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# TAXATION OF LAND IN KENYA: A STRATEGY FOR STRENGTHENING LOCAL GOVERNMENT PARTICIPATION IN RURAL DEVELOPMENT

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Candidacy for the Degree of

*Juris Scientiae Doctor*

by

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I, ARTHUR A. ESHWANI, declare that: This Dissertation is my original work and has not been presented for a degree or any other award in any other University or Institution.

(JSD Candidate)

This Dissertation has been submitted to the Law School with my approval as the final fulfillment of the requirements of the JSD degree for which the above candidate was admitted.

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Dedicated to my sainted mother

Rael Ayuma Ashubwe
(*Om'aholia*)

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# PREFACE

> ....[If] the future of Local Authorities is to be safeguarded, the functions assigned to them by [the] government need be clearly defined and specified *and reliable sources of income found and provided in order to enable the Councils to discharge those responsibilities and to play an effective role in the fields of economic and social development...of the community* (Kenya: The Report of the Controller and Auditor-General on Local Authorities, 1981:3; my emphasis).

This passage broadly captures the central issue to which this study is devoted. Local Authorities in Kenya, despite difficulties which they have continued to experience, have an acknowledged role to play in the well-being of our people. This is more so through the functions assigned to them and the services they supposedly render in pursuance of this mandate.

However, the achievement of this goal has increasingly become difficult. Many factors account for this. Lack of clear criteria for allocating functions, as the passage indicates, is one of them. This will be illustrated.

It is the second factor in the passage that the study focuses upon. Accordingly, the issue addressed in this dissertation is the revenue problem facing Kenya's Local Authorities (the County Council category in particular). How can this problem be confronted? It is suggested in the

passage that "reliable sources of revenue" must be found for a solution.

This study will explore the feasibility of applying (or more accurately--reviving) a tax on land ownership as one way of identifying reliable revenue sources. The major assumption in this is that though the problem can be tackled in other ways--in concert or singularity--the identification of new and dependable sources is perhaps the more appropriate and direct approach. It has the potential to beef up the existing resources and ultimately expand the Local Authorities' revenue bases. Strong bases will in turn trigger the Authorities into playing the role expected of them.

Since each chapter introduces its subject-matter, it is not necessary here to give the structural outline of the study. At any rate, this has fittingly been done at the end of Chapter One. I devote this preface to an account of the background to the study.

My interest in the Local Authorities' revenue problem stemmed from a number of factors. At an individual level I had been a special beneficiary of certain services rendered by Local Authorities at one time. In the 1960s I was a recipient of an educational bursary from my home County Council of Kakamega. I certainly would not have gone through

school without this assistance. Therefore, I always felt guilty to just stand by and watch Local Authorities sink into revenue decline.

Further, from 1981 when I became a tax law teacher at Nairobi University's Faculty of law, I started to increasingly encounter the problem. That is, I began to see its practical consequences on a rather alarming scale. The collapse of various Councils due to revenue shortfalls became phenomenal. From this, I sharpened my perception of the problem's scope and effects.

By mid-1980s I had become a keen observer of, and a participant of some kind in, the public debate that had ensued over the problem. Since Kenya's independence in 1963 government planning vis-a-vis Local Authorities had overly centred on dismantling their colonial image and creating in its place, a new system strictly accountable to the centre. The revenue issue did not receive the timely attention it deserved. As we shall see in Chapter One, this was a disastrous approach. By the end of the 1970s, it had been abandoned in favor of a new one that decentralized the planning and execution of the development process. But while the new strategy was somehow cognizant of the role of the Authorities, it compounded their revenue problem. It assigned more functions without corresponding revenue resources.

This change correspondingly shifted the thrust of the debate away from role *per se* to the search for a solution to the revenue problem. The debate welcomed the new approach largely for the reason alluded to above. But as more and more Councils came to a standstill partly because of the exacerbation of their revenue posture traceable to the new arrangement, the debate emphasized the need for urgent solution. As it will be seen later, justification for urgent redress became cast on the premise of - a quick action to salvage institutions of grass-roots participation.

This thinking was profoundly inspirational to me. It marked the genesis of a suggestion that is the backbone of this study. One of the alternatives debated, admittedly not in succinct terms, was the application of a land tax for, *inter alia*, raising revenues for Local Authorities. Quite interestingly, the government itself intimated that it was favorably considering this alternative. All this sufficiently challenged me into exploring the possibility of land taxation for an alternative solution. Indeed, in 1986 I began groundbreaking by testing public reaction to the notion of a land tax (see Chapter One, fn. 19).

The revenue problem is for sure topical. The search for its resolution is going on as it will be seen later. Its confrontation is being taken seriously because undue delay could put a lock on our development effort.

Let me now acknowledge the assistance I have received at various levels toward the realization of this study. I am indebted to Professors Charles Okidi (Moi University, Eldoret) and Migot-Adhola (Nairobi University) for initially encouraging me to study this issue. In this connection I thank the U.S. Government for granting me the prestigious Fulbright Scholarship. Without this funding, I would have missed opportunity to formally undertake the project and to be exposed to an environment (academic and social) from which I have substantially benefitted.

I am grateful to the Rockefeller Foundation and the Rocca Memorial Scholarship Fund, for funding my field research in Kenya. Again, without this assistance, empirical input into the study would have severely suffered. In this regard, I graciously thank all those that assisted me in various ways during the research. Let me start by commending my research assistant--George Maundu whom I admittedly overworked. Next I express deep appreciation for views expressed by Professors Walter Ochoro and Charles Wanjala (of Nairobi University's Department of Economics and Faculty of Law respectively).

From personal interviews (PI.) with them, I was able to expand my empirical inputs on various issues. I anonymously commend all the government officers (in the Ministries and County Councils) for the trouble they took to respond to my interviews or to avail me with relevant documents. I cannot, indeed, forget the laboring peasants and farmers who discussed with me various issues on which they were singled. Although the names of these persons will forever remain anonymous, their views have been expressed and acknowledged. I also thank the Kenya Government for granting me permission to research an issue that is often regarded with sensitivity.

The bedrock of my study and candidacy was, in all respects, Professor Kenneth Phillips. It is difficult to find more precise and fitting words to express my often emotional gratitude to him.

Prof. Phillips took charge of my candidacy at my most precarious moment. By the Spring of 1987, when I was about to complete my Master of Laws studies, it occurred that I was not going to be able to find anybody from Boalt Hall's academic staff who was interested in supervising a topic that was entirely African. Without a supervisor, my admission into the JSD program appeared certainly derailed. This is the point at which Prof. Phillips came to my rescue. He

straightaway guided me through the preparation and submission of my application. The dividend was immediate.

Since then I have worked with Prof. Phillips in a most rewarding manner. I have been able to complete my studies on time, primarily because of his judicious counsel, insightful academic input, and a stewardship that has been rigorous but supportive. He has, in other words, contributed tremendously to a positive definition of my career and future.

I also thank those who worked with him as Readers of my dissertation. For a policy-oriented study that this is, a thorough understanding of African politics and statecraft was vital. This was assured by the supervision of an Africanist of no lesser stature than Prof. Carl Rosberg.

With only the background knowledge of a lawyer, it was risky to venture into an area where economists are perhaps the judge and jury. My anxiety was rested by Professor George Break, whose comments on the first draft assured me that I had not fouled economic concepts discussed in the study.

A number of other people made very valuable comments either on the proposal or first draft (or both). In these regards, I sincerely thank Prof. David Leonard and Dr. Judith Geist for very resourceful reviews. I was greatly guided by

their profound knowledge of the Kenya situation in general, and of the problem under inquiry in particular. Indeed, Dr. Geist had been part of a Harvard University team that advised the Kenya government between 1983 and 1989 on the modalities of integrating Local Authorities into the decentralization program. Besides, out of her own interest, she had since 1981 been gathering data on the revenue position of Kenya's County Councils. She did not hesitate to share with me this information. Her very dimensional comments helped me greatly in the clarification of a number of substantive as well as procedural issues.

Professor David Newbery (then a visiting Professor of Economics from Cambridge University, England) was greatly influential at the course-work stage. I specifically acknowledge his guidance through one of my course-work papers from which I gained timely insights into issues that later formed part of my research goals. I am grateful too for his facilitation of my early encounter with the economic concepts that are pertinent to the study. In the same context, I appreciate suggestions made by Professor Oliver Oldman of Harvard Law School on various issues for which he has been cited accordingly.

The burden of word-processing fell on Kaye Bock. I sincerely thank her for transcribing from a difficult hand-

writing; and for organizing the mechanical outlook of the dissertation. Above all, I commend her for enabling me to meet deadlines. Despite the tremendous pressures I exerted on her, she worked with commendable industry and craft. Let me, nevertheless, make it known that I take full responsibility for whatever defects or shortcomings from which the dissertation may suffer.

Lastly, I fondly appreciate the moral support my family gave me. Four years of separation from my wife and young children were cruel on them. Nevertheless, they continued to pray for me. Akinyi (*nyar Gem*), Ayuma, Ambunya, Adhiambo, and Okombe--thanks a great deal for remaining steadfast while I was away. I gladly share with you the joy this achievement has given me.

# CHAPTER ONE

# SETTING THE AGENDA: DEFINITION OF THE PROBLEM AND OTHER PRELIMINARIES

This Chapter primarily delineates the revenue problem facing Kenya's Local Authorities today. However, it is fitting to open discussion with a profile of the Local Authorities' historical evolution and their present setting. The purpose of this is to highlight a number of pertinent issues. These include the significance and role of the Authorities today in our development effort (and hence the merit of drawing attention to their revenue difficulties); and suggestions hitherto made in regard to the tackling of these difficulties.

The Chapter also outlines the alternative approach to be examined in this study as a further attempt to find a way out. In this regard, there is an identification of the research base that was studied for the empirical understanding of both the problem and the envisaged alternative. In conclusion, the Chapter indicates the contexts in which these two are to be discussed in subsequent chapters.

## 1.1 LOCAL AUTHORITIES IN KENYA: A HISTORICAL PROFILE

The institution of Local Authorities (or alternately Local Government) in Kenya today is a culmination of about ninety years of evolution. And this history can conveniently

be divided into two historical times: the colonial and the post-colonial.[1]

### (i) Local Authorities in the Colonial Period

The earliest forms of Local Authorities in Kenya started in 1900. This was three years after the annexation by the British of the territory that was to become Kenya.[2] They were primarily introduced to serve as a machinery for public administration at the local level. And as it is well-known, the institution was broadly modelled along the lines of local government prevailing in England at the time. Thus, local government in Kenya came immediately after the establishment of central authority, and was made accountable to the center via the office of the governor. The accountability of Local Authorities to central authority remains in practice today.

Municipal Councils were the first category of the Authorities to be introduced. They were more urgently needed to administer towns that were already in existence (notably Mombasa), and those that were rapidly springing up as a consequence of European settlement and the construction and operation of the so-called Uganda Railway. In 1903 the Township Ordinance was promulgated by the governor's Order-in-Council (there being no legislature to enact laws). The Ordinance empowered the governor to create these Councils as

he deemed necessary. The Ordinance remained in existence up to the time of Kenya's independence in 1963.

The rural cadre came later than the Municipalities. But unlike the municipalities which were multiracial, the rural councils came in two distinctive forms that primarily turned on racial segregation. One type catered for local administration in areas settled by the natives (popularly known as Native Reserves); the other administered those areas settled by whites (popularly known as the White Highlands).

Creation of rural councils was necessitated by, among other reasons, the urgent need to stop increasing clashes over land between white settlers and the natives. As white settlement expanded, certain tribes started to resist displacement from what they regarded as their tribal land. The most notable example was the case involving the Maasais and white settlers in the Rift Valley region. As nomads,the Maasais have roamed the entire region for centuries. To the white settlers, the region's volcanic soils were ideal for farming and livestock rearing. This clash (and many others like it) was decided by the Court in the famous *Maasai Case*[3], whose effect was to confine the Maasais to a much smaller area in the south of the valley. White settlement was thus allowed to expand.

Primarily because of these clashes, the Governor--Sir Percy Girouard--decided to separate the native reserves from white areas. In 1912 he promulgated the Native Authority Ordinance under which Traditional Councils were created (with boundaries following generally the pattern of settlement of the tribes). This marked the beginning of what are today County Councils.

Between 1912 and 1963 the Native Authority Ordinance underwent numerous changes designed to strengthen local administration in native areas. Two of these deserve a brief mention because of their pertinent implications to certain issues raised in this study.

First, when the Traditional Councils were created they had no clearly defined functions. They had one amorphous task of 'solving traditional (or tribal) disputes arising among their peoples'. Besides, their members were nominated by the respective District Commissioners from among tribal leaders. The Locational Chief attended the Councils *ex officio*. In 1925 the Native Ordinance was amended to strengthen the Councils' administrative capacities and democratize their image as grassroots institutions. And for a depiction of the new stature, the Councils were renamed African District Councils,

but with each Council still subservient to the area District Commissioner.

As regards the new functions, the African District Councils were statutorily given a general duty of promoting peaceful progress in their areas--in pursuit of which they had powers of initiative. In addition they had special duties in the fields of education, public health, development of agriculture and preservation of forests (Ursula Hicks, 1961: 215). They even got some limited powers of taxation. Their prominent tax was the hut and poll tax.

As for elective representation, regulations were formulated to provide the modalities of the timing of elections, qualification of candidates, the constitution and legislative powers of the resultant assemblies.

Secondly, in 1928 the office of the Commissioner of Local Government was created to take the supervision of Local Authorities from the Governor's office. This step was significant because it marked the beginning of what is today the Ministry of Local Government. Among the notable achievements of the Commissioner was the development of a comprehensive body of legal rules and regulations for the supervision of all categories of Local Authorities. These gave birth to the present law under which the Authorities are

regulated (Patricia Stamp, 1986: 23-25; George Rukwaro, 1971, passim).

The Councils in white areas started around the same time as those in the native areas. However, their exact territorial limits were left to the expansionary initiative of the white farmers. The Councils were known as County Councils. Their duties were better spelt from the beginning. They broadly consisted of provision of services for constituents that were predominantly large-scale farmers. Accordingly, emphasis was placed on construction of rural access roads, provision of water, and veterinary services. These Councils had tax powers too. Indeed one of their taxes was "land rating" whose importance to this study has been amplified in subsequent chapters.

Though the Feetham Commission of 1926 had recommended that boundaries for County Councils be clearly demarcated, this was ignored until 1952. In this year the *Mau Mau* (armed struggle for independence) broke out. It started in the central part of Kenya where the Kikuyu tribe, like the Maasais before them, sought to regain land lost to white settlers. Because of this uprising, the government decided to ascertain and confirm boundaries of the County Councils in all areas this far settled by whites. These boundaries lasted up to the

time of independence. In addition, under the regulations mentioned above, the Commissioner declared that as between the African District Councils and the County Councils, the latter superceded the former.

It can therefore be said that it was not until 1952 that the structure of Local Authorities in colonial Kenya matured. A three-tier system of councils emerged. On top were Municipal Councils, at the bottom, the African District Councils, and in between, the County Councils. It is this structure, marked by clear racial distinction between the Native and County Councils, that was inherited at the time of independence. The primary goal of the system remained throughout--the provision of some form of local administration as determined by the peculiar circumstances of each race--in the case of the rural councils.

**(ii) Local Authorities in the Post-Independence Period**

The post-independence developments do conveniently fall into two periods. The first period commenced soon after independence and lasted up to 1979. During this period the Local Authorities were subjected to substantial re-structuring whose primary aim was to firmly place them under the control of the central government. The second period--though it became more noticeable in 1983--did in effect commence around

1979. Its theme was a re-evaluation of the role and significance of the Authorities (particularly as institutions of development) with a view to utilizing them more in this capacity. The activities of this period are still going on.

Restructuring consisted of the abolition of the old system and its replacement with a new one. The African government resented the 'apartheid' nature of the old system arguably because it polarized the nation, and encouraged regional economic inequalities. A perpetuation of such a structure would have automatically meant embracing its vices too, i.e., its intrinsic antagonization of national cohesion and broad dispersion of national resources for economic development.

The old system was also resented because the continuation of its apartheid composition was one of the conditions upon which Britain accepted to grant independence. The independe constitution stipulated, *inter alia*, that the Local Authorities in their pre-independence structure, were to constitute the various autonomous *Majimbo* (or regions) into which the country was to be divided. The idea behind this arrangement was to strengthen local administrative units (Regions) by giving them substantial autonomy (political and economic). In this way each tribe or race would maintain their identity and

consequently be secure from the hegemony of a monolithic central government.

Arguing that physical restructuring was necessary to get rid of inefficient and corrupt local government units, the *Majimbo* constitution was abolished in 1964. The Regions were replaced with administrative provinces with newly drawn boundaries designed to eradicate patterns of racial settlement. The Provincial Commissioner was the chief administrator general of each province, and he reported directly to the President in Nairobi.

Boundaries for the Local Authorities (more so for the rural cadre) were similarly re-drawn. The chief characteristic of the new County Councils was that the boundary for each was to be coterminous with that of the administrative district in which it lay. In this way the new Councils were brought under the umbrella of the district and ultimately of the provincial administration. It should be noted that the re-settlement of the landless in the former white settled areas was simultaneously being undertaken to eliminate, among other things, racial settlement.

As a further step of consolidating its control, the government appointed the Hardacre Commission of 1965. The

Commission was mandated to review the relationship between the central and local government. The Commission recommended, *inter alia*, that the central government must exercise absolute control over "...all matters pertaining to local government and its requirements" (Kenya: The Hardacre Report, 1965: 7).

Following this recommendation, Parliament enacted the famous Local Government (Transfer of Functions) Act (No. 20 of 1969). Section 2(1) of this law empowered the President to make regulations designed to transfer to the central government certain major functions hitherto exercised by the Local Authorities (with some exceptions applicable to municipalities). That meant the transfer of functions relating to education, health, and roads.

As a concomitant to physical restructuring and transfer of functions, certain major revenue sources of the Local Authorities started to be phased out. Quite notably, the Graduated Personal Tax (GPT--the final stage into which the poll and hut taxes had developed) was terminated in 1973 (Kenya: Development Plan 1974-78: 168). And by 1984, general grants from the central government had ceased to exist. I will return to the implications of these measures in later chapters.

By 1979 restructuring had essentially been completed. First, and most significantly, the process had given birth to a new structure and system of Local Authorities that is in force today. Instead of a three-tier, racially segregated system, we now had a four-tier structure that incorporated racial integration. The Local Government Act (Cap. 265 of the Laws of Kenya), which had in the meantime been created out of the Local Government regulations that were mentioned earlier, spelled out the new categories of the Local Authorities. Section 2 of the Act defined "local authority" to mean a *municipal, county, town*, or *urban council*.

Today there are 20 municipalities (which include the City of Nairobi), 20 Town Councils, 28 Urban Councils, and 39 County Councils. With the exception of County Councils, the other three are urban categories of Local Authorities, with the Municipalities being the biggest and the Urban Councils being the smallest (essentially fledgling towns). The Town Councils lie in between, and they consist of viable distinct towns capable of self-sustainment. All three categories are accountable (through a district local government officer)to the District Commissioner of each respective district, and thereafter (through a provincial local government officer) to the Provincial Commissioner in each Province. Beyond the Provincial Commissioner, Local Authorities report to the

Minister of Local Government and Urban Development. On behalf of the central government, the Minister controls and regulates Local Authorities through the many legal powers he has under the Local Government Act and other laws. For instance, he has the power to create, amalgamate, or abolish any single Local Authority unit or an entire category.[4]

Secondly, by adopting a restructuring that heavily favored consolidation of the center at the expense of sub-regionality, the Kenya government had opted for a centralized system of government and economic development. This strategy was incorporated in major policy and development instruments. The Five-Year Development Plan of this period, for instance, defended the rationale for centralization by arguing that "...the ultimate power to guide and control the use of all [national] resources belongs to the State [cf., the Central government]...[An] increase in the role played by the [central] government is necessary to ensure an efficient and complete use of resources" (Kenya: Development Plan, 1974-78: 11).

The second portion of the post-independence changes began towards the end of the 1970s. The changes were primarily sparked by one major problem into which centralized planning had run by then. This forced the government to review the role of the Local Authorities in nation-building.

The essence of the consequential developments consisted of the abandoning of centralization in favor of decentralization. The new approach had been mooted since 1978 following the death of our first president, Mzee Jomo Kenyatta. But it was not launched until July 1, 1983. The main reason for this reversal was the excessive cost to the government due to centralization. By taking away functions from the Local Authorities, the government had taken on too much too soon. Some statistical evidence is called for.

The governments' recurrent expenditure (in nominal terms) increased from K£ 61.2m. to K£ 68m. in the first year of transfer (Kenya: Dev. Plan, 1984-88: 16; Budget Speech, Fiscal Year 1973-74: 6). As adjudged thereafter by the growth of the development expenditure item in the annual budgets, the trend became one of rapidly expanding budgetary deficits. For instance, in the fiscal year 1973-74, the development expenditure was K£ 68m., out of a total expenditure of K£ 222 (i.e., 31% of the total). As against the available revenues, this created a budget deficit of K£ 7m. (Kenya: Budget Speech 1973-74: 6). By the fiscal year 1977-78, the item had grown to K£ 112m. out of an estimated annual expenditure of about K£ 513--which, though a moderate 29% of the total expenditure for that year, marked a 61% increase over the 1973-74 level.

It is admitted in government sources that the escalation in recurrent expenditure arose from the costs of providing the transferred services: notably health and education (see, for example, the Budget Speech, 1973-74: 5). The burden also arose from the need to increase general grants to enable the Local Authorities to pay salaries, pensions, and the cost of remaining services. This was crucially needed since certain of their major revenue resources were being taken away anyway.

Excessive cost came from other causes too. The 1970s were the years of the oil crisis and its destabilizing impact on Third World budgets. Kenya did not escape this crunch. The oil crisis came at a time when the rate of growth in the domestic economy was just entering the downward trend that still persists to date. But more seriously, cost came from a geometrical rise in the demand for public services as a consequence of a fast growing population. The population had grown from a modest 9m. in 1963 to 15m. by 1979. This was a 60% increase in just 16 years. The trend was worrisome because at a 4.2% annual rate, this was the fastest growing population in the world (Kenya: Statistical Abstract, 1987: 40, 52).

In two National Leaders' Conferences (1978 and 1980), the new president, Daniel arap Moi, took decision to steer the government away from spiraling costs. Centralization was

condemned not only for its excessive costs, but also for its inability (as a development strategy) to address problems into which the country had grown. Decentralization of the development process (not of the government) was instead adopted (Kenya: National Leaders' Conference, 1978: 26; Development Plan, 1984-88: 96).

The launching of decentralization marks the current major step in the development of Local Authorities in Kenya. Because of the specific role the Authorities are to play in the process of decentralization, their status and importance have been recognized. Unlike in the early post-independence period, when all effort was expended to suppress them, the second portion of the independence era has acknowledged their role and sought to rehabilitate them. This recognition has found expression in all the subsequent national development plans. For instance, the Fifth Five-Year Plan (1984-88: 172) declared:

> Local Authorities were established to encourage participation of people in their local affairs and to enable the government to become responsive to the needs and wishes of the people either directly or through their elected representatives [The Councillors to Local Authorities' Assemblies].

The Local Authorities' specific role in the process consists of project-initiation as well as the implementation

of a number of functions newly assigned to them. Decentralization is popularly known as the District Focus because the district (and hence the County Council) is both the initiator and executor of development decisions. The role left for Nairobi is financing and national coordination. County Councils are integral members of their respective District Development Committees. The Committees are the policy organs whose duty is to initiate development programs, prioritize and implement them (Development Plan, Ibid., p. 96).[5]

Decentralization is, on one hand, quite welcome for restoring an institution that had otherwise been laid to waste. On the other hand, however, it has contributed to the problem that is the central inquiry of this study. I will later explain how. For now, let me draw some pertinent conclusions from the foregoing history.

Despite a somewhat turbulent metamorphosis, Local Authorities did not only survive an onslaught that was broadly catastrophic. They even emerged more appealing. This says something about their residual utility. It would have been disastrous and quite unwise to dispense with institutions that had made some positive contribution to Kenya's public administration and development. Let me briefly elucidate this contribution.

Administratively, the creation of the Authorities helped put a definitive form to tribal (and other) settlement. This was in itself significant because, firstly, it contributed to peace. That is, it pre-empted the pre-colonial viciousness of determining tribal settlement by inter-tribal warfare. Secondly, as a consolidation process, the Local Authorities beget (or at least influenced the establishment and development of) other administrative units, i.e., the administrative location, district and province. In broader terms, the Local Authorities helped tremendously in the legal determination of the structure and system of public administration in Kenya.

With modifications as discussed earlier, the African government more or less adopted the boundaries, the Law and administrative practices created by the Authorities in the colonial times. In most of the former African District Councils, the major change consisted of renaming the units. For example, my home African District Council of Kakamega became Kakamega County Council. Thus peace was fostered by, among other things, the creation of definitive and viable units of local government. This, together with other considerations, helped us to transit into a viable post-independence state with smoothness rare in many parts of Africa.

Politically, the coming of the Local Authorities introduced our people to the institution and principles of modern democratic government. The introduction of elections and elected representation at the local level, as already mentioned, are monumental examples of this. The practices spread to the national level and indeed to other organized institutions such as trade unions. The nurturing of our political leaders into the acceptance and appreciation of these practices has helped Kenya to institutionalize and regularize parliamentary and civic elections. Subject, of course, to certain limitations (e.g., in the area of political pluralism), these practices have equipped our people with a means to participate in the political process (at both national and local levels) and thereby determine their destinies.[6]

Economically, and perhaps most significantly, the legitimacy of Local Authorities today emanates from the role they have hitherto played in local development. This is in reference to the functions they have been assigned to perform and the consequential services they have provided to their constituents since their inception.

In the area of education, for instance, African District Councils were a primary source of bursaries and scholarships

that enabled many needy Africans to acquire education. Indeed, the Local Authorities built schools, developed curricula, and paid the teachers. They built rural-access roads, water facilities, and health clinics.

Although in 1969 this role appeared severely negated, the difficulties of development compelled us to re-think the status of the institutions. Given that the Authorities are today required to render even more exacting services, their retention is not out of our sympathy for them. It is out of their crucial role to us.

However, their recognition as central players is not simply built on their historical tenacity as the foregoing discussion tends to suggest. The role of Local Authorities enjoys wide support from the intelligencia as well as from proven successes in countries where they have been vigorously utilized in development.

There is a trail of academic opinion that points to the significance of Local Authorities as a reliable organ of rural development. Throughout the 1970s and 1980s, development theorists have been preoccupied with the task of identifying programs and institutions that best serve peasants in the Third World. The search has been guided by the need to identify institutions closer to the rural people, free of

elitist manipulations and government bureaucracies. It is often argued that only institutions with these characteristics can best act as conduits of delivering development programs and materials designed to improve the economic welfare of the peasants.

From this effort there has emerged the consensus that certain local institutions (e.g., cooperatives, village or religious leaders, neighborhood organizations, and NGOs) are ideal in advancing rural development.

Local governments have often been cited as one of such appropriate institutions. Their suitability is said to arise from their proximity to the needy masses, and from their long historical association with these people as institutions of local administration (as their history in Kenya has shown). Let it not be forgotten that the rural Local Authorities are, in virtually all Third World countries, home to the majority of the population. In Kenya, for instance, it is currently estimated that more than 80% of our population (of 20m.) live in rural areas (Kenya: Development Plan, 1984-88: 58). Although it is projected that some of this population will have migrated to urban areas, the migration will present only a 10% reduction by the year 2000 (i.e., 84.7 to 74.4%--Kenya: The Sessional Paper, 1/1986: 41). And given that the government vigorously pursues a "return-to-the-land" policy

under decentralization, it means County Councils in particular will foreseeably continue to be home to the majority of Kenyans. It is therefore worthwhile to identify and strengthen institutions such as these because of their strategic proximity to and potential contribution toward the alleviation of the poverty of the majority.

For instance, Dale Marshall has examined the role of state and local governments in augmenting federal effort in the fifties and sixties to develop rural America. She argues that with correct linkages (control and assistance) intended to avert subversive elitist forces, these governments helped tremendously in the delivery of the relevant programs (Dale Marshall, Chapt. 2. See Chapter Four for the details of this approach).

Applying this scenario to Third World development strategies, it can be argued that here governments dominate rural programs (through their own agencies or regulatory laws). It may not be easy to find institutions free of central government intervention or private forces through which the rural masses can freely be reached. Out of desperation, any institution that shows a glimmer of proximity to the rural people must be supported. It is in this vein that regard has often been had for Local Authorities.

Other studies go further to give the economic perspective of the foregoing argument. They reason that it is wrong strategy for governments in the Third World to shoulder all the responsibilities of development. They have no capacity nor means to achieve the goals of such ambitious undertaking. Indeed, such an approach is unmanageable because of bureaucratic excesses and the consequent costs and inefficiencies inherent in it. And for sure, the experience of Kenya with centralized planning seems to support this contention.

To ease pressure on the center, the argument continues, there should be decentralization whose aim should be, *inter alia*, to involve a wide spectrum of participants and development resources at the local level. This re-orientation of the development process is said to be capable of cutting costs and inefficiency. Consequent upon this, both growth and development can be restored in an economy otherwise doomed to stagnation. The positive results of decentralization are said to flow from its intrinsic economies. The economies include grassroots participation, efficiency, and democracy (John Cohen and Richard Hook, 1986; Glynn Cochrane, 1983; Richard Harris, 1981). These economies are too familiar today to require further explanation.

There are a number of success examples of this strategy. It has been argued, for instance, that Japan could possibly not have achieved dramatic recovery from the ravages of the Second World War if it had not, among other measures, intensively used peoples' participation through their local governments (FAO Report, 1964; Bruce Johnston and William Clark, 1982: 82-86). Nor would Brazil ever have tasted a flare of development it exhibited in the 1970s and early 1980s (Glynn Cochrane, 1983: 9-10).

By reverting to decentralization, and by co-opting Local Authorities as integral participants in the process, the Kenya government has thereby acknowledged their role. Further, this is *ipso facto* an expression of commitment to their viability and all-round strength if they are to discharge their onerous tasks. But even though, are these institutions strong and a going concern?

## 1.2 THE PROBLEM: LOCAL GOVERNMENT IN FINANCIAL CRISIS

Local Authorities in Kenya today face enormous financial difficulties. These difficulties are visible, widely acknowledged and disturbing: visible because of their often dramatic and tumultuous manifestations, widely acknowledged because they, too, have had a long history. The difficulties

are disturbing because of the disgraceful image they have consequently brought to bear on an institution we all recognize as a cornerstone of development.

As stated earlier, these difficulties constitute the problem to which this study is devoted. In broader terms, Local Authorities have too inadequate revenues to stay viable and operational.[7] The situation has perhaps deteriorated to a point of crisis. Consequently, the Authorities have been rendered incapable of sufficiently (if at all) rendering their service obligations to their constituents. Therefore, since we expect them to play a significant role in development, it is obligatory upon us to salvage them.

Some illustrations of the problem are apt in order to grasp a sense of its existence and magnitude.[8] First, an increasing number of Local Authorities are today unable to pay their ordinary recurrent bills. During my seven months of field work in Kenya, I observed several cases of councils being unable to pay salaries to their staff, or to make contributions to their workers' pension funds, or to settle modest court fines. It was these incidences that brought to the surface the drama and ignominy.

For example, Nzoia and Siaya County Councils, and Busia Town Council had totally failed to pay salaries in the course

of 1988. Siaya had failed to pay for the whole year, Nzoia for five consecutive months, and Busia for periods not yet determined then. Area members of parliament had protested, and workers--together with their Local Government Workers' Union--threatened a national strike action.[9] My home County Council of Kakamega had not remitted employees' cooperative savings for over six months.[10]

Councils in debt default were many. They included Kenya's second biggest city of Mombasa, and other major towns like Malindi. These two had lost their property to court bailiffs for totally failing to meet court orders.[11]

Secondly, since the end of the restructuring in the late 1970s, a number of Local Authorities have collapsed as a result of lack of revenues. The central government has had to intervene in all cases to rescue them. A living example today is the collapse of Nairobi City Council in 1983. This was the most unexpected occurrence and hence the most disturbing. Nairobi is the capital city of Kenya. It enjoys a vast base of revenue resources because of an enormous business base. And yet, lack of revenues was the primary cause of its collapse.

The Nairobi City Council had reached a stage where it totally failed, among other things, to collect garbage--

leading to the adage that this was no longer a city in the sun but one in the garbage. Since 1983 the City has been managed by a Ministerial Commission which is equally paralyzed by the same old problem. Nairobi residents have often had to resort to neighborhood self-help organizations to tackle the most consequential problem of garbage disposal.[12]

Thirdly, all the studies available to me regarding this issue describe the Local governments' revenue position in very negative terms. Paul Smoke, whose study focuses primarily on the income-expenditure depiction of the problem, thinks the financial position is "mediocre to poor" (Smoke, 1987: 76). Maundu Ndisya and Irene Nderitu, whose studies focus on the broader question of the survivability of the Local Authorities given their somewhat neglected state, regard the revenue position as "nagging, chronic and catastrophic" (Maundu Ndisya, 1984: 41; Irene Nderitu, 1987: 66). Even more disturbing is the now standard conclusion from these studies to the effect that the revenue position is so despicable that even when the Local Authorities show surpluses in their budgetary processes (and indeed we shall see this in Chapter 2), it is frequently sheer manipulation of various accounts (Siganga A, 1986: 66; Paul Smoke, *op. cit.*, 76).

Fourth, I interviewed various citizens as to whether or not their County Councils had served them satisfactorily since 1963. The samples of those interviewed were not systematic and therefore neither can be considered representative nor conclusive. However, I used them to get some insight into the existence of the problem.

The majority of those interviewed thought that Council services had been unsatisfactory. Among the reasons given for this was the belief that lack of revenues was perhaps the most serious cause. In corroboration to this public reaction, there were the somewhat suppressed admissions of the County Councils themselves. In addition, a perusal of their budgetary documents strongly suggested the existence of the problem. In the next chapter, empirical data will be given to show the aspects of the budgets that encouraged this observation.

Let me now illustrate the problem by pointing to the central government's confession. The government of Kenya agrees that indeed Local Authorities are experiencing long-standing problems. Leaving aside the other issues apparent in Table 1, the bottom line is that the revenues of the County Councils do show a trend of constant deficits during the substantial portion of the 1980s. Except for the surplus of 1983, the rest of the fiscal years recorded deficits. It is

TABLE 1: County, Town and Urban Councils Economic Analysis of Expenditure (1982-1985)

Analysis of Estimated Revenue: 1982-85 (Kf '000)

| | 1982 | 1983 | 1984 | 1985 |
|---|---|---|---|---|
| Current Revenue | | | | |
| Direct Taxes (Rates) | 923 | 1,072 | 933 | 1,700 |
| Indirect Taxes Licenses and cesses) | 6,078 | 5,591 | 4,701 | 5,107 |
| Income from Property | 1,302 | 1,539 | 670 | 1,456 |
| Current Transfers | 1,368 | 629 | 371 | 189 |
| Sales of Goods/Services | 3,481 | 4,112 | 1,530 | 4,239 |
| TOTAL CURRENT | 13,152 | 12,943 | 8,265 | 12,691 |
| Capital Revenue | | | | |
| Loans Raised | 1,695 | 2,863 | 74 | 3,380 |
| Grants | 14 | 2 | 70 | --- |
| Loan Repayment | --- | 6 | --- | 23 |
| TOTAL CAPITAL | 1,709 | 2,871 | 144 | 3,403 |
| TOTAL REVENUE | 14,861 | 15,814 | 8,409 | 16,094 |

Analysis of Expenditure: 1982-85 (Kf '000)

| | 1982 | 1983 | 1984 | 1985 |
|---|---|---|---|---|
| Current Expenditure | | | | |
| Labor Costs | 7,963 | 8,253 | 5,057 | 8,459 |
| Other Goods/ Services | 2,615 | 2,772 | 1,856 | 3,370 |
| Transfers to Households & Enterprises | 323 | 268 | 124 | 664 |
| Transfer to Funds (Current) | 165 | 362 | 120 | 270 |
| Interest | --- | 1 | --- | --- |
| TOTAL CURRENT | 11,065 | 11,656 | 7,157 | 12,763 |
| Capital Expenditure | | | | |
| Gross Fixed Cap. Formation | 5,476 | 550 | 3,061 | 7,134 |
| Loan Repayment | 176 | 220 | 103 | 390 |
| Transfer to Funds (Capital) | 75 | 64 | 20 | 211 |
| TOTAL CAPITAL | 5,727 | 824 | 3,184 | 7,735 |
| TOTAL EXPEND. | 16,792 | 12,490 | 10,341 | 20,498 |

interesting to note, as a primary cause of this, the termination of general grants from 1981, and the decline in the major revenue sources--notably indirect taxes and incomes from property--between 1983 and 1984. It is granted that local governments, unlike private corporations, need not always record surpluses. However, it is for the sake of fiscal responsibility and the need to remain committed to satisfactory levels of service rendition that concern for deficits must be strongly expressed. I know of no government in the world today that would disregard striving toward a balanced budget.

It can rightly be said that there is evidence recognizable to the government itself to suggest a general decline in the revenues in the 1980s. It is therefore important to watch this trend in the future.

**Historical Antecedents of the Fiscal Crisis**

Let us examine the root causes of the problem. There are four broad and somewhat inter-related factors. First, the restructuring of the Local Authorities in the post-independence period while meritorious in its eradication of the apartheid nature of the institution, did totally overshadow consideration of their financial sustainability. The transferring of functions, the re-drawing of boundaries

and the consequential placement of the Authorities under the muscle of provincial administration, enkindled the kind of inimical perception that could hardly encourage a sober inquiry (or any at all) into their financial strength. The consequence was not just an erosion of the institution's image and role; but a missing of an opportunity to reflect upon and arrest a problem whose eruptions we are witnessing today. Critics were quick to notice this and to charge that because of these happenings Local Authorities had ceased to be "local nor government" (Walter Oyugi, 1983: 137). Others even called for their abolition (ALGAK, 1969: 1; Patricia Stamp, 1986: 33).[13]

Secondly, the problem was exacerbated by the reversal of the centralization policy which had been the engine behind restructuring. On one hand the reversion was good news in that the institutional role of the Local Authorities was restored. But on the other hand, the resultant decentralization approach began a process of returning old services as well as the assignment of new ones. The germ of the problem lay in the fact that the restoration and assignment were not matched with new revenue resources. It is admitted, as we shall see later, that start-up revenues were promised from the central government. Ultimately, however, the Local Authorities would be expected to be self-sustaining. Broadly, the effect of service-obligations

without corresponding revenues was to punch-up pressure on the limited revenues available. This added to the difficulties exemplified above.

Thirdly, the most revenue-dehydrating blow came from certain acts or omissions that were part of the centralization. I have already mentioned the phasing out of the GPT and general grants. By some kind of tacit policy of omission, the government neglected or refrained from a review and re-alignment of the remaining revenue resources to bring them in line with the restructuring process or, at least, the changes that were taking place in the country. For instance, land rating (a rudimentary form of land tax) which had successfully applied in white-settled County Councils prior to independence, was not popularized and expanded in the new councils. The result has been that many County Councils do not apply the tax because it has been too dormant to be capable of revival.

Though cess, service charges, licenses and fees remained the major revenue sources for the Local Authorities, their revenue performance was hardly reviewed (or sufficiently, if at all) through the 1960s and 1970s. Their revenue capacities cannot therefore be said to have been made responsive to the ever-escalating expenditure needs. For instance, their rates stagnated throughout the period at levels that were (and still

are) quite asymmetrical to their potential productivity. A number of studies which we shall encounter in the later discussions consistently pointed out and disrecommended the discrepancy.

Disregard for review has today added to other factors that have frustrated the expansion of Local Governments' revenue growths. In response, councils have, as the discussion in the next chapter amplifies, sacrificed their service commitments in favor of their own sustainment. The bulk of their limited revenues goes to the payment of staff salaries and Councillors' allowances.

Lastly, it has been widely noted that inefficiency and corruption on the part of the Local Authorities have contributed to the problem. Due to their significance to the other themes of this study, these two aspects have been examined in detail later. However, it suffices to mention here that the annual audit and inspection of the Local Authorities by the central government do always point to the existence and the ramifications of these phenomena (see, for example, Kenya: Report of the Controller and Auditor General on the Authorities, 1981: 4-7). These audit reports have sufficiently been corroborated by findings of independent studies. The overall conclusion from these sources is that the existence of inefficiency and corruption have, among other

things, made it difficult for Local Authorities to collect all the revenues they are entitled to, nor to use whatever is available in an accountable manner.

What is being done to confront this problem? Surely, if the Local Authorities are as important to development as we do acknowledge, we must find ways and means to rescue them. Let us next look into the rescue effort.

## 1.3 THE SEARCH FOR A WAY OUT

A number of remedial measures have been suggested. They do, of course, include the rather untenable view that the Local Authorities be abolished if they cannot afford to be viable revenue-wise. The argument behind this position is essentially that retaining unsustainable units and departments of government constitutes a serious drain on meager national resources. Just as certain unprofitable public corporations (e.g., the National Construction Corporation, and KENATCO) have been disbanded or privatized to stop the revenue drain, so too should the Local Authorities. Though the abolition movement was strong during the restructuring period, it seems to have lost most of its steam today. At any rate, given the status the Authorities enjoy today, abolition as a remedy has lost integrity.

### (i) Existing Suggestions

There are four suggestions that deserve some reflection. First, a number of studies have emphasized the importance of tackling the inefficiencies that bedevil the administration of the Local Authorities' current revenue sources. The central argument here is that even if most of these (tax) sources are inherently poor-revenue performers, whatever they are capable of producing will not be fully realized if the Local Authorities are lax in assessments, collections and enforcement.

The frontliner here is Paul Smoke (1987). He was from 1987 to 1989 part of a USAID/Kenya Mission, advising the Kenya government on a variety of issues relating to urban-rural planning. In one of the studies in which he has examined the local government revenue situation, he primarily argues that inefficiency is one of the major causes of the difficulties confronting Local Authorities. He has reiterated this stand in a number of correspondences I have had with him and, as I have been made to understand, in his other studies I have had no opportunity to access.

His study focuses on twenty-five Councils (urban and rural) over a period of nine months in the fiscal year 1987. From an extensive review of data on the incomes, expenditures,

and population of these councils, he argues in essence that there is a serious "collection-inefficiency". In his view, the administrative machineries of these Councils have virtually broken down in collection-efficiency terms. Although he does not show how, he is supported by earlier studies on the subject (Gitonga Aritho, 1980 passim; Gilbert Njuguna, 1984: Chapt. 4; Hellen Owino, 1984: Chapts. 3 and 4).

Smoke's suggestion that collection or administration be tightened is admittedly reasonable. Indeed it does state a correct proposition upon which there is wide agreement. And for sure it will be revisited in Chapter Four. Any viable remedy to beef up the revenue position of the Local Authorities must emphasize to them this concern to ensure that current taxes are made productive.

However, as a remedy intended to tackle a monumental problem, it has shortcomings which must be noted. It is, for instance, oblivious to certain technical limitations from which the current sources (the taxes in particular) suffer. Take the poll tax, for example. It is today applied by County Councils under the Poll Tax (Regional) Enactment Act of 1964. This legislation was the legal authority from which the *Majimbo* derived their taxing authority. The abolition of the *Majimbo*, *arguendo*, repealed the statute. Attempts to apply it today

must be regarded legally questionable--more so since the abolition of the poll tax (or the GPT) itself.[14] Kenyans have indeed questioned the legality of the tax today (the *Daily Nation*, June 16, 1978: 33 and July 11, 1978: 7). As a result County Councils are admittedly reluctant to enforce a tax whose legality is in issue.

Besides issues of legal legitimacy, revenue performance of some of the current taxes may suffer from a combination of other factors which cannot wholly be handled by efficient collection. For instance, charges, licenses, or fees may be constrained in terms of revenue productivity by the somewhat restricted nature of their bases. The services on which they are levied largely depend on voluntary demand. Although it is true that failure on the part of a Council to track down a license defaulter impinges on revenue collection, it is equally important to note the limited demand for the relevant services that characterizes the Third World situations. Respectfully, this cannot be remedied by efficient collection alone, if at all. Similar reservations will be expressed later in regard to cess.

Further, the underlying assumption in this argument can be assailed. To assert for tight administration exclusively presupposes that the current revenue sources are adequate

barring relaxed enforcement. Smoke's analysis does not demonstrate this. Neither do I know of any that offers help. Opinion that redress must be broader than patched administration exists (as the later discussion shows). And this is strengthened further by the approach the government itself has taken in its response to the problem.

Secondly, it has been suggested that for a remedy the government must trim its expenditure levels. The thrust of this argument is that if there are no sufficient revenues (and there never will be), public expenditure must be curtailed. And along with this, steps must be taken to privatize inefficient public-sector services. The streamlining must be undertaken at both national and local levels. At the latter, the effort should go farther to ensure that rates for taxes such as service charges, fees and licenses, are not fixed at subsidy levels. They must, instead, reflect the actual market costs of providing the services in question. The economic perspective of this argument is broader and more complex than what is needfully stated here.

The IMF is the leading exponent of this view (The World Bank, 1984: 11-24; 1987, passim). The advocacy for expenditure cutting, more so its emphasis on the withdrawal of subsidies from basic services and food commodities, has not been well-received in most developing countries. The

objection, in its usual metaphor, is that IMF remedial packages are often blind. They are more or less a prescription of malaraquin, whether the patient is suffering from malaria or a broken leg. Besides their insensitivity to unique circumstances of different countries, these measures do refuse to recognize that in poor nations of the Third World it is only the governments that have capacity to spend so as to build a capital base, development infrastructure, and provide basic services to the masses. At least at the "take-off" stage, elaborate public expenditure must be seen as an input that is both inevitable and urgent. Its curtailment has directly led to the bread-riots that we have widely witnessed in the Third World. This eventuality makes expenditure trimming unpragmatic, if not dangerous.

Thirdly, others argue that the central government should restore general grants to Local Authorities. This is the very antithesis of the anti-expenditure campaign. Naturally, the Local Authorities themselves are the lone champions of this suggestion. Immediately, this deprives the suggestion of the support needed in our kind of situation.

Nobody doubts the need for some form of grants. Indeed, the government gives capital grants for projects Councils alone would have no capacity to fund. Grants for the general revenue fund are also given to basket cases, i.e., to Councils

like Wajir, Isiolo, and Marsabit. These have no revenue capacities of their own due to genuine causes, e.g., a hardship locale, or economic marginality (James Kayila, 1989: 64-76).

However, there are good reasons for disavowing support for grants to beef up the revenue fund. Local Authorities, in the first instance, must be encouraged to develop autonomy on many fronts, including the development and realization of revenue resources. Over-dependence on government handouts is detrimental to their ingenuity to initiate, prioritize, and implement local projects.

Further, salivating for grants is evidence of laziness and defeatism. If pushed to fending for themselves, in addition to pressures to show cause for outside support, Authorities would be driven into the search for potential revenue sources available locally. A look at the initiatives and drive of Councils like Alameda and Contra Costa in California has persuaded me that deprivation is capable of inspiring the search for potential solutions from within the locality. Councils in Kenya have even more cause to explore local potential. The government, after all, takes the view that there is ". . .diversity of revenue potential in the County Councils" (Kenya: The Sessional Paper, 1/1986: 51). And indeed, the government has (see Chapter Three) started to

push the Councils to realize this potential. Grants were terminated to encourage Local Authorities to move in this direction anyway.

Fourth, there is also the contention that the Local Authorities' revenue problems stem from the over-kill controls from above. Therefore, redress must primarily consist of removing a substantial portion of the controls. This will allow for some autonomy needed in the synchronizing of service obligations with available revenue resources.

Sindiga and Wegulo have advanced this view most forcefully. They have discussed this position within the context of the District Focus program. It is their argument that given the constitutional controls (which empower Parliament to censure Local Authorities as sub-parts of the central government), and the administrative ones (that empower the Minister of Local Government to create or dissolve the Authorities, control their budgetary processes, regulate their tax powers, etc.) , the District Focus aggravates the position by adding a further layer of controls. Under the Program, the Local Authorities must now submit their capital development plans to the District Development Committees for approval. It is only after the Committees have endorsed these plans that the Authorities can forward them to the Minister in Nairobi.

The Minister then exercises his controls by rejecting or approving the plans (conditionally or otherwise).

Implicit in this argument is, perhaps, the point that funds may be approved in part or not at all; or the approval may come after the project environment (particularly in regard to input costs) has substantially changed. These eventualities would have the total effect of stiffling or otherwise throwing the budgetary process of a Local Authority off-course, and thereby resulting in the kind of financial despair that prevails today.

The contraction of controls, Sindiga and Wegulo go on to recommend, can be achieved through the redefinition or moderation of the center-periphery relations. Instead of the present pure up-down command model, a partnership status should be established. They do not tell us how. Presumably, they are calling for a consultative rather than a command approach in regard to initiation and dispensation of development decisions, and the ancillary revenue management. In conclusion, they posit that this arrangement is bound to produce economies of ingenuity in revenue planning (Sindiga and Wegulo, 1986: 136-9).[15]

Admittedly, this argument is admirable in its general theme. My subsequent discussion has in various respects

agreed that autonomy is both proper and necessary. Indeed, the resurrection of the Local Authorities revenue-wise must incorporate some corresponding "adjustments" in the center-periphery linkages.

However, its advocacy for a partnership status *in simpliciter*, is somewhat unpragmatic. The reasons for this are not far to see. The political fluidity of the African states does appear, at the moment, to render redefinitions of this kind of relationship rather unattainable. In the first instance, given the sub-national character of our tribe-nations, the central government must always be in sufficient control to hold the nation together.[16] Further, controls are not without good reason, given the budding stage of our institutions. They may, for instance, ensure sound expenditure policies at the local level through checks and audit. Controls do also serve a coordinating role to see to it that distribution of national resources is equitable region-wise (see the very picturesque justifications by Davey Kenneth, 1983, Chapt. 1; Moses Kayila, 1980: 8-16).

Most significantly, autonomy or partnership, if anything at all, appears to be a rather tangential way of dealing with the revenue problem. Autonomy may help more in the better expenditure of the resources available than in their

generation. I am inclined towards the position that the search must concentrate on a remedy that tackles the heart of the problem, i.e., one that identifies means of revenue generation. This is what the next discussion seeks to suggest.

### (ii) Taxation of Land for an Alternative Approach

This study proposes to examine the feasibility of applying a tax on land ownership in Kenya as another alternative way of meeting the problem at hand. My central thesis is therefore that the Local Authorities deserve direct revenue strengthening so that they can, in turn, render services to our people. In this way they will help in the uplifting of our peoples' living standards. Taxation of land may be one other, and perhaps a more direct, way of strengthening.

My approach stems from the perception that the problem is an acute lack of revenues. The foregoing suggestions do not seem to centrally address it. Let there be revenues first before we can talk of their efficient administration; whether or not grants will be necessary; or the extent to which controls should be eased.

The idea of a land tax in Kenya is not new. It has a history that is as long as and contemporaneous with that of the Local Authorities themselves. Let me briefly reflect upon its pertinent points.[17]

Taxation of land was first suggested in 1900 as part of a general scheme to introduce taxation in the colony. But it was determined inapplicable for a number of reasons. The major one was lack of a number of prerequisites--most notably--cadastral information (Thandi, 1984: passim; Hicks, op. cit.: 214-220, 332-4, 402-12; Nizar Jetha, 1966). However, because such information was possible in urban areas, decision was taken to apply the tax there. This can be said to be the debut of land (or property) taxation in Kenya.

After the First World War, it was decided to extend the tax beyond the municipalities. As a result of revenue constraints arising from the cost of the war, rural Councils were to be encouraged to be self-sufficient. Upon the recommendations of the Feetham Commission of 1926, and amid stiff opposition from land owners, the tax was finally introduced in County Councils (or in white-settled areas). The African District Councils were left out because it was virtually impossible to determine various cadastral factors in a situation where the imprecise African customary law governed land tenure.

The year 1926 is, therefore, a watershed in our history of land taxation. Up to the time of independence the position remained as described above. Notable developments of the period, however, included the emergence of legal rules that were later to develop into the Land Rating and Valuation Statutes we shall encounter later. Quite significantly, the base for the tax was defined. The tax was to fall on "agricultural land" (obviously so in the case of the rural Councils). The taxpayer was the land-owner, not user. The appropriate rates were imposed on unimproved value of the land--a flat rate per acre graduated according to the use of land as pastoral or agricultural (Aritho, *op. cit.*, 56-58). Attempts by Lord Moyne's Commission to impose a "cultivation tax" (based on the assumed value of crops) on the Africans were rejected (Lord Moyne: 1932). We therefore inherited some kind of land tax from the colonial government.

The fate of the tax in the post-independence era is closely related to the restructuring through which the Local Authorities underwent. Prior to the 1980s the tax was virtually discarded. Although the government's declared policy was to introduce (or expand) property taxes, the political atmosphere in the 1960s and early 1970s rendered this intent unrealistic. The *Mau Mau* (war of independence)

had been waged on the inviolable understanding that land would revert to Kenyans unconditionally. Therefore, a land tax would have been immediately resisted.[18] Technically, however, the tax would have been inapplicable anyhow due to lack of cadastral information.

By the early 1980s, however, the government started to express interest in a broader idea of land taxation. The primary point was that land was going to be taxed as one way of coaxing its efficient utilization. A number of reasons accounted for this policy-stand, including of course, food shortages traceable to idle land. One must also mention the apparent relaxation in the political sensitivity of the land by this time. Policy instruments of the government repeatedly expressed fears for idle land and the urgent need to take remedial steps that would include the use of the tax (e.g., Kenya: Sessional Paper 4/1981: 14-26; Sessional paper 4/1982: 19; Sessional paper 1/1986: 89-90, 114-115).

Most relevant to this study was, however, the policy declaration of 1984. In the Fifth Development Plan launched that year, it was revealed that the tax was being studied "as a possible source of revenues in the districts [cf. County Councils] where land registration had been completed" (Kenya: Dev. Plan, 1984-88: 51). It should be recalled that this declaration came a year after the commencement of the District

Focus. This is significant in the sense that it gives us some insights into the government's realization that districts (cf., County Councils) must be made revenue-buoyant if they are to be able to execute their decentralization assignments. Notice also the indication that the application of the tax was considered possible because of progress made in the land registration process that far.

This declaration was significant. In historical as well as real terms, it seemed to strongly suggest that taxation of agricultural land for the purpose of revenue-generation was staging a comeback. Further, upon its return, it would not be as restricted to certain units of the Local Government as it had been in colonial times. To the contrary, it would be more concerted and widespread to all districts (or County Councils for that matter) as land registration progressed.[19]

What is the position today beyond these policy statements? Has there, in other words, been any practical movement towards the realization of these policy intents?

In 1986 a Commission to inquire into the use of the tax as an input of efficient land use was promised (Kenya: Sessional Paper 1/1986: 115). In 1989, it was reported that "preliminary work" on the setting up of the Commission "had already been started" and that the task force would be "fully

commissioned during the [current development period]" (Kenya, Development Plan, 1989-1993: 60). This being my most current state of information, I am led to the conclusion that some practical step, at least in planning terms, has been commenced on the tax vis-a-vis the land-use question.

In regard to the use of the tax as a source of revenues for the County Councils, one has to look for indications farther afield. Since 1988, the government has embarked on certain measures towards addressing the Councils' revenue problem. In essence these steps are aimed at broadening the Councils' revenue bases by strengthening the current tax resources, or identifying new ones. Due to the significance of these measures to this study, their further analysis has been merited under Chapter Three.

Perhaps more than any other factors, these steps make it more worthwhile to call for a land tax. Arguably, the position seems to be that since the government itself intimates that base-broadening (or identification of new resources) is the preferred general thrust of the search for a remedy, the envisaged tax squarely fits into this scheme. Its application would intrinsically be an effort to identify or, more accurately, revive a source that has hitherto only been politically dormant. After all, there is a policy commitment on record to apply the tax as a revenue measure.

## 1.4 THE STUDY BASE

As part of the preparations to study this alternative, I undertook a seven months' field research in Kenya. I focused my observations on five County Councils. These were Kakamega, Wareng', Masaku, Narok and Taita Taveta.

There were general reasons for singling out the County Council category of Local Authorities. In addition, there were specific ones for zeroing in on these five. The primary considerations for choosing the County Council category were that the land which is to be the base for the suggested tax lies within their jurisdictions. Besides, since the study urges, *inter alia*, that these Councils be made the taxing authorities of the tax as well as beneficiaries of revenues generated by the tax, it is logical that we examine them in these and other relevant respects. It is also important to recall at this point the importance of County Councils both as institutions of rural development and as home to the majority of Kenyans.

The sampling of the five Councils was dictated by thematic needs of the study. Each Council represents a factor, common or particular, the analysis of which draws attention to primary issues that deserve careful reflection

if the envisaged tax is to be a success. Some of the factors present obstacles to be overcome. Others highlight experiential bases worth exploiting. Let me now point out these factors as I outline a general profile of each Council.

Kakamega County Council is administratively part of the Kakamega District, with which it shares common boundaries. Both are in turn one of the three districts (or County Councils) that constitute Western Province. Kakamega, therefore, lies in the west of Kenya, approximately 350 km. west of Nairobi and 80 km. from the Kenya-Uganda border.

Historically, Kakamega is one of the oldest Councils. It was one of those established from the very outset to be home to one of Kenya's predominant tribes. For this reason, Kakamega became home to the Luhya tribe (the third largest today) and the center of Luhya political and cultural life. The Luhyas had a kingdom form of government led by *Nabongo* (King) before the coming of the British. Prior to independence the Council was known as the North Nyanza African District Council.

As an old home to a major tribe, Kakamega played a significant role in the independence struggle. By the early 1920s (and along with other councils in Central and Nyanza

provinces) it had become a cradle for organized political activity through organizations like the North Kavirondo Tax Payers Association. This was partly due to a substantial number of enlightened servicemen returning from the First World War; and also because of a growing number of educated elite. This enlightened group of people were themselves the product of a strong Christian missionary education activity, and a buoyant socio-economic infrastructure in the area. Among our frontline nationalists, several of them came from Kakamega or thereabout (e.g., Musa Amalemba, Joseph Otiende, Masinde Muliro, and Arthur Ochwada). Kakamega continues today to play a leading role in national life because of this long history, a strong agricultural base, a supportive climate, and a well-developed economic infrastructure.[20]

The significance of Kakamega County Council to this study arose from the factor of its enormous population. With a land area of only 3,520 sq. km., it presently has a population of 1,030,887 people (1990 estimates). This means a density of about 283 people per sq. km. This is said to be the highest density in rural Kenya (Kenya: Statistical Abstract, 1987: 13).

This factor does not only mean tremendous pressure on land and its exhaustion. To a land tax planner, it also presents the tedious and eternal problem of fragmentation

(plus others that are socially-related) which must be anticipated. For instance, a recent report on the consequences of the population demand on land, estimates that as we commence the 1990s, a majority of family households in the district will on the average own only 0.26 hectares of land. And it is on this that they must subsist and raise capital for their development (Kenya: Ministry of Agriculture Annual Report on Kakamega District, 1987: 1).

In the context of this study, Kakamega was examined to see how the land tax could be designed to cope with the serious and consequential problem of fragmentation. How, for instance, do we fix the tax threshold in a situation like this to distinguish between genuine and evasionary subdivision? Most critically, what land base do we select, and how do we design the rate to ensure that revenue is generated as land parcels continue to diminish? In contrast, how do we determine these matters in County Councils like Isiolo, where land is virtually empty and begging for settlement?

Wareng' County Council, on the other hand, is relatively young--having been created after independence. It lies approximately 220 km. northwest of Nairobi. On its western side it shares a common border with Kakamega. Administratively, it lies within Uasin Gishu District, which is one of the twelve that make up the Rift Valley Province.

Unlike Kakamega, Wareng' is big and quite sparsely populated. It has a population of only 516,028 (1990 estimates) against a land area of 3,784 km. Its population density is therefore only 79 people per sq. km. (Statistical Abstract, op. cit., 13). Land fragmentation is not, for the moment, the problem here.

Economically, the Council is much stronger than any of the other four (though Narok could in a way be an exception). The economic strength comes, first, from the fact that having been created out of a former white-settled area, Wareng' inherited land, plantation farms, and other agricultural infrastructure that were very well developed. Besides, its predominantly tertiary volcanic soils, and a temperate, cool climate abundantly support farming and livestock rearing. Consequently, it produces so much maize and wheat that it is perhaps the heart of what is often regarded as Kenya's bread-basket. Among its many economic firsts is the world renown Eldore mushrooms and the wattle trees. The latter are used in the production of leather-tanning substances. One land-use survey shows that 50% of the land is devoted to crop production, and 49.52% to livestock rearing. Fallow land was estimated at only 0.48% of the total (H. Mwendwa, 1986). In terms of national politics, this agricultural base has enabled Wareng' to produce a very influential farming community.

Why was Wareng' studied? Having been created out of the restructuring process, the Council was perhaps pushed to the very limit of the problems associated with assignment of more functions amidst the removal of major revenue resources. Chapter Three examines this paradox more closely from Wareng's point of view. Let me, however, emphasize that the Council experienced a tremendous influx of people between 1963 and the mid-1970s. This was because of the government policy of settling the landless in the former white areas. The pressure from this was acutely felt by Wareng' (and a number of other new County Councils) because there was a sudden increase in demand for Council services and yet the most viable revenues were being denied.

The revenue alternative that Wareng' resorted to is what interested this study. The Council took decision to revive and develop land rating as one of its new resources. While leaving the modalities of this to the discussion in Chapter Three, it is important to mention here that Wareng' is one of a number of County Councils that to-date apply land rating consistently as a source of revenues. Currently, it raises more than 50% of its total revenues from this form of land tax.

Evidence presented later strongly suggests that the revenue performance of this source will in future continue to excel. This experience was studied to determine if it could possibly be a model for other County Councils. It was also examined to find clues and hints as to how the structural components of the tax could be designed for general application. On the whole, I intend to cite this experience in making a general argument in regard to the feasibility of the land tax today.

Narok County Council lies about twenty-five miles to the southwest of Nairobi. Its southern end marks the border between Tanzania and Kenya. It has simultaneous boundaries with Narok District which is, in turn, the southern end of the Rift Valley Province. Narok is not only the location of the world-famous Maasai Mara National Park. Together with Olkejuado County Council to the east, it is also home to the Maasai people.

In its present setting, Narok is (like its sister Olkejuado) relatively young. Like Wareng', it is a creation of the post-independence process. At independence time, the remaining traditional land of the Maasais was considered too big to be one County Council--hence, the two Maasai Councils. However, as home to the Maasais,the Council has a long history. It presented the colonial government and white

settlers with some of the most formidable and long-lasting land disputes, as it was mentioned earlier. But the nomadic life-styles of the Maasais denied them the opportunity to be exposed to early education, agricultural activity and monetary economy in contrast to the people of Kakamega, for instance. Therefore, the Maasai contribution to the independence struggle is not as substantial as, say, that made by people in Kiambu, Nyeri, or Kakamega.

Today, however, the Maasais play an astounding role in Kenya's political and economic lives. For instance, the current Vice-President of the country, George Saitoti, is a Maasai from Kajaido District.[21] Equally important, a number of Maasai traditions have more or less been adopted by the government to epitomize our national (or African) culture. For instance, our bank-notes carry the picture of a Maasai *Moran* (warrior) to depict our inherent national gallantry. And *Moran* title is one of our national Orders of Merit.

It was the nomadic lifestyle that compelled me to sample Narok. Although the Maasais have for centuries fought hard to retain their land, they have not viewed it in terms of cultivation. This has sharply distinguished them from the majority of Kenya's forty-five tribes that are primarily cultivators. Consequently, this huge County Council (the

ninth largest with an area of 18,519 sq. km.) has only a population of 210,306 (1990 projections). This makes its population density one of the lowest in the country, i.e., eleven people per square kilometer (Statistical Abstract, *op. cit.*).

The issue is, therefore, how to apply a land tax on nomads. Surely if they assert, and if we accept, that they *own* some land somewhere that is their traditional grazing ground, it is incumbent upon tax planners to bring them within the tax net. This is demanded on account of a number of reasons. Most significantly, as *residents* of one or more County Councils, they will be entitled to services thereof. In fact, as the discussion in the next chapter shows, a Council with nomads may be compelled to incur extra cost for the sake of addressing their specific needs (e.g., in the provision of water-holes, and veterinary services). As consumers, the nomads must be made to pay for these costs. It would be quite inequitable to other residents to openly permit nomads to become free-riders.

Further, it is increasingly becoming evident that the lands roamed by nomads may in future have enormous value. Apart from the two Maasai districts in the south, other nomadic tribes (e.g., the Boran, Pokomo, and Rendille) roam

substantial portions of the north and northeast of the country. In fact, the total land area occupied by nomads approximates half or two-thirds of Kenya. Not all of it is productively marginal. In Narok, for instance, migrant tribes from the neighboring districts have rapidly transformed the district into Kenya's largest wheat and onion producer (S. Mwichabe, 1986: 10-18; Henry O. Ndege, 1987: passim). In the north and northeast the ongoing geological surveys have given tentative indications of oil deposits. Besides,the recently expanded ASAL program intends to reclaim and improve the agricultural potential of some of this land (Kenya: Development Plan, 1989-93: 132-138).[22]

Nomadic lifestyle, like fragmentation in Kakamega (or aridity in Masaku as we are about to see), presents an obstacle in the way of the intended tax. How do we design the tax so that while its application brings revenues, it also encourages the nomads to settle and cultivate? It is in the interests of the tax to have more land owners with traceable physical addresses. Planners must further face the fact that since most of the cultivators in Narok are outsiders that largely lease the land from the Maasais, the tax must not drive them away. We need them to demonstrate and coax the nomads into the attributes of settled lives of cultivators.

From my discussions with the officers of the Narok County Council, subtle questions arose in regard to attempts to tax nomads. For instance,the officers emphasized that if and when the tax comes, it must be highly "invisible". This begs the question whether or not a tax like this ought to be stealth in its application.

Masaku County Council is, unlike the rest, a representation of Kenya's arid regions. It has high temperatures throughout the year (an annual mean minimum of 30° C.). The average annual rainfall is less than 80 mm. Indeed, this rain is concentrated between mid-April and the end of May each year. Technically, this translates into only fifteen wet days in a year (Kenya: Machakos District Annual Reports, 1980-87).

This arid climate has severely limited the availability of water, expansion of agriculture and human settlement in this vast district. Most of the farming is done on high elevations where cooler temperatures and moist soils can be found. Coffee is grown here as a cash crop, together with maize--as the predominant food crop. The *Katumani* maize specially developed for the arid areas is the only type grown. On the lower land, sisal can be found as another cash crop. Otherwise livestock ranching has been encouraged as the major

economic activity--particularly along Athi River and its tributaries. The rest of the famous Athi and Yatta Plains stretch virtually empty for hundreds of miles towards Nairobi on the west and Mombasa to the southeast respectively. My conversation with farmers and government officers overwhelmingly pointed to the eventuality that these conditions have forced most men from the area to flock Nairobi and Mombasa for jobs.

Masaku and the Municipality of Nairobi share a common border. The council lies in Machakos District which, together with Kitui, is the heartland of the Kamba Tribe. These two are part of the six districts that make up the Eastern Province (a province whose northern boundary forms the Kenya-Ethiopia border).

For a region this arid, Masaku's population of 1,022,522 is numerically as high as that of Kakamega. In real terms, however, the two are different considering that with an area of 14,178 sq. km. Masaku's population density is only 72 people per sq. km. The endurance of the people here goes to show that most tribes of Kenya will persist in their traditional homelands regardless of natural severities. This land is of great sentimental value to the Kambas because it constitutes their tribal homeland. In this regard, the historical evolution of Masaku County Council is similar to

that of Kakamega. Consequently, Masaku has contributed to Kenya's historical development in the same manner as Kakamega did. Among its enduring legacies to the nationalist movement is Paul Ngei. He deserves to be perceived as one of our "founding fathers."

I examined Masaku's aridity in order to sharpen my perception of a land tax on a people trying to survive on an economically marginal land. The fundamental question raised by this is whether or not the tax should apply at all. A further marginalization of the people by a tax ought to be weighed with utmost care. This is because its extra monetary burden could easily provoke an unwelcoming political reaction.

In comparative terms, aridity and its consequential marginalization are a more threatening problem than nomadism. In the long run, the latter may disappear, thereby leaving room for the tax to be asserted without a social guilt or political itch. This is not a possible scenario in the case of arid conditions. The overall question to be addressed is, therefore, how to design the tax in a manner that shows sensitivity to and concern for this situation. The issue is significant, considering that three quarters of Kenya is arid. It is also important to encourage people to settle there.

The last Council on the itinerary was Taita Taveta. It is part of the Coast Province. So from Kakamega on the western border to Taita Taveta on the eastern seaboard, we complete a near 900 km. cross-section of Kenya. This council of 16,959 sq. km. is administered as Taita Taveta District. The district is, in turn, one of the three that make the Coast Province.

For the reason stated below, I do not intend to introduce Taita Taveta more elaborately. It is sufficient to mention that it is an old County Council which, like Kakamega and Masaku, was created as a home to a major tribe (the Taita people). Its historical path and role resemble those of these two. It is one of Kenya's most scenic regions: undulating evergreen hills, plenty of rains, and good sunshine. The result is a buoyant agriculture (with sisal as the main cash crop). But it has a very moderate population of only 147,595 (The Statistical Abstract, op. cit.). Surprisingly, with an area of 16,959 sq. km., its population density is only nine people. One of the major causes of this is the scare of wild animals since Taita Taveta is home to the Tsavo National Park--another of Kenya's world-famous tourist resorts.

Taita Taveta was of interest because of its rough physical relief. It has a very hilly and undulating landscape that rises and falls sharply from the coastline towards Mt.

Kilimanjaro. In the area around Taita Hills, for instance, land rises suddenly from 200 m. to 4,000 m. Consequently, during heavy rains, some villages on the Kenya side cannot be accessed by car without first driving through Tanzania.

Bird's study of Columbia's land taxation drew my attention to the factor of a mountainous terrain. Columbia's many mountains, while suitable for coffee-growing, presented the biggest obstacle to cadastral surveys. Because of constant cloud cover (attracted by mountains) and because of the sharp gradient too, it was not easy to carry out these surveys either by ground crews or aerial photography (Richard Bird and Oliver Oldman, 1964: 420). Of course, technology exists today by means of which these can be overcome. Infrared photography or intelsat charting by satellite could be used. But Third World countries can hardly afford them, given the frequency with which these services are needed to update information.

What were the empirical findings from Taita Taveta? Luckily, the terrain was said to be manageable. Officers of the Council had no difficulties from this in administering current taxes. Accordingly, I will not give prominence, if at all, to this factor in the subsequent discussion.

Let me conclude the discussion by charting the general course of the rest of the dissertation. On the basis of the

foregoing background, I propose to examine the problem at hand by, first, underscoring its empirical scope. In this regard, the next Chapter looks at the Local Authorities' workload and the revenue sources presently available to them to execute these functions. The primary focus of this exercise is to give insights into the revenue short-falls as revealed by the Authorities' budgetary records. Chapter Three addresses the question: why I think the proposed tax is a feasible approach of dealing with the revenue problem. Accordingly, it is devoted to an examination of various factors considered to be positive parameters.

Chapters Four and Five shift focus to the practical questions of program implementation. Chapter Four in particular focuses on how the tax could be designed and applied so as to generate the revenues the Local Authorities expect. The central task here is to highlight aspects of the tax common to all Councils which an enabling legislation would incorporate, as well as the unique ones to which the attention of various Councils would be drawn as a matter of policy adoptions. It is in this area that I discuss the various factors for which the foregoing Councils were sampled.

A supportable tax proposition must forecast in its agenda the potential burden of the tax. It is futile to belabor a tax whose burden is going to render it unmanageable, or

unbearable. Chapter Five looks at this factor from the perspectives of both the taxpayer and the tax authority. By tax authority I mean the County Councils because I have throughout argued that the Councils (and not the central government) must be the authority and beneficiary. Opportunity was seized to argue in this Chapter that the tax as proposed should be limited to the revenue goal if we are to successfully apply it as a way of addressing the Local Authorities' problem. It should not be over-stretched to the goal of coaxing effective land use.

# CHAPTER TWO

# LOCAL AUTHORITIES: ROLE AND FINANCIAL RESOURCES

## 2.1 ROLE -- HOW THE COUNTY COUNCILS FUNCTION

Functions of County Councils fall into two classes. The first consists of functions prescribed by statute law; the second -- those that have emanated from pressures of development politics and policies. I will discuss the two in this order and then come to revenue sources. The underlying aim is to show that the existing sources are far from adequate to cover the statutory functions. Yet despite this, development pressures have piled additional functions without additional revenues. Therefore, it is logical that if we want the Councils to carry out these obligations we need to assist them to strengthen their revenue resources.

### (i) Role As Per the Statute Books

The statutory functions are spelled out in various Acts of Parliament. The major statute is of course the Local Government Act. They are also to be found in Ministerial orders and directives; and in the by-laws of the Councils themselves. Some studies have mistakably only focused their discussions on the Local Government Act. In consequence, they have encouraged the perception of the erroneous view that Local Authorities (or County Councils for that matter) ". . . .have a rather limited range of functions" (Paul Smoke, *op.*

*cit.*, p. 29; The World Bank 1976; Appendix XI, p. 8). To the contrary, a scan through Kenya's *corpus juris* does reflect functions that are both wide in scope and onerous in their performance demands.

The Local Government Act defines functions to mean "powers and duties" (s. 2). This is a very revealing definition. In his interpretation, George Rukwaro (1971) suggests that this definition was intended to reflect the financial limitations of the Local Authorities. Duties are mandatory. Powers, on the other hand, are optional. They can only be undertaken if financial resources permit. For instance, a Council has a duty to ensure the disposal of dead human bodies within its jurisdiction (Local Government Act, s. 167); but a power to grant a bursary to a needy student (s. 146). Akivaga and Kulundu have christened duties as "mandatory"; and powers as "permissive" (Akivaga, Kulundu and Opi 1985: 29).

It was evident from discussions with Council officers that advantage has been taken of the duty-power classification. As a consequence of this, Councils have totally ignored the powers and only marginally addressed the duties. In so doing they have taken refuge in the excuse of limited revenue resources.

Statutory functions can themselves be divided into the welfare (social, economic, and educational powers); public health; and those relating to resources-management. They are considered in this order.

## WELFARE

The welfare functions were not directly affected by the transfer of 1969. They consist of a cluster of powers a County Council may undertake to enhance the social, economic, and educational well-being of the rural people. Because they are too numerous, I will only be illustrative.

For purposes of social recreation, County Councils may set aside or acquire land for public recreation facilities (e.g. sports grounds and parks): s. 144(2). Those near the sea or lakes may provide boats, yachts, and other water recreation facilities for public use. In this connection, aquariums, pavilions, piers, etc., may also be established and maintained (s. 145).

For public entertainment, Councils may establish and maintain musical bands. And for the information of citizens, they may establish radio relay stations, T.V. redifussion services, information and inquiry bureaus. They may also erect or establish monuments for public viewing (S. 145).

For public transportation, Councils may establish omnibus services within their jurisdictions (S. 153). For a complete transit system they may build (toll) bridges, ferry-boats, etc. (S. 186). And in this regard the Minister in charge of transportation and communication may require them (in addition to their duties in regard to 'rural-access roads') to open and maintain connecting roads (S. 196).

One visible flaw in these social functions is the erroneous criterion upon which they are apparently based. They are based on the so-called Maud-Finer model: a model of social functions practiced by local governments in England and Wales and made applicable to the colonies without regard to their relevance (Maud and Finer 1953). They notably exhibit a sophisticated urban taste in some instances.

As regards the yachts and boats, they are reminiscent of a period in Britain when river transport was an important form of bulk movement of goods and people. This cannot certainly be said of Kenya today nor then. For these reasons most of the functions here are totally incompatible with the conditions in rural Kenya.

The law and policy require amendment to embody a service-allocation criterion that emphasizes achievement of "basic

needs". It makes no sense to overburden Councils with powers to provide music bands, or public monuments, knowing very well that this is neither in keeping with our people's basic pre-occupations, nor taste. We need mass-transit, for sure. But is it a realistic goal? Is it achievable under the circumstances?

Welfare functions also include the care for the indigent and incapacitated persons. The care has to be limited for obvious reasons. Section 145(aa) requires County Councils to return destitute persons to their homes within Kenya (those from other countries are the obligation of the central government). Such persons are legally perceived to be vagrants. The most common type of persons under this definition are lunatics and beggars. The former are taken to mental institutions for treatment usually by the police and relatives. Councils may help in evaluation of the patients during the legal determination of sanity or otherwise.

Ordinary vagrants must be returned to their homes (or to their relatives). For beggars, a Council may establish centres for their rehabilitation (S. 155). It appears, as in the case of lunatics, that a court of law has to make a ruling one way or the other under the Vagrancy Act, Cap. 58. It is the duty of the Council to instigate action for this ruling. Failure to do so and to adjudge a person a vagrant (or a

beggar) on unfitting non-legal considerations could violate civil liberties under the Constitution.

"Incapacitated persons" is narrowly defined. Service to this group is limited to children. In this regard, Councils may establish and maintain institutions for their day-care, nursery schools and clinics. Alternatively, the Councils may materially help NGOs involved in this work. I found that the NGOs (and they are mostly foreign), relied on assistance from over-seas. Councils had not been forthcoming with help.

County Councils also owe Urban Councils some welfare obligations. Because they have to administer these Councils, they must provide public utilities. They may also provide housing and assist in the creation and maintenance of schools and primary health services in these jurisdictions. But they have no legal duty to provide amenities such as water or electricity to the general rural population outside these centres. However, as the later discussion shows, this is one area where development politics have compelled Councils into more obligations.

To promote commercial and economic welfare, County Councils may provide land for industrial and commercial establishments (s. 145). Such establishments include factories, shops, workshops, quarries, and open-air markets.

In most County Councils open air markets have been established abundantly. This is because they are very simple establishments, requiring only barbed-wire fencing of the area where trading has to take place. From this, as budgetary data will show in this and Chapter Three, County Councils have been able to transform markets into major revenue earners. The revenues come from the entrance fees that is charged and collected by market-masters. Though the markets in most instances have been very poorly maintained, they have proved to be strong and popular trading centres where the rural people have engaged in economic exchanges. Commodities traded range from food-stuffs to livestock.

Councils may supervise grading and storage of produce involved in the above trade (S. 155). Their inspectors check on weighing and measuring methods and tools to ensure that there is no cheating. This may compel Councils to establish or prescribe standard weigh-scales and machines (S. 145).

Through a system of licensing, they prescribe location and design of shops in rural areas. The current rule as regards location, is that shops should be built around a market to make it an integrated shopping centre for the neighboring villages. Sometimes, location may be permitted in other places to ensure that communities are not unduly too far from some kind of shop. Sanitary facilities, and

sometimes water and electricity, may be established at such centres.

My impression from travelling through sample County Councils was that a commendable job has been done in the provision of the open-air markets; yet this has hardly proved sufficient. Further, the markets are neither well-organized nor maintained. For instance, inadequacy was evident from the establishment by the people themselves of what, in Kakamega, they called *amatekula*. These are unofficial additional markets located near or away from the official ones. They are held daily instead of the official days designated for Council markets. Popular locations are near schools (or such facilities) and along the roads. Councils need to be encouraged to study these developments and determine how to respond with a view to enhancing economic welfare further.

The education functions on the statute book are quite misleading. They are confined to creation of nursery schools, training and payment of their teachers. This is one of the obligations that remained to County Councils following the transfer of education functions. To-day, however, the Councils have enormous education responsibilities as a result of development pressures on them. I will therefore consider the education obligations under the "development politics."

## PUBLIC HEALTH

Though clinical functions were taken away in 1969, County Councils still have a number of duties relating to preservation of public health. They must ensure that meat and other foods prepared and sold within their jurisdictions are not contaminated. Councils have found it obligatory (in the case of meat, for instance) to provide slaughter houses; or to control private slaughter houses through licensing and inspection.

Traditionally, our people slaughtered livestock on the grass, and sold the meat from there. Councils have intervened to ensure that slaughtering is done in Council premises or only in those which are licensed upon satisfying hygienic and veterinary requirements. Similarly, selling and storage of the meat must be done only in licensed butcheries. Bulk transportation of the meat is also regulated. The preparation and storage of skins and hides must conform to statutory conditions which the Councils enforce. In all these measures they work hand in hand with the livestock and health inspectors of the central government (the Local Government Act, s. 154(b); the Hide and Skin Trade Act, Cap. 359).

Councils have the further task of preventing the outbreak or spread of animal diseases. In this respect they have to

liaise with the livestock department to apply and enforce animal quarantines (Local Government Act, s. 155; Animal Diseases Act, cap. 364).

They also have obligations in the human health area. These obligations are scattered in a number of legislations. For instance, under the Local Government Act they may cancel or refuse to grant a licence to a businessperson (dairy farmer and restaurant operator) on the ground that his business premises are unhygienic.

The most demanding of the human health obligations relate to the suppression of diseases and epidemics. For example, the Public Health Act, Cap. 272, requires "all local authorities" to take all lawful, necessary and reasonable practical measures to prevent or control any outbreak of disease and to safeguard and promote public health (ss. 13, 14). These outbreaks are common and quite demanding because they include dangerous and fast-spreading diseases like cholera. County Councils have to manage the epidemics arising within their jurisdictions and those that may spring from within the urban councils.

The Public Health Act also imposes upon local authorities duties in connection with: (a) prevention of small pox (s. 106); (b) protection of food stuffs; and, (c) prevention and

destruction of mosquitoes (s. 136). The list is much longer. Many other statutes impose further health duties.[1]

## MANAGEMENT OF RESOURCES

Water and land are the two resources in respect of which County Councils have extensive duties. Let me quickly dispose of the water obligations. As administrators of urban councils, or as "water undertakers,"[2] County Councils have a duty to preserve water catchment areas to ensure continuity of supply. This has involved them in policing forests in the catchment areas to prevent their destruction. In some instances, they have to plant trees to reinforce the catchment capacity. Further, they must guarantee to their tenants the safety and wholesomeness of the water supplied (The Water Act Cap. 372, s. 124). And as members of the Regional Water Committees in their areas, they advise the Minister of Water as to how best to supply water to various other consumers within Trust Land (The Water Act, ss. 24, 161).

In the management of land resources, County Councils are involved, on one hand, as trustees, and on the other, as administrators (or *ex-officio* functionaries). The former capacity recognizes their constitutional duty to look after Trust Land on behalf of their people. The latter denotes the

fact that since the land lies within their jurisdictions, it would be inadvisable to omit them in any land-resource management. Their proximity to land has imbued them with localized knowledge of both the land itself and the social matrix within the locality. This knowledge can best be marshalled by consulting or involving them *ex-officio*.

Their functions as trustees are spelled out in the Constitution itself. Section 15 vests all "Trust Land" in the County Councils within whose jurisdiction such land is situated. Trust land is the land that, distinct from "White Highlands," was reserved for natives during the colonial times. The County Councils in those areas were managed by natives selected from among the local elders. They were therefore considered good custodians because these officials would put to heart the land rights of their people. The policy was continued after independence, awaiting the completion of a land registration system that would give each individual landowner his state-guaranteed title. Therefore, after such land has been consolidated and adjudicated, the owners acquire private titles thereto and councils cease to be trustees.

To better appreciate the trust-duties, let me state the Constitutional provision in its originality:

s. 15:

> Each County Council shall hold the Trust Land vested in it for the benefit of the persons ordinarily resident on that land *and shall give effect to such rights, interests or other benefits in respect of the land as may, under the African customary law ... in force ...* be vested in any tribe, group, family or individual [my emphasis].

In the former African District Council areas, the African customary law has continued to govern land tenure and all the land transactions. It is automatically replaced with the statutory law after the process of adjudication and registration. County Councils, according to the above constitutional provision, have the enormous task of taking care of this land and of protecting the highly imprecise rights of the people thereon. Their overriding consideration in all this is to ensure that no person, family, clan, nor tribe is deprived of its land so as to be rendered landless. Their role in protecting clan or tribal land has been most visible.

Clans or tribes have continued to call upon County Councils for protection against unscrupulous land speculators from outside. Recently, a clan in Kisii district called upon Gusii County Council to stop the Lake Basin Development Authority from taking their land.[3]

The Maasais have since colonial days struggled to protect their land. The most notable and recent case was the one involving members of the Purko Clan in Narok district. The 1960s and 1970s were years when there was enormous competition among many tribes to buy some of the white farms in places like Nakuru district. In the process land that had belonged to the Purko clan for years became a target. The Narok County Council intervened in 1978-9 to stop land-buying companies belonging to outside tribes. In some instances, purchase moneys had to be refunded. Today Narok has helped the clan reassert their claim on the land and to develop it economically through the establishment of sheep and cattle ranches. The Council even administers the ranches as a trustee for the clan.

County Councils also determine succession questions arising out of the trust land. In about ten districts where the customary rather than the statutory law governs succession, the Councils are instrumental in settling inheritance claims. Their primary goal is to ensure that land devolves to members of the clan, family, or tribe -- where the members thereof can be found. If not, they have the power to declare the land *bona vacantia* and take it for public use.

As trustees County Councils also have zoning duties. They exercise powers relating to whether trust land should be used for industrial, commercial or public purpose. After taking the appropriate zoning decision, they advise the Commissioner for Lands regarding due compensation of persons who might have been thereby displaced (Trust Land Act, Cap. 288, ss. 4, 5, 7-9, 13 and 17). In this connection, Councils go farther advising landowners on how to best use their land, or how to protect their legal positions in third party dealings. For instance, they may advise for or against an intended lease (s. 65). And this could prove a most useful intervention for the people in instances of "contract-farming" where multi-national agro-business conglomerates (e.g., Del Monte, Bookers International, or Brooke Bond) seek to lease land from them.[4]

As trustees they were and have continued to be guiding in the adjudication and registration processes. Here they intervene in a host of issues. They help in determination of boundaries of land parcels, and registration of individuals (or groups where appropriate). They are often involved in the invitation of the Survey of Kenya to come and survey and thereafter help prepare the various registration maps. It is widely agreed that this intervention has tremendously contributed to peace and tranquility in the rural areas on an undertaking that quite easily evokes violence.

As administrators or *ex-officio* functionaries, their duties are equally expansive. They administer both urban and agricultural land within their jurisdictions. Their primary mandate under these duties is to make sure that land is efficiently utilized. I will exemplify these duties by references to only two statutes.

Under the Land Planning Act (cap. 303), County Councils administer land in urban centres. This is land in Urban Councils. In this regard: (a) they are the ones who prepare the ground plans for the intended town. These plans may be needed for a new township or expansion of the existing one. They must submit the plans to the relevant Minister for approval. In doing this they must settle the claims of persons affected by the plans (Cap. 303, rr. 6 and 9 of the Schedule to the Act). Under the urbanization program of the District Focus, a lot of activities in this direction are going on in the County Councils. For instance, between 1987 and 1988, Kakamega County Council has prepared and submitted for approval, plans involving the creation of Luanda, Chavakali and Mumias Urban Councils. Plans for more townships are in the making.

(b) Where a Municipality or private landuser has submitted a plan to the Minister and there is no "Central Authority" to process the application, the Minister may refer the application to the relevant Council for processing. The County Council may grant or refuse consent (cap. 303, reg. 12 - Schedule of Regulations).

(c) If a person has developed his urban land contrary to the approved plan (or conditions attached thereto), the Council may serve him with an "enforcement notice" to comply (cap. 303, r. 27).

(d) Similarly, if he was required to effect some measures before using the land as per his plan, and has failed to take those measures, the Council within whose jurisdiction the land is situated, may enter the land to enforce those measures. Alternatively, the Council itself may undertake those measures and seek full reimbursement for costs from the land owner (reg. 28).

A County Council may delegate any of these functions to the urban council itself. If it delegates, it must supervise the Council in question to ensure compliance with the requirements of this statute (reg. 32(2)).

Under the Agriculture Act (cap. 318) County Councils are deeply involved in the management of agricultural land. Again their duties have a primary goal: to ensure good husbandry and preservation of agricultural land. There are also extensive duties which relate to credit advances to farmers. I will again take a brief look at these matters.

First, as *ex-officio* members of District Agricultural Committees, County Councils participate in all discussions relating to agricultural issues that come up at Committee meetings. They may, for instance, advise on suitable seed and fertilizer (or their prices), marketing of produce (considering that they do control its storage, and are beneficiaries in sales of cessable produce), and land transactions. Narok County Council quite often intervenes in land leasing in order to ensure that lease agreements are not unconscionable to the landlord, or that the lessee performs to the full his part of the deal. This latter part is most crucial.

Maasais quite often prefer payment of rent in kind (or at least some portion thereof). It may not be surprising to find ornaments being given for consideration. The Council has been instrumental in the valuation of such payments in kind and in vetoeing those which are not beneficial to the whole

clan. As a result there has developed a policy that the Council will not support leases wherein payment in kind is ornamental or only beneficial to a few (e.g. clan elders). If they opt for payment in kind, lessees are encouraged to undertake capital projects, e.g., building of nursery schools. They may also be encouraged to provide iron sheets and other materials for construction of houses for clan members. Where such an agreement exists, the Council monitors it to ensure its performance by the lessee. Interventions like these, and advice on various land aspects by different Councils, have led to the development of numerous policy inputs that have helped shape the content and thrust of some of the "land preservation orders" discussed below.

Secondly, as members of District Agricultural Committees, County Councils have further advisory duties. For example, they may advise the Minister of Agriculture that some land owner has seriously mismanaged his land. This is often in cases of large-scale farms. Their advice is intended to move the Minister to intervene to restore good management (Cap. 318, s. 187). This advice may, for instance, be given if it is felt that owners of land in water-catchment or arid areas, or those with farms on steep hill-sides or river beds, are not using their land in a manner that shows regard for these factors. In response the Minister or the Director of Agriculture may make a "land preservation order" to require

good husbandry (s. 50). In these eventualities, the County Council must enforce the order (s. 65).

Councils implement preservation orders, whether they originated from their advice or the Minister's own initiative. Normally, they have to pass a by-law to define their legal authority and scope of implementation. For instance, an order may seek to reduce over-grazing. The relevant Council will then make a by-law, say, to limit the number of livestock per person, or to prohibit grazing in certain areas (cap. 318, s. 48). The by-law must, where appropriate, define sanctions for its non-observance. Accordingly if a person failed, for example, to observe limits on the number of livestock, the Council can seize those depastured contrary to the by-law (s. 49).

Thirdly, Councils play a role in some credit decisions involving farmers. There are a number of credit schemes operated by government agencies for the benefit of farmers. These agencies rely on, among other institutions, County Councils in making some of their decisions.

For example, under S. 25(c), cap. 318, a County Council may be consulted by the Agricultural Finance Corporation for input in developing a credit policy towards farmers in a given area. The Council may advise against credit extension, or

recovery of payments due to some local hardships (e.g. poor harvest). It may also advise on the viability or otherwise of taking land for a collateral security. Councils like Gusii County often warn against taking land in their areas for a collateral. It is so difficult to enforce such a security in a place like Kisii because the defaulting owner may resort to violence against foreclosure officers; or the clan may not accept a purchaser who is not one of them. Enforcement officers and purchasers alike can quite possibly be murdered.

Thirdly, in cases of aggravated land abuse, the law allows confiscation and sale. County Councils also advise on these matters. I will examine the details of this in Chapter Five.

**(ii) Role As Per the Pressures of Development Politics**

In addition to statutory duties, County Councils have today assumed wide ranging non-statutory functions. These have increased steadily since the launching of the decentralization program. These duties have come from policies and politics of development. The major policy has been decentralization. By some extraneous extension of the law (or its spirit), new and far-reaching functions have been assigned since the early 1980s.

Development politics are further characterized by our *harambee* (self-help) practice. County Councils have been compelled by *harambee's* momentum to take on duties not prescribed by the law. They have to do so in order to be seen as being supportive of their people in their development efforts. Let us get a feel of the general nature and scope of these duties by focusing a little bit on decentralization and *harambee*.

## DECENTRALIZATION

To implement certain measures of decentralization, the government assigned certain specific functions to Local Authorities. These are functions broadly designed to help create employment opportunities in rural areas so as to stem the rural-urban migration.

First, County Councils are *required* to create and manage medium urban centers that will be the focus for industrial and commercial investment (Kenya: Sessional Paper No. 1, 1986: p. 42). In this connection, they are further *required* to provide the necessary urban infrastructure that will attract both foreign and local investors. In government words, this is the policy of creating "Rural Trade and Production Centres" (Sessional Paper p. 44, 54, 105-8).

County Councils have since 1987 been busy upgrading some of the existing market centres into the so-called production centres. This has involved them in planning to provide public utilities in these centres. In addition, they must provide *Jua Kali* shelters for all registrable artisans within their jurisdictions.[5] Instead of, say, a tin smith carrying on his trade in his village, he will be allocated with a *jua kali* shelter built by the County Council at a market centre. With some financial assistance (possibly from the Council) he will be encouraged to modernize and expand his trade in order to serve the Community better.

Councils are also *required* to provide information as to credit and production materials. The Council may, in liaison with relevant Ministries, be expected to assist in the finding of the market for finished products. To do all these things, Councils are required to review and align their by-laws. It is hoped that in this way a base for small-scale industrialization and employment will be realized (Sessional Paper, p. 106; Development Plan, 1989-93, pp. 164-166).

Secondly, County Councils should now provide infrastructure needed to develop and expand agricultural production. It is again hoped that if agriculture can be

improved, employment will be generated and enough food produced (SP. p. 46). This function has, however, not been well-defined. My guess is that infra-structure involves building and maintenance of feeder roads, devising marketing strategies for local produce, or assisting in the establishment of small-scale agro-based industries.

Thirdly, Councils have to provide "bridging-finance." This means the finance that will supplement resources of the central government agencies in their efforts to bring electricity, telephone services, information and news to the production centres and rural areas in general (SP. p. 47). For instance, a County Council should contribute to the cost of transformers to encourage the Kenya Power and Lighting Company to bring electricity to production centres within its area.

Fourth, they must participate in the protection of the environment (SP., pp. 54, 109). The scope of this is yet to be defined. My guess is that while on one hand they must lure industries to come, they must, on the other hand, stand firm against pollution of local water sources, air or destruction of forests. Enforcement of these goals will certainly require financial resources, as well as better-trained manpower.

Lastly, there is an assortment of other functions that I will mention randomly. Every County Council I visited expressed concern over the pressures on them to provide housing for government officers being transferred to the districts to carry out decentralization. For example, the treasurer of Kakamega County Council estimated that before mid-1990 he will be expected to have provided 50 houses to somehow meet the current demand. He was working on the basis of five houses for each of the ten divisions in which the district was divided then (today there are twelve divisions).

The treasurer's estimates showed that at the prices prevailing in 1989, each house would cost Kshs. 350,000 (or US $16,667.00) to build. Fifty houses would cost Kshs. 17.5 m. This figure does not include the cost of land, which the Council would have to purchase in areas where it has none of its own. If the project is to be undertaken at all, it would mean diverting all the revenues earned in two consecutive fiscal years (see Table 3) to the undertaking!

Some of these functions started off as voluntary undertakings by the County Councils. Now they have become mandatory by some directive from above. For example, the Councils used to voluntarily participate in national tree planting programs by providing people with free tree seedlings. Today, the Ministry of Natural Resources and

Environment requires them to provide the seedlings on every national tree-planting day. Councils have had to plan and expand the service more than they had at first envisaged. They have had to set aside land for nurseries and to employ agro-staff to manage the program.

Others came quite suddenly and perhaps unexpectedly. For example, as part of the 'cost-sharing' policy (whose details we shall meet in Chapter Five), County Councils must provide bursaries or guarantee loans for University students from their jurisdictions.[6] I have no information as to the amounts involved and therefore the financial implications to the Councils. Similarly, I was given the impression by officials of the Ministry of Local Government that soon some of the clinical health functions taken away in 1969 will be reassigned. It was strongly suggested that the first of these will be the building and maintenance of clinics and dispensaries starting in 2000 A.D.

## OBLIGATIONS FROM DEVELOPMENT POLITICS

County Councils consist of elected councillors too. This plunges them into constituent politics. Through their councillors, people make demands for services from the Councils. Most of the time, the demands do not pay regard to the revenue limitations facing the Councils. Of least

importance, if any, is the argument that the Council does not have legal powers to provide the services being demanded.

Quite often people and councillors demand services because the service in question is being rendered elsewhere, or because it is the current and most topical development item. As a consequence of this, Council officers often find themselves in a dilemma. On one hand, there is the limitation of inadequate budgetary resources. On the other, there is the constituent demand that represents the current political mood a disregard of which can be quite detrimental. As a way out, Councils have had to respond to these pressures and spend beyond their means to demonstrate solidarity with the Councillors and people. Projects undertaken under these circumstances constitute what I have called obligations from development politics. Let me exemplify.

In 1986 or thereabout, President Moi launched the building of *Nyayo* wards. The idea here was that each district should, on a *harambee* basis, rally its people to contribute money and materials towards extending the patient capacity of its district hospital. The President led people in his own Nakuru district and soon the district hospital had four new wards, a kitchen, laundry, and a number of staff-houses. By 1987 the practice was quite wide-spread and the pressures on

County Councils elsewhere inescapable. Most Councils responded first by donating money and material. It is significant to note that hospitals are not within the legal ambit of the Councils. But the Councils had to pay to launch, and later to sustain these projects. Let us look at one case.

In 1987 Narok County Council responded to the pressures of contributing money to the *Nyayo* wards. It first donated Kshs. 4 m. (cf. US $ 231,495.00) towards the expansion of Narok District Hospital and clinics in the district. This expenditure had not been budgeted for. Quite often no one knows in advance what the topical development item is going to be. But the Council soon discovered that contributions from other sources had ceased by the beginning of 1988, and yet the project was far from complete. Bowing to further pressure from Councillors, the Council decided to take over the project.

By end of 1988, the Council found out that to complete the project (at the then prices), it would need Kshs. 1.2m annually. There was a further worrisome development. The Council found that in addition to the general-ward extension, it had to build two staff houses, a new kitchen and laundry facilities for the hospital in order to meet *Nyayo*-ward standards that other districts had established. What started

as a once-for-all *harambee* contribution became a "mandatory" and recurrent commitment. This is now the standard experience of many Councils. They have had to intervene to take on and complete other *harambee* projects.

Councils are also compelled to intervene beyond their statutory obligations in order to alleviate some urgent local problems. For example, to help the Maasais settle on the land and to generally catch-up with the rest of Kenyans, County Councils of Narok and Olkejuado have to go beyond the statutory power of establishing mere nursery schools. They have had to build and sustain some primary and secondary schools. They also have had to undertake social programs designed to encourage the students to abandon *moran* practices so as to appreciate the value of modern education. They do this additionally through an elaborate system of bursaries and scholarships. Table 4 shows that between 1981 and 1988, expenditure on this service grew by more than 100%.

Realizing that the Maasais cannot abandon nomadic life over-night, these Councils have gone on to provide livestock-services. Thus, over and above their legal duties, they do establish cattle-dips, provide staff and cleansing chemicals. They also counsel the people on the need to keep manageable numbers of livestock. I was impressed by the extensive

records the Narok County Council maintains on the livestock services. Again Table 4 shows that expenditure on this item has more than doubled in seven years.

Similarly, County Councils of Masaku, Kitui, Isiolo, etc. must do something to help their people manage life under severe arid conditions. In conjunction with NGOs and the Kenya government, these Councils have helped to establish and maintain water-holes for both livestock and the people. A look at Table 2 will vividly illustrate the committment of Masaku County Council, for instance, in providing for this service in its budgetary planning.

Let me now draw some conclusions. There are two positive factors from these functions. First, County Councils have been extensively exposed to landowners and the land itself. In their capacities as trustees or administrators, they have acquired the knowledge and experience that could make them capable managers of a land tax. In these various phases they have considerably encountered the social, political, and economic forces relating to land that can be anticipated in a land tax program. For example, having participated in the adjudication and title registration process, they should find the cadastral requirements of the tax familiar and manageable. Further, as a result of being involved in questions of tenure, succession, clan interests, and market forces, they have come

face to face with the social engineering that is necessary in the design and implementation of a land tax. Having initiated and/or enforced "preservation orders," and considering that they currently administer other tax measures, the Councils have enriched and expanded their experiences substantially so as to be able to successfully enforce land taxation.

Secondly, though their functions are murky and lacking in unifying or coherent themes, their assignment establishes the undeniable role of the Local Authorities. Save for revenue constraints, the Councils have demonstrated their ability to manage the statutory functions, and in addition, to respond to local problems, even if the latter lie outside their statutory obligations. This is a responsiveness and adaptability for which only the Councils are suited. As a result tangible benefits, even if minimal, have come to our people in the form of cattle-dips, water holes, and schools. Thus, Councils have shown that if properly steered, and if financially cushioned, they have capacity to identify and address some of the immediate local problems.

But these functions do also present some serious problems. In the first place, they are murky because County Councils, which should be tackling purely rural issues, are increasingly being taken into the realm of urban problems. This emanates partly from their duties of administering urban

councils, and also from their urbanization functions under the District Focus. As it was seen in the quote with which the introduction opened, lack of a clear yardstick is serious in itself.

Most critically, the functions are murky because there is no supportable development theme that one can discern in them. A theme, if any, appears to go contrary to development goals espoused by the Kenya government itself, or aims widely associated with institutions of rural development. I have in mind the advancement of our people's basic needs -- a policy to which the government is firmly committed, and in the light of which it sees the Local Authorities (Kenya: Sessional Paper No. 1 of 1986, p. 42-48, 104, Sixth Development Plan, 1989-93 p. 34). The advancement of basic needs must be the corner-stone of allocating functions to the Authorities, so long as the definition of this is made more precise. I will suggest how.

At the moment functions appear to be allocated on a *location naturae* basis. County Councils are required to do all sorts of things because those things lie within their borders. All the functions in regard to land, environmental protection, and those that relate to urbanization, do not exhibit any concerns for helping our people to meet their basic needs. The

consequences of founding functions exclusively on a location-basis are that County Councils have obligations whose load reflects no concerns for their revenue capacities, nor their role in alleviating immediate needs of the rural masses.

Studies have shown that local governments in the third world have failed partly because of this inaccurate function-allocation criterion. Whereas governments have spoken of them as providers of services to the rural people, and whereas the masses have expected those services, none of these has materialized in practice. Local Authorities in Kenya, like their counter-parts elsewhere the Third World, have largely been deployed to implement at the local scene centrally-planned programs. They have not been utilized to articulate autonomously the needs of their constituents. For the sake of relevance in development, they must be allowed a new role or a developmental model that emphasizes "basic needs" and also takes cognizance of their revenue resources (Mamadou Diop, 1987; Philip Maundu, 1965: Chapters 1 and 3).

The concept of "basic needs" is, indeed, rather imprecise. It means different things to different people. For example, if we adopted the government perception, Local Authorities would be expected to provide water, food, clothing, education and primary health care to their

residents. This would certainly be a very unrealistic basis given the revenue problem that is the subject of this inquiry.

In this study, "basic needs" is conceived in functional or pragmatic terms. Local Authorities should be required or helped to identify and address those problems they consider a priority in their specific areas. Indeed, many such problems would readily present themselves. However, the foregoing discussion has shown how councils like Narok, or Masaku have been able to isolate and confront problems they have considered most consequential to their constituents. Thus, "basic needs" must largely be left to the imagination and initiative of each Council. It is conceded, however, that guidance and coordination by the central government remains paramount.

There is, therefore, urgent need to re-think the basis of function-allocation. It does not make much sense to ask Olkejuado County Council to protect the environment (not an objectionable but near-impossible duty) when its most urgent tasks are to settle the Maasais and build schools and cattle-dips for them. Similarly, why over-burden Masaku with urbanization obligations when local conditions urgently dictate provision of water-holes? People in Kakamega have demonstrated that they want more markets urgently. Why not let the Council emphasize this in its planning?

It is contended that a basic-needs inventory of this nature would be manageable. This is because it would be precise: that is, tailored, as it should, on local needs and availability of resources. This would require selecting services the rural population need most and for which they are likely to contribute towards. It is this narrowly-focused and less-overburdened approach that can precipitate local enthusiasm and participation.

The financial implications of a crowded functions-agenda are obvious. Though I will deal with them in the next segment let me say here that: to attend to a wide-spectrum of functions such as those we have seen, is demanding both in manpower and resources. Professional and other skilled work-force are needed to plan and execute environmental protection or urbanization. Setting up trading centres and medium towns obviously generates continuing revenue demands as well as social difficulties. There will be need for revenue resources to zone and review zoning plans from time to time. There will also be need for sustained revenues to deal with the social problems arising from slums and other unplanned settlements that these towns are bound to attract. As it will become apparent in the later data, there is nothing in the current revenue resources that can adequately prepare County Councils for an enormous undertaking like urbanization. Survey studies

are beginning to sound this pessimism (Willy Mutunga and Saad Yahya 1987, Chapter 6).

## 2.2 RESOURCES: INSIGHTS INTO REVENUE SHORTFALLS

Section 2 of the Local Government Act defines revenue sources for Local Authorities. It says revenues for a local authority shall include the County fund or general rate fund, all rates, government contributions and other revenues from any other source receivable by a local authority.

The statutory definition has in practice crystallized into the following standard sources for County Councils.

SOURCES OF REVENUE FINANCE

- Rates*
- Fees and charges*
- Licence fees*
- Agricultural Produce cesses*
- Profits from Trading Undertakings*
- Poll Taxes*
- The Service Charge*
- Royalties, and
- Revenue Grants.

SOURCES OF CAPITAL FINANCE

- Internal Sources (Revenue Surpluses and fund balances)
- Capital grants
- Borrowing
- Leasing

I will briefly describe the nature of these sources.[7] With examples of budgetary practices from some of the sample County Councils, I will illustrate the general picture of revenue performance. I will thereafter draw some conclusions.

Rates are taxes on real property in urban centres. County Councils administer rates for the Urban Councils. They are also taxes on agricultural land (the so-called land rates) in Councils that have revived colonial land taxation. These are discussed in detail in the next Chapter. Fees and charges are impositions on a variety of services County Councils supposedly render. They must be distinguished from the Service Charge. Whereas the former are optional in that they are collected only from those who consume the relevant services, the latter is a mandatory levy on every employed and self-employed persons within the jurisdictions of the Local Authorities. The levy is imposed on the basis of the Local Authorities Services Charge Act, No. 6 of 1988. One of the

criticisms that greeted the introduction of this charge was that it is in nature a poll tax. Therefore, it is needless to retain on the revenue list another poll-tax item.

Licenses are imposed on numerous activities and things. Their imposition is primarily for raising revenues (e.g. licenses on bicycle or motor-cycle ownership). They are also imposed to regulate local commercial activities (e.g. licenses on shops, business kiosks, restaurants, and slaughter houses). Councils have also been urged to deter or restrict certain activities through licenses. In cases like this stiff rates are used. Such activities include licenses on the growing of *miraa*[8] to deter the drug abuse related with the chewing of this plant; or licenses on the brewing and selling of traditional liquors to deter alcohol abuse.

Agricultural cess is a very old tax. It was introduced during the colonial days under the circumstances discussed in the previous Chapter. For a long time, it demonstrated its revenue potential and yet it was restricted to a small number of crops. To make it more widespread, Parliament enacted the Local Government (Agricultural Produce Cess) (Adoptive By-Laws) order (LN 202, 1988). This measure has significant implications which are discussed in the next Chapter.

Profits, rather strangely, are said to include takings from users of markets. Royalties are collections from partakers of Council resources. Royalties are, for instance, paid for sand gathering, timber harvesting and mineral prospecting. Grants are government handouts. The poll taxes need no further introduction, given their historical notoriety.

On the Capital resources side, Internal Sources consist of savings a Council may make in a given year on various funds that the Local Government Act requires to be established. Such funds include the General Reserve, Renewals, Consolidated Loans, Benevolent, and Trust Funds (Local Government Act ss. 218, 219, 221, 151, respectively). These are the funds whose resources, as I said in Chapter One, are often used to wipe out budget deficits and thus present a balanced picture.

Capital grants are another of the central government's handouts. They are given to support capital projects County Councils on their own cannot afford. The government supports these projects because, though they may be regional, they contribute to national infrastructural growth.

Borrowing can be internal or external. Major sources for internal borrowing include commercial banks, and the Local Governments Loans Authority. Local Authorities can also

borrow internally through the issuance of bonds and stocks. External borrowing, like the internal, must first be approved by the central government. But even more, the central government has to guarantee it. Leasing involves rental of Council assets such as land, trucks, tractors, and graders.

## Insights in Revenue Performance

Let us now look at revenue performance. The most appropriate sources to examine in this respect are the Councils' budgetary materials.

I endeavored to put together the data that follows under a number of difficulties. The reader is forewarned to note: (i) that sometimes, some fiscal years in between are omitted because of the unavailability of data; (ii) or that sources or items on the tables may carry different names from the resources list we have just gone through; (iii) the reader should also note the discrepancies in the fiscal years -- sometimes shown as calendar years, other times as operational or accounting fiscal years.

The effect of the discrepancies is more noticeable, for instance, in Table 2. The figures shown for 1985/86 are indeed for half a year. Effective from 1985 the Calendar Year ceased to be the basis of the accounting period. The new

fiscal year was the period commencing July 1 of one year to June 30 of the succeeding year. This resulted in the figure for 1985/86 being shown in this way. What was disturbing was the absence of explanation from a number of Council officers. One had to look farther afield to find explanation. There were other instances of unexplained discrepancies as the discussion below will show.

I have limited examination to three of the sample Councils. Figures for Wareng' County Council are discussed in the next chapter to illustrate pertinent themes of that Chapter.

The resources I have described were intended to finance the statutory services. Today they have to be spread to also cover the non-statutory obligations. Although the central government has promised to provide initial funds for some of the non-statutory obligations (e.g. initial finances for the creation of medium urban centres), the funds have not yet been made available. The Councils must therefore make provisions from the existing sources. They cannot wait for the promised funds because, for instance, *jua kali* programs must be implemented immediately.

Using surplus-deficit as a yard-stick of performance, the general observation is that the Councils in question were neither badly nor better off. Their total position seems to be balanced since their recorded deficits equalled their surpluses. Deficits were seven (two for Kakamega, one for Masaku, and four for Narok). Surpluses were the same number (two for Kakamega, three for Masaku, and two for Narok).

On a Council to Council basis, Narok performed comparatively worse during the 1980s since it suffered more deficits. It managed only one surplus between 1981 and 1989. The data for 1988-89 fiscal year shows an enormous deficit gap. (K£ 1, 175, 237 in expenditure against, a modest K£ 190, 237 in income). I was informed that this came about as a result of undertaking *Nyayo* Wards and other *harambee* projects that I described earlier.

Masaku and Kakamega showed a more impressive performance. The former had only one deficit, and it came early in the period. Thereafter all the years up to 1985/86 showed

TABLE 2: MASAKU COUNTY COUNCIL ANNUAL BUDGET SUMMARIES (KE)--1980-88

| Item (or service) from which income was earned or on which expenditure was incurred. | INCOME | | | | EXPENDITURE | | | |
|---|---|---|---|---|---|---|---|---|
| | 1980 (Actual) | 1981 (Actual) | 1982 (Actual) | 1985/86 (Actual) | 1980 (Actual) | 1981 (Actual) | 1982 (Actual) | 1985/86 (Actual) |
| Clerk's Dept. | 10,803 | 10,980 | 11,580 | 6,092 | 80,817 | 84,839 | 167,555 | 30,738 |
| Treasurer's Dept. | --- | 231,688 | 281,820 | 68,158 | 140,828 | 133,949 | 150,710 | 79,723 |
| Rates | 61,000 | 61,000 | 77,800 | 53,219 | --- | --- | --- | --- |
| Cesses | 215,900 | 215,900 | 267,300 | 243,014 | --- | --- | --- | --- |
| Licenses | 268,250 | 75,000 | 80,000 | 23,826 | --- | --- | --- | --- |
| Councillors | --- | --- | --- | --- | 14,004 | 29,035 | 32,940 | 24,311 |
| Community Dev't | 35,000 | 35,000 | 35,000 | 26,229 | 154,913 | 148,191 | 187,727 | 113,622 |
| Dist. Training Ctr. | 5,100 | 5,100 | 5,100 | 8,650 | 15,287 | 14,137 | 19,216 | 7,889 |
| Children's Home | --- | --- | 1,368 | --- | 7,207 | 7,442 | 9,249 | 5,076 |
| Veterinary Services | 580 | 180 | 180 | | 22,431 | 22,759 | 22,881 | NA |
| Forestry Services | 1,500 | 12,050 | 1,500 | 244 | 10,962 | 11,936 | 12,115 | 6,892 |
| Agriculture | --- | 50 | 50 | NA | 2,967 | 3,101 | 1,292 | NA |
| Markets | 75,000 | 75,000 | 85,000 | 46,086 | 102,873 | 95,625 | 128,017 | 80,488 |
| Water and Works | 20,500 | NA | 17,500 | 6,843 | 100,978 | NA | 170,502 | 79,502 |
| TOTALS | 663,267 | 732,003 | 867,198 | 484,361 | 683,633 | 658,206 | 842,204 | 427,915 |
| Revenue Flows (Surplus/Deficit) | (Deficit) | (Surplus) | (Surplus) | (Surplus) | | | | |

Source: Annual estimates of the respective years shown.

TABLE 3: KAKAMEGA COUNTY COUNCIL: ANNUAL BUDGET SUMMARIES (IN Kf) - 1983 - 1988

| Item (or service) from which income was earned or on which expenditure was incurred. | INCOME | | | | EXPENDITURE | | | |
|---|---|---|---|---|---|---|---|---|
| | 1983 (Actual) | 1984 (Actual) | 1985/86 (Actual) | 1987/88 (Estimated) | 1983 (Actual) | 1984 (Actual) | 1985/86 (Actual) | 1987/88 (Estimated) |
| Administration | 163 | 214 | 1,630 | 1,130 | 217,203 | 115,869 | 153,120 | 182,709 |
| Community Development | 5,934 | 8,471 | 1,310 | 17,000 | 81,341 | 88,051 | 126,848 | 157,124 |
| Veterinary Services | --- | --- | --- | --- | 6,938 | 8,668 | 6,241 | 7,010 |
| Markets and Trades | 210,310 | 136,648 | 172,310 | 202,230 | 71,924 | 63,258 | 96,269 | 110,988 |
| Water Supply | --- | --- | --- | --- | --- | --- | --- | --- |
| Conservancy | 5,651 | 5,738 | 7,740 | 10,000 | NA | NA | NA | NA |
| Bus Park Fees | 1,297 | 1,767 | 6,870 | 10,800 | --- | --- | --- | 2,800 |
| Local Rates | 7,438 | 8,573 | 9,000 | 13,010 | NA | NA | NA | NA |
| Cess | 1,514 | 10,000 | 1,710 | 48,198 | --- | --- | 160 | 300 |
| Licenses | 123,687 | 126,753 | 120,275 | 171,310 | NA | 4,220 | 4,219 | 7,050 |
| Land Transfer Fees | 100 | 100 | --- | --- | NA | NA | NA | NA |
| Miscellaneous | 18,696 | 22,289 | 26,565 | 22,820 | 4,729 | 6,871 | 1,282 | 4,800 |
| TOTAL | 374,790 | 312,608 | 347,410 | 496,498 | 385,381 | 286,937 | 388,139 | 472,781 |
| Revenue Flows: (Surplus/Deficit) | Deficit | Surplus | Deficit | Surplus (Estimated) | | | | |

NA = Not Available (Figure) though item listed in budget

Source: Annual estimates of the respective years shown

TABLE 4: NAROK COUNTY COUNCIL ANNUAL BUDGET SUMMARIES (K£)--1981-89

| Item (or service) from which income was earned or on which expenditure was incurred. | INCOME | | | | | | EXPENDITURE | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | 1981 (Actual) | 1982 (Actual) | 1983 (Actual) | 1984 (Actual) | 1985/86 (Actual) | 1988/89 (Estimated) | 1981 (Actual) | 1982 (Actual) | 1983 (Actual) | 1984 (Actual) | 1985/86 (Actual) | 1988/89 (Estimated) |
| Clerk's Dept. | 3,459 | 4,076 | 2,300 | 2,867 | 4,142 | 5,028 | 32,145 | 36,518 | 29,523 | 55,822 | 66,465 | 134,160 |
| Treasurer's Dept. | 4,343 | 2,836 | 1,394 | 4,998 | 4,562 | 101,680 | 36,623 | 48,978 | 33,954 | 59,423 | 79,964 | 137,415 |
| Councillor's Dept. | --- | --- | --- | --- | --- | --- | 30,465 | 40,523 | 10,924 | 47,286 | 32,484 | 71,510 |
| Comm. & Adult Literacy | 323 | 371 | 223 | 465 | 313 | 2,580 | 19,198 | 21,876 | 13,874 | 23,305 | 29,115 | 186,430 |
| Sports Activities | 39 | 29 | 67 | --- | --- | --- | 839 | 143 | 816 | 1,500 | 1,164 | 4,750 |
| Auctions and Hides and Skins | 21,494 | 16,729 | 16,527 | 21,609 | 14,591 | 12,030 | 8,369 | 9,033 | 6,160 | 10,054 | 14,438 | 20,634 |
| Veterinary Services and Dips | 52,526 | 51,025 | 37,685 | 44,628 | 53,944 | 88,900 | 71,801 | 80,834 | 41,521 | 87,362 | 103,736 | 167,325 |
| Forestry Dept. | 8,261 | 5,555 | 5,653 | 5,862 | 268 | 2,500 | 15,130 | 19,485 | 13,251 | 21,756 | 21,128 | 123,941 |
| Education | --- | --- | --- | --- | --- | --- | 3,087 | 3,311 | 4,526 | 7,500 | 12,504 | 56,500 |
| Showground | 3,117 | 1,986 | 154 | --- | --- | 8,300 | 4,224 | 7,168 | 1,586 | 353 | 246 | 17,160 |
| Markets and Trading Centers | 58,368 | 86,236 | 63,015 | 73,131 | 89,388 | 291,650 | 18,847 | 14,170 | 16,250 | 23,473 | 27,907 | 132,824 |
| Beer Halls | 100 | 33 | --- | --- | --- | --- | --- | 3 | 5 | 100 | 100 | 100 |
| Slaughter Houses | 2,938 | 1,741 | 778 | 1,280 | 399 | 900 | 1,184 | 2,145 | 2,488 | 1,683 | 2,334 | 9,282 |
| Cemeteries | 1 | 17 | 9 | 5 | 2 | 20 | 949 | 1,436 | 1,074 | 1,643 | 1,635 | 5,219 |
| Works Dept. | 128 | 6 | --- | --- | --- | --- | 13,016 | 17,277 | 12,614 | 20,087 | 29,636 | 79,104 |
| Conservancy | 357 | 347 | 43 | --- | --- | --- | 3,687 | 4,357 | 4,322 | 8,469 | 5,067 | 13,277 |
| Poll Rates | 876 | 1,011 | 916 | 1,002 | NA | NA | 247 | 263 | --- | --- | NA | NA |
| Transfers (Tourist Fees) | 40,000 | 50,000 | --- | 150,000 | 305,000 | 663,649 | --- | --- | --- | --- | 10,000 | 12,500 |
| Misc. | 1,619 | 2,521 | 2,445 | 4,266 | NA | 13,000 | 454 | 308 | 210 | 10,199 | 880 | 3,000 |
| TOTALS | 197,889 | 224,519 | 131,209 | 310,113 | 475,401 | 1,189,937 | 260,025 | 307,828 | 193,100 | 380,015 | 438,803 | 1,175,237 |
| Revenue Flow | Deficit | Deficit | Deficit | Deficit | Surplus | Surplus | | | | | | |

Source: Revenue Estimates of the Respective Years Shown

surpluses. Kakamega had two surpluses and an equal number of deficits. On the surface Kakamega performed better tnan Narok. This is practically not tenable. Narok is obviously richer than Kakamega because it earns substantial revenues from tourist fees.

However, these impressive showings have been discounted by ground evidence. Kakamega, for instance, is one of the Councils cited in Chapter One for not being able to remit contributions of their workers to the relevant credit co-operative societies. In fact in 1987-88 when it failed to do this, it courageously estimated a surplus.

Further, there are indications to suggest that some of these surpluses are, in the words of Judith Geist, "balances by a sleight-of-hand."[9] For example, Narok's surplus of 1988/89 resulted from an incredible projected increase in market and trading centre income; i.e., from K£ 89,388 in 1985/86 to K£ 291,650! No explanation was forthcoming as to whether this would actually occur. In addition, in the original sources, the total income and expenditure figures for 1984 balanced squarely at K£ 380,015. But a careful review of the relevant data revealed a clerical error which required adjustments in the income figure to show K£ 310,113 and the expenditure amount to be K£ 380,015. Whereas a balance had been officially recorded, the rectification resulted in a

deficit. Notice also that in 1983 the figures for tourist fees are not shown in the Narok table. This being the major revenue source for the Council, one wonders how it could have been overlooked.

Besides the doubt cast upon these surpluses by the discrepancies apparent on record, independent studies of the revenue problem also express their reservations.

Sindiga and Wegulo think that surpluses are unreal. They wonder why there is hue and cry by most Councils for lack of funds and yet they show surpluses at the same time. In support of their over-control argument, the two contend that Councils are driven into cooking surpluses because the Minister of Local Government will not approve their budgets unless they are balanced on the book (1986: pp. 144-47). A World Bank Study expressed the same view when it concluded that it was difficult to study and accept the authenticity of Local Authorities' revenue practices because budgetary estimates were always a depiction of ministerial control rather than the factual position (World Bank Mission, 1976 Appendix VIII, p. 4. See also Paul Smoke, op. cit., pp. 10,14-15, 17).

The government itself doubts that Local Authorities, or County Councils for that matter, are capable of surpluses.

Their performance through the 1980s has persistently been poor as the summary in Table 1 showed.

Confessions by the Councils themselves finally foreclose the issue of surpluses. No single revenue officer I talked to could defend these surpluses. To the contrary, the prevalent opinion was that Councils were facing constant revenue shortfalls.

It is admitted, however, that not all County Councils experience deficits. There are a number of them (most notably the so-called "Coffee Councils"--Muran'ga, Nyeri and Kiambu) that enjoy genuine surpluses. So they do not have to manipulate their data to show balanced books.

Even though there is wide agreement that genuine surpluses are an exception rather than the rule (Judith Geist, 1987). Therefore, it can still be arguably concluded that either from the confessions and records of the Councils themselves, or from observations of independent studies, Councils have revenue problems which they are compelled to conceal. However, the kind of eruptions discussed in Chapter One make this effort futile.

Let me now elaborate on the consequences of these problems. Lack of revenues has forced Councils to side-line

service delivery. In the first place, this may be discerned from the choice they have made between servicing their own staff as against services to the public.

There are some indications in the Tables to suggest that Councils spend the bulk of their resources on salaries and very negligible portions on services. It is not a mere coincidence that the first three items in the budgets of these and other County Councils relate to the departments of the treasurer, clerk and Councillors. This to me is a priority listing. Notice in this connection the random listing the service departments receive in these records. This is the eventuality I had in mind when I earlier on said that Councils have taken advantage of the "power-duty" distinction in drawing their expenditure priorities.

Salaries to staff and allowances to Councillors take precedence over service obligations. From what I have said before, this is not an accusation. It is a lamentation that as good-intentioned as Councils may be towards local people, revenue deficits have forced them to draw salary expenditures in preference to service commitments.

TABLE 5: TOWN, URBAN AND COUNTY COUNCILS: ECONOMIC ANALYSIS OF EXPENDITURE AND REVENUE - 1983-1987

K£ million

| | 1983 | 1984 | 1985 | 1986 | 1987 |
|---|---|---|---|---|---|
| Current Expenditure | | | | | |
| Labour Cost | 8.25 | 5.06 | 8.85 | 8.38 | 12.75 |
| Other Goods and Services | 2.77 | 1.86 | 4.14 | 2.64 | 5.38 |
| Transfer to household and Enterprises | 0.27 | 0.12 | 0.46 | 0.20 | 0.44 |
| Transfer to Funds(Current) | 0.36 | 0.12 | 0.39 | 0.11 | 0.43 |
| Interest | | | | | |
| TOTAL | 11.65 | 7.16 | 13.84 | 11.33 | 19.00 |
| Capital Expenditure | | | | | |
| Gross Fixed Capital Formation | 0.55 | 3.06 | 3.82 | 2.85 | 6.48 |
| Loan Repayments | 0.22 | 0.10 | 0.32 | 0.18 | 0.71 |
| Transfer to Funds(capital) | 0.06 | 0.02 | 0.11 | 0.08 | 0.23 |
| TOTAL | 0.83 | 3.18 | 4.25 | 3.11 | 7.42 |
| TOTAL EXPENDITURE | 12.49 | 10.34 | 18.09 | 14.44 | 26.42 |
| TOTAL REVENUE | 15.81 | 8.40 | 17.41 | 15.69 | 18.87 |

SOURCE: Kenya -- Economic Survey, 1988, p. 70

The bias toward staff commitments as against service-provision, became visible in the early 1970s. After the loss of the GPT, Councils reacted by overlooking the service departments. Records show that through the 1970s, they spent an average of 70% of their resources on labor costs (Kenya: Development Plan, 1974-78, p. 504). However, the picture of the 1980s has optimistically shown some reversal in this trend, as Table 5 shows. Though the labor item has continued to claim the lion's share of the incomes, it has steadily been falling as a percentage of total expenditures. During the period in question, the average cost on labor dropped to 54%. In summary the following was the full picture between 1983 and 1987.

TABLE 6: SUMMARY OF LABOR COST AGAINST TOTAL EXPENDITURE (1983-1987)

| YEAR | PERCENTAGE OF LABOR COST TO TOTAL EXPENDITURE |
|---|---|
| 1983 | 66% |
| 1984 | 49% |
| 1985 | 50% |
| 1986 | 58% |
| 1987 | 48% |
| AVERAGE IN FIVE YEARS | 54.2% |

Although the situation appears to be getting better, it is important to point out that service provision must not become sacrificial lamb for the upkeep of the labor force. There are some indications, albeit inconclusive in themselves, to the effect that provision of services is being compromised. For example, Narok County Council is desirous, among other goals, to advance education services among the Masaais. Yet, in 1985-86, it spent nearly 40%, of total revenues on the labor item, and only 3% thereof on education. By the Council's own word, this was not due to a lack of commitment to this service. It was primarily because of inadequate revenues. Similar calculations show that Masaku spends negligible amounts on its self-declared priority--water--than it does on salaries.

This accusation must, however, be toned down. It is admitted that the labor costs in most Councils include salaries and other disbursements to personnel in service departments. For example, the salaries for nursery school teachers, clinic, dip and water kiosk attendants, market masters and road crews, are part of the labor item. It is therefore true that service departments are not totally forgotten. This does not, however, mean that these departments have been adequately addressed. There is wide agreement that they have continued to be treated as

subordinate to the Clerk's and Councillors' departments (Kayila, op. cit., 17; Siganga, op. cit., Chapt. 4).

But services are not the only victims. Recruitment of qualified staff, modernization of office operations, or the purchase of capital equipment (for capital projects such as roads), have all been frozen due to lack of finances. For an illustration, Mombasa Municipal Council has not been able to recruit revenue collectors for over ten years. The Council acknowledges that as a result its revenue collections have remained quite poor. Attempts to use private debt-collectors have proved more expensive. The Council does in fact estimate that every year it has not been able to collect anywhere near 50% of the assessed revenue.[10] This is perhaps true of other Councils. If a Municipality, with a slightly better personnel calibre, can fail this way, there is no way a rural County Council can be any better.

Revenue limitations further drive County Councils to over-rely on one or a few sources that perform comparatively better. A look at Table 4 shows that Narok receives over 60% of its revenues from veterinary services and tourist fees. Masaku and Kakamega (Tables 2 and 3 respectively) over-depend on market and licence fees. Kiambu, Nyeri and Muran'ga collect over 70% of their revenues from cess on coffee.[11] In Chapter Three we shall see how Wareng' County Council, for its

part, depends on land rates for over 50% of its total revenues. It is not wrong to exploit a promising source to the full. It is, however, unwise to put all the eggs in one basket by ignoring to diversify and develop other available sources. One would have logically expected diversification to be a common practice because since Councils are in need, they surely must try all possible sources. The call that is made at this point is that in addition to urging Local Authorities to try new sources of revenues, they should be encouraged to exploit the full potential of the existing ones.

This Chapter has presented the position that County Councils have a wide range of functions. If all of them were to be performed, barring revenue difficulties, they would constitute a work-load that is demanding in manpower and revenues. The revenue sources we considered were meant to provide finances for the statutory duties. The analysis attempted to show that the revenues are inadequate since a substantial portion thereof is spent on salaries, wages and allowances. Yet despite well-acknowledged revenue shortfalls, Councils have continued to be assigned more demanding functions. Since there is recognition that indeed Councils are necessary for rural development, we must review the criteria upon which functions are to be allocated in the future. It has therefore been argued that functions should be allocated on a redefined basic-needs basis. In this way

the work-load will be clearer, manageable and appealing to the rural people. This is good for arousing local participation.

Further, it was urged that we must steer Councils towards service provision. This must be a government policy to be pressed upon the Councils. Perhaps more importantly, while we must encourage them to fully exploit all their current sources, we must also help them identify other and dependable sources. Accordingly, when we urge Narok, for instance, to focus on resettling the Maasais; or Masaku to help in the provision of water-holes, we must demonstrate and show how the revenue for this will be obtained. Having identified a land tax as a potential source for such revenues, let me next present the position that the tax is feasible.

# CHAPTER THREE

# WHY THE LAND TAX: ASSESSING THE CHANCES OF SUCCESS

There are at least three factors supporting a land tax in Kenya. First, there appears to be political will for the tax. Thus, a tremendous obstacle that often kills tax measures in their infancy seems potentially manageable. Secondly, that the tax is a superior alternative revenue-wise as compared to the existing resources. For instance, it has a more stable and enduring base--thereby promising a steady flow of revenues--than any of the current resources. Thirdly, and perhaps most importantly, a number of prerequisites do now exist. There is, for instance, a start-up cadastral base; there is also legal basis for the tax; and quite encouragingly--successful experiences from the application of land-rates by some County Councils.

## 3.1 FAVORABLE POLITICAL DISPOSITION

The application of any tax is ultimately a political decision. There should be determination on the part of the government to apply the tax. On the other hand, the usual displeasure from the potential taxpayers must be surmountable. Neither the economist's well-conceived agenda, nor the lawyer's precise statute can apply a tax unless the body-politic is favorably disposed and the potential taxpayers are accommodating. There are, therefore, two centers of good-will (or otherwise) to be satisfied: the government and the people. Let me first discuss the latter.

Land in Kenya has often been regarded as politically sensitive. Experts have assigned two major reasons for this. Professor Charles Wanjala is one of the leading exponents of the historical reason. He maintains that land was central to the war of independence. Kenyans are bound to question a tax that directly impacts on a possession so hard-won. Thus, Wanjala re-echoes an adage of the politics of the 1960s: if land is taxed then we are not yet *Uhuru* (independent) (Charles Wanjala: PI, 1989).[1]

Today, however, the sensitivity of land is explainable on more pertinent considerations. The government officers who were interviewed for clarification of this perception, emphasized the second reason: economic factors. In their view, since the economy of Kenya has continued to be agriculture-based, land has appreciated both in monetary and sentimental values. Its taxation, bringing with it the possibility of dispossessing a person of his land for default in payment, must clearly show concerns for reaching a base that is emotionally perceived and determinative to the economic survival of many. Land is, therefore, sensitive, but not so much for the historical factor. It is sensitive, as it is in other Third World Countries, because of the economic

repercussions to the people and the country that would ensue from its exaction.

What then is the disposition of the people of Kenya? I interviewed a number of people to get some insight into the potential reception of the tax by the public. Though the findings from this cannot be determinative as I have cautioned, I used them to draw a general conclusion on public reaction.

A majority of those interviewed appreciated the revenue problems facing their institutions of development (the Local Authorities). They wished to see these problems overcome. Having shown a general support for the tax, they went on to assert conditions upon which they would accept the tax. These included using the tax to achieve some social justice; ensuring that Local Authorities are made more accountable in their use of the resultant revenue than the case is presently; and that the revenues generated are spent in their local areas in the same manner *harambee* funds are.

In showing a conditional approval, these people seemed to support one of my assumptions. The people of Kenya want to improve their economic well-being. They therefore do not mind contributing towards this so long as their willingness

is respected by observation of certain conditions. After all, they are already contributing in form of *harambee* effort and payment of current taxes to their County Councils.

The government's good will is evident from a number of factors. Since the late 1970s, it has continued to recognize the role of the Local Authorities. Decentralization and the consequent functions allocated to the County Councils have already been discussed in this light. Since the early 1980s, there have been policy statements to the effect that the government intends to apply the tax either as a revenue or effective land-use measure. I have already mentioned the policy pronouncement of 1984 and the promise to appoint a Land Tax Commission. Let me now trace relevant developments thereafter.

Though no specific moves towards the tax have been taken to date, a general expansion of the fiscal base is being undertaken. In May 1988 the cess on agricultural produce was expanded. Prior thereto, the tax had been confined to cash crops such as coffee, pyrethrum, and cotton. This meant that only a handful of County Councils wherein these crops grew enjoyed revenues from the tax. Indeed, County Councils of Muran'ga, Kiambu, and Nyeri had become very affluent, partly

because of the good performance of the cess on coffee that grew there in abundance (Judith Geist, 1987).

The Local Government (Agricultural Produce Cess). . . Order of 1988 expanded the cess by making it applicable to selected food crops (e.g., maize). It also brought into the net well-established crops that had not hitherto been cessed (e.g., wheat and sugar-cane).[2] A cess at the rate of one percentum of the gross producer price is imposed on these products. Since they must, under the relevant laws, be marketed only through the approved government agencies, the amount of the tax from each farmer is withheld from the price due to him. Thereafter, the agency remits the tax to the Council in question. This rate and the use of these collection agents are controversial. I will return to them in the next segment.

In August 1988 the Local Authorities Services Charge Act was passed.[3] At rates that progress proportionate to income, every person (employed or self-employed) pays to the council in which he is resident a service charge (S. 3). For employed persons, the employer is the collection agent for the Council. He withholds the amount due from the salary of his employee and remits the same to the Council. Self-employed persons pay directly to the Council (SS. 5, 6). As I said earlier, it is a kind of poll-tax because of its crude definition of base.

The revenue contribution of these two new measures is yet to be determined. I am certain though, that they will go some way towards the alleviation of the problem at hand. But even more importantly, these measures demonstrate two things. First, that the expansion of the fiscal base by new or re-assessed revenue sources is the most appropriate approach to addressing the Local Authorities' financial difficulties. Secondly, from these measures I am optimistic that soon attention will turn to the land tax. This optimism is somehow fortified by the promise to appoint the land tax commission just mentioned.

Political will *per se* cannot produce revenues for the Councils. It is, however, tremendously significant because it facilitates the momentum and atmosphere necessary for the success of any tax measure. Momentum--because political leadership is the genesis of and driving force behind any intended tax. Atmosphere--because it is only under political tolerance that the enforcement of the tax law can succeed. It ought to be remembered that land taxation carries the very serious penalty of foreclosure. This cannot be enforced in the absence of a political will on the part of the government--considering that the direct consequence of a foreclosure is the dislocation of a person from his life-line.

The need for political will is an enduring theme in land taxation. Bird, with evidence from six Latin American countries, demonstrates the double-edged nature of political factors. In the first place, the elite landowners can easily block the inception of the tax in order to protect their properties. Alternatively, they can make its working quite difficult if they feel that it is not bending to their desires. This may, for instance, make it difficult to use the tax to advance social equity programs. He cites a number of *coups d'etat* by Army officers whenever they felt that these taxes were working against them. It was easier at times to generate a revolution (in Columbia, for instance) than it was to achieve a land reform or a re-distribution goal by way of land tax (1974, Chapter 5).

On the other hand, revolt by peasants can easily be fomented if fear for the elite leads to shelving the equity goals of the tax, thereby leading to the perpetuation of the old inequities and marginalization of peasants. The latter may react by revolting. It requires both political muscle and persuasion in order to balance the scales (Bird: 1974, Chapts. 6 and 12).

Today caution about political will is still being sounded. As part of their Optimal Tax Theory, Newbery and Stern warn that it can be counterproductive not to thoroughly assess the political mood of the country before introducing any tax. They then go on to reiterate the points exemplified by Bird's work (Newbery and Stern, p. 198).

## 3.2 LAND TAX: A SUPERIOR ALTERNATIVE

A land tax has certain intrinsic qualities that give it an edge over the major existing sources. It has a more stable base and less distortionary effects on economic and other activities.

### (i) Stability of Base

There is general agreement that a land tax has possibly the most stable base. Stability is adjudged by several factors. First, that land is universal. It is, so to speak, abundant in every County Council. Ignoring for a moment its qualitative and quantitative variables, and cadastral considerations, no County Council would be lacking in base for the tax. And its situs is inconcealable. A County Council need not be worried that the land will not be there some day. Because of this ambient characteristic, land has been

described as a "rich inexhaustible goldmine of an extraordinary character" (J. A. Umeh, 1980:21).

The base for cess, on the other hand, consists of selected crops. Not all County Councils have cessable crops. Despite the effort to widen the categories of crops, there are County Councils covering about half the total land area of Kenya that have no cessable crops. A look at any map depicting Kenya's agriculture will be convincing.[4] To make cess as universal as land tax would require, quite inadvisably, to net every conceivable produce in each Council. And since cess determinatively depends on the marketability of the produce, many crops would not qualify because they are grown only for subsistence. It is, therefore, quite difficult to attempt to universalize cess as a tax. Because of this one Commission recommended at one time that the tax be replaced with a GPT. The Tress Commission considered that because of a highly narrow base, cess was discriminatory (Kenya: The Tress Report, 1963: Paras. 118, 193, 194). Its further shortcomings will be considered soon.

Fees and charges have a very nomadic base. They very much depend on the level of demand for the services on which they are imposed. Take, for instance, the fee charged for entering a market, or a licence imposed on owning a bicycle. There are a number of factors that nibble away their bases.

These factors include many opportunities for evasion and avoidance. As for the markets, people are responding, as I mentioned in the case of Kakamega County Council, by setting up their own *amatekula*. This could be considered avoidance or evasion, depending on a number of variables.

Bicycles are expensive to own. As such they are a possession of the few working elite in the rural areas -- the teachers, veterinary and agricultural extension officers, the chief, and assistant chief.[5] The majority of our people go on foot. Besides, there are still many chances of owning a bicycle without paying for the license. The Council has not sheriffs of its own. It has to depend on the already over-burdened national police force.

Fees or takings from markets suffer from the fact that infrastructure has not permitted a faster pace of expanding the markets. I was informed that earth roads make it difficult for Councils to establish markets in some places, even though local people there may be operating thriving *amatekula*. Similarly, unavailability of public water means public amenities cannot be established in places where the Councils would wish to have markets. All these difficulties put together severely restrict the expansion of this kind of base.

Secondly, base is adjudged stable or otherwise on account of its ability to endure fluctuations in its "environment". By "environment" it is meant changes in natural phenomena (such as the weather), as well as changes in political forces. One need not over-stress the impact of the weather on cess revenues. Since the tax due is based on a pre-fixed percentage of whatever the gross producer price, it means revenue generation has to fluctuate with the weather and harvests. Estimated revenues may thus record a substantial discrepancy against revenues actually collected. Kenya, like Ethiopia, lies in that part of the Sahel region where droughts are assuming a cyclical occurrence.[6]

Fees and charges for services are quite sensitive to political tremors. Apart from downward adjustments that may be necessary to accommodate public uprising[7], a major political crisis (such as a military *coup d'etat*) could possibly wipe out their entire base. For instance, Narok County Council, which heavily depends on tourist fees, could be badly jeopardized if tourists, for some political reason or other, ceased to come.

Without over-stating the sanctity of land, one can still say that it will always be there after the "storm". It may be

damaged, but not lost. The economic activities thereon may be swept away or devalued. But its residuality will survive. In the words of Professor Umeh again, to this extent land is not just a rich inexhaustible gold mine. It is one which *ceteris paribus*, grows richer in size and productivity with the passage of time (1980: 28).

Let us compare land with at least one non-tax source. Borrowing is the source I have in mind. Apart from the fact that credit facilities (local or foreign) have become severely scarce, borrowing is only a short-term solution. In the ultimate analysis, it will put the Council in more financial problems. Both the principal and interest must be paid. This, instead of expanding the fiscal base, puts a strain on the existing resources. Loans to Councils create specific charges on Council taxes. For instance, a loan obtained from the National Housing Corporation to finance construction of houses for the Council creates a charge on the council's rates, fees, and charges (The Housing Act, Cap. 117, SS. 8, 21). So too are loans raised through the issue of stocks and bonds [The Local Government (Stocks and Bonds) Rules, 1986, r. 4].[8] Besides, unforeseen costs could arise from borrowing. Litigation costs come to mind at this point.

A land tax generates revenues, not equities. The only costs to watch are those that relate to collection and general administration.

**(ii) No Distortionary Effects on Revenue Flow**

There is no need to use agents or intermediaries to collect revenues from a land tax. The revenue flow does not, therefore, suffer from agency-distortions. The Council has full command over and retains the initiative in the entire administration of the tax (except to the limited extent to which the locational chief may be involved).

Cess, on the other hand, depends for its collection on the marketing agencies through which the cessable crops must be sold. The governing law, which we saw earlier, specifies these agencies. For instance, coffee must be sold through the Coffee Board of Kenya; and cotton, through the Cotton Lint and Seed Marketing Board. Collection of taxes through agencies is not peculiar to cess. Income tax, for one, very much depends on employers and other paying agents for the collection of income earned from employment or transactions upon which tax-withholding rules apply. However, the distortionary effect on revenue flows due to the interposition of an agent in the nature of a marketing board is widely acknowledged.

There is evidence to suggest that Councils do not receive from these Boards all that is due to them. It has further been suggested that remittance of the collection does often suffer undue delays.

For instance, the World Bank Mission of 1976 had a number of reflections on revenue flows from cess. One of its pertinent observations was that the Marketing Boards retained questionable administrative expenses from the collections (1976: Appendix X, p. 1). This has apparently been corroborated by farmers who have consistently argued that the boards rip off their earnings in the same way. Peter Igiria has talked of cases where the Coffee Board has refused to remit collections to the Local Authorities. In this regard his study has argued that this arrangement is one political constraint on Local Authorities' revenue capacity which must be eliminated as a matter of base-broadening (1988: 6-7).

It has further been argued that a tax like cess interferes with the application of better and more broad-based taxes. The treasurer of Wareng' County Council observed that the major opposition to land rating has come from the obvious burden of applying land rates and cess at the same time. Farmers argue that these two amount to an over-taxation of their incomes and consequently a discrimination against them

as a class. The treasurer was of the view that the application of the two at the same time presents a policy dilemma that compels the Council to tacitly favor one against the other. The World Bank Mission broadly thought that cess was a kind of hindrance to the full exploitation of land rating. It went farther to question the application of cess in addition to an export duty on the cessable produce (1976; op. cit.).[9]

Fees and charges do also suffer from crippled revenue capacities. Since some of the services upon which they are charged are essential (or basic), the rates have to be fixed at subsidy rather than cost-effective levels. As indicated in Chapter One, this policy has denied the taxes opportunity to generate optimum revenues. Numerous calls have been made advocating the reversal of the rate fixing policy. Now, the government has declared that it will encourage Councils to adopt cost-efficient criteria in fixing these rates as part of a strategy to expand their fiscal-base (Kenya: Sessional paper 1/1986, pp. 50, 108, paras. 4.26, 7.12). This will result in higher rates. The consequence of higher rates on demand for the relevant services and on the revenues from these taxes can be imagined.

Under a land tax program, it is possible to address concerns for which a subsidy rate is usually chosen without

sacrificing revenue generation. As we shall see later in the Chapter, this can be achieved through the application of a differential rate. Under this approach, the poor can be made to pay a land tax without feeling its burden unduly. The revenues compromised as a result of applying a soft rate on the small peasant can be recouped by making the second part of the differential rate impact a little more heavily on the rich farmers. This arrangement is likely to balance the revenue generation. It also underscores the equity principle of paying according to ability (or wealth).

It is possible to argue that the same approach can be applied to rates on services. True, but this would encourage more of free-rider behavior by the rich switching to the subsidized services. Because of the legal safeguards, as we shall see in the next chapter, a wealthy landowner would find it quite difficult to opt for a land size holding that would bring him into the lower portion of the differential rate. It would thus be easier to monitor his behavior towards a subsidized rate than it would be to police the switch by the rich to the subsidized services.[10]

### (iii) No Incidence Shifting

Economic theory appears to suggest that the burden of a land tax cannot be shifted either to tenants, laborers or

those who supply the landowner with inputs. In fact, the price or value of the land always falls by the capitalized value of the future tax liability (Bird, 1974: 163-64; Newbery and Stern, 1987: 380-81).

My understanding of this is that if, for example, the value of the land before the tax is planned is $100, income from its produce is $20, and then a tax of $2 is introduced (i.e., 10% of income), the value of the land falls by 10% to $90. The tax is capitalized (internally absorbed) in the sense that a buyer of the land can only accept the price of $90 and not of $120 (i.e., land + productivity). This is because after the purchase, the new buyer will shoulder and continue to pay the tax. It would be a double burden if the seller passed onto him his tax liability through the price of $120.

This would be the position if the land was rented. The landlord, since he is already charging the maximum that is possible under the prevailing market conditions, cannot succeed to hike the rent by adding on the amount of the tax. If he hikes the rent beyond the current market rate, the tenant--as a rational individual in an open market--will go elsewhere. Likewise, he can neither force nor persuade suppliers to lower prices of the inputs so as to pass the tax

burden to them. Suppliers, again, as rational persons in an open market, will sell to those who offer higher prices.

Although the first assumption appears a bit unrealistic for Kenya (in that there are not many houses available to tenants to enable them to choose rationally), it is still correct to argue that in theory the incidence of the land tax remains on the shoulders of those who were targeted. Even if market forces fail to deter shifting, price, rent or wages controls that are found in an economic setting such as Kenya's, will do the job.

Inability to shift incidence is good for policies of wealth redistribution. In young nations, ownership of land is symbolic of social status, political power, and wealth. And since political process is often lacking in a mechanism for fair distribution of this wealth, the land tax offers an opportunity, even if marginal. By placing and confining the burden where it was intended, the tax makes landowners to account according to their wealth. Since the days of utilitarian socialists (e.g., Adam Smith and David Ricardo), it has always been essayed that this fiscal arrangement is a canon that must not be missed. And indeed, the desire to use taxes to address social justice has been, as mentioned in Chapter One, one of the kingpins of Kenya's fiscal policies.

Inability to shift incidence is also good for the revenue goal. If, for instance, the tax ultimately impacts on a vulnerable group (e.g., the poor) as a result of shifting, this may compel tax authorities to review the tax threshold with a view to lessening the burden on the poor, or totally eliminating them from the tax ambit. Besides shrinking the base, these measures do not solve the problem. Shifting will still go on and plunge the planners in disarray and constant reviews to close loopholes. It becomes virtually impossible to target and access the revenue potential of certain groups in society. Taxation of corporate or business income, for instance, has always failed to perch and rest on the intended targets because the statutory impact will always be different from the economic impact so long as price-fixing is left to market forces (Richard Musgrave, 1984, pp. 250-251). A land tax is said to achieve the opposite because incidence sticks where it was intended.

## 3.3 EXPLOITING THE EXISTING EXPERIENCE

Up until now, I have largely considered theoretical factors that give land tax an edge. Let me now come closer to the empirical position in Kenya and examine some practical parameters. The broad path of the analysis here is to demonstrate that there exist encouraging experiences--exploitation of which can assure the successful application

(or expansion) of the tax. Three factors constitute these experiences: the existence of a start-up cadastral base upon which expansion can commence; the availability of legal authority and basics from which application can be started; and successful attempts by some County Councils to apply land rating--attempts that have brought to light a number of guiding lessons.

### (i) The Cadastral Effort in Kenya

A land tax cannot be applied unless we have information concerning who owns the land we want to tax, where it is situated, its size, and probably its productivity. A determination of these issues constitutes cadastral information. Cadastre is, therefore, a cornerstone prerequisite.

Kenya's cadastral achievements can be summarized this way: that the portion of the country that ought to be first targeted has now been brought under the process of land registration. Accordingly, a number of "tax handles" have been created to facilitate a vigorous expansion of the tax. I will leave the handles until the next chapter to which they substantively belong. I will devote this sub-section to a brief look at the title registration process.

Since independence the government has pursued a land policy that advocates privatization of the individual title. The reasons for this are the usual ones for an open market economy. So the history of cadastral surveys is coincidental with that of the post-independence Kenya. It is also simultaneous with that of the process of consolidation and adjudication.

Two systems of cadastral surveys have been applied in Kenya. The first is the Torrens, or "fixed boundary surveys". The second is the English, or "general boundary surveys." Both start with individuals first sorting out their bundles of rights on parcels of land; and thereafter a recognition and confirmation thereof by statutory registration.

The fixed boundary system requires that the boundaries of each parcel be accurately surveyed and marked so as to be given a definitive legal determination. The idea behind this is that after such determination by an entry in the register, disputes as to boundary or title claims can only be entertained on statutorily permitted grounds. Such grounds may be fraud, or duress. But they do not include claims under the African customary law. In other words, except as is restrictively permitted by statute, the register is unassailable.

The actual ground demarcation is marked by angle-iron in concrete. Therefore, the precise position of the boundary for each parcel is an invisible line joining the beacons. Thereafter, both aerial and ground maps are prepared to record the parcelization. The Director of Surveys then submits the maps to the Registrar of Lands for the latter to prepare a register for each parcel. It is in this register that any registrable transactions relating to each parcel must be "mirrored." This particular method can be used in an area either because the Registrar considers it appropriate in his opinion or because an individual (or a County Council) has applied for it (The Registered Land Act [RLA], S. 22).[11]

The second system, as its name implies, does not definitively determine boundaries. First, the Minister for Lands declares an area (e.g., a County Council) a registration district (RLA, S. 5). Then the Director of Surveys sends his team to prepare a Registry Map. The map shows parcels whose boundaries have been determined *generally* by consolidation and adjudication. There are no beacons used to mark the physical boundaries. The map simply identifies the parcels by numbers or letters (or a combination of both) in a consecutive manner. After statutorily set times, the Registry map is confirmed and handed over to the Registrar of Lands to prepare the Land Register for the area (RLA, SS. 10, 18).

The Registrar may make boundary alterations as he sees fit (RLA, S. 19). The entries in the Land Register are a register for each parcel identified by district and parcel number. Section 10 embodies the "mirror principle." It prescribes that the register of each parcel must contain information relating to the up-to-date transactionary status of the parcel. Those who wish to search for information--including a County Council searching for land taxation purposes--will have the current status of the land. In practice, however, most registers are hardly up to date. In Chapter Four I will amplify the mirror principle.

What has the process achieved? First, 6,852,000 hectares of land have been registered. As against the total land area of 571,416 sq. km., what has been registered is 12% thereof.[12] This percentage is quite minimal in terms of the total land area. However, its significance lies in the fact that it represents coverage of 28 out of 39 districts (or County Councils).[13] Logically, the registration process can only be applied on settled land. The 28 districts (or the 12% of land area) is the part of Kenya that is well settled. The rest of the land is more or less occupied by nomads or game reserves. It was the aim of the government to complete registration of the settled districts first. This appears to be accomplished.

There is, therefore, no reason why the land tax cannot be made widespread in these areas.

Secondly, the process has generated a number of laws that make pertinent provisions crucial to a land tax program. In essence, it is now possible to get virtually every bit of cadastral information we need. For instance, by virtue of Section 10 of the Registered Land Act, a County Council can, by checking up in the register of the land parcel in question, know where the land is situated, and its size. I will give the details of this in the next chapter.

Most importantly, we now can tell the owner of any registered land at any time. Because of the mirror principle in Section 10, we can determine the owner and the capacity of his title. The register of the parcel is required to tell us if he is individual or corporate; a single or group proprietor; common or joint owner; trustee, governor or administrator. I will return to this very important question of "owner" in the next chapter.

The core of my argument this far is that there now exists a sufficient cadastral foundation upon which the land tax process can be applied. But as it is well known in land taxation, a lot still remains to be done. Cadastral information has to be constantly updated--more so if a value-

base has been selected for the tax. It should also be added that as settlement takes place in the remaining portions of Kenya, there will be need to spread the registration process. But we cannot withhold the application of the tax until every bit of land has been registered.

**(ii) The Legal Basis**

There is legal foundation upon which to build a land tax effort. The legal regime consists of the Valuation for Rating Act, cap. 266, and the Rating Act, cap. 267. Broadly, the Rating Act is supposedly the substantive statute. The Valuation Act, on the other hand, is procedural. Both statutes were first introduced during the colonial days to govern land rating in urban centers. Later they were extended to govern rating of agricultural land in the white settled areas in the manner already discussed. But they could not practically apply after independence for reasons we also have seen. They were, however, retained. And this is of strategic importance to us today. Let us examine them a little closer to see what they say and what needs to be done to them to facilitate their optimum use.

The Rating Act has made some foundational provisions. It gives County Councils legal authority to levy what it calls "land rates" on agricultural land (SS. 2, 3). Soon we shall

encounter the nomenclature question as to whether the tax should be called land rates or land tax.

Secondly, the statute defines some key terms. For example, it defines a "rateable owner" as the owner of a registered freehold. And this includes, for example, a tenant for life (Rating Act, S. 2, read together with Section. 7 of the Valuation for Rating Act). But these definitions suffer from shortcomings we shall soon see.

Thirdly, the Act gives three alternative bases a "rating authority" can apply. They are the area base, rental-value base, or site-value base (S. 4). A rating authority can choose one of these. It may also, upon fulfillment of certain requirements, combine some of them. These terms are most relevant for purposes of the next chapter. From this, the statute goes farther to indicate types of rates a rating authority can apply, depending on the base chosen. Such rate could be flat, graduated, or differential (S. 5).

Lastly, the statute contains some provisions in regard to the administration of the land rating. For example, the taxing authority is the Council itself. In this capacity, it has powers relating to assessment, collection, and enforcement. Enforcement, for instance, embodies both

penalties and incentives. Most importantly, execution of land for default in payment is permitted.

The Valuation for Rating Act primarily makes provision for the valuation of the land so as to impose the land rates on its most recent market-value. Every rating authority *must* value land within its jurisdiction once every five years. This is called primary valuation (S. 7). However, the Authority *may* carry out a "supplementary valuation" annually (S. 8). For this purpose every authority *must* appoint one or more valuers (S. 7). The valuers must present their work in the form of valuation rolls.

## Shortfalls of the Rating Statutes

What are the shortcomings of these laws? How can they be remedied so as to facilitate a full-scale application of the land tax? Before I address these questions, let me start by restating my support for the intent to tax agricultural land for which the statutes provide. The existence of the legal authority is, in itself, a major step in the land tax application program. It marks one step forward in the realization of the program. The following are, however, the defects of the statutes that challenge our initiative to implement that program.

### a. Statutory Obscurity

First, the statutes have suffered a substantial measure of obscurity. This was partly because in the absence of a cadastral base (among other prerequisites), the law could not apply soon after independence, even if this was desired. In addition, from the earlier discussion, we saw how the whole issue of land taxation together with the applicable statutes, were shelved. Twenty one years after independence, the government was to admit these inhibiting factors (Kenya: Dev. Plan, 1984-88, p. 51).

As a consequence of taking a back seat, some County Councils do not even know that this law exists. I was amazed by the confusion that some Council officers exhibited in their inability to distinguish between land rates and general rates. Some talked of the statutes but with startling ignorance. Was it because they were not lawyers? I do not think so because they showed remarkable knowledge of other laws that they apply. In my estimation, and that of Gitonga Aritho (1980: 66), these statutes are not familiar to the constituents for whom they were legislated.[14]

We are, therefore, faced with an enormous task of popularizing the law and educating County Councils on its

content. We cannot just assign new functions without new revenue sources. Since this is incumbent upon us, we must make the revival and publicity of this law part of the agenda of identifying this particular source. In the next chapter, I have emphasized that this is by no means a small task. We will be required to go farther and devise content and procedure of how best to communicate this law to the Councils and landowners.

Second, substantive defects are multifarious. Some are quite serious. They affect virtually all the structural components of the tax. They also touch on its conceptual approach.

### b. Land Rating Only Supplementary

The goal of the land rating is to raise revenue. The Councils are supposed to demand from landowners (according to base and rate they have chosen) payment of the tax as one way of raising revenue. The short-fall of this goal is that the tax is to be applied only as a "gap-filling" measure; that is, to be used only when and if the Council finds that it has revenue obligations that are not provided for in the general rate fund (The Rating Act, S. 3). In this eventuality, the tax may be applied in some selected areas of the Council as a supplementary measure (SS. 8, 11). Such may be areas where

the Council has undertaken certain projects that benefit only the residents thereof. I was informed by a number of revenue officers that such areas are often urban Councils within County Council jurisdictions. A Council can impose a special rate for such an area. And if the initial project is not completed, two consecutive impositions in one fiscal year are permitted (SS. 5, 8, 9).

As a result of the "gap-filling" approach, most Councils have just ignored land rating. They have not sought to perceive and apply it as a general source of revenues. The only times when they have attempted to go beyond its limited application is when they restrictively impose it on their leased land, government forests, and a bit on land transfers. The legality of this extension is questionable in some respects.

The tax has not directly and encompassingly reached the agricultural land. Its restrictive intent has correspondingly squeezed its scope. Councils are quick to explain, despite their visible revenue difficulties, that they are not applying land rating because they have one or two major sources of revenues; or that it would be politically risky. But they can furnish no evidence to support these claims.

It is suggested that the law must be amended so as to provide for land rating as one of the primary resources. The tax ought to be made one of the standard sources and not a mere gap-filler. We should not insubordinate a tax which seems, as the next segment suggests, to have capacity for revenue generation. There is need to take another serious look at this tax. It is not at all peripheral.

### c. No Statutory Right to Access Rating Services

There are no provisions in the statutes regarding the right of County Councils to access cadastral information. It was clear to me that Councils have to rely on the grace of district land registrars for this information. Since the registry is a department of the central government, the Councils could experience some delay or difficulties in obtaining it. The Registrar of Lands (together with his district registrars) must be statutorily mandated to furnish this information as an inter-departmental operation. He must also be compelled to prepare and furnish any other relevant information that Councils may require. We cannot allow access to a prerequisite of this nature to depend on departmental courtesy.

We know that except for the big municipalities, County Councils are unable to employ valuers. Part-time hiring is

equally expensive. The Registrar of Lands should, together with the Survey of Kenya, be required to render this service for County Councils. It does not make sense at all to require County Councils to employ when we know very well that they are unable to. The availability of the service could enable Councils to apply a value base and thereby improve the revenue performance of the tax.

### d. Statutory Omissions

Though the law has very well tried to provide for base and rate, some issues still remain outstanding. Since, for instance, it is quite unthinkable for County Councils to update their valuation rolls at the statutorily mandated intervals, the application of a value-base is correspondingly difficult. As a matter of legal policy, the law should direct the Councils to start with area-base. Thereafter, they should only be permitted to progress towards a value-base after the Minister of Local Government has determined that they have capacity to do so. Each Council should be reviewed as a case on its own. This step-by-step approach is recommendable because it offers opportunity to learn from experience and consequently plan for the future judiciously and incrementally.

Rate provisions, on the other hand, have not embodied some of the expected measures to alleviate poverty and other taxpayer hardships. These days, rate fixation should reflect concerns for inflation burdens on taxpayers. For sure our income tax practice makes an attempt in this direction by way of rate adjustments from time to time. Even so, this is not done as a statutory mandate. It is left to the goodwill of the Minister of Finance in his annual budget measures. I am inclined towards the embodiment of rate indexation in our statutory law--whether the tax is national or local. That is, statutory law should mandate automatic adjustments in the rates to take care of inflation. County Councils could be encouraged to apply a consumer price or wages index. Failure to index means we have neglected to make impact-assessment part of the ethos of land rating.

**e. Inadequate Statutory Provisions on Administrative Issues**

There are three administrative shortcomings. Two require statutory adjustments. The third can be redressed through the application of non-legal government policy.

First, provisions relating to the recovery of rates from the absentee landlord must be tightened. Since the outcry has been that this issue has serious impact on land-use, it is not enough to provide that rates due from such a person will be

collected from his agent (Rating Act, 20[2]). Cases where the agent may be unavailable are many and can easily be imagined. In such instances, the law should direct Councils to quickly report the unavailability of the agent to the Director of Agriculture. Under the Agriculture Act, Cap. 318, the director has power to regard such unattended land as mismanaged and thereafter proceed to compulsorily acquire it. If the director sells or leases it, the Council can recover rates due from the proceeds of sale or rents.

In this connection, I urge the Minister to exercise his powers under S. 27 of the Rating Act to give guidelines on assessment and collection. The step suggested above could be taken care of under such guidelines or rules. Besides, the Minister could take opportunity of such rules to further guide Councils in the design of taxpayer-education, or the incorporation of the locational Chief into the collection and enforcement.

Secondly, the law should be administered fairly. This cannot be so in the absence of extra-judicial institutions for County Councils in the same way the Valuation Courts exist for Municipal Councils. It is not enough, as section 27 (2)(f) of the Rating Act does, to simply require the Minister to prescribe rules to this effect. This is a very crucial institution. It must be compelled and constituted by the

statute itself. Chapter 5 shows how this could be tackled as an aspect of doing justice to the taxpayer.

Thirdly, I urge the government to be more committed to the application of this tax. To demonstrate resolve, the government should fulfill the pronouncement of 1984--that the tax would be applied in districts where registration has been completed. The District Development Committees can be directed to assist their County Councils to make necessary preparations for the tax as soon as registration is completed.

### f. Conceptual Pitfalls in the Law

The law also suffers from two conceptual problems. One relates to the notion of equity espoused thereunder. The other is whether the tax should be called "land rates" or "land tax".

The law makes some effort to address individual equity. It allows exemptions and remissions (Rating Act, S. 22). There is also an attempt to ensure that the tax threshold reflects equity concerns by fixing the rate ceiling at 4% of the site value in cases where a value rate is opted for. But, first, Section 12 introduces a curious concept of equity.

Section 12 in its origin:

> It shall be the duty of the rating authority in adopting any method or methods of rating under this Act to ensure that costs of the rating authority's general expenses, and of the general expense of every urban, area or local Council in whose area the rating authority levies a rate, are distributed *equitably* over *all parts* of the respective areas of the rating authority...[my emphasis].

I do not mind a scheme of equitably sharing the costs of land rating. But who are "parts"? Are they individual taxpayers? Of course, the burden will fall on the taxpayers ultimately. The burden cannot fall on an area or "part" as such. If this is so, then the Kenyan law has introduced a criterion of equity unheard of in the science of taxation. Normally, equity is adjudged on the ability or benefit principle. A taxpayer should shoulder the burden of a tax because of his ability (or wealth), or because of the benefit he has derived from the government service (Arthur Eshiwani, 1987: 16-20). We cannot be sure that equity cast in terms of area or parts will actually address any of the two criteria. I need not over-emphasize the obvious change needed in the laws to restore an accurate concept of equity.

Section 8 is similarly curious. I have already alluded to the concept of a "supplementary rate" which is contained therein. Under this provision, a Council is empowered, in any financial year, to levy a supplementary rate if its revenue

needs dictate. My understanding of this is that a Council could levy the tax twice in one year. Apart from its extra burden on the taxpayers, such a measure would make a tax system quite arbitrary and invasionary. No one could know in advance whether revenues are going to be adequate or otherwise. And so it would be difficult to know if and when the supplementary rate will come.

It could be argued that a supplementary rate is good for rare capital projects. On the other hand, however, it represents an approach which results in the insubordination of a potentially prosperous revenue resource. It also makes the application of land rating to be founded on a contingency basis. The provision should be eliminated altogether and its place taken by one that restores the core status and role of the tax.

Should the tax be called land rates or land tax? The current law uses the former term. This is a British import. When the idea of taxing land was first conceived in Kenya, the colonial government simply adopted the model of the Rating and Valuation Act of 1925. This English statute applied (and still does) rates on dwelling houses and flats. As such it was a statute designed for urban property taxation.

The English statute combined both the rating and valuation. The general rate on land was (and still is) calculated at an amount in the pound sterling on the *rateable value* of each hereditament in the rating area. In other words, the rate was so much in the pound, and not a pre-determined lump sum. The real value was not necessarily a market value though it was supposed to reflect the obtaining market.[15]

The colonial government thus introduced into Kenya a law designed for urban property taxation. This far there was nothing wrong so long as the law continued to apply in Municipal Councils. Its subsequent extension to agricultural land brought substantive difficulties as well as a general misunderstanding. Substantively, it was *per incuriam* to apply a rate structure meant for a value base onto an area base. It was mentioned earlier that the earliest base was the area of the land owned by each farmer. A rate in the pound clearly required that base must be value, not area. The problem is more than conceptual. It has led to confusion elsewhere.

Both Hicks (1961: 278) and Gitonga Aritho (1980: 51) do point out that the concept of rating was unfortunately extended to taxes whose bases have no semblances with those of a land tax. A number of Council taxes are erroneously referred to as "rates." Some Council officers talked of rates

when referring to land rates, rents from Council properties, and even charges and fees. Most seriously, some of the budget materials examined contained an item called "rates" underwhich rents and land rates were lumped. One officer informed me that his Council applied land rating and not rents. Yet upon examination of the relevant budgetary records, the position turned out the exact opposite.

There is, therefore, a conceptual quarrel arising from the nomenclature. The tax should be given a name that distinguishes it from the other taxes. Most appropriately, the name should be simple, direct, and yet capable of reviving the image of a major fiscal measure that this tax actually is. Simple, because it would be easy to perceive, thus making it possible to eradicate its confusion with rent. Direct, because we want to be serious in taxing land. There is no reason for being timorous. The tax should be called by its name since Kenyans are sophisticated enough to see through disguised names.

I therefore prefer "land tax" to "land rates." I also suggest that the Rating Act and Valuation for Rating Act should be consolidated into one statute. There would be no substantive or procedural difficulties at all in doing so. After all, this was the approach of the English statute from which our statutes were abstracted.

In conclusion, I pay tribute to the two statutes. They have made an overall foundational contribution, albeit minimal, in giving us a springboard for future action. Their shortcomings give us the realization that the past effort was half-hearted and not at all driven by urgent needs for revenues as we are in today. The future law must be drafted to provide for a broad-based land tax. Founded on an expanded and a more assertive legal base, and on lessons drawn from County Councils that have attempted to apply the present law, the future statute should be capable of providing for a more serious land tax program.

### (iii) The Experience of Wareng' County Council

A recent study has shown that 15 out of 39 County Councils apply land rating (i.e., a tax on agricultural land). They are the Councils mentioned earlier for having haphazardly, but persistently, applied the tax since independence. The tax has somehow proved a stable source of income. Most of these Councils lie in the former settler areas (Judith Geist, op. cit.). Let me now examine one of them, i.e., Wareng' County Council, to shed some light on the stability and feasibility of the tax.

The analysis that now follows identifies reasons that led Wareng' to focus on and nurture the tax as a primary resource, and how it administers the tax to ensure revenue generation. I will then review data to demonstrate the actual revenue performance of the rates. I will conclude with the argument that Wareng' offers some relevant lessons for other County Councils in particular, and for the re-design of the land tax agenda in general. In anticipation, Wareng's experience is supposed to show that a purposeful and vigorous application of this tax, subject of course to the regional variables, could possibly render it a dependable revenue source.

Wareng' came into existence in 1971. It was one of the five new County Councils that were created as a result of splitting the old Sirikwa County Council. Sirikwa had primarily been a white settled county. It was one of the biggest Councils due to the fact that it had to encompass big tracts of land owned by white farmers. For reasons we saw in Chapter One, it was split up and resettled by allocation of plots to the landless. Not all the land was subdivided into plots. Some large farms can still be found. The facts that Wareng' came out of a former white County Council, and that it experienced a tremendous re-settlement after independence are quite significant as we shall shortly see.[16]

A number of reasons led Wareng' County Council to opt for land rating. To begin with, the Council was established at a time when the Local Authorities were in the political turmoil described in Chapter One. By the time of its creation, the major and surviving revenue source was the GPT. In 1973 this was abolished without a replacement. Wareng's revenue capacity was immediately jolted by this. While its major revenue resource disappeared, its service obligations were tremendously increasing with the rapid influx of people under the resettlement program.

Secondly, though Sirikwa had been a very prosperous County Council, its subdivision resulted in a thin sharing of assets and resources. Although Wareng' inherited most of the capital assets (buildings and other realties in Eldoret Municipality), revenue therefrom proved too inadequate to meet the expanding demand for services. This was exacerbated further by the fact that due to white farmer settlement, markets and other handy revenue sources common in African County Councils had not developed in Sirikwa. Wareng' had inherited no such base and therefore lacked quick revenues such as fees from markets. The white farmers often drove to Eldoret, Kitale, Nakuru or Nairobi to shop for their groceries. Africans in Sirikwa were too few (consisting mainly of security guards, house servants, and farm hands) to warrant development of markets. In fact, since they were

regarded as squatters, they were encouraged to subsist from squatter plots, or to seek further subsistence back in their native reserves. The base for licenses was similarly absent given this insignificant number of natives. There were no familiar bases such as beerhalls, bicycles, and artisan trades, on which to impose licenses.

The third and most significant event that catapulted Wareng' into the resolve was the abolition of grants. In 1974, a year after the termination of the GPT, the government announced that general grants to Local Authorities were to be phased out by 1978-79 fiscal year. In lieu thereof, the Local Government Loan Authority would be established. Local Authorities would borrow therefrom, not to meet their general revenue deficits but capital expenditure. And stiff conditions were imposed to restrict the borrowing (See, for example, the Local Government Act, Cap. 265, S. 222, and the Local Government Loans Act, Cap. 270, ss. 12, 13.).

In 1976, Wareng' took the decision to develop land rates into a revenue source. The decision was taken after a careful evaluation of certain factors that suggested the chances of its success. Three of these are worth mentioning. First, though the law had been shelved as I said earlier, the Council took advantage of the legal authority therein. Second, the Council had experienced officers who had been associated with

land rating in the colonial days. It too had records and other materials relating to the administration of the rates. Most significantly perhaps, the resettlement of the landless had brought more landowners and hence a substantial base for the tax. In addition the resettlement went hand in hand with title registration. Cadastral information was therefore available.

On the basis of these factors, Wareng' commenced the application of the tax. The first step was to establish new cadastral files and records upon the guidance of the colonial ones. Thereafter, the strategy of assessment and collection, the choice of base, and the rate to be applied fell into place by marrying the legal provisions to the known practices.

The Council then developed and pursued measured policies to make the tax a success. The overriding goal was and still is to generate maximum revenues from the tax. To achieve this, the following steps were taken.

### a. Management of Base and Rate

As regards base, the Council chose the area, as opposed to any value-oriented type. The reason for this was the simplicity of administration which the former base offered.

Its inherent revenue deficiencies were to be countered by a manipulation of the rate.

Rate started off by being flat. A landowner paid 30 cents an acre, regardless of his land size. This is the rate at which the tax had terminated at the advent of independence.[17] After the first four years the Council felt that the tax had picked up momentum. So in 1980 the rate went up to 50 cents an acre. This lasted only a year. Reasons for this were not forthcoming. However, the major point here is that between 1976 and 1981 revenue deficiency was made good through upward rate fixation. Of course upward mobility of rates is an inadvisable strategy of raising revenues. It has potential for triggering off taxpayer resentment because rate hikes are a very pinchy and visible lever. Even before its incidence starts to be felt, taxpayers are likely to resent its frequent rises *per se*.

Since 1982 a more ingenious rate formula has been applied. This was devised to partly conceal (or mitigate) the new rise, and at the same time address the equity issue. For the first 20 acres, a landowner pays Kshs. 60.00 (approx. U.S.$ 3.00, as at 1989 exchange rates), and for every extra acre, Kshs. 1.00. This is the differential rate. By the early 1980s, the Council reckoned that the resettlement

program was over and had clearly produced small as well as large scale landowners. In the Council's judgment, 20 acres marked the dividing line.

The Council appears forward-set. It does not apply land rates as a supplementary tax. For this reason, it has several plans in store to enhance revenue generation from the tax. It is preparing, for instance, to introduce simultaneously a value base and a more progressive rate scale in lieu of the differential. The new rate structure will definitely go beyond the current two slabs. The Council is weighing between the rental and productivity of the land considering that the land has greatly appreciated in both value and productivity.[18]

### b. A Planned Administrative Strategy

The Council had well-projected personnel policies. They touched on establishment, training and motivation, job assignment and accountability.

The revenue department had eight out of an envisaged capacity of 10 revenue clerks by 1990. All of the officers had taken the National Accounts Clerks Examination. Their future training schedules had already been drawn. Their next training goal was to take Stage One of the Certified Public

Accountants Examination and progress thereafter to the second and final stages. However, the treasurer emphasized that citation for training was not automatic. Each officer had to score an acceptable job-performance point aggregate. These are computed on the basis of dedication to work, honesty, and productivity. For this reason, each officer's performance is monitored throughout the year at the end of which a report is compiled on him.

Like the rest of the Council staff, the revenue officers enjoy fringe as well as terminal benefits. They are entitled to a health plan that takes care of hospitalization and prescription medicine expenses. Their immediate families are covered. The women are entitled to paid maternity leave of up to three months. And each officer is entitled to annual paid leave of thirty days. The employer provides housing or rent in lieu thereof. Where an officer is staying in his mortgage-financed house, the Council pays "owner-occupier" allowance toward the mortgage repayments. They have retirement funds to which the employer contributes. It was not made clear to me what portion this contribution constitutes. However, the officers expressed their satisfaction with these arrangements. It may be observed here, however, that these kinds of terms of service may be the precise reason why labor costs to Councils are well over the percentage we saw in the previous Chapter.

As regards the execution of the tax itself, the Council has a standing policy to always rally the support of the Councillors. Councillors are used to decide on a host of issues. They are also used to explain to the people any steps taken on the tax. The treasurer was clearly of the view that this had greatly helped in communicating the tax itself and its purposes to the people. There was no unusual resentment for the tax except for the fact that some people wanted cess to be dropped in favor of the land rates.

The Council has a policy regarding the timing of collections. Normally collection is scheduled to commence in September and end the following December. The time in between coincides with the harvest of wheat and maize, the major crops in the district. It is also the time when farmers are being paid for the milk they have delivered to the Kenya Cooperative Creameries since the start of the year. In the Council's judgment, this is the most opportune moment because there is money around. The treasurer was of the view that partly because of this timing, the rate of compliance was substantially high. For this reason, it was not necessary to give discounts for early payment.

Though the Rating Act provides that payment be made at Council headquarters, Wareng' prefers to send officers out

too. The Locational Chief is deployed to announce at his *barazas* (public meetings) the visitation dates. People may pay to the officers during these visits. It has been planned that effective 1990, the Council will establish permanent field offices in each of the six administrative locations for land rates purposes.

The Council uses field visits for other purposes too. Some of the officers on the team are required to collect information on various issues. For instance, they may be sent to find out and record the general mood of the people towards the tax, or how they would like to see it administered. These views are recorded randomly, or sometimes in accordance with some subject categorization. Officers may also record information as to why certain farmers have become perpetual delinquents, or the general outcome of the year's harvest. Most importantly, the officers observe and record trends in subdivisions based on activities on designated "observation farms." It was from this kind of information that the Council decided on the 20 acres as the demarcation line.

It must be mentioned that the Council feels very strongly against exemptions to the tax save as is permitted by the Rating Act. Though it shows sensitivity towards poverty levels, it does not encourage this to become a policy. There

is, therefore, a deliberate effort to make every landowner pay. Philanthropic hardships are considered quietly and on a case-by-case basis. Payment may be deferred, but rarely remitted. The Council argues, and quite understandably, that philanthropic concessions could virtually wipe out the tax.

This brings me to an aspect of enforcement. The most worrisome aspect of enforcement is execution of the defaulter's land. Though the Rating Act Section 17 (6) allows it, the Councillors have vehemently opposed it. The Council has been strongly urged to find alternative ways of avoiding foreclosure. At the moment a private attorney is hired to deal with delinquent farmers. He collects from defaulters in the normal way of debt recovery. In choosing an attorney, the Council was exploiting the people's fear of attorneys. From perusing the records and talking to the then attorney, the strategy appears to have worked. A Mr. Mwangi of Mwangi and Mwangi Advocates (Eldoret), told me that in his three years experience in this capacity, he had not found it necessary to file a single suit. Defaulters have always responded to his demands. But his demand notices have to threaten foreclosure.

However, the farmers I talked to were not in favor of an attorney being used against them. They complained, *inter alia*, that he imposed a collection fee on them which sometimes

exceeded the rates due. The Council insists that defaulters must pay. It refuses to subsidize them by absorbing the fees. The Council is aware that as people become more sophisticated, they will start defying the attorney's demand notices. In that event, foreclosure will have to apply but as a last resort.

### c. Assessing Performance

Let us now look at how the tax has performed. First let us start by looking at gross revenue growth since the inception of the tax.

Table 7 tells a most remarkable story of revenue growth. The land rates were quick-footed right from the start in 1976. The tax took an overall fourth position against the major revenue earners of the time. In 1980 and 1981, it moved to the third and second positions respectively. By 1985-86 fiscal year, it had taken a commanding lead which it still retains to date.

The nominal revenue growth was more steady as compared to trends in other major sources. Between 1976 and 1980, it grew by 26%. The 1980-81 performance recorded a 50% growth. The 1981 to 1985-86 period was even more dramatic. It recorded an 861% growth rate. Though in 1985-86 to 1986-87

period the growth dropped, it still held at a 56% rate. On the other hand, the second and third largest earners (i.e., the licenses and stock auctions) did not record as high growth rates. Table 7 shows, for instance, that the stock auctions tended to be erratic. The revenues therefrom faltered more times than they increased. Notice the tremendous leap in revenue yields from the land rates in 1985-86. This was the year the differential rate was introduced.

Caution must be sounded, however, in regard to the years between 1981 and 1985/86. I was unable to find data on these years. Accordingly, the tremendous revenue growth for 1985/86 against the revenues recorded in 1981 could not be explained. The unavailability of data on a consistent basis is one of the difficulties from which my observations suffered.

Revenue performance can further be appreciated by looking at the percentage contribution of the land rates to total incomes and expenditures during the period in question. Table 8 summarizes the picture. In absolute terms, the contribution to income since 1976 can fairly be described as substantial. After minimal contributions in the start-up years, the land rates thereafter show that a vigorous application led to over 50% contributions to revenues in each of the subsequent years. Equally substantial are the percentage contributions to total expenditures. It is amazing that the rates alone financed over

TABLE 7: WARENG' COUNTY COUNCIL - INCOME GROWTH: LAND RATES VS. OTHER SOURCES - 1974 - 1988/89 (IN KF)

| SOURCE OF INCOME | 1974 (Actual) | 1976 (Actual) | 1980 (Actual) | 1981 (Actual) | 1985/86 (Actual) | 1986/87 (Actual) | 1988/89 (Estimated) |
|---|---|---|---|---|---|---|---|
| Revenue Accounts General | 1,050 | 900 | 8,320 | 8,320 | 16,220 | 1,950 | 2,350 |
| Clerks Department | 4 | 10 | 22,500 | 8,320 | 1,850 | 1,835 | 2,100 |
| Treasurer's Department | 1,445 | 6,440 | 6,241 | 6,842 | 8,669 | --- | |
| Councillor's (income from) | --- | --- | --- | --- | --- | --- | |
| Building Section | --- | --- | 1,110 | 1,802 | --- | --- | |
| Pool of Vehicles | 647 | 2,645 | 9,239 | 10,202 | --- | 20 | 1,500 |
| Community Dev. & Social Services | 5,368 | 5,931 | 3,483 | 4,228 | 6,728 | 7,697 | 11,875 |
| Market & Trading Centers | 7,303 | 10,220 | 7,405 | 7,380 | 12,777 | 11,653 | 24,230 |
| Water Supply | 2,045 | 7,020 | 757 | 463 | 840 | 124 | 375 |
| Land Rates | --- | 8,000 | 10,080 | 15,162 | 130,480 | 203,159 | 225,030 |
| Poll Rates (Tax) | 5,087 | 10,000 | 690 | 3,461 | --- | --- | --- |
| Hides & Skins | 505 | 1.250 | 1,891 | 4,374 | 675 | 1,352 | 2,650 |
| Charcoal Cess | --- | 3,000 | --- | --- | --- | --- | |
| Licenses | 9,250 | 11,650 | 20,140 | 24,245 | 37,590 | 46,744 | 63,400 |
| Stock Auctions | 3,443 | 1,100 | 1,340 | 13,594 | 19,349 | 18,277 | 38,400 |
| Quarry Income | --- | --- | --- | --- | --- | 1,377 | 15,000 |
| Beer Halls | 437 | 2,350 | 1,352 | 1,053 | --- | --- | |
| Miscellaneous | --- | --- | --- | --- | --- | --- | --- |
| TOTALS | 38,776 | 84,536 | 119,338 | 113,838 | 235,178 | 306,446 | 405,435 |

Source: Annual Revenue Estimates for the Respective Years (Wareng's Budgetary Records)

55% of total expenditure in each of the years after 1986. Average-wise the tax is still a high performer. It contributed a consistent 39% of total income, and financed an average of 47% of the total expenditures.

**TABLE 8: WARENG COUNTY COUNCIL - LAND RATES: PERFORMANCE VIS-A-VIS REVENUE/EXPENDITURE TOTALS (1974-89) (in K£)**

| Year | Income from Land Rates | Total Income for the Year | Total Expend. for the Year | Percentage of Land Rates to... | |
|---|---|---|---|---|---|
| | | | | Total Income for the Year | Total Expend. for the Year |
| 1974 | 0 | 38,776 (actual) | 45,903 (actual) | 0 | 0 |
| 1976 | 8,000 (actual) | 84,536 (actual) | 57,162 (actual) | 9 | 14 |
| 1980 | 10,080 (actual) | 119,338 (actual) | 112,479 (actual) | 8 | 9 |
| 1985-6 | 130,480 (actual) | 235,178 (actual) | 213,403 (actual) | 55 | 61 |
| 1986-7 | 203,159 (actual) | 306,446 (actual) | 240,519 (actual) | 66 | 84 |
| 1988-9 | 225,030 (est.) | 405,435 (est.) | 397,821 (est.) | 56 | 57 |

Source: Budget estimates for the relevant years shown in the table (Wareng's Budget Records).

There are further methods of assessing performance. Professor George Break suggests that revenue performance must be measured against the cost of administering the tax. His formula is that a tax is *cost-efficient* and hence revenue-generative if the cost of collection does not exceed one-half of one percent of the total revenues yielded therefrom in any fiscal year (George Break, 1987).[19]

On the basis of this formula, Table 9 shows a steady improvement from poor to excellent performance. It appears that as revenues from the tax increased, the cost of its administration correspondingly fell. There is temptation, therefore, to conclude that the tax has been cost-efficient since its founding. And this efficiency, together with other factors, augurs well for revenue performance.

**TABLE 9: WARENG COUNTY COUNCIL: LAND RATES--ASSESSMENT OF REVENUE EFFICIENCY (1976-89) (in K£)**

| Year | Total Income from Land Rates | 1% Thereof | Collection (Admin.) Costs | Revenue Efficiency Assessment |
|---|---|---|---|---|
| 1976 | 8,000 | 80 | 390 | Poor |
| 1980 (actual) | 10,080 | 101 | 158 | Poor |
| 1985/86 (actual) | 130,480 | 1,305 | 750 | Fair to Good |
| 1988/89 (est.) | 225,030 | 2,250 | 250 | Excellent |

Source for figures on total income and collection costs: Revenue estimates for the years shown.

Alm and Schroeder suggest a further test for revenue performance. In their analysis of the performance of the Bangladesh land tax system, they propose that in addition to cost-efficiency, *revenue efficiency* should also be applied to measure revenue generation. In broad terms, a tax is revenue-efficient (i.e., generating the optimum revenues) if *all* the tax assessed is actually collected. The margin, if any, should be negligible. This is determined by dividing total collections (arrears and current) by total assessments (demanded arrears and current). It appears from their analysis that any resultant figure below 75% is evidence of revenue inefficiency (Alm and Schroeder, 1984: 17).

Since it was difficult to obtain data on assessments, the revenue-efficiency cannot be demonstrated here. Nevertheless, the system of taxation envisaged in this study must pay attention to this issue on a systematic basis. County Councils, and indeed other Local Authorities, should in the future be urged accordingly.

Wareng's effort compels me into one major conclusion. Revenue desperation should inspire the ingenuity rather than lamentations of County Councils. Wareng' did not just sit there shedding tears over increasing obligations from the

influx of resettlement. To the contrary, it perceived landowners as a reservoir of rate payers. What appeared at first to be a helpless situation was converted to yield fruit.

There are many County Councils in circumstances similar to those of Wareng'. There are those that are even adjacent, and yet have not felt envious of Wareng's revenue strength. Since the inception of the land rates, Wareng' walked out of the perennial revenue deficits (See Table 8).

Wareng's success is also a story of dogged determination. After identifying the problem before it and the solution thereto, the Council explored and manipulated all tax handles to realize revenues. There is no tax that is just revenue-magic. Its application and how it is handled are really the crucial determinants.

In explaining the optimal tax theory vis-a-vis developing countries, Newbery and Stern emphasize this point. In their view the optimum performance of any tax depends largely on the mastery and manipulation of local factors that are likely to enhance (or stiffle) its intended goal (revenue--in our case). Their analysis lists those factors that are peculiar to Third World economies (some of which have been discussed elsewhere in this study) on the basis of which they urge that before the application of any tax measure, these local factors must be

fully grasped. When a thorough understanding of local circumstances precedes the implementation of the program, the planner is said to have drawn a judicious and systematic agenda. This kind of understanding will enable the program to avoid "errors of omission" and at the same time facilitate the exploitation of handy factors prevailing locally (Newbery and Stern, 1987: 4-5, 14, 197-202). This appears to be the approach Wareng' took.

Wareng' refused to treat the tax as supplementary. It accepted the area-base, but strengthened it by a measured rate manipulation. It has a research program, even though it is quite underdeveloped. It has paid attention to personnel needs, as much as it has taken into account the agricultural and political factors that constitute the environment for land rating. And it has its eyes on the horizon.

I, however, admit that there were unique factors that favored this success. I also admit that Wareng' seems to have fallen into the trap of over-relying on one source that performs best. But the bottom line is that there are rewards for *determination and planning*. These two constitute the approach that should be urged upon other County Councils. It does not have to be limited to land rates. It should be the policy with which other taxes ought to be faced. County Councils

should be discouraged against the obvious complacency into which they have sunk. They have revenue problems. They too have obligations. They must wake up to these realities and discard unproven fears of applying and expanding land rates.

Councils must be guided in their endeavors. This study contributes toward that by offering a conceptual framework of understanding and resolution of the problem before them. In various chapters, I have addressed the specifics of the problem and solution. Let me continue this in the next chapter by expanding on some of Wareng's lessons as aspects of the design agenda.

# CHAPTER FOUR:

# DESIGNING THE STRUCTURAL COMPONENTS OF THE TAX

To encourage County Councils to apply the tax we must, *inter alia*, offer them guidelines. These will enable them to design their respective programs with some certainty. This task is by no means easy, considering that there are many variable factors and sub-regional peculiarities as aridity and nomadism. In addition there are the common problems that transcend all County Councils. These include the poverty of potential taxpayers, their illiteracy, and widely varying soils from which they must gain a living. And from the administrator's standpoint, there are problems of lack of management skills and working facilities, and potential or actual corrupt practices in the system.

This chapter is about assemblage and analysis of the land tax structure. In accordance with the optimal tax theory, we must draw the attention of County Councils to the factors they must reflect upon in their efforts to develop a land tax program. These factors are the handles, levers or push buttons the administrators will use to effectively assess and collect revenues and enforce sanctions.

Base, rate, and the administrative machinery are the traditional components of such a tax. "Base" deals with the

issue of the type of land to be taxed. How do we define it to give us revenue and at the same time address our concerns about poverty, nomadic lifestyles, and aridity, for instance? Rate is complementary to base. So it too concerns our revenue goal, as well as those issues addressed in the choice of base. The eventual success of these goals determinatively depends on a well-geared administration. And in the specific terms of land taxation, the administrator must have cadastral information so as to devise assessment and collection strategies. To crown it all, the legislator must provide the administrator with a workable statute. That is, a statute that embodies the intended program precisely so as to render it administrable and its goals achievable at minimum cost to both sides.

It must be clarified here that base, rate, and administration, being the major components of the tax, ought to be provided for in an enabling legislation. Details of procedure can be left to each Council. It is admitted, however, that the division between central (or basic) authority and procedural (or peripheral) details is quite often a question of government policy. No rule of thumb can be offered here. It is important, however, to remember that Councils must be allowed sufficient flexibility to inject local circumsances in the program. For this reason, I endorse the present approach of the Rating Act in its effort (although

somewhat modest) to provide for the basic aspects of base, rate and administration. Let me now turn to each of these three in the foregoing order.

## 4.1 CHOICE OF BASE

In taxation, base can be said to be that which the law subjects or makes liable to tax. Different taxes have different bases. Under the poll tax, base was the individual person. The tax was imposed on his or her personae. In the case of the hut tax, base was the hut or house of the native that was regarded a representation of wealth. In income taxation, a person's (or corporation's) income or accretion is the base. So his salary, rent, profits or royalties become liable to tax as part of his income base. Similarly, taxes on consumption, import and exports do identify their bases. After identifying base the law must provide for it so that there can be legal authority to access it.

In land taxation, base must be identified too. A number of key questions must be answered by planners as a matter of base definition. Indeed, the starting question is -- what type of land? In our case, the land is agricultural. In this regard there is ample help from the Rating Act as to what agricultural land is. Section 2 of this Act (read together with Section 2 of the Agriculture Act) defines agricultural

land by exclusion -- that is -- land used for agriculture. this excludes land used or designated for industrial or commercial purposes, or for urban development.

However, knowing whether or not land is agricultural is not the end of base definition. Professor Oliver Oldman and Professor Kenneth Phillips (commenting on the first draft) converged on the suggestion that the key question is whether the tax will be imposed on *owner* or *user* of such land. At the same time decision must be taken on whether assessment will be based on the size (or area) or value (capital, rental, or rateable) of the land; or on a combination of some or all of these.

The broad position taken in the analysis hereafter is that having isolated the land in question as agricultural, the taxpayer should be *owner*. And an effort has been made later to define the various characteristics of owner. Taxation of user is disavowed on account of practical difficulties of collecting the eventual taxes from him. For example, by relying on cadastral records, owner can be traced. This may not be possible in the case of user since his position is bound to alter quite often with changes in the realm of private contracting.

Further, the analysis takes the view that once the land and owner are identified, the tax should be assessed on the basis of area or size of his land. Quite often in land taxation, there is a tendency to agitate for a value rather than area base. Admittedly, the value base is theoretically attractive since -- if achievable -- it is more revenue yielding. However, taking into account the empirical situation in Kenya's County Councils (particularly their current and foreseeable future administrative bases), it is practically judicious to start small. Value base should be the ultimate goal rather than the start-up step. It has been argued throughout the study that circumstances for the successful application of a value-base are unobtaining. Even if they do, there is still need to first study and evaluate how they would be exploited to assure successful application of a value base.

Questions of owner and area (or value) base are intertwined. Let me now look at them more closely to see what they entail. The attention of the Councils is therefore drawn to the considerations that now follow.

Decision to tax the owner requires an answer to whether or not the tax should be assessed *in rem* or *persona*. Should the tax focus on the land *per se* in total disregard of the status

of its owner, or should it take his position into account too? Taxation *in rem* is only concerned with the land or its ownership. The tax falls on a person simply because he owns the land. It is of no consequence that he is wealthy or poor. So it does not matter whether he has one or a million acres.

Taxation in *persona* goes beyond the land. It takes into account the stature of the owner. Opportunity is taken to consider whether he is rich (as adjudged by the amount of landholding) or poor (as adjudged by land-size held). The inquiry also extends to the quality of the land (arable, dry, etc.) and on the income derived therefrom (or the productivity thereof). In some instances the program could be made to address the question whether or not the owner is a good husbandman.

If a Council chooses the *in rem* base, then it must also choose a rate that falls on area or acreage and not value. This is what Wareng' County Council did in 1976 when it imposed 30 cents per acre. The Council should be advised that in this event, it has sacrificed considerations of social justice that are usually apparent in land-holding patterns. For instance, it should realize that by opting for this alternative it has equated a peasant holding five acres with a wealthy landowner in the same area owning 1,000 acres.

The Council should further be alerted to the fact that in so dealing, it failed to take into account that the peasant was employing his five-acre plot to grow maize for subsistence, whereas the big landowner employs his 1,000 acres to grow wheat or tea from which he earns substantial income. Is there anything socially unfair with a base that ignores the economic disparities between the poor and rich members of our society? More pertinently, by making such a choice the Council has ignored the marginality or the arability of the different types of land in its jurisdiction. Should it not show sensitivity to these factors by opting for a base in *persona* that addresses these concerns (Hicks, 1961, Chap. 15)?

Admittedly, a contrary case can be made. It might be argued that the poor family uses more County Council services per acre than does the rich, so that an *in rem* base is stil progressive. Be this as it may, the position above still substantially stands.

Furthermore, a *rem* approach is unproductive revenue-wise. Unlike the *persona* base which is variably linked to some form of value of the land (income, productivity, or rent) a *rem* formula based on area tends to be static. In fact, revenues may fall farther as people fragment their land to exploit the

loopholes of the threshold acreage. Bird has shown that governments in the Third World have a traditional reluctance to review the acreage from time to time so as to revive the revenue capacity of the tax. Because of this political expediency, revenues under a *rem* base tend to be quite inelastic. The opposite is said to be true under a *persona* approach because the application of some value formula here ensures that revenues grow in correspondence with appreciations in land values (Bird, Chap. 5).

Whereas a *rem* base has these demerits, a *persona* approach presents difficulties that should not be overlooked. A value base, regardless of its type, is an expensive and complex exercise: expensive, because it has to be updated from time to time to match rising values of land. In the previous chapter we saw how the Valuation for Rating Act requires this updating every five years (and also annually on a supplementary basis). It was noted that County Councils have not been able to do this because they have no valuers. The effort of the government to provide valuers has not gone far enough as Councils do often point out. The help is quite intermittent. And it was because of this position that I urged for a consistent deployment of the Survey of Kenya to provide the service or else we let the Councils go on applying a non-value base.

Valuation is complex and thus difficult to administer because of a number of reasons. First, there is no valuation method that satisfies all the given variables. The type chosen may ultimately be quite arbitrary. For instance, if the value base is productivity, how do we draw the bottom line of this? Land in an area may be productive because the owner works hard, uses more expensive inputs, or puts it to use that he is able to predict to be more profitable. This year he may plant maize because he knows there will be a market for it. Next year he may change to dairy farming because of his ability to predict downward trends in the maize market. The productivity of land, in other words, is a product of many variable factors which may not necessarily reflect the intrinsic qualities of the land. In fact, in the case of a farmer who has worked hard, to tax him on the basis of productivity is quite discouraging. The same can be said of taxing value based on improvements.

Site value, on the other hand, is quite arbitrary. This is because property values in a given area are based on the so-called market trends that may not reflect the market position of each parcel of land. This base has always spawned unending litigation because landowners want to plead various factors that place the values of their actual parcels below the site value imposed by the tax authority. And zoning as

a solution worsens the legal position because landowners always resist property categorization detrimental to their monetary positions. Consequently, they will seek to be placed in the zonal categories that are beneficial. The litigation tendency is similarly true where the rateable value is applied--i.e., where the tax authority simply apportions a supposed market value to a property.

Expert opinion in Kenya appears to favor a *rem* base at least for the moment. While acknowledging the virtues of a value base, Gitonga Aritho argues that it makes no sense to call for its application in a County Council where the compilation of preliminary cadastral information is still going on. Further, the cost involved in applying a value-base may end up exacerbating rather than improving the revenue problem facing County Councils (Gitonga Aritho, pp. 44-53). Similar views have come from certain officers of the government. Thandi writes that cost alone is too forbidding to make a value-base manageable even if the tax were to be applied by the central government (S. M. Thandi, 1984).

My support for a *rem* approach and hence an area-base is based more on the Wareng's experience. The revenue and equity shortfalls of an area-base can, for a start, be balanced by the application of a differential rate. We saw in the

previous chapter how Wareng' was able to kill two birds with one stone by applying such a rate. Revenue performance improved dramatically, while at the same time certain elements of social justice were addressed. The Council refused to allow exemptions on account of poverty. But it mitigated the harshness of the refusal by incorporation of a lower tier in the differential rate.

While I do admit that a differential rate still falls short on a number of equity considerations, Councils should be cautioned to make decisions that are practicable even if unappealing in tax theory. Bird's wisdom is that when faced with hard choices between competing factors, what is "second best" in theory should be preferred, if it is "first best" in practice (Bird, p. 110). That is why I reiterate the view that area base should be chosen as a starting point. From here Councils should be encouraged to move towards a value base as and when they demonstrate capacity.

Whether base should be in *rem* or *persona*, there is still the further question as to how to handle arid land on one hand, and nomads on the other. Let me start with nomads. Although I said earlier that nomadism, unlike aridity, can be overcome in the long run, it is a more difficult situation in terms of whether or not to apply a land tax where the practice

exists. As the Narok experience suggests, there is need to attract nomads such as the Maasais to settle on land. They can better be helped to develop in the fields of education, health, shelter, water, etc., if they have a permanent residence. The need to encourage settlement, therefore, seems to negate the application of the tax--at least in the short run.

However, the law need not expressly exclude the land occupied by the nomads. In principle such land should be taxed. But the decision as to when should be left to the relevant Councils. If this is so, there would be need on the part of the central government to review the situation from time to time in conjunction with the relevant Councils in order to determine the appropriate time. And when the moment comes, the tax should be open, not stealth as the officers of Narok County Council appeared to suggest. The tax would openly apply because its cause is legitimate and in the interests of those to pay it.

As regards aridity, the land in question should be taxable once it is settled and registered. It is needless to incorporate special provisions in the enabling statute to govern taxation of this land. The relevant Councils can be encouraged to develop appropriate rules as a matter of policy. What the enabling legislation should embody is a rate option

which can be manipulated appropriately to mitigate the marginality of arid conditions.

## 4.2 RATE DETERMINATION

Choice of base and rate fixation are complementary to each other. Indeed, both exercises are always simultaneous. Again, in accordance with the optimal tax theory, a wide range of factors and policies must be borne in mind. Rate fixation must incorporate the primary goal of the tax (revenue in the present study). The exercise must also be responsive to the impact of the tax. These two factors are not mutually exclusive, nor are their components. Guided by theory, let me now present what I consider primary inputs in determining an appropriate rate.

First, the type and level of rate must be influenced by the primary goal of the tax. If, for instance, the aim is to encourage efficient land use, a rate can be chosen that would impose an unbearable cost to idlers, speculators, and absentee landlords.

If the primary aim is social justice (i.e., redistribution), a progressive rate could be picked. In this case the rate brackets or slots can intentionally be designed to reflect different land sizes and hence abilities of the

owners to pay. Upon this, marginal rates would correspondingly be imposed to reflect the society's sense of social justice on the ability to own and pay. I have no reservations for this approach except that County Councils taking this route would have to be encouraged to apply a matching value-base. A combination of both progressive marginal rates and a value-base is often said to be capable of underscoring the equity concerns. However, studies on land reform and on the wider question of redistribution do strongly suggest that taxation alone cannot be, if at all, a restorer of equity in land ownership. A land reform program, embracing as it should, the redistribution goal, is the better alternative (John D. Montgomery, 1972: 62-75). Taxation is perhaps too indirect to reach the heart of the evil.

What if the aim is to raise revenues?[1] This option deserves more attention since it is the core of my thesis. The quick answer is that a progressive rate would be chosen and not a flat one. The theory of taxation shows that the former type has more revenue potential than the latter (Kayila, 1980: 27-28; Leechor Chad, 1986: 14). However, the more substantive answer is that factors other than rate *per se* must be addressed at this point. Among these is the fact that the Council would have to determine its revenue needs more precisely. It would have to quantify the cost of providing

services to constituencies. It would have to draw an accurate list of service-priorities. It would have to do some forward-budgeting over a chosen period of future years in order to avoid what fiscal experts call "crisis budgets." Equally important, it would have to ponder over population sizes and rates of growth within its jurisdiction, patterns of basic needs of its people, family sizes and incomes.

These considerations are often quantified to constitute two major issues on our kind of tax program -- namely -- the tax threshold and the impact of the tax. In other words, given a Council's present resources, its present and projected service obligations, population growth, peoples' basic needs, their income capacities, etc., how should the Council determine rates (or the entire tax threshold) in order to end up with a tax burden the people can manage while at the same time sufficient revenues are earned? Threshold and impact are complex questions in any rate fixation agenda. Let me examine them a little closer.

Rates should be fixed after the determination of the other factors that constitute the threshold. A tax threshold is the legal point at which the tax begins to apply after having taken into account the deductions, exemptions, reliefs (or credits) and incentives (e.g., the discounts for early payment). It is in the granting of these reprieves that the

political agenda is often tucked. And this may take its toll on the revenue goal.

Exemptions for their part are meant to save the poor from the tax. Quite often the "poor" may be a political definition. And so in the desire not to tax what the poor need for survival, an exemption level may be fixed that narrows the tax base.

A very difficult decision here is whether or not there should be exemption at all on account of poverty. Indeed, the very poor are automatically exempt since they do not own any land. The "poor"' in the context of this discussion therefore refers to land owners holding what should functionally be regarded as marginal sizes. In this eventuality, what will be the consequences of decreeing, for example, that all those holding one acre or less are exempt because they are presumed to be poor? The outcome is easy to imagine. This would turn into a loophole as many people fragment their land to be below the exemption level. At any rate, it would be problematic to define poverty on the basis of land size alone. A landowner with 50 acres in an arid place may indeed be poor because of the marginality of his land. This goes to show that a Council would be plunged in endless arguments as to what constitutes poverty.

I would, therefore, like to take opportunity here to fulfill the promise I have hitherto been making. Namely, that while I do appreciate the difficulties of imposing a land tax in circumstances of high poverty levels, or on marginal lands, it would be difficult on the bases of these considerations, to define exemptions and even more difficult to administer them. I do therefore agree with the experience of Wareng' County Council in refusing exemptions. This makes the tax administrable and leaves the base broad. This approach is supported by experts on property taxation (Dick Netzer, 1966: 145). County Councils should, therefore, be cautioned against any attempts towards exemptions designed to address poverty. However, they may develop policies towards a low rate to reflect concerns for both poverty and marginality of the land.

Reliefs, deductions, and credits are allowed to mitigate the tax impact. They may also be permitted to promote economic agenda: for example, those that are given to investors to encourage re-investment and ploughing back of profits. And in land taxation in particular, they have often been used to dramatize pure political considerations. For example, a general relief of the tax due may be allowed as the government's way of showing solidarity with the people following catastrophic harvest failures (e.g., due to locusts or flooding). Alm and Schroeder do further exemplify the political considerations by informing us that in the 1972-73

fiscal year, the government of Bangladesh granted extensive reliefs from the tax due in recognition of the peoples' contribution in the war of liberation against what remained to be Pakistan (1984: 22).

Discounts are normally recommended by experts to encourage taxpayer compliance. It is good if they produce the intended response from taxpayers. But it is not easy to determine a percentage that will encourage, and at the same time, guarantee the flow of revenues. It is possible that the percentage that incites taxpayers may end creating a serious disequilibrium between revenues as assessed and as collected. If it is minimal, taxpayers may ignore it. There is need to reflect carefully before picking on a percentage.[2] As we saw in the previous chapter, Wareng' County Council considers incentives as a crevice in the revenue potential of the land rates. As such, it has not allowed them. So far the decision has worked. Prompt rate payers have not demanded to receive incentives. Section 16 of the Rating Act is clear that incentives are discretionary.

From this discussion the bottom line appears to be that Councils should be encouraged or even warned to note that rate fixation is not an isolated exercise. It must incorporate all the factors that constitute the threshold of the tax. The guiding policy consideration should be that the ultimate level

of the rate must compensate for revenues surrendered through exemptions, reliefs, and the adoption of a low rate. Otherwise, the tax would be rendered unproductive.

But threshold is only part of the agenda. There is also the question of impact to be addressed in rate determination.[3] Let me present here the side of impact that relates to rate fixing. I will address the issue in general in the next chapter.

Rate is in effect the point at which impact of the tax transmits to the taxpayer. This is even more so given that land tax is a direct tax. Therefore its impact is monetarily direct and immediate. The primary policy here should be to urge County Councils to always be sensitive to the issue of impact whenever they do fix rates. I was amazed to find insufficient sensitivity, if at all, on the part of revenue officers in the County Councils. Perhaps the major and only restraints came from the fear for opposition from Councillors and ministerial reprimand.

To show regard for impact, County Councils should be taught to observe and recognize its indicators. While leaving the subtle indicators to the analyses and determinations of economists, Councils should be encouraged to grasp the common-

sense types--e.g., taxpayer demonstrations, or unusual opposition to proposed or actual rate hikes.

There is tremendous need for the central government to guide County Councils on this issue. While allowing autonomy in rate fixation, the center should constantly review and advise on the exercise of rate fixation to ensure that some of the more sophisticated indicators are not being violated. In the ideal circumstances, Councils should employ their own economists and other experts to monitor movements in impact. This is, however, not foreseeable in the near future. The more complex indicators include inter-council population migrations, or inter-sectoral labor movements. They also include opportunity-cost behavior (e.g., land sales in preference for other economic pursuits). There is also the tax/GNP ratio which is used to ensure that the burden of the total taxes in the national system do not exceed the level where they negate individual per capita incomes. There will be more discussion of this ratio in the next chapter.

Let me now offer opinion on the handling of rate in a County Council with a substantial trend in land fragmentation. As I indicated earlier, I observed the phenomenon, albeit in a limited way, in Kakamega County Council. Consequent upon this I conceived some impressions as regards the phenomenon

and how a typical Council should proceed to handle it in its tax administration.

First, fragmentation is bound to create an enormous work-load for assessors and collectors. This is so because it is inevitable that quite often cadastral registers may need to be supported by on-the-spot ground checks. The work-load should not, however, deter a Council from applying the tax. It can be overcome, *inter alia*, through careful personnel projections, and the use of area Chiefs and elders. The aim in all this should be to minimize (or totally eliminate) inadvertent skipping of landowners because of sheer size of terrain to be covered; and to prevent falsification of cadastral records by officers for the sake of completing spot-checks, etc., in time. A Council must accordingly be vigilant and strictly committed.

Secondly, no mistake should be made in allowing exemptions on account that a given plot has become too diminutive. This would be a serious loophole and thus an erosion of the revenue base. The tax should therefore apply on all land, diminutiveness notwithstanding.

Thirdly, in the circumstances of "disappearing" land, the Council must still stick to the goal of revenue maximization.

Refusal to grant exemptions is, of course, one step in this direction. But even more crucial is how the rate level is handled (along with the type of base chosen). The ultimate level and rate structure are indeed factual issues to be decided upon by each relevant Council. It is important, however, to caution that the Council must never make the mistake of distinguishing genuine fragmentation from the speculative. This would paralyze the overall administration of the tax. The policy goal should be to apply a rate which, as the land diminishes, renders the tax able to produce the revenues the Council expects from it. This may ultimately mean, for example, adopting a rate structure that is in inverse proportion to falling land sizes.

In conclusion I would emphasize that Councils must stop treating rate fixation casually. And this is in respect to rate fixing for any form of tax or levy. They must be urged to be broad and vigilant in their effort to identify and analyze the various inputs of rate.

The broad approach is merited, first, because along with other measures outlined in this study, it will enable the tax to sustain its revenue goal. And sufficient revenue flows will make the tax defensible. Secondly, Councils should be made to realize that rate fixation is an undertaking with tremendous political dimensions. In broad terms, as our

people become more enlightened and politically alert, they will demand to know basis on which rate and other measures have been determined. Councils will have to come up with satisfactory answers in order to sustain taxpayer morale and general public disposition towards taxes. To this extent, rate fixation will not just be a means of maximizing revenue flows. It will also be an occasion to satisfy the demands of an open government, grassroot democracy and participation.

## 4.3 IMPLEMENTATION OF THE PROGRAM

Having chosen base and rate, the next task for the planner is to draw up the program of implementing the tax. This is the challenge of setting up the administrative machinery and the policies and rules of law that will steer its working. In this study my task is not so much the assemblage of the administrative machinery. County Councils do already have such structures in place. It would, therefore, be unnecessary and financially unwise to advocate for a separate administrative structure for the land tax. After all, one of the lessons to be drawn from Wareng's experience is that personnel used to administer other taxes can and should be used to manage the land tax too.

My task is to identify and analyze some structural as well as policy adjustments needed to reinforce the existing

administrative machinery. Tax theory and empirical findings have been guiding in my identification of the various components of these adjustments. In the discussion that now follows, I intend to present the view that for a successful implementation of the tax in question we must, in addition to what has been suggested elsewhere in the study: (a) broaden the applicable statutory law in order for it to provide a strong driving force to the envisaged program; (b) apply certain innovative practices whose objective should be to improve the revenue collection-efficiencies of the County Councils.

## A. The Statutory Adjustments

The legislative agenda should reflect two major policy goals. First, the law should be administrable. Secondly, it should embody provisions that will enhance the realization of the revenue goal. I will defer discussion on the first policy until the next chapter where it will be considered as part of the burden of the tax. I am therefore left with the second policy for immediate consideration.

For the realization of the revenue goal a number of adjustments are needed in both the Rating and Valuation for Rating Acts. I do, of course, advocate the consolidation of these statutes.

## Minor Adjustments

Let me start with the minor adjustments. First, the future law should enable County Councils to have quicker access to cadastral information. In the previous chapter I deplored the current practice of leaving accessibility to depend on departmental grace. As I advocated then, the law should mandate district land registrars to pass the information to their respective County Councils. In the course of time certain other information in the domain of other departments may be routinely required by Councils to supplement the cadastre. For instance, I mentioned earlier the need for Councils to have information as to prospective trends in inflation and population, as part of the rate fixing exercise. In cases like these, the relevant departments should be mandated to prepare and provide the information on a regular basis. To plan successfully the various aspects of the revenue goal, County Councils will need all such information for which they have no capacity to compute. There is need to assist them in the meantime. A legal mandate rather than departmental courtesy may be the best way of securing this assistance.

In the long run, County Councils must be encouraged to develop their own infrastructures for the compilation and

management of this information. This will enhance their autonomy and planning. It is fair, however, that Councils be made to defray part of the expenses incurred by other departments in providing the information.

Secondly, the statute should incorporate some of the administrative adjustments suggested below. For instance, to strengthen revenue collection, I have suggested the co-option of the locational Chief into the collection team. His presence will give the revenue goal a strategic feasibility in the manner discussed below. The future law should specifically incorporate him and his staff. He should not be available to the Councils as a matter of another departmental courtesy.

Thirdly, the statute should empower the Minister in charge of local government to review the case of each County Council for purposes of determining whether or not it should be encouraged to progress from area to value base. From the earlier discussion, it was my stand that value-base must be the ultimate goal for the sake of substantial revenues. But that there is need to encourage and caution Councils to move toward it incrementally depending on their proven capacities.

Fourth, there is need to provide in the statute certain measures that will enable Councils to match estimated revenues

with those that are collected. For example, the law should specifically empower the Minister to periodically review the collection efficiency of each County Council. He should be permitted to develop guidelines for Councils to this effect. Further, the law must provide for "pay-now-and-object-later" device. As people become sophisticated and litigious this device will be handy in the exercise of matching revenue estimates and collections. We do have this kind of provision in the Income Tax Act (Section 92 [6], Cap. 470) to counter the sophistry of income taxpayers.

There are, however, three major changes that the adjustment program must emphasize. The first concerns the elevation of the status of land rates into a major tax. The second relates to the definition of land owner. The third concerns the re-design of a tribunal for dispute settlement. These have perhaps greater and more direct influence on the revenue goal.

## Primary Adjustments

### (i) Land Tax: Not a Supplementary Measure

Land rates must be recognized as an independent and major tax. We have seen evidence to suggest that the tax is indeed a revenue major, and yet the law still treats it as

supplementary. There should be an amendment to the statute to align the law with practical realities.

In Chapter Three, we saw that Section 3 of the Rating Act only allows the land rates to apply for purposes of covering expenses not provided for by the other revenue sources. Land rates can only be invoked to supplement. My main point here is precise. This section must be deleted and replaced with one which ranks the rates at par with the other taxes. The revenue crises facing County Councils put the need for such adjustment beyond debate.

The change should be crowned by re-naming the statute itself as the Land Tax Act. And as I have been calling, the Valuation for Rating Act should be consolidated in the new Act. A related change should be to separate certain provisions that are clearly for property rating in the Municipal Councils into a segment of their own. For instance, the elaborate provisions on various value-base, and their accompanying rules on choice of rate (ss. 4-10) could be separated and re-grouped in this manner. The rest of the provisions can be rearranged in another segment to provide for the County Councils on issues mentioned above. This would not proliferate the statute. To the contrary, it would simplify it for easy following by the Councils' revenue officers.

## (ii) Definition of Owner

Having decided that the tax be imposed on the "owner", there is need to spell out who he is. Let us build on the existing legal effort. Section 7 of the Valuation for Rating Act currently defines the "rateable owner" for purposes of land rating. It provides that a rateable owner is a person who owns rateable property, or is a lessee thereof (so long as the lease is not for less than twenty-five years and is registered). Owner also includes, in the case of unregistered property, any person who claims to be owner of the rateable property. In cases where a County Council is still holding land in trust, and it receives rents therefor, it will be the owner.

This definition embodies "user" whom I recommended should be excluded from the future definition of owner. However, even more seriously, it is too inadequate to advance a revamped and broader land tax program such as I am calling for. It is not useful because it leaves a lot out and even fails to be precise on what it covers. How, for instance, can we find owner in cases of unregistered land where such determination depends on the willingness of some individual to come forward and lay claim to the land in question? It also makes no sense to make County Councils both rating authorities and taxpayers.

Besides these shortfalls, it appears that this definition does not show the realization that rating should be confined only to registered land. There seems to be no awareness that the type of cadastral information required to administer a land tax cannot be available in cases of unregistered land. This is yet another piece of evidence to the effect that land rates were not seriously intended by authorities to be a tax. We would have otherwise witnessed a more serious effort to define key terms and concepts such as owner.

In order to push a more concerted land tax program, we need to confine the effort on registered land. It is comparatively easier in this situation to obtain workable cadastral information. My understanding was that this was the thinking behind the 1984 policy declaration that land taxation would closely follow the registration process.

The registration process which we met in Chapter Three has produced a better and more pertinent definition of owner. By the application of the "mirror principle", the Registered Land Act defines owner by relating him to an official, government-guaranteed register. This saves us from the problems of undocumented claims that the Valuation for Rating Act encourages.

Section 3 of the Registered Land Act (Cap. 300) provides that owner (or proprietor), in relation to land or a lease, is the person named in a land register as owner. In relation to a charge of land or a lease, proprietor is again the person named in the register of the land as the one in whose favor the charge or lease is made. Where the land is owned by a group of persons, their representatives are regarded and registered as proprietors (S. 106A).

The register is thus the place to start with. The Council would be saved time and expense by the fact that it knows where to search. The register mirrors, as the Sorren's System of registration was designed to do, the person who at any time is the proprietor of the land in question. By legal implication, any person not named cannot be owner. Therefore, the tax assessor need not go beyond the register, nor fear that the person identified therein is an error. The owner's title to the land is absolute once he is shown in the register (S. 27). And the state guarantees the title. So there is no mistake in showing his name in the register as owner (S 28).[4]

The register provides further relevant information. The "property section" of the register shows the physical location of the land and its size. The "proprietorship section" which gives the name of the owner, gives his address too (Registered Land Act, S. 10). These particulars constitute the core of

the cadastral information a land tax assessor would need. The revenue clerks in Wareng' County Council told me that they had no difficulties at all in relying on these particulars in the registers of the area.

Most innovative, perhaps, is the definition of owner in the various transactional situations. As it is clear from the following discussions, neither the Rating Act nor the Valuation for Rating Act has anything similar or close to these definitions.

In cases of disposition by sale (speculative or *bona fide*), the transaction must be registered with the Registrar of Lands. Section 38 (1) of the Registered Land Act is absolute in providing that such a transaction (including lease or charge) cannot at all transfer legal interest in the land unless registered:

> Every attempt to dispose of such land...otherwise than in accordance with this Act shall be ineffectual to create, extinguish, transfer, vary, or effect any estate, right or interest in the land....

The collector of land taxes would therefore demand payment from the person whose name still appears on the register, and not from the purported buyer.

Where the sale is genuine and registrable, Section 30 (e) provides that any outstanding rates on the land automatically become a registrable overriding interest. And, in accordance with Section 86 (a), the Registrar *shall not* register the disposition unless a "clearance certificate" from the relevant Local Authority is produced to show that the rates have been paid. It is of no consequence to the Registrar as to who actually pays the rates. That is a matter of agreement between the seller and buyer. This measure is a perfect safeguard against sale of land intended to evade payment of rates that are due. Revenue flow is thus kept stable, the transfer of land notwithstanding.

In the event of subdivision or fragmentation (be it genuine or evasionary), Section 89 offers a safeguard. The subdivision must first be registered or else it will be of no legal consequence. If refused, the person whose name appeared on the register prior to the purported subdivision will still be the landowner and hence the taxpayer. If approved, new registers will be opened in respect for each subdivision. The allotees will become the respective proprietors and hence the new taxpayers.

It should be recalled from Chapter Two that County Councils are represented on the Land Boards that decide on sales and subdivisions. They therefore have an opportunity to consider the facts relating to these transactions and accordingly protect their tax positions.

While still on the subject of subdivision, let me note a point from the Bangladesh experience. Miller and Wozny (1983, 22-3) have argued that a land tax ultimately leads to some form of fragmentation. They reached this conclusion from a land occupancy survey they conducted in Bangladesh in 1978. Their aim was, *inter alia*, to see how the introduction of a more aggressive value-base and a high rate around 1978 impacted on patterns of land occupation. They noted that the tax perched more heavily on the poor peasants because, unlike the wealthy landowners, they had no other means of paying the tax other than from the meager incomes of their small plots. The rich, on the other hand, did not need to till the land harder so as to pay the taxes. They paid from other income sources. Besides, it was noticeable that quite often they sought to escape the liability of the tax through dispositions and settlements.

Does the law of Kenya offer any solution to the inevitable outcome of subdivision? The availability of legal

safeguards would be quite welcome considering the trends observed in Kakamega County Council. A perusal of the land law regime, however, did not point to any direct solution. Perhaps the provision of Section 106 of the Registered Land Act could be of some use. This section appears to set a floor below which subdivision would become uneconomic and legally unacceptable. Though no size is actually prescribed, the provision empowers the Registrar to treat each situation as factual and apply his discretion accordingly.

In Kenya, like it is elsewhere in the developing world, pressure on land makes fragmentation a real problem. It is quite difficult (or unfair) to prevent subdivision in densely populated districts like Kakamega, Kiambu, and Murang'a. In that event, it becomes equally difficult to distinguish between genuine and evasionary subdivision. Property rights are guaranteed under our Constitution. We cannot successfully close our constitutional eye just for the sake of tax revenues.

So does the "floor" in Section 106 help the tax situation? Indeed, as a measure designed to ensure proper land use, the floor theoretically prevents land units from becoming economic shadows. The limited tax utility of the provision lies in the fact that better some floor than nothing at all. And that is because some kind of floor may help

reduce an enormous workload the collector would face if fragmentation was left *ad infinitum*.

Where land is jointly or commonly owned, the Registered Land Act guides the future assessor on how to identify the owner thereof. First, County Councils are empowered to recommend to the Minister in charge of land the maximum number of persons that can be registered as joint or common proprietors (S. 101 [3]). If the land is *jointly owned*, the proprietors do not have proprietary shares. As such they would be jointly liable as taxpayers (S. 102). The opposite is true where ownership is *common*. Here the proprietors have individual shares. So each would be liable for a corresponding portion of the total tax (S. 103). Should such a person die before paying his share of the tax, his estate will be held accountable in accordance with the rules that follow.

Identification of owner in cases of death (or liquidation) requires a broader reflection. A look at both the Registered Land Act and the Law of Succession Act, Cap. 160, suggests that there are variable situations to be independently considered. Where the owner dies testate or intestate in circumstances to which Cap. 160 applies, the personal representative and administrator respectively become

the proprietors and accountable for the tax (Registered Land Act, SS. 119, 122). At any rate the Succession Act mandates that any outgoings from the estate and due to the state (e.g., land rates) rank first against all other claims (Cap. 160, S. 86).

If the owner dies intestate and the African Customary law applies to his estate, the Court should determine who the administrator of the estate should be (Registered Land Act, S. 120). The Council would accordingly secure payment of taxes from him. But if nobody comes forward a year or more after the application to the Court was made,the land will (after some steps) be regarded as *bona vacantia*. In this case the court will direct that the Registrar of Lands or the relevant County Council become proprietor (Registered Land Act, S. 121).

In bankruptcy cases, the trustee in bankruptcy is the proprietor (Registered Land Act, S. 123). The Council should recover from him. But care must be exercised where there are more than one trustee and one of them dies. The Council cannot simply rush to the survivor for rates. It is necessary to acquaint itself with the provisions of the trust document to determine the powers and duties of the survivor (See Registered Land Act, S. 127). The position is similar in

cases of liquidation. Under the Companies Act (Cap. 486), the Council should hold the liquidator accountable (Cap. 486, Sec. 311 [1][a]).

In other fiduciary capacities (e.g., where a person acquires land on behalf of a minor, insane person, or alien enemy), such person is regarded by the common law as the owner. Land rates should thus be recovered from him. In addition to the Common Law, Kenya has a number of statutes that govern each of these respective incapacities. They would be consulted to determine how they qualify the general power of the Council to recover from the fiduciaries.

Who is the owner in cases of adverse possession? The Agriculture Act offers some help. If ownership is doubtful due to adverse possession or prescription, Section 2(5) empowers the Minister of Lands "to deem some person to be the owner." The Minister deems after hearing arguments from the disputants. In 1988-1989, Mulu Mutisya (a member of Kenya's Parliament and a prominent tribal leader) became embroiled in a dispute over some land in Machakos district with the Kavulo Nthei clan. The Minister applied the section when he ruled in favor of the clan. His reason was that the members of the clan had lived on the land long enough to acquire title by prescription. A purported purchase of this land by Mutisya from one of the clan members, and without the consent of the

rest, could not dislodge this title.[5] In a situation like this the Council should collect taxes from the winning party even before he has been registered.

In the case of the absentee landlord, a number of remedies exist under the Agriculture Act. Broadly, they include collection from the landlord's agent, if any; or compulsory acquisition of the land for lease or sale (SS. 57, 60,184-88). I will return to these measures in the next chapter.

These categories of owner are obvious to a trained lawyer. It could possibly be argued that if and when County Ccuncils hire lawyers, they will be able to identify the categories. It is also possible to argue that valuation rolls are required by Section 6 of the Valuation for Rating Act to show some of the information discussed above.

The point, however, appears to be that since the envisaged land tax program is supposed to be broader and well-planned, we must not leave these matters to be discovered by flip-flopping through other statutes. The new statute should expressly incorporate them for purposes of the program. We do not know when County Councils will be able to employ and retain lawyers. We also do not know when they will be similarly able to hire valuers. The lay revenue officer and

his clerks will therefore remain, for a long time, the interpreter and implementor of the law. He will not have before him valuation rolls to offer guidance. The new statute must make his task a little easier by listing these categories.

### (iii) Redesigning the Tribunal

Sections 12 to 19 of the Valuation for Rating Act provide for the establishment of valuation courts. The courts are for purposes of settling disputes arising out of valuation of properties for land rating purposes. On the face of it, this is a very welcome step because it provides for an extra-judicial forum in which property owners can defend their rights without the impediments of procedures in formal law courts. However, on closer examination, the valuation "courts" (as they are statutorily called), are unreal and not at all useful from the County Council standpoint.

These courts suffer from two things: one, the level at which they are to be set in each council is not at all reflective of the realities in County Councils; second, their mandated composition is equally unattainable in these Councils. These problems are not manifest because the Councils do not apply land rates; or if they do, they have not bothered to constitute the valuation courts. Wareng' admitted

that it had not constituted a valuation court since land rating resumed. The landowners have not challenged the Council's practices. Disputes have tended to be settled on an *ad hoc* basis.

Both the level and composition of the valuation courts must be reconsidered. It is only in this way that they can be made relevant to and workable in County Councils. In addition, their re-establishment must be made part of the publicity agenda for the tax program. Let me reflect on these issues.

Composition is an issue because the Valuation for Rating Act simply applied a concept of valuation courts meant for Municipalities onto County Councils without adaptation. Sections 12 and 13 provide that the court should consist of three members, one of which must be a magistrate (or an attorney) and two other persons not necessarily from within the Council in question. In Municipalities, it is easy and possible to find magistrates because of the concentration of courts therein. I do not have to argue so hard that this is not possible in the majority of County Councils. In most of the districts in the North Eastern Province, for example, lay administrative officers have to be used as magistrates because trained lawyers are hard to find and retain in such desolate

places. How possible then can it be to find a magistrate to chair a valuation court?

The essential point is that when the circumstances for such a court materialize, its composition must be reviewed. In County Councils, flexibility should be built into the law to allow for appointment of civic leaders from the area. If lawyers can be found, this would be ideal. But the law should accept reality by not insisting on membership that is difficult to obtain. In the long run, it may be plausible to prescribe for lawyers, but not now nor in the near future. At any rate, one would expect that other relevant professionals be made members. Why not a valuer, or an economist, or a social scientist?

Level is an issue because the Valuation for Rating Act seems to suggest only one court for each Local Authority. Municipalities are small, compact, and coherent systems. One court at some central location is accessible because of the better transportation system. But can one court be ideal for a County Council that may be hundreds of square kilometers? Can such a court be accessible to the people in a County Council with rough roads (or roads that may be unusable during certain times of the year)?

When I discussed the issue of the valuation courts with Council officers, they seemed to be at a loss on many points. However, they seemed to be definite on the issue of level. At what level should the tribunal be set in each County Council? Should it be at the locational or divisional level? Alternatively, should we retain the mandate of the Valuation for Rating Act and have only one court at Council headquarters?

The administrative location would be most ideal because it would bring the court closer to the people than at the other two levels. And this would seem to be supported by Wareng's decision to take rates collection away from Eldoret to each of the six locational headquarters. However, the majority of the council officers with whom I discussed this issue showed outright disfavor for this alternative. Their objection stemmed from the fear for huge costs that would result from the establishment of so many courts at this level.

On the other hand, one court for the entire County Council appeared totally unattractive. The primary reason for this was that such a court would be too alienated from the people, more so in the large Councils like Kitui and Turkana. The court should be close enough to encourage our people to come forward and seek redress.

By this process of elimination, the divisional level appeared to be the choice. Divisions are the second cadre in which districts are divided. And each division is further divided into locations depending on its size and/or population. There was a more practical reason for favoring a division. The central government has established Land Control Boards at divisional level to deal with land disputes that must be settled by "elders" before going to courts. This is permitted by the Land Control Act, Cap. 302, Sec. Five.[6] Members of County Councils sit on these boards at divisional headquarters. It is not surprising, therefore, for council officers to be well-disposed towards this alternative. From my discussions with them it was, however, clear that even though there was still need to allow a discretion for dividing the Council territory into jurisdictions that did not coincide with administrative divisions. This would be a better approach in keeping administrative costs at efficient levels.

Our next statute must, therefore, separate the municipal court from the County Council one. Similarly, the issue of composition must be decided on a separate basis. Most importantly, since the court is more useful when the value base is applied, its restructuring should be tackled together with the program of phasing in of the value-type bases. And the Councils should go out to inform landowners of the existence and the workings of the court. In educating the

public about the courts, Councils must communicate clearly issues that may be brought for settlement. These include incorrect zoning and the corresponding assessment; errors as to acreage; or matters relating to omission or misdescription. It is inconceivable that time was spent providing detailed court rules for Nairobi and Mombasa Municipalities (see the Schedules to the Valuation for Rating Act) and not at all on similar details for County Councils.

## B. IMPROVING COLLECTION EFFICIENCY

There is wide concern that Local Authorities are utterly inefficient in collecting revenues due to them. Several studies have made this observation. Smoke's study, as we saw in Chapters One and Two, seems to regard this inefficiency as the primary cause of the revenue problem. The government itself has been worried about this situation for a long time. For example, the reports of the Controller and Auditor-General on Local Authorities have consistently bemoaned the inefficiency (Kenya: The Report of CAG, 1981: pp. 1, 5). And many policy instruments on fiscal restructuring often refer to this situation (Kenya: Sessional Paper, 1/1986: 51; Fifth Dev. Plan, 1984-88, p. 174).

A number of causes have been blamed for the inefficiency. They too are well-known. They include sheer laxity and

indifference on the part of the officers. There is also ignorance of the legal sanctions, and the general confusion on the part of Councils.

Laxity on the part of the officers has far reaching consequences. It wastes good effort expended in designing a good taxation system. The law fails to be communicated, thereby making its goals unattainable. Laxity insulates taxpayers against legal sanctions. Default to pay becomes an institutionalized right. This apparent legitimation of default begats inequity. Those who feel it a civic duty to pay taxes lose morale and respect for the system when they see others default with impunity. In the long run,it may be quite difficult to reverse the trend.

I did sense some amount of confusion on the part of County Councils. Because of the turbulent history through which they have gone, and also because of the controls imposed on them from above, they are often hesitant to take certain steps. This is because they do not know whether the government will react with a reprimand or support. I was made to understand, for instance, that this was one reason why some County Councils have avoided applying land rates altogether. Since landowners are bound to complain loudly, it is predictable that the government would choose to sacrifice a Council rather than the public. Whether some of these fears

are genuine or not is not the issue. The point is that there is fear and confusion and they are contributing to the unwillingness of Councils to vigorously apply legal sanctions against tax defaulters. Let it not be forgotten that patronage and clientelism are still practical in our midst. These too may have their subtle contribution towards these fears and confusion.

Ignorance of the legal sanctions comes partly from the personnel problems that the Councils face. Since they have no capacity to hire and retain qualified lawyers, the interpretation of the relevant laws must fall on lay officers. It is imaginable that when this happens the enforcement of the law suffers in many respects. There is no doubt in my mind that we must initiate measures that will reactivate the law.

### (i) Policy Guidelines

To improve the collection resolve we must institute a number of policies and innovative practices. The government itself has suggested the steps to be taken. I discuss them here in the hope that as policy pronouncements, they will be matched with concrete action.

First, the Ministry of Local Government should establish criteria by which County Councils (and other Local

Authorities) can measure their collection performance. It is not enough to assess revenue performance by requiring councils to submit annual budget estimates. Audit and checks currently exercised by the Ministry need to be reinforced by measures that determine revenue performance. The modalities of such criteria are within the capacity of the Ministry. Such criteria do obtain in tax theory as it was shown in the discussion under Chapter Three. Councils should be required to apply these measurements as a statutory obligation. And the ministry should be vigilant in supervising the exercise. Punitive measures in form of economic sanctions (e.g., withholding of any forms of grants or refusing to guarantee loans), together with sanctions on individual council officers, should be instituted.

Secondly, the Ministry should devise ways of helping the Councils to understand and enforce tax laws. One Council officer suggested to me that one way of doing this would be to catalogue offenses and sanctions in lay language in some form of booklet. In addition,the Chief Revenue Officer should be trained and empowered to prosecute defaulters so as to avoid undue delay occasioned by waiting for prosecution from the Attorney General's office.

Thirdly, other policy guidelines could be made on the basis of Wareng's experience. For instance, collection could

be improved through good timing, or by rallying the support of Councillors, and local area chiefs. Council officers should be urged to go out and seek defaulters. It is also useful to tell Councils to constantly monitor local as well as external circumstances that may adversely affect payment of taxes. Wareng', for instance, follows agricultural trends and harvest seasons with keen interest.

### (ii) Promotion of Good Public Relations

Even if the law is vigorously applied, there is still need for the Councils to promote the civic image of the tax. Two reasons make this need obligatory. Illiteracy and ignorance of our people are likely to impede their ability to relate demand for public services to the need to pay for them. Mutunga and Yahya have devoted a substantial portion of their study on land use strategies to this point. Though their study focuses on service provision in urban Councils and the difficulties of raising revenues for those services, they emphasize the point that people always demand services without accepting that taxes must be paid or raised to finance the services. And if this is the case in urban centers where people are supposed to be more enlightened and appreciative, the position in rural Kenya must be worse (Mutunga and Yahya, 1987).

Thandi's study, whose central theme is the merit of land rates given their administrative difficulties, makes the same point too. The study argues that an appreciating taxpayer or constituency will help reduce collection costs through good response. This will, in turn, improve collections (1984: 10).

Promotion of a good public image for the tax is also good for that eternal civic reason. Payment of taxes is a life-line for a civil society. Taxes are not a rip-off. Nor is their department an immoral and unjust extortioner as the Biblical Pharisee once described the Publican (tax collector) (St. Luke 18:11). In Kenya's context, payment of taxes is reinforcement of development fuel. County Councils should not feel guilty in asking people to pay.

Public relations can be implemented in a number of ways. I do not pretend here to offer anything spectacular. I only emphasize the obvious to draw attention to the fact that the obvious should not be ignored. It may turn out to be the best if not the only weapon of fighting the menace.

First, cordial and good public relations at the tax counter ought to be practiced whenever taxpayers come to pay, seek information, etc. It may be useful to re-emphasize to the revenue staff to be helpful and kind to the taxpayer. They must be taught the simple and basic rule that a taxpayer

is not a criminal who deserves cold shoulder. When he comes forth to pay he is performing an important civic duty for which he deserves all the help he may seek.

Although the Internal Revenue Service (IRS) in the U.S. may have its problems, it has greatly impressed me in the manner in which it goes out of its way to help and assist taxpayers.[7] The IRS encourages taxpayers to phone (toll-free) or call at their well-distributed offices for assistance. In addition, it has spawned numerous pamphlets, booklets, and other written information to guide taxpayers in handling their tax matters. Although people have complained of complex instruction manuals, etc., this has not been the intention of the IRS. Complexity has come out of the huge and complex economy and society which the instructions must take into account. For this reason it is better to have complex guidelines than nothing at all.

To help taxpayers meet the various deadlines, the IRS wages a spirited notification campaign at the relevant times. It even liases with the U.S. Postal Service to operate up to midnight to help taxpayers beat deadlines.

The IRS practices emphasize an important point about good public relations. The tax authority need not only wield the executioner's hammer to secure compliance. It should also

extend a helping hand. In the familiar metaphor, both the stick and carrot should be applied. In more colloquial terms, the department must also serve with a smile. As a student of Kenya's tax system, I know that I am expressing a majority opinion when I charge that our revenue departments (national or local) are far from appreciating the need for treating the taxpayer with a human touch.

Secondly, there is also need to review what one study has called the "counter-efficiency". Meshack Mwera's study calls for the need to reform Kenya's tax system. Though the focus is on national taxes, he presents one observation in his "counter theory" that is quite applicable here. He argues that ever since independence, "reforms" of taxes in Kenya have exclusively focused on how to cast and tighten the tax noose around the taxpayer. There has been no major effort to address aspects of taxation that do enhance the taxpayer's transactional interaction with the departments. Mwera concludes that reform should focus with equal concern on what may appear to be trivial procedural matters. One of this is efficiency at the public counter.

The counter theory espouses that taxpayers are inefficiently served if they are made to stand in queues for long hours to be attended to, to obtain or hand in forms, or to receive answers to their questions. Similarly, the counter

is inefficient if taxpayers spend many hours rumbling over poorly drafted forms or being made to see many different officers to settle a single problem. In the same way, there is counter-inefficiency if taxpayers are charged to obtain forms, subjected to slow refunds or resolution of their problems. The counter should be a manifestation of good management, not unresponsive bureaucracy. It should not break, but seek to enkindle taxpayer morale (Mwera, 1986, passim).

While I do admit the merits in Mwera's suggestions, I must hasten to point out a few of its limitations. For instance, it is difficult for faceless institutions that tax departments are to have a smile or the clean counter performance. Clerks at the counter get so accustomed to people and their problems that routine bores and consequently hardens what should have been a smile. Service with detachment becomes inevitable even if not explicit.

Long queues and delays may at times be the result of trying to be efficient. It may come from the effort of a clerk to prepare and give a thorough explanation or answer to a taxpayer. It may also be caused by circumstances for which the counter is not to blame. County Councils do not have computerized and other easy-to-access systems of information. Digging through manual files may require more time as it will

be argued in the next chapter. No system is fool-proof in its endeavors of responsible duty. Having made these admissions, I do still agree with the need to be sensitive to counter efficiency.

### (iii) Taking a Shot at Corruption

Corruption is an immense subject. Neither the time nor scope of this study allows an in-depth discussion of it. The analysis that follows is highly restricted to the needs of this study: that is--to show that the practice, as a breaker of the taxpayer morale--must continuously be addressed in our tax agenda despite its illusive nature. County Councils must be urged once again, never to surrender.

Corruption at the level of public institutions involves violation of the duties of public office and the public interest. It also involves the privatization of public resources for personal advancement and self-gratification through acts of bribery, embezzlement, extortion, speculation, nepotism, etc.; and a choice or decision on the part of a public official (or civil servant at the national or local level) to take advantage of opportunities that arise while the individual functions in an official capacity. This is the broad definition that experts agree with (David Gould and Amaro-Reyes, 1983:14).

Experts have long recognized the effects of corruption on any public institution and its mandate. It may start as a mere leakage, progress into a fault line, and eventually become a crater into which the institution sinks (Meshack mwera, 198: 7). In terms closer to our land taxation, a small bribe by one landowner to a revenue clerk for the latter to under-assess the tax due, can possibly develop into a system that will swallow the tax program.

Is there corruption in Kenya's County Councils (or Local Authorities)? Understandably, Council officers flatly denied that the practice existed. There are, however, some indications of its presence.

First, the farmers I interviewed thought that there was corruption and other related practices within their County Councils. Indeed, they went further to stipulate the condition that if they were to pay land taxes, the County Councils would have to clean their houses first.

Secondly, the reports of the Controller and Auditor-General have often admitted the presence of corruption in various forms. Accounting records such as cash books, vote books, and revenue registers, were either not maintained at all or maintained with many manipulated errors suggestive of

a scheme of concealment. Salary advances and imprests were given contrary to regulations and the latter were often not recovered without explanation. Revenues were sometimes not collected in circumstances which indicated intention to fraternize. And quite visibly, plots were irregularly allocated in circumstances that were evident of nepotism and kick-backs (Kenya: The Report of the Controller, 1983, pp. 4-7).

Thirdly, national leaders have acknowledged the existence of corruption in public institutions. The practice was one of the evils condemned by the National Leaders' Conference of 1978 at K.I.A. The leaders feared that corruption (presumably at national and local levels) was undermining development. The Conference admitted that the solution to the problem was difficult. But it went on to resolve that "every effort should be made to eradicate it" (Kenya: Proceedings of the National Leaders Conference, 1978: 41-2).

Fourth, there is anti-corruption law. Logically such law would be unnecessary if the practice did not exist. There is the Prevention of Corruption Act, cap. 65. The statute is designed to deal with corruption in public institutions. In addition, the Penal Code, Cap. 63, extends the fight into private institutions as well. Closer to Local Authorities,

there are provisions in the Local Government Act, as we shall see, designed to punish corrupt officers.

Lastly, as a consequence of the evil to the Local Authorities, Nairobi City Council collapsed due to corruption also. The practice had reached a stage where, apart from triggering mismanagement of services, it made it difficult for Council revenues to be collected and/or accounted for (Siganga, 1986: 54; Irene Nderitu, 1987:32).[8]

The causes of corruption have equally been abundantly discussed. There is general agreement that by understanding causes we may, perhaps, be able to attack and make the problem somewhat manageable.

First, the role of the government in the development process while it may, on one hand, be justifiable, does on the other hand facilitate conditions for corruption. Experts point to the fact that government intervention gives it a monopoly in the provision of public services. This tends to be replicated at local levels as well. Because of the tremendous demand for these services, officers (or civil servants) find themselves in the determinant positions. Soon the service-to-all rule gets replaced with the rule of the highest bidder (M.U. Ekpo, 1979: 11-28).

Secondly, government intervention spawns a tremendous amount of regulations designed to give legal as well as administrative discretion to public officers. This is to enable them to decide the various issues that they may encounter. It is also necessary to confer discretion in order to make government programs flexible and accommodating and ultimately implementable. The exercise of the discretion offers opportunity for corrupt practices. It may be used to favor a relative, friend, or a person of influence. Similar favor may be extended to any other person ready to pay *chai* or *dash*.[9]

The other notable cause is degeneration of ethics and morality in society. If, for instance, the political system is lax on the ethical conduct of its leaders, the interests of society will take a second place to personal ones. If ethics matter and there is strong institutional watch (either from the citizens or the press), and freedom of expression, it may be possible to arrest the situation through exposure, public condemnation and legal sanctions.

Finding solution is difficult because of the illusive nature of corruption. For example, it can possibly be argued that if government intervention is causing corruption, it should be replaced with privatization. This will remove

bureaucracy and the need for regulations. But as a solution, this approach would be too simplistic. It may not only lead to privatization of the economy but of corruption too. Again, it is easy to suggest vigorous application of sanctions, or improvement of the working terms of public officers. But as it is well known, legal sanctions have never been a deterrent. On the other hand, better terms have tended to exalt the status and appetites of the officers. The level of *chai* will correspondingly go up.

Despite difficulties of finding a solution, a tax program must address the issue nonetheless. Land taxation cannot be the occasion to deal with all the manifestations of corruption in society. Such an approach would be inadvisable. However, there are aspects of corruption that impact directly on taxation. These ought to be faced for the sake of the taxpayer morale, compliance and collection.

First, County Councils should be constantly encouraged to aggressively apply the existing legal sanctions. As obvious as this may sound, we must emphasize the need to apply the sanctions without fear or favor. Prosecution can be instituted under any of the three statutes mentioned above. The one with stiffer penalties should be preferred. It is

thought that legal sanctions may be the best practical option available.

In this connection, we should further urge Councils to activate the provisions of the Local Government Act. The Act has some useful safeguards against corruption. For example, section 135(1) provides that a council may require an officer to furnish security to ensure faithful execution of his revenue functions. Under S. 137(1) a revenue officer must disclose in advance any private interest he may have in any contract between the Council and some third party. This is to ensure that contracts are negotiated at arms-length. Non-disclosure is punishable. Section 138, on the other hand, prohibits officers from engaging in private pursuits that may render their private interests to conflict with those of the Council. For this reason an officer (e.g., a lawyer, engineer, or doctor) employed by the Council is forbidden from engaging in the private practice of his profession during the tenure of his employment. And S. 137(2) specifically prohibits the taking of bribes; while r. 18 (Second Schedule) prohibits officers from canvassing councillors for appointment or promotion to any Council office.

Secondly, training and motivation of officers are also often stressed as a solution: training, so as to inculcate, among other things, ethical conduct and self-discipline; and

motivation, so as to remunerate at a scale that will place the officers above temptation.

Admittedly, these suggestions are replete with flaws. For instance, it is not humanly possible to find a remuneration scale that can overcome appetite for bribes. Corruption depends a great deal on a person's disposition or nature. Extrinsic solutions such as these are unlikely to reach the inner man. It is also recognized that even if we succeeded in tackling the practice at the County Council level, this alone may not do so long as the evil remains elsewhere in society.

In addition to the foregoing, experts advocate the application of more insidious methods, the hope being that since corruption is subterranean, it should be thwarted in its genesis or progression by means that are equally subtle. One such approach is said to lie in the application of linkage mechanisms between the relevant institutions.

The theory of linkages has been applied by experts primarily in development administration in the developed or Third World (David Leonard, 1982: 37). It has broadly been advanced as a formula for defining relations between the centre (government, NGO, aid agency, or any other source of development resources) and the institution (e.g., cooperative,

village or neighborhood group, etc.) at the periphery (or the locale of the development project) to ensure that the development program in question is successfully delivered to the intended population. In this regard, the linkage mechanisms are viewed as a means of influencing or tacitly compelling the peripheral agencies to stick to and steer the program in question. For example, to secure the compliance of a local agency, the centre may withhold funds "to punish" deviation from the mandate. The opposite is true--namely that funds will flow to reward adherence. The discussion that follows is not an in-depth exposition of all the ramifications of the theory. It is limited to and presented in the context of the land tax vis-a-vis corruption.

Although Dale Marshall (1982) and Martin Landau (et al., 1981) discuss linkages in contexts not directly referring to corruption, their observations are adaptable and relevant. They offer a general approach of handling peripheral agencies to avoid obstacles that could possibly impede delivery of programs at the local level. The tax under inquiry is one such progrm. It too has potential to suffer from some of the development administration problems they discuss (e.g., elitist subversion, or rigid hierarchy command models that exclude citizen participation). In addition, it can be hindered by corruption--which they do not discuss.

Marshall evaluates, as mentioned in Chapter One, lessons to be drawn from the application of certain linkage mechanisms by the U.S. Federal Government in the early 1950s and 1960s to implement certain poverty alleviation programs. She specifically examines the control and assistance linkages. The former were used successfully to enable the federal government to decentralize the administration of the programs, but at the same time keep watch over the local agencies that were involved in the delivery of these programs at the local level. By manipulation of federal funds (grants) in the manner exemplified above, or through direct legal regulations, control over the agencies was achieved (1982: 54-57). Assiatance linkages were, on the other hand, employed to encourage, assist, or support the agencies to be autonomous, and consequently innovative in adapting the programs to local circumstances. Thus assistance was given (financial, technical, personnel, etc.) as another form of centre-periphery linkage. These kinds of linkages in fact had the overall effect of, *inter alia*, injecting a dialogue or "bargaining" in the relationship and thus mitigating the harshness of control mechanisms.

The relevance of Marshall's analysis to this study lies in the exposition of the element of participation which was one of the lessons yielded by assistance linkages. Assistance

to local agencies encouraged voluntary citizen participation in the program. The total effect of this was the strengthening of the programs through the economies of local participation. The participation did not only contribute momentum and resourcefulness to the programs. It also brought censure from the public for the defects and shortcomings of the programs.

Participation, when applied to corruption in the administration of the land tax program, would arguably require that we encourage citizens to speak out and demand for redress. Accordingly they would be instigated to be watchdog, or bloodhound, or both.

Admittedly, a lot would have to be done to prepare citizens of Kenya for this participation. For example, there would be need to find an appropriate node in the structure where they would be given the forum of participation. And I suggest the use of the tribunals mentioned earlier in the Chapter in order to avoid duplication of institutions and complexity in the administration of the tax. It is also obvious that our people would have to be formally educated to make them perceptive and assertive. To match this, we would need a strong local press, and a government provincial administration that did not just see people as passive recipients of government programs. Above all, we would need

a highly committed government policy to follow citizen complaints and prosecute officers implicated in the allegations.

Landau and Eva Eagle, on the other hand, discuss linkages in theoretical terms. They demonstrate that institutions involved in a common activity define relationships among or between themselves according to their circumstances. The relations could depend on the charisma of their leaders, or they could be rigid command models, or flexible and promotive of dialogue. Either way, there are merits and demerits (1981: 3-14).

Their functional contribution to my study lies in the various linkage paradigms that they have advanced as a means of defining relations between these institutions. Whatever relationshp institutions choose to have between them, there are certain fundamentals that should be observed to achieve the goals of these institutions. These fundamentals relate to linkages between the institutions, i.e., the definition of authority between the institutions.

those of information from the periphery. In our context this would mean that County Councils (which would have all the information regarding the application of the tax) must not at the same time monopolize all the decision-making based on this information. The central government should retain some powers to review some of the decisions.

The foregoing seems to require the application of linkages that balance the need for division of labor on one hand, and supervision on the other. Some of the practical steps here are familiar. For example, a County Council would rightfully appoint all the revenue officers, but allow the central government to second the Chief revenue officer, the idea being that such an officer would be detached from Council politics, lobbying, clientelism, and patronage and thus be able to expose corruption upon its detection. Understandably, of course, this officer would have to be transferred from Council to another (or recalled to the Ministry) as often as need be to avoid the development of patronage and localization around him.

Secondly, the two go farther to advocate that in some instances more direct intervention by the centre may be justified (1981: 52-3). This should, for example, be done whenever it appears that the peripheral situation has suffered serious deterioration, and that public confidence in the

relevant institution has been undermined. For sure this calls for sensitivity and responsiveness on the part of the central government on one hand, and the existence of anti-corruption activism on the part of the citizens, church, press, etc.

There are various methods of intervention. They include commissions of inquiry, followed immediately by criminal prosecutions of those suspected; and structural reviews and reorganization of the Councils to intrinsically "clean up the mess."

Intervention can also be perpetuated through an office or agency of the central government that may itself not feel censured or constrained by actual or implicit reminders of allegiance to the executive. In the United States, for example, this has been achieved throught the Office of the Controller General. Though he is appointed by the President, he must be confirmed into the post by the U.S. Congress. He heads the General Accounting Office whose primary duty is to audit and check accounts of the departments and agencies of the federal government. He does not report to the President, but to the Congress. He is, in fact, appointed for fifteen years so that his independence is guaranteed by overlapping his tenure with that of the President (four or eight years) who appointed him. In these ways, he is thought of as being

above political influence and hence able to report on corruption without fear or favor.[10]

Kenya's Controller and Auditor-General stands and works broadly in similar ways. He is a presidential appointee, but reports to Parliament. He audits and checks the accounts of all government (central and local) departments and agencies. As it was pointed out earlier in this Chapter, he has quite often detected and reported corruption within the Local Authorities.

So what is the problem since we have this pivotal institution? This office has, following the Constitutional Changes of 1986-87, lost strength and integrity needed in an anti-corruption agency. Prior to these changes, the Controller enjoyed a constitutionally protected tenure. His services could only be prematurely terminated upon fulfillment of certain constitutional steps. Apart from sending the wrong signal, this has removed the force that used to fuel the Controller to call for legal sanctions against those he suspected. Since it has not been found easy to dispense with the office, there is need in future to give it teeth to demonstrate our resolve as a nation to confront corruption.

### (iv) Using the Locational Chief

County Councils strongly felt that for efficient assessment and collection, the central government must offer administrative support. Given the need to expand and vigorously apply the tax, given also its direct impact, and the fact that the base is one that is emotionally endeared, Councils need a more authoritative support. Apart from the legitimation of the program, this support would provide the administrative muscle that Councils do lack.

The councils suggested that the Administrative Chief (and his Assistant Chiefs) would be the most appropriate agency of the central government to give the support. The Chief is an employee of the central government. He is the administrative boss of a location, and he reports directly to the District officer (an officer in charge of a district division), and the latter reports to the District Commissioner. Under the chief, there are Assistant Chiefs, each of whom administers a sub-location (the smallest legally recognized administrative unit) (The Chief's Authority Act, Cap. 128).

The Chief was considered suitable for a number of reasons. By some tacit administrative tradition, the chief of a location must be appointed from among the people of the location. Preferably he should be one of their tribe and

residing permanently therein. These qualities are supposed to underscore the "tribal-elder" status that the office of the Chief was founded upon when it was adopted by the colonial government for the administration of the natives. In this regard the Chief is both elder and public administrator. These are the qualities the British used extensively in making the Chief part of the administrative machinery for the hut and poll taxes.

Having come from the local area, the chief is expected to have thorough or unique knowledge of the people and their land. He is, therefore, capable of offering insights on various land tax issues that a detached revenue clerk from the Council headquarters may not be able to. In other words, using the Chief would give the tax and its administration some local touch.

Most importantly, as a public administrator with powers of arrest (Cap. 128, S. 8), he will give the needed coercive force. County Councils do not have sheriffs of their own. As the elder of the location, and also as a taxpayer himself, he is bound to give legitimacy to the tax.

It should be recalled from the last chapter that Wareng' County Council is already exploiting the office of the Chief.

His *barazas* are conduits for assessment and collection notices. And his knowledge of the location has assisted greatly in determining certain decisions that relate to the land-rating vis-a-vis the settlement program. For example, where the Council cannot find the registered representative of a land-buying company, it often uses the Chief to help trace senior members of the company who may in the alternative be billed. The Council admitted that his involvement had contributed to the smooth administration of land rating.

Indeed, the Chief should be deployed for the stated reasons. However, I must sound some caution. Chiefs (and their assistants) as employees of the central government, are thus beyond the command and sanction of County Councils. Their services in the program would be, realistically speaking, *ex gratia*. Under the current legal setting, it would be difficult to hold them liable for any commission or omission. The Council would still have to take the initiative and accept liability. Besides, the chiefs' schedules of work are determined by the needs of the District Commissioner's office. We can be sure that there will be times when he may be unavailable when the Councils need him most. But these problems are not unsolvable. A carefully coordinated schedule can bring the chief in line with the council needs. It was, after all, a good sense of coordination that synchronized the

chief's other duties with those of administering the poll and hut taxes.

# CHAPTER FIVE

# REFLECTIONS ON THE IMPACT AND THE LAND USE QUESTIONS

This chapter discusses two issues that are integral to the application of a land tax in Kenya. I have alluded to them several times in the previous chapters.

The first issue is the impact of the proposed tax program. Impact is a very crucial issue because it is the jury and judge as to the applicability of the tax. No matter how well-designed or good-intentioned a tax may be, it can still fail if it turns out to be too burdensome on the taxpayers and/or on the tax department itself.

Impact is, therefore, concerned with assessing the overall burden the new tax is likely to bring to both sides. Its analysis is, however, quite difficult because a better view of it can only be had after the tax has been applied. Should we postpone its assessment or bring it up front? The weight of expert opinion is that an effort must nevertheless be made to fore-assess impact. In the previous chapters I showed how Council officers have totally ignored or failed to see the issue despite the fact that it ought to be a policy cornerstone in any tax program. If we are to emphasize its importance to them with some success, we ought to offer guidelines on how it should be perceived.

The second issue is whether or not the tax in question should also be used to tackle the inefficient use of land.

This is the broader question of resource-use that has surfaced many times in the previous chapters. My stand all along has been against the extenuation of the revenue goal of the land tax by overloading the program with an extra goal for which County Councils have no capacity to administer. In this Chapter, I will elaborate on my objection.

## 5.1 IMPACT ON THE TAXPAYER

How then do we assess the impact of the additional tax on the taxpayer? I am guided in this primarily by a study done for the World Bank.[1] S. K. Krishnaswamy addressed this issue in 1984 as an aspect of financing public sector investment in developing countries. His central thesis is that since taxation is one of the methods of raising revenue for the investment finance, there is always the temptation to jump in for additional taxes without due regard for their impact. He therefore found it imperative to warn that if additional taxes are applied, their impact on potential taxpayers must be thoroughly evaluated.[2] Although the study drew heavily on the Indian experience, it has nevertheless been held out as a model for other developing countries.

According to Krishnaswamy, there are four parameters for assessing impact. These are the tax/GNP ratio, movements in domestic savings, the degree of peasant marginalization, and

fluctuations in the level of agricultural production--all of which must be attributable to the tax. But I am of the view that there is a further factor. For want of a more precise term, and for a desire to revisit one of my earlier themes, I have called it the pressures of other development demands. I will consider these issues in this order.

### (i) The Ratio of Tax Receipts to GNP

As a yardstick of burden, the tax/GNP ratio requires a policy maker to ask a simple and yet a fundamental question: can more tax revenues be mobilized? Indeed, whether or not more taxes can be mobilized depends on other considerations besides burden--e.g., levels and patterns of private consumption and savings, the structures of taxation and its flexibility, and the administrative machinery.

According to the ratio, the higher the proportion of tax receipts to national income, the greater will be the resistance by taxpayers to a further increase in it. Hence, the economic case for additional taxation has to be clear and strong. In other words, there should be no additional tax if its application is going to push the existing ratio beyond a level where taxpayers will be unduly impacted (Krishnaswamy, 1984: 1-2).

For Third World economies, Richard Musgrave has suggested an operational criterion. He has posited that a tax-to-GNP ratio of at most 18% seemed called for in most cases (Musgrave, 1987: 243). This percentage has received general endorsement from most of recent studies of the issue (e.g., by Vito Tonzi, 1987: 218, and others cited hereafter). If the additional tax pushes the level beyond this percentage it means the measure is adversely biting into peoples' per capita incomes, and vice versa.[3]

A ratio higher than 18% has far-reaching ripple effects. Besides eroding per capita incomes, a higher ratio leads to deterioration in domestic savings, making the accumulation of capital at individual and national levels difficult (Krishnaswamy, p. 4). It will further trigger inflation as corporations and individuals alike take measures to recoup high taxes through price-increases. If the prices happen to be controlled, the alternative venue becomes black-marketeering (Prof. Walter Ochoro, 1989: PI). And black marketeering will lead, *inter alia*, to distorted distribution of essential goods and services, food shortages (as hoarding replaces open dealing), etc. For a developing nation the political consequences of these events need not be over-emphasized.[4]

What is Kenya's tax/GNP ratio? And what is her policy stand on the effects of additional taxes to the ratio one way or the other? Tables 10 and 11 give Kenya's ratios from the fiscal year 1978 through 2000 A.D. Except for the figures of 1985/86 and 1999/2000, which are estimates, the rest are actual results. Though the ratio was erratic during the period in question, it stayed slightly above the level recommended for developing countries. The projection for 1999/2000 does show that it will be six percent higher in the next century. From Table 10 it is also clear that this trend is not unique to Kenya. There are other sub-Saharan countries whose ratios are above the 18% mark.

Besides a high tax/GNP ratio, Kenya has a marginal survival rate in the rural areas. As part of the search for a new economic path (decentralization) and the mobilization of local resources, the government undertook a rural household budgetary survey 1981/82. The aim was to determine potential for taxation in rural areas. The survey showed that net income per household (average number of members being 6) was Kshs. 829.00 per month (cash and kind).[5] People spent 74% of their incomes on food, and the rest on education and health.

**TABLE 10: SELECTED COUNTRIES OF SUB-SAHARAN AFRICA**
**Tax Revenue as Percentage of Gross Domestic Product**

| Country | 1978 | 1979 | 1980 | 1981 | 1982 | 1983 | 1984 |
|---|---|---|---|---|---|---|---|
| Benin | 16.5 | 15.3 | 14.6 | 17.8 | - | - | - |
| Botswana | 18.5 | 19.8 | 25.1 | 16.5 | 22.6 | 25.4 | 27.9 |
| Burundi | 15.1 | 14.2 | 12.6 | 11.7 | - | - | - |
| Cameroon | 16.9 | 13.4 | 15.5 | 16.1 | 22.4 | 20.9 | - |
| Central African Republic | - | - | - | - | - | - | - |
| Chad | - | - | - | - | - | - | - |
| Congo | - | - | 26.9 | - | - | - | - |
| Ethiopia | 13.1 | 14.8 | 15.8 | - | - | - | - |
| Gabon | - | - | - | - | - | - | - |
| Gambia | 15.5 | 16.2 | 19.3 | 16.8 | 16.0 | - | - |
| Ghana | 7.8 | 9.8 | 7.7 | 5.1 | 5.3 | 10.1 | 6.5 |
| Ivory Coast | 21.5 | 23.2 | 22.9 | 25.1 | 22.9 | 22.2 | 21.9 |
| Kenya | 20.3 | 19.3 | 21.0 | 21.6 | 20.9 | 19.5 | 20.3 |
| Lesotho | - | - | - | - | - | - | - |
| Liberia | 22.4 | 23.5 | 20.8 | 23.4 | 27.2 | 26.3 | 26.2 |
| Malawi | 14.9 | 16.1 | 16.2 | 15.7 | 16.1 | 16.0 | 17.1 |
| Mali | 14.3 | 12.3 | 10.9 | 10.6 | 11.9 | 11.9 | - |
| Mauritania | 15.6 | 17.8 | - | - | - | - | - |
| Mauritius | 21.1 | 19.1 | 19.6 | 19.1 | 17.8 | 19.9 | 20.8 |
| Nigeria | 14.5 | - | - | - | - | - | - |
| Rwanda | 10.2 | 12.2 | 10.9 | - | - | - | - |
| Senegal | 19.7 | 20.2 | 21.8 | 19.6 | 19.2 | 18.2 | - |
| Seychelles | - | - | - | - | - | - | - |
| Sierra Leone | 16.9 | 15.4 | 14.8 | 15.4 | 11.0 | 7.4 | 7.0 |
| Somalia | - | - | - | - | - | - | - |
| Sudan | 12.1 | 12.5 | 11.3 | - | 10.8 | - | - |
| Swaziland | 25.1 | 26.7 | 26.2 | 21.3 | 26.1 | 23.8 | 23.7 |
| Tanzania | 17.7 | 16.9 | 17.2 | 17.1 | 16.5 | 17.2 | 19.0 |
| Togo | 27.8 | 25.7 | 27.1 | 23.1 | 25.7 | 23.6 | 25.2 |
| Uganda | 9.9 | - | - | - | - | - | - |
| Upper Volta | - | - | - | - | - | - | - |
| Zaire | 13.2 | 17.2 | 19.5 | 17.4 | 17.9 | 17.1 | 23.9 |
| Zambia | 21.7 | 20.3 | 23.1 | 21.5 | 21.6 | 22.9 | 20.6 |

SOURCES: IMF, Government Finance Statistic Yearbook, Vol. X, 1986.
World Tables, 1983.
World Bank Country Report, various issues.

**TABLE 11: KENYA--TAX REVENUE SHARE (%) OF GDP, 1984-85 - 2000**

| | |
|---|---|
| 1984/85 | 21.8 (actual) |
| 1985/86 | 21.3 (estimated) |
| 1999/2000 | 24.0 (projected) |

Source: Kenya -- *Sessional Paper No. 1*, 1986, p. 27

The major source of their incomes (contributing approximately 59 - 65% of total income) was farming (Kenya: Economic Survey 1988, p.33, Tables 3.9 and 3.11). The government concluded that even though the data showed bare subsistence, there was potential for taxation only if the people were encouraged to use their land more efficiently. I operate on the assumption that today's survival rate is not much different.

Both the ratio and the household budgetary survey would appear to negate additional taxes. Is there a way out? Throughout the 1980s, the government has increasingly found itself in a dilemma. Whereas its expenditure obligations have rapidly soared, its incomes have fallen just as fast. In Chapter One we saw, for instance, how development expenditure (at least in nominal terms) rose from 31% in 1973-74 fiscal year to 62% in 1977-78 fiscal year (a period of just five years). And whereas the total annual expenditure was a modest

K£ 513 m. in 1977-78, it has since more than doubled. In 1986-87 fiscal year, for example, it stood at K£ 1270.8 m.-- an increase of K£ 757.8 (or 147.7% increase rate).

Though expenditure trimmings have been put into place (see cost-sharing below), general levels still remain way above those of incomes (in fact, growing by an annual rate of 24%). Incomes have suffered from falling export earnings, loss of support given by international aid, and increased debt service ratio. For example, the external public debt has grown from K£ 0.7 to K£ 3.8 billion between 1980 and 1987, representing a rise from 32 to 62% of GDP at factor cost. The domestic public debt has grown from 19.8 to 39.4% of GDP over the same period. The growth in external debt raised the service ratio from 17 - 19% (of export earnings) to 27 - 28%. The aim is to bring the ratio down to 25% (Kenya: The Sixth Development Plan, 1989-1993: 71).

Kenya's policy-stand is therefore that we must, *inter alia*, increase the level of taxation. The government's reasoning is that if we fear to apply new taxes because of exceeding some ratio, we shall slow down the pace of development (which, as said throughout this study, must substantially depend on domestic resources). Slowing the pace further means denying

our people services for which they may be willing to sacrifice as our *harambee* practice has demonstrated.

Besides, the tax/GNP ratio is only a yard stick. As a mechanical abstraction, it must bend to the dynamics and realities of the factual situation. After all, even the World Bank itself admits that it is neither possible nor practicable to pre-determine the "just right ratio" (World Bank, 1984: 3). The appropriate rate must, therefore, be our own determination --taking into account our dilemma and the limited options open to us.

The movement towards increased levels of taxation was first launched in the 1986-87 fiscal year. In the budget proposals of that year, the Minister for Finance announced that he was going to initiate several measures called for by the Sessional Paper 1/1986 to raise revenues for the government (at both local and national levels). The main objective of a higher revenue base was to fund the growing demand for government services (Kenya: Budget Speech, 1986/87: 5). The target level is the 24% ratio shown in Table 11. And this is one of the several measures towards revenue-base broadening. The new taxes discussed in Chapter Three are part of this strategy. Other measures include further reductions in public expenditure by way of termination of subsidies on

goods and services (a measure known as cost-sharing), and the recently launched Value Added Tax (VAT) at the national level.

Therefore, as per the tax/GNP ratio, the government itself leads me into concluding that there is still room for additional taxes. Our inescapable dilemma and limited options compel us to view the situation in this light. The government is ready to identify and reach for any viable tax potential (SP 1/86: 51). I, therefore, conclude that a land tax must still be applied, even if its potential burden cannot be denied. The Kenya situation dictates this outcome.

### (ii) Labor Movement as an Indicator of Burden

The essential point about labor movement is that a tax is considered unduly burdensome if it forces landowners and farm laborers to abandon the land in preference for the urban or industrial sector. If the marginalization is directly attributable to the tax on land, then there is need to minimize or mitigate its impact.

Bird's study of this issue in fact draws on the early attempts in Kenya to apply land rates on white-settled land. Although the study is not elaborate on its findings (being a wide survey of the entire world land tax practices of the 1950s up to the early 1970s), it advises on the need to

measure impact by observing labor movements (Bird, 1974: 15 - 17). So, according to Bird, an undue impact of tax on the agricultural sector would be revealed through the over-supply of labor in the modern sector.[6]

However, Newbery and Stern argue that in developing economies, labor movement is a poor indicator. Their position is that economies of the Third World are quite often dual in nature. On one hand, there is the agricultural sector which, though predominant, is essentially primordial and independent of the modern. Efforts to quantify the sector in monetary terms are often imprecise. It may not be easy to know whether or not people abandoned the land directly because of the impact of a tax. On the other hand, there is a small but quite powerful and equally independent modern sector. It is capable of fixing labor prices at will because unskilled labor is plentiful and cheap anyway. A movement of labor from the farmland may not upset labor prices additionally because even if the minimum wage is statutorily fixed, the industry is in a strong position to control the ceiling. The influx of job-seekers may not present economic dangers to the sector (Newbery and Stern: Chapt. 7).

Professor Walter Ochoro agrees with Bird's position, though on more elaborate reasoning. He argues that the separatist and dual capacities of the economic sectors

espoused by Newbery and Stern were, with specific reference to Kenya, tenable in the 1960s. Kenya's economy ceased to be dualistic perhaps by the end of the 1960s. Today, the two sectors are so interrelated that the labor movement between them would be felt on both sides.

If the tax forced people off the land, it would deny the agricultural sector of labor, since the sector is labor-intensive. The modern sector would suffer too in that abandonment of land would deprive it of raw materials. The industrialists would be forced to reduce operational costs, including existing wages, in order to produce efficiently. The tax planner must therefore take into account the potential impact of the land tax on both sectors via labor movement (Ochoro, 1989: PI).

Indeed, Ochoro's position is tenable for the reason that the two sectors of our economy are today sufficiently inter-connected as to affect each other. But so is the position of Newbery and Stern, namely that labor-movement would still be a weak indicator. The phenomenon of rural-urban migration, of which labor movement is an integral part, has been around in Kenya since independence. We know that its major cause is poverty and deprivation in rural areas with the consequence that people (or labor) flock to the urban (or modern) sector in search for opportunities that are assumed to obtain there.

The imposition of a land tax can only exacerbate a situation which is already there due to other and more influential factors. It may therefore be difficult to know the exact contribution of the tax.

On the other hand, the tax may not at all chase people from the land. There are various reasons for thinking so. First, Professor Mbithi's study of the sociological aspects of the labor migration in Kenya makes the observation that even when people migrate to the modern sector, they do not cut their roots with the land. Kenya's rural-urban migration is characterized by the fact that it is the men (young and middle-aged) who more often migrate (recall the situation in Masaku County Council). By implication women, children and old folks stay to assert the roots in the land (Mbithi, 1982: 71-85). This sentimental attachment to the land will certainly make it difficult to measure the impact of the tax. People will stay for this sentimental reason, and not because the tax is absorbable.

Muiti and Maiko informed me that from their observations, they had noticed that the one major reason why people in Kakamega district may be forced to sell land is when they need to raise school fees for their children. Children's education is seen as a worthy investment, one that is compelling enough

to make one part with the land.[7] That means that the tax may not be the cause of disposition.

Secondly, in economic theory, a tax on land will force those not using their land efficiently (and hence unable to pay the tax) to dispose of their land. Accepting this position for the moment, the consequence will be that land will fall in the hands of efficient users. Productive use should increase demand for labor. The tax can, therefore, be said to ultimately lead to increased demand for rural labor.

However, the limitations of the labor movement as an indicator do not mean that we ignore it. When the time comes for our economy to present a clear choice for the people--land or some other economic medium--the indicator will be decisive. It will then be easier to determine the impact of the tax since we shall be able to determine that the tax *primarily* contributed to preferring the service or industrial sector over the agriculture. In the immediate future the County Councils would, of course, be urged to be sensitive to labor migrations and to see to what extent the tax is a contributor.

### (iii) The Pressures of Other Development Demands as a Burden

The total picture of the burden can better be measured by adding the tax to the other demands the development politics or process make on our people. In Chapter Two we saw that County Councils have these kinds of obligations over and above their statutory ones. In the course of previous discussions, I alluded to the fact that indeed the people of Kenya have other obligations imposed on them by the forces of development. One of these is *harambee*, to which I have referred many times. Let me now examine *harambee* and the politics of cost-sharing from the burden standpoint.

Our *harambee* effort is internationally well-known. Because of its international visibility it has attracted a lot of international NGOs and other donor agencies on the reasoning that those who demonstrate ability to help themselves should be helped. Its national status is not just manifest in its dynamic practice. It has been adopted as a national motto and thus honored by its inscription in the national coat of arms. From a small start in 1963 when the nation's founding father, Mzee Jomo Kenyatta, first made the call, the movement has grown in strength and diversity. It is today an indisputable national character and part of Kenya's development strategy (Orora and Speigel, 1978).

Given that *harambee* is voluntary, it has not been possible to compute the percentage of "taking" it actually makes on personal incomes. Efforts to extract such data from government officers and other sources were very unrewarding. All I can do is to submit that indeed it claims some portion of peoples' incomes in reaction to which additional taxes should show sensitivity. Its characteristic description as a "sacrifice" does perhaps give us a sense of its exaction power. The reader is also invited to discern its "taking" effect from the statistics discussed below.

Perhaps by looking at the quantification of its overall contribution to development capital, we may better appreciate its true demands on the people, and the fact that this demand is a burden to which the application of new taxes must pay attention.

Today we know that the movement has been operating concurrently with official development programs since independence. And it has been responsible for the mobilization of large quantities of capital development resources that have provided for schools, clinics, cattle dips, roads, etc. It started off by placing more emphasis on development projects (water supply, transport, and

communication facilities). But it has lately switched to the social development projects (e.g., education, health, and social welfare). During the 1965-69 period, social development projects accounted for 64% of total *harambee* contributions, rising to 86% during the 1980-84 period (Kenya, Dev. Plan, 1989-93: p. 31).

The contribution of *harambee* to capital formation has risen steadily over the years from K£ 1.2 m. to K£ 21.9 m. in 1984. The total nominal value of *harambee* projects between 1965 and 1984 was K£ 160 m., accounting for 11.8% of Gross Fixed Capital Formation. Average per capita contributions also grew from Kshs. 6.42 in the 1965-69 period to Kshs. 8.46 during the 1980-84 period (Dev. Plan., *Ibid*). These figures do not, however, include contributions in kind which are substantial.

The number of completed projects grew from 6,711 in 1965-69 to 14,028 in 1980-84. The ratio of project completions to project starts also grew from 35.6% during 1965-69 to 80.4% during 1980-84 (Dev. Plan, *op. cit.*).

*Harambee* contributions take the form of cash, labor, materials, and lately, professional services. They come from various sources--the primary one being the *Wananchi* (the common

folk of Kenya). And they receive support, as I said above, from NGOs, as well as from the Government and Local Authorities.

*Harambee* symbolizes one aspect of the "participation" by our people in an endeavor to uplift their own economic well-being. That is why it should be encouraged and continued. And the Kenyan Government has declared as a policy that it will continue to encourage the effort (SP, 1/86: 29). The application of the land tax must therefore be made re-active to the effort. Planners should take care to avoid a situation where the tax impacts so heavily on the people as to lead to a substitution effect between the tax and *harambee*. A rate that is in the circumstances low is the best way of achieving the balance. The County Councils can be assisted by the Ministry of Local Government to work out the equilibrium position.

The policy of cost-sharing advocates the removal of subsidies on government services and goods. It also advocates introduction of fees and charges on those that had hitherto been provided completely for free. The effect of this is that in addition to *harambee* contributions and the payment of existing taxes, people must dig deeper into their pockets to have access to a variety of government services.

From the day of independence, the government was desirous of providing basic services to the people to alleviate diseases, ignorance and poverty. So these services were provided at no cost to the people, or were heavily subsidized. For instance, primary education was made free. University education was also free until 1975, when it was subsidized through a government loan system to students. Primary health was also provided free for both in- and out-patients (with only a Kshs. 20.00 bed-fee for hospitalized patients). The employed persons contributed to the Hospital Insurance Fund to meet part of their hospitalization costs. The Fund is still operative. Provision of water in rural areas, where available, was partly free. Fee or charge, if any, was quite nominal and far below the operational costs.

But with increasing population and the consequential increase in demand for these services (and for other reasons already discussed), the government has found it difficult to continue with the social welfare policies of the independence era. In the early 1980s, the possibility of cost-sharing was mooted. In 1986, the policy was actually adopted (SP, 1/86: p. 106, para. 7.6).

Since 1988 a number of steps have been taken to implement cost-sharing. I will only illustrate with a few examples

since an in-depth discussion of these would be unwarranted by the scope of this study.

In the field of health care there will be a service charge based on the actual cost of providing the service. Government hospitals will be partly privatized to cater for those with ability to pay for medical care at the full-market rate. Out-patient services will also be paid for, but the government is to work out details of accommodating the very poor (Kenya, Dev. Plan, 1989-93: pp. 237-244).

In the area of education, parents must, on *harambee* basis, build primary schools, equip science laboratories and libraries in high schools, and build teachers' houses. University students are to get loans at commercial rates (if they fail to get bursaries from their districts and Local Authorities).

As regards water supply, the rural folk must pay for the water they get from the state. A consumption-related charge reflective of production costs is to be applied. This will be done through the installation of water meters at every demand point or homestead where this had not been done before.[8]

Local Authorities, for their part, will also terminate subsidized rates on their services. They too must impose cost-efficient rates (SP, 1/86, p. 106).

The question can now be posed. In the face of *harambee* and cost sharing, can our people sacrifice further by paying land taxes? The answer is by no means easy. Obviously, the people themselves would respond by saying "no". And their reason would obviously be that it would be burdensome to expect them to pay and at the same time sustain *harambee*. The treasurers to the County Councils sampled expressed this opinion apparently on behalf of their constituents. They took the position that if the tax were applied, *harambee* has to be discontinued, and vice versa. And yet, on the other hand, we have seen that the central government favors both.

Whether or not the tax can be accommodated will require more technical reflections than I can afford. The ideal position, however, appears to be that the tax be added. This is primarily because it is more stable and equitable (at least in theory) than *harambee* is. Let me briefly amplify these two factors.

In terms of stability of base, *harambee* has some intrinsic demerits. As such it cannot be a substitute for land tax.

For instance, unlike a land tax for which there is both legal authority and compulsion, *harambee* is and must remain voluntary. Whereas legal compulsion would make the land tax certain and a sure source of revenues, *harambee* is likely to die or lose steam in the course of time.

Being voluntary, no planner can be sure in advance as to the levels of revenue to be expected therefrom. It would consequently be difficult to tailor a viable budgetary process on a source with such indeterminate productivity.

As regards equity, a land tax would afford us an opportunity to incorporate into it some social programs such as those considered in previous chapters. *Harambee* gives us no such arena. For example, there can be no way of ensuring that voluntary contributions reflect the principle of ability or wealth. In fact, to the contrary, *harambee* seems to offer plenty of room for free-riders, some of whom may be quite wealthy. Perhaps the greatest lesson and contribution of *harambee* as an institution is the demonstrated willingness of our people to pay for the sake of their economic development. And thus, the land tax would benefit from this only if the revenues therefrom, like those from *harambee* contributions, are spent in the local area. I therefore conclude that even if the tax would admittedly exacerbate the burden when applied

in conjunction with *harambee*, the latter cannot advisably be a substitute for the former. Again, through the manipulation of rate structures, the burden can be accommodated.

## 5.2 IMPACT ON THE TAX DEPARTMENT

A sound policy approach requires that the impact of the tax on the administration be assessed too. Quite often, impact is treated by many analysts exclusively as a taxpayer issue. This is, in effect, half the task.

My attention to the double-approach was drawn by the 1986 U.S. federal income tax reforms. One of the goals of the reforms was to ease the burden of the Internal Revenue Service (IRS) so that it could in turn help the taxpayer ease his. The past reforms had been as one-sided as other efforts elsewhere. By 1986 experience showed that this had not helped the taxpayer. As more burden heaped on the IRS, it became difficult for the agency to find enough time to help taxpayers with their queries, or filing the returns, etc. There was therefore need to institute a number of reforms designed to ease pressure on the IRS too. One such step was in the cutting down on content of information and instructions on or accompanying tax returns, and an overall simplification of the remainder. The idea was to enable both the taxpayer and

assessor to go through the tax calculation with comparative ease.[9]

There is a more practical reason why the position of the administration deserves attention. Whereas revenue officers showed some concern for the impact on the taxpayer, they showed no awareness that burden would also be their tormentor. Nobody seemed to articulate any aspect of the burden during my discussions with them. For the sake of the optimal tax theory, the issue must be discussed and their attention drawn to it to avoid "errors of omission".

The burden to County Council administrators arises actually or potentially from a number of factors. What are they? What solutions do I offer? I devote the rest of this segment to the discussion of three matters relating to these questions.

**(i) Manual Vs. Computerized Operations**

County Councils, like most government departments, are still very poor in terms of office automation. Their work is largely operated manually. So are their storage and information retrieval systems. A large number of clerks became inevitable to run the somewhat fragmented and scattered operations. I observed that behind every officer or clerk I

interviewed stood hundreds of manual files and loose leaflets. And it did not matter whether the files were in current use or closed.

Councils did not have trained documentation officers, or at least a librarian or archivist of some sort. There was a registry in each Council, manned by a registry officer. His main task was to file all official documents in appropriate files, and to retrieve them whenever needed and thereafter to monitor their movement from officer to officer. There was some sort of document indexation system. It largely consisted of files by numbers and years, and some subject categorization.

The main problem with this documentation system was that retrieval of information was quite difficult. This was more so with closed files. There was a tendency to dump some of the files in some kind of "junk yard", usually a dark, unused room, dusty corridor, or alley.

The level of office mechanization was equally modest. The most sophisticated gadgetry included small-size desk cash registers, stencil cyclostyles, and a few electric typewriters. In Kakamega County Council, for instance, I first observed that clerks had often to rush downtown to use private copiers for reproduction of urgent documents. I also

observed that certain clerks carried their own pocket calculators to avoid jostling for the one or a few available cash registers. Secretaries typed using carbon paper or stencils in order to secure multiple copies of documents. Of course, I never heard mention of computers anywhere except when I raised the subject myself.

The foregoing is the quantum of what I have regarded as the manual management of County Council work: a system, so to speak, where there is over-reliance on one's physical muscle in the preparation, storage and retrieval of information.

The question is whether this system can be efficient in the administration of a land tax, or indeed, any other tax.

The answer to the above question is obviously "no". And it comes from the confessions of the Council officers themselves, and also from a few studies that have addressed the problem. Let us now see how the system could be a potential burden in land tax administration.

The burden of the revenue officer under this system is not difficult to imagine. For example, in a populous County Council like Kakamega, he would need a large number of manual files for the upkeep of his cadastral notes, and for

assessment and collection entries. In the absence of an efficient indexation system (to record taxpayers, land parcels, subdivisions, transfers, and transmissions), it would be time consuming to locate information so as to speedily respond to a throng of tax inquiries. This would cause blame for the clerk and on the whole stifle the counter-efficiency discussed in the previous Chapter.

Retrieval difficulties may compel both the clerk and taxpayer to resort to shortcuts. The clerk is likely, for example, to estimate the tax due rather than take trouble to accurately compute it on the basis of information in the file. Unsubstantiated answers may be given just to get rid of taxpayers. And taxpayers may punch up the short cuts by offers of *chai* or *dash*. This would in turn open window for corruption, inefficiency, and degeneration. In another dimension, it may encourage litigation as landowners discover that information given to them was faulty in one respect or another. So there are actual and potential costs and problems that a council would face in a manually administered land tax program.

Computerization has widely been advocated as the solution (D. Ramasawmy, 1985: 16; Willy Mutunga and Saad Yahya, 1987: 60-62; USAID and MLG, 1987: No. 26). Its advantage lies in

fast and reliable information storage and recall. And this is said to be recipe for efficient administration.

I do not discount the contribution that computerization is bound to make. That is abundantly evident from the extensive computerization programs currently pursued by many government departments and parastatal organizations. The private sector in Kenya is, of course, far ahead in this. But the reality is County Councils are too poor to afford computers of the correct capacity, or any at all. This means manual operations will continue to be around for some time to come.

There are, however, some encouraging developments toward computerization. First, since 1985, the Ministry of Lands and Housing has embarked on computerization of cadastral information of all sorts. Right now, as it was evident from the description of the registration process, land use information and other data are inserted on Index Maps and registers. The goal is to convert this information on computer disks (Ramasawmy, *op. cit.*, p. 19). It is envisaged that when the conversion becomes operational, it will be easier and faster for County Councils to access this information for purposes of their land taxation. And as I suggested, this should be enhanced further by making it

obligatory on the Ministry to supply the Councils with this information.

Secondly, decentralization seems to be bringing computers closer to County Councils. Since each district is the designated focus of development decisions, it has also been made the center for all manner of development information in the area. As a consequence of this, each district is geared to have a District Information and Documentation Center (DIDC). Most districts now have some fledgling documentation centers, including those in which the sample County Councils lie.

I learnt that all government departments, NGOs, and even individuals who may be called upon must deposit at the DIDC information and copies of documents in their possession. The aim is to computerize the information so that any consumer thereof within or without the district can have ready access to it. I found a team of experts from the Netherlands teaching and helping the officers in the Kakamega Center to computerize the information they had so far received. The computers at Kakamega had been donated by the Netherlands. And I was informed that there were computers in other districts donated by other foreign governments and agencies. There was optimism that by the year 2000 the system will have become routine in all districts.[10]

County Councils will have access to computerized information at their respective DIDCs. It is not possible to tell at the moment whether or not all the information needed by the Councils in tax administration will be computerized. Most likely, it will not. And that is why certain Councils are considering to have their own computers. There was, for instance, such thinking in Narok and Wareng'. All these options should be encouraged so that tax administration in future will not be as much of a burden to the department as it is today. The burden of an additional tax cannot be denied. But is bound to be manageable in the manner indicated above upon the introduction of computers and other office automation devices.

Commenting on this point, Professor David Leonard expressed some reservations on computer enthusiasm. He was wary of urging reliance on computers at an early stage in the application of the tax because County Councils would not have the expensive manpower to operate and maintain the computers. In the event of a breakdown, and many would be bound to occur, a council would be deprived of information needed on a daily basis to administer the tax. This concern would have to be seriously addressed when the computerization comes.

**(ii) The Scope of Controls**

Controls and coordination *per se* are meritorious management practices. They offer any multi-sectoral organizations (e.g., governments, and big corporations), economies of integrated management. These include drawing on departmental specialization and compliance with approved procedures for fear of actual or potential censure.

But controls can also, among other disadvantages, be a burden on the controlled. This is often the case where either there is a proliferation of the centers of control, or the chain of command is vertical and unduly long. I would like, therefore, to admit and examine the issue of control from a perspective of burden in tax administration.

Before decentralization, control over the Local Authorities came from three major sources. The first was Parliament. It exercised control on any issues that came up for debate, most prominently the reports of the Controller and Auditor General on Local Authorities' finances. The central government, through the Ministry of Local Government, is another source of controls. This is done in the course of ensuring that Local Authoritiess obey the provisions of the Local Government Act (and other applicable statutes). And the

well-known exercise of this authority has been in the creation and dissolution of Local Authorities, and the audit and inspection of their accounts. Public opinion is supposedly another form of control. Local Authorities are supposed to respond to or otherwise show regard for the sentiments of their constituents in particular, and those of the general public.[11]

After decentralization, Local Authorities found yet another source of control. Under the program, County Councils, like all other Local Authorities, must submit their proposed projects to the District Development Committee so that the latter can evaluate and integrate them into those of the whole district. In the official jargon, Local Authorities must vet their development projects through the Development Committee before forwarding them to the Ministry of Local Government for funding (Kenya: District Focus Blue-Print, 1987: 3). If the Committee endorses the project, the Ministry will approve and fund it (and vice versa). In addition, the methods which a local authority intends to use to raise revenue from within the district for these projects must have the concurrence of the Committee. At the project implementation stage, the Local Authority must coordinate with the Committee (The District Focus, *op. cit.*: pp. 3-4.).

It can be argued that the new requirements from the District Focus have complicated more controls which were already excessive (Sindiga and Wegulo, *op. cit.*; Z. P. Omwando, 1988: 8-16). So, for instance, whereas in the past the only censorship on revenue raising came from the Ministry, County Councils have now to satisfy the regulations of the District Committee. It should also be recalled from Chapter Two that Councils are answerable to a variety of other ministries and government agencies in carrying out their other functions.

The controls which the Minister for Local Government can exercise over the Local Authorities under the Local Government Act are numerous. Under the *ultra-vires* rule he can strike down any of their functions. He approves their budgets and fixes ceilings for the rates at which they can impose their various taxes, charges, and fees. It was noted in Chapter Two that the budgetary controls alone are so overwhelming on Local Authoritiess that the budgetary estimates have to be manipulated, polished and made to balance so as to be approved.

Oyugi and Mulusa have severally argued (and many other analysts do also observe) that these controls have pushed the Local Authorities to a point of institutional decline (Oyugi, Mulusa, *op. cit.*). It, therefore, appears from the wide concern

that controls present some form of a burden. I have the impression that as more functions get allocated to the Local Authorities, they will bring with them a proliferation in controls. And I fear that when land taxation commences, more regulations will come.

Is there a remedy to controls? This is a difficult issue to resolve. There are a lot of conflicting interests to be balanced. On one hand, for instance, controls are necessary for national coordination and accountability for public revenues. But on the other hand a spiral of control centers will frustrate and defeat local autonomy. Wareng's success in the application of land rates stemmed partly from the free hand it had in designing its own programs and in setting its own policy goals. This tends to suggest that except for controls which are designed to steer, encourage and guide the Local Authoritiess towards their goals, all else should be abrogated. In broader terms, the policy goal should be to strive for autonomy so that in the long run the system can benefit from the ingenuity and drive that this brings. There should therefore be movement towards the gradual relaxation of current controls. The Ministry of Local Government and Local Authorities can agree on the substance of this.

I am further of the view that excessive controls from the center grew as a result of ignoring grassroots participation.

Quite strategically, our Local Authorities are based on an electoral system. We elect Councillors every five years. And yet the legislative image of the councils has been severely displaced by controls from Nairobi. We should encourage councillors, and ultimately the electorate, to be the primary source of controls. There is need to teach our people to assume the responsibilities of policy formulation, development priorities, revenue raising and expenditure, through the people they elect. As it will be argued in the next segment, the institution of the Councillor has been so much allowed to decline to the extent that it is no longer a solution, but yet another source of burden to the Councils. It may be that if properly attuned and activated to debate the affairs of the Councils, controls from above might not be as necessary. And so their proliferation would cease to be an issue to worry us in our tax agenda.

### (iii) The Councillor as a Source of Burden

There are two major ways in which councillors can be another burden in the application of the tax. I alluded to the first in Chapter Two. It is the double capacity of Councillors as Council administrators on one hand, and as elected representatives on the other. These two are often difficult to balance. Quite often, the dual capacity works to the detriment of the council. In this respect I mentioned

the situation where Councillors use their political allegiance to commit Councils to projects for which they are unwilling to allow taxation to provide funds. They may not show sympathy to the Council treasurer upon whom they exert pressure to fund the projects from funds otherwise allocated to other Council priorities. Councillors are prone, as a result of this, to sacrificing professional officers of the Council (who may have professional justification for refusing to fund), rather than their electorate. The casualties of the double loyalty are not just the officers. The planning, priorities, and general administration of the council suffer too.

The second way is the one I wish to pursue further. It is the ignorance or illiteracy of the councillors. This factor has been repeatedly lamented by the government's own Commissions of Review, and by studies of the institution of local government in Kenya. I was fortunate to talk to a few Councillors during my field work. It was clear to me that the problem was profound. It did not make sense to expect people of this calibre to understand and apply participation, efficiency or such lofty principles. I have therefore entertained a fear since my field work that the land tax program could in some respects be misunderstood.

Councillors are elected because of the various influences they wield in their areas. Given constituents that are largely illiterate, we can expect literacy qualities to play a very insignificant role, if any. Not that there is no legal requirement for some minimum standard of formal education. Indeed, the Local Government Act, Fifth Schedule, r. 3(e) prescribes such a standard. A person seeking to be elected a Councillor must be literate--able to read and write the official language of the local authority in question.

However, the Minister of Local Government has power to exempt a candidate from the literacy requirements. This exception has replaced the rule. Whereas it is true that the exemption is still needed in a number of cases, the insistence on some academic qualifications has totally been abandoned. The result is that today a number of County Councils have a considerable number of illiterate councillors.

The ravages of illiteracy on council operations are accentuated by the fact that councillors have to be appointed to the Committees of the Council. They serve as members and as chairmen thereof. One such committee where devastation has been felt most in some Councils is the Finance Committee. Section 92 (5) of the Local Government Act provides that the duties of this committee include the regulation and control of the finances of a Local Authority. In specific terms, this

means (a) advising the Local Authority on financial matters (and this may mean balancing the incomes and expenditures); (b) advising the Local Authority on all rating matters (and this may mean advising on the rate levels and on other threshold matters); and (c) supervising the recovery of monies due to the Council (and this may involve the design of assessment, collection and enforcement procedures).

The general problem in the finance committee is the position where an illiterate Councillor is appointed to chair such a crucial organ of the Council. Officers in one County Council informed me of such eventuality in their Council. It was clear that the Councillor in question had been so appointed by his fellow councillors because of the tremendous influence he had arising from his wealth. The Chairman did not understand the proceedings of the meetings and was unable to guide discussions through the agenda. There were times when he signed minutes and resolutions of the meeting only to denounce them later when they came up for discussion before the full council. He openly admitted that he had not known nor understood the full implications of those resolutions at the time of signing them.

Ignorance of the Councillors was evident in other spheres. It is often difficult to persuade them to see the overall Council activities in terms of long or short term

development strategies or goals. For instance, each Councillor may insist on having one or more cattle dips in his constituency and will refuse or fail to see the treasurer's argument that the Council could be better served and the cattle dips better distributed if they were located in places that did not coincide with constituency boundaries. Sometimes, a Councillor may insist on having a church built on some land rather than a school. He may refuse to be persuaded otherwise because it is the church that his constituents want. In some instances, refuge may be taken into tribal customs and traditions to the detriment of the Council's development policies. It is true that participation entails the people themselves taking decisions. However, there is need for the Council to provide leadership sometimes. This is necessary to avoid development on hind-sight.

The consequences of the Councillors' illiteracy can be imagined. If a crucial committee is manned by those who do not understand what it is meant for, we can be sure that there will be no sound leadership in policy and substance in decisions from it. And unless the Council is fortunate to have qualified personnel at the top with resourcefulness to compensate for these short-comings, the Council will suffer systematic internal inefficiencies. If, on the other hand, councillors see Council planning in terms of episodes rather than as a system, we cannot expect long term and systematic

overall solutions to constituent problems. This is for the simple reason that there is no team approach. The players perceive and understand Council and Constituent problems in the same way the proverbial six blind men perceived the elephant.

This is a problem that requires urgent solution. The re-activation of the land tax that I have called for is a serious program. There must be in place people of understanding and determination to steer it through. Besides, since the coming of decentralization, Local Authoritiess are now being called upon to perform tasks that require technical know-how and sound perception of policies. Since these tasks are aimed at seeing Kenya succeed in her effort to provide basic needs to the people and solving ignorance, illiteracy, and disease, we must not fail to address the question of skilled manpower as well as knowledgeable legislators. For sure the current development plan sets this need as one of the goals to be achieved before the next century (Kenya, Dev. Plan, 1989-93: 220-225).

The solution which I suggest is not new. It has been repeatedly suggested by manpower-review Commissions of the government itself--The Hardacre (1966: p. 51), Ndegwa (1971: pp. 51-52), and Waruhiu (1980: pp. 52-3). These Commissions lamented over the illiteracy of Councillors in equal terms.

Analysts have equally been bothered (Kayila, 1980: 83-85). Even the International Union of Local Authorities, Africa Region, expressed their concern (IULA Conference Papers, 1987). All have suggested that the law must fix a minimum standard of formal education. It is not just enough to set such a standard by way of ability to read and write some tribal or local language.

Although those who have expressed concern have not suggested a specific minimum education standard, professional officers of the Councils I visited thought that a twelfth grade education would suffice. I reluctantly endorse the view. Reluctantly because this level will still be too low. But I nevertheless endorse it because it would be easier to apply it in a majority of County Councils than any level higher than this. If this be acceptable, there will be need to make corresponding adjustments in the minimum standards set for election to the national assembly. In addition, the Local Government Act should be amended to provide for additional qualifications for elections to various Council Committees.

It is not just enough to train council officers. We must also have an understanding and informed contribution from Councillors. This will, *inter alia*, make light the task of applying the land tax. In Chapter Three I mentioned that this

kind of council input had helped Wareng' to succeed in its land rating. There is no reason this cannot be the experience elsewhere.

## 5.3 THE TAX VIS-A-VIS THE LAND USE QUESTION

The question of efficient land use is central to Kenya's economic success. Reasons for this have been alluded to in the previous chapters. In essence they all add up to the concern that given the fast rate of our population growth, against limited arable land, and considering that our economy is agriculture-based, land must be efficiently used. The consequences of inefficient utilization are enormous and have been witnessed elsewhere in the sub-Sahara Africa. This thinking has preoccupied the government since independence.

The question is also important from the taxpayers' standpoint. One of the conditions attached to the application of a land tax by the land-owners interviewed was that, yes, land can be taxed so long as the bad husbandmen (absentee landlords and general idlers) are punished. This gives the issue a twist of social justice. Again the government has pondered over this dimension since independence. It has already been mentioned that these concerns (the economic and the social) were the primary pushers of the policy pronouncements of 1986.

Through the current Development Plan, the government intends to launch a number of corrective measures. To coax efficient land use in the 25% arable portion of Kenya, agricultural and livestock research is to be intensified, and so too the agricultural education, extension services, and the application of technology (Dev. Plan, 1989-93: pp. 126-128). To bring the marginal lands (which consist of 75% of the total land area) into production, irrigation is to be expanded thereto, along with other measures of a broader ASAL program (Dev. Plan, *op.cit.*: pp. 130-138).[12]

To address the issue of idle land, be it in the arable or arid portions of the country, a land-use review commission is being assembled. Soon it will look into the issue. Its primary mandate is to determine the feasibility of the land tax as a function of efficient use (Dev. Plan, *op.cit.*, p. 130).

The argument in tax theory for using land tax to coax efficiency is familiar. Its gist, to use the language of one report, is that the tax has an "off-loading" effect on inefficient users. Those who cannot till the land due to their constant absence will, as rational economic men, find the tax an unacceptable burden. They will in their self-interest off-load it by sale (and even by testamentary disposition).

Metaphorically, such a step would help put the land in the hands of "husbanders...rather than poachers and outlaws" (IUCN Report, 1985: 23). The attractiveness of this reasoning has found supporters in Kenya beyond government planners (Susan Minae, 1985; Gatere Kareko, 1986). Of course, the logical conclusion of the argument is that there will be increased food production as more land comes to the husbanders (Stephen Lewis, 1984: 167; SP 1/86, p. 115).

Animosity for absentee landlords in Kenya has its historical roots. And this origin seems to overcloud the debate more with emotion than reason. Prior to independence a ten-mile strip of land along Kenya's Indian Ocean coastline belonged to the Sultan of Zanzibar. Throughout the colonial period, the British government administered the strip as a protectorate for the Sultan. In 1963 the Sultan ceded it to Kenya as a mark of honor for President Jomo Kenyatta. But the Arabs (or their descendants) who had exclusively owned land within the protectorate left Kenya *en masse* in protest. Since the land had been registered and recognized under the Kenya law as theirs, their absence left it idle throughout the 1960s and 1970s. Though today some have sold it to Kenyans, or testamentarily disposed it to their Kenyan descendants, some of it still remains fallow.

Another source of idle land came from the departing British (or white) settlers. As Kenya commenced her independence, most of these settlers left on grounds of some imagined insecurity that would ensue from an African government. Although some of their farms were bought by the government for the settlement of the landless (recall the resettlement in Wareng' County Council), and although our people formed cooperatives or companies through which they bought some of the land, there are still some farms owned by the former settlers. And these farms lie desolate and unused.

On top of these historical episodes, there is idle land that is attributable to all sorts of causes involving Kenyans themselves. Some affluent Kenyans hold land for prestige reasons; others do not have the capacity to employ technology and inputs that would bring efficient use of their land, etc. But whenever the Parliament has reacted to idle land, it has evoked the historical factors more than the contemporary.

My task hereafter is to show, as I have severally promised in the previous chapters, that a land tax designed, as it should, to generate revenue for, and to be administered by County Councils, cannot be the appropriate vehicle of advancing goals of efficient use. It may be possible, on the other hand, to address the concerns of social justice thrcugh the tax. One can argue that through the fixation of rate and

appropriate choice of base, it may be possible to differentiate the wealthy landowners from the peasant holders. The details of this were advanced in Chapter Four.

In the handling of the tax-land-use question, I proceed on the assumption that the government intends to use the tax to do more than the tax is capable of doing at the marginal level. In tax theory, a tax on land would *automatically* force the owners of land to get *some* productive income out of it, to avoid losing it in default of taxes. The tax therefore has a marginal ability to coax land use -- hopefully leading to efficient land use and increased food production.

Applying a flat rate tax such as I have proposed before, would allow the owner to keep any and all profits above and beyond the tax. This automatically provides an incentive (weak or strong) to maximize income, and hence land use. Indeed, Richard Bird considers this potential ability of the land tax one of its "development virtues" because the tax coaxes land, and even more, it helps in the vital task of transferring land, and even labor capital to efficient users (Bird, *op. cit.*, Chapt. 1, p. 4, 10; See also Bird and Oliver Oldman, Chapt. 24, pp. 413-15).

Government rhetoric tends to suggest the use of the tax to *punish* owners of idle land, rather than reliance on its marginal effect. The militancy has been more evident in several public pronouncements by government officers following the issuing of the statement that a land review commission would be appointed to recommend legislation for land-tax use (SP, 1/1986: 115). The characteristic calls have been to the effect that the government must punish, or otherwise "get tough over uncultivaed land" (e.g., *Daily Nation*, Feb. 1985: 5).[13]

If the approach is to use the tax to punish, it still remains difficult to design the tax that can effectively identify and impact "poachers and outlaws", and at the same time reward the "husbanders." County Councils would have no capacity to administer such a system.

My stand is founded on two major reasons. First, is it possible to find a workable definition of idle land upon which to impose the legal (tax) sanction? Secondly, considering the many causes of idleness, can the tax be *the* remedy? Let me next examine these two issues.

Idleness of land means different things to different people. An economist sees idleness or under-utilization in

terms of potential profit maximization. According to Professor Walter Ochoro, whose view I take to represent the economists' perception, land use requires primarily human intervention. A rational land user will or should only intervene if he stands to maximize profits from the output of his labor and capital. This calls into play many influential variables that are far removed from the land. For example, considering market trends, the farmer may predict that it is not worth the effort to do farming now. So he will in this case leave the land uncultivated. He may, as a rational person, engage in other pursuits for which opportunity costs are more attractive. The conclusion should be that he has efficiently used his land even if he produced no food therefrom (Ochoro, PI, 1989).[14]

Agriculturalists insist that there are two major indicators one has to look at to conclude whether or not the land is idle. Muiti and Maiko (PI, August 1988) emphasized that one has to look at both the use for which the land in question is optimumly suitable, and its maximum carrying capacity. If both criteria are unsatisfied, the land is idle. For instance, if land that is best suited for wheat growing is instead used for maize, there is under-utilization. But even when wheat is grown but below the carrying capacity of the land, there is also under-utilization. The jargon becomes

more entangled as experts interchangeably use "idle" for "under-utilization", and equate "full" with "efficient".

One can imagine this far the tremendous task County Councils would face if some of these definitions were adopted into the law. They would police land owners to compel conceptual, quantitative optima, and land use formats. Landowners failing to meet the factual standards would accordingly be taxed. I have no doubt that apart from complexity, Kenyans would view such an approach as an encroachment on their property rights.

The Agriculture Act, Cap. 318, has its definition of "efficiency." Land is efficiently used if its owner shows "good husbandry" and also "good management" (S. 2 [2]). Good husbandry, depending on a number of changeables, means that the owner has put the land to efficient production of "the kind of agricultural produce and the quality and quantity thereof" for which the land is capable of. And in so doing, he has not exhausted the land. He has maintained it at a standard at which it can readily be re-used in future. Good management, on the other hand, is seen as an input of good husbandry. In other words, the owner must apply such a standard of administrative skills that will produce good husbandry.

The statutory definition is broadly similar to the one advanced by Muiti and Maiko. Its flaw is that it ignores a lot of factual determinations. Professor Charles Wanjala argues, for instance, that this definition is an attempt to remedy the shortcomings of the English system of tenure. In his view, unlike the traditional tenure system where allocation of land depended on ability to till it, the English system only emphasized the bundles of rights for individuals. The allocation of freehold or leasehold rights under the English system did not bother whether or not the person in question was a good husbandman. The system is thus open to speculators and absentee landlords, as much as it may be open to good land users. This approach is another cause for idle land (Charles Wanjala, PI, Jan. 1989).

There is a lay definition also. Muiti and Maiko drew my attention to the fact that when politicians complain about idle land, they are applying the "bush" criterion. As they drive to Nairobi from their constituencies, politicians see a lot of bushes and thickets along the road sides. This leads them to regard such land as idle. In more refined terms, the "bush" is what I would call the "cultivation" criterion: that is, if land is not under growing crops, it must be viewed as idle. To some extent, the statutory definition of good husbandry seems to reflect this notion. Good husbandry is defined exclusively in terms of agricultural produce. At any

rate non-cultivation must not be dismissed as ridiculous. The government itself uses it as a yardstick of determining the non-use of land (Kenya, Statistical Abstract, 1987: 99-101).

Subsumed in these definitions are a number of causes of idle land. Land may be idle because of absent landlords, or that it is simply being held for speculation. Some land may be under-utilized because its ownership is in dispute or clear titles have yet to be issued. Laziness, lack of capital and technology, intrinsic qualities of the soil, failure of agricultural extension officers, technical factors, and traditional practices, are all well-known causes.

Can the tax be applied as a remedy? There are causes over which the application of the tax would have no effect. Climatic conditions, for instance, may be determinative one way or the other. In a rain-fed agriculture no tax, however ingenious, can have an impact on the level of farming if the rains constantly fail to come (or do come at the wrong times). If the tax was much of a remedy, Ethiopia and the other countries of the Sahel region would have applied it to achieve effective land-use droughts notwithstanding.

Full utilization does also depend on the level of agricultural technology. Villagers in a typical African setting might already be at the optimum of their farming

capacities, given the elementary tool (the hoe) available to them. Imposition of the tax may push their capacities no farther, considering that the tax would not be providing tractors or fertilizers. To the contrary, it is a taking.

Utilization, one way or the other, does also depend on agricultural pricing policies of the domestic government and international markets. Good prices, though not alone, may encourage maximization of land use in anticipation of increased returns.[15] Common sense also tells us that soil conditions may be an impediment. Whereas fertilizers could for sometime improve the quality of the tropical soils, no amount or type of tax can.

Under-utilization may also be blamed on the government itself. Besides poor pricing policies, fingers are often pointed at ineffective agricultural extension services as part of the problem. David Leonard's study of extension services in Western Kenya shows that extension officers failed to reach maize farmers adequately or at all. Many reasons accounted for this, including lack of motivation for the officers and poor ministry's information transmittal systems (David Leonard, 1977: Chap. 2, 6 and 7). Taxing farmers to coax their productivity would in this regard be punishment for a mistake that is partly government's. And one can go on to doubt the ability of the tax to cure under-utilization that

is caused by traditional and customary practices. How can the tax reverse the practice that assigns cultivation of the land to women, for instance?

Solution to the under-utilization problem, imagining that we are unanimous on its definition, lies more in non-tax measures. And such measures do exist in our current law.

The remedies under the Agriculture Act are more appropriate. Section 57 empowers the Minister of Agriculture to warn the owner or occupier of land that he intends to invoke his powers of entry under the section. The warning is to the effect that the Minister has determined that the owner is under-utilizing or mismanaging the land in question. The Minister directs him, in form of a preservation order, to effect appropriate changes. Failure to comply will move the Minister (or the Director of Agriculture) to enter such land and effect the necessary preservation or utilization changes at the expense of the owner. In addition, criminal proceedings may be instituted against such a person. And the penalties include a "default fine".[16]

The Minister has other powers which include directing the landowner to take specific steps to restore optimum utilization. Such steps may touch on both the full use of the land's capacity or a switch to the most suitable form of use.

They could also involve the owner in uplifting the standard of administration.

If preservation orders fail, the Minister is empowered to resort to tougher actions. Such actions include taking semi- or full acquisitive steps. In this regard the Minister has power to order the owner or occupier to vacate the land so that it can be leased to a tenant approved by the Central Agricultural Board. The primary consideration in approving such a tenant is proven good husbandry in the past. In this eventuality the owner does not lose legal title to his land. After the Minister has been satisfied that the owner has reformed and is capable of complying with the preservation orders, the land can be returned to him.

The ultimate penalty is the compulsory acquisition of the land. Where the owner has totally failed to be a good husbandman, the Minister may agree with him to have his land purchased by some other person. If the owner refuses, the Minister can go ahead and compulsorily acquire the land (S. 185).

Section 186 covers the position of absent landlords. Where the land is not in actual occupation and management of the owner, the Minister can compulsorily acquire it if the

Board so recommends. The Board must, *inter alia*, be fully satisfied that the situation is really one of absent landlord.

It is clear to me that the land-use issue deserves a forum of its own. Only such a forum can provide room for a profound address of the issue's complex ramifications. The difficulties of defining under-utilization are alone enough to paralyze Councils' under-capacitated and unskilled administrations. The futility of applying the tax on causes for which it is obviously not a remedy logically compel us to seek steps other than this tax.

I therefore conclude my discussion by reiterating my position. A different form of land tax, addressed exclusively to the land-resource question, is a better approach. Small is beautiful and manageable. Let us concentrate our energies on helping the County Councils to focus the tax on the revenue goal. It is obviously inadvisable to over-crowd or digress this goal by an additional agenda which is likely to fail the primary aim. For these reasons, I anxiously await the findings and recommendations of the Review Commission.

# CONCLUSIONS

There is no doubt that Local Authorities are important to us--whether as institutions of local administration or development. There is also no doubt that these institutions are facing a stifling revenue problem that renders their utility questionable. Indeed, both the problem and the role of Local Authorities are widely acknowledged. It is equally correct to say that both the expert opinion and exigencies of the Kenyan situation point to the need for an urgent resolution of this problem.

An attempt has been made in this study to suggest the taxation of land as an alternative way of facing the problem. Despite the difficulties involved in making a decision to tax land, and despite the acknowledged limitations of this approach, this tax has revenue potential. We saw a number of indicators to this effect--including the demonstrated success of land rating in some County Councils. Even more important were favorable back-up factors such as the existence of a well-disposed government will, and the experiential exposure to land matters which the Councils have had since colonial days. At any rate, given the bottlenecks in our economic development effort, and a virtually non-existent international aid, we are left with no options in terms of development resources. Self-reliance makes resort to this tax incumbent upon us.

The study highlighted a number of factors which should advisably be addressed in order to apply the tax successfully. Amongst these it was stressed that there is need to encourage and guide Councils to exploit revenue potential in their localities. For the central government, it was emphasized that it has a number of necessary adjustments to make in the current center-periphery relations for the sake of a successful land tax program. These include, quite prominently, the application of more judicious criteria of assigning functions to the Councils with a view to balancing service-assignments with resources available. It was also emphasized in this regard that the level of current controls requires a review with a view to a reduction so as to encourage local autonomy. The aim behind these adjustments should, *inter alia*, be to steer the Councils towards a culture of service provision rather than self-sustainment.

It was also pointed out that increased autonomy could add mileage to the success of the program. It is only with a free-hand that Councils can be able to adapt the program to the peculiar circumstances within their jurisdictions. A Council like Kakamega has over-population to contend with. It should be left alone to plan the assessment and collection of taxes under the strains associated with fragmentation as

it was pointed out. This also goes for Narok--with nomadism; and Masaku--with aridity.

It was nevertheless recognized that some central government intervention will still be needed in some areas. For instance, there are a number of program-factors for which the Councils have no management capacity. We saw in this respect lack of valuers -- which forecloses an outright option for a value-base, capacity to compute and/or maintain up-to-date cadastral information, etc. In addition, intervention is justified in instances where censure and reprimand are necessary as a means of combating ills or defects within the Councils that could otherwise defeat the program. Audit and checks were encouraged, among other steps, as counter-measures against corruption, for instance.

Further, it was admitted that for the sake of national coordination, central intervention cannot be ruled out. There is, as it was argued, need to institute overall mechanisms of measuring, or otherwise guiding the program so as to attain national aspirations. In this respect, coordination by the centre was advocated in such areas as the monitoring of collection-efficiency and concerns of the taxpayers' equity. This can be done through regulation of rate-ceilings, tax-thresholds, and the constant review of the impact of the tax.

For the basket-cases of Councils, intervention in form of general revenue grants was taken as given.

Given the political sensitivity of land in Kenya, it was underscored that planners must be ready to make hard or unpopular decisions. Neither time nor circumstances (local or international) are on our side in terms of soft options. A timorous approach which leads us to postpone action now is more disastrous than timely but unpalatable steps. Recourse should be taken in the realization that the motivation to tax land, though momentarily difficult, is in the long run legitimate and strong. Development for which the tax is necessary, is an aspiration of all Kenyans as we have demonstrated through the *harambee* effort. But it is at the same time, inescapably costly. Our demand for public services must go hand in hand with our readiness to pay for them.

It was also emphasized that to drum public support for extra taxation, taxpayer education, his courteous handling, and provision of extra-judicial fora for his redress, must be undertaken. Besides, we must be ardently committed to combating evils such as corruption, that are capable of undermining his morale in the program. For a further morale booster, the revenues raised from the tax must be retained by the Councils to be spent in the taxpayers' neighborhood.

This study was not intended to be a blue-print for action. It is only thought-provoking. As such it is only a modest contribution to the understanding of a long-standing and monumental problem. Neither is impression intended to the effect that the study is definitive on issues raised. It is, indeed, admitted that some of the issues might have received superficial treatment. Further, it is acknowledged that other issues might have been overlooked totally. I am aware, for instance, that a proposal for a draft legislation and accompanying regulations, would have enhanced the applicability of the program suggested in the study. Without blaming time limitations on my candidacy, I accept the missed aspects as my future challenge. To this extent, the study was not an end in itself. It cannot be -- given that development to which it relates is itself eternal.

# NOTES

## CHAPTER ONE

[1]The history of Local Authorities in Kenya has abundantly been discussed in academic works. For detailed analyses, instructive reference can be made to the studies of Maundu Ndisya (1984: Chapt. 1); Owino Hellen (1984: Chapts. 1); Nderitu Irene (1987: Chapt. 1).

[2]The exact date of the origin of "local government" in Kenya has been a subject of sharp disagreement. Those who have discussed this history with a nationalist sentiment contend that the institution existed in the pre-colonial "Kenya". It was not an import, nor invention of the British. The British merely took advantage of and adapted an institution already in existence. Its presence was manifest in the Councils of elders found in our pre-colonial societies (e.g., *Abakofu bo Luyia* in the Luhya land; or *Kokouet*, in the Kalenjin land; or *Njuri Njeke* among the Meru and Embu people). Exponents of this include, for instance, Siganga Alukhava (1986: 24-26). Those who present the institution as a colonial imposition include Ursula Hicks and Patricia Stamp (*infra.*).

[3]*Ol le Njogo and Others Vs. A.G. of the EAP* (1914), 5 EALR, 70.

[4]The proliferation of Town and Urban Councils since independence may sometimes be evidence of the excessive use of these powers by successive Ministers of Local Government. During the Charles Njonjo Inquiry, allegations of abusing the powers were made. It was averred against Njonjo that in concert with the then Minister of Local Government (Stanley Ole Tiptip) he had conspired to over-establish units of Local Authorities as one way of building a political base in the country for himself (Kenya: *The Report of the Njonjo Inquiry*, 1984).

[5]There are those who have bitterly criticized decentralization in Kenya for not divesting political autonomy to Local Authorities, thereby failing to make them the overseers of the program. Because of failing to take this path, critics go on, decentralization was a half-hearted measure still reminiscent of the *Majimbo* days when Local Authorities could not be trusted as developers. It was thus not enough to only make them members of the Development Committees, because this alone did not go far enough to inject local participation in the development process (Joseph Makokha, 1985; Patricia Stamp, 1986).

[6]For insights into the dynamics of this political process in Kenya during and after President Kenyatta's era, David Throup's analyses are thought-provoking: David Throup, 1987-88. And for the shortcomings of the process, Atieno-Odhiambo (1986) argues, for instance, that lack of political pluralism has led to a system based on the "ideology of order" or conformism.

[7]By this I do not imply that financial problems are peculiar to Local Authorities of Kenya. Local as well as central governments (and other public or private institutions) in many parts of the world--developed or otherwise, federal or unitary--do have financial difficulties of their own.

[8]Though the study eventually focuses on the rural councils, examples of revenue difficulties for both rural and urban are given to show that the problem is common to both and with similar consequences.

[9]*The Daily Nation Newspaper*, Nairobi, Dec. 3, 1988: p. 3; February 2, 1989: 13; February 7, 1989: 4.

[10]*Daily Nation*, December 20, 1988: 11.

[11]*Ibid.*, October 7, 1988: 32; December 7, 1988: 3; November 19, 1988: 24; February 7, 1989: 24.

[12]*Daily Nation*, October 26, 1988: 15.

[13]ALGAK stands for the Association of Local Government Authorities in Kenya. Calls for abolition were cited by Isaac Lugonzo, the then Mayor of Nairobi, and Chairman of ALGAK (ALGAK's Mouthpiece, 1969).

[14]GPT was abolished in December 1973 (Kenya: *Development Plan*, 1974-78: 168). Despite this, numerous instances of the application of the poll tax by County Councils have continued to surface on the basis of the 1964 enactment. See, for example: *Daily Nation*, June 16,1978: 33; April 2, 1979: 16; May 10, 1979: 21; June 3, 1982: 5; *The Standard*, Nairobi, March 17, 1980: 8.

[15]Joseph Makokha (1985) has more or less taken a similar stance. His study centres on the impairment of the management autonomy as a result of subjecting the Local Authorities to the control of the District Development Committees under the District Focus Program. The further off-shoot of this being, as mentioned before, the suppression of local participation due to denying ascendency to the peoples' local institutions. John Cohen and Richard Hook (1986) agree that the District Focus program in Kenya lacks local participation since it is

merely a bureaucratic deconcentration in nature. The Local Authorities should have been assigned a more autonomous role.

[16]This fluidity is a well-discussed characteristic of the African state. Though it has at times rendered most African states shadowy and questionable, it constitutes the matrix within which development theory or any other must be advanced. See Robert H. Jackson and Carl C. Rosberg, "Why Africa's Weak States Persist", *World Politics*, XXXV, 1 (1982) pp. 1-24; and (same authors), "The Marginality of the African State," in *African Independence: The First Twenty-Five Years*, Gwendolen M. Carter, et al (eds.), Bloomington, Indiana: University Press, 1985, pp. 45-70.

[17]I am indebted to Gitonga Aritho whose work (*op. cit.*) and discussions with me (in the summer of 1988) helped me sort out the otherwise entangled and scattered history.

[18]See Chapt. 3, note 1 and the accompanying text. Indeed, some people argued that to ask the landless to buy off white settlers rather than give the land to them for free meant we were not yet *uhuru* (not yet independent). This was in fact the thesis of a book by our one-time Vice President Odinga Oginga. To counter this kind of populist-socialist argument, argues Atieno-Odhiambo (1986), the government was compelled to come up with a socialist manifesto of its own. This was contained in the famous African Socialism....(Kenya: Sessional Paper 10/1965) in which the taxation of property was advanced as a means of restoring social justice by taxing properties hitherto untouched (see also Kenya: Development Plan, 1974-78: 3).

[19]At a personal level the declaration was important too. It changed my perception of the land tax as a mere episode in the history of our taxation system. It encouraged me to conceive of the idea that has crystallized into this study. Indeed, in 1986, I took a step to test public reaction on the idea of applying the tax. I presented a paper at the First Annual Conference of the Law Society of Kenya (cf. the American Bar Association). In the paper I made a theoretical case for the tax ("A Case for the Taxation of Land in Kenya: A Theoretical Framework," LSK Conference Papers, Nairobi, February 1986). As a feather in my bonnet, it was encouraging to note some support from Kenya's informed and propertied elite.

[20]The strong economic base comes from the presence of many cash crops (sugar cane, tea, cotton, etc.) and the abundance of food crops (maize, beans, bananas, etc.) that are made possible by the availability of rains throughout the year (see, for instance, Kenya: *Kakamega District Annual Reports* for 1983:

7-18; 1987: 1-10; and the *Kakamega District Development Plan*: 1984-88: 1-4, 26-36, Courtesy of Kakamega DIDC). It should be pointed out that though most County Councils share boundaries and names with the districts in which they lie, there are others (e.g., Masaku) that have retained their indigenous or "correct" names.

[21]A holder of a Ph.D. degree in Mathematics from Stanford University, and formerly a professor of Mathematics, University of Nairobi.

[22]ASAL, an acronym for a program to develop Arid and Semi-Arid Lands.

## CHAPTER 2

[1]These include: The Shop Hours Act; Malaria Prevention Act; the Food, Drugs and Chemical Substances Act; Nurses, Midwives and Health Visitors Act, etc.

[2]A water undertaker is a person(s) or institution that has the duty to manage water supply to their constituencies.

[3]The Clan demanded that Gusii County Council intervene and secure the de-registration of the Authority as the owner of the land in question: *Daily Nation*, December 23, 1988, p. 4.

[4]In a study based on Kenya's circumstances, Buch-Hansen and Marcussen give us insights into the subtle vices that should necessitate informed local intervention in multi-national contract farming: Morgens Buch-Hensen and Henrik Marcussen, "Contract Farming and the Peasantry: Cases from Western Kenya," *Review of African Political Economy*, Vol. 23, Jan. - April 1982, p. 9 *et seq.*

[5]*Jua Kali* is a Kiswahili phrase meaning "hot sun." These artisans have previously been working on their own in open air and hot sun. County Councils must now provide premises for comfortable working environment.

[6]The *Daily Nation*, December 9, 1988, p. 7.

[7]Those marked with asterisk are taxes (indirect or direct). James Kayila (1980, pp. 18 et seq.) has discussed these sources in great detail.

[8]*Miraa* is a plant categorized as *catha edalis*. Its tender buds are chewed for refreshment. Its excessive use is injurious to health and has presented one of our "drug abuse" problems.

[9]I am greatly indebted to Judith Geist for a clarification of a number of points on the question of revenue performance. For instance, she helped me understand that at any rate the government never intended to fund the majority of the medium Urban Centres; and that currently there is no doner funding promised for more than the initial eight which have already broken ground.

[10]Sunday *Times*, Nairobi, December 4, 1988, p. 18.

[11]Judith Geist, 1987.

## CHAPTER 3

[1]The role of land in our national politics through the 1960s and the first half of the 1970s has been well-discussed: G. W. Wesserman, *Politics of Decolonization: A Case Study of Kenya* (O.U.P, 1976); M. P. K. Sorrenson, *Land Reform in the Kikuyu Country* (Oxford at the Clarendon, 1967); Oginga Odinga, *Not Yet Uhuru* (London Heinemann, 1967); M.P.K. Sorrenson, *Origins of European Settlement in Kenya* (O.U.P, Nairobi, 1968); Apollo Njonjo, *Land Politics and Settlement in Kenya* (Ph.D. Thesis, Princeton, 1979). Besides the narratives on land tenure and reform, these sources underscore the political perspectives of the land in Kenya's contemporary economy. They also emphasize the possibilities of spill-overs from the war of independence into current programs affecting land development and agriculture.

[2]LN. No. 202, of 1988.

[3]Act. No. 6 of 1988. Date of commencement was actually November 25, 1989 (*Daily Nation*, Dec. 2, 1988, p.1).

[4]See, for instance, the Standard Collins-Longman School Atlas (Kenya), p. 24 (Collins and Longman Atlases, Longman, Nairobi, 1987). It must be admitted, however, that most of these arid County Councils have a lot of livestock on which "livestock cess" is imposed. And indeed, the cess manages to keep most of them afloat. I am indebted to Judith Geist for this clarification.

[5]A standard bicycle at 1989 prices costs about Kshs. 3,800.00 (i.e., U.S.$ 190.00). Compare this to Kshs. 7,200.00 (U.S.$ 360.00) which is the current estimated per capita income. The figure for the rural areas is bound to be lower (see Chapter 5).

[6]It has been observed that our droughts occur at five-year intervals: *Wall Street Journal*, September 19, 1989, p. A26.

[7]For example, hikes in service charges by the Mombasa Municipality could not be implemented because of public protest: *Daily Nation*, October 7, 1988, p. 32. In Meru the District Commissioner had to intervene to calm protesters who objected to hikes in charges on market users by the Meru Municipal Council. The charge had to be shelved (*Daily Nation*, February 7, 1989, p. 24).

[8]LN, No. 93 of 1985.

[9]Some studies have demonstrated that cess (and other impositions) and the marketing of produce through government agencies have encouraged black marketeering. This has, in turn, affected food production and distribution, and the establishment of effective price mechanisms. See, for example, Robert Bates, *Markets and States in Tropical Africa*, (University of California Press, 1981), Chapters 1 and 2.

[10]I have elsewhere in the study argued that a land tax does not distort economic activities on land. There are studies by economists which show that the tax is capable of making people work harder and thereby increase food production.

[11]Part II of the RLA can be consulted for the detailed provisions of the process.

[12]Kenya's total area is 582,646 sq. km. Of this 571,416 is the total land area; 11,230, the total water area (Kenya: *Statistical Abstract*, 1987, p. 2, Table 2). The 6,852,000 hectares were converted into sq. km. by dividing 100 hectares which equal 1 sq. km., and thereafter working the percentage of the product against the total land area. The registration figures relate to the period up to 1987 (*Statistical Abstract*, *ibid*.).

[13]Kenya: *Statistical Abstract*, *ibid*.

[14]The Rating Act officially commenced on December 12, 1963 (the date of independence); the Valuation for Rating, May 11, 1956.

[15]The details of the system are well-discussed by J. M. Drummond, *The Finance of Local Government: England and Wales* (George Allen and Unwin, Ltd., 1952), pp. 28-32.

[16]The history of the Council was narrated to me by the acting Clerk of the Council in the fall of 1988. There is also a brief statement on this history in *The World Bank Mission Report*: 1976, Appendix VIII, p. 5.

[17]The Farmers' Register (Council Registry), 1962. Prior to 1962 the rate had been 10 cents per acre. With effect from 1962 the rate had been intended to be 30 cents an acre.

[18]Mwendwa's study, for example, illustrates that Uasin Gishu District (with which Wareng' has coterminous boundaries) is in effect part of the core of Kenya's bread basket. Its agricultural potential surpasses other districts. Due to its tartiary volcanic soils and excellent climate, 50% of the land is under livestock production, the other 49.52% under crop production (producing Kenya's leading cash crops, wheat and tea). All indicators show a land with more potential than what has hitherto been exploited (H. Mwendwa, 1986).

[19]Prof. George Break, Lecture notes on Public Sector Macroeconomics, Economics Department, University of California, Berkeley, Fall 1987.

## CHAPTER 4

[1]These aims are not exclusive of one another. A tax program can incorporate all of them at once--and indeed most tax measures do.

[2]At the moment Section 16(2) of the Rating Act provides for "a discount of not more than five per centum, or such other discount as the rating authority may determine." It is a percentage of the rates due, and is allowed for prompt or early payment. It is the exercise of the discretion allowed by this provision that requires balancing the revenue goal with the incentives allowed.

[3]The question of rate fixation, as well as choice of base, quite often turns on mathematical and economic models that are beyond my capacity as a lawyer. I have therefore not at all ventured into them.

[4]Other statutes reflect in substance, this definition. See, for example, The Agriculture Act, Cap. 318, S. 2(4); the Land Planning Act, Cap. 303, Rule 3.

[5]Mrs. Munee Mainga for the Nthei Clan (total number of members, 100), *Daily Nation*, Nov. 15, 1988, p. 3. The land in question was 45 acres in Machakosi District. It was purportedly sold for Kshs. 224,000 by two members of the clan, without the clan's consent.

[6]Even though S. 5 talks of the boards being established at district level, the sittings must be at divisional headquarters in every division.

[7]The IRS is the federal agency that administers the federal income tax system under the Internal Revenue Code (IRC).

[8]See also *The Weekly Review*, Nairobi, January 27, 1989, p. 13.

[9]*Chai* is a Kiswahili word which literally means "tea". It is a euphemism for "bribe". *Dash* is the Ghanaian equivalent as we learn from Robert Price, *Society and Bureaucracy in Contemporary Ghana* (University of California Press, Berkeley, 1975, Chapters 5 and 8).

[10]I am grateful to Prof. David Leonard for the clarification of this point. He, however, feels that today the Controller's focus has shifted from corruption detection to the preoccupation with the concern that agencies and departments of the federal government operate in accordance with the law. This trend, according to Leonard, has been observed since the end of the Second World War. It arose from the apparent decline in corruption practices in the government. The actual audit and checks appear to have more or less passed to the departments and agencies themselves.

## CHAPTER 5

[1]This again is an area dominated by economic models. I have to be guided given my limitations as a lawyer.

[2]Krishnaswamy considers other methods of financing public investment. These include a reduction in current expenditure and the generation of larger public enterprise surpluses. These are of no immediate relevance to my study. They are therefore omitted.

[3]The tax/GNP ratio is calculated thus:

$$\frac{\text{Total tax revenue}}{\text{GNP}} \times 100 = \text{Tax/GNP Ratio (\%)}$$

[4]There are other consequences which economists point to: M. L. Jhingan, *The Economics of Development and Planning* (Konark Publishers Pvt. Ltd., 21st ed., 1988, Chapters 39, 40, 53 and 61); Krishnaswamy, pp. 4-8. And some of these so-called consequences obtain in Kenya. However, I am sure that they do not exist exclusively because of a high ratio.

[5]At the then Kshs. 15.00--U.S.$ 1.00 this meant the net monthly income was U.S.$ 55.27. A good proportion of this was "in kind" income, i.e., the food grown on the *shamba*.

[6]Due to unavailability of data on rural-sector savings, I was unable to fashion any sustainable discussion on domestic savings as an indicator of the tax impact. There is scanty information (Kenya: Budget Speech, 1986/87, p. 3) to the effect that on annual average, Kenyans save the equivalent 13% of the GDP. And this is mostly by the salaried, in the modern sector. I have, therefore, not pursued this factor.

[7]These two officers were at the material time in charge of agriculture and extension services in Kakamega district. They had other interesting views which are discussed later in the Chapter.

[8]The *Financial Review*, Nairobi, July 25, 1988, p. 13 (Journal now defunct); the *Weekly Review*, August 26, 1988, p. 10; the Dev. Plan, 1989-93, pp. 244-46.

[9]Arthur Eshiwani, Fall 1987.

[10]I gathered this from a brief conversation I had with Professor Zack Maleche of Nairobi University in September of 1988 at Kakamega. I was made to understand that he was part of a team helping Kakamega District set up its DIDC. For sure I found useful information from what had so far been stored at the Kakamega centre.

[11]These controls have been discussed most elaborately by James O. Kayila, 1980, Chapters 8, 13, and 17.

[12]ASAL--a program to develop Arid and Semi-Arid Lands.

[13]See also *The Standard*, February 7, 1985, p. 4. Commenting on this issue in my earlier draft, Prof. David Leonard and Dr. Judith Geist thought that the government does not actually intend to use the tax to punish. It only intends to utilize the marginal effect of the tax to influence efficient land use.

[14]Professor David Newbery also emphasized this reasoning to me in his comments on my preparatory coursework paper in the Spring of 1988 (U.C. Berkeley, Department of Economics, April 1988).

[15]And studies show how good price returns have encouraged Kenya's tea and coffee farmers, and Ivory Coast's cocoa farmers to produce more--Michael Cowen, "Change in State Power, International Conditions and Peasant Producers: The Case of Kenya" (*Journal of Development Studies*, Vol. 2, No. 2, Jan. 1986, pp. 355-84); Robert Hecht, "The Ivory Coast 'Miracle': What Benefits for Peasant Farmers" (*Journal of Modern African Studies*, Vol. 21, No. 1, 1983, pp. 25-53).

[16]A monetary penalty imposed on the basis of every day the offense was perpetrated. Under S. 60 such a fine is Kshs. 100.00 for each day on which the offense continues after the service of notice or preservation order.

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