

# **KENYA'S DEMOCRATIC TRANSITION**

## **A Strategy for USAID's Continued Support: An Assessment of Kenyan Public Institutions**

**AEP-5468-1-00-6006-00 (NMS # AEP-I-00-96-90006-00)DO 812**

**June 9, 1999**

**Team Leader:**

**Judith Geist**

**Team Members:**

**Joel Barkan**

**Jesse McCorry**

e-mail: [lcooley@msi-inc.com](mailto:lcooley@msi-inc.com)



**MANAGEMENT  
SYSTEMS  
INTERNATIONAL**

600 Water Street, S.W.  
Washington, D.C. 20024  
USA

Tel: (202) 484-7170  
Fax: (202) 488-0754

# TABLE OF CONTENTS

Page

ACRONYMS.....	iii
EXECUTIVE SUMMARY .....	iv
I. INTRODUCTION: KENYA'S TRANSITION TO DEMOCRATIC GOVERNANCE.....	1
II. METHODOLOGY .....	3
III. MID-TERM STRATEGY REVIEW AND RECENT KEY ISSUES .....	6
IV. HISTORICAL CONTEXT .....	12
V. FINDINGS AND RECOMMENDATIONS: POTENTIAL FOR INSTITUTIONAL SUPPORT.....	17
PARLIAMENT.....	17
Context for Parliamentary Support .....	17
Benchmarks of Current Parliamentary Independence .....	18
Benchmarks of Current Parliamentary Effectiveness .....	19
Constraints on Parliamentary Effectiveness .....	21
An Agenda for Parliamentary Support.....	21
Considerations for Implementing an Effective Program .....	25
JUSTICE SECTOR .....	27
Institutional Context .....	27
Problems Confronting the Justice Sector .....	28
GOK's Efforts to Strengthen the Justice Sector.....	30
Potential areas for USAID intervention .....	31
LOCAL GOVERNMENT .....	34
Institutional Structure.....	34
Functions .....	34
Performance.....	35
Problems .....	35
Responses to Key Problems: GOK, Donors and Citizens .....	38
Local Government in the Transition: the Long-term Vision .....	40
Recommended Strategy .....	42
Investment Strategy.....	43
Constraints and Risks.....	44
Benchmarks of Political Commitment, Independence and Effectiveness .....	45
VI. CONCLUSION.....	50

## **ANNEXES**

**Annex A — Strengthening the Kenya National Assembly**

**Annex B — Strengthening Kenya's Justice Sector**

**Annex C — Strengthening Local Government**

**Annex D — Bibliography**

**Annex E — Persons Interviewed**

## ACRONYMS

AAK	Architectural Association of Kenya
ALGAK	Association of Local Government Authorities of Kenya
CGD	Center for Governance and Development
DFID	Department for International Development (British aid, successor to ODA)
DPK	Democratic Party of Kenya
EU	European Union
FIDA	International Federation of Women Lawyers (Kenya chapter)
FORD-A	FORD-Asili (“ “ “ “ “ - original)
FORD-K	FORD-Kenya(Forum for the Restoration of Democracy-Kenya)
FORD-P	FORD-People (“ “ “ “ “ - People)
FPEAK	Fresh Produce Exporters Association of Kenya
GPT	Graduated Personal Tax
GTZ	German Technical Assistance
ICJ	International Commission of Jurists
IED	Institute for Education in Democracy
IEA	Institute for Economic Affairs
IPPG	Inter-Parties Parliamentary Group
IPPC	Inter-Parties Parliamentary Committee
KNUT	Kenya National Union of Teachers
KAM	Kenya Association of Manufacturers
KANU	Kenya African National Union
KSC	Kenya Social Congress
LSK	Law Society of Kenya
MLA	Ministry of Local Authorities
MOF	Ministry of Finance
NCKK	National Council of Churches of Kenya
OOP	Office of the President
PIC	Public Investments Committee
PAC	Public Accounts Committee
Safina	Political party, registered just prior to 1997 elections; “the Ark”
SDP	Social Democratic Party
SPK	Shirikisho Party of Kenya

# EXECUTIVE SUMMARY

## Introduction: A Strategy for Supporting Democratic Transition in Kenya

This report recommends a strategy for US support of some public institutional arenas in Kenya. It is the outcome of a request by the USAID Mission to turn the recommendations of the mid-term strategy review into a set of possible actions and the detailed benchmarks to which they should be tied.

**Context.** Kenya's democratic transition, begun grudgingly in 1991 and manifested subsequently in two flawed multi-party elections, has entered a new phase. Kenya presently confronts three arenas of transition — political institutional, economic, and a regime change of leadership. The prognosis for a country such as Kenya, forced to confront all three of these transitions simultaneously, can be grim unless a combination of domestic political action and external assistance can turn uncertainty into opportunity.

Domestic political action in Kenya has forced the regime to move grudgingly in the direction of political liberalization. The potential of domestic political action and institutions to contribute to these three transitions is the main subject of the report that follows. Productive outcomes to these transitions ultimately will depend on Kenyan capacity and commitment. While civil society activism has kept central issues related to democratic reform on the front burner, civil society has inherent limitations, not least among them the lack of representativeness and accountability of many “vanguard” organizations.

Kenya's problems, especially the central and intractable problem of corruption, require public institutional response. The neo-patrimonial nature of the polity militates against the ability or willingness of the regime itself to undertake the significant reforms necessary to combat corruption, however. Action on the part of the Executive, through the Kenya Anti-Corruption Authority or ministerial efforts at reform, are unlikely to be effective. *Alternative public institutional arenas which can and will exercise independent power, and can and will provide oversight on Executive action, are essential.*

The **parliamentary arena** is the necessary and feasible venue for pursuing the reform agenda further in the near term — for dealing in an effective manner with corruption, executive abuse of power, and with efforts to limit avenues of participation and access to power. Assistance in strengthening parliament is a major potential focus for donor investment presently.

An independent **judiciary** with strong powers of judicial review, and a strong, viable **local government** system are also critical to democratic governance. At present, internal constituencies for these institutional arenas remain less organized than is the case with parliament. Signs of the effective commitment of strategic players internal to the institutions, which we will argue is critical, are far fewer.

## Mid-Term Review, Team Composition and Present Methodology

**Mid-term Review.** A mid-term review, undertaken in 1998, recommended a shift in emphasis and focus of the mission's DG strategy, support for civil society, together with renewed consideration of support for key public sector institutions that could provide countervailing power and consequent essential checks and balances on the Executive. (*See the mid-term review for details.*)

**Team Composition.** The team comprised Joel Barkan, of the University of Iowa, an expert on parliamentary processes and institutions (and former REDSO/Nairobi DG Adviser); Jesse McCorry, a consultant with significant experience in USAID-funded justice sector programs; Susan Jay, from USAID's Center for Democracy and Governance (Global Bureau); Dana Ott, from USAID's Africa

Bureau; and Judith Geist, as team leader, with specific experience in decentralization and local government in Kenya and the wider region.

Team members reviewed recent strategy statements and the 1998 mid-term review and conducted interviews with key actors in the relevant public sector institutions; with key “informed observers” knowledgeable about but not directly engaged in the institutions; with other donors; and with a handful of selected civil society organization representatives. The latter were chosen to address two issues that emerged during the team’s visit:

- 1) the feasibility of shifting support to broader-based, more accountable, membership-controlled organizations with a clear and legitimate interest in representing citizen views in the public institutional arenas under review (examples: KAM, KNUT, the Kenya Architects’ Association, ICJ)
- 2) the possibility of increasing synergies in the portfolio by supporting such civil society organizations and **linkages** between these and the public sector.

### **Macro-Political Context**

The report relies on the extended discussion of political history in the mid-term review, and the historical background sections in previous assessments (1992; 1995). It provides a summary of the recent factors in the macro-political environment that are directly relevant to the critical problems identified and program recommendations made by the team. These include:

- the grudging political liberalization of 1991 and subsequent efforts by the regime to retain control of parliament through electoral manipulation of varying types, up to and including the “ethnic clashes” of 1992 and 1997
- subsequent regime efforts to neutralize, if not marginalize, parliament
- growing civil society activism and pressure, leading to the pre-election ferment in 1997 that forced the regime to accede to a compromise strategy, involving a minimal package of reforms to reduce the skew in the electoral environment (the Inter-Parties Parliamentary Group, IPPG, effort)
- maintenance of a rough balance of power between KANU and combined opposition parties in parliament through the two elections, recognizing at the same time that the opposition is in no sense “united” or “combined”
- initiation of a constitutional reform process that has moved haltingly through the first stages but appears to have stalled, perhaps temporarily and perhaps permanently
- beginning of the presidential succession struggle, unwittingly highlighted by President Moi in his refusal to name a Vice President for 15 months after the 1997 election
- at the same time, and to some degree related to the succession struggle, the beginnings of the fragmentation of the regime core coalition

- increasing macro-economic pressure throughout the period, compounded by the insistence of the IFIs on economic liberalization, encroaching on the patronage resources available to the regime to pursue coalition maintenance and defense
- donor focus on corruption, which is the main mechanism for regime maintenance, as the key problem facing Kenya, both politically and economically

**Summary.** The **bottom line** is that Kenya being pushed inexorably in the direction of a political realignment which holds out the **potential** for democratic advance, based not on the commitment of the incumbent regime but on the increasing inclinations of a new generation of leaders, particularly parliamentarians, to pursue independent action. The patronage strategy that has served the present regime is failing and the constituent parts of the ruling coalition — as well as of the increasingly fractious opposition — have **less and less to lose** by taking novel actions. The visible crumbling of physical infrastructure and increasing pressure on middle class incomes, conversely, have brought home to a significant portion of the population, especially the urban population, just **how much they have to lose**, and have already lost. Unfortunately — but perhaps inevitably — the tone of the ensuing discussions is increasingly ethnicized. Kenya's friends should be prepared to assist with the opportunities that present themselves at a time of such far-reaching political transition.

### **Potential for Institutional Support**

The remainder of the report examines the present benchmarks that would suggest the viability of investment in each of the three sectors being considered, reviewing the current situation with respect to **independence** of the arena vis-a-vis other institutional arenas (particularly the executive); the **effectiveness** of the arena presently; indications of the commitment of strategic elites within that institutional arena to increasing both independence and effectiveness; and constraints to further advance in these institutional arenas.

The individual sector discussions then suggest activities that could be productive in facilitating a phased institutional strengthening, with the phases related to an expanded set of the type of benchmarks that the US Mission and other donors should monitor. Benchmarks will increase the confidence with which decisions are made about continuing, increasing, or suspending such support, and will assist in developing realistic phasing. The phasing suggested in this report is very tentative; it can be considered “illustrative” and should be reviewed thoroughly as and if concrete activities begin to be planned.

### **Parliament**

The parliamentary arena is the most promising arena in the near term, because of the indications of **potential** independence and effectiveness it manifests.

**Independence.** Several indications of parliamentary independence over the recent period are detailed.

- A significant number of MPs from the ruling party and the opposition now work together on legislative business, and do so with increasing regularity. Roughly 30-35 KANU MPs, together with a slightly larger number from the opposition, now constitute a core of 55 to 75 reformers.
- A clear majority of the leadership of the Assembly, including the Speaker (a KANU MP) and Deputy Speaker, are supporting proposed legislation to establish a Parliamentary Services Commission. *The purpose of this proposed legislation is to de-link the National Assembly from the Office of the President, which currently exercises budgetary and administrative control over it, and to establish the National Assembly as an independent branch of government.*
- Several *key KANU MPs* are charting an independent course on parliamentary independence and strengthening, including the Francis ole Kaparo, the Speaker of the House.
- Workshops held by the Centre for Governance and Development for MPs, including the well-publicized seminar on the state of the economy in May, 1998 in Mombasa, have been attended by large numbers of MPs from both sides of the floor.
- Passage of legislation to establish an Anti-Corruption Committee to delve into corrupt practices within the executive branch occurred on the basis of a concerted effort by the opposition parties and over the objections of the KANU front-bench, but with the support of some KANU backbenchers.

**Effectiveness.** Parliament's role in the past has been primarily to question Government legislation, requiring answers from the front bench. During the first recent multi-party parliament, the Seventh Parliament, efforts by the opposition and KANU backbenchers to exercise oversight was limited, although some legislation was withdrawn and amended by the Government after queries.

The IPPG process brought about a revision of the Standing Orders of Parliament to **require** committee scrutiny of all legislation after its first reading. Eight sectoral committees dealing with combinations of ministries were established and have begun to affect the legislative process. The record of the departmental committees has been mixed but five have been active to varying degrees, including that dealing with agriculture. Given the importance of agriculture for the Kenyan economy, and recent crises in selected sub-sectors such as coffee, sugar and rice, it is not surprising that the members of the Agriculture Committee have been motivated to examine government policies in this area. The committee has also been pressured by the farmers of selected crops to look into their situation. This may be the first time economic interest groups in Kenya have contacted a specialized legislative committee about their concerns.

*Dialogue between interests within civil society and their counterpart committee within the legislative branch have historically been one basis of strong legislatures in advanced democracies.*

**Constraints.** Parliamentary effectiveness is constrained by resource inadequacies, lack of institutional development and political factors. Recent activities by the central decision-makers in parliament indicate commitment to institutional development, and to pursuing the necessary financial support from the GOK (e.g. action on tendering and contracting of the work to provide physical facilities, offices and committee rooms, in the buildings recently acquired for the purpose).

Donors can play a key role in removing resource constraints *if political will among the key actors remains evident, and the regime does not attempt to marginalize the committees (or even parliament as*

*a whole, for example by prematurely proroguing it.)* Donors should coordinate efforts in support of parliamentary strengthening. A phased program is suggested.

**Activities in Support of Parliamentary Strengthening.** A number of activities are proposed, including:

- Provide specialized training for selected groups of MPs.
- Provide specialized training for parliamentary staff including, but not limited to: (1) 1-2 librarians, (2) an information technology specialist, (3) research specialists for the departmental committees, (4) legal affairs.
- Limited material support to support the Assembly's library and initial efforts to establish a research resource center for MPs.
- Support for the establishment of a Parliamentary Research Resource Centre.
- Expose Kenyan MPs and staff to "best practices" in region.

Phasing of these activities, to tie them to benchmarks and to budget cycle realities, is proposed, looking first at a set of initial activities in FY 99/00, then at the period from FY 00/02 and finally at the period FY 02/05.

**Benchmarks** important to monitor in gauging the viability of any program of support include the fate of the Parliamentary Services Commission Bill; the establishment of an increased parliamentary staff, following passage of the Bill; the continued and increasingly more regular meeting of the departmental committees; the ability of the committees to affect legislation; the degree to which the committees become access points for relevant civil society organizations, especially the mass or professional membership organizations with vital interests in the area of the committee's jurisdiction. Several other indicators of increasing institutional capacity are suggested, on a realistically phased basis. Taken together, they provide a skeletal vision of an empowered parliament with significant oversight functions and citizen access, over a ten year period.

**Risks.** Risks discussed in the report relate primarily to any efforts by the incumbent Government to obstruct the processes which have been set in motion, including the committee system, which is the focus of this program of proposed parliamentary strengthening. Parliamentarian apathy might also obstruct the process, particularly if the Parliamentary Services Commission Bill is shorn of any provision for the improvement in terms of service for parliamentarians themselves, and they continue to have to devote large amounts of time to self-preservation via outside economic interests and activities. Both of these are not inconsiderable risks, and donors should consider them at the outset, before undertaking significant preparations for support.

### **The Justice Sector**

The justice sector is a less promising arena for the development of independent and effective countervailing power at present. While the physical and human infrastructure is on the surface more intact than is the case in many African countries, political commitment to creating an independent and effective justice sector is not apparent, with the important exceptions of a few internal reformers whose efforts are

noted below. Recent activities of this handful of committed reformers, and that a combination of internal and external pressures, have put justice sector strengthening on the front burner, at least temporarily.

The report details the problems of the sector as recognized by key actors within it, and outlines the potential for donor action.

***Independence.*** Independence of the judiciary in Kenya is a complicated topic. While some judgments reversing regime decisions have, and continue, to be made, indicating some degree of scope for independence, in general the tradition's of Kenyan justice system and the actual appointment procedures for judges conspire to maintain a conservative judiciary supportive of the regime's decisions and unwilling to challenge it. Further, the terms of service of the lower ranks of the magistrature ensure that many can easily be corrupted and their decisions influenced. While this is more a problem of biased judgments on cases of no interest to the regime, and high level political interference is only likely to be felt at levels of the bench where justices are adequately remunerated, it nonetheless means that there is a less reliable cadre of magistrates on which to build a reform-oriented program.

***Effectiveness.*** Problems of effectiveness in the justice system are many. Court and case management incapacity contributes to a significant backlog in cases, which is similar to most other African justice systems. Compounding the lack of resources and skill at management is the lucrative rent-seeking opportunities which attend lengthy backlogs, permitting subordinate court staff (and lawyers) to manipulate the dockets and case files to their financial benefit.

***Police.*** The multiple lack of resources and skills of the police, as well as their vulnerability to corruption, also greatly inhibit court effectiveness. Many members of the bar are unpersuaded of the qualifications of many justices and magistrates; many magistrates, whether qualified or not, are without the resources to provide "justice" — a complete lack of case precedents and reporting characterized much of the system, among other deficiencies.

***Kwach Commission.*** The Chief Justice appointed a committee to review the problems in the judiciary and to recommend ways of eliminating them. Justice Richard Kwach, the committee's chairman, produced a report with a detailed set of recommendations about what needs to be done to combat administrative deficiencies, personnel qualification and training, and corruption, among other problems.

***Constraints.*** Lack of resources, including law reports, is evident. Other constraints are not so evident, but relate to structural aspects of the justice system, including the division of responsibilities between the judiciary, under the centralized control of the Chief Justice, and the Attorney General's Office, which undertakes investigation, litigation, prosecution, and legal drafting. The jurisdictional distinctions are not clear, and the public is not at all aware of them, making it doubly difficult to pinpoint "first causes" of the system's problems, or strategic intervention points to deal with them.

Recently, in public fora organized by the Public Law Institute and the judiciary with support from UNDP, charges were traded back and forth about the culpability of the Attorney General in the problems bedeviling Kenya's justice system, especially delay. ***Organizational conflict, and the more politicized and public conflict between the bar and the bench, will constrain forward movement on an effective agenda for justice sector strengthening.***

***Activities.*** The report outlines three areas for potential investment in the sector.

- court and case management assistance, including alternative dispute resolution

- legal aid; in collaboration with DFID, and possibly using a “public/private partnership” approach with the NGOs that have been supported to provide legal aid in the recent past
- law reports, possibly in conjunction with a consortium of donors

**Benchmarks.** The report recommends that the US use the Kwach Report, and the machinery set in place to implement it, as the core set of benchmarks of political commitment to effective justice sector strengthening, providing assistance only as the GOK meets its own agenda.

**Risks.** Risks are difficult to assess. Law reports are an expensive and long-term activity, but would/will have to be done to make the judiciary more effective whatever its degree of dependence or independence, and whatever regime is in power. There appears to be no downside to such an activity, although the payoff might be considerably delayed. Legal aid would similarly appear to have no downside risk, although it is likely that strains between the NGO community and the public sector might surface, hampering effective implementation. Court and case management assistance, on the other hand, could conceivably provide assistance to an “unreformed” justice sector, which dispenses something not clearly related to “justice”, and dispenses it in a biased manner. Were the US to be involved in this type of activity, an explicit strategy for assessing and managing this type of risk should be devised.

### **Local Government**

The local government arena also presents major problems for the establishment of effective countervailing power and oversight. The report describes briefly the evolution, structure and functions of Kenya’s local governments, as well as the present jurisdictional conflict between these and the provincial administration (which coordinates the central ministries on the local level.) The deteriorating financial and service provision performance of the councils is discussed, along with the impact these have had in terms of the growth in corruption. Council non-performance is likely to result in councilors being abandoned by the electorate in large numbers. They therefore have a strong motivation to profit from their positions in whatever way possible in the present, the future being so precarious.

The contribution to corruption of the tightly-centralized administrative control over councils by the Ministry of Local Authorities is explained: it means that councils tend not to be responsible or accountable to the citizenry, but to the Minister. The political function of such control is important to the regime’s coalition maintenance strategy, and will continue to be so as the economic resources that the regime can tap to maintain its support base shrink, due both to its own economic mismanagement and to the effects of the economic liberalization.

The Government of Kenya has periodically stated its intention of streamlining and strengthening the local government system. At present, it is reportedly circulating a draft of a Cabinet paper, based on the recommendations of the Omamo Commission into the needs of the local governments, and has incorporated into it the core elements that are also enunciated in the Policy Framework Paper. These recommendations reportedly center on improving the revenue position of councils and reducing arbitrary ministerial authority. Political commitment can and should be monitored with respect to the outcome of these documents and any implementation plans which are undertaken.

The local government arena present one important additional issue that the parliamentary and justice arenas do not: it is the one arena for which there is virtually no agreement on the desirable ultimate structure of the system itself, and little articulation at present of the alternatives. Major changes in the conceptualization of the appropriate role of local government and its relationship to central government are bound to surface as and when the constitutional reform process eventually gets underway.

Thus, while it is possible to conceive productive ways to assist in strengthening local government under its existing framework, and the report outlines the main current donor initiatives, it is also essential to look ahead to a different configuration, and to avoid investing in activities that might be completely irrelevant under a new local government system. The report recommends that the Mission keep in mind two key objectives as it determines whether to support assistance to local government:

- to create **demand for accountability** within the system as it exists; and
- to assist Kenya in working toward a **consensus on the structure of a viable local government system** that eliminates the present highly incapacitating structural constraints.

**Independence.** Local governments in Kenya are nominally independent, and operate under elected leaderships, but they are in fact tightly constrained under the present formulation of Cap. 265 of the Laws of Kenya (the Local Authority Act) and the control of the Minister for Local Authorities. With respect to initial benchmarks of independence, the report recommends that the mission monitor the forthcoming Sessional Paper and any implementation agenda that is set from it. Over the short term, some concrete benchmarks of independence should include:

- A revised Local Government Act (Cap 265) should be in place, whether as part of a new constitution or as a systematic amendment of the current Act. It should significantly reduce ministerial/central control over local authorities and set out explicitly their areas of autonomy and their permissible revenue base.
- The increased revenue base for local councils, presently under construction, should be in place, as well as a transparent algorithm for allocation of the central transfers.
- Increased community assumption of responsibility for service provision/regulation should be visible, based on community and neighborhood organizations in the urban areas, on public/private partnerships and privatization of some services, and on the development of public regulatory bodies with citizen participation.

**Effectiveness.** The performance of the councils is very briefly discussed. Many benchmarks of effectiveness are suggested, including the ability of councils to pay staff on time; to provide services; to undertake capital development projects, including developing capital funding mechanisms and the ability to plan for replacement (“renewals”, in the Kenyan context); the effective maintenance, conservation and exploitation of natural resources, including forests; and the like. While a phasing for the monitoring of effectiveness is suggested, in reality the Kenyan local government is so varied, comprising councils which urban, rural, wealthy, poor, “basket cases”, etc., that it will be necessary to devise a graduated scale for measuring effectiveness. Kenya has a precedent, in the graduated increase in district treasury financial floats (under District Focus) based on increasing capacity for financial performance.

**Constraints.** Constraints to strengthening of the local government arena are numerous. The very complexity of the system, and the proliferation of financially non-viable councils in recent years, is a major constraint. The lack of consensus on the desirable shape of a better system is also important and guarantees that this arena will be plagued with uncertainties — and with politics — until and beyond the resolution of the constitutional reform process. The lack of civil society organizations with strong interests in the sector is a constraint, although they are beginning to emerge, and their relatively small number may be an asset in the short run, rather than a liability.

At present, the main organizations are the Association of Local Government Authorities of Kenya (ALGAK); a growing number of neighborhood associations, including the long-established Karen/Langata Association; some housing-related groups, such as Shelter Forum; a handful of NGOs in Nairobi, such as Sheria cha Kitutu and Undugu; and the Chambers of Commerce, both in individual local government areas and nationally.

Political constraints are also significant in this domain. Regime strategies for maintaining and increasing its support have always included the ability to manipulate the councils, reward and punish, since the councils provide a handy avenue for increasing the patronage network and extending it down to the grassroots. In an era of shrinking resources, this arena will be hard fought.

*Activities.* Despite the significant constraints, a strategy for supporting the sector is outlined, focusing on:

- building demand and capacity for advocacy among strategic elites;
- supporting the exchange of information among relevant regional elites/councils to expand the range of alternative local government structures Kenyans are aware of;
- assisting with “bottoms up” community involvement, possibly through co-funding with GTZ, in a “learning by doing” mode; and
- assisting one or two councils with financial management on a pilot basis as a vehicle for monitoring the allocation process of centrally transferred funds.

Concrete activities are outlined to implement this strategy, and a very tentative phased program is proposed, with appropriate benchmarks. *The specific activity entailed in building demand and capacity for advocacy — perhaps through support to ALGAK — should include efforts to target the relevant parliamentary committee which might also be the focus of support, increasing the synergy in the portfolio.*

*Benchmarks.* Initial benchmarks have already been discussed and are further elaborated, focusing particularly on the development of a detailed agenda for strengthening the councils within the existing legal framework, and the implementation of the revenue increases already decided upon. The mission should watch these carefully, and should consider lack of progress, or transparency, in increasing the revenue base as a reason to stop, or refuse to initiate, investment in the sector (except for the investments that support civil society demand creation.) In addition, some **negative benchmarks** are outlined, which strongly advise against investment in the public sector, including:

- **Lack of transparency of the formula for allocation of the LATF; evidence of its political use, rewarding councils with KANU majorities and penalizing non-KANU councils.**
- **Creation of many new local authorities, prior to the design of a new local government system in the constitutional review process.**

A large number of benchmarks of both independence and effectiveness are appended at the end, to give some indication of the types of concrete indicator that can be devised to monitor the sector. To be meaningful, these need to relate to the specific structure and functions of the local government system, which may change if the constitution is reformed significantly.

**Risks.** Risks to the strategy proposed are principally:

- Politicization of the civil society organizations which USAID supports, leading to an erosion of their utility or credibility. This can best be addressed by choosing civil society partners very carefully.
- A refusal by the GOK to let individual councils, or ALGAK, work with a donor effort; and/or manipulation of the responsible parliamentary committee, to preclude the development of a parliamentary oversight function related to local government. This can best be addressed by talking extensively with the relevant committee chairman and members before any activities are undertaken.

## I. INTRODUCTION: KENYA'S TRANSITION TO DEMOCRATIC GOVERNANCE

Kenya, east Africa's regional center for business, financial and transportation systems, has entered a period of political transition fraught with both uncertainty and opportunity. In 1992, when Kenya held its first multi-party elections in over 25 years, Western nations began to see the need to support institutions that could facilitate the transition from a one-party state to a more open, liberal political order. Many devised strategies to support emerging civil society actors, who were applying pressure on the Kenyan government to make good on the implicit promises of the 1992 election, which presaged a democratic transition. Now, with that liberalization only barely begun, Kenya faces additional transitions. Sympathetic Western donors must craft strategies supportive of a democratic outcome.

**Leadership transition.** The transition from one leader to another is precarious in all new states, where a peaceful, routine process of transfer of power has not been institutionalized. Kenya is presently confronting the transition from the leadership of President Daniel arap Moi, who has been the head of state since mid-1978, to an as-yet unknown and ungroomed successor, who will assume the reins of power after the election anticipated for 2002, under the provisions of Kenya's current constitution..

**Political liberalization.** The transition from an authoritarian regime — whether colonial, or a benign dictatorship (as many characterize the Kenyatta state), or a more malevolent authoritarianism such as gripped much of Africa in the 1970s and 80s — to a more open, pluralistic system, is equally precarious. Kenya embarked on this transition in 1991, grudgingly and as a “house divided”, with President Moi abruptly but unwillingly acceding to the unprecedented, united and sustained pressures of both domestic opponents and the international financial community.

**Economic transition.** Even more filled with uncertainty is the transition from a rigidly controlled economy, characterized by high levels of unproductive economic rent that undergird an increasingly fractious political coalition, to a liberalized, “privatized” economy with far fewer state-controlled resources to maintain the patronage base. There is little likelihood of an economic turnaround unless this corruption, which reaches to the core of the economy and provides distorting incentives while squandering resources, is combated effectively. Kenya's present regime has made numerous promises and half-hearted actions to crack down on corruption. But there is little to show for the promises thus far, and it will be argued below that there is little likelihood of progress unless alternative institutional fora, such as parliament, are empowered.

**Domestic Commitment and Capacity.** The prognosis for a country such as Kenya, forced to confront all three of these transitions simultaneously, can be grim unless a combination of domestic political action and external assistance can turn uncertainty into opportunity. Domestic political action in Kenya has forced the regime to move grudgingly in the direction of political liberalization. The potential of domestic political action and institutions to contribute positively to these three transitions forms a significant part of the report that follows. Productive outcomes to these transitions ultimately will depend on Kenyan capacity and commitment.

**Donor Support.** Donor efforts in support of both domestic capacity and commitment can also be important, as they were in 1991. Presently, however, as Kenya moves towards interrelated transitions, it is important that donors review the emerging opportunities and strategies of domestic actors, and determine how best to support them. The broad, unfocused support for civil society which kick-started the liberalization process in the early 90s may be insufficient now. Targeted support for strategic elites who play decision-making roles in public sector institutions may be critical to the reformulation of those public sector institutions, both as a part of the constitutional reform process and as key elements in managing

theses transitions. While the transitions present great uncertainties, they also herald a room for maneuver, negotiation and brokering which is new in recent Kenyan political experience. Western donors need to respond to these opportunities, extending and refashioning strategies where necessary. This report is an effort to chart a course that takes into account emerging opportunities while tying any investment decisions to domestic commitment on the part of the relevant strategic elites.

**Institutional Arenas in Transition.** To summarize the report's main conclusion, while civil society activism has kept central issues related to democratic reform on the front burner, civil society has inherent limitations. Not least among them is the lack of representativeness and accountability of many "vanguard" organizations, which make them easy for a recalcitrant government to criticize, manipulate, and ultimately to marginalize. In the Kenyan context, there are few avenues for civil society actors and organizations to participate in decision-making or to influence decision-makers, other than on an individual, *ad hoc* basis. Something more in the way of organized and systematic participation in, influence on, and oversight over the fora of public decision-making is essential in a democratic system, and therefore its construction is central to a democratic transition. Institutions of public decision-making need to be opened up to influence from, and oversight on the part of, the organized citizenry. It should be noted that this is **not** a disavowal of the civil society strategy the Mission has been pursuing, but a complement to it. Channeling effective civil society demands into the public sector is the essence of the strategy; assisting public sector institutions to be receptive to these is a necessary next stage.

Simply from the perspective of broad representativeness, it is likely that the **parliamentary arena** will be the necessary and feasible venue for pushing a reform agenda further — for dealing in an effective manner with corruption, executive abuse of power, and with rearguard efforts to limit avenues of participation and access to power. Assistance in strengthening parliament is a major potential focus for donor investment. An independent **judiciary** with strong powers of judicial review, and a viable **local government** system are also critical to democratic governance. At present, internal constituencies for these institutional arenas remain less organized than is the case with parliament. Signs of the effective commitment of strategic players internal to these institutions, which we will argue is critical, are fewer. These institutions will no doubt be central in subsequent phases of Kenya's interrelated transitions. The role of the donor community at present is the nurturance of such commitment on the part of strategic elites, both internal and external to the institutions.

**USAID's Strategy Review.** As Western democracies reassess bilateral aid policies and goals, Kenya's USAID mission has also been engaged in a review of its strategy in support of democratic governance. In 1998, USAID undertook a review of the civil society strategy, evaluating whether support to civil society organizations was contributing productively to a democratic transition, and whether or not the time was right for a return to support of public sector institutions to meet this "demand side" civil society strategy. The results of that review are summarized after a brief description of the methodology employed in the present strategic proposal formulation.

## II. METHODOLOGY

Team Composition. The team comprised Joel Barkan, of the University of Iowa, an expert on parliamentary processes and institutions (and former REDSO/Nairobi DG Adviser); Jesse McCorry, a consultant with significant experience in USAID-funded justice sector programs; Susan Jay, from USAID's Center for Democracy and Governance (Global Bureau); Dana Ott, from USAID's Africa Bureau; and Judith Geist, as team leader, with specific experience in decentralization and local government in Kenya and the wider region.

The three substantive institutional arenas were assigned to the three subject matter specialists, assisted by the USAID staffers with interest in the relevant areas — the legislature in the case of Susan Jay, and local government in the case of Dana Ott. The USAID staffers also provided valuable comparative information on USAID's programs and experiences in other relevant cases in these sectors, as well as raising the issues they knew would be of concern in their respective wings of USAID in Washington. They participated in relevant interviews and explored the management and financing implications of the strategies under consideration by the team.

Procedure. Team members reviewed recent strategy statements and the 1998 mid-term review and conducted interviews as follows:

- with key “informed observers” in each of the sectors, persons who were not central actors in the public sector arena themselves but who knew it intimately, either from past participation or as active and informed observers. The objective was to ensure information on the sector was current and to get a first-order impression of the perception of the political will and feasibility of forward movement in these institutional arenas.
- with other donors who are either invested in or interested in the particular institutional arena, most particularly DFID, the Bank, the Dutch/EU and GTZ, in the case of local government. The objective was to learn what goals, objectives, and specific activities were being pursued, and what constraints confronted these lead donors. Again, the perception of political commitment to a reform agenda was a key issue.
- with key actors in the public sector institutions, including the Clerk to Parliament, the Deputy Speaker and around 15 MPs from a cross-section of parties; the Chief Justice, Justice Richard Kwach, and several other members of the judiciary; and the technical assistance team in the Ministry of Local Government. The objective was to ascertain the commitment of the leadership of these institutions to a reform agenda, the nature of the agenda, and the participants' “vision” of forward movement on it.
- with a handful of selected civil society organization representatives, chosen mostly to address two issues that emerged during the team's visit: 1) the feasibility of shifting support to broader-based, more accountable, membership-controlled organizations with a clear and legitimate interest in representing citizen views in the public institutional arenas under review (examples: KAM, KNUT, the Kenya Architects' Association, ICJ), and 2) the possibility of increasing synergies in the portfolio by supporting such civil society organizations and **linkages** between these and the public sector. (A large number of NGO representatives had been interviewed in 1998, including some involved in local government issues.)

Documents. Documents collected and reviewed by the team included the Kwach Report (Report of the Committee on the Administration of Justice, 1998); the revised Standing Orders of the National Assembly, (revised November, 1997); several brief statements of work and status reports on the Kenya Local Government Reform Project in the Ministry of Local Authorities; and other donors' project background papers in relevant areas.

Benchmark Strategy. The terms of reference called for central emphasis on the development of benchmarks which USAID can use to determine the advisability of investment in public institutions in the near term, as well as in determining whether the institutions remain on track, in case such investments are made. Such benchmarks were to be based on the concepts of **independence from the executive and effectiveness**. The team interpreted these as the concrete demonstrations of political commitment to reform — that is, indication that there existed a minimal consensus on the need for reform of public sector institutions in a democratic direction, as the mid-term review had argued should be a key criterion in determining whether public sector institutions were good investments at this time. The team discovered early in its visit that there were a set of documents either in existence or in process which could serve as the core for these benchmarks, one for each institutional sector under review.

For *parliament*, a soon-to-be tabled Parliamentary Services Commission Bill was a central focus of attention on the part of virtually all the MPs we spoke with in Kenya, as well as the Speaker and the Deputy Speaker. It will set out an ambitious reform agenda critical to increasing the independence and effectiveness of parliament. It is discussed in the section on parliament, below, and in greater detail in the sector paper on parliament. The degree to which the GOK pursues the agenda set out in this Bill (eventually, Act) will serve as a strong signal of the commitment to increasing parliamentary effectiveness.

Similarly, for the *justice sector*, specifically the judiciary, the Kwach Report serves as an agenda for reform. It is somewhat limited in its scope, addressing only the problems of the judiciary and not the auxiliary institutions that assist or constrain it, such as the police and the AG's office. Nonetheless, it serves as an agenda for reform of the judicial sector, particularly — and explicitly — for reducing corruption and increasing effectiveness in the administration of justice. The Chief Justice has recently established a committee to produce an implementation plan for the recommendations contained in the Kwach Report. Once again, this should form the core of USAID's benchmark monitoring effort in this sector.

Finally, with respect to *local government*, the Ministry of Local Authorities is in the process of internally vetting a Cabinet paper that will turn the recommendations for reform contained in the unpublished Omamo Commission of Enquiry (into the operations of local government) into a reform agenda. Together with tentative increases in the financial base for local authority operations, this will provide a GOK-set agenda for reform.

The important point is that **this makes the benchmark setting and a monitoring effort a concrete exercise that uses the GOK's own perceptions of the need for reform as its foundation**. Rather like the Bank's methodology for setting the terms and conditions for structural adjustment support, the adoption of these documents as a central part of the benchmarks in effect puts USAID (or other donors who use the method) in the position of having negotiated an acceptable set of benchmarks with the Government, rather than constructing benchmarks that are wide of the mark in the view of local actors, and for which there may be a notable lack of political commitment.

There are additional benchmarks that should be considered. These are suggested in the sections on specific institutional investment potential. Some of them pinpoint "negative" benchmarks — that is, actions which should warn against investment in the sector. In general, though, to the degree that

benchmarks can be set on the basis of concrete commitments and agreements within Kenya's political institutional matrixes, they will be more convincing and legitimate than those conjured up from more generalized "indicators" efforts unrelated to the specific political and socio-economic dynamic animating the transitional processes described above.

### III. MID-TERM STRATEGY REVIEW AND RECENT KEY ISSUES

The mid-term review of Kenya's DG strategy recommended some refocusing of attention in the civil society strategy, plus consideration of support to one or two public sector institutions. The present effort to turn the results of that assessment into program-specific recommendations also turned up some issues that increasingly take a leading position in discussions about Kenya, both in Kenya and in Washington. These include:

- **corruption**, which was mentioned by the overwhelming majority of both Kenyans and the American diplomatic community as the number one problem confronting Kenya;
- **civil society as membership organizations**, rather than the present overwhelming focus on NGOs with personal, unaccountable leaderships and goals, and small, non-focused memberships;
- **linkages** between civil society organizations and the public sector institutions which constitute arenas for decision-making; "*effective demand for reform*," the central focus of USAID Kenya's DG SO, is critically dependent on such linkages; and
- **synergies in the portfolio**, which USAID has, for examples, pursued in tying its natural resources program to governance initiatives, and which can and must be increasingly incorporated in the governance portfolio.

Both Washington and US Mission personnel in Kenya have focused increasingly on corruption as an overarching issue that must be addressed as well. The team accordingly explored the relationship of its recommended strategy to corruption as a constraint on democratic governance. This section deals with this issue specifically, and with other key issues in strategy reformulation which the Mission may wish to consider.

**Corruption.** Corruption is a central fact of life in Kenya, having grown to massive proportions through the 1980s, although anecdotal evidence that a problem was emerging dates back even to the early 70s.

Historical context. As earlier assessments have pointed out consistently, "corruption" is not a simple, easily identified phenomenon anywhere in Africa. African ruling parties and coalitions are accurately characterized as neo-patrimonial. The combination of personal rulership, an age-old redistributive ethic, and the need to construct all-encompassing ethnic umbrellas, has fostered institutionalized corruption.

Redistribution and political coalition formation. Power means the authority of the leader to distribute economic benefits in a way that will maintain a large, viable political support base. Both individuals and, through them, ethnic groups are rewarded for support through access to business licenses, import quotas, land. In the process, economies become non-competitive, characterized by distorted incentives in the form of artificially low producer prices and artificially high import prices, artificial exchange rates, and increasing inflation as governments compete with the private sector for finance. As economies shrink, the tax base also shrinks, leaving these governments even more dependent on manipulating licenses, nationalizing property or coercing its sale to the state, and other distorting actions in order to accumulate the resources with which to pursue regime maintenance.

Structural adjustment. Structural adjustment programs meant to eliminate the distortions — through privatization of businesses that “compete” unfairly with private producers, reduction of bloated civil services, tightening up of government contracting procedures, establishment of limits on budget deficits — inevitably cut the patronage resources for a regime to the quick. They are meant to. They are not “swallowed whole”, however, by any regime that is truly dependent on a patronage strategy, as Kenya’s is. The result is the gravitation of those whose duties are to accumulate the patronage resources needed to keep the regime in power toward other avenues.

“Privatization”, one of the IFIs’ central tools for removing the rent-seeking opportunities that fuel corruption, has itself become a focus for corrupt practices, for example. Parastatals previously serving a patronage function have been deliberately subjected to a run down in assets and then sold off at throw-away prices — to former and future patronage recipients, who may then capitalize on windfalls by selling them on to wealthy buyers, or may hold them while trying to throw regulatory obstacles in the way of erstwhile competitors in the “liberalized” economy. This has happened in Uganda and may be in process in Kenya in some of the privatization deals under consideration.

Public sector contracting becomes another critical fall-back for a patronage-hungry regime. Kenya has experienced major scandals in the contracting of roads and other works projects; these are other avenues for the corrupt transfer of wealth, with its now-obvious impact on public infrastructure. Numerous other methods for garnering patronage resources in a pie shrinking because of the inroads of structural adjustment could no doubt be discerned and documented in Kenya, as in other African countries..

Toward a Strategy for Dealing with Corruption. The point is that “corruption” is not a by-product of regime formation and maintenance in Africa; it is central to the process; it is the post-industrial variant of the redistributive glue that holds together as-yet un-institutionalized African states and regimes. It also provides the coping mechanisms which get subsistence economies through the bad times — droughts, floods, wars, natural catastrophes. Corruption will not disappear under a post-Moi government, nor will any amount of Western donor rhetoric cause it to wither and die.

What is achievable with respect to corruption in Kenya, as in other African states, falls into two areas:

- A carefully crafted strategy to identify corruption and eliminate it, which prioritizes corruption by type and level of impact on the socio-economic structure.
- An institutional framework providing alternative and competing sources of power and patronage, which can themselves serve as a check on an unaccountable leadership.

Prioritization. To declare war on all types of corruption simultaneously is merely to set oneself up for failure and admit defeat in advance. Corruption is differentiable, and its impacts are equally varied. For example, the petty bribery of daily bureaucratic transactions may promote cynicism in the citizenry, but it generates no major economic distortions. Kickbacks on government construction contracts in Nairobi, on the other hand, are responsible for the mushrooming of many unfinished, or unoccupied, buildings at a cost of tens of millions of dollars, and the destruction of some of the large social security funds — the National Social Security Fund, for example. These do have a major impact on the economy.

In general, corruption that affects the macro-economy (such as the Goldenberg scandals, putting pressure on the availability of finance and affecting interest rates) has to be combated, especially since going after the “little fish” while the big fish get away only exacerbates the regime’s lack of credibility and

general citizen cynicism. “Corruption” that produces economic gains for communities (e.g., projects hijacked from the central budgets to specific communities) has to be considered less corrosive than that which simply goes to feed individuals’ off-shore bank accounts.

**Empowering Public Institutions Outside the Executive.** It cannot be stressed too forcefully that dealing with corruption requires non-executive institutional arenas characterized by substantial independence from the executive. This is not to say that corruption is only a function of the executive (although the nature of neo-patrimonial politics makes it an overwhelming preoccupation of the executive). A very corrupt legislature may ultimately be the target of a reformist executive — this has been the case in much of the lengthy history of the US reform movement (prominent in the first two or three decades of the century), for example. It is inevitable that the locus of corruption, wherever it is, will not clean itself up, though. Supporting alternative institutional foci that exercise oversight, and ultimately effective countervailing power, is the only way.

**Inadequacy of Executive Responses in Institutionalizing Anti-Corruption Action.** The main response of many governments to demands for a crackdown on corruption, including Kenya’s, is to appoint an anti-corruption authority. Kenya’s Anti-Corruption Authority, under the initial chairmanship of Harun Mwau, a maverick Nairobi-based political figure with a background in financial management and accounting, as well as police employment (and who opposed President Moi for the Presidency in 1992) demonstrates the fallacy of this approach. Mwau began to round up key individuals in the Treasury in his bid to deal with the octopus-like Goldenberg scandals. He was promptly removed, President Moi convened a tribunal to assess his “fitness” to continue in the position (likened to a kangaroo court by some) and the justice system ultimately quashed his legal efforts to regain his position. The Solicitor-General, Aaron Ringera — a sterling member of the Attorney General’s establishment — was appointed in his place. While no disrespect is meant to the former Solicitor-General personally — indeed, the team heard almost wholly positive comments about his integrity during our brief interviews — this is nonetheless likened to appointing the fox to guard the hen house.

What credibility can a Presidential appointee muster when the task is largely to uncover the corrupt practices that serve to fuel the patronage machine that keeps the President’s support base in place? None. This is *not* a viable method for combating corruption. Instead, the main mechanism for addressing corruption has to be the empowerment of public institutions outside the executive which can exercise oversight on the executive, and which can pit alternative networks of patronage against those dominating state resources.

**Importance of the Judiciary.** Where an independent judiciary and an active tradition of litigation exists, these can be turned on the issue of corruption. Kenya’s judiciary has been criticized for the lack of independence of many justices, and for interference from the executive branch. Yet it is the case that the efforts to bring the key players in the Goldenberg scandals to justice have been and continue to be fought by leading members of the legal fraternity, through the court system, despite clear signs of executive interference.

**Importance of Local Government.** Possibly the most powerful check on corruption practiced by a central government would be a radical shift in the distribution of power and authority to an empowered system of local governments. (This might merely result in a redistribution of corruption, of course, an argument which has been used both for and against decentralization over the years.) As the relevant section of this report will demonstrate, this is not on the cards for Kenya any time in the near future. Local government may be able to play a valuable role in pinpointing problems of corruption in the central organs of state, but will have to do so through a central forum.

Importance of Parliament. This leaves **parliament** as the remaining institutional arena in which corruption can be fought. Parliamentary oversight over the executive is a strong component of the Western notion of checks and balances, even in a parliamentary system, in which the separation between the executive and the legislature is less clear than in the American system. As the report will argue, the National Assembly in Kenya is increasingly poised to take on this role, with an incoming class of freshman parliamentarians on both sides of the political divide who are not part of the existing patronage networks, and who are therefore not beholden to them. Many signs that this parliament is serious about corruption have surfaced, including the creation of an Anti-Corruption Committee under the chairmanship of a leading opposition politician.

**Civil society organizations, linkage to the public sector, and “effective demand.”** Another key issue set relates to the present civil society strategy, the objective of which is the “creation of effective demand for political, legal and constitutional reform”. This strategy has borne fruit, as indicated in the previous assessment. It seemed to the team that did the mid-term review last year, however, that the concept of “effective demand” had been subordinated to the notion of stirring up civil society activity generally — creating general demand, preferably visible, and sometimes media-oriented, demand. The review recommended greater focus on *effective* demand and on focusing civil society support more strategically. The present report takes this recommendation a step further. It suggests ways to better focus the strategy, finding that in important institutional arenas such as local government, and even the justice sector, support for civil society organizations will have to continue to be the immediate approach. *This restatement of the US strategy, then, is not a repudiation of the “civil society strategy”, but a reformulation of and supplementation to it.*

“Effective Demand”. This notion is central to the strategy and to the measurement of its success. Effective demand is demand that induces a supply; that is, demand that has a decisive impact on policy formulation. USAID’s civil society strategy has created demand, and this demand has had an impact, but it is not, as constituted, a strategy for pursuing effective demand. Such a strategy would target strategic elites, both within public decision-making arenas (e.g. parliament, the judiciary) and outside them (in civil society organizations) and support their efforts to produce inputs into relevant policy decisions.

This should not be seen as a very narrow focus. Supporting parliamentary caucuses, bar associations, chambers of commerce, farmers unions, teachers unions, and the like are obvious candidates, but educating the citizenry on the meaning and mechanisms of the anticipated constitutional reform process — and thereby promoting an informed public, which can exercise more “effective demand” on the constitutional agreements, would certainly qualify. In general, however, the scarce resources that USAID controls need to be channeled to **strategic elites** which have mechanisms and strategies for articulating demand and introducing it into the national policy debate, rather than to fledgling, start-up NGOs which are constrained by lack of capacity and access.

Civil society organizations, similarly, need to be conceived more in terms of membership organizations that represent significant citizen aggregates and interests. While there are many NGOs which have done valuable work in Kenya in pursuit of democratic governance, some with USAID assistance (good examples being the Centre for Governance and Development, the Institute for Education and Democracy, the Citizens’ Coalition for Constitutional Change), these NGOs do not represent the full spectrum of civil society organizations. Further, problems with NGO accountability have, inevitably, increased as donors have fed the mushrooming NGO sector. These organizations are best at highlighting problems, at publicizing abuses or system failures. They have done so convincingly.

In order to demand further reforms effectively, however, organizations representing specific professional, economic and social interests — and which are comprised of individuals **including** political

leaders — need to be an increasing focus of support. These include most importantly the church; also professional associations — doctors, lawyers, teachers, accountants, architects, surveyors, engineers, nurses — and business associations, such as chambers of commerce, specific industry associations, including the main farmers' organizations. The traditional conception of civil society as the network of organizations linking the citizenry to the state is founded on this broad spectrum of membership organizations, of which the human rights oriented NGOs are a very small part. It is, of course, not the case that the bulk of USAID's assistance is directed toward such fledgling NGOs; indeed, USAID's program has supported the church, the Kenya Association of Manufacturers (KAM), the Kenya National Union of Teachers (KNUT), and several other of the membership-based civil society organizations that we recommend receive emphasis. These have been appropriate investments. The sheer flood of proposals that reach the Mission, coming from many new NGOs, puts pressure on for deflecting support away from these membership organizations, however.

Linkage to the public sector implies the creation of intersections or spaces for public/civil society dialogue. That in turn suggests attention to public institutions themselves, and the degree to which they can support such intersection. Much of the rest of the report deals with this latter question. The civil society strategy is premised upon the idea that demands for action, whether characterizable as "reform" or not, are effectively aggregated through these (membership-based) civil society organizations and **channeled into the public institutional fora of decision-making.**

A critical missing ingredient in the Mission's strategy to date has thus been the identification of such fora — the linkage mechanisms into public sector institutions. The report pinpoints the parliamentary committee system as one such linkage mechanism. Committees in local governments might be another such forum. The team found few other viable linkage mechanisms, however, and thus puts heavy stress on the parliamentary committee system, which provides a public forum for debate and decision on other public policy areas, including the justice sector and local government.

Synergies in the portfolio. Whatever strategy the Mission decides upon, it should look for ways to incorporate synergies into the portfolio. The emphasis on parliament, and particularly the committee system, as a key public sector forum that would provide the type of linkage described above for civil society vis-a-vis the State also addresses the synergy issue. Support for committees dealing with issues that are key to recipients of USAID civil society organization grants, and which can serve as public fora for the furthering of these interests, is an important type of synergy. As an example, the AIDS control and population programs which are a key part of USAID Kenya's overall strategy, and the civil society efforts supported under these, would be further assisted by a strong parliamentary committee on health, which could be a public forum for raising issues important to these efforts — issues on legislation regarding the rights of AIDS patients, the allocation of public health funding as between curative and preventive care, and on the ethics of AIDS vaccine tests. The Mission has provided some support for institution-building in the Ministry of Health; committee strengthening to assist in oversight of the Ministry of Health would complement this effort in an effective manner, while increasing the democratic content in the system.

Similarly, any support for the justice sector or for local government along the lines suggested below should build on the strengthening of the parliamentary committees — and oversight function — provided in support to the parliamentary committee system. For example, support to the Association of Local Government Authorities of Kenya (ALGAK) or to the Justices and Magistrates Association, as key civil society organizations in these sectors, should be focused as well on their capacity for making their case in the relevant parliamentary committee. In sum, we are not proposing the strengthening of the parliamentary committee system simply for itself, but as a way to increase the leverage points for public input into decision-making, and that includes increasing the leverage points for civil society organizations which have been supported to further USAID's other programmatic goals. As activities in each of these

sectoral arenas are considered, the ways in which they might productively intersect and reinforce each other should be considered.

**Summary** USAID Kenya's approach to supporting democratic governance needs to shift as the political situation in Kenya shifts. The present transitional situation in Kenya is fraught with both uncertainties and opportunities, which suggest a consideration of support to critical public sector institutional arenas — where certain levels of commitment on the part of strategic elites to democratic transitions can be discerned. The specific types of support recommended below are based on both a careful reading of recent benchmarks of political commitment, on the potential of the proposed support to contribute to the effort to combat corruption and economic decline, and on the need for the Mission to establish further synergies in the portfolio.

## IV. HISTORICAL CONTEXT

This report does not contain a lengthy historical overview. Several of those have been done recently enough that another one would serve little purpose. For detailed historical background and the assessment of its significance, the reader is referred to the relevant sections in the DG assessment of 1995, the mid-term review done in 1998, and the extended historical discussion in the parliamentary “short paper” accompanying this report. Here, only a few points pertinent to the present institutional focus and transitional situation are made.

1. **Grudging Political Liberalization.** The political liberalization of 1991 and the multi-party election of 1992 which followed it were grudging concessions by the current Kenyan governing regime, hard and unfairly fought, which had several important consequences:
  - they brought the economy closer to the point of economic ruination because of the inflationary spending the Government compelled to make on the election to ensure KANU would capture control of Parliament;
  - they triggered state-sponsored violence in the form of “ethnic clashes”, really ethnic cleansing, which were also engineered to guarantee control of the maximum possible number of threatened seats in “KANU zones”;
  - they nonetheless led to a KANU parliamentary majority of only 12 seats, which was then augmented by the President’s prerogative of appointing 12 members, who were (needless to say) staunch party supporters.

In the process of harassing opposition candidates during the campaign, the Government pushed too hard in the harsh spotlight of international attention, triggering a backlash from a core of enraged Kenyans, many of them civil society leaders and most particularly the establishment churches, who were opposed to this culmination of a fifteen-year slide toward authoritarianism and brutality. **The campaign thus, perversely, fomented an inexorable move toward greater civil liberties, including freer speech and association, which has continued and increased.**

2. **GOK/KANU Efforts to Neutralize Parliament.** The KANU government, subsequent to the 1992 election, easily obstructed the disunited opposition efforts to move any agenda through parliament, parliament continuing to be marginalized as an arena of decision-making. The regime mounted an aggressive effort to coopt opposition members, harass them, engineer by-elections by any means possible, in order to increase the parliamentary majority to something more comfortable. **Despite these efforts, the opposition lost only 12 of 29 by-elections — that is, less than half — and maintained a credible presence in the Assembly.**
3. **Civil Society Ferment.** Because of the apparent emasculation of parliament and the inability of opposition-elected MPs to make any impact, civil society organizations began to “move to the left” and to pursue a parallel agenda of mobilization of their constituencies in support of reform, ranging from the production of a “model” constitution (by the Citizens’ Coalition for Constitutional Change) to threats to boycott the 1997 elections and to hold a national constitutional convention.

The KANU government yielded under the unusually united pressure and organized a “compromise” response, consisting of a cross-parties agreement (marshaled under the auspices of

the Inter-Parties Parliamentary Group, IPPG, a loose grouping of key KANU and opposition MPs) for the bare minimum of legal reforms that would ensure opposition party participation in the 1997 election. One outcome of this process was a growing estrangement of civil society from the political class, the parliamentarians; the latter were perceived as opportunistic and vulnerable to manipulation by the former.

Despite the manipulateness of the IPPG process, it both: 1) confirmed the viability of concerted civil society action/international community pressure in bringing the GOK to the table (in the process validating USAID's strategy), and 2) provided a graphic demonstration that negotiation and compromise were possible even in this highly charged, polarized polity.

4. **The IPPG Reforms.** The IPPG process produced small but important changes in legislation relevant to the electoral process, and agreements on areas outside the purview of legislation, dealing with the broader electoral environment. These included:

- Presidential nominees to the Assembly were henceforth to be selected in proportion to the strength of the parties' elected representatives in the Assembly, and were to be proposed by the parties and confirmed by the President. **This prevents the President from packing the Assembly with his own party members.**
- Councilors nominated by the Minister for Local Authorities to the local councils also have to be selected in proportion to the party distribution of elected councilors, **preventing the domination of a large number of local councils by a "minority" ruling party and their subsequent use to make local political capital which is then turned into national gains through adroit use of patronage networks.**
- Standing Orders of Parliament were altered to require that the hitherto-dormant sectoral committees become a necessary step in the legislative process, with all bills being sent to committees (composed of KANU backbenchers and opposition party MPs in proportion to their distribution in the Assembly) after the first reading, **introducing a new arena for both political and civil society input into and oversight of the legislative process.**
- A Constitutional Reform Bill was tabled — though not formally enacted — setting out a process for undertaking constitutional reform after the election.

Several other agreements were reached, including one to provide equitable access to the media during the campaign (not honored); an agreement to "stand down" the Provincial Administration from partisan support for KANU (variably acceded to in areas of overwhelming opposition strength, ignored in KANU's areas of strength and the crucial swing areas); and a reversion of the control of the Public Accounts Committee (PAC) and the Public Investments Committee (PIC) to control by the parliamentary majority, a change which represented a step backwards in the view of many. Despite the meager output of the IPPG process, **it involved a "first" in terms of significant numbers of KANU and opposition party members talking together and negotiating a compromise to forestall a complete political breakdown.**

The IPPG process is rejected by cynics and purists with the criticism that the motivations of the Government in its participation were not genuine, but wholly manipulative. This is no doubt true. All political compromise is born from the need to try to keep the game going, and maneuver the

situation to one's advantage, rather than to have the game turn into a war. This is what the IPPG was meant to do, and did.

5. **The 1997 Election.** The outcomes of the 1997 election, which was characterized by administrative incompetence and significant vote-buying, included:

- further economic deprecations to acquire the wherewithal to influence the vote in KANU's favor, but with less of an impact on the macro-economy than in 1992
- renewal of the "ethnic clashes/cleansing" strategy on a scaled-down basis to retain or increase KANU's seats in the coast, Nakuru and Kisii
- an ethnicization of the opposition parties as parties fragmented into their ethnic components
- **nonetheless, KANU managed only a 4-seat majority, with 107 elected MPs to the combined opposition's 103 (bearing in mind that the opposition is in no sense united). (KANU has recaptured three seats in by-elections as of this writing, increasing the margin to 110-100.)**
- the removal of the Chairman of the Electoral Commission two and a half weeks prior to the election, and his appointment as Chief Justice — positioning him (as something of a personal vassal of Moi's) to deal with election petitions in a manner favorable to KANU, when the inevitable campaign to unseat opposition MPs began
- an "informal" coalition between KANU and the National Democratic Party (NDP), and less clearly FORD-Kenya, the parties of the two largest political communities of western Kenya, with whom Moi had had functioning, informal working coalitions during the early and mid-80s, albeit based on personal clientage rather than party machineries.

Clearly, despite the marginalization of parliament during the late 80s and from 1992-97, KANU and Moi perceive parliament, and control over it, as paramount in their political strategy.

6. **Constitutional Reform.** A major issue in the election campaign was the demand for constitutional reform, to which Moi was forced to accede, while avowing that constitutional reform was not necessary. A Bill setting out a Constitutional Reform Commission was ultimately substantially amended and enacted, in June, 1998, after a contentious negotiating process involving most of the major stakeholders, including parties, NGO leaderships, and civil society organizations — most notably the church, which has attempted to chart an independent course.

The constitutional reform process has currently stalled over the issue of the composition of a 25-person commission to run it, with KANU and the opposition parties trading claims of each others' responsibility for the impasse. KANU's aggressive rejection of an earlier-agreed formula for the distribution of party seats, followed by a slight concession (agreement to scale back its demands by one seat) have brought out multiple cracks in the opposition and its strategy. **The Government's struggle to maintain parliamentary control are compounded by the need to maintain control over the form and direction of the constitutional reform process (if any).**

7. **Presidential Succession.** Presidential succession is legally mandated with the two-term limit established by a 1992 amendment to Kenya's current constitution. The presidential struggle is underway. **The President is a lame duck, the VP is a "place holder", and succession struggle is driving further ethnicisation of Kenyan politics.**
8. **Ruling Coalition Fragmentation.** Partly because of the full-scale emergence of the presidential succession struggle, the coalition that provides bedrock support for the regime is crumbling and alternatives emerging, as attested by:
  - KANU A/KANU B struggles; a seesawing of primacy by moderates vs. hardliners. With the abrupt attempt to demote Finance Minister Nyachae and his subsequent resignation, the hardliners have presently regained the ascendancy;
  - however, the northern core is fragmenting, with violent, ostensibly "cattle rustling" raids among and between the Pokot, Turkana, Tugen and Markawet casting long shadows on the Kalenjin periphery, while increasingly fractious debates in the county councils and party branches animate the Nandi, Keiyo, Marakwet and Kipsigis Kalenjin core;
  - pastoralist coalition partners are increasingly vocal about and critical of the lack of Government attention to their problems, especially to the serious and deteriorating security problems on the borders with Somalia and Ethiopia, which have seen incursions that resulted in many deaths; the Pastoralist Parliamentary Group is particularly active and vocal in staking out its position and attempting to increase its leverage with the regime by establishing some independence;
  - other ethnic groups are talking across party lines in parliamentary caucuses, (frequently about strategy for positioning themselves advantageously in the presidential succession struggle) including the Kamba, the Luhya, and the Kisii, all critical swing areas which have been the target of KANU's efforts to coopt MPs.

Regime maintenance tactics in the past have always involved "side payments" to the constituent groups of the core political coalition, in the form of both political and economic patronage. With the shrinking of available economic patronage, Kenya is entering upon a fluid and dangerous period; political patronage resources have apparently also failed to stem the erosion of the support base.

9. **Macro-economic Issues.** The present negative macro-economic situation, a function of political patronage and the necessary side payments — corruption — has contributed to the regime's unfavorable position. The Central Bank used fiscal policy (high interest rates) to mop up the excess liquidity caused by the flood of money in the 1992 election. The Government then capitalized on the attendant embarrassment of riches (which of course were accompanied by a squeeze of private sector investment) to finance government's recurrent operations through continued public borrowing. The regime thereby maneuvered itself into a corner from which it had only just begun to extract itself, by dramatic improvement in income tax administration/collection combined with an austerity program announced by Finance Minister Nyachae — when Nyachae's removal was engineered by those whose interests (that is, patronage bases) were about to be decimated.

There are conflicting indications of the attitude of the IFIs to these abrupt advances and reversals, but the Bank has expressed its commitment to seeing an improvement in governance before considering further loans, while the IMF has delayed the meeting scheduled to be held in April. Currently, the dramatic improvement in financial position, especially the decrease of the short term interest rates to a reasonable 9+%, from the 27% characterizing the era of the revolving T-bill floats, is widely suspected to be premised on a temporary halt by Government in payment of bills, payment which will be resumed in the post-budget period with the attendant upward pressure on short term interest rates once again.

**Increasingly, it is becoming clear that economic governance issues and political governance issues cannot be divorced; that economic improvements require political reforms that combat the pernicious effects of neo-patrimonialism by increasing institutional pluralism, as well as effective oversight of the executive.**

**Summary.** The **bottom line** is that Kenya being pushed inexorably in the direction of a political realignment which holds out the **potential** for democratic advance. The regime's need for a palatable succession after Moi has fueled increasingly erratic actions on its part, such as the year-long hiatus in Saitoti's reappointment as VP, and equally erratic reactions from alternative leaders and political forces. The patronage strategy that has served the present regime is failing and the constituent parts of the ruling coalition — as well as of the increasingly fractious opposition — have **less and less** to lose by taking novel actions. The visible crumbling of physical infrastructure and increasing pressure on middle class incomes, conversely, have brought home to a significant portion of the population, especially the urban population, just **how much** they have to lose, and have already lost. Unfortunately, the tone of the ensuing discussions is increasingly ethnicized, but this may be inevitable. Kenya's friends should be prepared to assist with the opportunities that present themselves at a time of such far-reaching political transition. The team's suggestions about how to do so follow.

## V. FINDINGS AND RECOMMENDATIONS: POTENTIAL FOR INSTITUTIONAL SUPPORT

The three institutional arenas under review present widely differing potential for investment in the near and medium term, in the team's view. For details in each of these, see the accompanying sector reports, which set out in greater detail the historical context, current opportunities and constraints, benchmarks of independence and effectiveness, and suggestions about phasing of possible activities in the sector.

### PARLIAMENT

The team found considerable ferment and signs of commitment on the part of a critical mass of parliamentarians for action to strengthen parliament. The agenda and strategy for parliamentary strengthening was a central topic of discussion among parliamentarians during our visit. *Here, the objective is clearly to determine the feasible and appropriate role of a donor in supporting this critical mass of reformers.*

#### Context for Parliamentary Support

While the Seventh Parliament, elected in 1992, marked the return to a multiparty legislature, the ensuing five year term of the Seventh Parliament represented an exercise in frustration, as the ruling (majority) party was able to dominate all parliamentary business and block action on the reformist agenda that many in the opposition parties supported, until the final run-up to the 1997 election.

The Eighth Parliament, elected in December, 1997 marked the first significant movement towards an independent and effective legislature. In the past, KANU's razor-thin, four seat majority would have been extended to a comfortable 16 through adroit use of the Presidential power to nominate 12 Members. Since this was no longer possible under the terms of the IPPG agreement, the ruling party was forced to seek accommodation with one or more opposition parties, joining into an informal relationship of support with the National Democratic Party (and, less clearly, FORD-Kenya), a tacit concession that KANU could no longer freeze out the opposition.

Equally significant was the fact that of the 124 KANU incumbents in the previous parliament, less than half gained the party's nomination for the 1997 elections. The composition of the KANU delegation in the Eighth Parliament is thus very different from that of the Seventh. The new members of the KANU delegation are younger, better educated, and above all, more independent of the President and the inner core of the party than their predecessors. They are also more predisposed to reach out to their counterparts in the opposition, with the example of the IPPG process fresh in their minds. The result is a more cooperative atmosphere in the House.

A final but critical variable that explains the new mood in the National Assembly is the approaching end of the Moi presidency and the beginning of the politics of succession. Moi is consequently a "lame duck," a situation which intensifies the tendency for politicians from all points on the political spectrum to reexamine their options in terms of political affiliation and attempt both to hedge their bets and to position themselves opportunely for the ultimate resolution of the succession. The new mood in the Assembly and the prospects for its revitalization are thus the result of the changing of political generations **within and beyond the ruling party** as much as they are the result of the continued strength of the opposition.

## Benchmarks of Current Parliamentary Independence

A critical portion of our analysis must be directed at assessing the significance of the signs of this new parliamentary spirit of independence. Is it sustainable? Is it sufficient to warrant commitment of resources in support of parliamentary strengthening? The following evidence is offered in support of the proposition that a critical mass of support for parliamentary strengthening exists *within* the Assembly at present.

- A significant number of MPs from the ruling party and the opposition now work together on legislative business, and do so with increasing regularity. While it is hard to estimate their precise numbers, roughly 30-35 KANU MPs, together with a slightly larger number from the opposition, now constitute a core of 55 to 75 reformers. The size of this group varies from day to day and from issue to issue, but now constitutes more than a third of the Assembly.
- A clear majority of the leadership of the Assembly, including the Speaker (a KANU MP) and Deputy Speaker, are supporting proposed legislation to establish a Parliamentary Services Commission. Because an increasing proportion of MPs take their work seriously but are frustrated by the constraints under which they labor, the reformers *from all parties* have proposed an innovative package of legislation to establish a Parliamentary Services Commission. The proposed bill would eliminate or reduce the constraints which inhibit parliamentary effectiveness, described further below. *The purpose of this proposed legislation is to de-link the National Assembly from the Office of the President, which currently exercises budgetary and administrative control over it, and to establish the National Assembly as an independent branch of government.*
- Several *key KANU MPs* are charting an independent course on parliamentary independence and strengthening, including the Francis ole Kaparo, the Speaker of the House and Sammy Leshore, the KANU chief whip. These political leaders have obviously concluded that their political futures and their own self-interest lie with a revitalized legislature where cooperation with the opposition, rather than confrontation, is the norm.
- Workshops held by the Centre for Governance and Development for MPs, including the well-publicized seminar on the state of the economy in May, 1998 in Mombasa, have been attended by large numbers of MPs from both sides of the floor, including some ministers and assistant ministers (who are, of course, all KANU MPs, who have defied attempts by KANU's leadership to prevent their attendance.) Control over KANU backbenchers seems to have greatly diminished, although the party will clearly make strenuous efforts to re-establish it.
- Passage of legislation to establish an Anti-Corruption Committee to delve into corrupt practices within the executive branch occurred on the basis of a concerted effort by the opposition parties and over the objections of the KANU front-bench, but with the support of some KANU backbenchers. This is an example of how KANU's narrow majority in the National Assembly can no longer guarantee the party's or the President's dominance over the proceedings in the House — explaining also the need to maintain KANU's "informal" coalition with the NDP, and the increasing tempo of efforts to force vulnerable opposition MPs to cross the floor, and to hamstring recalcitrant KANU backbenchers.

**Summary.** Independence has increased significantly since the period of complete parliamentary marginalization of the late 70s and 80s, and the frustrations of the initial multi-party era from 1992-1997.

The political economy of the Eighth Parliament, compounded by the fact that it confronts the ethnically and politically charged issue of presidential succession, increases the tendency to chart out independent courses of action — or at least to keep all options as open as possible. The drive to empower the Assembly and eliminate its subordination to the executive is one of the methods for doing so.

The Parliamentary Services Commission Bill will serve as a litmus test for the strength of the reforming core, for the strength of the KANU reaction, and thus for the viability of the Assembly's efforts to establish sufficient independence to exercise effective oversight over the Executive. Benchmarks of increasing and desirable independence for Kenya's Assembly are discussed below and in the accompanying sector paper.

### **Benchmarks of Current Parliamentary Effectiveness**

The issue of effectiveness is complex. Measures of effectiveness need to be linked to the appropriate role of the legislature, and this varies between presidential, parliamentary, and mixed parliamentary/presidential political systems. For the US system, for example, measures of legislative effectiveness would include the amount of legislation drafted in a given session, the amount passed, and the ratio of bills drafted to bills enacted.

For Kenya's parliamentary system, legislative drafting is a function of the executive, with ministries drafting legislation based on Cabinet papers and submitting it to the parliamentary scrutiny of backbenchers and MPs from the opposition. Effectiveness in this context must be measured in terms of the substantive consideration, amendment, and on occasion rejection of legislation tabled. In addition, parliamentary scrutiny over and amendment of the budget; regular reports from the traditional "oversight" committees, the Public Accounts and Public Investments Committees (PIC and PAC), and action taken on their output; and a feasible procedure for "private members' bills", are further indicators of effectiveness.

**Private Member's Bills.** Taking these in reverse order, the feasibility of private member's bills is questionable. Historically, only one private member's bill has succeeded in the National Assembly, and that was in 1969. A more recent effort, moved by an opposition politician and supported by the hardline KANU faction, which would have established a post-presidential retirement package, neither succeeded nor "failed" but is in limbo, with a highly dubious prognosis because of the lack of understanding of Kenyans generally about its purpose. While a procedure for tabling private member's bills and moving them through the Assembly must be available, and requires that Members have access to expert legal drafters, this is in no way a substitute for an effective mainstream legislative process.

**PIC and PAC.** There are continuing efforts by the members of the Public Accounts Committee (PAC) and the Public Investment Committee (PIC) to scrutinize the operations of the executive. The Standing Orders of the National Assembly previously required that the chairship of these two oversight committees be held by MPs from the opposition party. However, the Standing Orders were changed at the end of the Seventh Parliament as part of the IPPG package, and now permit the two committees to be chaired by KANU members. Notwithstanding this change in the rules, only one of the two committees is now chaired by KANU, and he is a reformer. Moreover, both committees appear to be as diligent or more diligent than their predecessors during the Seventh Parliament in monitoring the executive. Yet both PIC and PAC suffer from a fundamental weakness in that they have no power to force the executive to implement their recommendations to prevent the repetition of malpractices that have already occurred. The two committees are consequently jokingly referred to as "post-mortem" committees; that is to say, committees that consider governmental operations *after* the fact rather than committees that set government policy or practice.

Parliamentary Sectoral Committees. Recently a major increase in the potential for parliamentary effectiveness was engineered, through the IPPG-negotiated effort to breathe life into the provision in the Standing Orders of the Assembly for the establishment and operation of eight “departmental committees” to review legislation presented to the Assembly by the more than 20 ministries of the Government of Kenya.

Although the Standing Orders have long permitted the formation of departmental committees, such committees were not established prior to the convening of the Eighth Parliament. Only three types of parliamentary committees have functioned regularly since Kenya’s independence:

- PIC and PAC, the traditional oversight committees of government expenditures.
- select committees that have been established occasionally by the House to examine a single issue, and which have then gone out of existence after completing their work.
- The so-called “housekeeping” committees such as the Speaker’s Committee, Business Committee, the Library Committee, and the Catering Committee, whose purposes are to provide logistical services within the Assembly and reinforce the Government’s control over the legislative schedule.

The establishment of eight departmental committees at the beginning of the Eighth Parliament is potentially a major step towards enhancing the traditional legislative role of MPs and increasing their ability to scrutinize governmental operations.

*Committee Performance to Date.* The record of the departmental committees has been mixed but they provide a glimpse of what the House could become once the technical capacity of these committees is enhanced. Of the eight committees, five have been active to varying degrees: Agriculture, Finance, Health, Justice, and the committee on Security. Given both the importance of agriculture for the Kenyan economy and recent crises in selected sub-sectors such as coffee, sugar and rice, it is not surprising that the members of the Agriculture Committee have been motivated to examine government policies in this area. The committee has also been pressured by the farmers of selected crops to look into their situation. This may be the first time economic interest groups in Kenya have contacted a specialized legislative committee about their concerns. ***Such dialogues between interests within civil society and their counterpart committee within the legislative branch have historically been one basis of strong legislatures in advanced democracies.***

Committees have the power (under the Powers and Privileges Act) to subpoena witnesses, including members of the Government, and the active committees have not hesitated to use these powers. The Finance Committee, for example, met 13 times to consider the Finance bill of 1998 during which the Minister of Finance, the permanent secretary for the ministry and other officials appeared before the committee. When debating the proposed Intelligence Act, the Security Committee called the Minister of Home Affairs, the head of the Criminal Investigation Department, and the head of the GSU. The Committee also amended the bill before returning it to the House for its second reading. The Justice and Constitutional Affairs Committee similarly debated and amended the proposed Community Services Act, a bill to relieve overcrowding in Kenya’s prisons through the early release of minor offenders. The Health and Social Services Committee likewise queried the Minister of Health prior to amending the proposed National Hospital Insurance Act. Clearly, the sectoral committees are a key to increasing parliamentary effectiveness.

## Constraints on Parliamentary Effectiveness

For a donor such as USAID, it is important to understand the constraints on parliamentary effectiveness, and to determine the extent to which they are political (and thus not susceptible to donor efforts at assistance) and to what extent a function of resource constraints. As one would expect, the constraints appear to be a mixture of both. Resource scarcities, including shortages of information, office space, meeting rooms for the committees, and budgetary support for committee operations, are compounded by the incentive structure of membership in Kenya's Assembly. This is not conducive to secure, full-time legislative attention for any but the members of Government themselves, i.e. ministers and assistant ministers. That is, MPs who are not members of the Government are poorly paid, earning about a third the amount that their counterparts in Uganda and Tanzania earn. They thus spend considerable amounts of time on outside business interests or simply searching for funds from patrons and supporters. *Until this problem is solved, the likelihood that most MPs will be able to afford spending adequate time on committee work is remote.*

Nonetheless, the record of the active sectoral committees to date suggests that *none* of these constraints presents insuperable obstacles. While the incentive structure is a critical issue — and not one addressable by donors — the adamant and vocal commitment of a critical mass of parliamentarians, including the Assembly leadership, to a resolution of these issues through the passage of the Parliamentary Services Bill (Act) indicates that Kenyan political will is likely to be sufficient to the task. **If** this bill passes (and its passage, both in terms of content and “process”, is a critical benchmark the US mission should monitor in gauging the viability of parliamentary support at this time), the remaining critical constraints are budgetary and can be addressed by donor support.

## An Agenda for Parliamentary Support

**If** the Assembly follows through on passage of the PSC — and **if** it is felt to adequately address the incentive issues, both for MPs and for the Assembly's staff, as well as to satisfactorily de-link parliament from the executive — an initial program of assistance to strengthen the Kenya National Assembly should center on the following activities.

Provide specialized training for selected groups of MPs. MPs are in need of specialized training in the following areas: (1) parliamentary procedure, (2) the budgetary process, (3) macro-economic reform, “structural adjustment,” the role of the IMF and World Bank, (4) the structure of the Kenyan economy and implications for macro-economic and fiscal policy, (5) Kenya government policy in light of world practice in education, health, agriculture, housing, the judiciary, revenue generation, local government. *Local resources for providing such training are abundant.*

Provide specialized training for parliamentary staff including, but not limited to: (1) 1-2 librarians, (2) an information technology specialist, (3) research specialists for the departmental committees, (4) legal affairs. Assistance should be provided to train librarians and an information technology specialist for the purpose of strengthening the operations of the existing library with a view towards its ultimate transformation into a larger parliamentary research resource center, one that would assist both individual MPs and committees in their legislative work. *Both USIS and Fulbright vehicles for the provision of such technical assistance should be explored, similar to the Fulbright provision of a librarian/training specialist to the Ghanaian Court system.*

Limited material support to support the Assembly's library and initial efforts to establish a research resource center for MPs, i.e. books, especially reference books for the library, a very small number (1-3) number of PCs with Internet capability (software, modem, arrangement with Internet service

provider). *The Leland Initiative may be an available vehicle for such assistance by the time the Mission is ready to make a decision; Library of Congress support should also be explored.*

Support for the establishment of a Parliamentary Research Resource Centre. The National Assembly must enhance its technical capacity if legislation is to be meaningful over the long term. A parliamentary research/resource center within the House is critical, but should be built from the perceived, immediate research needs of the committee members, based on appropriate technology and assistance with analysis, not on a “high tech” facility featuring computerization. The center envisioned by the Assembly leadership will consist of appropriate staff to:

- provide background briefings on the likely impact of legislation, analyzing demographic trends, economic reports, and the social implications of proposed legislation
- assist MPs in obtaining answers to inquiries on matters of public policy, including realistic costings and alternative policy options
- provide information on past and present legislation and legislative outcomes
- enable members of the Assembly to compare their efforts with the efforts of other legislatures in Africa by developing the capacity to access legislation from neighboring countries on issues before the House.

The establishment of a parliamentary research support center would take a minimum of three years, probably five. *Regional examples, such as that in Uganda (which USAID has also supported) should be examined for a cost-effective, action-oriented model of a research/resource center; both academic and research institute resources in Kenya can provide input, both in terms of staff recruitment and training.*

Expose Kenyan MPs and staff to “best practices” in the region. The Uganda National Assembly and the Tanzania National Assembly both provide better terms of service for their members than does the Kenyan parliament at present. The Uganda National Assembly has also been more effective at investigating corrupt practices and forcing the removal of corrupt senior government officials. A very effective forum organized by the World Bank and attended by a small number of MPs and staff from twelve Anglophone African countries was held in Kampala in 1998. USAID Kenya might sponsor regional or intra-Africa study tours for selected groups of Kenya MPs to observe legislative practices elsewhere on the continent. Or USAID Kenya could support an annual or semi-annual regional forum for MPs from all three East African legislatures. Training might also be provided on a regional basis. *Support for the regional strengthening of legislatures might also be financed and implemented under the GHAI.*

These activities clearly imply varying time horizons. They are listed in a rough order of initiation, i.e. the first steps that the US mission should consider are training sessions for parliamentary committee members; secondly, the initiation of support and training for committee research staffs, as a prelude to the longer-term assistance to establishment of a fully-fledged parliamentary research/resource center; and ultimately, a regional initiative involving the three east African legislatures.

## *Phase I: Training Sessions for Committee Members*

Training sessions for committee members, using the abundant local resources (for example, the CGD capacity for mounting parliamentary workshops) could be justified prior to successful accomplishment of the positive benchmarks suggested below, but should **not** be undertaken if there are clear signs of “backsliding” in the Assembly, such as prorogation of the house or interference with the committee process. Training sessions could be organized within a few months, and could be implemented under the auspices of an NGO such as CGD, which has done five sessions in the last 18 months, or more appropriately through a “public/private” partnership involving an appropriate housekeeping committee of the Assembly and an acceptable NGO. *The US Mission should undertake a training session for a carefully selected committee within six months, ideally before the end of US FY98/99.*

The Mission should use the outcome of this effort both as a benchmark, assessing the degree to which cross-party participation is maintained, and as baseline information for the planning of successive training efforts. Benchmarks to monitor during the implementation of such a preparatory activity include:

- Continued cooperation among the existing group of reformers, continuation of the type of workshops pursued since May 1998, continuation of committee work by the eight departmental committees (as well as the PAC and the PIC) and an increase in the frequency of contact and dialogue between civil society and parliamentary committees.
- An increase in the number of MPs participating in the aforementioned activities; an increase in the number of MPs who can be classified as “reformers” or sympathetic to the reformers to 40% of the House (between 90 and 110 MPs.)
- Passage of a constitutional amendment and related legislation to establish a Parliamentary Service Commission. This is probably the most important single benchmark that the National Assembly has become and will continue to become an independent political institution.
- Continued and increased activity on the part of the eight departmental committees to review government policy and craft legislation.
- Agreement by the Speaker and the Clerk of the National Assembly to seek donor assistance to strengthen the Assembly, including the prioritization of what types of assistance are most urgently required by the Assembly in the near term.
- Completion of the tendering process and the signing of contracts for the remodeling of Constitution Hall and Continental House to provide adequate offices, meeting rooms and other facilities for all MPs and parliamentary staff.

## *Phase II: Assisting the Parliamentary Staff Development Effort*

Benchmarks for any effort beyond an initial committee workshop or two should include both the **fate of the Parliamentary Services Bill** and the **follow-through of the GOK on budgetary commitments to provide office space** for parliamentarians and committees.

If these appear to be satisfactorily underway, the US mission should undertake a second phase, assistance to the parliamentary staff development effort, as described above, and the provision of Internet

connectivity and some library materials, (as preparatory action to a third phase, assistance with a parliamentary resource center). *This second phase should be implemented from an appropriate time within FY 99/00 and FY 01/02, which coincides with the final two years of the current Kenyan government.*

Benchmarks to monitor during such an effort, in order to determine whether to continue with it, and/or to proceed to the next phase, include:

- Departmental committees meet on a regular basis, and all legislation tabled before the House is considered by these committees. Departmental committees exercise the power to amend legislation.
- The number of MPs who can be classified as “regular” or “active” participants in the independent activities of the House increases to between 60-67% of the Assembly (between 130 and 150 MPs).
- Completion of the remodeling of Constitution Hall and Continental House, and the utilization of these buildings by MPs and parliamentary staff.
- Following the passage of the Parliamentary Service Commission Act, the establishment of a new and independent scheme of service for MPs. Such a scheme would be funded by a separate vote of the Treasury and provide for a substantial increase in salaries and expenses for MPs, both to enable them to carry out their official duties on a full-time basis and to reduce their vulnerability to those who would seek to buy their services by providing for their expenses.
- Provision of funding, following the passage of the Parliamentary Service Commission Act, to support the establishment of a new and independent scheme of service for parliamentary staff. Such a scheme would provide for a substantial increase in the salaries for staff with scarce technical skills (e.g. librarians, researchers, specialists in information technology) and thus enable the National Assembly to retain the services of such staff over the long term. The strengthening of the committee system and the establishment of a sustainable research resource center for MPs will not be possible until the issue of staff retention is resolved.

### ***Phase III: Full-Scale Support for a Parliamentary Research Service***

As a reasonable level of these benchmarks are met, the US Mission, together with other donors, (possibly in a consortium arrangement, which might be feasible and justified at that point by demonstrated progress in establishing an effective parliamentary oversight capacity) should undertake a third phase in support of parliamentary strengthening, involving full-scale support for a parliamentary research service, as described above. This facility would be in some senses similar to the US Congressional Research Service but tailored to east African realities in terms of scale, cost, and technology. *The third phase should be implemented from 2002 to 2005, and should include further training sessions and the preparatory work on developing a regional legislative center that would support harmonization of legislation, legislative procedures and budgets in the East African Cooperation*

Benchmarks to monitor during this post-Moi era phase in order to decide whether to continue funding these activities or to consider other or additional activities, include the following.

- The National Assembly gains a measure of control over the budgetary process by gaining the power to amend authorization bills for the annual budget.
- The National Assembly increases its statutory authority to enforce the implementation of the recommendations of the PAC and the PIC.
- The National Assembly enhances the statutory authority of the Office of the Auditor General so that the Office may prosecute cases of malpractice uncovered in its annual review of governmental operations.
- The strengthening of the eight departmental committees: all committees function on a regular basis, nearly all committee members attend most meetings, and the skill level of each committee is raised in respect to the ability of committee members to understand the issues and legislation before them.
- The National Assembly censures members of the government and senior officials within the civil service found guilty of corruption and other malpractice. Government officials found guilty of corruption are forced to resign.
- The establishment of strong links between civil society organizations, particularly economic interest groups and other citizens organizations *not* concerned with issues of human rights and democratization, and the National Assembly, via the committee system.

### Considerations for Implementing an Effective Program

It is important that the implementation of any program to strengthen the National Assembly be both nuanced and targeted. The Mission should therefore consider the following:

- Effective assistance to the National Assembly must be calibrated to match the absorptive capacity of the House. The rule of thumb should be to start small and scale up, as demand from the Assembly warrants. Support for a parliamentary research resource center must be contingent on the ability of the Assembly to hire and retain an appropriate number of additional staff, for example. Support for building staff capability should precede any effort to provide commodities or computerization; support for parliamentarian specialized training should be a first effort, and should be monitored closely to determine absorptive capacity.
- Any assistance provided via a contractor should be tailored to the specific needs of the National Assembly; a **“one size fits all” approach must be avoided**. Contractors should be experienced in providing appropriate, locally-relevant assistance, and must be able to provide personnel familiar with legislatures in an African context, with recent Kenyan political history, and be willing to work closely with the USAID D/G advisor or other Mission-based specialist who can provide the context-specific, continuous monitoring that this effort would entail.
- Assistance to the Assembly should be negotiated and implemented through a joint agreement with the Offices of the Speaker and the Clerk, and monitored by an appropriate committee, such as a modified Speaker’s committee that would consist of both MPs and representatives of the Office of the Clerk sitting as ex-officio members. *Given current tensions and suspicions on the part of most*

*Mps towards the Clerk, any attempt to implement a program of assistance via the Office of the Clerk alone will be a non-starter.*

- To provide both specialized training and the strengthening of the parliamentary library, USAID-Kenya should consider asking USIS to be the implementing mechanism for such support. USIS currently implements programs to provide technical specialists on a short-term basis, and has previously done work with respect to the strengthening of libraries. In respect to any effort to establish a research support center, the Mission should consider contacting the Congressional Research Service or the National Council for State Legislatures for specific advice on how to proceed with such an undertaking. The DG Center's IQC with the State University of New York may also be relevant for this endeavor.
- Assistance provided by USAID should be coordinated with that contemplated by other donors, such as the European Union. The European Union is contemplating a large program of support of yet undetermined scope. This could evolve into a program similar to EU support for the South African parliament where substantial funding was provided for training and commodities. It might also provide material support for the refurbishing of Continental House and County Hall, if not for the remodeling itself then for equipment such as PCs. Since these are not areas in which USAID normally commits resources, USAID Kenya should liaise with the EU over its intentions and seek to coordinate programs that are complementary. The UNDP may also provide additional assistance to the National Assembly as a follow-up to a recently concluded program that provided some computers, printing equipment to reproduce parliamentary debates, and training in parliamentary procedures.
- ***Finally, USAID-Kenya must be timely in providing support once a decision has been made to proceed with a program to strengthen the legislature.*** Because USAID previously offered such assistance and then reversed this decision, some MPs are skeptical about USAID's intentions. In the words of one prominent reformer: "We need it; stop talking about it; get on with it!"

## JUSTICE SECTOR

The justice sector is a more difficult arena to characterize. The justice sector began a long period of decline at the beginning of the 1980s, and is riven with institutional conflicts. A handful of committed insiders have proposed action to deal with the judiciary's problems but there is a considerable degree of skepticism among a broader swath of opinion leaders as to the viability of the internal commitment. Several times the team were told that the truly serious reformers "could be counted on the fingers of one hand".

Many of the critical issues were on the "front burner" at the time of our visit because of a series of regional seminars involving senior justice sector personnel, which rehearsed all of the serious problems affecting the sector. The seminars were hosted by UNDP, the Public Law Institute and the judiciary, an interesting precedent in "public/ private/donor" partnership in this arena. One conclusion of the team's review is that such partnerships are the most viable way to address the needs in the justice sector. Charting a specific course will require a careful assessment of the overall institutional structure of the provision of justice in Kenya, and might benefit from a full-fledged sector assessment. *Here the objective will have to be identification and support of strategic elites who can implement and sustain the long-term reforms needed to improve the Kenyan justice system. These key actors will be both inside and external to the public sector institutions involved.*

### Institutional Context

The institutional context in which the judicial sector operates is complex, and issues of independence and conflict are evident. Independence from the executive is not a strong component of the British-inspired historical tradition. Kenya's judiciary has been viewed by most of its practitioners as a separate but complementary wing of the executive, one which enforces the laws drafted by the executive and enacted by the legislative branch. Executive participation in the appointment of judges reinforces this tendency, with the consequence that the personnel filling judicial positions are by nature and choice not activists, but rather conservators of the existing body of law.

The notion that the judiciary should serve as a check on abuse of executive power, or a source of countervailing power and authority in the elaborate system of "checks and balances" that American political theory propounds, is foreign to this tradition. It is important that Americans understand that the conception of judicial function, of the advantages and disadvantages of the separation of powers, and of judicial review of legislation are different in parliamentary systems like Kenya's. There are legitimate strengths as well as drawbacks to these differences; as with the legislature, a "one size fits all" approach to justice sector strengthening, imposing an American conception of judicial functioning, is neither feasible nor desirable. Kenyans will ultimately have to decide the desirable structure and function of justice sector institutions, as part of the constitutional reform process.

Institutional Conflict. In theory, this means there is a low level of institutional conflict in the system. Executive interference in judicial operations, a frequent target of criticism and calls for reform in many systems that USAID has attempted to assist — e.g. Latin American countries — is short-circuited by the upstream manipulation of judicial appointments. However, institutional conflict in Kenya's justice sector is in fact quite apparent.

*Judiciary vs. Attorney General.* In common with other ex-British colonial systems, the responsibilities for provision of justice are divided between a judiciary, under the control of a Chief Justice, and an administrative wing which undertakes investigation, litigation, prosecution, and legal drafting, under the control of an Attorney General. Both the Chief Justice and the AG are appendages of

the executive, in terms of budgetary and organizational control (though the judiciary has partial independence in personnel terms through the operation of the Judicial Services Commission, which takes the power of firing judges out of the hands of the executive.) The lines between jurisdiction of the Chief Justice and the AG, while they may be clear to those individuals, are not clear to Kenya's citizenry.

One problem in this regard is highlighted by the power of the Attorney General to determine which major cases will be heard before the High Court. In the present context the decisions of the Attorney General are a source of frustration to Court officials and add to the perception that the judicial process lacks impartiality. Recently, control by the Attorney General over such decisions has hamstrung judicial response to executive corruption, with the AG dismissing a suit brought by private citizens against the alleged perpetrators of the Goldenberg mega-scandals.

The public outcry over Goldenberg forced the Government to respond by establishing a Kenyan Anti-Corruption Authority, which promptly fell afoul of the same lack of closure on legal jurisdiction. The creation of the Kenya Anti-Corruption Authority (KACA) may be a signal that the government has begun to take the issue of corruption seriously, but the relationships between the courts, the Attorney General's office and the Authority needs to be clearly stated and made transparent to the Kenyan public.

***Bench vs. Bar.*** Another important arena of conflict is the current state of the relationship between the bench and the bar. Kenya's bar is one of the largest in Africa. The bench and the bar regard each other with suspicion, with members of the bar expressing doubts about the qualifications of many judges and magistrates to sit on the bench, while the current occupants of the bench perceive the bar as pursuing a patently anti-regime political agenda.

### **Problems Confronting the Justice Sector**

The institutional conflicts outlined above are themselves problems confronting the justice sector, especially in that they have led to a public distrust of the judicial system and a questioning from the organized bar concerning the competence of members of the bench. There is thus little faith in the current leadership, and little trust between the constituent agencies. Apart from the structural uncertainties, three general problems can be discerned:

- corruption
- susceptibility to interference from the executive branch of government
- inefficiency in court administration and management.

**Corruption.** Corruption was the key problem identified by everyone the team talked to, both in the general public and among the judiciary itself. The problem exists throughout the Kenyan judiciary, although knowledgeable insiders claim that the problem is more prevalent at the lower levels of the magistrature because of the low salaries and lack of personal and professional amenities. The judiciary itself has recognized the problem, in the Kwach Report commissioned in 1998 by the Chief Justice (discussed below), which proposed ways to address it. To the extent that corruption is a function of the incentive structure facing justice sector personnel (including lawyers, court clerks and registrars, and policemen, as well as judges and magistrates), it must be addressed through attention to incentives — civil service reform. While this may not be *sufficient*, it is certainly a *necessary* step for a long-term solution.

Civil service reform is a complex, expensive, time-consuming effort which requires sustained political commitment. There is little evidence that the GOK is prepared to mount a sustained effort in support of civil service reform, which is generally implemented in conjunction with Bank structural adjustment assistance. The US mission should keep this in mind as it contemplates any justice sector

assistance, which is unlikely to be meaningful or sustainable in the long term without attention to incentives and the civil service reforms on which they depend.

Susceptibility to Interference from the Executive. As indicated above, interference is only part of the problem. A tradition of judicial conservatism, compounded by the specific judicial appointments made by the incumbent regime, have combined to render interference increasingly less necessary in cases in which the executive has an interest in the outcome of a specific decision. Removing judicial personnel from the administrative control of the Public Service Commission, thus de-linking them from the executive in terms of day-to-day administration, was a step in direction of increased judicial independence.

However, the resulting Judicial Service Commission appears to lack the necessary administrative infrastructure and authority to manage its responsibilities effectively. For example, it has been unable to overcome the practice of “dumping” under-qualified personnel from other ministries. Further, the exercise of presidential authority to remove inconvenient judicial personnel can easily circumvent the controls of the Judicial Service Commission. Justices and magistrates who are recalcitrant in matters of vital concern to the executive may find themselves exiled to extremely unpleasant posts, with no professional facilities and lacking any of the amenities needed for family life. They may in extreme cases simply be asked for their resignations, a request which is not lightly ignored in a country in which both politicians and churchmen of outspoken bent have been harassed and occasionally killed.

A major issue for the Mission, and other donors who may wish to provide assistance to the justice sector, is the determination of benchmarks of tolerable levels of interference, or potential for interference, versus the unacceptable levels that would invalidate any assistance. It is naive to expect that susceptibility to interference can be eliminated as a prelude to, or even during the initial phases of, assistance in justice sector strengthening. On the other hand, it is equally naive to lend a hand in an effort whose positive accomplishments are bound to be negated through the exercise of unchecked executive power.

In many countries, the bar association provides assessments of judicial independence and effectiveness, including both overall evaluations and evaluations of individual justices. The donor community might consider supporting such a professional evaluative function, albeit incorporating the Kenyan Judges and Magistrates Association as well as, or instead of, the bar, and working the assessments of such professionals into the benchmarks of independence that guide donor assistance.

Inefficiency in Court Administration and Management. USAID’s assistance to African justice sectors is traditionally in the area of court administration and management — “administration of justice”. The administration of Kenya’s judicial functions has declined precipitously in the last decade, not unlike other African countries. Backlogs and delays are significant and growing, with regard to both civil and criminal matters. Inadequate resources, space, materiel and personnel help produce these problems. In turn, backlogs and delays provide the room for maneuver and for rent-seeking that feed the bulk of petty corruption in the system: in response to “chai”, cases moved forward in the queue; case files doctored or removed entirely; “missing” police reports produced miraculously; delays and adjournments granted for lawyers with conflicting court dates, or inadequately prepared; and the like.

Attacking the problems of delay and backlogs can have important effects on the incentives feeding corruption; however, attacking them will also generate resistance from those whose interests are negatively affected, and who may be able to put up effective defenses if the implications of the size and scope of the rent-seeking problem are not carefully addressed. *While solutions to the problems of administration of the justice system may seem like technical fixes, they are inseparable from the major factors contributing to the feasibility, if not the incentives, for corruption.*

## **GOK's Efforts to Strengthen the Justice Sector**

Although the GOK has recognized many of the problems confronting the justice sector, its response to these and other problems has been limited. Since 1997, the GOK has created about a dozen task forces under the authority of the Attorney General, charged with studying various areas of weakness among the nation's judicial institutions. It appears, from discussions with members of the bench, the bar and civil society, that there is little knowledge of the status of these task forces, which were primarily directed toward code revision in the critical areas as perceived in 1991, and which are now perceived as a regime stratagem for accomplishing a limited constitutional review quite unlike the constitutional redrafting anticipated in opposition quarters.

***Kwach Commission.*** However, a somewhat more encouraging sign that the government was taking a serious look at the problems of the sector is found in the recently (1999) released Report of the Committee on the Administration of Justice, (the Kwach Report), prepared by a commission under the chairmanship of Justice Richard Kwach, appointed by the Chief Justice. Unlike the activities of the task forces mentioned above, this report was carried out under the aegis of the Chief Justice, not the Office of the Attorney General.

The Kwach Report covers a broad range of problem areas:

- judicial rectitude (judicial ethics and conduct);
- human resource management, especially performance appraisal;
- case management and court administration;
- physical facilities, equipment and supplies;
- court security and managing traffic flows within court buildings.

In a section entitled "Other" the Report addresses additional issues that were not specifically covered in the charge to the Committee, e.g., reorganization of the Judicial Service Commission, creation of a new administrative structure of the Kenyan judiciary to improve case-handling efficiency, and introduction of a mandatory transfer policy for magistrates and executive officers with more than five years of service in any given jurisdiction. The Report is not a study of the entire justice sector as it gives only limited attention to other actors and institutions who have direct roles in the pursuit of justice in the society. Still, as a self-examination it constitutes a reasonable overview of some of the major problems noted above. The recommendations of the report relevant to the three major problem areas outlined above are summarized as follows:

### ***Corruption***

- Develop a code of ethics for judges, magistrates and executive officers.
- Create a judicial inspectorate.
- Institute a financial disclosure scheme for judicial personnel.
- Develop a system for management of cash collections in courts outside Nairobi (fees, fines, deposits) by judicial personnel.
- Investigation by the Chief Justice of circumstances surrounding the transfer of land belonging to the judiciary to private developers in the following jurisdictions: Eldoret, Kisumu and Mombasa.
- Acquisition and holding by the Judiciary itself of titles/deeds for its buildings, residential properties and any undeveloped land allocated to judiciary for future expansion

### ***Case Management and Court Administration***

- Adoption of a case flow monitoring system.
- Implementation of the existing authority for Assizes to deal with old cases in Nairobi courts.
- Reduction of the High Court backlog through the raising of financial ceilings on magistrates' jurisdiction
- Issuance by the Chief Justice of a circular regarding required application of rules of Civil Procedure.
- Examination of the feasibility of Alternative Dispute Resolution to address procedural delays and backlogs
- Abolish of the requirement of Attorney General's consent to prosecute criminal matters and the similar provision requiring his direction in civil matters.

### ***Judicial Independence and Strengthening***

- Reorganization of the Judicial Service Commission.
- Broadening of the membership of the Commission to include representatives from Magistrates and Judges Association and the Law Society of Kenya.
- Development of a specific Scheme of Service for personnel of the judiciary to enhance "delinking" from the civil service.
- Funding of the National Council for Law Reporting (enacted in 1996) so as to be compilation of Kenyan jurisprudence and publication of law reports.

On April 13 this year the Chief Justice announced the constitution of a committee to recommend an implementation schedule and scheme for these recommendations. *The Report's recommendations can serve as clear, measurable benchmarks for use by the US mission in developing an assistance program for the country's justice sector.*

***Attorney General's Reform Coordinating Committee.*** In January, 1999 the Government created the Legal Sector Reform Coordinating Committee, chaired by the Attorney General, with a broad mandate to examine the problems and propose appropriate corrective measures for problems affecting the justice sector. This mandate includes the Kwach Report as well as the 11-13 task forces whose efforts the Committee will coordinate. In the next 3-5 years this Committee will be the focus of donor attention as it seeks to determine the level of government commitment to justice sector reform. In considering assistance to the sector as suggested below, the US Mission should pay special attention to the content of the Coordinating Committee Work Plan and any Implementation Plan that emerges from the Committee, noting as benchmarks any actions taken by the Coordinating Committee to implement specific recommendations made in the Kwach Report.

### **Potential areas for USAID intervention**

#### **◆ *Courts and Case Management and Alternative Dispute Resolution***

This is a growing problem area for Kenya's judicial sector. It is tied into the ubiquitous problem of corruption, as discussed above. USAID and Great Britain have provided assistance on these problems in the past, but this assistance appears not to have had a lasting effect. Kenyan law provides some means of addressing elements of these problems related to workload, and some recommendations in the Kwach Report indicate steps the GOK could take to begin to address the problem. If these steps are taken, *the US*

*and Britain could consider short-term assistance for a careful needs analysis of the nature and characteristics of the problems contributing to backlogs and delays in the judicial process.*

**Benchmark:** Court appoints Commissioners of Assize to work on the backlog problem in Nairobi (location of most significant problems). As the legal authority already exists for Chief Justice to put this into effect, it could be implemented within the upcoming Kenyan financial year. Once this were done, USAID could consider providing technical assistance and small-scale financial support.

**Benchmark:** Government takes action to increase financial limits for magistrate courts in order to reduce volume of cases that have to be transferred to High Courts merely on the basis of their monetary value.

◆ *Legal Aid*

Support for the idea of more accessible legal assistance exists at the level of the Attorney General. Great Britain invested in this area because it has forged some degree of cooperation between civil society and the GOK. Evidence of impact is limited. There seems to be an emerging consensus between civil society, the bar and the Government that the rights of the prison population deserves urgent attention. The unacceptable size and conditions of the remand prison population is a major negative issue in the human rights reports for African countries generally, and conditions appear to be deteriorating in Kenya. **USAID might consider expanding existing support to civil society organizations addressing legal aid needs to include services to this group.**

The GOK would like to have a national program of assistance to the under-served populations, e.g., the rural poor and prisoners. Such expansion is likely to require amendments to the Constitution, existing laws and new statutes. USAID in collaboration with DFID could explore the use of advanced law students as legal interns who would be jointly supervised by members of the bar and the bench. USAID/DFID collaboration seems to be a real possibility. ***A national program in this area would not be low-cost, however, as it would engage a significant number of strategic elites (courts, Atty. General, civil society and law schools) in the judicial sector.***

**Benchmarks:** Enabling legislation, action/implementation plan and start-up financial resources from the government.

◆ *Law Reports*

These reports provide digests of judicial opinions in an accessible format for use by the bench and the bar. US and Commonwealth members share a common law tradition and some members of the latter have used American judicial opinions where there is an absence of local precedents. Kenya hasn't published law reports for almost twenty years (compilation for the period 1876-1956 does exist.) Regional Law Reports (East African Court of Appeals Reports: 1934-56 and East African Law Reports: 1957-75) are available, as are decisions from other Commonwealth countries. However, these are only available in Nairobi. African Commonwealth countries' reports are not available in Kenya. Legislative authority to produce reports was passed in 1994, but the GOK has taken no steps toward implementation.

These are fundamental aids to the quality of judicial decisions. The availability of these compilations could also be a means to reduce the tension between bench and bar by providing a common intellectual base for the two parties' approaches to judicial and legal work, i.e., preparation of briefs and pleadings and judicial decisions

***Compilation, publication and dissemination of these judicial resource would have a high impact, and would be relevant in the future as much as the present, i.e. in a post-transition Kenyan***

*political context. They are a possible vehicle for a regional approach involving Kenya, Uganda and Tanzania, the East African Law Society and the several law schools of the region. This is a viable long-term type of assistance which could be justified on the basis of the benchmarks indicated below. Costs would be significant and might make this a project best undertaken within the context of a donor consortium, involving the US, DFID and the Bank, and perhaps other interested donors.*

**Benchmarks:** Government activation and start-up funding for a National Council for Law Reporting (created in 1993), development of action plan by the government.

**Benchmark:** The World Bank continues financial support for the Legal Sector Reform Secretariat.

## LOCAL GOVERNMENT

The local government arena is more complicated than either the parliamentary or justice sectors, with a primarily technical commitment to reform on the part of the GOK riding on a politically-charged (but relatively non-articulated) desire for major increases in autonomy on the part of local governments themselves. An extended treatment of the local government system in Kenya is attached in the detailed sector paper.

**Importance of the Sector.** The importance of local government to the establishment of a democratic system cannot be overstated. Local government in Western democratic systems is an important arena of countervailing power. It not only counterbalances excessive executive powers, but also serves as an effective check on the central institutions of the state and on the elites that control these and which are frequently drawn from a restricted social stratum. Local government also serves as the first concrete experience of most citizens with government, and establishes or negates the legitimacy and credibility of government generally, with concrete impact on the commitment of citizen resources and good will. Local government serves as a recruitment and training ground for new elites, feeding new blood into the system after an apprenticeship in practical politics.

“Local government” in Kenya itself comprises a variable arena, with rural “basket case” county councils, a few better-off county councils, non-viable small town councils, viable but financially incompetent large towns and municipalities, and ultimately the rapidly deteriorating (some say non-existent) Nairobi City Council. All operate under the aegis of an obsolete legal framework and tightly-centralized and politicized ministerial control, as well as overarching subordination to the provincial administration. *Here the objective should continue to be the creation of demand for accountable local governments, and for a consensus on a viable new framework for local government, primarily through support to relevant civil society organizations.*

### Institutional Structure

Kenya’s local authorities currently number 167:

City Councils	1
Municipal Councils	44
County Councils	60
Town Councils	62

Counties have historically been coterminous with districts. There are now reportedly 69 districts so the process of creating new counties is somewhat lagged; the subdivision of county councils into ever smaller populations, and thus revenue bases, has caused a significant increase in financially unviable rural councils. Municipal and town councils have also proliferated unchecked over the past 15 years, many created in response to political pressures: municipal and town councils escape from the financial control of the county council in which they are situated, and can exercise autonomy in drawing up budgets and attempting to increase staffing. The additional councilor positions and subordinate staff provide a good source of patronage for local elites.

### Functions

Councils, especially rural councils, provide few functions presently, although they are permitted to provide a wide variety of services under Cap. 265, the Local Government Act. At independence, the councils were the main authorities involved in the provision of most significant services — health,

education, and roads, in the case of both rural and urban councils; and all of the normal urban infrastructure in the case of municipal councils, including water supply. In 1969/70, however, enough councils appeared to be on the verge of bankruptcy that it was decided that they were unviable, and that central ministries should shoulder the major service provision burden.

*Infrastructure.* Since that time, local government has been essentially concerned with urban infrastructure, with some few water supplies (most notably in the large municipalities), with nursery schools, with maintenance of the secondary and tertiary road system in the county councils (coterminous with districts), with some livestock services in the pastoral areas, and most importantly with maintenance of local markets.

*Natural Resource Management.* The county councils also have responsibility for maintaining gazetted forests and other natural resources on communal lands and for enforcing health, sanitation and building codes in markets, restaurants, bars and hostels.

*Municipal Council Delegated Functions.* Municipal councils retain responsibility for health, roads and education on a delegated basis from the relevant central ministry; parallel and delegated service provision by municipalities and central ministries causes confusion.

## **Performance**

Performance of the councils varies enormously, but to characterize it as overwhelmingly unsatisfactory would not be an over-exaggeration. County councils provide very few of the services they are empowered to provide (such as maintenance of the tertiary road system, and market maintenance and upgrading). On the other hand, many have ventured into revenue-generating activities, running beer halls, hotels and guest houses — and issuing natural resource exploitation permits irresponsibly, and even alienating public resources, especially forests — in an effort to earn the revenue that is not generated through the service provision. Such revenue is frustratingly apt not to materialize, flowing into the subsidization of councilors and staff.

Municipal councils manifest even more visible incapacity in the mounds of uncollected garbage, increasingly pot-holed roads, traffic congestion and pollution, and market dilapidation. More aggravating to the citizenry is the callous disregard for public amenities and public land, which has been irregularly allocated in many towns and municipalities, generally benefiting individual councilors and staff. The most graphic demonstration of council incapacity is provided by the increasing cases of strikes by council workers, whose salaries are not being paid on time, or in many cases, at all. While these are regularly reported in the newspapers, very little national attention is paid to this ubiquitous phenomenon, despite the fact that it has happened over a long period of time, from around the late 1970s.

## **Problems**

The problems confronting the local government system are legion but can be summarized under the following categories:

- inadequate resource/revenue base
- corruption
- limited functional responsibility
- centralized administrative control

**Resource base.** The resource base of local councils has undergone major change in the post-independence period. The mid-70s abolition of the Graduated Personal Tax, which funded the councils' service provision, accompanied the cut-back in functional responsibilities discussed above. This was replaced by wholly locally-collected taxes in the form of crop cesses, market fees, administrative fees and livestock service provision fees in the county councils; and property rates, water fees, business/trading licenses, market fees and the central transfers from ministries for delegated services, on the part of the town and municipal councils.

Extreme variations in revenue, and in types of revenue available to them that councils chose to collect, led in the mid-80s to the institution of an "urban service charge" and a parallel agricultural tax (in rural councils), and the abolition of crop cesses. These were meant to even up the resource base and try to stop the councils from double taxation of businesses, pursuit of income producing businesses of their own, and other counter-productive strategies for managing their revenue base. What they accomplished instead was to gut the viable, "coffee councils" (county councils whose revenue came overwhelmingly from a coffee cess collected at source, and thus at no cost to the councils) and produce little additional revenue for most councils. No central funding of the councils occurs, unlike the case in much of the rest of the region, with the important exception of the responsibility of the relevant central ministries for payment of salaries of staff providing services delegated to the major municipalities — i.e., health, education and roads/works.

The argument is made, with some validity, that the councils are not really as inadequately funded as they argue. In fact, major improvements in revenue collection are possible within the existing structure of revenues, and some councils perform much better than the average at revenue generation. Major improvements are not likely, however, given the incentive structure facing most council staffs. Further, it is clear that the councils are totally underfunded to provide any increment in the services they now provide, and most cannot make ends meet even with the restricted scope of functional responsibilities within their jurisdiction.

**Corruption.** A key problem for the entire local government system is corruption. In the past, significant corruption brought dissolution of councils by the ministry responsible and the replacement of the elected council with an appointed commission, charged with providing services until another election could be held. This no longer seems to happen often, in part because over the last decade the record of appointed commissions — most notably those that have run the City of Nairobi for extended periods of time — has been as dismal as the elected leaderships.

Corruption is in good part, paradoxically, a function of the over-centralization of control by the central Ministry of Local Authorities, described below. Because councils are so tightly controlled from the center — and since there is such important capacity for the center, and the Minister in particular, to reward those which serve the regime's interests — their loyalties are at least as much to the Minister as to their hapless constituents, who have no alternative. On the other hand, electoral defeats of incumbents among council members are frequent, for this same reason — an irate citizenry which receives nothing for its taxes. *This, too, fosters corruption; incumbents are fairly aware of and "rational" about their chances to be re-elected, so there is a strong compulsion to appropriate whatever material resources they can during their short time in the sun.*

The review of performance indicated that non-payment of council staffs has been increasing, although it has always been a problem since the elimination of the GPT. Non-payment of council staffs has been a major incentive for the "privatization" of council resources, whether through the corrupt receipt by individuals of revenues meant for the councils, or the diversion of supplies meant for works departments, or the tendering of council works to councilors or staff who provide substandard materials and work.

In a downward spiral, substandard and deteriorating council services has fed the resistance to payment of council-mandated fees and rates (or their “privatization”), which means less revenue to the councils, which in turn leads to non-payment of councilors, staff and suppliers, increasing their incentives to corrupt action that merely feeds the process. This is the situation that confronts the local government system in Kenya today. Corruption will not be effectively reduced, let alone eliminated, until both incentives and effective sanctions for corrupt practices are instituted, but the emphasis must be on the incentives.

**Limited Functional Responsibility.** Limited functional responsibility means that citizens see no real purpose to the councils, and no urgency to supporting them, financially or in any other way. Of course, this is another circular problem. The unsatisfactory performance of most councils means that most citizens would not support an increase in responsibilities at this time. While central ministerial service provision also leaves a tremendous amount to be desired — indeed, in a few cases, the councils might be preferred — in most cases the feeling is that whatever small amount of service provision is actually effected by ministries would be eliminated were these services to revert to the councils. Limited functional responsibility has thus removed essential support for local government institutions at grassroots level. **Identification and support of strategic actors in the local government arena will be challenging, and will be a long-term effort for donors.**

**Administrative centralization and control.** Kenya’s local councils are tightly controlled by the Ministry of Local Authorities. They cannot make decisions about revenues, about the size of the “establishment” (number of employees), the level of property rates and business license fees — or anything else of even minor importance, especially if it has any fiscal consequences — without the express approval of the Ministry. Despite decades of assistance to enhance councilors’ and staff skills in planning and financial management, such skills remain minimal. Why would a councilor or a council staff person need such skills, given that all significant decisions are vetted by the Ministry, and most often changes in current practice denied?

Administrative over-centralization and control has important political causes. Local councils, though not providing important services, are sources of local patronage. Councilors are politicians. Politicians seek sources of patronage to build up their support bases, and local politicians seek patrons on the national political stage. The Minister for Local Authorities is in a position to grant and deny favors, including allocation of the minuscule development funding available from the Ministry (not really so small in the case of Bank-funded transport sector loan funds for urban infrastructure improvement), permission to hire additional subordinate staff, to raise rates and business license fees, to license activities previously untaxed, and the like.

Ministerial powers can be used to coopt councils, with the local support bases they rest upon, and thus to extend the hold of the regime and governing party in rural areas which might otherwise have different political inclinations. Ministerial powers have, in fact, been used this way throughout Kenya’s independence period. The most tangible evidence of this is the proliferation of town and municipal councils with questionable financial viability, or which are clearly not financially capable of the independence that their status presupposes.

The person of the Minister for Local Authorities is always one close to the regime and to its coalition formation needs and strategy. Eliminating the over-centralization that drives lack of accountability and nurtures corruption, as has been proposed periodically in Kenya, is not primarily a technical issue but a political one. **One benchmark of commitment to real reform in the local government arena will be reduction of central Ministerial authority; it is not likely to be undertaken any time soon, although cosmetic efforts at Ministerial restructuring may occur.**

## Responses to Key Problems: GOK, Donors and Citizens

***GOK's Recent Initiatives.*** Since the watershed 1992 multi-party election, little if any progress can be discerned in reforming or strengthening the local government system. Indeed, while discussions about the need for improving performance of local authorities have gone on since the late 1970s, the only actual changes that have been made are:

- the decision in 1984 to remove hiring and firing decisions of senior council staff (Clerks, Treasurers and major department heads) from the councils themselves, vesting them in the Public Service Commission.
- a series of alterations in revenue base, including the removal of crop cesses from the revenue basket of the councils, the introduction of an alternative produce tax, the introduction of the urban service tax (in 1988), and the introduction of the Road Maintenance levy (in 1990) from which few councils have actually benefited.
- *Omamo Commission of Enquiry.* In the early 90s President Moi appointed a Commission under the Chairmanship of William Odongo Omamo to study the needs for reform in the local government sector. The Omamo Commission presented its finding to the Government in 1996. Since then, while the President has indicated he had accepted the report and intended to implement the recommendations it makes, the report has not been published.

***Current Donor Assistance.*** In the local government sector, the GOK has traditionally sought assistance with capital development, technical assistance and training of councilors and staff — not with the larger issues of system design, including financial system design. The sector is presently characterized by a number of uncoordinated efforts. The Bank's credits for urban transport, described below, are far and away the largest. The Bank and GTZ have a lengthy history of activity in the sector, as did USAID until the mid-80s. The Bank projects deal primarily with large municipal infrastructure and with attempts to impose conditions for successful utilization of the loans on local authorities, such as Nairobi, which are highly politicized and corrupt.

USAID has had substantial involvement in the local government sector, most notably with site and service housing schemes, but also with some support for institutional capacity building in the authorities on a systematic basis. These have not been very fruitful, although the germ of the institution-building assistance, the Local Authority Development Planning system, has been retained by the GTZ team. Councilor training, in the mid-80s, was brought to an abrupt halt when President Moi objected to the presence of US trainers on the basis of what appears to have been a personally-motivated objection by some local politicians, carried on the basis of erroneous information.

The main current projects supporting local government are the following:

- ◆ **KUTIP**, the Kenya Urban Transport Improvement Project, funded by the Bank. This is a \$115m credit. KUTIP will work in 26 towns on road construction and rehabilitation. It is in varying stages of preparation, with some work underway but mostly at the stage of tenders and contracting. (The Bank has also granted a large emergency credit for reconstruction of roads destroyed by El Nino rains last year; these are also mostly not underway yet.)
- ◆ **Microprojects**, also Bank-funded, in conjunction with KUTIP, provide councils with \$100,000 allocations to construct or rehabilitate infrastructure such as markets and bus parks, and serve as the "carrot" for getting improved financial management systems in place, for which assistance is

then provided under the KLGRP, (see below). KUTIP is the “big carrot”, though, and indicators of capacity building against which the disbursement of funds will be made have reportedly not yet been devised, either for KUTIP or for the Microprojects.

- ◆ **LGRP**, the Local Government Reform Program, also Bank-funded, and implemented by an HIID team, provides technical assistance for institutional development, focusing particularly on financial issues — revenue rationalization, management, rationalization of the ministry’s administrative systems. The project has introduced a streamlined system for local authority business licensing, including an agreement that the Minister will delegate responsibility for approving fees to the councils, and an agreement that the local authorities will collect license fees and the Ministry of Trade will relinquish them.
- ◆ **GTZ** fund the Small Towns Development Project, working in selected small towns to develop infrastructure, institutions (particularly public/private partnerships), working on issues such as squatter settlement upgrading and improving planning capacity. GTZ also assists ALGAK, as does the Friedrich Ebert Stiftung (FES).
- ◆ **Dutch “Green Towns”**, a project working with towns to develop environmental protection and conservation plans and civic education directed at environmental concepts.
- ◆ **JICA** has a solid waste management project/program in several towns/municipalities.
- ◆ **UNDP** has done studies of the four largest municipalities to try to come up with a strategy for preventing a total meltdown. RUWASA, the Rural Water Supply Associations, is also a UNDP activity which deals with the development of community infrastructure around the maintenance of water supplies.
- ◆ **DFID** has negotiated an agreement with Mombasa for a 2.5 million pound pilot project which will focus on public/private partnerships — that is, getting the municipality to enter into economically constructive arrangements with the business community to provide infrastructure and services. It will also provide training and resources for improving financial management.

**Citizen Action.** Apathy and alienation is the reaction of most of the citizenry to the manifest incapacity of local governments. However, there have recently been two other types of reaction:

- pursuit of litigation strategies by a mushrooming movement of neighborhood associations, pioneered by the Karen/Langata (Karengata) Association in Nairobi, targeting municipal governments and staging ratepayers’ boycotts in response to lack of service provision, as well as organizing community self-help service provision efforts
- extra-legal action to reverse corrupt allocation of public lands, tear down private developments that have encroached on municipal amenity reserves, restore “informal” sector premises torn down by municipal authorities, and plant trees in areas in which environmental protection responsibilities of councils has been ignored

It should be noted that, while these appear to be very similar strategies, deriving from the common rage at rapacious and ineffective councils, in fact they are quite distinct. Litigation strategies depend on the legal system and their practitioners are scrupulous about remaining within the law — only withholding rates after court injunctions are obtained, for example; attempting to negotiate with the appropriate council service departments, in the case of efforts to introduce private sector service providers to supplement

council services. This strategy emphasizes use of the legal system, flawed as it is, to force local governments to respond.

The second strategy is a much more high profile, deliberately *extra-legal* effort to highlight the failings of the legal system to produce justice. Those who pursue this strategy sometimes attempt to inform the authorities of their intention to take action at a specific time and place, in an effort to abide by the legal requirements to inform the police about assemblies, but equally as much to attract media attention and spotlight the reaction of the local governments and the police, in a bid to mobilize the anger that permeates the urban and peri-urban arena.

### **Local Government in the Transition: the Long-term Vision**

Decisions about whether and how to invest in local government in Kenya, in pursuit of a democratic transition, should derive from a vision of progressive local government and the most feasible transition to it in the Kenyan context. This is particularly important for Kenya because of the development of highly politicized regional identifications, with increasing ethnic overtones, and the need to contain them within a productive local government system that can reduce inter-regional and inter-ethnic conflict. It is a complicated issue in Kenya because of the history of “majimbo”, or federalism, which provided the basis for the independence constitution. More recently, “majimbo” has been the rallying cry of those who feel threatened by the incursions of the “large tribes” into their territorial space.

Despite the negative political freight that federalism carries in the Kenyan context today, a significantly greater degree of local autonomy and responsibility is likely to be a *sine qua non* in the post-Moi era for a negotiated agreement that protects the group rights of those communities currently forming the base of the regime. Whether based on the current counties and municipalities, or on some larger units grouping small counties into financially viable blocs, the brokering of a “deal” to break the current political stalemate and to permit Kenya to resume economic growth should include an element of local autonomy considerably greater than is presently the case.

Given the current skepticism of Kenyans about local government, the transition to this state must comprise **both** the constitutional and legal reforms required to transfer significant responsibilities, resources and incentives to the councils, **and** simultaneous efforts to improve the structure and functioning of the councils as they currently exist. Signs that improvements can be made — even in the existing framework — are critical to mobilizing support for the larger structural changes which will ultimately be necessary. At the same time, putting all the energy into non-structural improvements would be self-defeating. Only Kenyans can sort out what structural changes are ultimately essential to them, but the transition is likely to be a piecemeal one for which we might expect the following signposts.

#### **Year 2002**

Three areas of progress should be visible by the Year 2002, based on actions in process currently on the part of the GOK, relevant donor assistance, and citizen action:

- A revised Local Government Act (Cap 265) should be in place, whether as part of a new constitution or as a systematic amendment of the current Act, significantly reducing ministerial/central control over local authorities and setting out explicitly their areas of autonomy and their permissible revenue base.
- The increased revenue base for local councils that is presently under construction should be in place, with a transparent algorithm for allocation of the central transfers.

- An increase in community assumption of responsibility for service provision/regulation should be visible, based on community and neighborhood organizations in the urban areas, on public/private partnerships and privatization of some services, and on the development of public regulatory bodies with citizen participation.

### Year 2005

- A majority of councils should be able to pay salaries on time; to remit social security and hospitalization benefits on behalf of employees; to pay their water and electricity bills; and to avoid piling up large numbers of unpaid vendors bills.
- A capital funding mechanism should be in place and the major municipalities should be beginning to borrow for capital development.
- Constitutional reform should be completed, with a local government **structure** that:
  - puts councils in a superordinate position over the central government administration locally
  - incorporates elective mayors and council chairmen and makes council offices a five-year term
  - addresses the legitimate career needs of council senior staff while retaining a significant measure of control over hiring and firing at council level
  - addresses the incentives of councilors and staff

and a set of local government **functions** that:

- includes a phased return of significant responsibilities currently centrally assumed
- sorts out the reasonable local and national jurisdictions for natural resource management and environmental protection
- incorporates a significant element of public/private partnership, or at least permits this

### Year 2010

- A majority of the councils should be providing an expanding portfolio of services effectively
- A majority of councils should be in improving financial condition, i.e. demonstrating:
  - improved ability to estimate and collect revenue
  - realistic expenditure estimates and controls
  - ability to close books at the end of the financial year and to pass audits
  - attention to depreciation/renewals accounts
- A majority of the councils should be holding transparent elections for councilors and for officials, with directly elected mayors and council chairmen
- A significant element of citizen oversight should be established, through:
  - elections
  - mechanisms for demonstrating financial transparency (published accounts, audits, allocations, tender outcomes, and budgetary assessment)

- strong citizen lobbies and organized demand (ALGAK, Chambers of Commerce, PTAs, professional associations, unions)

These are not precisely “benchmarks”, although they might be viewed that way, as and if a serious effort to strengthen local governments gets underway on the part of the GOK. Some more modest, short term benchmarks will be suggested below, to which initial efforts in assisting local government strengthening should be tied.

### **Recommended Strategy**

**Goals.** The US Mission’s objectives in considering support for strengthening Kenya’s local government system are:

- to create **demand for accountability** within the system as it exists; and
- to assist Kenya in working toward a **consensus on the structure of a viable local government system** that eliminates the present highly incapacitating structural constraints.

The **ultimate goal** is agreement on, and legislation of, a local government system that provides a “first order” independent channel for citizen participation in decision-making on public policies and the allocation of public resources relevant to their daily activities.

**Initial Strategy.** Given the need to create viable domestic demand and support for stronger local government, the team recommends an approach which focuses on:

- building demand and capacity for advocacy among strategic elites;
- supporting the exchange of information among relevant regional elites/councils to expand the range of alternative local government structures Kenyans are aware of;
- assisting with “bottoms up” community involvement, possibly through co-funding with GTZ, in a “learning by doing” mode; and
- assisting one or two councils with financial management on a pilot basis as a vehicle for monitoring the allocation process of centrally transferred funds.

**Preliminary Strategic Objectives.** The Ministry of Local Authorities is reportedly presently in the process of reviewing a draft Sessional Paper that will set out an agenda for reform in the local government sector. Many of the ideas in the draft are reportedly from the unpublished Omamo Commission Report of 1995/6, and have been incorporated into the Policy Framework Paper (PFP) that guides policy and budget formulation.

The US Mission should:

- use the reform agenda that emerges as a set of detailed benchmarks for monitoring political commitment;

- support some preliminary activities aimed at identifying strategic elites, both internal and external to the public institutional machinery, who are committed to a genuine strengthening of local government.

Initial activities should focus on creating demand for accountability within the existing legal framework, and on creating demand for a new legal framework that provides meaningful autonomy, responsibility and resources for local government.

### **Investment Strategy**

#### **To the Year 2002:**

- ◆ Support the Association of Local Government Authorities of Kenya (ALGAK) and/or other civil society organizations with credible interest in strengthening local government reform (examples might be Institute for Economic Affairs, the new Transparency International chapter). Specific activities could include:
  - Funding/co-funding the legal advisory effort ALGAK is undertaking to produce a draft revised local government code
  - Supporting provincial workshops for council chairmen to inform them about the constitutional reform process, the issues relating to local government, ALGAK's position or other alternatives
  - Offering speakers (possibly through USIS funding) from the region on alternative local government systems, such as South Africa, Uganda, Tanzania, Ethiopia.
  - Arranging exchange visits with other regional local government-relevant institutions, involving ALGAK officials, strategic council chairmen, and the parliamentary committee members of the relevant parliamentary committee. (*Synergy in the portfolio*)

*This should be organized cautiously, since ALGAK is an unknown quantity at this time.* Initial assessment would need to be done to see to what degree it is a credible representative of the majority of the councils. If there appeared to be political agendas in play that invalidate the organization as a credible lobby, then these activities should be pursued through other civil society organizations with relevant agendas and expertise, such as IEA, the new Transparency chapter, or the Karengata Neighborhood Association. Some degree of political neutrality is essential to maintaining credibility of the activities and their output.

- ◆ Explore mechanisms for supporting public/private partnerships in service provision; assist in developing a model of local government as service providers rather than service producers. This model has gained the ascendancy in most other parts of the world, including some of Kenya's neighbors, but is not yet well-understood in Kenya (and the patronage needs of the regime militate against it). Four types of activities which could be undertaken:
  - Monitor the donor-funded projects which already have elements of this in them — JICA's solid waste management project, the Dutch "green towns" project and DFID's efforts in Mombasa. Possibly fund a small study of these projects to draw out "lessons learned".
  - Commission a study on the current scope and experience of Kenya's local councils with tendering out service provision (e.g., management of markets, bus/taxi parks, garbage collection). Focus on a few councils where either successes or failures are clear and draw lessons from them. The Government Department at the University could probably undertake

such a study under someone like Prof. Walter Oyugi, using graduate students to do case studies.

- Organize an exchange for ALGAK and some strategically chosen council chairmen on the topic of public/private partnerships with ULAA, ALGAK's Ugandan counterpart. Uganda has had considerable experience with these and could fuel ALGAK's own thinking about the shape of local government in a new constitutional order.
  - Co-fund a GTZ small town, chosen on the basis of a willingness to experiment with public/private partnerships, and design "lessons learned" into the project from the outset.
- ◆ Monitor the increased flow of funds to local authorities mandated by recent legislation. Assist ALGAK, or other interested and credible civil society organizations, to produce useful information on the funding flow and to feed in into the relevant committee of parliament (**synergy with the parliamentary initiative**).

#### From Year 2002 to 2005

- ◆ Continue the dual approach above, producing information, and identifying and assisting strategic elites in the local government arena.
- ◆ If constitutional reforms and/or code revision are in process, and there is some evidence of transparency in the financial flows from the Ministry of Local Authorities or the Treasury, consider assistance to one or two specific councils on:
  - financial planning — not simply bookkeeping and accounting, which is the general meaning of "financial management assistance" offered by donors, but rather the development of a strategic financial plan, including capital development and the realistic revenue estimation capacity and investment strategy. This should be tied to some capital development funding, such as USAID had provided for the small towns in which it previously worked. Planning initiatives without capital "carrots" do not work.
- ◆ environmental protection planning issues — possibly along the lines of the Uganda mission's project in Kabarole District, which provided technical assistance to the council to assess environmental impact and write appropriate environmental legislation

If sufficient progress on benchmarks at that point has been made, hold a **regional workshop** on the key local government issues facing Kenya, with the Municipal Development Program in Harare playing a key role in the provision of resource persons (this is a first-class operation which networks most of the key local government players in the region).

#### After the Year 2005

- ◆ If constitutional reforms are completed with an appropriate role and structure for local government, consider assistance to a **mixed group** of councils — some county, some town, some municipal — based on the lessons learned from the efforts to that point. This should primarily focus on capital development funding accompanied by technical assistance for financial and investment planning.

#### Constraints and Risks

**Constraints.** Several factors may constrain the degree to which USAID is able to invest in this sector, the most important among them being:

- The cynicism with which large numbers of Kenyans view the local authorities, which makes it very difficult to generate enthusiasm for assistance to or reform of the system
- The lack of civil society organizations with local government as an explicit focus
- The lukewarm nature of the GOK's commitment to reform of the local government system, compounded by the increasing need (given the shrinking of other sources of patronage) to use the local authorities and the resources they control for political purposes
- The uncertainty of direction of the constitutional reform process, which (rightly) confounds efforts to address needed legal code revision on a piecemeal basis

**Risks.** The main risks would be:

- Politicization of the civil society organizations which USAID supports, leading to an erosion of their utility or credibility. This can best be addressed by choosing civil society partners very carefully.
- A refusal by the GOK to let individual councils, or ALGAK, work with a donor effort; and/or manipulation of the responsible parliamentary committee, to preclude the development of a parliamentary oversight function related to local government. This can best be addressed by talking extensively with the relevant committee chairman and members before any activities are undertaken.

### **Benchmarks of Political Commitment, Independence and Effectiveness**

#### **Recent indicators of commitment to reform:**

- Appointment of the Omamo Commission, presentation of its report.
- **Negative: Non-publication of the Omamo Commission Report.** It remains officially unavailable.
- Agreement during the IPPG process, prior to the 1997 elections, that the Minister, in his up-to-25% appointments to local councils, must appoint in proportion to the party distribution of the elected councilors. *Need to determine whether this was actually incorporated as an amendment to the Local Government Act; if not, monitor whether it is so incorporated, through the constitutional reform and/or the reform of subsidiary legislation.*
- Passage of the Local Authority Transfer Fund Act, December 1998, committing GOK to transfer 5% of income tax to local authorities.
- Amendment in 1997 of the Road Maintenance Levy Fund Act of 1993 to incorporate funds transfer to local authorities for roads maintenance.

- Agreement by GOK to pay Contribution in Lieu of Rates to local authorities on behalf of Government agencies. (This is reported by the HIID-Local Government Reform Project team in its progress reports.)
- Incorporation of an agenda for reform of local government institutions in the Policy Framework Paper (PFP), based in good part on the recommendations of the Omamo Commission Report.

**Benchmarks of Near Term Commitment:**

- Sessional Paper in draft form, which is being commented on in the Ministry now, **published**, setting out agenda for reform in the PFP as Government commitments. This should appear during FY 99/00.
- Sessional Paper becomes an agenda for reform, by FY 00/01, and there is substantial progress on the agenda by FY 01/02.
- Actual transfer to the local authorities of the 5% Transfer Fund derived from income tax.
- If this is to start in FY 99/2000, there should be indication in the budget as tabled in Parliament in June, 1999.
- Receipt by local authorities of revenue on this item.
- Development/publication of an algorithm allocating the fund
- Transfer to the local authorities of revenue from the Road Maintenance Levy Fund; how to track this will be an interesting issue, as with the LATF, and could involve working with a council or two who are amenable to the idea of USAID gathering information systematically; or from a grant to ALGAK to do this; or a local consultant with good knowledge of local authority financial transfers
- Receipt by councils of Contributions in Lieu of Rates (CILOR).
- Ministerial agreement to abide by the informal delegation of approvals on trade license schedules to the standardized schedules developed by the KLGPR (26 councils now have adopted the standardized trade licensing schedules).
- **Negative: Lack of transparency of the formula for allocation of the LATF; evidence of its political use, rewarding councils with KANU majorities and penalizing non-KANU councils.** This could be tracked through comparing transfers with the allocation formula (but there will undoubtedly be many constraints on the actual disbursement of funding/ authorities, so it might be necessary to make statistical inferences from aggregate receipts and population statistics).
- **Negative: Creation of many new local authorities, prior to the design of a new local government system in the constitutional review process.**

**Benchmarks of Independence.** The topic of “independence” in respect of local government is not as straightforward as it may seem. There are several legitimately different forms of local government, ranging from the highly centralized French type of system in which local governments are really a department within the central government, to the highly decentralized US system, in which localities operate very independently and are only “influenced” by national and state governments through the “carrot” of resource transfers (bloc grants). It should not be argued that one end of this spectrum is preferable to the other. They have very differing implications for benchmarks of “independence”. The following are offered as examples of benchmarks under the US conceptualization of local government, but this may not be appropriate to Kenya; only Kenyans can decide that.

1. Councils control their own budgets, do not have to have approval for budgets from a central ministry (or anyone else)
2. Councils decide on their own establishments, hire and fire their own staffs (subject to national civil service legal provisions)
3. Councils decide on their own revenue sources and levels of fees and rates
4. Councils decide on the modalities for service provision — i.e., whether through direct production of a service or indirect provision through contractual arrangements, either with the private sector or community groups
5. Councils have access to capital development funds on the “open market”, that is through floating bonds or undertaking commercial investments of other sorts
6. Councils are not dependent for the bulk of their revenues on central transfers of funds (Kenya comes across **highly independent** on this item, unlike many other systems; that is going to change as and if the LAFT begins to function)
7. Councils decide on what services to provide; central government legislation outlines what services are **permissible** to local governments, and what services are **reserved to the central government**, but does not mandate specific services for LAs
8. Councils are comprised of elected members; central government does not appoint councilors
9. Councils make local by-laws without reference to central government, except insofar as the central government has the power to determine whether local legislation is in conflict with national legislation
10. Councils are not subordinated to an administrative hierarchy in proposing, prioritizing and attracting funding for development

Most of these measures of independence would require major revision of the Kenyan local government code, not only administrative changes.

**Benchmarks of Effectiveness.** Effectiveness is no less complicated an issue. Councils should be able to provide services to local residents on a cost-effective basis. Which services they provide is a function of national legislation. Providing these services *cost-effectively* is a trickier notion. It implies a rough calculus that pits the cost of provision by the private sector against the cost of provision by a council **together with the benefit of social provision**. That is, private provision of services can very well be

more profitable, but the social costs of private production have to be considered — that is, the inability of some social groups to have access to these services when produced privately.

Cost-effective production by a council thus has to take into account reasonable costs against a differing profile of cost recovery than would be the case with strictly private provision of services. In practice, the difficulties in assessing costs against a combination of revenues and benefits makes the calculation of “cost-effectiveness” at the council level impossible, let alone the comparison of councils’ cost-effectiveness against each other. Consequently, effectiveness has to be gauged indirectly, in terms of financial performance, and directly, in terms of the proportion of residents receiving services, along the lines of the following.

1. Councils should not run continual budget deficits; should estimate revenue accurately and collect a high proportion of what they estimate; and should budget for renewals, i.e. depreciating assets and putting money into renewals funds to replace them.
2. Councils should perform on a “cost center” basis to the extent possible, that is running discrete operations with a plan for costs/cost recovery, especially assets which are supposed to be income generating. (The “General Rates Fund” basis on which Kenyan councils historically operated deliberately inhibited the assessment of performance on a “cost center” basis).
3. Councils should be able to pay salaries on time.
4. Councils should not be paying **only** salaries; salaries should not be more than about 33% of the councils’ budgets (the majority of Kenya’s councils would “fail” any effectiveness test based on this item).
5. Councils should be providing tangible services in the case of their remaining responsibilities — not merely tax and fee collection. Thus, in urban places, there should be evidence of satisfactory:

- garbage collection
- fire protection
- street repair
- street lighting
- sewerage/storm drainage/flood control
- market sanitation/health inspection/vermin control
- market infrastructure/security
- animal control
- maintenance of parks and verges

In rural areas there should be evidence of satisfactory:

- market infrastructure/maintenance (including security)
- market sanitation/health inspection
- secondary/market access road maintenance
- forest protection/conservation
- mineral resource protection/conservation

In general, the extreme resource inadequacies facing Kenya’s councils (in part a function of the corrupt diversion of resources) means that they put maximum effort into collecting

revenues from markets, and other administrative fees and taxes, while providing no maintenance or services.

6. Councils should **not** be operating businesses in competition with the private sector — bars, hostels, rest houses and the like — unless the private sector is completely absent in the area (e.g. in Samburu or Turkana, other places where the level of profit is likely to be so low as to dissuade private sector investment). These tend to operate less efficiently, at greater cost, than the private sector, and to drain scarce managerial resources.
7. Councils should be tendering out the management of services where their own cost center results are not satisfactory. This reduces the burden on both the budget and managerial resources, reduces the scope for “rent seeking” on the part of subordinate staff, and stabilizes the council’s revenues by producing a fixed income from what was frequently a wildly unpredictable revenue base.
8. Councils should have formal mechanisms for citizen input, including open council meetings (I believe Kenya’s local councils do have open meetings, but the councils’ committees are another matter, and these deal with issues at the stage of real policy debate and decision.)
9. Councils should not be characterized by frequent conflict between the elected members and appointive staff.

Many of these measures of effectiveness relate to financial management skills and the ability to prioritize and strategize within the available resource base. On those grounds, Kenya’s councils could theoretically be “ranked”, and it is the case that some councils perform much better than others. With others of these measures, improvement will depend on changes either in the permissible revenue base or the legal framework within which councils operate.

## VI. CONCLUSION

The overall conclusion of this report is that there is a reasonable degree of potential for constructive investment in the parliamentary arena at present, in support of the strengthening of the committee system in particular, and that such support would complement the present civil society strategy the Mission has been pursuing. It would assist in building the critical linkages into this public institutional arena of decision-making that has hitherto evaded the civil society strategy. It should not be undertaken without careful consideration of the implications, however.

These include the need to demonstrate a certain level of independence and effectiveness of parliament, and in this respect the team proposes that the passage and effective implementation of the Parliamentary Services Commission Bill currently being debated be taken as a key benchmark of effective political will, together with evidence of progress on the provision of office space and material resources, as well as the recruitment of staff, which would be essential to any functioning committee system.

The Mission should coordinate any planning and efforts with the EU, in case it decides to fund parliamentary operations, as well as any other donors who may be engaged in discussions with the Parliamentary administration. It should work only through an inclusive committee of Parliament that contains representatives both of the administration (i.e. the Clerk's and Speaker's offices) and a broad spectrum of MPs, and should emphasize parliamentary identification and prioritization of needs rather than an attempt to corral and provide American "specialties". It should develop a phased investment program that begins with specialized training for committee memberships, both on their areas of specialty and on the nature uses of parliamentary research services, and moves ultimately toward assistance to a meaningful parliamentary research service. Benchmarks of the independence and effectiveness of parliament, provided above, should be monitored and decisions about whether to proceed to the next phase based on the performance of the parliamentary system on the relevant benchmarks.

The report concludes that there is presently less justification for direct support to the justice sector and that the US Mission should pursue a strategy of watchful waiting, observing the treatment of the Kwach Commission Report and the Attorney General's legal sector reform committee. If it is felt in six months that sufficient progress has been made to justify an initial investment in this sector, the team recommends that assistance to a public/private partnership in support of a legal aid program be considered first. Further progress on benchmarks related to the effectiveness of the justice sector, and of demonstrated commitment to reforms in the sector, would justify investment in support for court and case management improvements, and in the provision of law reports. These should be undertaken, if at all, in collaboration with other donors, and following the lead of the World Bank, which is the lead donor in this sector. Prior to any investment in the public institutions of the justice sector, the US Mission should focus on assistance to civil society organizations representing the strategic elites in this sector, in an effort to build a more credible critical mass of reformers.

The report concludes, similarly, that there is little, if any, justification for direct support to local government in Kenya at present. The Mission should pursue the same strategy of watchful waiting, observing the progress of the Sessional Paper expected during FY 99/00, and identifying the civil society organizations with most credibility and relevance to the local government arena for support. The Mission should have as a long-term goal the agreement by Kenyans on, and legislation of, a local government system that provides a substantial channel for citizen participation in local decision-making on both local laws and public allocation of resources relevant to the daily lives' of citizens. This is a very long way from the present Kenyan local government system, which is highly centralized and very corrupt, providing no channel at all for citizen participation and almost no local service provision of significance.

While no direct support to local government can be envisioned at this time, over the longer term, if progress is made on a more acceptable local government system, the Mission should assist in **both** the efforts to increase the effectiveness of local councils as they exist, and the efforts to design a local government system with significantly greater resources and responsibilities. Neither of these objectives can really be pursued independently because of the great alienation that Kenyans have from their local governments. It is not likely, however, that the present regime will significantly loosen the central controls that it exerts over the local councils, or eschew the patronage resources that such control of the councils affords it. Support for relevant civil society organizations, for the generation of real information related to local council performance, and for the introduction of such information into the relevant committee of parliament is likely to be the most that the Mission can accomplish in the next three years.

A final word must be said in regard to the civil society strategy. It is viewed by the authors of this report as an important building block on which this public institutional support strategy attempts to build further. The point is to support also the public arenas and linkage mechanisms that can give the civil society organizations supported an effective voice in decision-making. The two are complementary, and their careful, common pursuit would increase the synergies in the USAID portfolio in Kenya.

# **ANNEXES**

## **Annex A**

# **Strengthening the Kenya National Assembly**

Prepared for USAID Kenya by Joel Barkan  
Contracted with Management Systems International  
Under Kenya Democracy Assessment Project  
Project No. 3224-029

June 9, 1999

## Executive Summary

### The Importance of the Legislature

A cornerstone of all consolidated democracies is an *independent* and *effective* legislature where all or nearly all of the members of the legislature are directly elected in free, fair, and legitimate elections. Indeed, without an independent and effective legislature, the concept of representative democracy, is meaningless. An independent and effective legislature is also one of several key institutions for controlling corruption. Together with a free and investigative press, an independent judiciary and an effective office for public prosecution, the legislature plays an important role in identifying corrupt practices, and passing legislation to limit its corrosive impact on both governance and everyday life.

### The National Assembly in Historical Context

Although Kenya's legislature — the Kenya National Assembly — is neither independent nor effective, its prospects for becoming so are greater today than at any time since Kenya's return to multi-party politics in 1992. To understand why this opportunity exists, one must consider the evolution of the Assembly in the overall context of Kenyan politics.

During the presidency of Kenya's first president, Jomo Kenyatta (1963-78), the Kenya National Assembly was weakened as a result of the merger of the principal opposition party with Kenyatta's party, the Kenya African National Union (KANU) to create a *de facto* one party state. Elections became referendums on the ability of incumbent MPs to service their districts. In the process, the ability of the National Assembly to play a meaningful role in the policy-making process declined. During the first 13 years (1978-1991) of the presidency of Kenyatta's successor, Daniel arap Moi, the National Assembly was weakened further. For all intents and purposes it became a rubber stamp of the President. Finally, in 1982, Moi forced an amendment of Kenya's constitution making the country an official a one-party state. Elections ceased being open referendums on the performance of incumbent legislators. Electoral processes were increasingly manipulated, including by the introduction of "queue voting" in the KANU party primary, to insure that Moi loyalists within KANU dominated the National Assembly. Kenya's human rights record also declined during this period as did the performance of its once vaunted economy. By the end of the 1980s, per capita incomes were declining while corruption grew into a major problem. Unchecked by either the National Assembly, the press or civil society, Moi's regime of personal rule bankrupted the country and undermined the quality of governance. In response, the international donor community suspended \$350 million in "quick-disbursing" aid to Kenya in November 1991. Momentarily chastised, Moi amended the constitution again in December by repealing the clause that had made the country a one-party state.

### The Return of Multiparty Politics

The return of multiparty politics did not improve the position of the National Assembly or its members. In multi-party elections held at the end of December 1992, Moi and KANU garnered only 37% of the vote, but Moi won a plurality while KANU captured 100 of the 188 elected seats in the National Assembly. Following the normal presidential appointment of 12 additional members, KANU's majority was increased to 112 to 88Ca margin of 24 seats. Following the elections and the reconvening of the National Assembly in February 1993, the President continued to stonewall the opposition. The level of civility between KANU and the opposition was low. Debates inside the chamber were often marked by shouting and unfocused harangues. Parliamentary committees remained moribund, although the Public Accounts Committee and the Public Investments Committee did meet. Outside the chamber, MPs from KANU and the opposition rarely gathered for any purpose. Efforts by civil society organizations and the international donor organizations to bridge the gap by sponsoring workshops and other fora to examine

selected issues of public policy were invariably boycotted by KANU MPs on orders from Moi. There was little dialogue across party lines. The National Assembly remained an ineffective body.

### Recent Changes in the National Assembly — The Eighth Parliament

Multiparty elections were held again in Kenya at the end of December 1997. Despite government attempts to repeat some of the electoral manipulations of 1992, Moi and KANU were returned to power with a razor thin majority of only four seats in the National Assembly (113 to 109). Equally significantly, less than half of the KANU members in the previous parliament gained the party's nomination for the 1997 elections, so the composition of the KANU delegation in the Eighth Parliament is very different from its predecessor. Indeed, the most distinctive feature of the National Assembly today is the presence of a new political generation of MPs, including the KANU MPs. The new MPs are younger, smarter, better educated, and more independent of President. They are more predisposed to reach out to their counterparts in the opposition. The result is a new political mood and sense of purpose in the House.

The new generation of MPs together with a holdover group of reformers from the previous parliament means that there are now a group of between 55 and 75 MPs from all parties who are committed to working across party lines to transform the National Assembly into an independent and effective body. Inside the House, these MPs have sought to strengthen the committee system, particularly a group of eight departmental committees, and have established an Anti-Corruption Committee to investigate allegations of corruption within the executive branch. Outside the House — and — much to the consternation of Moi — this group of MPs has participated in a series of workshops to examine various aspects of public policy.

Most significant of all, these MPs now seek to strengthen the National Assembly by passing a constitutional amendment to establish a Parliamentary Service Commission (PSC). *The primary purpose of this legislation is to de-link the National Assembly from the Office of the President of which it is constitutionally a part.* The establishment of the PSC, would address six major constraints that limit the ability of MPs to do their jobs and which in turn constrain the National Assembly from becoming an independent and effective body (see pages 10-11 of main report).

### Suggested Interventions to Strengthen the National Assembly

These dramatic developments indicate that much has changed within the National Assembly even though an overall stalemate continues between Moi and those who seek to move Kenya towards a more democratic political process. Democratic transitions, however, are often protracted exercises and in the context of Kenya the legislature may have emerged as the leading edge of this process. USAID Kenya should take advantage of the new parliamentary potential and mount a modest program to strengthen the Assembly over the next two to three years. Such a program would include some or all of the following:

Provide specialized training for selected groups of MPs, possibly on a departmental committee basis, on one or more of the following areas: (1) parliamentary procedure, (2) the budgetary process, (3) the structure of the Kenyan economy and its implications for public policy, (4) macro-economic reform, "structural adjustment," the role of the IMF and World Bank, (5) Kenya government policy in light of world practice.

Provide specialized training for parliamentary staff including 1-2 librarians, an information technology specialist, research specialists for the departmental committees, a legal affairs specialist. Assistance to train librarians and an information technology specialist would be for the purpose of **strengthening the operations of the existing library** with a view towards its ultimate transformation into a parliamentary research resource center.

Provide limited material support to the Assembly's library and careful, initial efforts to establish a research resource center for MPs, i.e. books, especially reference books for the library, a very small number of PCs with Internet capability.

Support the establishment of a Parliamentary Research Resource Centre, as a second phase of a support program tied to benchmarks of progress on independence and effectiveness. The National Assembly must enhance its technical capacity if legislation and legislative oversight of the Executive are to be effective. Ultimately this will require a research/resource center in the House. The center would house appropriate staff to provide background briefings on the likely impact of legislation tabled before the house and would assist MPs in getting answers to questions about any matter of public policy.

Expose Kenyan MPs and staff to "best practices" in region. Some MPs are aware of the fact that other African legislatures (e.g. Uganda) have greater statutory power and/or material resources than the Kenya National Assembly. USAID could support regional or intra-Africa study tours for selected groups of Kenya MPs to observe legislative practices elsewhere on the continent. Alternatively, USAID might support the establishment of an annual or semi-annual regional forum for MPs from all three East African legislatures. Training might also be provided on a regional basis. Support for the regional strengthening of legislatures might also be supported under the GHAI.

#### Considerations for Implementing an Effective Program

It is important that the implementation of any program to strengthen the National Assembly be both nuanced and targeted. Moreover, implementation of the program must be closely monitored because it will require periodic adjustment. Before commencing any program of assistance, the mission should therefore consider the following:

- All assistance to the National Assembly must be calibrated to match the absorptive capacity of the House. An effort destined to fail would involve the provision of a larger package of assistance than the Assembly can absorb in the short term. The rule of thumb should be to start small but scale up as demand from within the Assembly warrants.
- All assistance to the National Assembly must be negotiated and implemented through a joint agreement with the Office of the Speaker and the Office of the Clerk, and monitored by an appropriate committee, such as a modified Speaker's committee that would consist of both MPs and representatives of the Office of the Clerk sitting as ex-officio members. Given current tensions and suspicions on the part of most MPs towards the Clerk, any attempt to implement a program of assistance via the Office of the Clerk alone will be a non-starter.
- USAID-Kenya should consider asking USIS to be the implementing mechanism for specialized training and support to the parliamentary library, because of existing USIS programs to provide technical specialists on a short-term basis.
- Any assistance provided by USAID should be coordinated with that contemplated by other donors. The European Union is contemplating a program of support to democratic governance of yet undetermined scope and other donors expressed some interest..
- Assistance provided via a contractor needs to be tailored to the specific needs of the National Assembly; a "one size fits all" approach must be avoided. Contractors must thus be experienced in providing appropriate assistance and must be able to provide personal familiar with legislatures in the African context and/or willing to work closely with the USAID DG advisor or specialist.

- If USAID Kenya provides assistance to the Kenya National Assembly it should not be at the expense of the mission's current program to support civil society. In fact, linkages between civil society and parliamentary committees should be a special focus of both programs.

Downside Risks

The downside risks for any program to strengthen the National Assembly are minimal provided the initial interventions are small and any enlargement of the program is calibrated to the absorptive capacity of the institution.

## Strengthening the Kenya National Assembly

Joel D. Barkan

University of Iowa

In my view this House, since its inauguration last year, has made tremendous steps in addressing issues pertinent to our society. Debate has been more issue oriented [than at any time] since the reintroduction of multiparty politics in 1993.<sup>1</sup> There has been considerable rapport between members of the various political parties both within and outside the chamber. There has also developed a spirit of give and take. This is as it should be. I expect this trend to continue to be developed and nurtured. It is in the best interest of this country that we do so. There are, however, several limitations to the work of parliament that need to be addressed both internally and externally. For members to be effective in their work, they require space, material and resource persons.

Francis ole Kaparo, Speaker  
Kenya National Assembly  
April 6, 1999

[I]n order to promote and consolidate the dignity, independence and the supremacy of Parliament, this House urges the government to take immediate steps, including the introduction of any necessary constitutional amendments to establish a Parliamentary Service Commission which shall be directly responsible to the National Assembly . . . This motion is non-partisan; it speaks for the National Assembly and all Hon. Members of Parliament.

Peter Oloo-Aringo, MP  
April 20, 1999

### The Importance of the Legislature for Democratization

A cornerstone of *all* consolidated democracies is an *independent* and *effective* legislature where all or nearly all of the members of the legislature are directly elected in free, fair, and legitimate elections. This is true regardless of whether the democracy has a parliamentary form of government or a presidential system. It is true regardless of whether the democracy is a federal or unitary state. And it is true regardless of democracy's form of electoral system (e.g. proportional representation, first past the post, etc.). However, the existence of an elected legislature by itself will not lead to the consolidation of democracy

---

<sup>1</sup> Multiparty politics returned officially to Kenya in December 1991 when section 2A of the Kenyan Constitution that defined Kenya as a one-party state was repealed by the Sixth Parliament of the Kenya National Assembly. The National Assembly, however, did not consist of members from parties other than the ruling party KANU until after the convening of the Seventh Parliament in February 1993. Most observers mark the return of multiparty politics as occurring in 1992, because this was the year that opposition parties were registered for the first time, and a protracted competition occurred between the ruling party and the opposition in the course of a year long run-up to nationwide elections held in December 1992, Kenya's first multiparty elections in 26 years. Throughout this report, 1992 will therefore be cited as the year of the return of multiparty politics.

just as elections by themselves will not consolidate democracy.<sup>2</sup> And like elections, without an independent and effective legislature the concept of representative democracy is meaningless.

### **The Importance of the Legislature for Controlling Corruption**

An independent and effective legislature is also one of several key institutions for the control of corruption in government. Together with a free and investigative press, an independent judiciary and an effective office for public prosecution, the legislature plays an important role in identifying corrupt practices and in crafting legislation to limit its corrosive impact. Corruption flourishes where the law in respect to what constitutes corruption is not clearly defined legally, and where prosecutory agencies and the courts do not have sufficient statutory power or resources to enforce the law.

The legislature is especially important for combating corruption in the context of neo-patrimonial regimes in Africa. In these regimes, those in positions of presidential authority (e.g. Moi in Kenya, Mobutu in Zaire) have tolerated, even encouraged, corrupt practices by subordinate officials as a form of patronage to maintain themselves in power. Effective and vigilant oversight of the executive by the legislature is a major weapon against corruption, identifying such practices and limiting their perpetuation. Legislative control of corruption advances the process of democratization because it undermines a key pillar of authoritarian rule.

### **The National Assembly in Historical Context**

Kenya's legislature, the Kenya National Assembly, is neither independent nor effective, *but* it could become so over the next decade. As the Speaker of the Assembly stated recently, the prospects for strengthening the National Assembly are greater today than at any time since Kenya's return to multi-party politics in 1992. In fact, the Assembly is better positioned to develop a capacity for meaningful legislative oversight than at any time since independence. To understand why this opportunity exists, we must consider the evolution of the Assembly in the overall context of Kenyan politics: the role of the Assembly immediately before and after independence in 1963, its deterioration in the late 1970s, its near destruction during the 1980s, and the changes the Assembly has undergone since Kenya's return to multiparty politics in 1992.

#### **The Colonial Legislature**

As in other ex-British colonies, the formal structure of the national legislature in Kenya is modeled on British parliamentary practice. Kenya's first legislative body, the Legislative Council, was established in 1906. The National Assembly thus has its origins in the colonial era, during which time it was an advisory body whose members were either appointed by the governor of the colony or, later, elected by a series of restricted electorates defined on the basis of race. Membership in the Legislative Council was initially limited to representatives of Kenya's white settler (i.e. European) community. The first African was not appointed to the body until 1944.

The first direct elections for African representatives were held in 1957 when eight young politicians, including Kenya's current president, Daniel arap Moi, became members. Another six Africans were elected the following year, and in 1961, the number of directly elected African members rose to 33

---

<sup>2</sup> By "consolidated democracy," we mean *established* democracy—where democratic practice is regarded by all participants in the political process, both elites and citizens, as "the only game in town." Consolidation is thus much more than mere political liberalization or the first stages of transition from authoritarian rule. See Juan J. Linz and Alfred Stepan, *Problems of Democratic Transition and Consolidation* (Baltimore: Johns Hopkins University Press, 1996), pp. 3-16.

out of a total of 79. Finally, in a landmark election held in June, 1963, six months before Kenya obtained its independence, a bicameral legislature consisting of a 129 seat House of Representatives and a 41 seat Senate was elected to facilitate the transition to independent rule.

### **The National Assembly under Kenyatta**

During the term of Kenya's first president, Jomo Kenyatta (1963-78), Kenya experienced a period of benign authoritarian rule, during which the national legislature became an established, albeit subordinate, feature of Kenyan political life. In 1966, the House of Representatives and Senate were merged to form a unicameral legislature, now called the Kenya National Assembly, which consisted of 158 members elected from single member districts, plus 12 presidential appointees, for a total of 170 Members of Parliament (MPs). Kenya also became a *de facto* one party state as Kenyatta's political party, the Kenya African National Union (KANU), absorbed its smaller rival, Moi's party, the Kenya African Democratic Union (KADU).

This led to several fundamental changes in the role of the legislature and its members, although the National Assembly continued to adhere to the procedures and customs inherited from the British.

- Because the opposition party had ceased to exist, the classic Westminster model of parliamentary debate between "the government" and "the loyal opposition" no longer occurred. Instead, legislative oversight took the form of backbenchers (MPs who did not hold ministerial portfolios) scrutinizing the actions of government ministers and assistant ministers, who sat on the "front bench." Debate was lively, reasonably informed, well reported in the press, and occasionally resulted in the amendment of government sponsored legislation.
- The locus of power, however, was firmly in the executive -C with President Kenyatta and his bureaucratic arm, the Office of the President. Votes of no confidence were unthinkable. MPs who mounted any sustained challenge to the President paid for their audacity with their political careers, and, in three instances, with their lives.
- The role of the MP also changed. Rather than devoting most of their time to the deliberation of legislation and/or oversight of the executive, MPs shifted to servicing their constituencies by organizing local self-help development projects known as "harambees". Kenyatta encouraged this shift by urging Kenyans to re-elect those MPs who provided social welfare services (e.g. schools, health dispensaries, water, roads, and cattle dips) to their districts, and to punish those who did not.

The result was that although Kenya had only one political party, KANU, elections for the National Assembly continued to be held every five years and were relatively competitive exercises, similar to primary elections held in one-party congressional districts in the U.S. Elections became referendums on the ability of incumbents to *deliver the goods* back home. They produced a distorted yet meaningful form of political accountability. MPs were regularly held accountable to their constituents, as an average of roughly 60 percent of incumbents were defeated at each election. Nonetheless, governmental accountability, that is to say, the accountability of the executive branch to the legislature, and via the legislature to the Kenyan public, was limited. To the extent that legislative oversight existed, it was maintained through a combination of parliamentary debate and the operation of two standing committees, the Public Accounts Committee and the Public Investments Committee.

### **The National Assembly under Moi**

Following Kenyatta's death in 1978 and the succession to the presidency of Daniel arap Moi, the National Assembly was gradually reduced to a rubber stamp. An initial period of open rule that appeared

promising during the transition period (e.g., the release of political prisoners held under the Kenyatta regime) abruptly gave way to suspicion on the part of a regime which began to perceive enemies everywhere. That this paranoia was not wholly without foundation was graphically demonstrated by the abortive coup attempt mounted by the Air Force on Aug. 1, 1982, an effort which informed observers later claimed to have been only one of three coups in the plotting stage at that time, and the Air Force move amounting to a pre-emptive effort. The Moi regime shut down all potential arenas of dissent at that point, and shortly thereafter Kenya became a *de jure* one-party state.

The country subsequently evolved into a near perfect example of neo-patrimonial, "personal rule" where all power is concentrated in the hands of the president. MPs were marginalized into sycophantic cheerleaders of Moi. Those who dared to criticize the President were systematically harassed and jailed. While parliamentary elections in 1978 and 1983 were still guardedly competitive, they finally, in 1988, became a rigged event in which the secret ballot was replaced by "queue voting" at the primary stage.<sup>3</sup> As the legislature and elections became shadows of former practice, Kenya's political system became illegitimate in the eyes of a majority of the country's citizens. A once robust economy also declined during the 1980s as a result of a lethal combination of the oil shocks, bad macro-economic policy and bad governance.

Economic decline and political decline were mutually reinforcing, and a significant element of this dual process of decay was the accelerated decline of the National Assembly. Whereas under Kenyatta backbenchers could still monitor the government, albeit increasingly ineffectively, under Moi they could not. Although members periodically engaged in desultory debates, Kenya's national legislature, for practical purposes, ceased to perform any meaningful functions, operating completely in the shadow of the executive.

### The Return of Multiparty Politics

The return of multiparty politics in 1992 did not significantly improve the position of the National Assembly or its members. After a yearlong struggle between Moi and KANU on the one hand, and three opposition parties on the other, the President and his party were returned to power in Kenya's first multiparty elections in 26 years, held at the end of December 1992. Although Moi and KANU garnered only a third of the vote, both won a plurality overall, with KANU obtaining 100 of the 188 elected seats in the National Assembly. Following the normal presidential appointment of 12 additional members, KANU's majority was increased to 112 to 88Ca margin of 24 seats.<sup>4</sup>

---

<sup>3</sup> The procedure of "queue voting" was used for the 1988 party primary elections, which served as an essential screening process. Under this method, candidate's agents would assemble at "polling places" with pictures of their candidates, and voters would line up behind them and be counted in full view of all assembled. Many voters felt intimidated and turnout dropped to 26 percent, the lowest in Kenya's history. While the subsequent election of those who had been "vetted" was held by secret ballot, the party had guaranteed some critical seats through a rule giving an automatic "walkover" to any candidate achieving 70% or more of the vote at the queueing stage. The election was also the occasion for creating 30 new parliamentary constituencies, thus raising the number of directly elected members of the National Assembly to 188 plus 12 presidential appointees, for a total membership of 200.

<sup>4</sup> Had the opposition not divided its vote, KANU would have "lost the election", in the sense of winning less than 50% of the parliamentary seats. The average number of voters in districts won by KANU was also substantially smaller than the average number in districts won by the opposition. Indeed, unequal districting alone explains the outcome of both the 1992 election and the elections of 1997, in that a majority of the seats would have been held by the opposition parties combined, under any reasonably equitable districting. The opposition parties were at that Point in no sense "combined", or united, however, and KANU would still have had a plurality.

The run-up to the 1992 elections, if not the elections themselves, were widely regarded as flawed, symptomatic of Moi's underlying resistance to political liberalization, and more fundamentally, democratization. The President made no secret of his disdain for the existence of opposition, but had agreed to repeal the clause in Kenya's constitution that had defined Kenya as a one-party state following the suspension of "quick-disbursing" aid by the international donor community in November, 1991. His government systematically harassed the opposition throughout 1992, including the periodic arrest of its leaders, and the denial or suspension of campaign permits to candidates, as well as other forms of harassment. The return of multiparty politics was also marked by the government's initiation of "ethnic clashes" (in effect, ethnic cleansing) in areas of the Rift Valley and certain neighboring swing areas with clear evidence of support for the opposition. The President continued to stonewall the opposition after the reconvening of the National Assembly in February 1993, Kenya's Seventh Parliament since independence.

### **The Seventh Parliament**

The Seventh Parliament, like the broader political process of which it was a component, can only be described as a protracted stalemate. Rather than reach out and engage the opposition, Moi and KANU sought to decimate the opposition parties and intimidate their MPs. The government rarely sought cooperation or extended any courtesy to the opposition. The Speaker of the National Assembly was widely perceived as under the thumb of the Moi Government and as biased in his rulings. Standing committees other than the housekeeping committees (discussed below) remained moribund, although the Public Accounts Committee and the Public Investments Committee did meet and were chaired by leading members of the opposition as required by the Standing Orders of the House. Indeed, the committees were the only mechanisms available to the opposition to exercise legislative oversight. The government made concerted attempts to intimidate, coopt or buy-off the members of these key committees.<sup>5</sup>

Civility between KANU and the opposition, both within and outside the House, was nonexistent. Debates inside the chamber were frequently marked by shouting and unfocused harangues. Outside the chamber, MPs from KANU and the opposition rarely gathered for any purpose. Efforts by civil society organizations and the international donor organizations to bridge the gap by sponsoring workshops and other fora, to examine selected issues of public policy, were invariably boycotted by KANU MPs, Presumably under orders from Moi. There was little dialogue across party lines.

### **Parliamentary Incentives**

An important factor constraining the performance of parliamentarians is their extremely low salaries and allowances, totaling only 70,000 Kenyan shillings (approximately \$1,111 at the current rate of exchange).<sup>6</sup> With this sum, MPs are barely able to cover lodging and other basic expenses in Nairobi when the National Assembly is in session, or to travel back to their districts on a regular basis. Yet they are under tremendous pressure to return to their districts for the purpose of constituency service, the most notable legacy from the Kenyatta period. Given this situation, Moi's strategy has been to prey upon MPs financial vulnerabilities.

During the Seventh Parliament, KANU MPs were kept in line through the provision of patronage and/or loans over and above their official emoluments, while opposition MPs were confronted by carrots

---

<sup>5</sup> The most notable example in this regard was the alleged buying off of the chairman of the Public Accounts Committee during the course of the committee's investigation of the "Goldenburg scandal," a \$350 million dollar scam involving several senior members of the government, and the basis of subsequent suspension of quick-disbursing aid by the IMF and World Bank.

<sup>6</sup> Kenyan MPs earn between one-fourth and one-third that of their counterparts in Uganda and Tanzania.

and sticks. If they were willing to abandon their parties and defect to KANU, they were guaranteed the KANU nomination for the subsequent required by-election, as well as sufficient campaign funds to contest the election and side payments (if ultimately reelected) in the form of cheap loans, appointments to statutory boards, and other forms of patronage, including government support for social welfare services and infrastructure back in their districts. If, on the other hand, they remained in opposition, they were simply frozen out of the patronage system, and the needs of their constituents were ignored. More sinister still was the re-emergence of ethnic clashes in selected opposition strongholds following the 1992 elections, most notably in the Kikuyu areas of the Rift Valley Province.

Such hardball tactics yielded limited results. Of the 29 by-elections held between 1993 and 1997, KANU won only twelve. By the end of the Seventh Parliament in November 1997, the balance between KANU and the opposition had increased to 124 to 76, but the hard core of the opposition did not fold.

### **Recent Changes in the National Assembly: The Eighth Parliament**

While the Seventh Parliament, elected in 1992, marked the return to a multiparty legislature, the Eighth Parliament, elected in December 1997 marked the first significant movement towards an independent and effective legislature. What has changed and why? Again, the answers are to be found in the overall context of Kenyan politics.

#### **1997 Election**

The election of 1997 was an extremely high stakes event for the regime, following on a summer of increasingly vocal dissent and political rallies which prompted a violent response captured by the international news media. After initially pursuing the same strategy by which they had fought the 1992 elections, relying on harassment, skewed voter registration and renewed outbursts of ethnic clashes, the regime was forced into an accommodative position in agreeing to the Inter-Parties Parliamentary Group process to hammer out a minimum package of electoral reforms, which it attempted to control and manipulate. In line with constitutional requirements to redistrict after each census (which redistricting should actually have been done in 1992), 22 new constituencies were carved out of existing districts to raise the total number of directly elected seats to 210. With the 12 presidential appointees this produced a total of 222 parliamentary seats. Moi and KANU increased their proportion of the vote to two-fifths of the total in an administratively flawed election, but KANU's margin of seats over the opposition declined to 107 to 103. Whereas in the past, KANU's four seat majority would have been extended to 16, this was no longer possible, because Moi was forced to allocate the 12 appointed members on a proportional basis that reflected the proportion of directly elected seats for each party—6 for KANU and 6 for the opposition parties.<sup>7</sup>

Equally significant was the fact that of the 124 KANU incumbents in the previous parliament, less than half gained the party's nomination for the 1997 elections. As a result, the composition of the KANU delegation in the Eighth Parliament is very different from the Seventh. The new members of the KANU delegation are younger, smarter, better educated, and more independent of the President and the inner core of the party than their predecessors. They are more predisposed to reach out to their counterparts in the opposition. The result is a more cooperative atmosphere in the House. This has in turn led to a greater

---

<sup>7</sup> KANU's razor thin majority is the result of a combination of close monitoring of the 1997 elections by Kenyan civil society (i.e. the NCCCK, the Catholic Church and the Institute for Education and Democracy, a USAID funded NGO), and the provisions of the IPPG minimal package of constitutional reforms passed by the National Assembly in the face of an election boycott by the opposition and the NGO community. For details see Judith Geist, Stephen Ndegwa, et. al. Assessment, May, 1998 and Joel D. Barkan and Njuguna Ng'ethe, "Kenya Tries Again," *Journal of Democracy*, April, 1998, pp. 32-48.

number of MPs devoting more of their time the role of being a legislator *within* the National Assembly, as elected officials whose job it is to scrutinize and formulate legislation and to monitor the performance of the executive branch of government. A new rapport exists among members of Kenya's parliament.

A final but critical variable that explains the new mood in the National Assembly is the approaching end of the Moi presidency and the beginning of the politics of succession. When Kenya's constitution was amended to permit the return of multiparty politics, the number of presidential terms was limited to two. Because Moi had previously held the presidency by virtue of his leadership of KANU and his membership in the House, but had not been elected by a nationwide constituency, he was deemed eligible to serve two additional terms under the new rules that provided for the direct election of Kenya's president. The second of these terms will end with the next round of national elections, due at some point before the end of 2002 or early 2003. Moi is consequently a "lame duck," a situation that intensifies as his last term proceeds. At age 74, Moi is confronted by an increasing number of "young Turks" half his age within his own party, and the authority of the President has begun to wane. The new mood in the House and the prospects for its revitalization are thus the result of the changing of political generations within and beyond the ruling party as much as they are the result of the continued strength of the opposition.

### Benchmarks of Progress

The new mood has resulted in a number of other developments that suggest that the prospects for revitalizing the National Assembly are greater today than at any time since the return to multiparty politics in 1992. Indeed greater than at any time since the end of the Kenyatta presidency in 1978.

***Cross party support for parliamentary reform.*** Whereas parliamentarians from KANU and the opposition parties rarely spoke to each other during the Seventh Parliament, a significant number of MPs from the ruling party and the opposition now work together on legislative business. While it is hard to estimate their precise numbers, roughly 30-35 KANU MPs together with a slightly larger number from the opposition, now constitute a core of 55 to 75 reformers. They are MPs who are predisposed to talk and bargain across party lines. The size of this group varies from day to day and from issue to issue, but now constitutes approximately a third of the House. A common objective of this group is to establish the independence of the legislature from the executive. At the individual level, most refuse to be answerable to Moi. By contrast, the number of "hard-liners" surrounding the President, the so-called KANU-B faction that has vociferously eschewed any cooperation with the opposition, is estimated at between 30 and 40. The remaining membership of the House consists of between 105 and 140 "floaters," MPs who have heretofore been neither active for reform nor stalwarts of the President. Any attempt to strengthen the National Assembly must ultimately target a significant portion of these MPs—probably as many as half—if those committed to establishing the National Assembly as an independent branch of government are to control the House.

***KANU Reformers.*** Several key KANU MPs are now positively inclined toward reform and parliamentary strengthening, including the Francis ole Kaparo, the Speaker of the House and Sammy Leshore, the KANU chief whip. These political leaders have obviously concluded that their political futures and their own self-interest lie with a revitalized legislature, where cooperation with the opposition rather than confrontation is the norm.

**IPPG Reform Process.** The initial manifestation of cooperation across party lines actually occurred during the waning days of the Seventh Parliament. Between September and November, 1997, between 80 and 100 MPs from KANU and the opposition formed the Inter-Parties Parliamentary Group (IPPG) and negotiated a limited package of constitutional reforms to head off a threatened opposition boycott of the 1997 elections. The most significant provisions of this package included:

- the transformation of the Electoral Commission from a body wholly appointed by the President to an independent body with members from all parties;
- the allocation of the 12 nominated seats in parliament in a manner that reflected the proportion of elected seats won by each party;
- the allocation of nominated seats for municipal and county councils in a manner that reflected the proportion of elected seats won by each party;
- a modification of the Standing Orders of the National Assembly specifying that bills before the house must be referred to and discussed by eight departmental standing committees prior to substantive consideration by the whole House;
- the formation of a Constitutional Review Commission following the elections that would be broadly representative of all political parties as well as civil society, to review and rewrite Kenya's constitution.

*Post-IPPG Cooperation.* When fully implemented, each of these changes diminished the power of the President, though many among the opposition contend that this has not been the result and that the process was highly manipulated by KANU from the start. Although KANU has sought to pack the Constitutional Review Commission with its supporters, cooperation among MPs predisposed to reform, including KANU MPs, has increased since the beginning of the Eighth Parliament as indicated by the following developments.

- A series of five workshops was held between May 1998 and March 1999 on various aspects of public policy. The workshops, been organized outside the National Assembly by the Centre for Governance and Development (CGD), and attracted the participation of up to 130 MPs, including some ministers and assistant ministers.<sup>8</sup>
- The passage of legislation to establish an Anti-Corruption Committee to delve into corrupt practices within the executive branch. This legislation was passed by the opposition parties over the objections of the KANU front-bench, but was supported by some KANU backbenchers. It is an example of how KANU's narrow majority in the National Assembly can no longer guarantee the party's or the President's dominance over the proceedings in the House.
- The continuing and active efforts by the members of the Public Accounts Committee (PAC) and the Public Investment Committee (PIC) to scrutinize the operations of the executive. The Standing Orders of the National Assembly previously required that the chairship of these two oversight committees be held by MPs from the opposition party. The Standing Orders were changed at the end of the Seventh Parliament as part of the IPPG package to permit the two

---

<sup>8</sup> The most publicized of these workshops occurred in Mombasa in May 1998 on the topic of the plight of the Kenya economy. Included among the 130 participants were the then Minister of Finance, the Speaker of the National Assembly and a large number of KANU MPs. President Moi is reported to have phoned the Speaker and ordered him to instruct the KANU MPs to withdraw from the workshop. The Speaker refused as did the other KANU participants. Workshops since the Mombasa assembly have drawn between 20 and 30 participants including one on the problems faced by Kenya's pastoral peoples, one on the coffee and tea industries, a workshop to facilitate the work of the Anti-Corruption Committee of the House, and one to discuss legislation to establish a Parliamentary Service Commission that would delink the National Assembly from the Office of the President.

committees to be chaired by KANU Members. Notwithstanding this change in the rules, only one of the two committees is now chaired by KANU, and he is a reformer. Moreover, both committees appear to be as diligent or more diligent than their predecessors during the Seventh Parliament in monitoring the executive. Yet both PIC and PAC suffer from a fundamental weakness in that they have no power to force the executive to implement their recommendations to prevent the repetition of malpractices that have already occurred. The two committees are consequently jokingly referred to as “post-mortem” committees; that is to say, committees that consider governmental operations *after* the fact rather than committees that set government policy or practice.

- Recent efforts to breathe life into the provision in the Standing Orders of the Assembly for the establishment and operation of eight departmental committees to shadow the more than 20 ministries of the Government of Kenya. *The potential significance of these efforts for strengthening the National Assembly cannot be overstated.*

The two *key benchmarks* of forward movement in the parliamentary arena, and of the existence of an effective reform constituency and strategy, are the revitalization of this parliamentary committee system, and the anticipated tabling of legislation targeting significant parliamentary reform and strengthening.

*Parliamentary Departmental Committees.* Although the Standing Orders have long permitted the formation of departmental committees, such committees were never established prior to the convening of the Eighth Parliament. Only three types of parliamentary committees have functioned since Kenya’s independence: (1) PIC and PAC, the traditional oversight committees of government expenditures. (2) Select committees that have been established occasionally by the House to examine a single issue, and which have then gone out of existence after completing their work. (3) The Housekeeping committees, such as the Speaker’s Committee, the Business Committee, the Library Committee, and the Catering Committee, whose purpose is to provide logistical services within the Assembly. The establishment of eight departmental committees at the beginning of the Eighth Parliament is a major step towards enhancing the traditional *legislative* role of MPs while increasing their ability to scrutinize governmental operations.

The record of the departmental committees has been mixed but they provide a glimpse of what the House could become if political commitment to their growth is sustained and the technical capacity of these committees is enhanced. The eight committees comprise Agriculture, Lands and Natural Resources; Culture; Defense and Foreign Affairs; Education, Research and Technology; Finance; Health and Social Services; Justice, Legal and Constitutional Affairs; the Local Authority and Security. Of the eight, five have been active to varying degrees in the past year: Agriculture, Finance, Health, Justice, and the committee on Security. Given the importance of agriculture for the Kenyan economy and recent crises in selected sub-sectors such as coffee, sugar and rice, it is not surprising that the members of the Agriculture Committee have been motivated to examine government policies in this area. The committee has also been pressured by the farmers of selected crops to look into their situation. This may be the first time economic interest groups in Kenya have contacted a specialized legislative committee about their concerns. *This is an important first step, since such dialogues between interests within civil society and their counterpart committee within the legislative branch have historically been one basis of strong legislatures in advanced democracies.*

Although active on a less regular basis, the Finance, Health, Justice and Security Committees have all deliberated and amended legislation moved by the Government during the first year of the Eighth Parliament. To become law, proposed legislation in Kenya must be read and passed three times by the National Assembly and then signed by the President. The current Standing Orders provide that bills be referred to the appropriate legislative committee for consideration between the first and second readings. This is the only time a departmental committee may consider legislation. Despite this limited opportunity, the members of the committees have the authority under the Powers and Privileges Act to call any

government official or member of the public to appear before the committee and answer questions posed by committee members.

A few examples illustrate the manner in which the members of the departmental committees are beginning to use these opportunities to influence the legislative process:

- The Finance Committee met 13 times to consider the Finance bill of 1998 during which the Minister of Finance, the permanent secretary for the ministry and other officials appeared before the committee.
- When debating the proposed Intelligence Act, the Security Committee called the Minister of Home Affairs, the head of the Criminal Investigation Department, and the head of the GSU. The Committee also amended the bill before returning it to the House for its second reading.
- The Justice and Constitutional Affairs Committee similarly debated and amended the proposed Community Services Act, a bill to relieve overcrowding in Kenya's prisons through the early release of minor offenders.
- The Health and Social Services Committee likewise queried the Minister of Health prior to amending the proposed National Hospital Insurance Act.

The structure of the departmental committees fosters cooperation across party lines. Because these committees are composed entirely of backbenchers — that is, KANU MPs without ministerial appointments, and opposition MPs, in equal numbers — their members do not have to bridge the gap between the KANU front-bench (i.e. the Government) and its critics. The committees are also small (around 10 members each) and their proceedings are not reported in the press. There is consequently little incentive to “grandstand” or seek confrontation with one's opponents. MPs from different parties have been able to develop collegial relationships for the first time, reinforcing their predisposition to work together.

*Constraints.* Notwithstanding these encouraging developments, the departmental committees and their members operate under six major constraints:

- Many members of these committees lack an in-depth knowledge of the policy area with which their committee is concerned, although committee appointments are made by the parties in accordance to Members interests and skills to the extent possible. Committee members will be more effective with appropriate briefing/training on the issues with which they deal.
- The departmental committees have virtually no financial resources to support their work. This has created considerable friction between committee members, and especially between committee chairs and the Clerk of the National Assembly, because many MPs believe that the Clerk purposely withholds funds for travel and other committee expenses. For his part, the Clerk explains that he has sometimes reallocated unused funds for the PIC and PAC to several departmental committees, including Agriculture and Finance, in order to permit them to function at all. The Assembly's budget is clearly inadequate; the Assembly was one of the most serious “overspenders” in FY 98/99.
- The departmental committees presently have no staff, apart from the cadre of generalist clerks that service parliament as a whole. The Clerk envisions a cadre of three specialized clerks for each of the eight departmental committees, a total of 24.

- Space in the existing parliamentary buildings is short. The departmental committees often have only two rooms in parliament buildings in which to meet, supplemented by two rooms in County Hall, next door. Nor do individual MPs have offices. It is anticipated that this extreme shortage of space will be eliminated once two nearby buildings that have been purchased for the National Assembly are remodeled for use.
- The National Assembly lacks an adequate library or an appropriately staffed research resource center to facilitate the work of the committees and individual MPs.
- MPs remain poorly paid, with the result that they spend considerable amounts of time on outside business interests or searching for funds from patrons and supporters, which makes them vulnerable to KANU's coalition-maintenance strategy and feeds the neo-patrimonial basis of the system. *While there are always the handful of exceptional individuals, until this problem is solved, the likelihood that most MPs will be able to afford spending adequate time on committee work is remote.*

***Parliamentary Reform Legislation.*** Proposed legislation to establish a Parliamentary Services Commission was being discussed during the team's visit, and had the vocal support of an overwhelming majority of the persons interviewed, including the Assembly's KANU leadership. Because an increasing proportion of MPs take their work seriously but are frustrated by the constraints under which they labor, reformers from all parties have proposed an innovative package of legislation to establish a Parliamentary Services Commission. If enacted, the proposed bill would eliminate or reduce all six of the constraints described above. ***The fundamental purpose of this proposed legislation is to de-link the National Assembly from the Office of the President of which it is currently a part, and to establish the National Assembly as an independent branch of government.***

Passage of a PSC bill would require the passage of a constitutional amendment supported by two-thirds of the House. Despite this hurdle and the fact that the Government has refused to respond to previous demands for such legislation, the bill's chief sponsors believe that they will prevail during the current session of parliament. They believe that almost all members of the House recognize that to vote for the PSC and the schemes of service that it would provide for both MPs and parliamentary staff is to vote their self-interest, regardless of party. Supporters now include virtually all backbenchers, the Speaker, the whip and deputy whip of KANU, and some assistant ministers. Only the front-bench and the President himself are likely to resist passage, but they have been told that if the Government does not sponsor the legislation, the House will pass the legislation anyway. Should this happen, a significant shift will have occurred that would contribute to restructuring the balance of power between the Assembly and the President. The full significance of this bill is discussed by its mover, Peter Oloo-Aringo in Appendix II of this report.

### **Prospects for Strengthening the National Assembly**

The foregoing analysis argues that the prospects for strengthening the National Assembly are greater now than at any time since the return of multiparty politics in 1991. A core group of reform minded MPs have decided to assert their independence individually and the independence of the House as an institution. Asserting the independence of the legislature, however, is only one element in the democratic equation. Another is the need for the House to become an *effective* institution, but the prospects for this are more limited because of the six constraints described above.

If the National Assembly passes the envisioned legislation for a Parliamentary Services Commission (PSC), the prospects for the House becoming an effective institution will be significantly increased. Passage will create the enabling environment within which an effective House can be built.

Building it will take time; major progress is likely to take not less than five years, and consolidating such progress at least ten. By establishing a separate PSC, MPs intend to provide themselves with adequate salaries, professional staff who are accountable to the MPs rather than to the Office of the President, adequate office space and sufficient operating expenses to do their work. If they succeed, their remaining task will be to improve their skills as legislators and their specialized knowledge about one or two areas of public policy relevant to the committees on which they serve.

At this point, but only at this point, the donor community has a significant role to play. The MPs themselves must pass the enabling legislation and address their financial requirements, including their need for space and appropriate numbers of staff. What donors can do is to contribute to the training of legislators and staff, to expose them to what constitutes effective legislative practice in other political systems, and to equip them with the modern tools of policy analysis. *As with democratization itself, donors must be sensitive to the fact that when it comes to building an independent and effective legislature, donors are facilitators who operate at the margin, not the central actors in this process.*

### **Suggested Interventions to Strengthen the National Assembly**

The following interventions should be considered in designing an initial program of assistance to strengthen the Kenya National Assembly, if the preliminary benchmarks are satisfactorily met:.

- Provide specialized training for selected groups of MPs. Virtually all MPs are in need of training in the following areas: (1) parliamentary procedure, (2) the budgetary process, (3) macro-economic reform, "structural adjustment," the role of the IMF and World Bank, (4) the structure of the Kenyan economy and its implications for public policy (5) Kenya government policy in light of world practice in education, health, agriculture, housing, the judiciary, revenue generation, local government.
- Provide specialized training for parliamentary staff, including, (as examples) 1-2 librarians, an information technology specialist, research specialists for the departmental committees, and a specialist on legal affairs. Assistance to train librarians and an information technology specialist would strengthen the operations of the existing library first, with a view towards its ultimate transformation into a larger parliamentary research resource center.
- Provide limited material support to the Assembly's library and initial efforts to establish a research resource center for MPs, i.e. reference books for the library, a very small number (1-3) number of PCs with Internet capability.
- Provide support for the establishment of a Parliamentary Research Resource Centre. The National Assembly must enhance its technical capacity if legislation and legislative oversight of the Executive is to be meaningful over the long term. This will ultimately require a research/resource center within the House. The center would house appropriate staff to provide background briefings on the likely impact of legislation tabled before the house. It would assist MPs in obtaining answers to any inquiries they might have on any matter of public policy. It would serve as a reference subject on any matter on which MPs would like to obtain additional information. It would also enable members of the Assembly to compare their legislative output with that of other legislatures in Africa. The establishment of a parliamentary research support center would take a minimum of three years, probably five, and should be considered only as a late-stage initiative if earlier, more modest efforts proved fruitful.
- Expose Kenyan MPs and staff to "best practices" in region. The Uganda National Assembly and the Tanzania National Assembly both provide better terms of service for their members than does

the Kenya National Assembly. The Uganda National Assembly has also been more effective at investigating corrupt practices and forcing the removal of senior government officials for acts of corruption. A very effective forum organized by the World Bank and attended by a small number of MPs and staff from twelve Anglophone African countries was held in Kampala in 1998. Kenyans attending the conference, including some who are now behind the move to establish a Parliamentary Service Commission, reported that they learned a great deal by comparing their situation with that of their fellow MPs. USAID Kenya might usefully sponsor regional or intra-Africa study tours for selected groups of Kenya MPs to observe legislative practices elsewhere on the continent. Alternatively, and perhaps more usefully, USAID Kenya might support the establishment of an annual or semi-annual regional forum for MPs from all three East African legislatures. Training might also be provided on a regional basis. Support for the regional strengthening of legislatures might also be supported under the GHAI.

### **Benchmarks to determine whether USAID should support the National Assembly**

Whether USAID should mount and sustain a multi-year program for strengthening the National Assembly is contingent on continued progress in respect to two types of benchmarks — those that measure the *independence* of the National Assembly, and those that measure the Assembly's *effectiveness* for deliberating and crafting legislation and for exercising oversight over the executive. Both are equally important, but the first will be achieved mainly by the MPs themselves while the second will require outside assistance — from USAID and/or other donors. Indeed, if the Assembly could become a more effective institution on its own, there is no need for a program of assistance to strengthen its capacity in this regard. The present limited capacity of the Assembly to effectively perform its functions is therefore a benchmark *for* providing assistance, but a lack of progress at increasing effectiveness *after* the commencement of assistance would be a benchmark *against* providing assistance. It is therefore important to remember that *these benchmarks are time sensitive* and will lead to different conclusions for USAID depending on when they are used to mark the advance or decline of the institution.

### **BENCHMARKS OF INDEPENDENCE**

#### **Progress to date**

- The election in December 1997 of a new generation of MPs who are more predisposed to asserting the independence of the National Assembly than their predecessors, and who are similarly not afraid to assert their individual independence of the President.
- The holding of five parliamentary workshops outside of the National Assembly between May 1998 and March 1999 which brought together MPs from all parties to discuss various public policy issues independent of that prescribed by the executive.
- The motion of no-confidence in President Moi and his government considered by the National Assembly and defeated in November 1998. Though the motion failed, such a motion would have been unthinkable in the past, and especially prior to the return of multiparty politics in 1991 (i.e. the mover would have been jailed).
- The action taken by the House in 1998 to establish an Anti-Corruption Committee over the objections of the executive.

**Additional Progress over the next six months** (between May 1999 and October 1999)

- Continued cooperation among existing group of reformers through a continuation of the type of activities pursued since May 1998: the holding of workshops on selected areas of public policy; continuation of committee work by the eight departmental committees as well as the PAC and the PIC; an increase in the frequency of contact and dialogue between civil society and parliamentary committees.
- An increase in the number of MPs participating in the aforementioned activities; an increase in the number of MPs who can be classified as “reformers” or sympathetic to the reformers to between two-fifths to half of the House (between 90 and 110 MPs).
- Passage of a constitutional amendment and related legislation to establish a Parliamentary Service Commission. This is probably the most important single benchmark that the National Assembly has become and will continue to become an independent political institution.

**Additional progress during the following two to three years** (October 1999-September 2002/FY00 through FY02)

- Departmental committees meet on a regular basis, and all legislation tabled before the House is considered by these committees. Departmental committees exercise the power to amend legislation.
- The number of MPs who can be classified as “regular” or “active” participants in the independent activities of the House increases to between 60 percent and two-thirds of the House (between 130 and 150 MPs).
- The National Assembly periodically passes private members bills moved by backbenchers and/or by members of the opposition parties.
- The National Assembly gains a measure of control over the budgetary process by gaining the power to amend authorization bills for the annual budget.
- The National Assembly increases its statutory authority to enforce the implementation of the recommendations of the PAC and the PIC.
- Continued monitoring of corrupt practices by the Anti-Corruption Committee.
- The National Assembly enhances the statutory authority of the Office of the Auditor General so that the Office may prosecute cases of malpractice uncovered in its annual review of governmental operations.

**BENCHMARKS OF EFFECTIVENESS****Progress to date**

- New mood of cooperation within the National Assembly that has resulted in dialogues between MPs of different parties, particularly between KANU members and members of the opposition

parties. This inclination to cooperate, however, is limited mainly to the 60 to 75 MPs who have taken it upon themselves to change the way business is conducted in the House.

- The continued functioning of the PAC and PIC though their recommendations are rarely implemented by the executive.
- The establishment of eight departmental committees at the beginning of the Eighth Parliament and the periodic to regular functioning of five to eight of those committees that has resulted in the deliberation and amendment of legislation brought before the House.
- The establishment of the Anti-Corruption Committee and the functioning of that committee.

**Additional Progress over the next six months** (between May 1999 and October 1999)

- Passage of a constitutional amendment and related legislation to establish a Parliamentary Service Commission and the establishment of the Commission.
- Continued and increased activity on the part of the eight departmental committees to review government policy and craft legislation.
- Agreement by the Speaker and the Clerk of the National Assembly to seek donor assistance to strengthen the Assembly including the prioritization of what types of assistance are most urgently required by the Assembly in the near term.
- Completion of the tendering process and the signing of contracts for the remodeling of Constitution Hall and Continental House to provide adequate offices, meeting rooms and other facilities for all MPs and parliamentary staff.

**Additional progress during the following two to three years** (October 1999-September 2002/FY00 through FY02)

- Completion of the remodeling of Constitution Hall and Continental House, and the utilization of these buildings by MPs and parliamentary staff.
- Following the passage of the Parliamentary Service Commission Act, the establishment of a new and independent scheme of service for MPs. Such a scheme would be funded by a separate vote of the Treasury and provide for a substantial increase in salaries and expenses for MPs to both enable them to carry out their official duties on a full-time basis and to reduce their vulnerability to those who would seek to buy their services by providing for their expenses as is currently the practice.
- Following the passage of the Parliamentary Service Commission Act, the establishment of a new and independent scheme of service for parliamentary staff. Such a scheme would provide for a substantial increase in the salaries for staff with scarce technical skills (e.g. librarians, researchers, specialists in information technology) and thus enable the National Assembly to retrain the services of such staff over the long term. The strengthening of the committee system and the establishment of a sustainable research resource center for MPs will not be possible until the issue of staff retention is resolved.
- That nearly all MPs are knowledgeable about the Standing Orders and procedures of the House.

- That nearly all MPs are knowledgeable about the half-dozen major policy issues confronting Kenya at any point in time, and that all MPs have access to adequate staff support to facilitate their being informed about these issues.
- The strengthening of the eight departmental committees to the extent that all committees function on a regular basis, that nearly all committee members attend all meetings, and that the “skill level” of each committee is raised in respect to the ability of committee members to understand the issues and legislation before them.
- That nearly all MPs are knowledgeable about the budgetary process.
- That nearly all MPs have a rudimentary knowledge of what constitutes sound macro-economic policy for a country like Kenya.
- The National Assembly censures members of the government and senior officials within the civil service found guilty of corruption and other malpractice. Government officials found guilty of corruption are forced to resign.<sup>9</sup>
- Increasing tolerance on the part of President Moi and the executive towards parliament to the point that the executive and the legislature become partners rather than adversaries in the policy-making process. The prospects of such tolerance emerging during the course of the Eighth Parliament are limited, but not impossible. If nothing else, the President has by now concluded that the National Assembly will no longer be a rubber stamp or an institution that can be frozen out of the political process.
- The establishment of strong links between civil society organizations, particularly economic interest groups and other citizens organizations *not* concerned with issues of human rights and democratization, and the National Assembly via the committee system.

### **Considerations for Implementing an Effective Program**

It is important that the implementation of any program to strengthen the National Assembly be both nuanced and targeted. Moreover, implementation of the program must be closely monitored because it will require periodic adjustment. Before commencing any program of assistance, the mission should therefore consider the following:

- All assistance to the National Assembly must be calibrated to match the absorptive capacity of the House. The worst action, and one destined to fail would be to provide a larger package of assistance than the Assembly can easily absorb in the short term. The rule of thumb should be to start small but scale up as demand from within the Assembly warrants. For example, by providing limited support to the existing library, including Internet capability, and then — but only if demand warrants — expanding and transforming the library into a research resource center. Support for a parliamentary research resource center must also be contingent on the ability of the National Assembly to hire and retain an appropriate number of additional staff.

---

<sup>9</sup> Members of the Uganda National Assembly have the power to censure senior officials including ministers. In 1998 the Minister of Education was censured and forced to resign. The head of the army and brother of the President was also forced out after being subjected to criticism in the National Assembly for suspected corrupt.

- All assistance to the National Assembly must be negotiated and implemented through a joint agreement with the Office of the Speaker and the Office of the Clerk, and monitored by an appropriate committee, such as a modified Speaker's committee that would consist of both MPs and representatives of the Office of the Clerk sitting as ex-officio members. Given current tensions and suspicions on the part of most MPs towards the Clerk, any attempt to implement a program of assistance via the Office of the Clerk alone will be a non-starter.
- The program will fail if there is not proper coordination the relevant US agencies involved with this project, most notably between USAID, the Embassy and USIA.
- In respect to the provision of both specialized training and the strengthening of the parliamentary library, USAID-Kenya should consider asking USIS to be the implementing mechanism for such support because of existing USIS programs to provide technical specialists on a short-term basis, and its previous work with respect to the strengthening of libraries. USIS is also in a position to arrange for study tours to the United States for selected MPs and parliamentary staff who require exposure or training a specialized nature.

When considering study tours, the following considerations should be kept in mind: (1) Many MPs have already been on study tours to either the United States or other countries for the purpose of observing the legislative process in the context of a consolidated democracy. (2) Study tours limited to a general introduction to US legislative practice and political life are of relatively little value compared to tours that meet specific training needs. (3) Exposure to US legislative practice in the context of American state legislatures, especially state legislatures that function without an elaborate complement of professional staff, is far more appropriate for members of the National Assembly than exposure to Congress. Indeed, long visits to Washington serve little purpose as Congress is not a model which can be replicated in Kenya. In respect to any future effort to establish a research support center, the Mission should consider contacting the Congressional Research Service or the National Council for State Legislatures for specific advice on how to proceed with such an undertaking. The DG Center's IQC with the State University of New York may also be relevant for this endeavor.

The European Union is contemplating a large program of support of yet undetermined scope. This could evolve into a program similar to EU support for the South African parliament where substantial funding was provided for training and commodities. It might also provide material support for the refurbishing of Continental House and County Hall, if not for the remodeling itself then for equipment such as PCs. Since these are not areas in which USAID normally devotes its resources, we suggest that USAID-Kenya learn more about EU intentions and seek to coordinate programs that are complementary. The UNDP may also provide additional assistance to the National Assembly as a follow-up to a recently concluded program that provided some computers, printing equipment to reproduce parliamentary debates, and training in parliamentary procedures.<sup>10</sup>

- The Kenya mission will need help in the form of either an additional DG specialist or the reassignment or partial reassignment of the present DG advisor to this task.

---

<sup>10</sup> The program implemented by the UNDP, which ended in 1998, consisted of support similar to that intended as part of USAID's DG program in Kenya, as framed in a preliminary agreement in 1994-95. The Clerk and several MPs knowledgeable about USAID's intentions still lament that the Agency did not implement this program.

- It is important that any assistance provided via a contractor be tailored to the specific needs of the National Assembly and that a “one size fits all” approach be avoided. Contractors must thus be experienced in providing appropriate assistance and must be able to provide personal familiar with legislatures in the African context and/or willing to work closely with the USAID DG advisor or specialist.
- If USAID Kenya provides assistance to the Kenya National Assembly it should not be at the expense of the mission’s current program to strengthen civil society. Rather the current program for civil society should be modified to better complement the addition of a program to strengthen the legislature. Over the long run, a strong civil society is essential for an independent and effective legislature. *USAID’s program with respect to civil society should thus begin to nurture linkages between civil society and the National Assembly, particularly between economic interest groups on the one hand and the eight departmental committees on the other.*
- Finally, USAID-Kenya must be timely in providing support once a decision has been made to proceed with a program to strengthen the legislature. Because the USAID previously offered such assistance, and then reversed this decision, some MPs are somewhat skeptical about USAID’s intentions. In the words of one prominent reformer: “We need it; stop talking about it; get on with it!”

### Downside Risks

The downside risks for any program to strengthen the National Assembly are limited, provided the initial interventions are small and any enlargement of the program is calibrated to the absorptive capacity of the institution. A worst case scenario would be that no progress would be achieved with respect to any of the benchmarks discussed above.

Three factors may complicate the implementation of any program in this area:

- The programs of other donors. USAID should obviously avoid any duplication of what other donors are contemplating in this area, and vice versa.
- The relationships between the Clerk of the National Assembly and his staff on the one hand, and the Speaker and MPs on the other. Stated simply, these relationships are not harmonious at the present time, and may or may not improve with the passage of the Parliamentary Service Commission Act. If this legislation passes, the current Clerk will either be more solicitous of the members, or he will be dismissed. Given that the current Clerk is approaching the eligible age for retirement, he may choose to vacate his position. One encouraging sign on this issue is that both of the current deputy clerks are respected and liked by most MPs.
- The constitutional review process and the politics of succession. These are the truly “big” issues facing Kenya between now and the elections scheduled for 2002/3. Until they are resolved, or if they are resolved in an extra-legal manner, the evolution of the National Assembly into a fully independent and effective branch of government will not occur.

## **Appendix 1**

### **Speech by Francis ole Kaparo, Speaker of the Kenyan National Assembly, April 6, 1996**

[The speech was reproduced in the *Weekly Review*, April 9, 1999, p. 16]

Today is almost one year and two months since the formal inauguration of the Eighth Parliament on February 3, last year. There is need therefore for all honorable members to reflect on their program of activities, achievements and failures during the past one year. One year is a reasonable span of time to assess success or failure of any institution. In my view this House, since its inauguration last year, has made tremendous steps in addressing issues pertinent to our society. Debate has been more issue oriented since the reintroduction of multiparty politics in 1993. There has been considerable rapport between members of the various political parties both within and outside the chamber. There has also developed a spirit of give and take. This is as it should be. I expect this trend to continue to be developed and nurtured. It is in the best interest of this country that we do so.

There are, however, several limitations to the work of parliament that need to be addressed both internally and externally. For members to be effective in their work, they require space, material and resource persons.

To this end I am happy to report to your Excellency and to the House that the progress of awarding tenders for the partitioning of Continental Building are at an advanced stage. According to the approved designs by the relevant committee of the house, there will be 224 offices for all members (including ministers and assistant ministers), an ultra-modern parliamentary library, a parliamentary research center, five committee rooms and a health center, among other facilities. These facilities and services when ready will enable parliament to build the capacity to achieve the noble objectives of making this House accessible to all Kenyans through enhanced committee operations, researched and informed parliamentary contributions and enable honorable members (to) attend to the needs of their constituents in dignified offices rather than corridors, roadways and cars as the position has hitherto been. Parliament will therefore make to the Treasury requisition of considerable amounts to meet the cost of putting in place the necessary material and to employ all necessary human resource persons. It is a cost that Kenyans ought to and must bear in their quest for a working parliamentary democracy.

Parliament urgently requires to recruit and train personnel to service the various committees of the House, serve in the library, members offices, in the chamber and various other places. These officers must meet the special needs of parliament and (be) answerable to parliament. It is now time to have a parliamentary service commission in the same line as the Judicial Service Commission. In the meantime we shall employ the meager human resources to develop and shape the departmental committees. These committees have, due to lack of physical and human resources, been restricted to bills. Their scope is much larger than that.

Finally I would like to make a special appeal to ministers; please use the floor of the house to launch new government policies. I will avail the time for you. The House is a much better forum than Harambee meetings or funerals!

It is now my singular honor and privilege to invite Your Excellency to address the House and officially open this our 3rd session of the Eighth Parliament.

Appendix 2

**Speech by Peter Oloo-Aringo, upon tabling a resolution before the Kenya National Assembly urging the Government of Kenya to introduce constitutional amendments to establish a Parliamentary Service Commission that would be directly responsible to the National Assembly.**

[The speech was reproduced in Finance, April 25, 1999, pp. 20-23]

**Hon. Peter Oloo-Aringo:** Mr. Temporary Deputy Speaker, Sir, I beg to move the following motion:

**“That, in order to promote and consolidate the dignity, independence and the supremacy of Parliament, this House urges the government to take immediate steps, including the introduction of any necessary constitutional amendments, to establish a Parliamentary Service Commission which shall be directly responsible to the National Assembly.”**

Mr. Temporary Deputy Speaker, Sir, the dignity, independence and supremacy of Parliament are derived from the philosophical premise that the people are collectively sovereign, and that it is Parliament which exercises that sovereignty on behalf of the people. This Motion is non-partisan; it speaks for the National Assembly and all Hon. Members of Parliament. It speaks for the Speaker as the head of the National Assembly. It speaks for the Ministers, Assistant Ministers, the Whips as well as the Back-benchers because any other appointment to these offices is consequential to being a Member of Parliament. First and foremost, you must be a Member of Parliament before you can be appointed to the privileged offices of being a Minister or Assistant Minister. Therefore, this Motion is not only non-partisan, it is speaking for the institution of the National Assembly.

Mr. Temporary Deputy Speaker, Sir, you now know that the House is colored by many former Ministers and Assistant Ministers who are now serving as Members of Parliament. On the other side, my good friend, Hon. Mbela, is now a Member of the Back-bench and an MP. On our side, we have many who were Members of the Cabinet, but who are now Members of Parliament, emphasizing the fact that our first legitimacy here is derived from the fact that we are Members of Parliament. Therefore, we are speaking on behalf of the institution of the National Assembly.

Mr. Temporary Deputy Speaker, Sir, on 7th July 1993, the National Assembly resolved to create a Parliamentary Service Commission (PSC). In that same resolution, the Speaker’s Committee was directed by the House to work out the modalities for the implementation of this resolution of the National Assembly. On July, 1993 (sic) the National Assembly passed a resolution which reads as follows:

**“That, whereas section 2(A) of the Constitution of Kenya was repealed by the Constitution of Kenya Amendment Act of 1991, which, in effect, legalized the parliamentary system of government, and being conscious of the need to reaffirm the full independence of the Legislature in terms of finance and effective work by its staff, this House resolves that the Speaker’s Committee looks into ways and means of establishing a Parliamentary Service Commission to be charged with the welfare of the staff of the National Assembly, and in particular, with reference to appointments, confirmation and discipline.”**

Mr. Temporary Deputy Speaker, Sir, according to Standing Orders No. 150, the Speaker's Committee comprises the Speaker as the Chairman, the Minister for Finance and the Minister in the Office of the President responsible for parliamentary affairs together with other Hon. Members of this House. It is a proper protocol that the Minister in charge of parliamentary affairs, should have brought the report of the Speaker's Committee to this House. In fact, we not only expected the report of the Speaker's Committee, but also a Bill to be brought along with it because the principle had been accepted and only its enactment to create the Parliamentary Service Commission remained. This report has not come to this House five years later.

If we demand that the government implements the resolutions of this House, we must equally demand that the Committees which we establish in this House report to this House as is demanded by the Standing Orders. This procrastination is also contemptuous to the Powers and Privileges Act. We must not only set an example as a Committee of this House, but at the same time we must obey the various laws; in this particular case, the Powers and Privileges Act. Therefore, this omission on the part of the Speaker's Committee is actionable.

But that is not my only line of argument today. My line of argument is that this Committee must come to this House. Five years is a long time to present the report which it was directed to do by this House, which it has not done. Secondly it should bring, along with that report, a Bill for enactment of a law for Parliament to create the Parliamentary Service Commission since Parliament had resolved this issue.

Mr. Temporary Deputy Speaker, Sir, is it possible that this procrastination is part of an attempt by certain vested interests to perpetuate the *status quo*? Is it possible that these are the elements who want to continue to perpetuate dictatorship, corruption and exploitation, because they are afraid of a strong Parliament? They do not want the supremacy of Parliament. They are using every hook and crook method to undermine the progress towards democracy.

Mr. Temporary Deputy Speaker, Sir, the creation of an autonomous Parliament is essential to the achievement of a democratic society. In our Constitution, the democratic government is based on the doctrine of the separation of powers between Parliament, the Executive and the Judiciary. Each of these arms of the government is distinct, and ought to enjoy the freedom to carry out its functions without any interference from the others. This was not intended to estrange one arm of the government from the others. Rather, the separation was simply for detailed delineation of powers, functions and responsibilities of each arm of government, so that each one, in addition to enjoying independence, interrelates with the others through checks and balances to offer corporate service to the public. The separation, therefore, brings about smooth transaction of government operations within which Parliament executes its role and functions.

Mr. Temporary Deputy Speaker, Sir, in our country, the government has continued to pay lip service to the doctrine of the separation of powers. Secondly, it has continued to pay lip service to the concept of the supremacy of Parliament. It is not only that. It has gone out of its way to undermine the institution of Parliament. For example, if you take the circular on the organization of government, it clearly shows that Parliament is treated as just another department of the government. We are classified at the same level as the Departments of Police, the National Youth Service, and the Registration of Persons. That is where we are classified, and that alone indicates that the government is not committed to seeing the institution as the author and supreme organ of governance in our country. Its structural arrangement in government itself undermines our dignity as Parliament.

The Clerk is the Accounting Officer in this Parliament, but he is treated like any other head of department. It is true that he is ranked at the level of a Permanent Secretary, but unlike any other Permanent Secretary, he does not control, or through him we cannot control the appropriations of Parliament. This is a very serious point, and that is the critical point of departure. Who controls the appropriations of Parliament?

The Clerk to the National Assembly can work on the budget, but that budget is presented to the Treasury and it is treated just like that of the Police Department and the National Youth Service. In other words, the Clerk and the Speaker have no say, and this House has no say, whatsoever on the appropriations for Parliament. By controlling the appropriations to Parliament, the Executive not only controls Parliament, but diminishes the powers of this supreme legislative authority.

The constitutional role of Parliament, therefore, to control the Executive, is undermined and negated. *This is the source of the Imperial Presidency in Kenya.* (Bold, italics added). The imperial presidency is the accumulation of personal power in the hands of the President. Both President Moi and President Kenyatta are representatives of imperial presidency vis-a-vis this National Assembly. Like Lord Acton said: "Power corrupts and absolute power corrupts absolutely." Therefore, to understand the history of dictatorship in this country, it is actually the history of marginalization of Parliament and the moment you restore Parliament to its proper place, you will have reclaimed grounds for democracy.

Mr. Temporary Deputy Speaker, Sir, it is not only in that arrangement that we have the undermining of this institution. Every time the police or the provincial administration snatch microphones from Hon. Members of Parliament, they are undermining the institution of Parliament. Every time you do what you did in the Sabwani rally, where in the full presence of the police, grenades were thrown into a platform with two dozen Members of Parliament, you are undermining the institution of Parliament. The conduct of the police therefore, and that of the provincial administration, is derived from this imperial presidency and the excessive power which has muzzled this institution.

Parliament is a distinct organ of the State, which must have full autonomy in the control of its appropriations for it to enjoy independence. The Speaker is the head of the National Assembly, who must at all times enjoy the confidence of this House; but it cannot be otherwise. The Speaker therefore represents the sovereignty of Parliament and it is only proper that the autonomy and independence of Parliament should be invested in the Speaker, and yet he has no role whatsoever in the appropriations of Parliament.

The Speaker, as the head of the Parliamentary Service Commission, should be provided with funds for Parliament which must be drawn directly from the Consolidated Fund subject only to the Exchequer and Audit Act. It is ironical that Parliament, which levies taxes and controls all public expenditure, often finds itself having to ask for money from the government, which is accountable to Parliament, to provide services for the welfare of Hon. Members and staff. That is why we are seeking a Parliamentary Service Commission so that we can look after our funds — National Assembly funds.

On the second level, Mr. Temporary Deputy Speaker, Sir, the staff of the National Assembly, from the Clerk to the messenger, are civil servants who are employees of the Public Service Commission. Their terms of employment and conditions of service reside in the Public Service Act, the Civil Service Code of Regulations, and the policies of the Directorate of Personnel Management. Therefore the loyalty of the Clerk straddles the Public Service Commission and the National Assembly. In the conflict of loyalty involving the two institutions, the civil servant must choose where the bread is buttered and the advancement of his career is assured, and that is the Public Service Commission, or the Executive. He cannot, therefore, be loyal to us as the National Assembly. (*Applause*)

The Clerk, therefore, can disregard the Speaker of the Parliament — and that has happened many times — and the National Assembly with impunity, but he cannot ignore the Head of the Civil Service. This arrangement gives the Executive direct control over Parliament and this compromised the autonomy and the independence of Parliament. The staff of Parliament must be loyal to Parliament in order to maximize their efficiency and effectiveness. In this way, they stand to benefit in career development as well as in developing a parliamentary culture which is different and distinct from the culture of the Civil Service.

It is possible that in a multi-party situation, such as we have, we will need safeguards for the office of the Clerk so that they can carry out their functions without fear or favor. That is not a big deal because we can create a constitutional office, provided it is accountable to the Speaker, who is accountable to us and therefore to the National Assembly. We can improve these safeguards and then we can also improve their competence and training.

We must also provide training to the specialized functions of Parliament because Parliament is no longer just a debating Chamber. It is a complex institution that initiates, directs and shapes public opinion, to promote good governance and the enjoyment of freedom and human rights. That is what Parliament is today. It is not just a talking House or a debating Chamber; it is part and parcel of governance of a modern society. We must rise to that, and only then, can the staff and Members of Parliament be equipped with knowledge and skills to manage the complex government of a modern democratic society.

Let me at this stage congratulate Mr. Speaker and the Speaker's Committee for acquiring County Hall and Continental House to provide office accommodation for Hon. Members and the staff of the National Assembly. Hon. Members require offices to address the demands of their constituents. Every day the lobby is full with people who want to see their Hon. Members. You cannot see your constituents with dignity in the crowded lobby of Parliament.

Mr. Temporary Deputy Speaker, Sir, the delay in providing Hon. Members of Parliament (MPs) with offices is causing anxiety and concern and should be addressed urgently. The provision of offices for MPs will enable to attend to their constituents in dignity and respect. (*Applause*)

The National Assembly, through the proposed Parliamentary Service Commission, must also employ personal staff consisting of secretaries, personal assistants, and drivers for Hon. MPs to enable them to manage their offices in Nairobi and their constituencies. In that way we shall also help to solve the employment problem. (*Applause*)

These services are already available to Ministers and Assistant Ministers. All that we are asking the government is to extend the same services to the Back Bench Hon. MPs. We shall not only employ more people, but we are also demanding the strengthening of the research capability of this House, so that Hon. Members can have access to information and knowledge that they require in order to make meaningful contributions to Motions in this House. That is not a luxury, because every parliament in the world today has got a research division, which serves Hon. MPs. This is one of the few Parliaments in the world which does not understand the importance of research to legislators. It is for us to demand for these services because nobody will give us the services if we do not demand for them. I am saying that we should not be told about the state of our economy [i.e., as an excuse for the inability of the government to avail such services to the House]. This is an essential institution for the survival of democracy and this country. So it is not a question of begging the government to provide us with those services. I want to end this begging mentality. In fact, we are demanding these services as a matter of right.

Mr. Temporary Deputy Speaker, Sir, for example the House of Commons moved very quickly through the House of Commons Administration Act, which established the House of Commons Administration Commission. Under this Act, the House of Commons Commission is responsible for the provision of services to the House, covering administration and accommodation. The votes are presented directly to the House by the Speaker on behalf of the Commission, and are subject to no form of control by the government. That is what we are demanding, that we must control our own appropriation and that it must be drawn directly from the Consolidated Fund. It is shameful that we have run out of photocopying papers, ball pens and toilet papers. This is as bad as it is.

In the Republic of Tanzania, they have already created the Parliamentary Service Commission. We all heard it at the seminar when the Speaker of the Tanzanian Parliament was surprised that we have not reached that level yet. You can also say so for Zambia, which has provided for a Parliamentary Service Commission in the Constitution and Statute.

I would like to stress that there is this attempt to say that we can wait until the Constitutional Review Commission is over. We want to play our part now as an independent institution in the transformation of the Constitution. We want it to be done now and not tomorrow. Indeed, the next Budget will not be passed by this House if this Commission will not have been put in place. (*Applause*)

Let the government take note that the issue of contention, come the next budget, will be the establishment of a Parliamentary Service Commission. The independence of Parliament as well as Parliament controlling not just the appropriation but also the staff through the Parliamentary Service Commission, are urgent matters. This is a long notice and we hope the government is taking note of that. When the time comes, let the government not say that it was not aware, because we have given the notice early enough, that the next Budget will not be passed by this House unless and until the government brings a Bill to this House to enact the establishment of the Parliamentary Service Commission.

Mr. Temporary Deputy Speaker, Sir, with those few words, I beg to move the Motion. I would also like to ask Dr. Kituyi to second the Motion.

**Appendix 3**

**People interviewed for parliamentary assessment, March 15-27, 1999**

Ladipo Adamolekun	Principal Public Management Specialist, World Bank
Peter Oloo Aringo	MP for Alego, Siaya District (NDP)
William Barr	PAO, United States Information Service
Norbert Brackhuis	First Secretary, Netherlands Embassy
Prudence Bushnell	Ambassador, US Embassy
Jonathan (Jock) Conly	Director, USAID Kenya
Daniel Davis	Governance and Institutions Adviser, DFID
Paul-Albert Emoungu	DG Program Officer, USAID Kenya
James Gitau	coffee grower and businessman
Nancy Gitau	DG team leader, USAID Kenya
Grace Githu	Director, Institute for Education and Democracy
Robert Godec	Economic Counselor, US Embassy
Jim Huskey	Political section, US Embassy
Otieno Kajwang	MP for Mbita, Suba District (NDP)
Francis ole Kaparo	Speaker, Kenya National Assembly (KANU)*
Ngenyi Kariuki	MP for Kiharu, Muranga District (Safina)
Martha Karua	MP for Gichugu, Kirinyaga District (DP)
John Karuga	Chair, Fresh Producers Export Association
Adan Keynan	MP for Wajir West, Wajir District (Safina)
Richard Kwach	Judge of High Court and chair, Judicial Reform Commission
Wachira Maina	lawyer, consultant Centre for Governance and Development
Michael Marine	DCM, US Embassy
Japhet Masya	Head Clerk, National Assembly
John Mbogua	Former Kenyan Ambassador to the United States
Malcolm McLachlan	Head, political section, British High Commission
Simeon Mkalla	MP for Kinango, Kwale District (KANU); chair, Finance Committee of the National Assembly
Githu Muigai	lawyer, lecturer Faculty of Law, University of Nairobi
Paul Muite	MP for Kabete, Kiambu District (Safina)
Harris Mule	consultant and former Permanent Secretary, Ministry of Finance
Cyrus Mutiso	political scientist; consultant on legislative politics
David Ndii	economist; Kenya Institute of Administration
Peter Ndwiga	MP for Manyatta, Embu District (DP)
Njuguna Ng'ethe	political scientist/consultant
Pheroze Nowrojee	attorney, leading human rights activist
Norman Nyagah	MP for Kamukunji, Nairobi (DP)
Peter Anyang' Nyong'o	political scientist and nominated MP (SDP)
Henry Obwocha	MP for West Mugirango, Kisii District (KANU); chair, Public Accounts Committee
Raila Odinga	MP for Langata, Nairobi; Chair, National Development Party (NDP)
Ken Ohashi	Country Coordinator for Kenya, World Bank
Joab Omino	Deputy Speaker, Kenya National Assembly
Peter Owino Omolo	Deputy Clerk, National Assembly
Wycliffe Osundwa	MP for Mumias, Kakamega District (KANU)

Dana Ott	decentralization specialist, USAID Africa Bureau
Lee Ann Ross	Deputy Director, USAID Kenya
William S. Ruto	Assistant Minister, Office of the President
Robert Shaw	Economist, Institute for Economic Affairs and Executive Director designate, Transparency International
Mohamad Shidiye	MP for Lagdera, Garissa District (KANU), and KANU deputy whip
Martin Shikuku	Former MP for Butere, (Ford-A)
Lucien van den Brouke	Political Officer, US Embassy
Jelte van Wieren	Netherlands Embassy, Development Coordination
John Wariua	Deputy chair, Fresh Producers Exporters Association
Luke Wasonga	United Nations Development Program
Tom Wolf	DG advisor, USAID Kenya

## **ANNEX B**

# **STRENGTHENING KENYA'S JUSTICE SECTOR**

Prepared for USAID Kenya by Jesse McCorry

Contracted with Management Systems International  
Under Kenya Democracy Assessment Project  
Project No. 3224-029

June 9, 1999

## Strengthening Kenya's Justice Sector

### Introduction: Importance of the Sector

Kenya's justice sector is a critically important arena in the transition to a more democratic model of governance. An independent judiciary is the principal bastion of defense against undue exercise of power by an Executive or a legislature operating outside its legitimate, constitutional mandate. Especially where the Executive has gained excessive power because of the erosion of parliamentary checks and balances, and/or because of a long period of one-party rule and the decline of a competitive electoral process, the integrity of the judiciary is the sole defense against the ensuing misrule and corruption. Unfortunately, these are the conditions Kenya increasingly confronted from the last years of the Kenyatta era, and the justice sector has not been able to provide a satisfactory counter to the erosion of constitutional checks and balances on the Executive.

The justice sector plays a large role in the degree of credibility the citizenry places in the State as a whole, and it comprises much more than simply the courts. The police are at least as important a component of the justice sector, responsible as they are for the investigation and prosecution of most of the cases that wind their way through the courts. The Attorney General's office, akin to a "ministry of justice", is also a critical player, determining what cases the State will pursue, what priority they are accorded and the allocation of resources to their pursuit. The legal profession is also a key segment of the sector. Access to the courts, which is one of the main problems in Africa because of the extreme scarcity of the courts (Kenya is less badly served than most in this respect), is mediated by access to, and the competence of, legal assistance.

Lawyers can contribute to the skew in access to justice, remaining in the large urban areas, as well as through the fees they charge. Their competence and preparation have an important impact on the extent of delay in the courts in processing cases (some delay is a characteristic of all court systems), which also has an impact on access, and is in turn a function of the degree of stability and order in the management of cases through the courts. The justice sector should not be viewed narrowly in terms of the courts and the judiciary but all of the critical components, which may impose important constraints that attention strictly to court management and judicial competence may do little to assuage.

### Historical Context

**Sources of Kenyan Law.** Kenya's judicial system, like its parliament, derives from British precedent and practice. As with the British tradition, Kenyan law derives from the large body of case precedent coming from the colonial power, which were made effectively applicable to Kenya on Aug. 12, 1897. In addition to the Kenyan constitution, therefore, Kenyan law derives from Acts of the Kenyan parliament; of the East African legislative assembly (no longer in existence); specific Acts of parliament of the UK, as cited in the Judicature Act; certain Acts of the Parliament of India; English statutes of general application in force on 12 Aug. 1897; subsidiary legislation (i.e., laws passed by the Kenyan parliament); and "African customary law in civil cases in which one or more of the parties is subject to or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law". The reference to customary law is particularly relevant in the case of family law, including inheritance, in which Kenya has a complicated mosaic of rules applicable to the great variety of communities with their differing marriage, inheritance and burial customs — African cultures, Islamic sharia, Hindu and other Asian groups, and Christian tradition.

**Judicial Structure.** The judiciary comprises a High Court and a Court of Appeal; a descending pyramid of magistrates courts, with progressively more limited jurisdiction; and a parallel system of Kadhi's courts, in the Islamic areas of Kenya. For a considerable period of the post-independence period, the British

government provided British judges on a contract basis, to supplement the shortfalls of highly trained and experienced Kenyan judges, and while the latter were being developed. While Kenya's Chief Justice was an African shortly after independence — Kitili Mwendwa — in recent times the Chief Justiceship has been held by non-Africans, in part on the basis that it was more likely to be persuasive to Kenyans that justice was being administered impartially, whereas appointing a Kenyan from one or other ethnic group could raise suspicions of a political or ethnic bias. In 1997, however, President Moi, acceding to increasingly vociferous demands that the Chief Justiceship be "Africanized", appointed Justice Zaccheus Chesoni to the post. British contract judges are no longer provided, so that the judiciary can now be said to be fully indigenous.

### Institutional capacity and problems

*General Characteristics.* The justice sector began a long period of decline at the beginning of the 1980s. The sector suffers from three problems of significant proportions:

- corruption
- susceptibility to interference from the executive branch of government
- inefficiency in court administration and management.

The GOK has in the past shown limited willingness to directly address these deficiencies in the sector. As might be expected, the persistence of these problems and the absence of aggressive corrective by the government have led to a public distrust of the judicial system and questioning from the organized bar concerning the competence of members of the bench. Moreover, government actions limiting institutional interactions between members of the bench and the bar impose constraints upon the creation of a shared professional appreciation of the rule of law in the society.

The justice sector also lacks many of the basic resources that are needed to render decisions of satisfactory quality, e.g., compilations of judicial precedents, consumable supplies, space for archiving active court documents and cases. The lack of these basic requirements have a major deleterious impact on the morale of the judiciary and feeds the general problems identified above. Low morale makes the judiciary, particularly the lower ranks of the magistrature, susceptible to executive influence, as well as to straightforward bribery on the part of litigants. The lack of law reports compiling judicial precedents means that decisions reached are erratic and unpredictable, and that the accretion of a *systematic* body of law that makes personal interaction predictable — the underlying function of law — is short-circuited. Finally, inadequate court and case management promotes delay and provides an increasing series of rent-seeking opportunities for those responsible for court management, further damaging the citizenry's view of the justice system.

*Corruption.* The judiciary has come under massive attack for corruption in recent years, a fact which the Chief Justice has recently acknowledged and addressed tentatively, as discussed below. Corruption is alleged to be widespread at the lower levels of the magistrature, at district level and below, and is tied there to the poor terms of service that magistrates confront, including low levels of pay. It is also seen in the upper level court system as a function of the lengthy delays in the court calendar, and the subsequent motivation for clerks and lawyers to be involved in the exchange of "small considerations" to influence the court calendar in their favor, to cause alterations in case files (or their complete disappearance), to influence police testimony or action. These are petty forms of corruption, but they are perceived to pervade the system and they induce significant skepticism on the part of citizens. The overall view many Kenyans hold is that money talks, and that it is essential to use the language of money to obtain justice. *The judiciary cannot credibly play its essential role as a check on executive abuse of power, or on corruption related to neo-patrimonial regime maintenance needs, if it is itself characterized by corruption and perceived as such.*

***Susceptibility to Interference by the Executive.*** The independence of the judiciary is a more complex issue than it at first appears. Susceptibility to interference by the executive branch of government may be clearly manifested in judicial decisions that favor the executive and patently contradict commonsense, or established fact. Kenya has seen a few such cases, in the mid-80s in the stage-managed trials of the members of the allegedly subversive “Mwakenya”, mainly in Nakuru, during which cases clearly extorted confessions were summarily heard, recorded, and custodial sentences meted out with barely a nod to reasonable judicial process. Some American jurists attended these trials and reported on the clear manipulation of judicial process that they represented.

More recently, the attempts to bring the Goldenberg scandals to some effective judicial closure has produced a comic opera seesawing of judicial decisions relating to the permissibility of police efforts to gather evidence. On the other hand, some decisions have been handed down thwarting the efforts of those protecting the main protagonist in the Goldenberg saga (Kamlesh Pattni) to protect him. On a few other occasions, most notably the attempt by the Attorney General to assist the Chairman of the Electoral Commission to call the 1992 elections prematurely by a few weeks, the court has effectively opposed the Executive. While these occasions are not many, they do occur; they have been particularly frequent in the recent era in the government’s attempts to regulate the media, but have occurred in the economic arena as well (e.g. over issues of privatization.).

The reason they are so rare is the question. The regime’s interpretation, of course, would be that the judiciary is completely independent, but that the Executive rarely or never takes action that the courts find excessive or unconstitutional, and therefore there are few examples of judicial objection. The conclusion by a leading human rights lawyer, on the other hand, is that the recruitment of persons into the judiciary in the first place, heavily influenced as it is by the Executive, creates a natural reticence to take on that same Executive — i.e. in effect to bite the hand that feeds it. The persons chosen are carefully screened to ensure that they are “team players”, not mavericks. While the Judicial Service Commission regulates their employment and prevents them from being summarily dismissed, in fact all that is necessary, in case of Executive displeasure with a judicial decision, is to request the resignation of the individual in question, a request that would be ignored at great peril, either to the justice’s reputation and financial position or even, possibly, his life. ***The independence of the judiciary, then, is a function not just of the constitutional separation of powers and the mandate to the judiciary, but equally as much of the quality, motivation and tradition of the persons chosen as justices.***

***Inefficiency in Court and Case Management.*** Court management in Kenya is obsolete, as in much of the rest of Africa. Filing systems are unsatisfactory; the transcription of cases as they are heard is wholly inadequate, based on the judges own long-hand notes of the litigants’ testimony. Cases are manually scheduled and tracked and frequently the case files are unavailable when needed. Continuances are numerous, a function in part of the inadequate investigatory resources possessed by the police and in part of the need by many lawyers to have as many cases working as possible, to generate a reasonable income, and thus to “double-book”. Remand periods for persons held on criminal charges are so lengthy that it is not infrequent that a guilty verdict can be “liquidated” on the basis of time served already in the remand prison. Needless to say, those acquitted after lengthy remand periods are not compensated. The delays throughout the system present numerous loopholes for enterprising individuals — lawyers, jailers, policemen, clerks, magistrates — to extort “something small” in order to speed things up. ***In this way, inefficiency not only causes injustice, on the well-known principle that “justice delayed is justice denied”, but contributes to the corruption that has so seriously eroded the credibility of the judiciary.***

***Institutional Conflict in the Justice Sector.*** At present, there are evident conflicts among the institutions in the justice sector. The bar and the bench are virtually at war, with the Chief Justice rejecting what he perceives as efforts to influence the bench through the mechanism of awards to justices the bar holds in high esteem. Previous efforts by the bar to invite justices to functions organized by the bar, including

regional workshops, were rejected (by the previous Chief Justice) and the justices forbidden to attend. Conflict between the bar and the bench do not bode well for improvements in court and case management, since the requisite respect among these partners in the enterprise appears not to exist. In addition, a recent series of workshops on the justice sector, sponsored by the judiciary, a legal sector NGO and UNDP, produced evidence of conflict between the bench and the AG's office, with the latter the target of complaints that committal documents sit in the AG's office for too long, increasing the court management problems. In general, the division of responsibility between the AG's office, the judiciary and the police is not well understood by the public, and the deficiencies of one branch of the sector thus compound those of the others.

### **Government's Response**

The government's response to these and other problems has been limited. The government, since 1992, has created about a dozen task forces under the authority of the Attorney General charged with studying various areas of weakness among the nation's judicial institutions, but focusing on law revision. From discussions with members of the bench, the bar and civil society there is little specific knowledge of the task forces. One or two have functioned to some degree and produced revised legal codes; the code on Children's rights and privileges is an example. The Task Force on the law relating to women has also been active, albeit has not yet produced significant code reform. The donor community was requested to assist with the funding of these task forces, but few took the GOK up on this request. In part, this was because of the lack of clarity over the relationship of the task forces, and proposed code reform, to the broader constitutional reform effort which the GOK was under considerable pressure to implement. In some quarters the task forces were viewed as the Government's strategy for heading off any significant constitutional reform, dealing with code revision in piecemeal fashion instead. Despite the efforts of the AG to people the task forces with a wide spectrum of relevant stakeholders, they appear to have made little impression either domestically or on the donor community, and to have produced little output thus far.

A somewhat more encouraging sign that the government was taking a serious look at the problems of the sector is found in the Report of the Committee on the Administration of Justice (The Kwach Report). Unlike the activities of the task forces mentioned above, this report was carried out under the aegis of the Chief Justice, not the Office of the Attorney General. Justice Richard Kwach was assigned the task of reviewing all aspects of the administration of justice in Kenya, and recommending methods for improvement. (The Terms of Reference for the Committee on the Administration of Justice are appended).

Released in early 1999, the Kwach Report covers a broad range of problem areas:

- judicial rectitude (judicial ethics and conduct);
- human resource management, especially performance appraisal;
- case management and court administration;
- physical facilities, equipment and supplies;
- court security and managing traffic flows within court buildings.

In a section entitled "Other" the Report addresses some additional issues that were not specifically covered in the charge to the Committee, e.g., reorganization of the Judicial Service Commission, creation of a new administrative structure of the Kenyan judiciary to improve case-handling efficiency, and introduction of a mandatory transfer policy for magistrates and executive officers with more than five years of service in any given jurisdiction. The Report is not a study of the entire justice sector as it gives only limited attention to other actors and institutions who have direct roles in the pursuit of justice in the society. Still, as a self-examination it constitutes a reasonable overview of some of the major problems, as noted above. The Report's recommendations can serve as clear, measurable benchmarks for use by USAID/Kenya in deciding whether

and how to develop an assistance program for the country's justice sector. The Report provides a holistic, long-term perspective that could inform the long term evolution and assessment of the judicial sector.

### **The Kwach Report and the Evolution of the Kenya Judiciary**

For the purposes of USAID/Kenya it is useful to note that the Report discusses and proposes recommendations in several of the areas of concern to the Mission. It suggests dealing with the three general problems outlined above as follows:

***Corruption:*** Develop a code of ethics for judges, magistrates and executive officers.

Create a judicial inspectorate.

Institute a financial disclosure scheme for judicial personnel.

Institute cash collections in courts outside Nairobi (fees, fines, deposits), managed by judicial personnel.

Chief Justice should call for investigation of circumstances of transfer of land belonging to the judiciary to private developers in the following jurisdictions: Eldoret, Kisumu and Mombasa.

The Judiciary should obtain and hold titles/deeds for its buildings, residential properties and any undeveloped land allocated to judiciary for future expansion

### ***Constraints:***

The problem of corruption exists throughout the Kenyan judiciary, although some claim that the problem is more prevalent at magistrate level due to their inadequate salaries. The judiciary's credibility and impartiality are widely questioned. The creation of the Kenya Anti-Corruption Authority (KACA) may be a signal that the government has begun to take the issue of corruption seriously, but the relationships between the courts, the Attorney General's office and the Authority needs to be clearly stated and made transparent to the Kenyan public. The KACA has a broad mandate and this breadth may create conflicts relative to the implementation of corrective measures identified in the Kwach Report. The record of the KACA to date has not been encouraging; the appointment of the former Solicitor-General to head the authority has been widely questioned, since the Solicitor-General is widely perceived as a staunch regime supporter. The World Bank may be a major actor with respect to the Authority's connection to Kenya's SAP commitments.

### ***Case Management and Court Administration:***

Adoption of a case flow monitoring system.

Implement existing authority for Assizes to deal with old cases in Nairobi courts (this would reduce the case backlog.)

Raise financial ceilings on magistrates' jurisdiction so as to reduce High Court backlog.

Chief Justice to issue circular regarding required application of rules of Civil Procedure.

Examine feasibility of Alternative Dispute Resolution to address procedural delays and backlogs. (N.B. There is already a formal Arbitration process in Kenya, to which certain

business subsectors have turned almost wholly because of the delays in the formal courts; e.g., most cases brought in the construction sector are currently arbitrated.)

Abolish requirement of Attorney General's consent to prosecute criminal matters and the similar provision requiring direction in civil matters.

***Constraints:***

This is a growing problem area for Kenya's judicial sector. Backlogs and delays are significant and growing, especially with regard to civil matters. Inadequate resources, space, materiel and personnel help produce these problems. Organizational and process weaknesses contribute to these problems. USAID and Great Britain have provided assistance in the past, but this assistance appears not to have had a lasting effect. Kenyan law provides some means of addressing elements of these problems related to workload. Members of the bench have recently publicly complained that inaction and procedural delays in the Office of the Attorney General impede efficient case management by the courts. It is too soon to know if other matters affecting the relations between the judiciary and this office might also be raised. For example, the budget support for the judiciary is part of the vote for the Attorney General's office. Establishing a separate line item for the courts could increase the institutional independence of the latter. Similarly, allowing the courts to retain fees and fines that it collects could also contribute to independence, while simultaneously helping the courts to meet some of its financial requirements

***Judicial independence and strengthening:***

Reorganization of the Judicial Service Commission.

Broaden membership of the Commission to include representatives from Magistrates and Judges Association and the Law Society of Kenya.

Develop specific Scheme of Service for personnel of the judiciary to enhance "delinking" from the civil service. (Note: this echoes the current drive in parliament to create a parliamentary scheme of service, and is a critical element in removing the overarching regulatory and budgetary control of the Executive, which effectively prevents real independence and oversight.)

Fund the National Council for Law Reporting (enacted in 1996) so as to be compilation of Kenyan jurisprudence and publication of law reports.

***Constraints:***

Lack of judicial independence is primarily a problem that stems from Kenya's British-derived political tradition of centralized government, gradually increased over the early post-independence years. There is at present little evidence of willingness to reduce president's appointment powers for senior judicial personnel (judges). A further problem in this regard stems from the power of the Attorney General to determine which cases (major) will be heard before the High Court. From discussions with members of the court and others, this authority is a holdover from the colonial past. In the present context the decisions of the Attorney General are a source of frustration to Court officials and add to the perception that the judicial process lacks impartiality.

Removing judicial personnel from the administrative control of the Public Service Commission (de-linking) was a step in direction of increased judicial independence. However, the resulting Judicial Service Commission appears to lack the necessary administrative infrastructure and authority to manage its

responsibilities effectively. For example, it has been unable to overcome the practice of “dumping” under-qualified personnel from other ministries.

### **Mid-Term Perspectives:**

***Political Commitment.*** In January, 1999 the Government created the Legal Sector Reform Coordinating Committee, Chaired by the Attorney General, with a broad mandate to examine the problems and propose appropriate corrective measures for problems affecting the justice sector. This mandate includes the Kwach Report among the 11-13 task forces whose efforts the Committee will coordinate. In the next 3-5 years this Committee should be the focus of USAID/Kenya attention as it seeks to determine the level of government commitment to justice sector reform and the emergence of a genuine respect and appreciation for the rule of law.

The US Mission should pay special attention to the content of the Coordinating Committee Work Plan and any Implementation Plan that emerges from the Committee. In particular, the mission should note as benchmarks any actions taken by the Coordinating Committee to implement specific recommendations made contained in the Kwach Report. Some of these, e.g., a Code of Ethics and financial disclosure for judicial personnel could be accomplished within a short time-span. As a general matter, issues for the short-term (3 yr.) are those which could be put in place by the Chief Justice as the senior official responsible for the courts. Those requiring executive decision (Cabinet) would generally be considered for implementation over the longer term (5 yr.). Nevertheless, USAID could also look for evidence that the bench and the bar were beginning to develop more collegial relationships, joint training seminars on matters of law and procedure, for example. It would also be important to identify increased resource flows to the Coordinating Committee as evidence of the government’s willingness to facilitate its work.

***Constitutional Revision:*** Current political debate surrounding this issue clouds specific issues concerning the need to draft new provisions concerning the judiciary as a distinct branch of the government. Breadth of the proposed revision requires careful study by USAID as this could have significant consequences for the shape of US support to the Kenyan judicial sector. As part of its own due diligence, USAID/Kenya might consider a justice sector study as the constitutional revision process moves forward. A particular problem that might be of interest to USAID is the likely need for revisions to the Civil and Criminal Codes if some of the relevant recommendations of the Kwach Report are carried forward.

### **Principal Donor Interventions (non-USAID):**

The principal bilateral donors to the sector, the United States and Great Britain, are following complementary demand-side assistance strategies to the judicial sector. While Great Britain has been willing to provide some direct technical assistance to government entities, it has kept such aid at deliberately low levels. The World Bank and the UNDP assistance efforts provided direct support to government entities involved in the justice sector. This is generally in the context of the Bank’s larger public sector reform programs as part of an overall structural adjustment package. Some highlights of this assistance are provided below:

### **DFID**

Currently providing assistance to civil society organizations with an emphasis upon the provision of legal aid. The British government has previously provided assistance to the high court for library resources and similar aid to the Law Society of Kenya for its Professional Center in Nairobi. In the past, the British government has also provided technical assistance on issues of court administration and case handling.

## UNDP

Training programs for members of the bench using civil society organizations as the principal vehicles for delivery. These events have frequently helped to inform an agenda for judicial reform, but they do not seem to have resulted in concrete actions. The organization has also provided assistance to the courts with documentation needs.

## The World Bank

Support to the Office of the Attorney General (Sh 51m) to create a secretariat that would develop implementation schemes for the tasks resulting from the dozen or so task forces that are examining various aspects of judicial functioning in the country. To date, no plan has resulted from this financial support and the Bank is not inclined to renew this support when its funding authority expires in October of this year.

### **Potential areas for USAID intervention**

The US mission should monitor carefully the AG's Legal Sector Reform Task Force and the implementation agenda and mechanisms the Judiciary sets in respect of the recommendations of the Kwach Report. In line with the Terms of Reference for this report, the mission should consider the feasibility and desirability of any assistance to the justice sector after a six month monitoring period. If benchmarks of progress are evident, the mission could consider the following three types of assistance.

- ***Courts and Case Management and Alternative Dispute Resolution***

This is a growing problem area for Kenya's judicial sector. Backlogs and delays are significant and growing, especially with regard to civil matters. Inadequate resources, space, materiel and personnel help produce these problems. Organizational and process weaknesses also contribute to these problem areas. USAID and Great Britain have provided assistance on these problems in the past, but this assistance appears not to have had a lasting effect. Kenyan law provides some means of addressing elements of these problems related to workload. The two countries could consider short-term assistance for a careful needs analysis of the nature and characteristics of the problems contributing to backlogs and delays in the judicial process. Since Kenya already has an Arbitration judicial function in place and there is interest in ADR, some background has been laid. However, there have recently been fairly negative evaluations of other regional ADR experience, and the mission should be aware of the constraints these efforts have experienced.

***Benchmark:*** Court appoints Commissioners of Assize to work on the backlog problem in Nairobi (location of most significant problems). As the legal authority already exists for Chief Justice to put this into effect, it could be implemented within the year. Once this were done, USAID could consider providing technical assistance and small-scale financial support.

***Benchmark:*** Government takes action to increase financial limits for magistrate courts to reduce volume of cases that have to be transferred to High Courts merely on the basis of their monetary value.

- ***Legal Aid***

Support for the idea of more accessible legal assistance exists at level of Attorney General. USAID and Great Britain invest in this area because it has forged some degree of cooperation between civil society and the GOK. Evidence of impact is limited, however. There seems to be an emerging consensus between civil society, the bar and the government that the rights of the *prison population* deserves urgent attention. USAID might consider expanding existing civil society interventions to include services to this group. The GOK

would like to have a national program of assistance to the under-served populations, e.g., the rural poor and prisoners. Such expansion is likely to require amendments to Constitution, existing laws and new statutes. USAID in collaboration with DFID could explore collaboration on the use of advanced law students as legal interns who would be jointly supervised by members of the bar and the bench to provide assistance in drafting legislation. Legal draftsmanship is a sorely inadequate resource in Kenya and has severely constrained the AG's ability to respond to the calls for code reform.

USAID/DFID collaboration seems to be a real possibility. A national program in this area would not be low-cost; however, it would engage a significant number of strategic elites (courts, Atty. General, civil society and law schools) in the judicial sector.

**Benchmarks:** Enabling legislation, action/implementation plan and start-up financial resources from the government.

- **Law Reports**

Law reports provide digests of judicial opinions in an accessible format for use by the bench and the bar. US and Commonwealth members share a common law tradition and some members of the latter have used American judicial opinions where there is an absence of local precedents. Kenya hasn't published law reports for almost twenty years (compilation for the period 1876-1956 does exist). Regional Law Reports (East African Court of Appeals Reports: 1934-56 and East African Law Reports: 1957-75) are available, as are decisions from other Commonwealth countries. However, these are only available in Nairobi. African Commonwealth countries' reports are not available in Kenya. Legislative authority to produce reports was passed in 1994, but the GOK has taken no steps toward implementation.

These are fundamental aids to the quality of judicial decisions. The availability of these compilations could also be a means to reduce the tension between bench and bar by providing a common intellectual base for the two parties approaches to judicial and legal work, i.e., preparation of briefs and pleadings and judicial decisions. Compilation, publication and dissemination of these judicial resource are relatively costly, but high impact. This is a possible vehicle for a regional approach involving Kenya, Uganda and Tanzania, East African Law Society and the several law schools of the region. USAID/Kenya could look to the experience of Uganda to gain some insights on what might be entailed if it wished to proceed along these lines. As with Legal Aid, this could be another opportunity for collaboration with DFID.

**Benchmark:** Government activation and start-up funding for National Council for Law Reporting (created in 1993), development of action plan by the government.

**Benchmark:** The World Bank continues financial support for the Legal Sector Reform Secretariat.

<b>CONTACTS</b>		
Adamolekun	Ladipo	Principal Public Mgmt. Specialist, The World Bank, Kenya
Cassayre	Mark	Third Secretary, US Embassy
Chesoni	Zaccheus. R.	Chief Justice
Davis	Daniel	Governance and Institutions Advisor, Dept. for Int'l. Development/British High Commission
Emoungu	Paul	Control Officer, USAID/Kenya
Gicheru	Evans	Justice, Court of Appeals
Godek	Robert	Economic Counselor, US Embassy
Greeley	Ned	Regional Behavioral Science Advisor, REDSO/Nairobi
Juma	Esther	Librarian, Court of Appeals
Kapila	Surinder	USAID/Kenya, Legal Affairs Officer
Kibiru	Joseph	Archivist, Court of Appeals
Kinuthia	Benjamin	Archivist, Court of Appeals
Kwach	Richard	Justice, Court of Appeals
Litonga	Celina	Principal Personnel Officer, Court of Appeals
Conly	Jonathan ("Jock")	Director, USAID/Kenya
Marine	Michael	Deputy Chief of Mission, US Embassy
Matoka	Rosemary	Magistrate
Mbogori	Kagwiria	Exec. Director, International Commission of Jurists (Kenya Section)
Gitau	Nancy	Democracy and Governance Officer, USAID/Kenya
Muchai	Lumatete	Private Attorney, Mombasa
Muigai	Githu	Private Attorney
Muthoga	Lee	Private Attorney
Ombaka	Oki	Executive Director, Public Law Institute
Otieno	Roselinda	Archivist, Court of Appeals
Ouko	William	Ch. Court Administrator, Court of Appeals
Ross	Lee Ann	Deputy Director, USAID/Kenya
Simbiri-Jaoka		Kenya Human Rights Commission
Wackman	Harold	Country Director, Kenya The World Bank
Wolf	Thomas	Democracy and Governance Advisor, USAID/Kenya

## **ANNEX C**

# **STRENGTHENING LOCAL GOVERNMENT**

Prepared for USAID Kenya by Judith Geist

Contracted with Management Systems International  
Under Kenya Democracy Assessment Project  
Project No. 3224-029

June 9, 1999

## EXECUTIVE SUMMARY

**Role of Local Government.** Local Government plays an important role in the equitable distribution and regulation of power in a democratic system. It stimulates citizen involvement and commitment to decision-making and to the collection of resources. It colors the way citizens view government generally, since their primary service needs are likely to be functions of municipal and rural councils. It provides an arena for the recruitment and apprenticeship of new political leadership. Taking these roles as a whole, independent and effective local governments provide checks and balances on central government and central political elites; they provide an arena of countervailing power.

**Kenya's Local Government System.** Kenya's local authorities, which are very numerous, comprise city, municipal, town and county councils. They total 167 at present. Unfortunately, the functions the councils inherited with the independence constitutional arrangements have been pared away drastically, so that now they are responsible for fairly minor functions, with the exception of the large municipal councils. Those still retain significant service provision responsibilities, but perform them on a delegated basis, with central ministries making most of the policy decisions. The smaller town and municipal councils are responsible primarily for urban infrastructure, including markets, and perform these functions very badly, as is evident in the sadly deteriorated state of the infrastructure in most municipalities.

The rural, or county, councils are responsible primarily for the markets, which they maintain; and the secondary and tertiary road system, which they are meant to maintain but rarely do. They are also responsible for the maintenance of important natural resources, especially the forests, but are caught in a conflict between the need to preserve these and the need to exploit them for the revenues they can generate.

**Problems.** The councils suffer from several major problems, including:

- corruption
- inadequate funding/revenue base
- tight, over-centralized control by the Ministry of Local Authorities
- unclear jurisdiction and definition of functions
- conflict between elected councilors and appointed staff, who are responsible not to the councils but to the Public Service Commission
- inadequate incentives to attract acceptable quality persons as councilors

The causes of these problems, and the ways in which they are interrelated, are discussed in the report. They include the need on the part of the regime to maintain the tight, central control in order to use the councils for patronage purposes, especially as the previous sources of patronage are shrinking with the implementation of economic liberalization. The implication is that there seems to be little reason to expect major commitment from the Government of Kenya for significant reform, except insofar as it makes the existing council structure more efficient without undermining central control.

**Reforms Needed.** The reforms that are needed include both *improvements in performance of councils within the existing structural framework*, and major *changes in the structural framework and conception of local government*, delegating greater autonomy, responsibility and resources to the councils. It is argued that neither of these should be pursued without attention to the other. Attention to improving performance under the existing structures is inadequate to a vision of useful local government (especially as an arena of countervailing power); but efforts to make major structural changes will fall on deaf ears, given the cynicism with which Kenyans presently view local government, until and unless some improvements in performance are effected.

**Reforms Underway.** Not much progress has been made in the past decade; signs of deterioration are numerous, and are partly tied to some of the well-meaning efforts to alter the revenue base of the councils to make these more progressive. Such efforts have failed. Presently, the GOK is reported to be preparing a Cabinet Paper to propose a reform agenda, based on major conclusions of the recent Omamo Commission of Inquiry into the local government system, and which will deal with administrative rationalization, removal of unnecessary central overcontrol, and increases in the revenue base of the councils.

The major donor efforts in the arena are the Bank-funded Kenya Urban Transport Improvement Project (KUTIP) and its collateral institution building components, and some smaller efforts funded by GTZ and the Dutch Government to deal with various aspects of small town development including environmental protection efforts. All of these efforts are directed at improving the system as it now is structured; none are dealing with alternative formulations of a local government system with significantly increased responsibility and autonomy. None are dealing explicitly with the problem that Kenyans themselves most often identify, which is corruption.

**An Assistance Strategy for Local Government.** The paper proposes that the US mission monitor carefully the forthcoming agenda for strengthening local government, and sets some benchmarks that would indicate satisfactory progress. It recommends that USAID assist in creating *demand for accountability*, through support of civil society organizations (such as the proliferation of neighborhood associations with this objective), as well as support of the Association of Local Governments of Kenya (ALGAK). ALGAK represents the local governments and lobbies for them, and for increases in their autonomy and responsibility, and is concerned with the larger issue of constitutional reform to empower the councils (whether in the constitution itself, or through major revision of the Local Government Act).

A number of activities are proposed, including exchange visits with other local councils in the region, and ALGAK's counterparts elsewhere. Some baseline research on the degree to which there have been efforts in tendering out of services to the private sector, or public/private sector partnerships, is also proposed. A vision of progressive empowerment of local governments — i.e., increases in independence and effectiveness — is laid out against a phased sequence of activities which might be undertaken to assist the process, if the benchmarks appear to be positive.

## STRENGTHENING LOCAL GOVERNMENT

### 1. Introduction

**Purpose.** This paper supplements the main report dealing with potential public institutional support. It focuses on local government institutions in Kenya. It provides background information on Kenya's local government system and on the current status of local government institutions; on the degree of autonomy or independence they have from central state institutions; on the current potential and constraints for citizen involvement and participation in local policy making; and on current efforts underway to reform or strengthen the local government system, on the part of the GOK and donors. It suggests a number of alternative activities that could be undertaken in support of stronger local government, sets out a series of benchmarks that would assist in making informed decisions about pursuing of these, and provides recommendations for a strategy in this area.

**Countervailing Power.** There are several reasons to focus on local government in pursuing democratic governance. Local government in western democratic systems is an important arena of countervailing power. It not only counterbalances excessive executive powers, but also serves as an effective check on the central institutions of the state generally, and on the elites that control these and which are frequently drawn from a restricted social strata. However, in many developing countries, local government is seen as a subordinate layer of government to be controlled centrally, with little independence; this is the case in Kenya. Many of the services provided by local governments in the west have been pared away from local government and vested in central ministries, leaving local governments with few responsibilities and resources.

**Citizen Involvement and Commitment.** Local government, whether it performs well or badly (and it will be argued that the latter is the case in Kenya), is the citizenry's first point of access and visibility for government. It touches people literally "where they live". Housing, sewerage, road maintenance, street lighting, garbage collection, water supplies, parks and public spaces are daily reminders of the direct and indirect effects of government on people's lives and living conditions. The credibility and legitimacy of government generally is heavily colored by these daily experiences. In addition, local citizens are more likely to contribute resources for local service provision, whether through formal taxation or self-help contribution, where local governments are seen to be providing services with some degree of transparency and effectiveness.

**Political Recruitment and Leadership Renewal.** Local government serves as a training ground for political actors, including potential rivals to an incumbent government. One reason local governments have been curtailed so widely in Africa is this function of providing alternative elites who challenge incumbent politicians and regimes. Curtailment of this vital arena of alternative recruitment inhibits political renewal and the incorporation of new blood and new ideas. However, it also eliminates a vital safety valve, an arena where strictly local problems and local conflicts can be addressed without being tossed up onto a national political scene, where they often induce unpredictable responses and contribute to the destabilization of governing coalitions.

**Historical Background.** Kenya's local government system has undergone drastic changes in the independence period. Based originally on a set of large, multi-district "county councils" in the settler farming areas, and municipal councils in the handful of significant towns such as Nairobi, the system has gained units at an increasing rate while losing functions and resources, and with them the capacity to perform adequately even the functions that were retained. Local authorities are governed under the Local Government Act, Cap. 265 of the Laws of Kenya, and under a very centralized system of oversight by the Ministry of Local Authorities.

***Institutional Structure.*** Kenya's local authorities currently number 167:

City Councils	1
Municipal Councils	44
County Councils	60
Town Councils	62

Counties have historically been coterminous with districts. As there are now reportedly 69 districts, the process of creating new counties is somewhat in retard. Municipal and town councils have proliferated unchecked over the past 15 years, many created in response to political pressures. Municipal and town councils escape from the financial control of the county council in which they are situated, and can exercise autonomy in drawing up budgets and attempting to increase staffing. The additional councilor positions and subordinate staff provide a good source of patronage for local elites.

***Council Responsibilities.*** At independence, the councils were the main authorities involved in the provision of most significant services — health, education, and roads, in the case of both rural and urban councils; and all of the normal urban infrastructure in the case of municipal councils, including water supply. In 1969/70, however, enough councils appeared to be on the verge of bankruptcy that it was decided that they were unviable, and that central ministries should shoulder the major service provision burden.

The basis for this decision was as much political as it was factual. It is true that many councils in the most economically mobilized areas, particularly Central Province, were mortgaging themselves into the distant future by building and staffing schools far in excess of their capacity to finance them. They were responding to the pent up demand for schools, which farmers saw clearly as the road out of peasant servitude for their children. Some other areas of the country were not mortgaging themselves so heavily, however, having experienced the colonial economy differently. The fact that councilors were developing visible local support bases which threatened the independence elites — Member of Parliament and senior civil servants with political ambitions — contributed significantly to the decision to transfer the roads, health and education portfolios to the central government, along with the resources and the patronage they entailed.

Since that time, rural local government has been concerned with some few water supplies, with nursery schools, with maintenance of the secondary and tertiary road system, with some livestock services in the pastoral areas, and most importantly with maintenance of local markets. The county councils also have responsibility for enforcing health, sanitation and building codes in markets, restaurants, bars and hostels, and for maintaining gazetted forests and other natural resources on communal lands, a task which they are ill-motivated to perform effectively for reasons which will become clear from a discussion of council resources, below. Municipal councils retain responsibility for health, roads and education on a delegated basis from the relevant central ministry. They have substantial responsibility for urban infrastructure of all types. Parallel and delegated service provision by municipalities and central ministries causes confusion.

***Council Resources.*** The most important resource the councils controlled at independence included the Graduated Personal Tax, GPT, which was a graduated income tax assessed in all three east African territories (as well as most of the rest of Angolophone Africa), and which funded the African councils through the latter part of the colonial period. Uganda retains this tax. Tanzania and Kenya abolished it, the latter at the time of the transfer of services and functions to the central government. This left the councils with meager and very variable resources bases, which have been progressively eroded by a combination of central manipulation (some well-intended, but with disastrous results) and ineffective collection by the councils.

***Urban councils,*** especially the large municipalities, rely primarily on property rates, regulated by the Rating Act, Cap. 266, and the Valuation for Rating Act, Cap. 267, respectively, of the Laws of Kenya. They also charge fees for the provision of water and can assess property owners for improvements to sewerage roads, and street lighting. They generally own considerable property themselves and collect rents, as well as market

fees and “stand premia” from kiosk owners or others who utilize these assets. Along with the county councils they impose license fees for business permits.

Since the Ministry of Trade also licenses business and collects license fees, there has been substantial double licensing and taxing from this source. Until recently, business licensing, one of the few sources of income for small towns and counties, has resulted in a patchwork of hundreds of specific license fees, some of them literally applicable to only one particular business establishment. All of them have to be vetted each year, for each council, by the central ministry; the inevitable delays sometimes renders them uncollectible, particularly for councils whose residents have become aware of the feasibility of litigation to oppose them.

Efforts at reform are currently underway, involving the adoption of a rationalized, standardized set of graduated license fees to be applied by councils of varying economic base. Whether this reform will be managed successfully or not is too soon to say. There have been recent reactions by some urban council licensees to the new fees that indicate that much remains to be done to fine-tune this new, standardized system: several large municipalities, for example Eldoret, decided to adopt the “high end” fee structure without consulting with the local business community, which has responded by protesting vocally.

County councils historically have relied on three main sources of income. Agricultural produce cesses on three or four main cash crops were far and away the most important source for a handful of councils in coffee growing areas, which collected up to 95% of their income from this source until cesses were removed from the councils around 1988. Market fees were second in importance for these councils and the most important source for the rest; these are fees on persons using the markets both as buyers and sellers. License fees for businesses, and increasingly for administrative services, are the third most important source. A few councils in pastoral areas had significant income from livestock service provision (primarily livestock marketing facilities), and the Narok County Council had a major source of income from its control of the Maasai Mara Game Reserve. Significantly, there were few transfers from the central government, and what few there were disappeared in the early 1980s.

Most of the non-coffee councils were perennially strapped for money and as a result engaged in a never-ending quest for income earning opportunities, establishing housing estates, bars, canteens, hostels, rest houses, guest houses, and ultimately buying into larger businesses, such as tourist hotels (e.g. Eldoret’s Sirikwa and the Meru Hotel County.) The income they earned from these ventures was generally fairly meager, especially as council staff and councilors frequently patronize the establishments and grant themselves and their guests “subsidies.” Maintenance costs generally ate up most of the profits, especially as the councilors saw them as places to fob off the never-ending stream of job-seekers among relatives and friends, leading to gross over-establishment and lack of competent management.

Another source of income has been the exploitation of natural resources, primarily timber (including in the form of charcoal) and minerals such as sand, stone, and soda. This increasingly pits the revenue needs of the councils against their roles as conservators of the natural resource endowment. This is a complicated issue, and it cannot be assumed that overexploitation and environmental degradation is always to be blamed on the responsible local authority; many councils attempt to exercise responsible stewardship over these resources, despite the growing predatory pressures from rapacious leaders. However, the faltering revenue base from other sources has inevitably pushed many councils in the direction of granting excessive numbers of pit sawyers permits, and sand quarrying licenses, and charcoal burners licenses, and the like. Environmental degradation is an inevitable consequence.

Ultimately, the Ministry scrapped the crop cesses — in part because of the radical differential in income they produced, favoring Central Province and a few other high potential areas, (e.g. Meru, Kisii, Bungoma) while pastoral areas, which constitute the present regime’s political base, languished. It instituted an urban service charge in the late 1980s, which has not lived up to its promises in terms of making councils

more viable, and relating taxation more closely to service provision. The councils are seriously underfunded, a function of their inability to collect and rationally plan for the budgeting of the resources they do control; and of corruption in the provision of what services they do provide. The alterations in financial resource base have generally contributed to the deterioration of council service provision, to which we now briefly turn.

**Council Performance.** Systematic, objectively verifiable indicators of council performance are not available. However, the residents of most urban council jurisdictions, such as Nairobi, can point to graphic signs of deterioration in city services — uncollected garbage; potholes that make some areas almost impassable even with four-wheel drive; flooding in streets and estate areas that has actually claimed lives in the past few years and that attests to the state of the sewer and drainage systems; lack of medicines in the councils clinics; deteriorated school infrastructure. The situation is repeated in the other major municipalities. Lack of maintenance of the secondary and tertiary road system was graphically demonstrated in 1997 when El Nino rains struck with force and washed out roads across the country. Newspaper accounts of strikes by council workers on an almost weekly basis attest to the deteriorating financial performance of most councils.

Most Kenyan respondents we queried responded with varying degrees of anger and despair over the incompetence and corruption of the local councils. While there are a few councils which have performed better than others — Eldoret, Karatina, Malindi, and a handful of others — this is not apparent to their residents, as many of the same problems bedevil them, in the absence of a reasonable resource base. It is just that these few manage the woefully inadequate resources better; unfortunately, better management of woefully inadequate resources still results in the provision of woefully inadequate services, and the marginally better management is impossible to see, since citizens only live in one jurisdiction and have no basis on which to make comparisons.

## 2. Constraints on Performance

**Financial Resources.** That many of Kenya's present councils, especially the newer ones created on the basis of political pressures, are not viable is a widely recognized fact. As the population and resource base for councils decreases, the councils become more and more simply a vehicle for paying salaries, with insufficient resources to do anything more. Ultimately, those that were not financially viable to start with lose the ability even to pay salaries, and salary arrears mount. Consequently, council staffs increasingly seek "rent-seeking" opportunities, generally appropriating revenue the council should receive by simply pocketing fees of various types, without issuing official receipts, in a vicious downward circle feeding financial incapacity. The political use of the Minister's powers to create new councils has been a key factor contributing to the deterioration of council performance, by dividing already inadequate resources.

**Leadership and Commitment.** It can be argued that the lack of resources *per se* is not the cause of the increasing incapacity of the councils, and that better collection of existing revenue sources, better management of expenditure, and a commitment to well-defined programs of service provision can materially improve a council's performance. Certainly, substantial improvements are possible for all councils even without additional resources. There are a handful of councils which do perform better than others because of the commitment and vision of their leadership, and knowledgeable insiders argue that the quality and commitment of leadership is critical to improvement, and is at present the single most important variable in predicting council performance.

Considerable conflict exists at present between councilors, who are elected and paid small salaries, sitting fees and allowances; and council staffs, who are appointed by the Public Service Commission without reference to the councils' own preferences or consultation. Councilors are supposed to make decisions and policy, staff to execute the decisions the councilors make. Yet councilors are responsible to the electorate, while staff from the middle ranks upwards are responsible ultimately to the Ministry of Local Authorities. The Ministry has been used to "pack" councils with both nominated councilors and technical staff loyal to the

ruling regime, and to frustrate the initiatives of councilors and councils who may have different political preferences.

Even in cases where political infighting or external efforts at manipulation are not a problem, the quality of councilors leaves a great deal to be desired. The abysmal level of knowledge and education of councilors is singled out by many critics of the current local government system, who argue both for higher constitutional/legal qualification for candidates to office and for massive training efforts of sitting councilors. USAID would be well advised to exercise great caution about the utility of training approaches, however, in the face of the current incentive system, which in no way induces capable leadership at the local level.

***Central Ministerial Control of Decision-making: DDCs and the Ministry of Local Authorities Dominate the Councils.*** Last but not least, decisions of any real significance are made centrally. The local authorities having been divested of the main service provision portfolio in the 1969-71 period, they remain with few roles of importance other than the markets. The administrative structures at district level call for program and project planning and prioritization through a District Development Committee (DDC), and subordinately a set of Divisional Development Committees (DVDCs), which have in their membership the heads of central ministry departments at the respective territorial levels, plus the chairmen of local authorities in the case of DDCs, and the councilors in the case of the DVDCs.

Local authorities are supposed to vet their programs, especially their capital development initiatives, (which are admittedly very few, given the extreme resource constraints most find themselves confronting) through the DDCs, which can veto them. Second, even within the local authority domain proper, most decisions on hiring, firing, and budgets must be approved by the Minister for Local Authorities. "Vision" is a rare commodity under these circumstances. Frustration is far more common.

### 3. Progress Since 1992

***Recruitment of Staff and Revenue Base.*** Since the watershed 1992 multi-party election, little progress can be discerned toward strengthening local government. While discussions about the need for improving performance of local authorities have gone on since the late 1970s, the only actual changes that have been made are:

- the decision in 1984 to remove hiring and firing decisions of senior council staff (Clerks, Treasurers and major department heads) from the Ministry of Local Government and the councils themselves, vesting them in the Public Service Commission. It was thought this would improve the morale of senior technical officers, giving them a clear career path and protection from political victimisation. What it has actually done is promote divided loyalties and conflict between senior staff and elected councilors.
- a series of alterations in revenue base, including the removal of crop cesses from the revenue basket of the councils, the introduction of an alternative produce tax, the introduction of the urban service tax (in 1988), and the introduction of the Road Maintenance levy (in 1990) from which few councils have actually benefited. Perversely, these financial moves, which were meant to even up the resources available to councils and reintroduce something more like an income tax, in fact crippled the few really viable councils, which operated in the coffee growing areas and relied almost wholly on coffee cess for revenue. The alternative taxes have not been sufficient to make up for their loss and are much more difficult and/or costly to collect, and they have not helped councils in less wealthy areas. Councils' financial positions have deteriorated greatly in the last few years, which is clearly evident in the state of both urban and rural infrastructure.

***Omamo Commission of Enquiry.*** In the early 90s President Moi appointed a Commission to study the needs for reform in the local government sector, with William Odongo Omamo as its chairman. The Omamo Commission presented its finding to the Government in 1996. Since then, while the President indicated he had accepted the report and intended to implement the recommendations it makes, the report has not been published. The report is reputed to make suggestions for reform of the structural organization of local authorities, paring away central control powers from the Minister for Local Authorities, increasing the revenue base of the councils substantially, and pointing in the direction of a significant decrease of the role of the Provincial Administration, which would mean a real reversal in the subordination of local authorities to DDCs.

#### 4. Reforms Required

Reform and restructuring needed in the local government sector are of a different order of magnitude than for either the judiciary or parliament. Major constitutional and legal reforms are required. The GOK seems presently to be pursuing a considerably more limited vision of reform, involving primarily the improvement of service provision, better financial management, an increased revenue base, and the reorganization and rationalization of the central ministry. Reforms needed fall into the following areas.

***Parallel Institutions and Institutional Conflict.*** The present conflict between local authorities and central ministerial provision of significant services, with clear dominance of the ministerial and administrative cadre over locally elected councilors in formulating and prioritizing local needs, is counterproductive and confusing. It guarantees that there is little local oversight over government decision-making relevant to the local arena. There is correspondingly little local commitment of resources, time, energy, or good will. Without these, no long term development is sustainable.

The need to revisit the relationship between local government and provincial/district administration, even in the short term and under the existing legal framework (the Provincial Administration and the DDCs operate on the basis of administrative edict, not law) is paramount. Until a clear signal on the role of local authorities and their non-subordination to the provincial administration/central ministries is sent, little improvement in the performance of the councils can be expected. The Omamo Commission Report reportedly suggests this rethinking, and there are indications that it is presently being turned into a Cabinet paper. This can be done within the existing legal framework.

***Curtailing Excessive Ministerial Centralization and Power.*** The Ministry of Local Authorities itself is excessively centralized and controls too many decisions of local councils. The Minister's power to appoint councilors (albeit now in proportion to the party strength of those elected, so that the Minister cannot tip the balance of the council in political terms); his power to approve all financial decisions, including the hiring of subordinate staff, the alteration of license fees, rates, and other revenues; and his ultimate power to dissolve a council which is not performing up to vaguely held standards — all these rob councils of any semblance of autonomy. Kenya's local governments are in no sense "independent", although their sheer number means that central control is effectively exercised only in the cases that are politically important to the regime. The excessive centralized control of local authorities needs to be removed, and this can be done through amendment of Cap. 265.

***Financial Base of the Local Authorities.*** There are two distinct points of view on the adequacy of the financial base of the councils. The councils themselves, and sympathetic supporters, claim that the revenue base the councils presently confront is wholly inadequate, even for the meager responsibilities they retain. While corruption is seen as a major problem everywhere, this sympathetic view puts the blame for the lack of performance and concomitant corruption on the inadequate revenue base. Others, including knowledgeable insiders who have worked with local government for decades, argue that the councils' lack of revenue is at least as much a function of their inability to collect what is due them, and of the corrupt misappropriation of a good portion of what is collected, rather than an inadequate revenue base *per se*.

Which of these positions is “correct” depends on both an interpretation of what really are the appropriate functions of the local councils under existing law — i.e., what its realistic revenue needs are — and on an ability to assess the revenue a council could really collect if it made a cost-effective effort to do so, eliminating corruption. While no recent research on the latter has been done, work done in the mid-80s suggested that less than half of the amount of revenue available to councils was being collected in most cases, and in many revenue collected amounted to no more than 10% of mandated sources.

The shortfalls were caused both by corrupt misappropriations of revenue collected — for example, by market fee collectors simply pocketing their collections and issuing no receipts — and by a lack of interest in collecting some types of revenue. For an example of the latter, the “coffee councils”, relied almost wholly on coffee cess and ignored other sources of revenue. There was considerable rationality to this, however, in that the collection costs to the councils for this cess were zero, while costs of collecting many of the other types of permissible revenue — as well as the potential for rent-seeking in the collection process — are high enough to render them not cost-effective.

“Fixing” the revenue base is a critical concern for putting the local authorities back on the road to financial viability, even under the existing legal framework. Experiments with new types of revenues, including the local authority service charge (an attempt to return to a more equitable tax such as GPT had in theory represented), were necessary but have not improved the situation. A bold experiment is presently underway to provide transfer funds from the central government, on the basis of the Local Authority Transfer Funds Act passed in 1998. Whether this will provide an adequate financial base, and whether it will be allocated and disbursed equitably or will become a political slush fund, are critical to the prognosis for Kenya’s local authorities over the next few years.

**Corruption.** Corruption is rampant in the local authorities. It takes many forms, ranging from the petty pilfering of public revenues by the market fees collectors to the “creative” accounting practices of some councils’ senior accountants, leading to the disappearance of large sums. Council staffs are felt to be bloated, and the citizenry can usually point to significant numbers of idle staff who are paid for doing nothing. Of course, part of the reason that they do nothing is that they are paid little, or not paid at all. Salary arrears for many councils are counted in months.

Why would someone work for months — even years — without being paid? Clearly, because the salary is inconsequential in comparison with the opportunity to pocket money from revenue collection, or from creative accounting, or from selling the supplies the council purchases on the side, or from diverting them to one’s own private use. These practices are rampant and they deplete the councils’ coffers, with the inevitable outcome of little or no visible service provision. This is a vicious circle. It must be tackled if Kenyans are to be mobilized to support local government. *At present, most of the citizenry is either apathetic about local councils, or actively opposed to giving them either increased responsibilities or increased revenue, since they are perceived uniformly as corrupt.*

#### **Overall Constitutional Reform and the Structuring of a Meaningful Local Government System.**

There is a trade-off between careful, detailed attention to efforts to strengthen local governments under the existing legal arrangements, and developing a vision of an appropriate local government system that may entail a complete overhaul of the existing legal framework. The constitutional reform lobby has expressed the desire for a drastic overhaul, removing the Provincial administration entirely and constructing a local authority system with the substantive functions with which it was vested at independence.

Even the Association of Local Government Authorities of Kenya (ALGAK), a lobby organization comprised of local authorities as members, indicates that the priority need at present is a rational constitutional/legal framework for local government in Kenya, one that can provide protection from the whims of both the executive generally and an overcentralized, politically-charged ministry. As other countries in the

region experiment with new local government systems, Kenya is in a position to benefit from the lessons learned. Donors need to find cost-effective ways to bring these lessons to the attention of strategic elites in the constitutional reform process.

## **5. GOK's Agenda and Donor initiatives**

**Historical Context.** The GOK has traditionally sought assistance with capital development, technical assistance and training in the local government sector, which is presently characterized by a large number of uncoordinated efforts. The Bank's credits for urban transport are far and away the largest. The Bank and GTZ have a lengthy history of activity in the sector. USAID was also active until the mid-80s. The Bank projects have dealt primarily with large municipal infrastructure and with attempts to impose conditions for successful utilization of the loans on local authorities, such as Nairobi, which are highly politicized and corrupt.

USAID's substantial involvement in the local government sector was primarily in shelter-related efforts, most notably with site and service housing schemes, but also included some support for institutional capacity building in the authorities. These efforts have not been very fruitful, although the germ of the institution-building assistance, the Local Authority Development Planning process, has been retained by the GTZ team. USAID-funded councilor training was brought to an abrupt halt in the mid-80s when Pres. Moi denounced the presence of US trainers, on the basis of what appears to have been a personally-motivated objection by some councilors.

**Current Assistance.** The main current projects supporting local government are the following:

- **KUTIP**, the Kenya Urban Transport Improvement Project, funded by a \$155m Bank credit. KUTIP will work in 26 towns on road construction and rehabilitation and is in varying stages of preparation, with some work underway but mostly at the stage of tenders and contracting. (The Bank has also granted a large emergency credit for reconstruction of roads destroyed by El Nino rains last year; these are also mostly not underway yet.)
- **Microprojects**, also Bank-funded, in conjunction with KUTIP, provide councils with \$100,000 allocations to construct or rehabilitate infrastructure such as markets and bus parks. They serve as the "carrot" for getting improved financial management systems in place, for which assistance is then provided under the Kenya Local Government Reform Project, (see below). KUTIP's transport funding is the "big carrot", though.
- **KLGRP**, the Kenya Local Government Reform Program, also Bank-funded, is implemented by an HIID team. It provides technical assistance for institutional development, focusing particularly on financial issues — revenue rationalization, management, rationalization of the ministry's administrative systems. The project has introduced a streamlined system for local authority business licensing, including an agreement that the Minister will delegate responsibility for approving fees to the councils, and an agreement that the local authorities will collect all license fees and the Ministry of Trade will relinquish them.

With the passage of the Local Authority Transfer Fund (LATF) Act in 1998, and agreement to enforce the provisions of the Road Maintenance Levy Act, and the Government's commitment to payment of Contribution in Lieu of Rates (CILOR) to the authorities, the project expects the revenue base for the councils to increase dramatically. The project is now focusing on preparing the councils to manage these resources responsibly. It is currently working on recommendations for the Ministry for the allocational formulae according to which the LATF will be disbursed to councils, which it anticipates will be based on some set of population-based criteria.

*This is not a small issue.* The Ministry has historically retained tight central control of resources, and even decisions about permissible local resources, precisely in order to reward and punish councils strategically and maximize the incumbent regime's political base. There are no signs that this will not be the case with the anticipated expanded revenue.

- **GTZ** fund the Small Towns Development Project, working in selected small towns to develop infrastructure, institutions (particularly public/private partnerships), working on issues such as squatter settlement upgrading and improving planning capacity. GTZ also assists ALGAK, as does the Friedrich Ebert Stiftung (FES).
- **Dutch** "Green Towns", works with towns to develop environmental protection and conservation plans and civic education directed at environmental concepts.
- **JICA** has a solid waste management project/program in several towns/municipalities.
- **UNDP** has done studies of the four largest municipalities to try to come up with a strategy for preventing a total meltdown. RUWASA, the Rural Water Supply Associations, is also a UNDP activity, dealing with the development of community infrastructure around the maintenance of water supplies.
- **DFID** has negotiated an agreement with Mombasa for a 2.5 million pound pilot project which will focus on public/private partnerships — getting the municipality to enter into economically constructive arrangements with the business community to provide infrastructure and services. It will also provide training and resources for improving financial management.

**Summary: Foci of Current Assistance.** In sum, donors are currently working to improve the performance of councils within the existing legal framework.

The smaller, bilateral efforts are generally being directed at "bottom up" approaches involving community organization and public/private partnerships. GTZ and the Dutch projects are working in creative ways to try to develop community ownership, public/private partnerships and sustainability. There are also NGOs which have provided leadership in community organizing for local initiative and ownership, including the growing number of neighborhood associations in large municipalities like Nairobi and Mombasa, and Kituo cha Sheria and a handful of others, primarily urban-focused.

The large, Bank-funded efforts are directed at "top down" administrative rationalization. The technical assistance accompanying the large-scale Bank loans, can be characterized as:

- focused wholly on municipal and town councils
- primarily oriented to "supply side" assistance — e.g., training and systems development for improved financial management and planning capacity
- concerned with increasing the revenue base of the councils

**Unaddressed Needs.** There are some critical unaddressed needs of which donors should be aware.

***Corruption.*** There is little sign of a coming to grips in any donor efforts with the problem which Kenyans single out as the fatal constraint to local government improvement, and to the likelihood of donor projects having any impact: corruption. Corruption has a dampening effect on local economic activity, through the extortionate actions of revenue collectors in the markets, bus parks and other economic nodes. What business is promoted by the councils through purchases of goods and services frequently has distorting effects

on the local economy because of favoritism shown in the contracting process, a consequent lack of competitiveness and quality control in work performed (hence the rapid deterioration of “new” roads, for example), and an increase in local income disparities.

*Incentives* for upright public service through employment with the councils is extinguished by the lack of revenue flow and consequent need to engage in rent-seeking behavior, including “privatization” of council revenues, which simply exacerbates the problem of low revenue collection. Incentives for the honest performance of functions by councilors are also small, although councilor salaries are presently reported to be about the same as a progressive farmer or local trader. Councilors frequently stand for office for the access to lucrative council business that follows, and for the allowances and other perks, not for the opportunity to be of service.

Corruption is very much a function of incentives, yet the incentive system — personnel recruitment, election, management, payment, promotion, discipline, and the like — all of which are central topics when one talks to informed observers of local government, are not on the agenda of any assistance programs. They are reported to be central in the conclusions and recommendations of the Omamo Commission Report, which is reportedly being turned into a Cabinet paper. A serious GOK commitment to the issue of incentives should be a sine qua non for any assistance aimed at improving performance within the existing legal framework.

*Roles and functions of local vs. central government.* There is still a complete lack of agreement in Kenya about what role the local authorities **should** play — what functions and services they should provide, and why others should be reserved to the central government. Many Kenyans argue that local government should be the provider of most local services, and should have the requisite resources to do so. Unfortunately, this discussion is confounded by the complete incapacity of many of the authorities to provide even the services they are now responsible for, leading pessimists to reject the idea that they should have any more responsibilities.

The parallel institutional infrastructure of the Provincial Administration further confuses the issue and must ultimately be rationalized. The Provincial Administration, with organs at district, division, and location level is explicitly charged with prioritizing and coordinating development activity, under the aegis of the Office of the President. Local authorities are subordinated to these administrative units by administrative order, not by legislation. Elected councils are thus, in effect, subordinated to appointed and centrally directed ministerial technical staff.

This is not a situation in which motivation and incentive can be sustained on any reasonable basis, nor in which local ownership and participation can be promoted. Kenya needs to work out a viable local government system in which local service provision, local accountability, and some degree of national oversight and provision of standards are combined. Yet none of the donor assistance currently being provided is focused on the important issue of rationalizing roles and responsibilities, as opposed to rationalizing bureaucratic structures and financial flows.

*Constitutional and Legal Reform.* There appears at present to be no serious attention to constitutional and legal reform and the role of the local authorities in it. For three decades Kenyans concerned with local government have been discussing the need to completely overhaul the Local Authority Act. Now, with a constitutional review and revision in the wings, though stalled, assistance in rationalizing performance and systems within the existing framework will have an uncertain impact. Attention needs to be directed to building consensus on a new vision of local government that will speak to the structural, incentive and performance flaws of the present system.

## 6. Strengthening Local Government: the Context for US Assistance

*Local Government in the Transition: the Long-term Vision.* Decisions about whether and how to invest in local government in Kenya should derive from a vision of progressive local government and of a feasible transition to it in the Kenyan context. This is particularly important for Kenya because of the development of highly politicized regional identifications with increasingly ethnic overtones, and the need to contain them within a productive local government system that can reduce inter-regional and inter-ethnic conflict. It is a complicated issue in Kenya because of the history of “majimbo”, or federalism, which provided the basis for the independence constitution, and which was rapidly and completely rejected by the independence government at the earliest opportunity. More recently, majimbo has been the rallying cry of those who feel threatened by the incursions of the more populous or economically mobilized tribes into their territorial space. The term has come to be associated with the ethnic clashes of 1992/3 and 1997, prior to elections, and essentially to signify ethnic cleansing, Kenyan style.

Despite the negative political freight that federalism carries, some greater degree of local autonomy and responsibility is likely to be a *sine qua non* in the post-Moi era for a negotiated agreement that protects the group rights of those communities currently forming the base of the regime. Whether based on the current counties and municipalities, or on some larger units grouping small counties into financially viable blocs, the brokering of a “deal” to break the current political stalemate and to permit Kenya to resume economic growth should include an element of local autonomy considerably greater than is presently the case. Local government must ultimately provide **significant** services to Kenyans on a cost-effective basis, including the protection of natural resources and the regulation of their exploitation, a responsibility of the councils which few exercise effectively.

*Given the current skepticism of Kenyans about their local authorities, the transition to this state must comprise BOTH the constitutional and legal reforms required to transfer significant responsibilities, resources and incentives to the councils, AND simultaneous efforts to improve the structure and functioning of the councils as they currently exist. Signs that improvements can be made are critical to mobilizing support for the larger structural changes which will ultimately be necessary. At the same time, putting all the energy into non-structural improvements would be self-defeating.*

Only Kenyans can sort out what structural changes are ultimately essential to them, but the transition is likely to be a piecemeal one for which we might expect the following signposts.

### *Year 2002*

Three areas of progress should be visible by the Year 2002, based on actions in process currently on the part of the GOK, relevant donor assistance, and citizen action:

- A revised Local Government Act (Cap 265) should be in place, whether as part of a new constitution or as a systematic amendment of the current Act. It should significantly reduce ministerial/central control over local authorities and set out explicitly their areas of autonomy and their permissible revenue base.
- The increased revenue base for local councils presently under construction should be functioning, with a transparent algorithm for allocation of the central transfers.
- A visible increase in community assumption of responsibility for service provision/regulation based on community and neighborhood organizations in the urban areas, on public/private partnerships and privatization of some services, and on the development of public regulatory bodies with citizen participation.

*Year 2005*

- A majority of councils should be able to pay salaries on time; to remit social security and hospitalization benefits on behalf of employees; to pay their water and electricity bills; and to avoid piling up large numbers of unpaid vendors bills.
- A capital funding mechanism should be in place and the major municipalities should begin to borrow for capital development.
- Constitutional reform should be completed, with a local government **structure** that:
  - puts councils in a superordinate position over the central government administration locally
  - incorporates elective mayors and council chairmen and makes council offices a five-year term
  - addresses the legitimate career needs of council senior staff while retaining a significant measure of control over hiring and firing at council level
  - addresses the incentives of councilors and staff

and a set of local government **functions** that:

- includes a phased return of significant responsibilities currently assumed centrally
- sorts out the reasonable local and national jurisdictions for natural resource management and environmental protection
- incorporates a significant element of public/private partnership, or at least permits this

*Year 2010*

- A majority of the councils should be providing an expanding portfolio of services effectively
- A majority of councils should be in improving financial condition, demonstrating:
  - improved ability to estimate and collect revenue
  - realistic expenditure estimates and controls
  - ability to close books at the end of the financial year and to pass audits
  - attention to depreciation/renewals accounts
- A majority of the councils should be holding transparent elections for councilors and for officials, with directly elected mayors and council chairmen
- A significant element of citizen oversight should be established, through:
  - elections
  - mechanisms for demonstrating financial transparency (published accounts, audits, allocations, tender outcomes, and budgetary assessment)
  - strong citizen lobbies and organized demand (ALGAK, Chambers of Commerce, PTAs, professional associations, unions)

These are not precisely “benchmarks”, although they could be turned into benchmarks as and if a serious effort to strengthen local governments were underway. The complicating factor is the variation in present capacity of councils, which will require realistic flexibility in benchmarks. Some more modest, short

term benchmarks will be suggested below, to which initial efforts in assisting local government strengthening should be tied.

## 7. Recommended Strategy

**Goals.** The US Mission's *objectives* in considering support for strengthening Kenya's local government system should be:

- to create **demand for accountability** within the system as it exists; and
- to assist Kenya in working toward a **consensus on the structure of a viable local government system** that eliminates the present highly incapacitating structural constraints.

The *ultimate goal* is agreement on, and legislation of, a local government system that provides an independent channel for citizen participation in decision-making on public policies and the allocation of public resources relevant to their daily activities.

**Initial Strategy.** Given the need to create viable domestic demand and support for stronger local government, the team recommends that the mission:

- assist in building demand and capacity for advocacy among strategic elites;
- support the exchange of information among relevant regional elites/councils, in order to expand the range of alternative local government structures Kenyans are aware of;
- assist with "bottom up" community involvement, possibly through co-funding with GTZ, in a "learning by doing" mode;
- assist one or two councils with financial management as a vehicle for monitoring the allocation process of centrally transferred funds.

**Preliminary Strategic Objectives.** The Ministry of Local Authorities is reportedly presently in the process of reviewing a draft Sessional Paper that will set out an agenda for reform in the local government sector. Many of the ideas in the draft are reportedly from the unpublished Omamo Commission Report of 1995/6, and have been incorporated into the Policy Framework Paper (PFP) that guides policy and budget formulation. The US mission should:

- use the reform agenda that emerges as a set of detailed benchmarks for monitoring political commitment;
- support some preliminary activities aimed at identifying strategic elites, both internal and external to the public institutional machinery, who are committed to a genuine strengthening of local government.

Initial activities should focus on creating demand for accountability within the existing legal framework, and on creating demand for a new legal framework that provides meaningful autonomy, responsibility and resources for local government.

### **Investment Strategy.**

#### ***To the Year 2002:***

- Support ALGAK and/or other civil society organizations with credible interest in strengthening local government reform (examples might be Institute for Economic Affairs, the new Transparency International chapter). Specific activities could include:

- Funding/co-funding the legal advisory effort ALGAK is undertaking to produce a draft revised local government code
- Supporting provincial workshops for council chairmen to inform them about the constitutional reform process, the issues relating to local government, ALGAK's position or other alternatives
- Offer speakers (possibly through USIS funding) from the region on alternative local government systems, such as South Africa, Uganda, Tanzania, Ethiopia (a clear idea of the audience would have to be thought through, in order to maximize the exposure and impact)
- Arrange exchange visits with other regional local government-relevant institutions, involving ALGAK officials, strategic council chairmen, and the parliamentary committee members of the relevant parliamentary committee.

This should be organized cautiously, since ALGAK is an unknown quantity at this time. Some initial exploration should be done to see to what degree it is a credible representative of the majority of the councils. If there appear to be political agendas in play that compromise the organization as a credible lobby, these activities should be pursued through other civil society organizations with relevant agendas and expertise. These might include the Institute for Economic Affairs (IEA), the new Transparency chapter, or the Karengata Neighborhood Association.

- Explore mechanisms for supporting public/private partnerships in service provision; assist in developing a model of local government as service providers rather than service producers. This model has gained ascendancy in most other parts of the world, including some of Kenya's neighbors, but is not yet well-understood in Kenya. DFID is attempting to pilot an activity in Mombasa with this as a key objective. Three types of activities which could be undertaken:
  - Monitor the donor-funded projects which already have elements of this in them — JICA's solid waste management project, the Dutch "green towns" project and DFID's efforts in Mombasa. Possibly fund a small study of these projects to draw out "lessons learned".
  - Commission a study on the current scope and experience of Kenya's local councils with tendering out service provision, e.g., management of markets, bus/taxi parks, garbage collection. Focus on a few councils where either successes or failures are clear and draw lessons from them. The Government Department at the University could probably undertake such a study under someone like Prof. Oyugi, using graduate students to do case studies.
  - Organize an exchange for ALGAK and some strategically chosen council chairmen on the topic of public/private partnerships with ULAA, ALGAK's Ugandan counterpart. Uganda has had considerable recent experience with these and could fuel ALGAK's thinking about the shape of local government in a new constitutional order.
  - Co-fund a GTZ small town, chosen on the basis of a willingness to experiment with public/private partnerships, and design "lessons learned" into the project from the outset.
- Monitor the increased flow of funds to local authorities mandated by recent legislation. Assist ALGAK, or other interested and credible civil society organizations, to produce useful information on the funding flow and to feed in into the relevant committee of parliament (**synergy with the parliamentary initiative**).

*From Year 2002 to 2005*

- Continue the dual approach above, producing information, and identifying and assisting strategic elites in the local government arena.
- If constitutional reforms and/or code revision are in process, and there is some evidence of transparency in the financial flows from the Ministry of Local Authorities or the Treasury, consider assistance to one or two specific councils on:
  - financial strategizing — not simply bookkeeping and accounting, which is the general meaning of “financial planning and management assistance” offered by donors, but rather the development of a true financial plan, including capital development and the development of realistic revenue estimation capacity and investment strategy. This could be tied to some capital development funding, such as USAID had provided for the small towns in which it previously worked.
  - environmental protection planning — possibly along the lines of the Uganda mission’s project in Kabarole District, which provided technical assistance to the council to assess environmental impact and write appropriate environmental legislation
- If sufficient progress on benchmarks at that point has been made, hold a **regional workshop** on the key local government issues facing Kenya. The Municipal Development Program in Harare might play a key role in the provision of resource persons; this is a first-class operation, co-funded by the Bank and ACBF, which networks most of the key local government players in the region.

*After the Year 2005*

- If constitutional reforms are completed with an appropriate role and structure for local government, consider assistance to a mixed group of councils (i.e. county, town, and municipal) based on the lessons learned from the efforts to that point. This should comprise capital development funding accompanied by technical assistance for financial strategizing (not just financial “management”), as described above.

**8. Constraints and Risks**

**Constraints.** Several factors may constrain the degree to which USAID is able to invest in this sector, the most important among them being:

- The cynicism with which large numbers of Kenyans view the local authorities, which makes it very difficult to generate enthusiasm for assistance to or reform of the system
- The lack of civil society organizations with local government as an explicit focus
- The lukewarm nature of the GOK’s commitment to reform of the local government system, compounded by the increasing need (given the shrinking of other sources of patronage) to use the local authorities and the resources they control for political purposes
- The uncertainty of direction of the constitutional reform process, which (rightly) confounds efforts to address needed legal code revision on a piecemeal basis

**Risks.** The main risks would be:

- Politicization of the civil society organizations which USAID supports, leading to an erosion of their utility or credibility. This can best be addressed by choosing civil society partners very carefully, attempting to identify neutral, credible organizations from the start.

- A refusal by the GOK to let individual councils, or ALGAK, work with a donor effort; and/or manipulation of the responsible parliamentary committee to preclude the development of a parliamentary oversight function related to local government. This can best be addressed by talking extensively with the relevant committee chairman and members before any activities are undertaken.

## **9. Benchmarks for Monitoring Independence and Effectiveness**

USAID should construct a basket of benchmarks that refer to the main problems of the sector, including the development of a governmental agenda for local government reform. Since it is not recommended that USAID commit itself to public institutional support at this time, with the exception perhaps of informal monitoring of willing councils' financial transfers from central government, the monitoring of these benchmarks should be undertaken over a period of a year and the situation reviewed at that time.

### **Recent indicators of commitment to reform:**

- Appointment of the Omamo Commission, presentation of its report.
- **Negative: Non-publication of the Omamo Commission Report**, which remains officially unavailable.
- Agreement during the IPPG process prior to the 1997 elections that the Minister for Local Authorities, in his appointments to local councils, must appoint in proportion to the party distribution of the elected councilors. Need to determine whether this was actually incorporated as an amendment to the Local Government Act; if not, monitor whether it is so incorporated, through the constitutional reform and/or the reform of subsidiary legislation.
- Passage of the Local Authority Transfer Fund Act, December 1998, committing GOK to transfer 5% of income tax to local authorities.
- Amendment in 1997 of the Road Maintenance Levy Fund Act of 1993 to incorporate funds transfer to local authorities for roads maintenance.
- Agreement by GOK to pay Contribution in Lieu of Rates (CILOR) to local authorities on behalf of Government agencies. (This is reported by the HIID-Local Government Reform Project team and is depicted in its published reports.)
- Incorporation of an agenda for reform of local government institutions in the Policy Framework Paper (PFP), based on the recommendations of the Omamo Commission Report.

### **Benchmarks of Near Term Commitment:**

- Sessional Paper in draft form, which is being commented on in the Ministry now, **published**, setting out agenda for reform in the PFP as Government commitments. This should appear during FY 99/00.
- Sessional Paper becomes an agenda for reform, by FY 00/01, and there is substantial progress on the agenda by FY 01/02.
- Actual transfer to the local authorities of the 5% Transfer Fund derived from income tax.

- Transfer to the local authorities of revenue from the Road Maintenance Levy Fund; how to track this will be an interesting issue, as with the LATF, and could involve working with a council or two who are amenable to the idea of USAID gathering information systematically; or from a grant to ALGAK to do this; or a local consultant with good knowledge of local authority financial transfers
- Receipt by councils of CILOR.
- Ministerial agreement to abide by the informal delegation of approvals on trade license schedules to the standardized schedules developed by the KLGRP (26 councils now have adopted the standardized trade licensing schedules).
- **Negative: Lack of transparency of the formula for allocation of the LATF; evidence of its political use, rewarding councils with KANU majorities and penalizing non-KANU councils.** This could be tracked through comparing transfers with the allocation formula, but there will undoubtedly be many constraints on the actual disbursement of funds, so it might be necessary to make statistical inferences from aggregate receipts and population statistics.
- **Negative: Creation of many new local authorities, prior to the design of a new local government system in the constitutional review process.**

### **Benchmarks of Independence and Effectiveness**

The terms of reference for this assignment requested development of benchmarks of independence and effectiveness, from which the potential for effective investment could be gauged. However, it is not clear what levels of independence and effectiveness should be considered necessary in order to justify investment. Indeed, Kenya's local authorities are totally dependent, and this is a factor in the recommendation to work on the "demand side" first, identifying and assisting pro-reform constituencies. Similarly, if some degree of effectiveness is considered essential to a reasonable likelihood of successful investment, then Kenya's local authorities are not yet ready for "supply side" investment. However, when it is decided that such investment is reasonable, attention to relative effectiveness would be a useful way to choose which local councils to work with.

**Independence.** "Independence" in respect of local government is not as straightforward as it may seem. There are legitimately different forms of local government, ranging from the highly centralized French prefectorial system in which local governments are really a department within the central government, to the highly decentralized US model, in which localities operate very independently and are only "influenced" by national and state governments through the carrot of resource transfers (bloc grants). It cannot be argued that one end of this spectrum is preferable to the other. They have very differing implications for the benchmarks of "independence" that one might design. The following are offered as examples of benchmarks under the US conceptualization of local government. This may not be appropriate to Kenya; only Kenyans can decide that.

1. Councils control their own budgets, do not have to have approval for budgets from a central ministry (or anyone else)
2. Councils decide on their own establishments and hire and fire their own staffs, subject to national civil service legal provisions
3. Councils decide on their own revenue sources and levels of fees and rates

4. Councils decide on the modalities for service provision, whether through direct production of a service or indirect provision through contractual arrangements, either with the private sector or community groups
5. Councils have access to capital development funds on the open market, that is through floating bonds or undertaking commercial investments of other sorts
6. Councils are not dependent for the bulk of their revenues on central transfers of funds (**N.B. Kenya comes across highly independent on this item**, unlike other local government systems; that will change as and if the LAFT begins to function)
7. Councils decide on what services to provide; central government legislation outlines what services are **permissible** to local governments, and what services are **reserved to the central government**, but does not mandate specific services for LAs.
8. Councils are comprised of elected members; central government does not appoint councilors
9. Councils make local by-laws without reference to central government, except insofar as the central government has the power to determine whether local legislation is in conflict with national legislation
10. Councils are not subordinated to an administrative hierarchy in proposing, prioritizing and attracting funding for development

*Most of these measures of independence would require major revision of the Kenyan local government code, not just administrative changes.*

**Effectiveness.** Effectiveness is no less complicated an issue. Councils should be able to provide services to local residents on a cost-effective basis. Which services they provide is a function of national legislation. Providing these services cost-effectively is a trickier notion. It implies a rough calculus that pits the cost of provision by the private sector against the cost of provision by a council **together with the benefit of social provision**. That is, private provision of services can be more profitable, but the social costs of private production have to be considered — that is, the inability of some social groups to have access to these services when produced privately.

Cost-effective production by a council thus has to take into account reasonable costs against a differing profile of cost recovery than would be the case with strictly private provision of services. In practice, the difficulties in assessing costs against a combination of revenues and benefits makes the calculation of “cost-effectiveness” at the council level impossible, let alone the comparison of councils’ cost-effectiveness against each other. Consequently, effectiveness has to be gauged fairly indirectly, in terms of financial performance, and directly, terms of the proportion of residents receiving services, along the lines of the following.

1. Councils should not run continual budget deficits; should estimate revenue accurately and collect a high proportion of what they estimate; and should budget for renewals, i.e. depreciating assets and putting money into renewals funds to replace them.
2. Councils should perform on a “cost center” basis to the extent possible, that is running discrete operations with a plan for costs/cost recovery, especially assets which are supposed to be income generating. (The “General Rates Fund” basis on which Kenyan councils historically operated deliberately inhibited the assessment of performance on a “cost center” basis).
3. Councils should be able to pay salaries on time.

4. Councils should not be paying **only** salaries; salaries should not be more than about 33% of the councils' budgets (the majority of Kenya's councils would "fail" any effectiveness test based on this item).
5. Councils should be providing tangible services in the case of their remaining responsibilities — not merely tax and fee collection. Thus, in urban places, there should be evidence of satisfactory:

garbage collection  
 fire protection  
 street repair  
 street lighting  
 sewerage/storm drainage/flood control  
 market sanitation/health inspection/vermin control  
 market infrastructure/security  
 animal control  
 maintenance of parks and verges

In rural areas there should be evidence of satisfactory:

market infrastructure/maintenance (including security)  
 market sanitation/health inspection  
 secondary/market access road maintenance  
 forest protection/conservation  
 mineral resource protection/conservation

In general, the extreme resource inadequacies facing Kenya's councils (in part a function of the corrupt diversion of resources) means that they put maximum effort into collecting revenues from markets, and other administrative fees and taxes, while providing no maintenance or services.

6. Councils should **not** be operating businesses in competition with the private sector — bars, hostels, rest houses and the like — unless the private sector is completely absent in the area (e.g. in Samburu or Turkana, other places where the level of profit is likely to be so low as to dissuade private sector investment).
7. Councils should be tendering out the management of services where their own cost center results are not satisfactory.
8. Councils should have formal mechanisms for citizen input, including open council meetings. Kenya's local councils do have provision for open meetings, but the councils' committees are another matter, and these deal with issues at the stage of real policy debate and decision.
9. Councils should not be characterized by frequent conflict between the elected members and appointive staff.

## **ANNEX D**

## **BIBLIOGRAPHY**

## Parliament

Gertzel, Cherry, "Parliament in Kenya", chap. 5, in Gertzel, The Politics of Independent Kenya, Heinemann, London, 1970, 1974.

Gicheru, H. B. Ndoria, Parliamentary Practice in Kenya, Transafrica Publishers, Kenwood House, Kimathi Street, Nairobi, 1976.

Republic of Kenya, Standing Orders, revised 1997, Government Printer, 1998.

Republic of Kenya, Constitution of Kenya, revised 1997, Government Printer, 1997, Chapter III.

Throup, David and Charles Hornsby, Multi-Party Politics in Kenya, James Currey, Oxford and East African Educational Publishers, Nairobi, 1998.

USAID/CDIE, "Assisting Legislatures in Developing Countries: A Framework for Program Planning and Implementation", Assessment Report No. 20, February, 1998

## Justice Sector

Blair, Harry, and Gary Hansen, "Weighing in on the Scales of Justice", USAID/CDIE, 1994.

Jackson, Tudor, The Law of Kenya: An Introduction, Kenya Literature Bureau, 1970, 1976; esp. Chap. 2, "The Sources of Kenya Law", chap. 3, "The Structure and Jurisdiction of the Courts", chap. 5, "Constitutional Law", particularly pp. 72-77, constitutional provisions relating to the Judiciary and to judicial control of the Executive, Chap. 9, "Procedure", and Chap. 11, "The Legal Profession".

Hansen, Gary, "Doing Democracy in the Third World: Developing an Applied Framework for Legal Development", APSA Paper, Washington, D.C., September 1993.

Heilman, Lawrence C., "Measuring Performance of USAID's Administration of Justice Portfolio in Latin America: Some Lessons Learned", under contract with MSI, July 1994.

Kwach, Hon. Richard O., and others, Report of the Committee on the Administration of Justice, 1998.

Republic of Kenya, Constitution of Kenya, as above.

Wanjala, Smokin and Kivutha Kibwana, eds., Democratization and Law Reform in Kenya, Clairpress Ltd., Nairobi, 1997.

Geist, Widner et al., "Rule of Law Programs in Africa", unpublished report prepared for USAID under the auspices of AMEX, 1998.

Widner, Jennifer, "Indicators", unpublished listing of indicators of justice sector performance, focusing on traditional "administration of justice" areas.

Local Government

- Akivaga, K., W. Kulundya-Bitonye and M.W. Opi, Local Authorities in Kenya, Heinemann, Nairobi, 1985.
- Colebatch, H.K. "Some Political Implications of Service Provision: Roads and Schools and Health Services", Working Paper No. 79, IDS, February 1973.
- Colebatch, H.K. "Government Services at the District Level in Kenya: Roads, Schools and Health Services", IDS Discussion Paper No. 38, May, 1974.
- Geist, Judith, "Local Government Expenditure and Revenue Trends", unpublished manuscript, 1986.
- Kenya Local Government Reform Program, Report of Activities (1998)
- Oyugi, Walter O., "Local Government in Kenya: A Case of Institutional Decline", in Mawhood, P., Local Government in the Third World: The Experience of Tropical Africa, 1983.
- Republic of Kenya, The Local Government Act, Cap. 265, Laws of Kenya. Government Printer.
- Republic of Kenya, The Rating Act, Cap. 267, Laws of Kenya, Government Printer.
- Smoke, Paul, "Local Government Reform in Kenya: Progress to Date and An Agenda for the Future", draft discussion paper, Kenya Rural Development Project, Ministry of Planning and National Development, August, 1989.
- World Bank, "Kenya Local Government Finance Study", Confidential Report No. 8997-KE, September 18, 1990.

# **ANNEX E**

## **PERSONS INTERVIEWED**

## **List of Persons Interviewed**

### **DONORS**

Mr. Norbert Brakhuis, Netherlands Embassy, Political Counselor  
Mr. Jelte van Wieren, Netherlands Embassy, Development Coordination  
Mr. Luke Wesonga, UNDP, Governance Program Officer  
Mr. Malcolm McLaughlin, British High Commission, Head of Political Section  
Mr. Daniel Davis, Government and Institutions Adviser, DFID  
Mr. Ladipo Adamolekun, Principal Public Management Specialist, World Bank  
Mr. Kenichi Ohashi, World Bank, Kenya Country Coordinator, Washington  
Mr. Harold Wackman, Country Director, Kenya, The World Bank

### **GOVERNMENT OF KENYA**

#### ***Parliamentary Administration***

Mr. Japhet Masya, Clerk of the National Assembly  
Mr. Peter Charles Owino Omolo, Deputy Clerk, National Assembly  
Hon. Joab Omino, Deputy Speaker, National Assembly

#### ***Members of Parliament***

Hon. Mohammed Galgalo, MP Bura, KANU  
Hon. Peter Anyang' Nyong'o, nominated MP, SDP  
Hon. William Ruto, Asst.Min.OOP, MP Eldoret North, KANU  
Hon. Peter Oloo Aringo, MP Alego, NDP  
Hon. Peter Njeru Ndwiga, MP Manyatta, DP  
Hon. Njeru Kathungu, MP Runyenjes, FORD-Asili  
Hon. Otieno Kajwang', MP Mbita, NDP  
Hon. Ngenye Kariuki, MP Kiharu, Safina  
Hon. Adan Keynan, MP Wajir West, Safina  
Hon. Martha Karua, MP Gichugu, DP  
Hon. Simon Mkalla, MP Kinango, KANU, Chairman Finance Committee  
Hon. Henry Obwocha, MP West Mugirango, FORD-Kenya, Chairman Public Accounts Committee  
Hon. Norman Nyagah, MP Kamukunji, DP  
Hon. Wycliffe Osundwa, MP Mumias, KANU  
Hon. Mohamed Shidiye, MP Lagdera, KANU  
Hon. Raila Odinga, MP Langata, NDP  
Hon. Paul Muite, MP Kabete, Safina

***Others***

Mr. J. Dennis Akumu, former MP Nyakach (Kisumu District), Pan-African Research and Consultancy Associates, Exec. Dir.

Mr. Martin Shikuku, former MP Butere (Kakamega District)

***Judicial Sector***

Justice Richard Kwach, High Court, Republic of Kenya

Mr. Githu Muigai, Advocate, Mohammed Muigai Mboya Associates

Mr. Pheroze Nowrojee, Advocate

Mr. Zacchaeus Chesoni, Chief Justice, Republic of Kenya

Justice Evans Gicheru, Justice, Court of Appeals

Ms. Esther Juma, Librarian, Court of Appeals

Mr. Joseph Kibiru, Archivist, Court of Appeals

Mr. Benjamin Kinuthia, Archivist, Court of Appeals

Ms. Celina Litonga, Principal Personnel Officer, Court of Appeals

Ms. Rosemary Matoka, Magistrate

Mr. Kagwiria Mbogori, Executive Director, International Commission of Jurists, Kenya Chapter

Mr. Lumatete Muchai, Private Attorney, Mombasa

Mr. Lee Muthoga, Private Attorney, Nairobi

Mr. Oki Ooko Ombaka, Executive Director, Public Law Institute

Mr. William Ouko, Chief Court Administrator, Court of Appeals

Ms. Simbiri-Jaoka, Kenya Human Rights Commission

***Local Government Sector***

Mr. Roy Kelly, HIID Chief of Party, Bank-funded Local Government Reform Project

Ms. Joyce Nyambura, Program Officer, Association of Local Government Authorities of Kenya (ALGAK)

Mr. John Mbogua, former PS Local Government and former Kenyan Ambassador to the US

Mr. James Karuiru, Local Government Program Officer, World Bank

Councillor Sammy Aswani, Chairman ALGAK and Chairman, Kakamega County Council

Mr. Kioko wa Luka, Administrator, IPAR and former Clerk to Machakos Town Council

Mr. David Mshila, Urban Planning Adviser, GTZ Small Towns Development Project, Ministry of Local Authorities

Mr. Mike Mills, Karen/Langata Association (interviewed in November for a different assignment)

Dr. Walter Oyugi, University of Nairobi, Government Department

**CIVIL SOCIETY ORGANIZATIONS**

Mr. Wachira Maina, Centre for Governance and Development (CGD)

Ms. Grace Githu, Institute for Education in Democracy (IED)

Mr. Robert Shaw, Economist, Institute for Economic Analysis (IEA)  
Mr. Ambrose Adongo, Secretary-General, Kenya National Union of Teachers (KNUT)  
Mr. Chris Kirubi, Chairman, Kenya Association of Manufacturers (KAM)  
Mr. Ogola-Onyango, Vice Chairman, the Architechtrual Association of Kenya (AAK)  
Mr. John Karuga, Chairman, Fresh Produce Exporters Association of Kenya (FPEAK)  
Mr. John Wairui, Deputy Chairman, FPEAK

**MEDIA PERSONNEL**

Mr. John Githongo, East African  
Mr. Joe Kadhi, former editor, Nation

**US MISSION PERSONNEL**

Ambassador Prudence Bushnell, US Embassy  
Mr. Michael Marine, DCM, US Embassy  
Mr. Jonathan Conly, Director, USAID  
Ms. Lee Ann Ross, Deputy Director, USAID  
Mr. Bill Barr, PAO, USIA  
Mr. Lucien VandenBroucke, Political Officer, US Embassy  
Mr. Robert Godec, Economic Counselor, US Embassy  
Mr. Jim Huskey, Political Officer, US Embassy  
Mr. Michael Kamau, Political Section, US Embassy  
Ms. Surinder Kapila, Legal Officer USAID  
Ms. Nancy Gitau, DG Program Officer, USAID  
Mr. Paul Emoungu, DG Section, USAID  
Mr. Isaac Kataka, DG Section, USAID  
Mr. Thomas Ng'ang'a, DG Section, USAID  
Mr. Tom Wolf, DG Adviser, USAID  
Mr. Ned Greeley, REDSO/EA, USAID  
Mr Mark Cassayre, Political Section, US Embassy

**OTHERS**

Dr. Njuguna Ng'ethe, IDS, University of Nairobi, and SAREAT  
Dr. Cyrus Mutiso, Consultant, Muticon  
Mr. James Gitau, Coffee Grower  
Mr. Harris Mule, Consultant, former PS Finance