

THE AUTONOMY OF LOCAL AUTHORITIES IN KENYA:
PARTICULAR EMPHASIS ON THEIR CONTROL BY THE
CENTRAL GOVERNMENT.

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by

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Preface

THIS PAPER SEEKS TO ANALYSE THE STAND OF Local Government in Kenya today, through the study of Local Authorities as the lowest units of Local Government structure. It is due to the problem of analysis other than from inspiration that the author decided to write on this. Questions like, what is Local Government, whether it is necessary in Kenya and what it has accomplished in independent Kenya always intrigued the author during her 2nd year of study where "Administrative Law and Local Government" was a compulsory subject. These questions still remained unanswered after that year. The study of Local Authorities depicts that the Central Government through the Ministry of Local Government and other of its agents has a lot to play in their day to day functions and existence generally. This relationship raises the question of their autonomy and whether such a co-existence can survive without conflict.

Discussing the problem of Local Government today puts us into enquiry as to how the system can possibly be reformed. This is a major purpose of this paper.

Research for this paper took the form of interviews conducted personally by the author from certain Local Authorities and the general field of Local Government. Interviews with a Deputy Secretary in the Ministry of Local Government Mr. Muhashamy Masoud, the Embu D.C. Mr. Githenji, the Administrative Assistant of Embu Municipal Council and the Treasurer of the former Kiambu Town Council (now Municipal Council) were quite helpful. The author faced certain problems where

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for instance some people interviewed refused to disclose highly required information, dismissing it as sensitive or confidential or according to some, it was "in any case unnecessary."! As regards the reading done for the paper, some materials were not in any bound form but loose essays from individuals and therefore not likely to be found in Libraries or areas of reference. For this the Author requests the reader to bear with her.

Thanks are owed to Noel Okoth of the "Weekly Review" for helping me get some valuable information without which it would have been extremely difficult to substantiate some of the ideas advanced. I would also like to thank Mr. G.K. Rukwaro of the Department of Private Law, University of Nairobi for his supervision and guidance through out my research and writing, and also Mr. B. Kangwana, my Lecturer in Local Government Law (1979).

Special thanks to John Mugo Njuguna who apart from being a good friend and companion, encouraged me and allowed me the use of his car during my research. (mens rea)
Many thanks to Miss Sarah Njeri Kamau who typed this work and whose services I highly appreciate as indispensable. And to my parents, brothers and sisters - thanks for the concern.

CONTENTS

Preface.....(iii)

INTRODUCTION..... P.1

CHAPTER ONE
The Historical Background of
Local Authorities..... P.5

CHAPTER TWO
The Functions of Local Authorities...~~*~~..... P.23

CHAPTER THREE
The Control of Local Authorities by
The Central Government..... P.46 ~~x~~

CHAPTER FOUR
Problems in Local Government..... P.79 ~~x~~ 3

RECOMMENDATIONS AND CONCLUSION..... P.86

x
② ③ ④

Abbreviations :

A.D.C	-	African District Council
A.L.G.A.K	-	All Local Government Authorities of Kenya
D.C	--	District Commissioner
D.E.B	-	District Education Board
D.O	-	District Officer
G.P.T	-	Graduated Personal Tax
I.B.R.d	-	International Bank for Development & Reconstruction
K.A.N.U	-	Kenya African National Union
K.N.U.T	-	Kenya National Union of Teachers
Legco	-	Legislative Council
L.G.A	-	Local Government Act
L.G.W.U	-	Local Government Workers Union
L.N.C	-	Local Native Council
M.O.E	-	Ministry of Education
M.O.H	-	Ministry of Health
M.O.W	-	Ministry of Works
P.C	-	Provincial Commissioner
P.S	-	Permanent Secretary
T.F.A	-	Transfer of Functions Act
T.S.C	-	Teachers' Service Commission.

Table of Cases

Hussein v. Municipal Council of Mombasa /1969/ East African Law Reports (E.A) 214.....45

Kanji v. Tanga County Council /1940/ Tanganyika Law Reports (T.L.R)77

Kruse v. Johnson (1898) Vol.2 Queens Bench (2QB) 91.....56, 77

Mwaniki Macharia v. Tasker /1971/ E.A 395.....76

R. v. Harmitte /1933/ Kenya Law Reports (K.L.R) 55.....77

INTRODUCTION

If there is any aspect of our political system that has not been written on, it is the Local Government system. Most materials available are either of the colonial times, pre-1970 and hardly anything on the system as from the late 70's to-date. This paper is therefore intended to benefit the public with knowledge of the present day set-up, structure and nature of Local Government and its relationship vis-a-vis the central Government. The part of the executive most relevant to our study is the Ministry of Local Government. The term 'Local Government' itself has been defined as:

"a political subdivision of a nation or (in a federal system) state, which is constituted by law and has substantial control over local affairs including the power to impose taxes or exact labour for prescribed purposes. The governing body of such an entity is elected or otherwise locally selected." ¹

In other words it is taken to refer to a system of territorial units with defined boundaries, a legal identity, an institutional structure, powers and duties laid down in general and special statutes and a degree of financial and other autonomy. In the Kenyan context, it includes :-

"The entire system by which local areas of Kenya are governed. It covers municipal councils, county councils, urban councils and area councils. It also includes the Ministry of Local Government and administration." ²

The structure of Local Government after the 1979 civil elections was composed of 11 municipal councils, 11 Town councils, 39 county councils, 18 urban councils and no area councils though the act provides for them. The

structure has slightly changed following the raising of Kiambu and Kisii Town Councils to Municipal Council status, and the upgrading of Kajiado Urban Council to Town Council. This means that there are (at the time of writing) 13 Municipalities, 9 Town Councils and 17 Urban Councils. Nairobi City Council is included in the class of Municipalities.

The territorial units which form Local Government are called Local Authorities. They have their legal basis in the Local Government Regulations of 1963 as amended in 1977 and revised in 1978 as the Local Government Act Cap 265 of the Laws of Kenya. It defines each one of them as :-

"a body corporate, with perpetual succession and a common seal (with power to alter the seal from time to time and shall by such name (as it has) be capable in law of suing and being sued and of acquiring, holding and alienating land."

A study of Local Authorities should interest both the lawyer and the public at large because, as well as being legal institutions established, recognised and regulated by law do affect the life of every person in society through their functions. They also have a part to play in the general development of the country. Their place in the Development Plan is therefore to provide the basic foundation of basic social services upon which both government and private projects can be built. For this they must utilise all money, fees taxes and licenses to the fullest possible extent.

The autonomy of Local Authorities depends on their relationship with the Central Government and limitations

imposed on them by the law. As legal persons with rights and duties they are expected to always act in good faith and in accordance with the rules of natural justice. They should ensure that their acts do not injure the legal rights of the people they are meant to protect. They must protect and enhance, not violate these rights.

This paper examines the development of Local Authorities as components of Local Government and their stand as legal institutions. How autonomous they are, especially in their functions is a major consideration towards analysing how successful and useful they are as public institutions.

Footnotes to introduction

¹U.N. Public Administration: Aspects of Commonwealth Development. ST/TAD/M14 New York, 1959.

²Severeid, 'Local Government Members' Guide' 1970, K.I.A.

CHAPTER ONE

THE HISTORICAL BACKGROUND OF LOCAL AUTHORITIES AS
LEGAL INSTITUTIONS IN KENYA

T I The Rationale behind their introduction and
establishment

Like the parliament, the executive and the judiciary the whole system of local government, comprising of the various local authorities is British orientated. Though local authorities today owe their personality, powers and existence to an act of the Kenyan National Assembly, it is doubtful whether in the absence of invasion and subsequent colonization of Kenya by the British they would still have taken their present form, assuming they were an inevitable institution of government. Most of their characteristics depict them and the entire institution of local government as having their origin in the British imperialist expansion and colonization of Kenya. Many reasons however were given to justify the implementation of the institution of local government in Kenya.

1. Democracy and democratic training:

As with parliament, the idea here was to create a system of representation at the lowest levels or smallest units of the society - the village locality. [In such a system it is argued, people have a say in the running of their country in that they have the right ^{to} elect representatives to a local assembly, who remain there as long as they satisfy the majority who elected them.] This

democratic theory was introduced by the British as the best system of government, where majority rule and representative government are seen as central to democratic government because western democracy insists that power is legitimate power, where those who hold power are elected by, and are responsible to, the whole body of their constituents.

Local government in England, which has been introduced to many parts of the once colonised countries has been described as :-

"... just, enhances and safeguards citizens' rights and is an important setting for political education."¹

being that part of the state through which services are brought to the people in home communities, subject to local opinion. It is seen as having a place in the democratic theory because it is believed to be a proper arena in which legitimate power can be exercised and be held accountable.

The above views on local government and democracy are part of the British tradition. As to whether the same holds in the Kenyan situation begs many a question. An attempt to answer some of these questions will be seen in a later chapter.

2. Local Knowledge and Distance:

In western philosophy, the need for local government is based on geographical considerations, in terms of time and space.² This is part of an anglo-saxon philosophy that "no man shall be more than a day's journey from justice."³

Local government therefore emerged with the establishment of local courts and localised administration. This reason was the most stressed in introducing a system of local government in Kenya especially because of the problem of communication the Europeans encountered there on their arrival. They emphasized that localised government, would be the best especially where geographical and climatic conditions differed from region to region. People would know best what would suit their own local conditions and do this things themselves thus avoiding the delay that would follow if the central government was to be left responsible for all the problems of every region. This reason is somewhat connected to the idea of democratic training in that people would learn by direct involvement "what is possible, practical and expedient."⁴

3. Population Growth:

The need for local government has also been attributed to an increase in population. In Europe, the Industrial revolution and subsequent growth of towns brought the idea of local government when the 19th century utilitarians such as Jeremy Bentham started to examine government organisation in terms of :

- (i) The superior - directing and controlling
- (ii) The subordinate - raising taxes and providing services.

The British government, geared by its expansionist policy (after 1850 onwards) anticipated the creation of colonies abroad to form part of a greater British empire. With the

coming of settlers to Kenya the population increased but not at such a great rate as in the industrial revolution. The population question can only be related to the fact that the British looked forward to a time when Kenya would be an English dominion like Canada is today, dominated by British immigrants. It cannot be genuinely said that the colonisers took note of increasing African population apart from may be the increase caused by immigration of Arabs, Indians and the Europeans themselves, to justify the introduction of local government on this point.

4. Modern Developments :-

When the Europeans came to Kenya, they found that the people there had their own type of local government based on ethnical groupings. They only needed services to suit their daily and communal needs and activities such as subsistent cropping, communal cultivation and grazing, finding of suitable dwelling areas protected from wild animals and keeping away invaders. The European invasion brought with it money economy and currency to replace the barter type of commerce. They also introduced western innovations such as electricity, running water, dams, bridges, tar-mac roads and other things and institutions formerly inexistent in Kenya. Such institutions are schools and hospitals.

There was therefore a need to introduce a system of government which would suit these new innovations. A type of government which would effectively carry colonial government policy to the people in the name of civilization.

Another aspect attached to this is that central government only touched the settlers as they are the ones who had access to it in an atmosphere of language problems and poor roads. It was necessary to localise government so that even the rural Kenyans (Africans) came closer to the colonial government and its wishes. In this area, we should contend that it is the people who were being brought closer to the government not the government to the people because history has shown in many instances that the colonial government was not for the Kenyan people, and was not meant to bring services to the people but to extract service from them through forced labour, land alienation and dehumanisation.

Examined closely, some of the above given reasons are not convincing enough as a rationale behind the introduction of local government in Kenya seeing that most of them are as were given in England notwithstanding that the political, social and economic climate existing in Kenya at the time the institution was implemented is completely different from that of England in the 19th century. Moreover, the democratic theory assumes that people know what constitutes a modern government, and their rights therein.

II The Historical Development of Local Authorities.

The Traditional Period

As already indicated in part one of this chapter, there existed a form of local government in pre-colonial Kenya but only in a different form from the present. Administration was by traditional institutions which differed from tribe to tribe, but generally speaking,

there existed an administrative machinery composed of clan heads or council of elders who met, considered how best to solve the problems of their people and advised them on how to go about it. Every community had its own set principles on what qualifications one should have to join the "council of elders" or its equivalent. In most cases, it was a question of maturity a feature which is worldly accepted as an illustration of wisdom. People respected this wisdom and readily accepted the advise and guidance of their elders. Democracy was at its highest and most real bearing in mind that "local Government is best in small or natural areas where people have a local loyalty."⁵ The community was then, self supporting and the set-up was ideal for democracy.

The coming of the Europeans interrupted the system in a manner that was crowded by the imperialist paternalism that went along with the whole idea of European intervention. The European type of local Government was therefore introduced, basing this move on the justifications mentioned earlier and stressing that "it was impossible for the small village community to handle efficiently" these new 'developments.' Despising this "small village community" in this manner is a clear contradiction of the whole idea of Local Government.

Some colonial commentators, drunk with paternalism clearly mistook the nature of the pre-colonial institution. Talking about the statutory establishment of the African District Councils,⁶ the Deputy Commissioner for Local Government M.W. Evans once said that "Kenya lacked strongly developed organs of traditional Government prior

to the advent of British rule..."⁷ and also that "such tribal organisations as existed were for most part confined to informal gatherings of elders and the office of hereditary chief was with one or two exceptions unknown," hence the desire to establish a local government of the English fashion.

Although there were nowritten down procedures, rules or regulations of the affairs of the traditional heads, they had definite rules and regulations for all matters affecting the community and the role of every individual in the set up. Informal as the traditional administration may have appeared to a white man, the gatherings of the Council of elders were most formal and highly efficient for the times. However, as was with other African institutions, that of local government was also doomed to dwindle away with colonization.

2. 1900 to 1924: The Experimental Stage:

The history of local authorities in their present form goes as far back as 1901, though it has been suggested elsewhere that they started in 1925⁸. It should be noted however that the year 1925 only marked the beginning of a phase in the development of local authorities, a phase whose discussion follows here below. It was an experimental stage because it was not clear what form colonialism would take and what Kenya would eventually become.

In 1899 the British showed for the first time their keen interest in settling in Kenya by making Nairobi the headquarters of the Kenya-Uganda Railway and moving the provincial headquarters there from Machakos. Municipal

government then started with a committee of 5 appointed members in 1900. Before then, the British government often encouraged settlers to start some form of local government by setting up local authorities in their areas. But these, having neither the finance nor the ability could not organize their own local administration and expected the central government to provide protection (from African aggression), build the poor roads and provide cheap African Labour. The settlers also realised that they would gain more by co-operating with the central government so they did not want to separate themselves.

As for the Africans, there was no consultation whatsoever, and they were not encouraged, to organise themselves into local authorities it being contended that Africans were not 'mature' enough to govern themselves. They therefore continued to be governed through the P.Cs, D.Cs, D.Os Chiefs and sub-chiefs, all who were agents of the central government.

In their earlier days local authorities were only favoured in urban areas where only non-Africans were majority. Thus the 1903 Townships Ordinance which elevated Nairobi, Mombasa, Eldoret, Nakuru, Naivasha, Kiambu and Machakos to township status, all of which apart from Nairobi and Mombasa were directly managed by the District Commissioner often advised by unofficial committees of local citizens. It is noteworthy that many legislations have been passed to give legal authorities to local authority and to legalise the whole institution of local government by

giving it the force of law. The D.C. has all along since this period been a go-between ^{between} ~~between~~ these authorities and the central government.

The period 1901 to 1919 saw the emergence and growth of local government based on the concept of separate development - a dual policy of :-

- (a) Local authorities in settled (scheduled) areas
- (b) Local authorities in African (non-scheduled) areas.

At the same time ^{and} there emerged a developed system of towns which had a mixture of all the races that formed the social strata of Kenya (Africans, Asians and Arabs and Europeans). The most outstanding among these races were Africans, Asians and Europeans and it is upon these three lines that local government in Kenya developed until independence. The Arabs were swallowed up into the general class of indigenous people.

During this experimental stage, local authorities did nothing much, the question of how to govern Kenya as a whole being dominant. The English type of administration brought with it the need for people educated in that fashion. Some Europeans were therefore sent to the United Kingdom for attachment to local authorities there. This being an expensive process, it was desired that these should be trained in Kenya with the development of local government in non-African areas. The law that governed the standard of debates was that the minister made the rules himself. This was not fitting with the requirements of various authorities and the law needed amendment to allow councils to make their

own rules which would suit them best. *

It is difficult to say what local authorities achieved during these early years especially in the African areas where until 1924 administration was still by the central government. There was very little done in other areas too because settlers were reluctant to form strong local authorities and depended on the central government a lot. The multiracial urban areas were confused with 'class' conflict hence the problem of who would represent who on the local council arose. I say 'class' conflict because the economic position of each race differed. Local administration was therefore by the central government still.

However, one significant development during this period was that on 15th July, 1919, Nairobi became the first municipality with a multi-racial council.

The period 1900 to 1924 has been compared to the French prefecture of modern times because then, the D.C. under the P.C. held an authoritarian position.

3. 1924 to 1950.

(a) African Areas or Non-scheduled Areas

The year 1924 is significant as far as local government in African areas was concerned. The Native Administration Ordinance of that year converted the former District Advisory Councils into Local Native councils. These were given the power to raise money by way of rates and to make by-laws, to spend money on education, medical services, water supplies, roads and bridges which constitute the major functions of local authorities here. They were by nature consultative bodies to judge local feeling and to serve as organisations

through which the decisions of the central government could be explained. They were a true foundation of what local authorities are today - instruments of interpreting and implementing central government policy, and for fostering developmental projects.

The need for local people to participate in local affairs having been realised, chiefs were set up to act as agents for central government, while the D.C. remained the head of local administration.

We should note that local government among Africans started off in a very tense atmosphere amidst strong imperialist paternalism and racial arrogance in the years 1925 to 1945. It being thought by the colonialists that Africans were not ready to stand alone, a chief native commissioner was chosen to represent them in the colonial administration. At one time one of these native commissioners representing the opinion of the majority white community said about Africans that he hoped "...one day they to a limited extent will be able to stand alone, but that will not be for many years."⁹ The Arabs also held the same opinion.

Another factor connected to this stiff atmosphere is that Kenya had been declared a colony in 1921 by the Kenya Colony Order in-council of that year.

Being a new and strange imposition the English-type of local government had a very gradual development in the African areas. Some councillors were not conversant with the language of their constituents and were not very efficient. They represented the central government and the colonial

policy so in practice councils never derived authority from the people they were said to represent. This gradual development was expressed by a comment by the Marsabit D.C. in 1948 that :-

"The first and the last meeting of the Marsabit (Rendille) Local Native Council during the year was something of great shock to the D.C. It was not so much a question of debate as of no debate at all, the D.C.'s monologue being punctuated by the most prodigious yawns and grunts on the part of those councillors who were able to master their desire to sleep."¹⁰

This clearly shows that for the Africans, the new type of local administration was a boring process, most of the activities and procedures being new and strange.

Apart from the introduction of local councils, as a second tier of local government in 1950, which extended the Native councils, there had been no major changes in local government in the African areas during this period. Further developments came with the African District Council Ordinance which changed the local Native Councils (L.N.C.) to African District Councils (A.D.Cs) with an almost all African Membership, wider powers over local affairs and responsible for economic and social welfare needs of their African Constituents. They had power to decide on public health, regulation of markets, etc. The A.D.Cs were equivalent to English County Councils or Rural District Councils in that they were all poor in resources and emphasized on non-urban matters. In 1946 there were established what were called Locational Councils to act as agents of the A.D.Cs.

They were chaired by locational chiefs and members came from the location and included people who were members of the A.D.C's. The chief had power to execute any of the council's decisions on matters concerning markets, bridges, women's clubs, sports, and locational halls. The most important role of the locational councils was to advise the chief and to serve as a sounding board for local opinion, facilitating administration in the prevalence of poor communication, between the D.C. in the A.D.C. and the chiefs in locations.

Though the A.D.C. as a multipurpose authority was established at a level corresponding to an English county council, it was not expected that all the functions it was empowered to perform were best suited to an area of the size of a county, it being realised that these could have been better discharged at locational level. It was therefore hoped that the existing law would be amended to give locational councils statutory recognition. This does not seem to have been done. The A.D.C's were seen as important in bringing government to the African masses. ✕

Non-African or Scheduled Areas:

Local government here took the form of District committees and District councils. By 1919, a system of consultation had developed between the administrators (D.Cs, D.Os etc) and the settlers. In that year, the commissioner Sir Edward Northey set up District committees each consisting of 10 nominated members all Europeans from the settlements. These committees were advisory in nature and had no legal or executive powers. This differentiated them from the A.D.Cs where the D.C. was a member and held the executive powers of

the councils. Their deliberations consisted of:

- (1) alienation of land
- (2) development of roads and communications.
- (3) development of urban areas
- (4) Security and collection of taxes.

They expected the government to provide cheap labour (from Africans).

In 1926, a judge of the South African court of appeal called Feetchem was appointed head of a commission formed to make recommendations for the organisation of local government especially in the settled areas. He was a great believer in separate development and, following his commission's recommendations, local government District councils were established in 1928 replacing the 1919 committees. They were established by an Act of their name, in all settled areas each council having at least 15 elected members and one nominated member. Except in Kericho and Sotik, nowhere else were the interests of Asians considered. The district councils were given executive powers subject to central government control. They were later renamed county councils in 1952. It was then realised that they were too large to be administered as units, so smaller councils were established to take care of urban District areas and Rural District areas separately. This was the work of the 1928 District Councils Ordinance ^{prepare your work chronologically!} which was meant for rural Europeans and gave the councils a primary aim of building and maintaining secondary roads. This is the origin of the present day set up of local government in Kenya.

With the declaration of emergency in 1952, the

European councils were strengthened more and more for security measures and were made as independent from central government as possible.

Urban Areas:

Urban areas were not excluded in the developments which took place during this period. The Nairobi Municipal Council of 1919 had by 1925, 12 members of whom 5 were elected Europeans, 4 nominated Indians, 1 nominated Goan and 1 government official chosen by the other 11 councillors. This clearly shows that Africans were not considered. However this feature was quite consistent with the existing political climate where racial prejudice and discrimination were the order of the day despite the fact that councils were meant to be multiracial. All the offices of mayors were held by Europeans.

Since 1919, the problem of who should represent who was dominant. It was Asian agitation that led to their being allowed a nominated member to the Nairobi municipal council while Africans were left to be represented by a European.

In 1926 Nairobi was divided into 3 sections one for each of the 3 races. A municipal council of 20 was recommended and incorporated in the Local Government Municipalities Ordinance of 1928.

In 1934 Asians were allowed to elect their representative but this did not come into effect until 1942. In 1946 (2 years after the nomination of an African into the legco) an African advisory council was established in Nairobi and was allowed to appoint 2 Africans into the Municipal council. Owing to the fact that this advisory council was

composed of Europeans, only puppets of the colonial government were appointed.

In Mombasa, the Feetchem commission of 1926 recommended a municipal council of 23 members where Europeans were to be elected and Asians to be nominated but made no provision for the Africans. The council established on the basis of these recommendations consisted of 7 unofficial Europeans, 4 government officials, 7 Indians, 1 Arab and 1 representative of the Mombasa Port.

There were no remarkable developments in other smaller urban areas but this was the general pattern of representation similar to all councils in the urban areas. The situation remained the same until independence.

4. 1950 to 1963.

Local government continued to develop along the dual pattern of separate development (African and Non-African) until independence. The colonial set up had by 1955, three well established sets of local authorities, established by the Local Government Ordinance of 1952.

- (1) The Traditional local authority
 - These had chiefs and chiefs-in-council, chief and council or council of chiefs.
- (2) Appointed local authority.
 - An authority whose members were appointed by central government to perform certain functions in a defined local area.
- (3) Elected local authority
 - A fully/elected type of authority with councillors holding office for a limited period of time laid down by statute.

The general aim after 1950 was to develop the third type of authority though one finds that this took a long time to develop in African areas, owing to the fact the colonial government policy did not encourage it. The central government started increasing its control over African local Authorities while relaxing control over the Non-African ones after 1952, following the outbreak of the Mau Mau revolution and subsequent declaration of Emergency. Even as late as 1955 there was neither a unified system of election to A.D.C's nor was the government in a hurry to introduce it. Some authorities had elections in the form of candidates standing in open baraza and their supporters standing behind them to be counted. Others had secret ballot elections where colours and symbols were used to overcome the problem of illiteracy. In certain areas especially Kikuyu-land, it was found necessary to substitute direct elections for indirect ones even before emergency as open elections were being abused by political insurgents conversely, county and District councils which existed in European areas had more independence as they could elect their own chairmen, in addition to having almost all their members elected. Theirs had been a system of direct elections since their establishment.

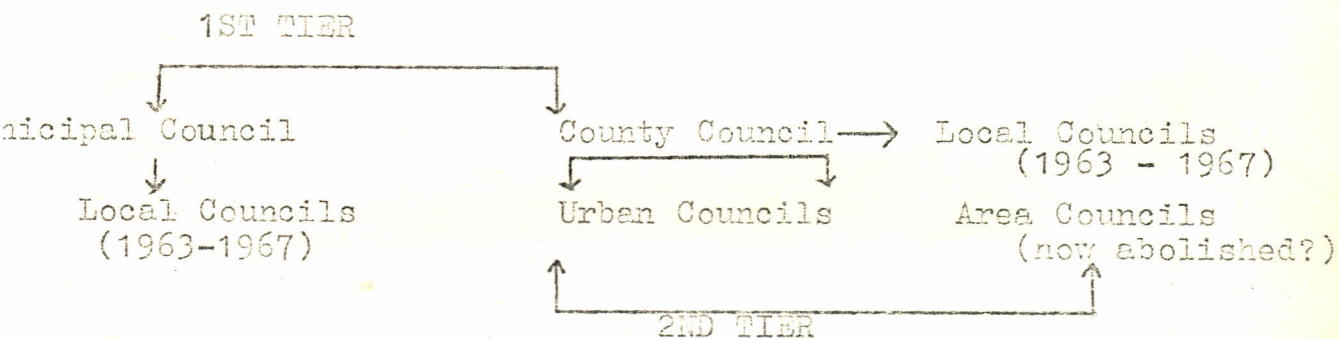
5. 1963 to 1969.

At independence, there were four developed systems of local authorities in Kenya :-

- (i) The Municipality of Nairobi
- (ii) County councils in the 'settled' areas (Urban & Rural District Councils)

- (iii) African District Councils in the African 'Reserves' covering most of the country.
- (v) Townships (6 of them, established by the Townships ordinance of 1963)

In 1963, the Local Government Regulations were passed to abolish the local government structure established by the 1952 Local Government Ordinance. From then on the composition, structure and functions of local authorities were governed by the 1963 Regulations. A two tier system was established in local government which, with some slight modifications represents the local government structure as it exists today.



After independence, a period of trial and error was entered there being no definite answer as to what local authorities to establish where. There was also the Majimbo constitution which established regional assemblies and consequently every local authority (except Nairobi as the proposed capital) was to be under a regional assembly, removing them from the central government's grip. A standing committee directly answerable to the ministry of local government¹¹ was set up to cater for Nairobi. The Majimbo set up however did not last for long. In 1964, the Republican constitution abolished all the regional assemblies and since then local authorities

have been directly under the ministry, their sole controller, (other than the president). The new system made every local authority "a body corporate, a public corporation with an individual legal personality. They were then given legal status and powers to do certain things such as enter contracts, borrow loans, sue (and be sued). Though their dealings were legally protected, stringent limits were put as to what they could do.

Among the changes that took place were changes in :

- (i) Education - Primary Education which was a matter of District Education Boards was made a responsibility of local authorities.
- (ii) Taxes - Poll taxes introduced by the colonialists were replaced by the graduated personal tax (G.P.T.) It was hoped that paying G.P.T. to local authorities instead of the central government would assist them much in financing their services especially primary education. But the future showed that G.P.T. by itself was inadequate so that in 1968 teachers were placed under a new body - Kenya National Union of Teachers as authorities could not pay them.

In 1965 the government established a commission known as the Bardacre commission to recommend on the nature, composition and functions of the local authorities. No revolutionary ideas were engineered as the commission was content with the existing structure established in 1963. However, it recommended that the central government should strengthen its control and in particular should have power to abolish any local authority that was being mismanaged

and also with express direction from parliament to allow an authority to continue for another term even after the normal term of 2 years. Significant changes appeared after 1966.

- (i) In 1967, all local councils were abolished by sessional paper No.12 of that year, leaving the system with only municipal councils and county councils.
- (ii) The office of Eldermen ceased to be part of local government. Before this, Local Authorities had been classified into first, class (of municipalities), second class (of county councils) and third class (of local councils). Eldermen were elected only in municipal councils and held office for six years.
- (iii) African courts were transferred from local to central government as magistrate courts, in 1968.
- (iv) In January 1968, there was a total abolition of government grants.
- (v) The office of mayors was extended from one to two years and that of councillors from three to four years.
- (vi) The amount of agricultural cesses that any local authority could demand from any individual was greatly reduced. Despite the fact that it had earlier on produced a substantial part of local government finances, the government does not regard it as a suitable form of revenue any more.
- (vii) Area councils have also dwindled off the scene leaving only Urban councils under county councils.

6. 1969 to Present Day:

The 'adult stage' of local authorities came at the end

of 1969 when the present pattern came into being. In that year the parliament passed the Transfer of Functions Act which transferred mandatory functions of primary education, public health and roads from county councils to central government. Placing education under local authorities meant that they would spend 50% of their revenue on it at the expense of other services. Writing in an official journal of the Association of Local Government Authorities of Kenya in 1969¹² the then secretary of this association J.P. Mbugua said that at the time, only a few local authorities could afford to pay their teachers up to the end of the year. G.P.T. was also transferred to central government. These two however, did not affect municipalities. By the same act the audit and accounts of all local authorities were transferred to the office of the Controller ^{and} Auditor-general. The transfer of functions was found necessary due to the inefficiency, laziness, illiteracy, incompetence and general parochial outlook of councillors.

The act also established the present day dual pattern of local government in general.

- (a) The President's office - harbouring the Provincial Commissioners, District Commissioners, District Officers etc.
- (b) The Ministry of Local Government - harbouring Municipal and County Councils and Urban Councils.

District Commissioners still retain their portfolios as central government representatives to local authorities.

They sit in council meetings, explain government policy and have power to veto/^{any}decisions of the council and to stop the council from undertaking any activity which they believe is ultra vires the councils' powers.

No major changes have taken place in the past decade, other than perhaps the creation of new authorities, raising of the status of certain authorities, and division of others. There has also been increased control by the central government over local authorities in the running of their day to day affairs. This is discussed in a later chapter.

FOOTNOTES TO CHAPTER ONE

- 1 Hill, Democratic theory and Local Government, Allen & Unwin, London, 1974 p.5
- 2 Maundu, The Evolution and Role of Local Government in Nation Building in Kenya. M.A. Thesis, Univ. of Syprus 1965 p.171
- 3 ibid
- 4 Hill, op.cit p.6
- 5 Wraith, Local Government W.A Series 1953 Pp 42 - 43
- 6 The African District Councils (A.D.C's) were established in 1950 by an ordinance of their name.
- 7 Vol. 7 1955 Journal of African Administration p.123.
- 8 Local Government in Kenya: a 1969 journal of A.L.G.A.K. p.14
- 9 Mulusa, The Image of Local Councillors M.A. Thesis, Nairobi University, 1972 p.152.
- 10 Hannigan, What is Local Government?
EALB Nairobi, 1958 p.30
- 11 The Ministry of Local Government started in 1928 with the establishment of the office of a commissioner for Local Government following a commission of inquiry.
- 12 Local Government in Kenya op.cit

CHAPTER TWO

THE FUNCTIONS OF LOCAL AUTHORITIES AS PER
LOCAL GOVERNMENT ACT AND IN PRACTICE.

The purpose of this chapter is to examine how autonomous local authorities are in the performance of their functions. It deals with those functions of local authorities which are of public concern. Internal administrative functions such as procedure at meetings and appointments are therefore excluded. It is an indisputable fact that it is in their functional arena that the role of local authorities is best depicted. [This role, as indicated in the introductory chapter involves :-

- (a) Local representation of the people in what is referred to as grass-root politics so that they can participate in national development.
- (b) Acting as agents for the central government by implementing its policies.
- (c) Provisions of services.

For the purpose of this chapter, the third object takes prominence.]

The term function has been defined in the interpretation section of Cap. 265 as including powers and duties, leading to the distinction of permissive and mandatory functions. The former refers to what local authorities may do, having the power; while the latter refers to what they must do, as a duty. This chapter seeks to show what is generally the area of local government operations as far as services to the public are concerned without paraphrasing the Act.

Local Government functions have been described elsewhere¹ as those functions which are controlled at the level of ^{the} local unit be it town, county division, municipality, urban or county. To decide what would be best so controlled the legislature should be guided by the criterion of utility and ask itself what task can be most conveniently and usefully entrusted to the care of local authorities and which services are required in urban and rural areas. It should be noted that local authorities can not do whatever they want to do because they are statutorily limited. They perform functions which are already set for them, at the mercy of the doctrine of "Ultra vires" and at the danger of penalty. Their autonomy here is therefore minimized since it is limited to that aspect of control stated in the above definition.

Owing to their diversity and numerous nature, this chapter highlights those functions which are most important and popular among the majority of local authorities. The L.G.A. deals with most of these. However, a word is said about the less popular ones later in the chapter. The impact of the Transfer of functions Act, 1970 is also examined.

The Act shows that local government functions depends on what kind of authority one has in mind, so that there are:-

1. Certain functions which all local authorities can perform (S 143 - S 150)
2. Functions which only municipalities, counties and Townships can perform (S 151 - S 159)
3. Functions relating to Municipalities, Townships and county divisions (S.160 - S.181)

But all are under L.G.A.

It is not clear what criterion was used for these classifications because, taking S.180 for instance, which

falls under the third class, one sees that under the section:-

"Every local authority....shall have power to compel the provision of a proper water supply for every dwelling house, school, storeroom, factory or workshop if the local authority considers (it) necessary, practicable and reasonable."

Examining the L.G.A. one can note four categories of functions.

- (a) Permissive functions - where a local authority can engage in certain functions "at will"
- (b) Mandatory functions - those which all local authorities or any of them must do, e.g. The duty to bury destitutes under Section S.167.
- (c) Restricted Permissive - functions which a local authority can perform but only with the minister's consent; e.g.
 - (i) S.152 - "a municipal council may with the consent of the minister establish and maintain schools and educational institutions....."
 - (ii) S.145 - any local authority may establish, maintain let, manage public markets but the consent of the minister is required to establish such a market within 3 miles of the boundary of a county or urban council area.
- (d) Hybrid functions - those which are a blend of both permissive and mandatory functions. The local authority here has discretion to perform them but must perform them if the minister requires them to do so. These include miscellaneous functions in respect of which the minister may make orders for execution if he considers them necessary.

This paper discusses these functions under three headings.

PROTECTIVE SERVICES

Whereas national security is the responsibility of the central government, internal security within the immediate locality is the responsibility of local authorities.

This explains why local authorities in England and various western countries have a police force. In Southern Nigeria, local authorities have a duty to carry out the functions set out by the law and also to maintain order and good government within their areas. This is statutorily provided for by the federal constitution. As well as being an implied duty for all Kenyan citizens, the above is catered for by S.201 of the L.G.A. which in similar words as those of the Nigerian provision states that local authorities can :-

"make laws from time to time relating to such matters as are necessary and desirable for the maintenance of health and well-being of inhabitants of its area... and for the good rule and government of such area ... for preventing or prohibiting anything it is allowed by this act to prohibit....."

Other provisions of the Act indicate that local authorities are expected to curb any natural or artificial dangers to life and health.

1. S.145(k) authorizes local authorities to take measures to control epidemics, such as locusts and other noxious insects, while S.145(j) authorizes them to establish and maintain magazines for the storage of explosives and dangerous articles subject to any law relating to such storage.

2. S.154 of the Act provides for the prevention and control of bush fires, the growth of famine relief crops and the establishment and maintenance of rehabilitation centres for beggars. Presently, the latter calls for urgent attention as indicated by the ever-increasing number of beggars in many urban centres.

3. Under S.162 which gives some powers of control, it is the function of local authorities to control any activities which would be injurious to health or life of the inhabitants or the name of the area. Such activities include offensive trades and noxious industries which are inter alia tied up with the cancellation of licenses under S.162(2)(c) which empowers an Authority to cancel a licence for such trade if the premises used have ceased to be suitable for the purposes or if the preventative measures taken by the licence holder are ineffective or inefficient.

4. Local Authorities are generally vested with the duty of ensuring that buildings are safe for the purposes for which they are used. They can therefore require the repair, alteration or abolition of any such building (dangerous premises) to remove the danger.²

5. Other protective functions include the provision of street lighting, repairing roads and streets, building bridges and maintaining fire fighting equipment.

SOCIAL SERVICES

These constitute the widest area of operation as far as the functions of local authorities are concerned. It is important to note that in most of these functions the local Authorities apply the committee system, whereby a committee deals with a certain service provision with the approval of the council.

1. Education:

The L.G.A. deals with the functions of local authorities as from 1970, i.e. the period after the Transfer of Functions Act.

Education has undergone many changes throughout the history of local government after independence. Local Authorities can only undertake services below the level of secondary education and the area of operation also varies with the type of Local Authority.

Education has been the most expensive of all Local Government services especially before the T.F.A. Before then, there was a convergence of interests between the government policy makers and the clients (parents) as far as primary education was concerned. The financial relationship between the central and local agencies was most significant, where parents still played a part in financing institutions. This made education to stand at a more politically critical position than other services.

After the T.F.A., county councils ceased to run primary education this being taken over by the Ministry of Education. Municipal councils were not affected, so they still run this service. Other councils can only establish and maintain nursery schools, Adult literacy centres, agricultural institutes etc, though they may make grants in furtherance of education generally.

The following are the major impacts of the T.F.A. on education.

- (1) Reduction of councillors' role in education especially in the field of disciplining teachers. Before the Act the latter were employed by the county councils thereby being at the mercy of councillors.
- (ii) The provincial administration now plays a more direct role in educational services through the D.E.Bs usually chaired by the D.C.
- (iii) The terms of employment and salaries of teachers became the responsibility of KNUT and T.S.C. The former situation where teachers went long without their salaries was therefore eradicated.
- (iv) As far as expenses are concerned, the crises has disappeared at least from the public eye, since education is no longer a locally administered affair. However, there has been a sharper increase in public expenditure on education at the national level. This is more so due to the policy of free primary education which has on many occasions proved unpracticable.
(The Ndegwa Commission Report of 1970 noted that in attempting to attain the goal of universal free primary education as outlined in the KANU manifesto at independence, the financial burden fell on local authorities so that in 1969 the cost of primary education was \$10 million out of a total expenditure of \$15 million).

The pattern of providing educational service did not change even after the T.F.A. because individual schools are not separated from the parent and self-help contributions

through "funds drives" which still involve the local people. For this reason it has been observed elsewhere that the transfer of primary education from county councils only did away with the control element (by councils) without changing the basic organization.³

Other functions connected with education are Library services, Public media services, Museums and community Development centres. The Act provides for these but in reality, Local authorities only embarked on the establishment of community Development centres. In March 1981 the President called upon Local Authorities to establish museums within their areas.

UNIVERSITY OF NAIR obi
LIBRARY

2. Health

A major part of this has also been transferred to the central government though it has always enjoyed less autonomy than other local services.

Before the T.F.A. health services ranked hierarchically from the national hospitals such as Kenyatta National Hospital to the local dispensaries.

Professionals concentrated their services at higher level Health institutions so that people at the local level got second rate practitioners. Two reasons for this are; that professionals hated interference from councillors and the fact that most local authorities could not afford to pay them. This led to the local area services being referred to as buffer zones or

"an area of service whose medical effectiveness might be doubtful but which was a response to public demand"⁴

This statement is supported by the fact that when in 1969 the government abolished outpatient fees, there was an increased demand for services while depriving the councils of a very important source of revenue.⁵

The L.G.A. does not specify what council can undertake the establishment and maintenance of health centres but S.131 provides for the appointment of a medical officer of health by a municipality, whose powers are exercised subject to the provisions of the Public Health Act. Only a few municipalities have appointed such an officer. Once again it is the county councils which were deprived of this social service, leaving the rural populace at the mercy of central government health institutions which are few in number and usually understaffed. The governmental services, however efficient are not open to criticism from the public as was the case during the time of the Health Committee of the county councils. This committee played a major role especially as a critical arena in the distribution of medical resources. Of all local authorities, only the City Council of Nairobi runs a hospital in conjunction with the Ministry of Health. This is Punwani Maternity Hospital.

The ministry of Health has taken an overall control over health matters. What local authorities can do is aid health centres with money. The sum total of this is that only municipalities can establish and maintain health centres. County Councils, Urban and Area Councils cannot do so, and the only area in health where Local Authorities play an active role is in ^{rehabilitation} ~~veterinary~~ services.

3. WATER SUPPLY ✓

This function is specifically provided for by the L.G.A. in S. 178 to S. 180, which allow a municipal urban or area council to undertake water supply, establish, acquire and maintain works for the supply of water within or without its area. (For the latter, the consent of the "invaded" local authority should be obtained under S.127). Local Authorities are empowered to do anything necessary for the performance of this function provided that where they canalise, divert, straighten or define the course of any stream etc. they must give notice and adequate compensation to any occupier, owner or any person entitled to rights or easements attached thereto. S.180 incorporates the power given by the water Act to local authorities other than county councils, to compel the provision of a proper and sufficient water supply for every dwelling house, school, store, shop, factory or workshop if it considers it necessary, practicable and reasonable.

It is not clear why this power has not been extended to county councils or what would follow if a county council undertook to exercise it especially now when water poses a grave problem for rural folk especially in agriculture and no one can speculate on when government efforts to provide ready water for all will be realised.

4. GENERAL SANITATION

In practice, it is the duty of local authorities to ensure that their areas of jurisdiction are clean and fit for human habitation. For this they have health inspectors

who work in conjunction with those of the ministry of health.

The L.G.A. by S.168 - 176 provides for drainage and sewerage services of municipal, urban, Town and area councils which are by virtue of S.169 - S.173 given power to perform all acts ancillary to this general function, including constructing, enlarging, altering, sewers, drain pipes, ventilation shafts, to maintain sewerage farms or disposal works etc. and to protect them.

Local authorities also carry out cleansing works, refuse removal, regulation of slaughtering and sale of meat, extermination of vermin and establishment of cemeteries and crematoria.

5. HOUSING

This service is in greater and increasing demand in urban centres. It is also an important source of local government revenue. It is provided for by section 177 of the Act, whereby a municipal council, Town council, urban or area council* are authorised to :-

- (i) lay out plots or subdivide any of their acquired or appropriated land within or without their area for housing schemes for the inhabitants of those areas,

*Area councils no longer exist and their functions are now performed by the county councils.

- (ii) erect, maintain, let, sell dwelling houses or convert buildings into such.
- (iii) sell, let or dispose of plots for the purchaser or tenant to erect and maintain a dwelling house for his occupation, provided that the above acts are not done in contravention of any contract binding on the local authority.
- (iv) advance money to any person to enable him to work on the dwelling house or to acquire one.

The council has to ensure that dwelling houses are proper and safe.

Other miscellaneous social services include the establishment and maintenance of recreational halls, parks, places of entertainment such as theatres and cinema halls. They also engage in the establishment of children welfare homes and the organization of women's clubs.

ECONOMIC DEVELOPMENT

This is an area where local authorities make a substantial contribution towards national development.

In Kenya, local authorities need to spend more money on economic development of their areas, for the benefit of both their constituents and the nation in general.

Commenting on local government in West Africa, Ronald Wraith said that :

"It may be said that in England local authorities administer expensive social services which the community can afford to pay for, and does in effect pay for. There is a danger that in West Africa, they may be charged with spending money which does not exist and providing luxuries for people who cannot afford necessities." 6

This danger equally exists for Kenyan local authorities the majority of the population being poor. The income got by the majority in Kenya is only enough for necessaries owing to the low prices offered for the produce of the small scale farmers and the low wages earned by the worker in the urban centres.

Highlighting this danger, the late Tom Mboya in a speech at a local Government seminar cautioned that :-

"If we devote too high a proportion of our resources to social services as distinct from productive or employment - creating activities, not only would the gap between educational and employment opportunities widen but our ability to implement a full welfare programme would also be adversely affected, since a high emphasis on social services would reduce the rate of economic development."

It is evident that most Local Authorities outside the metropolitan are to a large extent aware of this danger themselves largely on matters of economic importance. Such matters include the establishment and maintenance of markets*, roads, issuing of occupational licenses, trade licenses and the establishment and maintenance of community development centres where people are advised on how to increase their economic resources and production. Such advise is in matters concerning improvement of agricultural produce and livestock, outbreak of diseases among animals. Local authorities also play a part in the maintenance of forests and sale of produce, preservation of vegetation and most importantly, the prevention of soil erosion.

*Every well established local authority has established one or more more markets for its inhabitants.

A major part played by local authorities regarding economic development is in the field of communication. That this is the only base on which rural areas can develop is an undisputed fact. The L.G.A. gives local authorities the power to provide for both land and water communication and transport services. The latter is covered by S.186 which authorises local authorities to engage in ferry-boat operations and the establishment and maintenance of toll-bridges. This of course covers only the authorities along the coast and Kisumu (Lake Region). In respect of roads*, Local Authorities can construct and maintain roads, other than those which have been declared to be national or international Trunk Roads. They perform these functions in consultation with the ministry of Transport and Communications.

The T.F.A. left many questions unanswered as regards road service provision. Its impacts therefore need brief examination. Before this Act, there were two patterns of service provision :

- (i) The Central Government.
- (ii) The Local Authorities.

The former was a small and highly centralised area of service provision and was concerned with the development of national road networks which included high standard networks and feeder road systems in some areas of ...

* Though these appear to be a social service, the author prefers to discuss them here since travel for the sake of it is not a common feature in Kenya.

particular agricultural potential. The latter were often neglected after their construction and no maintenance and repair works were done on them.

Local Authorities were vested with the duty to construct and maintain roads generally within their jurisdictional areas.

There was very little interaction between the central and the local road agencies. The central had superior financial resources having notable access to development finance in way of foreign aid. This factor enabled the central government to upgrade almost the whole of its road network.

The task of the councils was greater due to :-

- (a) The extensive network of minor roads;
- (b) An infinite number of unclassified roads requiring attention.
- (c) Roads of a poorer grade so a perpetual need for repairs and improvement.
- (d) Shortage of road maintenance, - mainly as a result of the fact that the professionals at the centre wanted to retain their autonomy and sought to limit their resources and role rather than extend it to the whole road system.

*Monday 3
Tuesday - 5*

At the same time, some county councils still wanted to retain their control over roads despite the many problems they faced. Financial problems augmented all the time especially because expenses rose while government grants were static. For example, by the time roads were transferred by the T.F.A., government grants covered only 50% of the total costs.⁸

Today, Local Authorities have a smaller portion of

road network to establish and maintain, since a certain portion (Classified Roads) was transferred to the Central Government. This meant leaving out some smaller roads which inspite of their sizes, feed the bigger roads and are of more importance to the public especially in the agricultural rural regions. This loophole has led to public outcry in recent years so that at one time, the parliament engaged in serious debate over the issue, but never came up with a bright solution.⁹

These roads are the only ones through which rural resources can get to the larger roads and eventually to the market and have been rightly referred to as the

"bird which lays the golden egg."¹⁰

Though the government has started embarking on smaller roads, the process is rather slow so that many roads in the rural areas still remain under ill-financed county councils. Other areas are left to the mercy of corrupt councillors who would rather provide poor-grade roads and squander the money. *point*

OTHER PUBLIC WORKS AND SERVICES

These include such services as the construction and maintenance of dams, *Ponds*, electricity supply and all works, generally done in the performance of all the functions of local authorities.

The above are therefore the functions performed by local authorities. In so doing, these authorities act as agents of both the public and the central government in the day to day development programmes. It is for this

reason that local government is included in the Development Plan. It is clear that Local Authorities have no say in deciding what functions to perform and what not to engage in. The Transfer of Functions Act worsened the situation further by removing some major part of Local Government functions, leaving Local Authorities with very little to do. This goes to show that Local Authorities are very much subjected to the legislature, and therefore not at all autonomous in performing their functions.

FOOTNOTES TO CHAPTER TWO

- 1 Harris, Local Government in Many Lands: A manual of Law and Procedure under the Eastern Region Local Government Law. Cambridge University Press, Cambridge, 1957. p.25
- 2 Hussein v. Municipal Council of Mombasa /1969/ EA 214
- 3 Colebatch, Local Government and Government Process PH.D Thesis Sussex 1974 p.344
- 4 Colebatch, p.348
- 5 "The Report of the Ndegwa Commission of Inquiry" 1970
- 6 Wraith, op cit, p.57
- 7 "A Report on a Seminar on Local Government" mimeo 1970
- 8 "Official Report of the National Assembly Debates" 1973
- 10 Kinyanjui (M.P) ibid

CHAPTER THREE

THE CONTROL OF LOCAL AUTHORITIES BY
THE CENTRAL GOVERNMENT

This chapter seeks to portray how the affairs of Local Authorities are continually and consistently affected by Central Government control (or interference) so that any autonomy they might claim to have is minimized. This control emanates from the Legislature, the Executive and the Judiciary also, in the sense that Local Authorities are statutory bodies falling under a Ministry. It is open to the judiciary to determine any legal issues arising from the affairs of Local Authorities except where such jurisdiction is precluded by statute e.g. The Local Government Act, Cap 265 does not provide for right of appeal to the courts where the Minister had decided to withhold a grant. ¹ The Office of the President has also got a part to play in this control. Discussed in this chapter are inter alia, control over finance, functions, appointment and dismissal, confirmation of by-laws and dissolution. ^{formal}

Whereas the question is raised whether the Central Government should exercise any control over Local Authorities at all, it is of interest to note that governments in modern states have a tendency to increase this control. The trend has been justified as having been necessitated by the demand for equality of Social and Economic opportunity and the demand for higher level of provisions which can only be

financed from a national tax base.² But however much a government of any state wishes to promote uniform standards it is essential to remember that the local representative who sits in a locally "housed" council is in a better position to know what the needs of the inhabitants of that locality are, than a centrally placed legislature, which is mostly concerned with nationwide needs as opposed to purely local ones.

The legal basis of this relationship between the central government and the local authorities is seen to be in the 19th century principles of agency and partnership. The central government is seen as the principal and more likely to face the blame even when it is a local authority which is in the wrong. As a permanent secretary in the office of the President, Kariithi ^{Geetha} pointed out that when in 1967, the leader of the opposition acting as the Chairman of the Public Accounts Committee raised a matter concerning the loss of public funds, no local authority was singled out and the central government got the blame.³ The second principle ^{Agency - partner} implies that the central government and local authority work together as partners through consultation. Worldwide but similar arguments on this add up to a general view that:

"Governments manage the Economy and in so doing must control investments, promote growth and curb inflation and plan the orderly development of services."⁴

Local authorities are supposed to tow the line in national development and since the country's needs and resources vary from area to area, the aim of the central government

should be to help them in varying degrees to bring their services up to standard. Owing to the fact that Kenya pursues a capitalist type of development where money economy plays a major role, the major reason for central Government's control of local authorities is financial. The government will want every coin to be applied in the best way possible in a capitalist state, bearing in mind that local government affairs involves public funds, got by way of taxation. Questions which arise in this status of affairs are :-

1. What is the nature of Central Government control today?
2. To what extent must this control be exercised, (if at all)?
3. Bearing in mind that this control does in fact exist, how far can local authorities claim to be autonomous?

The first two questions can be answered simultaneously by examining the statutory powers of the minister for local government and other ministries, the powers of the President and those of other governmental bodies. The third question is somehow rhetoric and an answer can be found in examining the effects of these controls and their extent, analysing them by way of commentary whenever an illustration is possible. Commenting on general powers of control, Cross says that :-

"In one sense, local authorities are wholly subject to central control for parliament is omnipotent."⁵

This omnipotency is shown by the fact that parliament may allocate functions and take them away,⁶ change the structure of local authorities as it chooses, pursuant to S.5 of the Local Government Act Cap. 265, which gives the Minister

power to raise the Status of certain Local Authorities, subdivide others and other similar things discussed below. Between 1980 and March 1981, Kajjado, Kiambu and Kisii ~~Municipal~~ Councils have been raised to upper status, Kajjado being raised from an urban to a town council while the other two have rose from townships to municipalities with municipal councils. At the same time, area councils have disappeared mysteriously without any enactment to that effect. All what one knows is that there were no elections to area councils in the last civic elections in 1979.

[Any formal controls imposed on local authorities must be statutorily authorised. Non-statutory forms of control exist in form of consultation, practice codes, memoranda or circulars explaining and amplifying governmental policy] These are based on the principle of partnership where there is a common purpose to be attained through them. Here the government works its way into the practice of Local Authorities in the procedure called government by circular.

MINISTERIAL POWERS OF CONTROL

1. Financial Control

Having noted that the financial aspect forms the basic reason behind all other controls, the aim of the government can be said ^{to be} ~~to be~~ to keep the affairs of local authorities within manageable limits, that is, in relation to the amount of capital available. In recent years, there has been a continuous complaint that Local Authorities often engage in wasteful policies, so that when scrutinizing the Local Authorities budget for the two years ending on 31st December, 1979, the Minister for Local Government urged them to keep

to what he called "Controllable Expenditure."

In this paper, financial control is not discussed in isolation from matters relating to the financial position of Local Authorities. That is, how this money (revenue) is obtained and how it is spent.

(a) Control Over Budgets:

The Minister has to approve all annual, revised and supplementary estimates. S.212 of the L.G.A. requires all Local Authorities (through their financial committees) to prepare estimates of their income and expenditure for each forthcoming year, copies of which must be submitted to the Minister. This should be done within 14 days prior to the commencement of the financial year. However, it is evident that most local authorities do not submit their estimates on time for approval. The Provincial Commissioner of the province in which the local authority is situated is made part of this deal in that he too must be provided with similar copies of the budget and he may in turn make recommendations to the Minister in their respect. Although it is mandatory that Local Authorities submit these estimates to the Minister, he can under S.212(3) exempt any particular local authority from this requirement. Similar approval is required whenever a municipal, county or town council wishes to establish a capital fund for the purpose of defraying capital expenditure and reducing outstanding debts,⁷ and also whenever a local authority intends to establish a consolidated loans fund for the centralisation of all or part of its loan transactions.⁸ The Minister may issue directions for the creation and renewal of capital funds and as to the level of the general reserve funds. The establishment of the above by any Local Authority

requires approval.

The sum total of this requirement is shown in S.92 of the L.G.A. which states that :-

"no payment shall be made out of a Local Authority's fund unless it has been provided for in the approved annual, revised or supplementary estimates of expenditure and authorised by that Local Authority....."

There may be difficulties in trying to keep within this restriction especially where a Local Authority is determined to do a certain thing which may not be possible within the limited financial position. Sometimes the treasurer of such an authority may face threats of dismissal from the councillors if he tries to stop them from undertaking any such plans. The Minister then has to come in as an arbitrator.

(b) Control of Borrowing:

Local Authorities can only raise loans "in such amounts as the minister may approve."⁹

The purpose for which the money is borrowed and used ought to be intra vires the powers of the Local Authority. The Minister has to be satisfied that it is technically sound, not extravagant in conception and that the resources of the authority are sufficient to meet the new commitment. It is for these reasons that the control of schemes (discussed below) is exercised. For purposes mentioned in S.225(1), Local Authorities may do temporary borrowing in way of temporary loans, overdrafts from the government or from any registered bank or any other source, with the consent of the Minister.

They may not borrow money to meet recurrent expenditure,

as this is seen as likely to encourage the use of loans to postpone a possible financial collapse which would still come eventually and as a greater catastrophe. There is control over any loans granted or guaranteed by local authorities.

The Minister for finance controls stock and bond issues by local government under S.223, he has power to make rules relating to their issue and to specify the period within which the money is to be paid if this period is less than the statutory maximum of 50 years. He may also make rules relating to the determination of the rates at which any annual contributions to a sinking fund of a local authority shall be made. This clearly shows that the minister dictates the terms in the absence of any negotiation with the Local authorities inspite of the fact that their relationship has been equated to one of partners-in-business. This control extends even where the purpose of borrowing is not directly under the control of the minister.

(c) Audit and Accounts:

S.228 of the L.G.A. requires all Local Authorities to keep proper books of accounts and true and regular records to be entered regarding all transactions. Subsection 4 empowers the minister to make rules for the keeping of accounts. He is also empowered to appoint Local Government inspectors ¹⁰ to conduct examinations and extra-ordinary inspections of these records. These inspectors have very wide (almost quasi-judicial) powers to disallow anything which is contrary to law such as ultra vires expenditure, to surcharge sums not accounted for (e.g. money received but not paid in) and to surcharge amounts of loss or deficiency. They are answerable to the minister who has power to issue directions to local

authorities on the basis of the report of the inspectors. Any appeals from any surcharges made lie to the Minister. He may also approve certain items of expenditure which would otherwise be subject to surcharge. Any extraordinary inspection must be reported to the Local Authority concerned and also to the office of the ^{Comptroller} Controller and Audit General whose control is discussed in more detail below. The problem which arises regarding the audit of accounts is that whereas Local Authorities are supposed to prepare abstracts of accounts by 30th of June every year, it is usual for many Local Authorities to do this months later. In 1967, the then Permanent Secretary in the Ministry of Local Government, Rantu commented that :-

"it is the exception rather than the rule for Local Authority accounts to be audited within 12 months of their closing."¹¹

This remains true to this day.

Only the Nairobi City Council can employ its own professional auditors though this does not exclude the Minister from sending ministerial inspectors there any time. The most recent case of this nature was in May 1980 when investigations were ordered to be carried out as to the loss of some KShs.2.2 million from the Health Department at City Hall.¹² This type of control extends to both financial management and general administration of Local Authorities. The fact that the inspectors simply do not examine books and records and stop there. They may summon witnesses and as stated earlier, impose surcharges. Their reports may call in serious reaction from the Minister.

(d) Control Through The System Of Grants:

Local Authorities are supposed to receive yearly grants

from the government for capital projects.¹³ The Minister has power to reduce the amount of grants given to any local authority.¹⁴ They are not given as a matter of course but are meant for a particular purpose. The general rule is that they are payable if the Minister is broadly satisfied with the services that a grant is claimed. In most cases therefore all grant-earning expenditure must be approved by the Minister. The Minister may also withhold a grant. This control gives the Ministry a chance to influence the service to which any grant relates. The harm here is that the minister substitutes his own discretion for that discretion which the particular local authority may otherwise enjoy in determining the service and how it is to be carried out. The Minister reduces the amount as he thinks just, taking into account the standards maintained in other Local Authorities and his decision is only subject to parliamentary approval. Nonetheless, no appeal lies either in the courts or parliament where the Minister decides to withhold a grant. His decision is therefore final and a Local Authority is totally impotent on the matter.

(e) Other Financial Controls:-

The Minister controls revenue collection in that he has to approve the level of scales of fees, charges and rates levied by Local Authorities. The way local authorities spend their money is also controlled. The Minister has to be informed of the purposes for which any local authority intends to make grants of money. He also determines the rates for allowances of councillors. When the present system of Local Government started, Councillors used to be given sitting allowances

resulting in the fact that they would sit for as many times as possible in order to get the maximum of allowances possible. Unfortunately they did little so that they somehow got money for doing nothing. Seeing that this encouraged laziness allowances had to be clearly defined. Today, councillors receive monthly allowances.¹⁵

The salaries of Chief Officers are determined by the Minister. Local Authorities are spending as little as is reasonably possible and get the maximum possible in their transactions. The Act requires them to accept the lowest tender where they are paying out money and the highest where money is being paid to them.¹⁶ Any departure from this procedure requires the Minister's approval. An emergency procedure is provided in way of exception *would not apply to the LA* where the contract involves the purchase or sale of ^{wms} perishable goods, a public auction or the purchase of goods where the Minister has directed that the act shall not apply. In such cases however, the Chairman of the Finance Committee has to submit in the next full meeting, reasons for the divergence, and full details of the alternative procedure adopted. The Minister's power here is emphasized by the fact that he can actually direct that the L.G.A. does not apply in certain circumstances!

CONFIRMATION OF BY-LAWS

As already mentioned in Chapter Two above,¹⁷ the power of Local Authorities to make by-laws is conferred to them by S.201 of the L.G.A.¹⁸ S.201(2) allows them to make **By-laws** for the imposition of penalties by way of fine. No by-law should be inconsistent with the constitution. S.204 makes

it mandatory for all Local Authorities to submit all their proposed by-laws to the Minister for approval. The minutes of the meeting at which such by-laws was adopted, the clerk's certificate and copies of any objection or a statement to the effect that no objection was raised have to be equally submitted. The reason for this is mainly that by-laws may create penal offences.¹⁹ This draws Local Authorities' attention to the democratic idea that no man shall be punished without a justifiable cause.²⁰ Another reason for the ministerial control over by-laws is that Local Authorities do not usually have adequate or qualified staff to carry out the work of making by-laws effectively. They therefore have to look to the Minister for approval. The latter has discretion to reject or approve a proposed by-law under S.204(3) making sure that it fulfils the legal tests anumerated in the case of KRUSE V. JOHNSON.²¹ The court has jurisdiction to scrutinize the validity of all by-laws where such validity is in issue.²²

No by-laws will be validly effective without the approval of the Minister. In addition, the Minister may under S.210, make adoptive by-laws relating to matters for which a Local Authority may legislate under the Act, specifying the extent to which these may be adopted.

* CONTROL OVER FUNCTIONS ✕

For the same reasons given to justify the Minister's financial control, the Minister has extensive powers over Local Government functions.

Firstly, he has power to approve all standing orders made by Local Authorities and to make standing orders himself, to be followed by Local Authorities. He also specifies the

number of meetings to be held by various Local Authorities in each year, and to ensure that their meetings are held regularly and in a constitutional manner. It is in this supervisory role that he exercises his power to remove disability in voting even where members of councils have declared interests in contracts.²³ He can also cancel a meeting due to be held by a council of a Local Authority. Such an incident occurred at City Hall in May 1980 when the council wanted to vote out its Town Clerk. In a dramatic turn, the Minister cancelled the meeting which had already commenced and prayers were being said. The control over functions is done through the requirement of approval, regulation, inspection and directions in way of Ministerial orders. Often statutes conferring powers and duties ^{to} local authorities authorise a Minister to make regulations prescribing the manner in which the work is to be done or the standards to which the service shall conform and the conditions on which a grant if payable, shall be made. The statutes only lay down broad procedures and leaves the detailed working rules to the Minister who works with consultation of the parliament. The power to control schemes undertaken by local authorities comes in here. It is the duty of every local authority to prepare schemes and proposals of how their duties are to be carried out and submit these to the Minister for approval. The Minister consults other Ministers who may be involved in the scheme and more importantly, the advise of the Minister of Finance must be sought. The Minister then has power to alter any plan or approve it with modifications or reject it in total. All schemes must conform to the development plan and it appears that there is an assumption here that the

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Minister is more conversant with its requirements. In this connection, it is compulsory for every municipal, county, and town council to render to the Minister before 31st March every year, a report of its works, and of Local Government affairs in its area for the preceeding financial year.²⁴ Any later submissions must be accompanied by the Minister's consent. They must also render to him any records, minutes of council proceedings and those of its committees. The Minister may also require from time to time, a record of any account, reports and documents.²⁵ The Minister may, at any time, appoint a public officer or a body of officers to conduct researches, investigations and inquiries as he may consider necessary for any purpose of the L.G.A. or for assisting a Local Authority in the performance of its duties.²⁶ This way, the Minister is kept aware of what the Local Authority has been up to and what it proposes to do in the future. He may also direct that the costs of any investigations shall be paid by the Local Authority in such amounts as he might specify to be a civil debt recoverable summarily.²⁷ The dissolution of certain Local Authority Councils have resulted from such inquiries and extraordinary inspections.

8/27 The Minister has certain powers which he exercises whenever local authorities are in default. These are designed to prevent the breakdown of services through the failure of local authorities to perform their duties and their effect is to make certain duties compulsory. Most modern statutes of which our Local Government Act is, have the tendency to confer these default powers.

They take the following forms:

- (i) The Minister may direct the performance of

legal duties and in default he may perform the duties himself and recover expenses.²⁸

- (ii) He may require a Local Authority to submit proposals in the failure of which he can by order direct the manner in which a Local Authority's powers are to be exercised.²⁹
- (iii) He may transfer the functions of a smaller Local Authority to a bigger one or to himself if from a Municipal Council.³⁰
- (iv) He may reduce the grants of a Local Authority if it appears to him that its revenue is not being used in the interests of the inhabitants of the area as a whole.³¹
- (v) The Minister may sack all members of a council and replace them with a commission. This, as a last resort form of control is discussed below as it requires special attention.

The above powers are disciplinary and therefore of a penal character. Yet it is not clear whether the Minister inquires into the reasons behind the failure of a Local Authority to carry out a particular act, since it is possible that some authorities may have financial difficulties. An order of mandamus may even be sought by the Minister to enforce such acts.³² Given that the Minister has power to order the performance of a certain act which he may deem necessary, one wonders whether he takes into consideration the financial status of the Local Authority as situations may arise where such an act had not been budgeted for.

CONTROL OVER APPOINTMENT AND DISMISSAL

As a general rule,³³ every Local Authority has powers to appoint and dismiss³⁴ its officer and may stipulate what

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qualifications they may have. (Statutory qualifications are enumerated in sections 121 to 125 of the Act.) Only clerks and treasurers can be appointed from within the council but without remuneration.³⁵ S.119(2) states that they must be fit and proper persons. This freedom in appointment and dismissal is curtailed by the fact that the approval of the Minister has to be sought wherever the appointment is of a Chief Officer. The idea is to ensure that every council has some permanent officers to be responsible for the administration, finance and certain fundamentally important services. Thus the appointment of Medical Officers of Health (by Municipalities) Engineers, Clerks and Treasurers are subject to Ministerial approval. So is their dismissal.³⁶ The powers of the Minister are so extensive that they almost obliterate those of the Local Authority. A classic example is shown by the appointment of a Town Clerk by the Kisumu Municipal Council in 1969. Of the two and only candidates, one was a lawyer, and was nominated by a majority in the council. On forwarding the name for approval, the council was advised by the Ministry to forward two more names. In the final vote, the lawyer was nominated by 12 Councillors while the other two got 9 and 6 votes each. To everyone's surprise the one with the least votes was appointed by the Minister. Fracas followed in Kisumu whereby the Kisumu branch of the Local Government workers Union threatened to strike and 14 councillors called for the removal of the Minister (then Sagini) to another Ministry. This did not change things and the Minister had a final laugh at the councillors stating that

"It is not professional qualifications alone that matter but also personal qualities, character and experience"³⁷

in the appointment of council officers. The above statement taken seriously would appear to imply that the Minister's opinion is above any statutory limits as to appointments, or that the Local Government Regulations never had anything to do with it! The Minister's discretion here overruled that of the council and were it used as a precedent, then a general rule could be laid down that a Minister has absolute power to put into office a less popular candidate as a Chief Officer! The Kisumu Councillors in this case had nothing to do but get used to their new Town Clerk. It is rather ironic that the same officer of "good repute" had to leave in dishonour later in 1975 having been removed by a Commission for many charges of misconduct inspite of the fact that in an earlier occasion he had narrowly missed dismissal when the Minister (Paul Ngei then) reinstated him on what he called humanitarian grounds.³⁸

Another possible problem is that the Minister may extend his power beyond legal limits and cover cases which strictly speaking should not be controlled. This occurred in Thika in 1967 when the Municipal Council wanted to employ an assistant Town Clerk at a salary scale of £ 1,310 to £ 1,385 p.a. The Minister disapproved of this appointment advising that the council should employ an Administrative Assistant at a scale of £ 700 to £ 984 p.a. which the council considered unacceptable within its approved salary scale. The council later proceeded to advertise the post of an Administrative Assistant at a scale of £ 880 to £ 1,330 p.a. The successful candidate was the Council's G.P.T. Assessor who was already on a scale of £850 to £1,150. Overlooking this factor the Minister insisted that

The scale had to be as he had directed earlier. This frustrated the council and had to abandon the appointment. Here the Minister did in fact exceed his power, since the council was no longer appointing a deputy Town Clerk or any senior officer whereby the Minister would have claimed justification for the strict control. The scale he was insisting on was unreasonable, not being in existence in the councils approved scale which meant that the council could afford to pay at the scale if offered in the advertisement being one of the approved ones. The L.G.A. by S.119 and S.127 shows clearly that the legislature meant to vest a full power of appointment and dismissal to the councils of Local Authority and the Minister to act as a signatory to such appointment and dismissal. It could not have intended that the Minister exerts his powers of control to such extents as will render an appointment impossible. What the Minister should do is to advise Local Authorities on these matters. After all he has the power to appoint a man of his own choice where an authority fails to do so in 6 months of such requirement.³⁹

As regards dismissal, a most recent case is the suspension and dismissal of the Town Clerk to the City Council in mid 1980. This incident, described as the worst crisis (in City Hall) since independence, attracted the intervention of the President to bring an end to a harsh battle between the City Council and the Minister - Rubia. A meeting for the purpose of suspending the Town Clerk was convened as required under S.127. Though this meeting was cancelled by the Minister in its embryonic stage, it went ahead upto adult stage and a resolution was passed sacking the Town Clerk, and the Deputy Town Clerk

was given the status of acting Town Clerk and was asked by the council to convey the word to the Minister. The latter rejected the dismissal and warned that as the meeting at which this resolution was reached was in defiance of his order, the Deputy Clerk should desist from acting Town Clerk. The provincial administration was then called to watch over city hall. Incidentally, the same meeting was also a contravention of a Presidential directive against it, leading him to comment about the City Council

"I do not know whether they have their own government"⁴⁰

and later at State House read the Councillors the riot Act! The reasons for the prohibition of this meeting were not given (at least not to the Public). The Minister actually threatened the Council with dissolution in 10 days for failure to comply with what he called :-

"Government directions intended to help the Council to exercise its functions effectively".

The Minister was adamant in refusing to recognise the dismissal. As ironically as had happened earlier in Kisumu, Gitonga, the Town Clerk had to be dismissed following criminal charges of inter alia corruption, theft and misappropriation in which he was implicated. The City Council became yet another Local Authority to be pushed around by the Minister's whim. In a similar antagonism in Nyeri in 1973 where the Mayor had sent a telegram to the Minister stating that

"The presence of Mr. Kihara in office is a deliberate mockery and disgrace of our democracy and justice",

the Minister resorted to dissolving the council.

CONTROL OVER THE CONSTITUTION OF LOCAL AUTHORITIES

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The structure of Local Authorities is also subject to ministerial control. Some powers of the minister under S.5 have already been discussed.⁴¹ In addition to these, the minister can transfer an area of a Local Authority to another, amalgamate or divide existing Local Authorities. An example is the division of the Central Rift into Baringo and Nakuru County Councils. Prior to the 1979 civic elections, 16 new area councils had been created but their fate has also been discussed.⁴²

DISSOLUTION

This power, together with the power over structure emphasize the fact that Local Authorities are creatures of the Central Government. The power to dissolve a council of a Local Authority is given to the minister by S.252. If invoked, this section gives the minister power to make an order for the removal of a council and in its place appoint a commission to wind up the affairs of the dissolved council, taking over the management of the Local Authority. He will direct that a council be wound up where it appears to him that :-

- (i) A Municipal Council has not held a meeting for 3 months or any other Council for 6 months.
- (ii) Any particular council will not be able to meet its financial commitments.
- (iii) Any Local Authority is, in the opinion of the minister, failing to exercise its functions in such a manner as would best serve the interests of the inhabitants of its area.

It is not uncommon for the minister to resort to this

form of control which seems to follow automatically whenever there is an extraordinary inspection carried out on a particular council. Among the councils dissolved in the last decade are Mombasa Municipal Council, Nyeri Municipal Council, Kiambu County Council, Kisumu Municipal Council and Lamu Town Council. Presently, ministerial inspectors are busy combing out records in Embu, so we can keep our fingers crossed as to what will follow!

This system raises the question whether local authorities can be said to be masters of their own fate. To most observers, it would appear more true to say that their position is like one of a child who wants to feed himself while the mother insists on spoonfeeding him, and on his refusal she takes the food away from him altogether, giving it to a brother. *Point*

In addition to the above discussed controls, the minister has some appellate jurisdiction in that many statutes vest appellate jurisdiction in the minister whenever a Local Authority is a respondent. He also acts as an arbiter between Local Authorities and employees or between Local Authorities. There is already a local government workers union which represents Local Government employees in cases of the nature of a trade dispute.⁴³ An abortive Bill in contemplation of the establishment of a Local Government Service Commission was read in Parliament in mid 1980 but never went through. One cannot predict whether or not this position of the minister in respect of Local Authorities and their employees is bound to change.⁴⁴

CONTROL BY OTHER GOVERNMENTAL BODIES

1. OTHER MINISTERS:

These have been given control powers under various statutes in addition to the L.G.A. Cap. 265. These include the Education Act which gives the Minister for Education power over the appointment of Senior Education Officers and inspectors of schools, and the Public Health Act - Cap. 242 which gives the Minister for Health certain powers of control in relation to Medical Officers of Health and public Health inspectors. He may make regulations prescribing their qualifications and duties, the manner of appointment, salary scale and tenure of office.⁴⁵

The Act requires that they be given security of tenure to ensure that their appointments are not short-lived. The approval of the Minister for Health is therefore required before a dismissal is effective. The Minister can however dismiss them without the consent of the council. Other Ministers who may also exercise control over Local Authorities are those Ministers responsible for certain activities such as housing, social services, communications, and Ministers for Works and Finance. From these flow a stream of circulars and memoranda to Local Authorities.

2. THE CONTROLLER AND AUDITOR-GENERAL.

His office is independent of the Minister and carries out the audit of all accounts of government ministries and other bodies. Local Authorities are required to submit

to him the returns and records for every year so that his office may assess their income and expenditure. Though this office does plain audit work, the findings of the officers are tabled in Parliament for discussion. The Controller and Auditor-General is not answerable to the Parliament. As mentioned earlier, the dissolution of a council may be based on his findings. A recent report of the Controller and Auditor-General, tabled in Parliament on 7th April 1981 where the City Council was accused of being unable to control funds and that it had incurred expenditure in excess of its approved estimates and that its financial position had deteriorated so much that it was necessary to issue a special report

"on the various matters affecting the financial control and administration of the council"⁴⁶

The control mechanism requires that monies of certain funds be invested in the trustee securities but this was not done, so that from an expected general fund of Shs.118,017,360, a balance of Shs.104,659,880 was totally spent instead of being invested. This status of affair was occasioned by unauthorised spending in excess stipulated and then using money intended for embarking on capital projects without ascertaining there would be enough money to finance the projects. This resulted in the balance of Shs.129,599,080 uncollected. The report disclosed that the council had

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collect its debts from individuals, government ministries, and Kenya Railways in respect of water charges, rates, rents and conservancy fees. The council was also accused of having, in 1979, bought eight cars for chief officers through irregular methods. These allegations are not peculiar to the city council and are recurrent in many local authorities year after year. The present control mechanism is not a new thing. It has co-existed and grown together with local authorities, yet this status of affairs still exists. It appears that an alternative (or additional) solution has to be found somewhere and soon.

PRESIDENTIAL CONTROL.

S.23 of the Kenya constitution vests all executive powers in the president, and this in no means excludes local government. The fact that the president can exercise his power of control either directly or through his subordinates brings the Provincial Administration into play, as this falls under the President's office. The President, in exercise of his extensive executive power may issue directives on any issue pertaining to the running of local authorities even if it is contrary to the normal procedure. This can be illustrated by the late President Kenyatta's directive in 1973 that Kiambu County Council and the Kisumu Municipal Council which had been dissolved and was being run by a commission was to have normal elections as any other council in the 1979 civic elections. Normally, a commission remains in office for two years (or more with approval of Parliament). The Kiambu and

Kisumu ones had been appointed only in early 1978, so had not served two years at the time of elections.

The office has been especially influential in Local Government affairs especially in recent years. The controversy^{over}/Phase Two of the Nairobi Water Supply project known as C.102 gives an excellent example. This involved a tender for the construction of the Chania-Kimakia-Thika pipeline. The world Bank, which was to finance the project estimated a total cost of Shs.148,380,000. A problem arose as to which tenderer to accept, owing to the fact that the lowest tenderer who would otherwise be eligible pursuant to S.143 of the L.G.A. tendered a figure of Shs.96,425,383/50, a figure which was 37% below the estimated price, and which engineering consultants said would not be enough to finish the project which was three times larger than any other previously undertaken by this lowest tenderer, Kundan Singh. On the advise of the World Bank, the tender was granted to the 3rd lowest tenderer Fairclough/Greenhut whose figure was Shs.126,621,422.98. This was approved by the minister on 1st August, 1980. On 7th August, the Permanent Secretary in the President's Office Kiereini directed that the tender be given to Kundan Singh. This directive was complied with by the Council at a special meeting held on 20th August. The World Bank however refused this and recommended the 2nd lowest tenderer, Sumitomo, a Japanese Company. The council complied once again and ministerial approval on the re-tender was granted on the 22nd of September. Owing to the precarious circumstances surrounding this tender this tenderer declined to undertake the endeavour, leaving the

tender open once again. The Minister met the President and at this meeting it was argued that the Engineering consultants could not be relied on heavily because the request for advise on the tender, made by City Hall had the effect of requesting them to give a guarantee which no consultant will do on behalf of any contractor. The President's office now became the mastermind of the project. A kind of tripartite agreement was reached between the three that; to avoid any possible misunderstanding or political uproar and to safeguard the good name Kenya enjoys (in this case in the eyes of the World Bank?), the World Bank should be informed that the Kenya Government has decided that any further processing of the tender be discontinued and immediately retender for the project. In support of this the P.S. said that it would enable the government to supervise the tendering process right from the beginning to the end "to ensure fairplay." Taking into account that to this point, neither the Minister for Local Government or any other Ministry was opposed to the tender, one might as well say that "the government here meant the Office of the President. The tender was then re-tendered for the 3rd time, now to Fairclough/Greenhut, the acceptance of which was confirmed by their letter of 24th October promising to forward a performance bond of 10% of the tender price within 14 days in case of any breach in future. It was approved, and the World Bank also consented to it within the meaning of S D.2(b) of the Loan Agreement. A binding contract now existed with the city council. The above took place during October. A word need be said about some earlier events.

On 1st September, the World Bank had sent a telex to City Hall stating that :-

"there would be no justification for retendering in this case",

threatening not to disburse if the council did not agree with their recommendation, a factor which would constitute a loss of KShs.148 million to the Kenya government and the council. The legal opinion of the Attorney-General was also sought on the matter by the council. The consultants too had warned that a retender would cost 8 months delay and KShs.39 million would be lost, and an action for damages would ensue, making the council liable for an undisclosed amount of damages,⁴⁸ for breach of contract.

The government, as the ultimate sufferer should have done all in its power to prevent any such crises.

The minister for finance also came in on 27th October when he wrote to the World Bank asking for the discontinuation of the tender process. He requested that the project be tendered afresh and for the conveyance of this message to Washington. From this, one can see clearly that the tender affair had run completely out of the council's hands and was a deal between the government and ^{an} international organization. Note also the role played by foreign capital in local government affairs in a capitalist state, in dictating the development process.

According to the Mayor, the council had been placed in a very embarrassing position through no fault of its own. This ^{is} true because on its part, it had complied with all the requirements of the big forces, but was completely unable to control the matter. Even after the Mayor had consulted the

minister for guidance, city Hall received a copy of a letter written to the World Bank by the Permanent Secretary (President's Office) "on behalf of the council" a move which was seen as likely to create more confusion and in contravention of a fundamental term of the guarantee agreement and the I.B.R.D., S 3.02 of which stated that the government as the guarantor

"Covenants that it will not take or cause or permit any of its political subdivisions or any of its agencies or any agency of any such subdivisions to take any action which would prevent or interfere with the performance by the borrower (Nairobi City Council) of its obligations contained in the loan agreement....."

From the above discussed events, which had already resulted in three re-tenders and put the council in a very difficult situation shows clearly that this term was at all times overlooked. It was pointed out by the Mayor that the practice had been that the city council deals directly with the world Bank but in close consultation with the ministry of local government. The World Bank had repeatedly warned against retenders as these would cause the borrower tremendous sums of money. However it appears that the government in its "supervisory" role was ready to face any such consequences, though its interests in the deal were not made clear at all. One would expect some reasons to be given for its actions. On 7th November, a revocation order was issued from the President's office, revoking the

contract between the council and Fairclough/Greenhut who were already on the job. Whether this revocation order was a directive from the President is not clear, but in defence of the city council the Minister for Local Government had warned that :-

"It is the high time that unwarranted tug-of-war from an irrelevant ministry should cease and the council be given a chance to discharge her duties in accordance with the law."⁵⁰

Such a voice however was one in the wilderness. The President later ordered a cancellation of the whole process and appointed a 5 man civil service committee to retender. A complete take-over by the central government was hereby witnessed.

Yet the council was left to face the losses and a civil suit involving a claim of 21 million shillings by the contractors. Later the council was accused of "failing to comply with the World Bank agreement" covering this project.⁵¹ The allegation was that the council had agreed not to borrow more than Shs.8 million but that by 31st December, 1979 the figure was Shs.12,002,360 and Shs.70,000,000 by 31st August, 1980.

It is clear that the deal did attract other "interested" parties who as shown in the above discussion played a domineering (and confusing) role. It can reasonably be assumed that the tug-of-war involved had started earlier than October, 1980 and this caused the council to incur unforeseen costs so that it had to keep on borrowing.

The above case study illustrates the control exercised by the central government in its highest degree. To the

public, the real root of the problem is not clear, as it is apparent that the 3rd retender had solved the initial conflicts and work had began. However, there must be more to this controversy than meets the reader's eye!

THE PROVINCIAL ADMINISTRATION:

As mentioned earlier, the control from this sector is an extension of the presidential powers over the executive. The D.C. is the government's spokesman in local authorities. His^{to} is interpreted to be an advisory role. He represents the viewpoint of the central government to the people (through the council) and conversely that of the people to the governments functional ministries. Prior to 1963, D.C.'s had very wide powers over local authorities but these were decreased tremendously when the Regional constitution gave local authorities a more enhanced status, almost amounting to virtual autonomy. The D.C. no longer chairs council meetings. Today, his influence or control is based on his administrative position, not as a member of the authority. By virtue of his authoritative position, he may stop a council from pursuing a certain objective if he is of the opinion that it is contrary to central government policy. He therefore plays a preventative role. Considering that most D.C.s are non-professionals, it is time Town clerks were given the upper hand in local affairs in their meetings. It is in order to maintain this close link between the central government in the provincial administration and the local authorities that the ministry of local government has appointed a local government provincial officer in every province.

The relationship between the central government and Local Authorities today remains one of the controller and controlled. Sometimes, the latter find themselves placed in very unbearable conditions due to excessive or unnecessary controls exercised by the former. Moreover, it is apparent that in most cases, there is an imposition upon Local Authorities of decisions (made by the centre) involving their expenditure without prior consultation with them. Such consultation is vital in this so called partnership/agency relationship. It is most mysterious that the government appears not to have any confidence in Local Authorities in respect of its decisions about their finances. At the same time it has entrusted upon them the responsibility of providing multifarious important services in full satisfaction that they are capable of delivering the goods. But still the central government does not cease to poke its nose in the carrying out of this assignment by Local Authorities.

Surely, this is the greatest paradox in the whole process of Local Government.

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FOOTNOTES TO CHAPTER THREE

- 1 S.249
- 2 See Chapter I, above.
- 3 Report of a seminar on local government 1967
(mimeo) p.13
- 4 DILLYS M. HILL "Democratic Theory and Local Government."
George Allen Unwin Ltd (1974 ed.) p.198
- 5 CROSS "Principles of Local Government Law"
Sweet and Maxwell (1966) p.166
- 6 See The Transfer of Functions Act No.20 of 1969.
- 7 S.220 L.G.A.
- 8 S.221 "
- 9 S.222 "
- 10 ~~S.223~~ " S.231
- 11 Report of a seminar op.cit
- 12 The Weekly Review 23, May 1980 p.10 and 30, May 1980 p.11
- 13 My research showed that it appears like only smaller
and younger Local Authorities receive government grants today.
Use inferior the author's
Law in snippet
- 14 S.249 L.G.A.
- 15 The L.G.A. does not have any clear provision for this.
- 16 S.143 L.G.A. and MWANGI MACHARIA v. EUSKER /1971/ EA
385 *vv*
- 17 See Chapter Two, above.
- 18 Reasons for the parliament to delegate the legislative process are, firstly to reduce the rigidity which may

follow the setting up of government services by a general Act, thus provide for circumstances of different Local Authorities in varying conditions and secondly, to relieve itself of some of the work.

- 19 See The definition of a by-law in S.3 of the Interpretation and General Provisions Act Cap.1 and KRUSE v. JOHNSON (1898) 2QB 91, 96.
- 20 This idea is embodied in Part V of the Kenya constitution.
- 21 KRUSE v. JOHNSON (supra) Pp.99, 108.
- 22 See R v. HARMITTE /1938/ K.L.R. 55
KANJI v. TANGA COUNTY COUNCIL /1940/ T.L.R.
As regards delegated legislation generally, See WADE, "Administrative Law" Ch.22 of 4th Ed. or Ch.9 of 3rd Ed.
- 23 GERTZEL, "Government and Politics in Kenya" BAPH p.420
- 24 S.243 L.G.A. ✓
- 25 S.244 "
- 26 S.245 and S.231 L.G.A.
- 27 S.245(A) L.G.A.
- 28 S.246 L.G.A.
- 29 S.247 "
- 30 S.193 to 199 L.G.A.
- 31 S.249 L.G.A.
- 32 CROSS, op.cit p.174.
- 33 S.119 L.G.A.
- 34 S.127 "
- 35 S.119(1) L.G.A.

- 36 S.127 L.G.A.
- 37 The Daily Nation March 4, 1969
- 38 ibid August 11, 1975
- 39 S.133 L.G.A.
- 40 The Weekly Review May 23, 1980
- 41 See p.4 above
- 42 ibid.
- 43 See Pp 20-21 above
- 44 Bills No.5 of 1980
- 45 S.127 L.G.A. See also p.19 above.
- 46 The Daily Nation 8 April, 1981 P.1
The Standard " " " P.2
- 47 ibid
- 48 This did happen when a suit in which Fairclough/Greenhut
claimed Shs.21 million was filed. This was pending at
the time of writing. See The Nairobi Times 22 March, 1981
- 49 International Bank for Reconstruction and Development.
- 50 The Weekly Review 7, November, 1980
- 51 The Daily Nation 8, April 1981 op.cit
The Standard " " " op.cit

CHAPTER FOUR

PROBLEMS IN LOCAL GOVERNMENT

We have already observed that the Government works with Local Authorities on an agency/partnership basis. Local Government objectives are mainly to provide the institutional basis upon which the representatives of local communities participate in decision making affecting their communities, to mobilize locally available resources and energies for the development of their localities, to perform a certain number of functions which are primarily the responsibility of the central Government and to provide a vital link between the "wananchi" (especially in the rural areas) and the government. There is a notable agreement on this, expressed in both the Ndegwa Commission Report and the Report of the Waruhiu Civil Service Review Committee that :-

"Local Government ensures participation by the people at the local level in the policy making machinery of the government...(being) a system in which local people can decide on matters of local nature, while at the same time carrying out certain functions on behalf of the government because of convenience"

In trying to accomplish the above objectives, the system of local government is however infested with a conglomeration of problems rendering the endeavour very difficult if not impossible.

① A major and seemingly chronic problem is one of finances seen as unending because of lack of funds, unsatisfactory accounts and unbalanced budgets.

The major reasons behind the Transfer of functions Act (already mentioned) which took with it a major form of

revenue - the G.P.T. and the system of general grants formerly got from the government. First there was an abolition of the lowest rate of Shs.241/= which constituted only 3% of the total G.P.T. but yet formed a major source of income for the smaller councils. Later there was an abolition of G.P.T. itself - with effect from 1 - 1 - 74. The government assured the councils that there would be a 5 year period within which it would continue to offer grants to local authorities but that at the same time the latter would look for alternative sources of revenue. In 1973 a committee known as 'The Nyaga Committee' was appointed to investigate into ways and means of improving revenue and methods of its collection. It's recommendations however have never been acted on, and have now been slept on for over 7 years. 1997-1973 = 25'

→ Presently, Local Authorities depend on beerhall licenses, (which the government has actually restricted) veterinary services, site value rates, land rates, cesses on crops royalties and other licenses which really do not bring much money.]

All main sources of revenue are fixed by the treasury and any alteration to the rate of taxation must be endorsed by the treasury and the Ministry of Local Government.

Heavy dependence on direct taxes has been blamed for the aggravation of the financial crisis as these are difficult to assess and subject to evasion and late payments.

Until 1970, G.P.T., the major source of revenue was collected by the Provincial Administration staff who are not always trustworthy. Controller and Auditor-General disclosed that such employees defrauded a local authority of Shs.138,308/=

in revenue collecting in Embu.

The Ndegwa report disclosed that 42% of the total income of local authorities was spent on employing highly paid staff. This shows clearly that heavy administration costs greatly outmatch the money available to local Authorities. The Transfer of Functions Act had a paradoxical effect in that while it was intended to relieve local Authorities of financial and functional overload, it deprived County Councils of an important source of revenue. ² Financial mismanagement is a major weakness in that many councils do not produce their annual accounts over a long time while the balancing of budgets is usually impossible. Late collection or non-collection of debts also prevail throughout the system.]

³ Another problem concerns staffing. Throughout their history, Local Authorities have been unable to secure the services of highly qualified staff although they spend a lot of money on salaries. Such employees usually prefer working in areas where they can avoid interference from councillors. For this reason, most councils find themselves being forced to pay more money to maintain such services.

⁴ The Ministry of Local Government itself lacks qualified personnel. Nepotism and tribalism also affect promotion and privileges so that people are not employed on merit.

⁵ Corruption also exists, whereby councillors purport to spend a lot of money on worthless jobs when in reality they have misappropriated the greater sum of the money and done the jobs unsatisfactorily. Some even use grants from the council to give to self-help projects (as personal donations) so as to win popularity and favour during the elections. Coupled with this failure of councillors to act in good faith for the

benefit of their constituents is a measure of conflict of interests where they fail to disclose their interests.²

Corruption is not peculiar only to Local Authorities alone but is spread throughout the system of public administration. It also appears to be chronic and still being passed on as shown by a comment on the local press at the coming of the Kahara regime late in 1979 that :-

"It is generally agreed that the new councillors are inheriting a public body riddled with corruption, tribalism, inept administration and in many cases, protection rackets composed of council officers and some outgoing councillors."

A similar situation obtains in all local Authorities or at least the majority of them.

⑤ — Local Government functions lack certainty and it is difficult to state the extent to which they are meant to operate, or what exactly are their real functions as opposed to those of the central Government. This is connected to the problem of local Government structure caused by an existing overlap between the Local Authorities and the provincial administration in services as well as a clash in the boundaries of the districts and County Councils.

Since 1972, questions regarding the future of the transferred functions have been raised in Parliament. The report of the Auditor and Controller general disclosed that the rights and obligations attached to the assets worth KShs.34, 214, 586 . 92 transferred to M.O.H., M.O.W. and M.O.E. in 1969 still remained unresolved through 1977 - 78 and the same remains true in 1981.

The transfer was meant to be temporary but a decade has elapsed since it was effected. Kioko as the Minister for Local Government said in 1972 that the question of functions would only be entertained after the Ministers for finance, Local Government had discussed how to stabilize the finances of Local Authorities. It is absurd that the research on the possibility of creating uniform and more equitable sources of revenue which started in 1972⁴ has never been completed, despite the stipulation that the task would be accomplished by the end of that calendar year.

⑦ The control by the central Government also poses a problem to local Authorities as well as to the whole system of local Government in that it is to a great extent excessive. The Central Government acts as the head and brain of local Government affairs and local authorities are mere puppets or another arm of the centre, reminding one of the company law notion of "Holding and subsidiary" companies where the legal personality of the subsidiary is ignored in favour of the Holding Company.]

⑧ The system itself has not been able to establish itself fully. Being a borrowed idea, it assumes that the Kenyan populace is well educated enough to understand the real nature of representative government. The Waruhiu Committee rightly observed that the system is not suited to the needs of a developing country, being overpoliticized, yet even councillors are not fully knowledgeable in matters of modern development. They cannot therefore contribute beneficially in debates and actual work. In this regard, it appears that the ban on the requirement of academic qualifications in civic elections in 1979 was a step backwards.]

Barring chief officers from participating in policy decisions means depriving the council of the knowledge of better informed persons.

④ - The failure of the government to carry out certain measures meant to ensure the accountability of local authorities also creates a problem and encourages mal-administration where such escapes special inspection. On implementing the present system in 1963, there was going to be a general review of local Authorities every 10 years but this has only been done once, in 1968. Ministerial or governmental secrecy and confidentiality is also likely to mislead the public as to what is actually happening in local government generally. For instance, amidst all the above mentioned problems surrounding local government administration Rubia as the then Minister for local Government commented in a press statement (in 1980) that by and large, the Ministry and its affairs had been doing very well.

FOOTNOTES TO CHAPTER FOUR

- 1 Republic of Kenya, "Report on the Civil Service Review Committee" 1979 - 1980.
- 2 See Republic of Kenya, "Report of the Auditor and Controller - General" 1977/78 - on Kiambu County Council.
- 3 See The Weekly Review May 23, 1980 and May 30, 1980.
- 4 Kiano in the "Official Report of the National Assembly Debates" 1972 column 1187
- 5 See Chapter 3, above.

RECOMMENDATIONS AND CONCLUSION

The author concurs with the recommendations of both the Ndegwa commission and the Waruhiu Committee and requests the government to implement them, noting that it is about ten years now since the Ndegwa report was presented and its recommendations accepted.

Secondly recommendation is here made for a nationwide elimination of corruption in order to eradicate this evil from Local Government. This can be solved by establishing an ombudsman both at the national and local level. Such a step would also reduce central government control which, as already mentioned needs relaxation. It will also mean that an independent body will be available to curb the present tendency of the minister to act as judge in his own cause when resolving local Government conflicts. Having observed that too much control of the central Government is likely to stifle the growth of Local Authority by killing their enthusiasm, the government should change its attitude towards Local Authorities and play a purely advisory role. It is dangerous for guidance in policy matters to be reduced to interference as is usually the case, in the relationship between the central Government and Local Authorities today. The situation calls for a complete overhaul and reform of the whole system which is currently handicapped by the multiplicity of local bodies in decision making and a chain of command-carrying policies and suggestions from the central Government. Leaving all major decisions to the central Government is detrimental and defeats the idea that people participate in the general path of local development. Cooperation and understanding between the centre and the local Authorities is vital. Such cooperation and understanding can be achieved

by establishing a coordinating body above the councils and the provincial administration. This will ensure uniformity in local planning.

Other problems will be resolved by trained management which can be attained if the recommendation in paragraph 316 of the Waruhiu Committee report was implemented. This recommendation calls for the establishment of a local Government Training Institute.

The proposed Local Government Service Commission should be established to remove Central Government involvement in appointments salaries and dismissal of local government employees.

In the search for new methods of raising revenue, the government should consider the proposal in the independence constitution that 32% of duty and Excise on imports and locally produced goods be transferred to regional assemblies, and now transfer them to local authorities. These should also be allowed to impose duties on transporters ("heavy commercials") using roads within their jurisdiction. Government grants should also be re-introduced.

A mass-education programme should also be introduced to educate the entire population as to the essence of democracy so that they can not only accept but also appreciate it. It was correctly said during the colonial times that democracy is not something that can be worn like clothes. It is after such education that people can know what criteria to apply when choosing their representatives.

Finally, the functions taken away from county councils in 1969 should be returned to ensure maximum autonomy and usefulness of local authorities. With improved methods of

raising revenue, they will now be able to cater for these services.

With the above in mind it is obvious that the present status of local authorities and hence that of local government in Kenya leaves much to be desired. The autonomy of local Authorities has deteriorated so much that all that one sees is the arm of the central government at work. This fact does impair national development generally since local government is the cradle for national resources and the real root of nationalism and political independence. This goes well with Tomlin Smiths submission that :-

"Free institutions then do not exist and national independence can never be assured, nor individual independence and forethought ever characterise a people unless true local self-government is fully and freely excercised throughout the land unshackled alike by local clique-ism and by central government intermeddling". *

* Smith, Local Self Government and Centralization, Lond.
1851 Pp.30 - 31.

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Bridena

B I B L I O G R A P H Y

BOOKS

- Cross, Principles of Local Government Law
(Sweet & Maxwell, London 1966)
- Gertzel, Government and Politics in Kenya
(E.A.P.H, Nairobi 1970)
- Hannigan, What is Local Government?
(E.A.L.B Nairobi, 1958)
- Harris, Local Government in Southern Nigeria:
a manual of Law and Procedure under the
Eastern Region Local Government Law
(Cambridge University Press, Cambridge, 1957)
- Hill, Democratic Theory and Local Government
(Allen & Unwin, London 1974)
- Severeid, Local Government Members' Guide (K.I.A
Nairobi, 1970)
- Smith, Local Self Government and Centralization
(Oxford University Press, Oxford 1951)
- Wade, Administrative Law
(Sweet & Maxwell, London, 1966)
- Wraith, Local Government: West African Series
(Lagos 1953)