institutions is seen in recent concerted attempts to sensitize their followers to participate in changing the political culture towards multiparty democracy and realisation of human rights.

Similarly, the liberalisation of the mass media, particularly the print and electronic media has equally had an important contribution in influencing the socio-cultural and political values and practices.

URBANIZATION:

Urbanization in Kenya predates colonisation of the territory by the British and was confined at the Coast. Subsequently, more and larger urban centers emerged during the colonial and post-colonial periods. This has been a rapid development as demonstrated by the increasing numbers of people living in urban areas (Table 1). As already mentioned above, the urban centers are part of the new space that has been created in the process of building a modern nation.

The urban areas have been associated not only with modern life but also with wage employment and recently with high crime rates, especially Nairobi and its environs. Socially, they also provide an alternative to rural life dominated by demands of ethnic and traditional communal life. As a result, millions of rural people particularly the young people have migrated to towns and other urban centers where the basis of social life is voluntary and not controlled by ethnic and other ascriptive bonds.

DEVELOPMENT OF A MODERN ECONOMY

The Kenya economy is largely capitalist based on private ownership of property and pursuit of profit from investment. For instance, this has resulted in the privatisation of land ownership which originally belonged the community. This economic development coupled with rapid population growth has forced many people to seek other alternative sources of livelihood and settlement away from family and clan land. These opportunities are mostly found in the urban and peri-urban areas as well as in the commercial activities and wage employment in rural areas.

Another important development has been rural-rural migration within and beyond ethnic boundaries and regions. This has been in the form of individual land purchases, group settlement schemes

and squatter settlements (Mbithi and Barnes, 1975). The two processes of migration and settlement have brought together people from different ethnic and social backgrounds thus promoting inter-ethnic socio-cultural interactions in areas such as marriage, worship, education and recreation.

The shift from the subsistence economy based on reciprocity and domestic labour to a market economy based on monetary exchange and paid labour has radically transformed the social values and relationships in the society. As a result, it is now quite common among people including even those in the rural areas to perceive their relationships in terms of monetary gain instead of the traditional ascriptive ties or the general human values of mutual assistance. For example, farm labour that was offered freely by relatives in most of the agricultural communities is now available only at a monetary price.

There are many other examples showing how the value for money is fast replacing the traditional values of generosity, affective ties, locality and kinship. For example, during the last El Nino rains, many travellers in the rural areas, especially motorists had to pay money to their relatives and neighbours for assistance to push them out of the mud. It is also a common practice these days for relatives and neighbours to sell and buy subsistence foods from each other that used to be shared freely according to need and availability.

Similarly, the traditional practice of assisting sons and relatives with livestock for bride price has been replaced in many communities not only with monetary payment but also tends to be the sole responsibility of the bridegroom. The value for money is also being manifested in the widespread corruptive practices involving individuals who enrich themselves at the expense of other members of the society.

In addition, the pattern of economic development and differences in wealth in Kenya have created social class divisions in the society which have in turn introduced new social cleavages in the local communities. These new social groups not only differ in terms of material and financial wealth but also in the levels of social status and power. Consequently, social interaction and personal identity tends to be increasingly based on these newly emerged social structure rather than the affective ties based on kinship and community. Furthermore, these changes have provided the possibilities for organising political alliances and participation by individuals outside the traditional kinship and ethnic boundaries.

THE INFLUENCE OF THE TRANSFORMED ASSOCIATIONAL LIFE AND VALUES.

The Creation of New Social Structures

The general demands of living in a modern society have necessitated the development of associational life based on common interests and problems and not on the basis of ethnic and other ascriptive relationships. This alternative basis of social life consists mainly of a wide range of formal and informal groups both in the rural and urban areas. These are voluntary groups in the urban neighbourhoods and in the rural communities organised to meet the specific needs of their members irrespective of their kinship, ethnic or religious backgrounds.

In nearly all these groups and organisations the common interests and problems revolve around political participation, neighbourhood security, economic empowerment particularly among women, recreation and environmental protection which are beyond the narrow sectarian interests of the family, clan or ethnic group. For instance, the savings and credit groups have become very popular mainly among women as a mechanism of meeting their economic needs. In addition, there is also the spontaneous self-

help groups or harambee that are organised as the need arise be it individual or personal in nature. As a result, the new developments and problems have forced changes in peoples values and perceptions as well as in the relationships towards others which are also likely to influence their views with regard to political and economic development in the country.

Management of National Economy and Politics.

The replacement of communal and egalitarian values with the drive for individual gain has created problems of economic accountability particularly in the public sector. As already pointed out, the African societies believed that welfare of an individual meant the welfare of the whole community and that individual tribulations were tribulations of the whole community. The collective and mutual assistance values were supported by a rich mythology and folklore. In some societies, the hyena become a major symbol of selfishness and greed and people who were like hyenas were detested and avoided. In contrast, generous people were regarded as being rewarded with wealth and prosperity. These values have been replaced with the insatiable urge for personal wealth and individuals are doing everything possible to enrich themselves. As a result, the national economy is characterised by corruption, negligence and apathy. The conflict of interest which is highly discouraged in the private sector has become the norm in the public sector. These malpractices have created a cadre of wealthy people at the expense of the public which is the very opposite of the mutual assistance values of the traditional societies. The inefficiency and failure of the economy to develop has in turn resulted in high unemployment rates particularly of the young and energetic people who feel alienated from the society including the family and authority.

Political Development

The majority of the people are reasonably exposed to modern influences to adequately appreciate the value of the new social order based on the development of the modern economy and society. In addition, the change in the values and the demands of the new social environments have created fairly objective groups (urban youth, professionals, business community, political young turks whose appearance symbolically marked a generational gap in politics, etc.) in the political thinking and decision making in the choice of the representatives in the political institutions such as Parliament, cooperative societies and church councils. In other words, the population is sufficiently mobilised and quite aware of their problems which they find it difficult to solve. Starting from the colonial time, the political elite has made itself indispensable in the process of development and provision of welfare, but always according to its own terms or in line with personal interests of a particular individual member of the elite (Haugerud, 1996). However, the weakness of the new third world economic and political elite or bourgeoisie, "manifests itself in all sorts of conflicts which constantly threaten to engulf the rest of the society as individuals seek to enlist ethnic and regional interests on behalf of their class or personal interests. In fact, some of them do not only seem to be political entrepreneurs but also merchants of civil strife, human suffering, threat to life and death like in the cases of Somalia, Rwanda, Sudan, Liberia, Uganda, Congo, Angola and Mozambique.

Traditionally, the elite utilises the patron-client relationships with the electorate which are largely based on ascriptive ties of kinship, ethnic and local community to mobilise for support during electioneering. However, the change in values has made it possible to broaden the political base to include monetary payment for support as well as shared interests and concerns that are outside the affective boundaries. These multiple bases of

social mobilisation and associational life might explain the composition of the current Parliament with a reasonably high proportion of relatively young and well educated members and very popular female representatives. On the whole, the baraza, has been very important political structure and busy arena where "some groups make contingent claims to shore up a social order, in response to attempts by others to dismantle it. In deed rather than an order, or a structure, it is helpful to think in terms of part structures being built and torn down; a complex mix of order, antiorder, and nonorder". Thus individual orators at particular barazas can be seen to create as much as to enact political structures and or part-structures. Some examples include the barazas that were convened to debate the merits and demerits of multiparty democracy in Kenya. No doubt, some of the orators are remembered for their creative political scripts which were dramatically presented.

The fragile nature of the macro institutions particularly the national social and political structures demands high moral and ethical standards from those who occupy positions of influence and power in the society. Also nation building will not succeed here in Kenya unless there is determined effort to develop a national culture that respects and protects all human rights, recognises the sanctity of human life and provides enough guarantees for the material and socio-cultural wellbeing of all the members. Accordingly, the current debates and proposals on constitutional reforms should be nonpartisan and also be seen as part of clear commitment in nation building and not mere self-seeking or attempts to protect personal, kinship or ethnic interests or the interests of small cliques of the elite who are competing for the control of power and national wealth. At this juncture, it is important to point out that the entire nation has been transformed into one big baraza of all citizens: politicians and bureaucrats; rich and poor; literate and illiterate; women and men; old and young; stranger and native, etc. who unlike in

the ordinary baraza, there is negligible dialogue, if any, among these diverse social groups thus threatening social cohesion which is absolutely vital for national survival and development.

CONCLUSION AND RECOMMENDATIONS

Conclusion

The process of building a modern nation in Kenya has resulted in major changes in social structures, values and beliefs in the society. Some of the factors that are associated with these changes are government policies, population growth, urbanization, modernising institutions and the development of a market economy. While sectarianism including regionalism that often coincides with ethnic and other divisions has been dominant, there have also been concurrent developments and countervailing processes that tend to challenge the sectarian tendencies.

Already, there are important changes in social relationships, role structure and social institutions as well as in social values and beliefs for an increasing number of people who are no longer controlled by the affective ties of kinship and ethnicity. Instead, there is a clear trend in the development of the alternative basis of associational life which is dictated by urban life, new economic realities and changing social values. This alternative to the ascriptive ties is also likely to influence the political and economic development as new friendships, political alliances and business associations emerge cross-cutting the locality and ethnic boundaries.

Recommendations.

Clearly, one of the greatest challenges is to develop a national culture on the basis of democratic principles, and equitable distribution of economic and other opportunities for human development such as education and health. The first step should

be a comprehensive national reconstruction: rehabilitation of both physical and social infrastructure; strategic planning, mass education, promotion of positive social and economic values such as respect for human life and hard work; accountability and professional and responsible approach to duty. Secondly, there should be ways for promoting the new developments in associational life which is the basis of new social order in the society. Finally, the issue of leadership should be examined very critically at all levels and aspects in the society. Particular attention should be directed to the training and selection of leaders as well as the organisation of the positions of leadership in the society. There is plenty of evidence how leadership problems have destroyed nations with well established social structures and institutions.

REFERENCES

- African Studies Review, Vol.37, Number 1, April 1994
- Gakuru, O.N. 1998. Education Inequality and Poverty in Kenya in Bahemuka, J.M. (eds), Poverty Revisted: Analysis and strategies Towards Poverty Eradication in Kenya, Ruaraka Printing Press, Nairobi.
- Hauggerud, A. 1997. The Culture of Politics in Modern Kenya, Cambridge University Press, Great Britain.
- Hoogvelt, A..M. 1981. The Sociology of Developing Societies, The MacMillan Press Ltd., United Kingdom.
- Kenya, Republic of, 1997, Development Plan, 1997-2001, Nairobi, Government Printer.
- Kituyi, M., 1990, Becoming Kenyans, ACTS Press, Nairobi.
- LeVine,R. 1984, Properties of Culture: Culture Theory: Essays on Mind, Self and Emotion, Cambridge University Press.
- Lloyd, P.C. 1969, Africa in Social Change: Changing Traditional Societies in the Modern World, Penguin Books.
- Mbithi, P.M. and Barnes, C. 1975, The Spontaneous Settlement Problem in Kenya. EALB, Kenya.
- Mulanda-Nyanga,N.D. 1997, The Reconstruction of Africa, All Africa Conference of Churches, Nairobi.
- Ojwang, J.B and Mugambi, J.N.K. 1989, The S.M. Otieno Case: Death and Burial in Modern Kenya, Nairobi University Press, Nairobi.
- Parsons, T. 1964, Evolutionary Universals, American Sociological Review.
- Preston, P. 1982, Theories of Development, Routledge, London.

KENYA'S ENVIRONMENTAL PROBLEMS
Policy Limitations and Institutional Rigidities

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Introduction¹

Kenya is experiencing a number of serious environmental problems which are likely to undermine—at least in the long-run—prospects for her economic renewal and political stability. The problems include deforestation, pollution of water bodies, increasing erosion and loss of soil, degradation of urban infrastructure (associated with poor disposal of industrial waste) and loss of wildlife. They are generated by interrelated factors which include: ambiguous resource tenure arrangements, high and growing population growth rates and densities without corresponding ability of the country to mobilize and efficiently apply environmentally sound technologies, absence of systemic long-term environmental policy and legislation, increasing poverty, expansion of large-scale agriculture, overexploitation/overharvesting of timber in commercial and indigenous plantations, degazettement of protected areas, increasing misappropriation of public and trust lands and their subsequent conversion into commercial private property, absence of incentives for good ecological stewardship, and sometimes lack of political commitment to key environmental management processes and programmes.

The country's economy and sociopolitical stability are dependent on maintaining the ecological integrity. Agriculture and tourism, the two largest sectors of the economy, are both directly dependent on environmental goods and services. In addition, Kenyan cultural and political structures are closely tied to the natural resource base, linking the destruction of the environment to the erosion of social and political systems as well.

Despite official recognition of the importance of natural resource conservation and numerous government commitments to environmental protection dating back to 1965, Kenya's environment continues to deteriorate. Existing environmental laws, plans, policies, and institutions have proven inadequate to arrest current trends, much less shift the country's development trajectory to an environmentally sustainable path.

The inadequacy of previous efforts to address Kenya's environmental problems stem in part from a tendency to conceptualize the environment as a sector of the larger economy, and environmental problems as the inevitable result of economic activities. As a result, environmental policies and laws have adopted a "mitigation approach" to these problems—environmental considerations have been mere "add-ons" to investment projects and economic reform programmes, and responsibility for environmental management has been marginalized in environment-specific institutional structures.

1. This paper draws heavily from an earlier study, Mugabe, J. et al. 1997. *Environmental Adjustment in Kenya: Emerging Opportunities and Challenges*. ACTS Press, Nairobi.

In addition, proposed solutions to environmental problems have tended to focus on technical and economic instruments, and insufficient attention has been given to the underlying political and institutional factors. Finally, the political will necessary to overcome short-term vested interests (which favour natural resource exploitation) to promote long-term public interests (which are served by environmental management and sustainability) has not been forthcoming.

This paper assess the adequacy of governmental efforts (particularly existing policies, legislation and institutions) to reverse current environmental degradation trends and promote sustainable use of natural resources. It argues that the problem with the current national environmental regimes is that they are not founded on a solid political foundation—essentially, there is a disjunction between existing environmental policies and legislation on the one hand and prevailing political interests and programmes on the other. Indeed existing environmental policies and laws lack political legitimacy in so far as they are not understood, cherished and promoted by existing political institutions (e.g. current political parties have not instituted specific environmental programmes and activities). In addition, existing government institutions responsible for environmental policy implementation suffer from problems of lack of clear mandate (purpose), weak human and financial resource base, and insufficient authority and autonomy. These institutions are also centralized and have adopted elitist environmental policy-making and implementation—local authorities and communities are generally alienated from environmental policy-making as well as the implementation of national programmes.

The first section of the paper focuses on environmental trends in Kenya. It also discuss the economic costs of increasing natural resources degradation. The second section provides an overview of the country's responses to the environmental problems. The third introduces the concept of National Environmental Governance (NEG) and identifies specific governance issues/challenges that Kenya should address in order to establish a path for environmental sustainability.

1. ENVIRONMENT AND SUSTAINABLE DEVELOPMENT

1.1 Environmental problems and challenges

Kenya's economic change and stability are greatly dependent on the environment in general and natural resources in particular. The main economic sector, agriculture, contributes to about one-third of the Gross Domestic Product (GDP) and employs more than 70 percent of the country's population. This sector depends on the availability, use and management of natural resources such as soils, water, plant genetic resources and is also dependent on rainfall regulated by ecological systems.²

2. Republic of Kenya, 1994.

In tourism—which is the second largest economic sector—wildlife provides a basis for an estimated US\$ 450 million per year tourist industry with considerable prospects for growth and generates about 10 percent of total employment in the country.³

Kenya's forests also generate revenue and employment for the economy and provide a wide range of ecological services. They provide 95% of rural energy and generate value added products amounting an average to US\$ 200 million per year, an equivalent of 1.5 percent of GDP.⁴ In 1990 some 389,000 tonnes of wood materials from forests were used by pulp and paper industries to manufacture paper, cardboard, bags and other related products. Domestic production of wood and paper is estimated at US\$ 100 million per year and over 100,000 people are employed in wood-based enterprises.⁵ Forests are also a habitat for about 40% of Kenya's animal species, 30% of bird and 35% of butterfly species and are also important for the preservation of endangered species. Coastal forests, which account for less than 0.1% of the remaining closed-canopy forest area, support 50% of the threatened plant species.⁶

However, despite the significant role that natural resources play in Kenya's economic life, they are being degraded at relatively rapid rates. It is estimated that about 5,000 hectares of forest cover are lost every year.⁷ This amounts to loss of at least US\$ 0.8 million per year in revenue. There are also other threats offered by the loss of forests. These include ecological instability, loss of new employment opportunities, destruction of plant and animal species with considerable current and future economic values, and loss of scenic beauty. For example, in the area of wildlife it has been estimated that about 75 percent of Kenya's elephant has been lost in the last twenty five years while more than 15,000 rhinos had been poached between 1970 and 1992.⁸ The loss of these wildlife resources threatens the country's tourist industry.

Kenya also faces serious soil erosion problems. It is estimated that about 5000 tonnes of soil are lost every year as a result of many inter-linked factors including deforestation and extensive agricultural production. The degradation of soil—particularly in terms of fertility—results in loss of agricultural productivity estimated at more than US\$ 120 million year.⁹

Finally, industrial activities in urban areas have led to effluents which have destroyed water and terrestrial ecosystems in areas such Webuye and Nairobi. High

3. Eriksen, *et. al.* 1996; Nyeki, 1993 and Mugabe, 1994.

4. Bondi with Mugabe, 1996; Estimates drawn from World Bank, 1990; Republic of Kenya, 1994; and IUCN, 1995.

5. Republic of Kenya, 1993.

6. Bondi with Mugabe, 1996.

7. Republic of Kenya, 1994. *National Environment Action Plan.*

8. Mugabe, 1994.

9. Darkoh, 1990.

concentrations of industrial wastes without proper collection, disposal and treatment systems have resulted in degradation of urban and surrounding environments. In addition, the growth of urban centres and associated human population increase—with Nairobi having an estimated population of 1.4 million having risen from about 950, 000 in 1985—have led to destruction of ecosystems as more land has been converted to housing and other facilities. These problems are also associated with the lack of appropriate urban planning and weak enforcement of existing legislation such as the Factories Act as well as the absence of economic and fiscal incentives to promote environmentally-sound industrialization.

1.2 Sources of environmental decay

Kenya's environmental problems are caused by many complex and interrelated factors. The first cause of environmental degradation in Kenya is an inappropriate land tenure system that makes it difficult for the majority, especially the poor and women, to make long-term investments in sound environmental management.¹⁰ The current land tenure system is ambiguous and denies socio-economic security to the majority. It is a source of disincentives for environmental management, particularly among rural households.

The second is the stress on the ecological base imposed by the large and growing human population. The country's population was estimated to be more than 25 million by 1993 and is growing at a rate of over 3.34 percent per year.¹¹ More than 75 percent of the population is found in the high potential areas which represent less than 20 percent of the country's land area. A majority of this population lacks access to appropriate technologies to manage the ecological base but practices agricultural and other socio-economic activities that degrade the environment. This is exacerbated by the fact that more 10 million people live in absolute poverty and are directly dependent on fragile ecological systems due to population pressure in the high potential areas.

The third underlying cause of environmental degradation is economic policy and market failures concerning natural resources and the environment in general. Current policies and market activities fail to reflect the full economic value of natural resources. They do not reflect the costs of environmental degradation, or the full value of conserving natural resources. For example, there is extensive use of pesticides in wheat, maize, coffee and tea growing zones without concern for the environment. A recent World Bank document has noted that the domestic market for pesticides is fully liberalized and there are more than 700 pesticide products on the

10. For a detailed analysis of land tenure-environmental degradation nexus, See Juma, and Ojwang, eds. 1996. Also See Okoth-Ogendo, 1990.

11. Republic of Kenya 1989, p. 26.

market.¹² These are extensively used in the country with considerable environmental and health impacts.

The loss of forests and wildlife resources is related to, inter alia, a lack of appropriate pricing systems. Currently, Kenya captures less than 35 percent of the rent accruing from logging. Log prices are generally low. This acts as incentive for unsustainable forest exploitation. Low prices have also reduced the profitability of forest plantations in the country and lead to considerable exploitation of wood from indigenous forests. In addition, the government has tended to put higher value on production of tea in forest zones. Forests have been cleared to provide land for tea farming which is considered to generate more revenue. During the past 10 years decisions in favour of agricultural production have resulted in over 33 forest excisions covering about 47,000 ha.¹³ More than 15,000 ha of forest in the Mau and Transmara forests were lost as a result of the creation of Nyayo Tea Zone.

Related to the above underlying causes of natural resource degradation in Kenya, is the absence of strong institutions and institutional arrangements to formulate, implement and enforce environmental policies, laws and regulations.¹⁴ In addition, the management of natural resources in Kenya is further constrained by the lack of up-to-date information and data on environmental processes and poor packaging and exchange of existing information. Policy makers lack access to reliable quantitative data on the status of natural resources, economic values of the resources, and economic costs of environmental degradation.¹⁵

2. POLICY AND INSTITUTIONAL ARRANGEMENTS

2.1 Policies and legislation

Kenya's policies on environmental management and natural resources utilization have been expressed in a number of government documents (such as national development plans, policy framework papers, sessional papers on various development facets, and the National Environmental Action Plan (NEAP)). However, the government has not adopted and issued a comprehensive policy statement on environment. Environmental policies are scattered across the policy terrain. Various efforts to formulate such a national environmental policy regime has not been

12. World Bank, 1995.

13. Okowa-Bennun with Mwangi, 1996.

14. By institutional arrangements we mean relationships between organizational units, responsibilities and authorities, and the sharing of expertise and other resources between the units. We are concerned with institutional links and synergy than the mere existing of organizational structures.

15. Juma, and Mugabe, 1995.

possible, partly because of the existence of strong vested interests by a large number of sectoral ministries which have responsibilities whose implementation are likely to be affected by new environmental policies.

There are a number of landmarks in the evolution of environmental concerns in Kenya's policy development. The Sessional Paper No.10 of 1965 on African Socialism and its Application to Planning in Kenya made clear statements on environmental management. It stressed that "the concern for the quality of the environment must be put on equal footing with the need for exploitation." But this concern could not be immediately implemented because environmental management was for a long time associated with coercive measures which were applied during the colonial period. These included the soil conservation measures in areas experiencing land degradation due to high livestock density. Since the mid-1960s, every development plan has recognized the need for environmental management.

The 1974-1978 Development Plan articulated the need to manage the environment for ecological, socio-cultural and economic reasons. It recognized the lack of appropriate institutional arrangements and policies as the main factor limiting environmental management: "Not only are the various arms of the Government in disagreement or in confusion but there are no clear policies providing for environmental management and well established and coherent institutional system to implement the policies."¹⁶

The 1994-96 Development Plan is the most advanced in environmental awareness. It has adopted "Resource Mobilization for Sustainable Development" as its theme and says that the Government is committed to tackling key environment and development problems and achieving social sustainable development." It stresses that "success in achieving social sustainability will largely depend on conserving and protecting the natural resource base on which future development depends." It explicitly calls for the integration of environmental considerations into the policy-making process.

The 1997-2001 National Development Plan recognizes the underlying causes of environmental degradation. It observes that: "[e]nvironmental management tools, including laws relating to the management of internationally shared resources, cross-border issues, environmental economics and accounting, and environmental impact assessments, have not been adequately developed for effective environmental management."¹⁷ In the Plan, the Government makes a commitment to achieve successful environmental management through: implementation and enforcement of environmental laws; provision of economic incentives and penalties to encourage sustainable use of natural resources and ecological functions; increasing resource

16. Bragdon, 1990.

17. Republic of Kenya, 1996(a), p. 210.

allocations for environmental management; making adjustments in taxation to promote sustainable use of natural resources; and instituting pollution charges.¹⁸

In many cases, the government has also recognized specific areas of concern such as land use conflicts. The 1974-78 Development Plan said that Kenya had "reached a situation where land use interests - each of them valid and nationally productive uses of land - in some cases in competition and in conflict over the large areas of the country. Not only are the various arms of Government in disagreement or confusion on these issues, but this is compounded by the demands of the landless and the burgeoning population growth which haphazardly realized in the absence of clear policies."

In the 1989-93 Development Plan, the Government was more specific and promised to set up "an Independent Land Use Commission...to review questions related to land and advise on optimal land use patterns for present and future generations in various agro-ecological zones." Political statements on environmental management can be gleaned from a wide range of policy documents and manifestos of existing political parties. However, the translation of these statements into action has been hampered by the limited institutional capacity to deal with issues.

In addition to the policy commitments deposited in development plans, over a similar period, Kenya has evolved a plethora of laws and institutions which directly or indirectly relate to the environment. Thus there are more than 70 different laws that either directly or indirectly apply to natural resources management including These include the Forest Act, the Wildlife Conservation and Management (Amendment) of 1989, and the Factories Act. Other laws relate to: land use, agriculture, land control, chief's authority, local government, mining, trust lands, land planing and government lands.

Many of the sectoral laws have provisions which deal with environmental management. Part I of the Agriculture Act, for example, deals with "The Preservation of the Soil and its Fertility" and vests extensive authority in the Minister responsible for agriculture to make rules regarding land clearing, grazing and watering of livestock. The rules relate specifically to soil conservation, protection of dams or water catchment areas, prevention of soil conservation, protection of dams or water catchment areas, prevention of soil erosion and protection of soil fertility.

The Forests Act and the Wildlife Act provide for the protection of specific areas through a gazettement process. The Minister responsible for forests may declare an area a forest reserve whose use would be regulated by the law. Similar provisions are contained in the Wildlife Act which promotes the protection of wildlife through parks, game reserves and sanctuaries. In both cases, the ministers responsible may de-gazette areas or vary their boundaries. In practice, the Forest Act have given the state power to de-gazette forest areas and turn them into agricultural land wile the

18. Republic of Kenya, 1996(a), op. cit.

Wildlife Act has been used to expand the area under wildlife protection. The two contradictory trends underline the different roles that the government performs regarding land use management.

2.2 Institutional arrangements

Kenya has more than governmental 10 institutions and departments dealing with environmental matters. These include the Ministry of Environmental Conservation, the Ministry of Natural Resources (MENR), the National Environment Secretariat (NES), the Forest Department (FD), the Kenya Wildlife Service (KWS), the Kenya Forest Research Institute (KEFRI), the Kenya Marine and Fisheries Research Institute (KEMFRI), the National Museums of Kenya (NMK) and the Permanent Presidential Commission on Soil Conservation and Afforestation.

NES was established in 1974 to: raise public awareness on environmental matters; initiate processes to formulate environmental policy; and undertake research and information dissemination on environmental matters. During its initial years NES wielded considerable political authority because of its location in the Office of the President although, unfortunately, it did not use that position to institute the formulation of a national environmental policy regime and supporting legislation. In 1981 it was relocated to the MENR. It lacks legislative mandate, autonomy and technical competence to lead an effective national environmental policy formulation process: "NES has been largely ineffective in implementing many of its objectives including promoting the enactment of laws and regulations, enhancing enforcement of legislation, and encouraging scientific research."¹⁹

In order to coordinate environmental management activities and to promote the integration of environmental concerns into activities of sectoral ministries and departments, the Inter-Ministerial Committee on Environment (IMCE) was established. The IMCE is coordinated and chaired by the MENR. It operates on an ad hoc basis and lacks legislative mandate. Furthermore, the MENR which houses and chairs the Committee's activities has limited capacity and does not have much influence over other ministries such as ministries of finance, industry and commerce, agriculture, energy, economic planning, tourism and wildlife. Often it is the sectoral ministries that are responsible for implementing any decisions of the IMCE but these ministries hold more power than the committee and the MENR, and are guided by their sectoral interests and policies.

NGOs are already major actors in environmental management. The Kenya Energy and Environment organizations Association (KENGO) played an important role in implementing governmental policies and donor programmes. In the 1980s KENGO played a central role in the implementation of the Kenya Renewable Energy

19. Juma, *et. al.* 1995.

Development Programme (KREDP) whose aim was to develop and disseminate wood energy-saving technologies. The project, which cost over US\$4 million over a five-year period, was supported mainly by USAID and involved a wide range of governmental and non-governmental institutions. The energy-saving charcoal jiko (stove) which is now widely marketed in Kenya and other eastern African countries is a product of this initiative. This project became a basis upon which KENGO was able to design follow-up environmental activities.

Advocacy NGOs are also starting to emerge and some of the traditional conservation organizations are starting to work on policy-related issues. One of the most active NGOs is the East African Wildlife Society (EAWLS) which has been instrumental in influencing government decisions on wildlife and wetlands issues. The EAWLS has been able to mobilize technical and scientific expertise on wildlife and wetlands issues and to bring it to bear on public policy discussions. In addition, it has also relied on support from its members as well as local newspapers in articulating its position on wildfire conservation. Such organizations, especially where they have links with local and international research institutions, will increasingly play a larger role in policy formulation in the country.

2.3 Analysis of effectiveness

Why despite this long history of enabling legislation and institution-building has so little apparently been achieved in environmental protection? On the legislative side, a number of laws contain provisions which act as disincentives to popular participation in environmental management. For example, the current forest and wildlife management laws vest control, ownership and management of forests and wildlife on public lands to the state which effectively deny citizens access to these resources. A good case in point is the Wildlife Conservation and Management Act takes ownership and user rights of wildlife on private lands away from the respective land owners. This acts as a disincentive to conservation of wildlife outside protected areas.²⁰

A related point is that current natural resources legislation is sectoral and hence fails to recognize the complexity and interrelatedness of the various components of the environment. The Forest Act, for example, only deals with forests and ignores other environmental components such as wildlife found in protected forests. And of course institutions that have been established to implement and enforce these laws also operate on sectoral basis and are therefore in conflict because of overlapping mandates.²¹ In addition, some of these institutions (e.g. the Forest Department) have limited authority, autonomy and technical competency to implement and enforce the

20. Marekia, 1991; and Siri, *et. al.* 1996.

21. Republic of Kenya, 1994.

laws.²² In this way the implementation of existing laws suffers from the absence of an umbrella environmental legislation and constitutional provisions which give higher legal standing or authority to natural resource management efforts.

Kenya's institutional arrangement for environmental management is largely centralized. Environmental management activities and resources are vested in the central government institutions—a number of them listed above—and there are weak local government institutions with authority and competency to engage in environmental management, enforce existing environmental policies and laws, and even formulate natural resource by-laws. Local government institutions, for example the County Councils, have inadequate legal power, and lack adequate skilled staff and equipment to engage in environmental management activities.

In short, the numerous central government agencies with overlapping, poorly coordinated, and limited capacities, and the lack of strong local government environmental institutions hamper the development, implementation and enforcement of environmental policies and laws. The need to address these institutional weaknesses and to upgrade existing natural resource policies and laws has been recognized by the Government. This recognition is deposited in the NEAP. To address the various limitations of current environmental regimes, the NEAP recommends, *inter alia*: (a) the creation of a single autonomous agency with legal authority to coordinate and monitor environmental management matters, and (b) the harmonization of sectoral laws through the enactment of a national umbrella environmental legislation. It recommends that environmental management responsibilities be decentralized to district and divisional levels.

The NEAP, however, does not address a number of political and constitutional reforms that are required to support the implementation of its recommendations. It does not deal with issues of land tenure and the political reforms required to facilitate the formulation of a new land tenure arrangement.²³ It also fails to provide clear time scales and resources needed to implement the various proposed reforms.

Despite these limitations, the NEAP has established the foundation of initiating processes and measures aimed at implementing environmental management reforms in Kenya. It has provided a basis for preparing national environmental policy and legislation. The Sessional Paper on Environmental Policy is to be presented to cabinet for approval and adoption. It also promotes a wide range of policy measures aimed at promoting environmental sustainability. These include: (a) the creation of economic and fiscal incentives for sustainable utilization, conservation, and management of natural resources; and (b) the development and enforcement of environmental standards.

22. Juma, *et. al.* 1995.

23. For more discussion of the political underpinning of environmental management in Kenya, see Ojwang, 1992.

As a follow up to the NEAP a number of sectoral policy and legislative reform processes have been initiated. These include: revision of the wildlife and forest policies and the associated legislation; and the formulation of a national umbrella legislation—the Environmental Management and Enhancement Bill—to harmonize the sectoral laws and to give environmental issues a strong legal standing. The Bill is to be debated in parliament before being enacted into legislation. It proposes a series of measures that if effectively enforced could bring environmental sustainability concerns to the mainstream of national politics and governance. For example, it suggests the formation of a National Environment Council to be the supreme body for policy formulation and be responsible for the formulation of national priorities and objectives for the protection of the environment. The proposed institutional arrangement could solve the current problem of lack of a coordinating body for environmental policy-making.

3. GOVERNANCE AND ENVIRONMENT

3.1 Environmental governance defined

The concept of environmental governance is fairly new, at least in international and national policy discourse. Its usage is just beginning to gain currency in academic and environmental diplomacy circles. Though its origins cannot be easily traced in the historical development of environmental policy and law, the concept has emerged from the increasing efforts to establish and understand what links there are between issues of governance generally and environmental management. Indeed the concept of environmental governance is emerging from the academic efforts to explore the “governance-and-the environment” nexus. These efforts are largely based on an assumption that the presence or absence of democratic governance or good governance determines how well a society is able to engage in the management of the natural environment.

The concept of environmental governance is largely erected on two concepts: environmental management and governance. While the concept of environmental management²⁴ is now fairly well understood at least in academic and some policy-making circles, that of governance is widely used but not defined and well understood.²⁵ Governance as is generally talked about today refers to a wide range of political, economic, legal and social issues. It is often equated to government; sometimes to political liberalization and accountability on the part of government. The absence of a clear and agreed upon definition is a major source of tension in public policy analysis and practice. It even generates more tension and confusion when extended to issues of the environment in general and environmental

24. Environmental management is generally defined as ...

25. See Hyden, G. and Mugabe, J. in this volume.

management in particular. Therefore, to minimize the tension and destroy any basis for confusion, at least in intellectual thought, it is useful for this study to first and foremost provide our definition of governance before exploring what environmental governance is all about.

The concept of governance, as we have already noted, is subject to confusion and misuse. It is often defined differently by different persons from different political and/or intellectual backgrounds. For example the World Bank, in its 1989 report on sub-Saharan Africa, defined governance as the "exercise of political power to manage a nation's affairs".²⁶ Others have conceived governance as the nature of power and how its exercised by government to maintain public law and order.²⁷ A renowned political scientist, Goran Hyden, has defined governance as "the conscious management of regime structures with a view to enhancing the legitimacy of the public realm".²⁸ Hyden treats governance to go beyond political power exercised by government. His definition provides the required flexibility to study and understand informal (non-governmental) socio-economic and political institutions that create, destroy and use various forms of power to manage change over time. It does not restrict us to the analysis of formal government.

Governance, as far as we are concerned, refers to a set of norms, values, policies, rules and laws—often deposited in formal and/or informal organizations—that are institutionalized at different levels (global, regional, national and local levels) in order to bridge the gap between the governed and the governors. It is about better articulation of the governors with the governed. The norms, rules, policies and laws form a regime which binds the governors to the governed; and creates a measure socio-political order in a particular system. They restrain the governors from behaving in manner that injures the interests of the governed—i.e. the governor is made responsive to the needs of the governed. In summary, the regime is responsible for ensuring that the governed articulate among themselves and with the governors well. Conceiving governance as how the governors and the governed articulate provides us with adequate space for analyzing state capabilities and what processes and/or measures civil society should invest in to create responsible and responsive state apparatus.

Having clarified what governance is, it should now be fairly easy to explore the concept of environmental governance. Environmental governance is about those regimes—values, norms, policies, rules, laws and more generally institutions (both formal and informal)—that determine (or guide) the nature and level of society's interaction with the natural environment. It is about the scheme of organization of public duties to manage the environment and rights to use its goods and services in a

26. World Bank, 1989.

27. See for example Frischtak, L. 1994.

28. Hyden, G. 1992, p.7.

sustainable manner. Environmental governance is thus a framework (either formal or informal; modern or traditional) that establishes reciprocal relationships between and among people (globally, regionally, nationally and locally) to access and use environmental goods and services; and binds them (at whatever level) to certain specific ethics of environmental management.

The juxtaposition of governance and environment has a number of useful features. First, the linkage highlights social and political processes through which human societies can self-consciously adjust their behaviour into environmentally benign ways. Second, it indicates that environmental management involves issues on which the state and civil society must assert control as well as establish consensus. Thirdly, it enlarges the management of environmental policy beyond governmental apparatus—it enjoins civil society in environmental decision-making systems.

3.2 Political liberalization and environmental management

Kenya has been undergoing major political changes in recent years. The one-party system has been replaced by a multi-party system. This change has created new space for political actions and new possibilities for reform in public policy related to environmental management. The political changes have resulted in the initial enrichment of the political terrain and growth in its complexity. There is increased political activity in most sections of society and a number of issues are openly being discussed. The focus, however, has been on political liberties, and often narrowly defined the establishment of new political organizations not necessarily the creation of new political values, norms and philosophies. Political discussions and liberalization have not moved to address fundamental issues of environmental rights and duties.

Another issue that is being openly debated is the nature of the Constitution of Kenya and options for its reform. The debate and its outcome will have far-reaching implications for environmental management in Kenya and deserves the attention of those interested in providing support for environmental management.

Of particular importance is the issue of land ownership in Kenya. Also related to this is the question of the lands which were acquired during the colonial rule through a series of "agreements". The historical background to the current agrarian law and institutions in Kenya is starting to play an important role in shaping current political discussions in the country in general, and the constitutional debate in particular. The outcome of the constitutional debate and the related reforms will affect the systems of governance as a whole, which have implications for land use and the related activities such as environmental management.

3.3 Constitutional basis for environmental sustainability

One of the aspects of the Kenyan Constitution is the emphasis placed on private property. Section 75(1) of the Constitution says that "no property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired." Property can only be compulsorily acquired where it "is necessary in the interest of ...public health, town and country planning or the development or utilization of property so as to promote the public benefit." The acquisition can only take place if "the necessary thereof is such as to afford reasonable justification for the causing of any hardship that may result to any person having an interest in or right over the property." Other requirements for justifying the "taking" are proof that the action will promote the public interest and that there will be prompt payment of compensation .

The Constitution also links private property with the ability of individuals or groups to file suits in the courts. The issue of locus standi (or standing in law) is often related to whether one has a property interest in the matter being considered. In the *Wangari Mathai v. Kenya Times Media Trust* case, an individual attempted to stop what was seen as a violation of the public interest in the integrity and aesthetics of a recreation park. The defendant was to build a 60-storey building in Nairobi's Uhuru Park. The case fell on the test of locus standi. It was held that for an individual to bring suit against the proposed construction, he or she had to establish injury to himself or herself, over the above injury that would be caused to the general public. The only person with the competence to institute such proceedings in the Attorney-General.

From Juma, C., *et. al.* 1995.

On the whole, Kenya's constitution carries provisions which undermine basis and prospects for long-term environmental sustainability. As the 1994-96 Development Plan says that there "has been overemphasis on the protection of property rights and inadequate provision for the regulations of the said rights in the interest of soil conservation." Juma C. *et. al.* have further observed that "the main problem with the current constitutional provisions is that they restrict opportunities for creating multiple land uses which are necessary for the conservation of resources, the state can expropriate land provided that the owner has been required to carry out certain measures and has failed to do so. Other environmental needs such as corridors for wildlife migration on private land cannot be easily accommodated under such provisions."

4. OPTIONS FOR ENVIRONMENTAL GOVERNANCE REFORM

4.1 Systemic policy and legislative measures

To achieve environmental sustainability in Kenya, specific policy, legislative and institutional reforms are required. Given the complexity of actions to be undertaken, and the limited existing institutional capacities, the reforms should be sequenced on the basis of agreed on priorities. The priorities for action must be based on careful analysis of environmental problems—their nature and causes—and should be established through a consensus process. Careful analysis of the costs of reforms, including those costs and benefits of not undertaking the reforms, must be done. For example, the following economic policy reforms could be undertaken to ensure that environmental conservation and natural resources sustainable use objectives and principles are integrated into and are promoted in the conduct of economic activities. Such reforms should include the formulation and implementation of economic and fiscal incentives; and establishing realistic and appropriate pricing systems for various components of the environment. Specific reforms could include:

- increased pricing of forest products and increased timber royalties by at least 25 percent to create disincentives for unsustainable use of components of forest biodiversity;
- removal of protectionist tariff measures, e.g. the tariff on wheat imports, which encourages the unsustainable and/or environmentally unsound land use practices in arid and semi-arid ecologies;
- increased budgetary allocations to environmental programmes in tandem with the relative contribution of the sector.
- removal of perverse incentives such as land conversion subsidies
- creating economic incentives and promoting benefit-sharing/revenue sharing with local people who give their land for biodiversity conservation purposes; e.g. extending KWS like revenue sharing scheme (now being applied to wildlife management) to other biodiversity-rich resources such as forestry and marine ecosystems;²⁹ and
- providing tax relief to private sector and other institutions that invest in the development of technologies for conservation and sustainable use of biodiversity. e.g. Welcome Ltd. investment in the development of elephant fertility control techniques in collaboration with KWS should be provided tax relief.³⁰

29. For description of KWS revenue sharing programme see Barrow, *et. al.* 1995. 'The Role of the African Wildlife Foundation in the Evolution of Community Conservation Practice and Policy in Kenya'. Paper Prepared for ACTS, Nairobi; and Mugabe and Masika, 1996.

30. See Mugabe, 1994.

In addition to the policy reforms, various institutional changes are necessary. They include for example, a review of existing institutional arrangements at local and national levels to create synergy between local authority and central government in environmental decision-making and implementation of projects. Such reform should enlarge the authority and accountability of local officials and should lead to the creation of institutional space for local participation in decision-making on environmental management. Other institutional reforms to be considered include:

- strengthening the Inter-Ministerial Committee on Environment by relocating it to the Office of the President, renewing its legal standing by establishing it through an Act of Parliament, and giving it a component technical secretariat to address environmental issues in general and biodiversity management in particular;
- staffing district and local authorities with component environmental officers on various aspects and particularly biodiversity and giving local authorities legal mandate to enact by-laws and policies aimed at promoting environmental management in general and biodiversity conservation in particular. For example, by-laws may include increased compensation fees to households whose crop is damaged by wildlife or whose land is given to community conservation programmes;
- reassessing the roles and competency of the Ministry of Environmental Conservation vs that of Natural Resources, and carefully locating NES, KWS and NMK in appropriate governmental organogram.

In addition, it is vital that the operations of sectoral institutions working on various aspects of the environment be decentralized; and where appropriate privatizing some of them or changing their status from purely public (government managed) to parastatal. A target area is the forestry sector where the Department of Forests needs to be strengthened and given adequate legal standing to enforce laws by making it a parastatal. This would give it more autonomy and authority it requires to enhance its capacities to collect revenue and enforce forest policies and law.³¹

4.2 Greening the constitutional review process

While it is necessary to include in the constitution the right of individuals to a healthy environment, it is also critical to review the provisions relating to private property (especially land tenure) and bring them in line with the requirements of sustainable development in general and environmental management in particular. The specific nature of the provisions need to be carefully studied in light of the current debate on constitutional change and land issues in Kenya. While there are general

31. See Mugabe, 1994; and World Bank, 1990.

provisions that relate to the right to a healthy environment, specific issues such as the legal standing to instruments such as environmental impact assessments (EIA) and the right access to environmental information may need to be reflected in the constitution.

The constitutional review process will need to seriously take on environmental issues. It should provide a basis for undertaking sectoral reforms and harmonization of these through constitutional and environmental legislation provisions. entrenching in the country's constitution provisions that enable individuals and groups to sue on behalf of the environment and removing laws that deny that opportunity by linking "the ability of individuals or groups to file suits in the courts to their private property interest."³² The proposed environmental legislation should also provide *locus standi* to an individual and/or individuals to sue for the environment—this could provide a strong basis for the emergence of ecological stewardship.

4.3 Public education and decentralization of environmental responsibilities

The extent to which Kenya will achieve environmental sustainability depends on the support it acquires from a wide range of groups: local people, government departments, women's groups, political parties, donors, academic institutions, grassroots and national NGOs, international NGOs and for-profit private sector. The support can be established through constituency and consensus building processes. Members of Parliament (MPs) can play a major role of mobilizing the different groups—including themselves—to provide various kinds of support (intellectual, technical, political, etc.) to the environmental sustainability project. This is essentially the role of building a constituency for environmental sustainability and ensuring that there is consensus on specific environmental reforms to be articulated in a national environmental programme as well as the mechanisms of implementation of the agreed-upon reforms.

Other related activities that Mps can undertake to build a constituency and consensus for environmental sustainability include: sensitizing the public on the NEAP and particularly its recommendations; raising public awareness of the environmental commitments deposited in the development plans and other instruments such as the Policy Framework Paper (PFP) and soliciting public engagement in demanding for implementation of agreed-upon reforms.

In addition, Mps have a role to play in strengthening environmental governance. As noted earlier, the scheme of governance influencing environmental management has a number of deficiencies. The first is that it has relied heavily on public sector institutions and will not be able to cope well under conditions of market

32. Juma, in Juma and Ojwang, eds., 1996, p. 370.

liberalization and increased demand for public participation in policy making. Second, the role of local communities in managing natural resources is becoming an important factor in policy formulation and project design. A viable scheme of governance under the current Kenya conditions has to take into account the growing role of the private sector as well as local communities. At the community level, issues such as the role of women in environmental management become evident.

CONCLUSION

This paper discusses some of the environmental problems facing Kenya and outlines a number of policy, legislative and institutional reforms that are required to address these problems and promote environmental sustainability. It introduces the concept of environmental governance and calls for entrenchment of provisions on environmental rights and duties into Kenya's constitution. The paper argues that existing political and governmental institutions have not provided adequate attention to key environmental concerns. It recommends that a parliamentary process to address key environmental issues be established. Such an initiative could mobilize political will and support as well as create the necessary transparent and participatory processes required to undertake economic, institutional, constitutional and governance reforms for environmental management and sustainability in Kenya.

REFERENCES

- Bragdon, S. 1990. *Kenya's Legal and Institutional Structure for Environmental Protection and Natural Resources Management: An Analysis and Agenda for the Future*. Washington, DC: Economic Development Institute, World Bank.
- Bruce, J.W., and S.E. Migot-Adholla, eds., 1994. *Searching for Land Tenure Security in Africa*. Dubuque, Iowa: Kendall/Hunt.
- DANIDA. 1989. *Environmental Profile: Kenya*. Copenhagen, Denmark: Danish International Development Agency, Ministry of Foreign Affairs.
- Darkoh, M.B. 1990. Kenya's environment and environmental management. *Journal of Eastern Africa Research and Development* 20: 21-25.
- IUCN. 1995. *Forest Cover in Kenya: Policy and Practice*. Nairobi: IUCN-World Conservation Union.
- Juma, C. and J.B. Ojwang, eds. 1996. *In Land We Trust*. Nairobi: ACTS Press.
- Juma, C. 1991. 'Sustainable Development and Economic Policy in Kenya.' In *Gaining Ground: Institutional Innovation in Land-use Management in Kenya*, Rev.ed., edited by A. Kiriro and C. Juma, pp. 51-86. Nairobi: Acts Press.
- Juma, C. et. al. 1995. Institutional Capacity for National Resource Management in Kenya. Paper prepared for the United States Agency for International Development (USAID), Nairobi.
- Kenya Forestry Master Plan Programmes. 1994. *Kenya Forestry Master Plan*. Nairobi: Ministry of Environment and Natural Resources.
- Keohane, R. and M.A. Levy, eds., 1996. *Institutions for Environmental Aid*. MIT Press: Massachusetts, Cambridge.
- Korten, D. *Getting to the 21st Century*. Kumarian Press, U.S.A
- KWS. 1990a. *A Policy Framework and Five-Year Investment Programme*, rev. ed. Nairobi: Kenya Wildlife Service.
- KWS. 1990b. *A Policy Framework and Development Programme, 1991-96. Annex 4: National Park and Reserve Planning*. Nairobi: Kenya Wildlife Service.
- KWS. 1990c. *A Policy Framework and Development Programme, 1991-96. Annex 6: Community Conservation and Wildlife Management Outside Parks and Reserves*. Nairobi: Kenya Wildlife Service.
- KWS. 1991. *Development Policy and Activities 1991-96*. Nairobi: Kenya Wildlife Service.
- Lele, S. and R. Norgaard, 1996. 'Sustainability and the scientist's burden'. *Conservation Biology* 10:354-365.
- Nyeki, D.M. 1992. *Wildlife Conservation and Tourism in Kenya*. Nairobi: Jacaranda Designs Ltd.
- Marekia, E.N. 1991. "Managing Wildlife in Kenya." In *Gaining Ground: Institutional Innovation in Land-Use Management in Kenya*, edited by A. Kiriro and C. Juma, rev. ed. Nairobi: ACTS Press.
- Makau, B., J.B. Ojwang, and C. Juma. 1990. *Environmental Impact Assessment in Kenya: Indicative Capability, Potential and Legal Issues*. Nairobi: Norwegian Agency for Development Cooperation.
- Mugabe, J. 1994. *Technological Capability for Environmental Management: The Case of Biodiversity Conservation*. University of Amsterdam, The Netherlands.
- Mugabe, J. and P. Wandera, 1995. "Wildlife Management and Structural Adjustment in Kenya: Institutional Reforms." in Juma, C. et. al. 1995. *Economic Reforms and the Environment: African Experiences*. United Nations Environment Programme.
- Mugabe, J. and A. Masika, 1996. Incentives for Biodiversity Management in Kenya: The Case of Amboseli Community Conservation. Paper prepared for the World Wildlife Fund (WWF), Gland Switzerland.