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THE FINAL REPORT OF THE CONSTITUTION OF KENYA REVIEW COMMISSION

**APPROVED FOR ISSUE AT THE 95th PLENARY MEETING OF THE
CONSTITUTION OF KENYA REVIEW COMMISSION HELD ON 10TH FEBRUARY
2005**

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DEDICATION

To the people of Kenya.

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PREFACE

We, the Commissioners of Constitution of Kenya Review Commission are pleased to publish this final report on the work we were mandated to do.

We listened very carefully to the views of Kenyans throughout the country. We have been touched by their stories and found much wisdom in their recommendations. We analysed social, political, economic and constitutional developments in Kenya over the last four decades, and tried to imagine the future in which the new Constitution will operate.

As mandated by the Constitution of Kenya Review Commission Act, we went around the country, between December 2001 and July 2002, to collect and collate the views of Kenyans of all walks of life concerning the issues they wanted addressed in the new Constitution. Although the information we assembled is vast, this report, and other publications of the Commission, is intended to make this information conveniently available to the public. The report is a condensed version of the verbatim reports in five volumes on the constitutional review process, which was a long, complex and arduous exercise.

Part One consists of two introductory chapters, which record the stages of the negotiations that led to the establishment of the Constitution of Kenya Review Commission itself and provides background information on Kenya's main features. Part Two consists of four chapters; it discusses the country's constitutional development and the conduct of the reform process.

Part Three, which forms two thirds of the report, is appropriately entitled "Views from the People". In order to make the presentation therein uniform, the fifteen substantive chapters (Seven to Twenty One) are each designed to provide the following information:

- (a) the mandate of the Commission relating to the chapter theme;
- (b) conceptual discussions of the subject matter addressed in the chapter;
- (c) presentation of how the current Constitution deals with that issue;
- (d) a brief analysis of how other countries deal with that issue;
- (e) a synopsis of what the people said;
- (f) a commentary on what the people said; followed by
- (g) recommendations.

It is important to note that the main points made by Kenyans, on the basis of which specific recommendations were formulated by the Commission for its constitutional drafting exercise, are distinctly placed in several boxes within each chapter in this part.

Part Four consists of eight chapters and is on the National Constitutional Conference, the penultimate stage of the constitution review process; while Part Five provides a brief description of events after the National Constitutional Conference, which the Commission believes to be issues of public interest and should be recorded as part of the Constitution making process.

The initial draft of this Report was prepared by the Research, Drafting and Technical Support Committee before finalization and approval by the Commission for publication. Backstopping assistance by way of research and logistical support was provided by the technical staff of the Research, Drafting and Technical Support Department of the Commission, consisting of:

Ms. Pauline Nyamweya	- Deputy Commission Secretary, Research and Drafting
Mr. Harrison Gicheru	- Programme Officer, Legislative Drafting
Mr. Jeremiah Nyegenye	- Programme Officer, Legislative Drafting
Mr. Charles Oyaya	- Programme Officer, Research
Ms. Eunice Gichangi	- Programme Officer, Research
Mr. Walter Owuor	- Programme Officer, Data Analysis
Mr. Peter Kanyi	- Programme Officer, Data Analysis
Ms. Roselyn Nyamato	- Programme Officer, Library
Mrs. Patricia Mwangi	- Programme Officer, Hansard
Ms. Achieng' Olende	- Programme Officer
Mr. Joash Aminga	- Assistant Programme Officer, Library
Mrs. Sarah K. Murithi	- Secretary
Ms. Millycent Achieng'	- Secretary
Mrs. Mary L. A. Rado	- Secretary

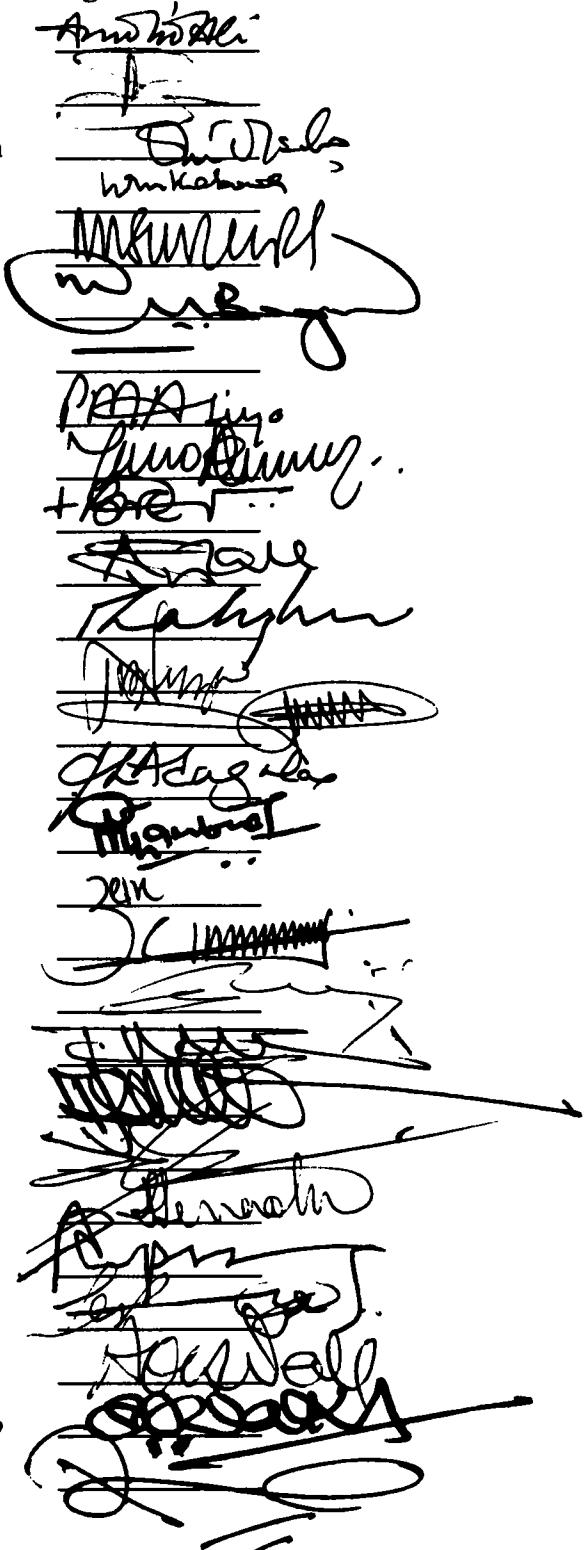
We wish to acknowledge and thank the thousands of Kenyans, professional groups and institutions who offered their views freely and sincerely during the Commission's public hearings. We also wish to thank the delegates, observers and lobby groups who tirelessly participated at the National Constitutional Conference in discussing and adopting the Commission's Main Report and Draft Bill of 2002. Those views are the substance from which this Final Report of the Commission is derived.

We, the Commissioners are pleased to present this report to the public for perusal and discussion and append our signatures below:

No. Name:

1. Mrs. Abida Ali-Aroni, Chairperson
2. Prof. Ahmed Idha Salim, 1st Vice-Chairperson
3. Prof. H.W.O. Okoth-Ogendo, Vice-Chairperson
4. Prof. Wanjiku Kabira, Vice-Chairperson
5. Dr. Mohammed A. Swazuri
6. Dr. Charles Maranga Bagwasi
7. Ms. Salome Wairimu Muigai
8. Hon. Dr. Phoebe Asiyo
9. Mrs. Alice Yano
10. Bishop Bernard Njoroge Kariuki
11. Dr. Abdirizak Arale Nunow
12. Pastor Zablon Ayonga
13. Ms. Nancy Makokha Baraza
14. Mr. John Mutakha Kangu
15. Ms. Kavetsa Adagala
16. Mr. Paul Musili Wambua
17. Mr. Abubakar Zein Abubakar
18. Mr. Ahmed Issack Hassan
19. Mr. Riunga Rajji
20. Mr. Ibrahim Lethome
21. Mr. Keriako Tobiko
22. Prof. Githu Muigai
23. Justice Mr. Isaac Lenaola
24. Dr. K. Mosonik arap Korir
25. Mr. Domiziano Ratanya
26. Dr. Andronico O. Adede
27. Hon. Amos Wako, Attorney-General - *ex officio*
28. Dr. PLO-Lumumba, Secretary - *ex officio*

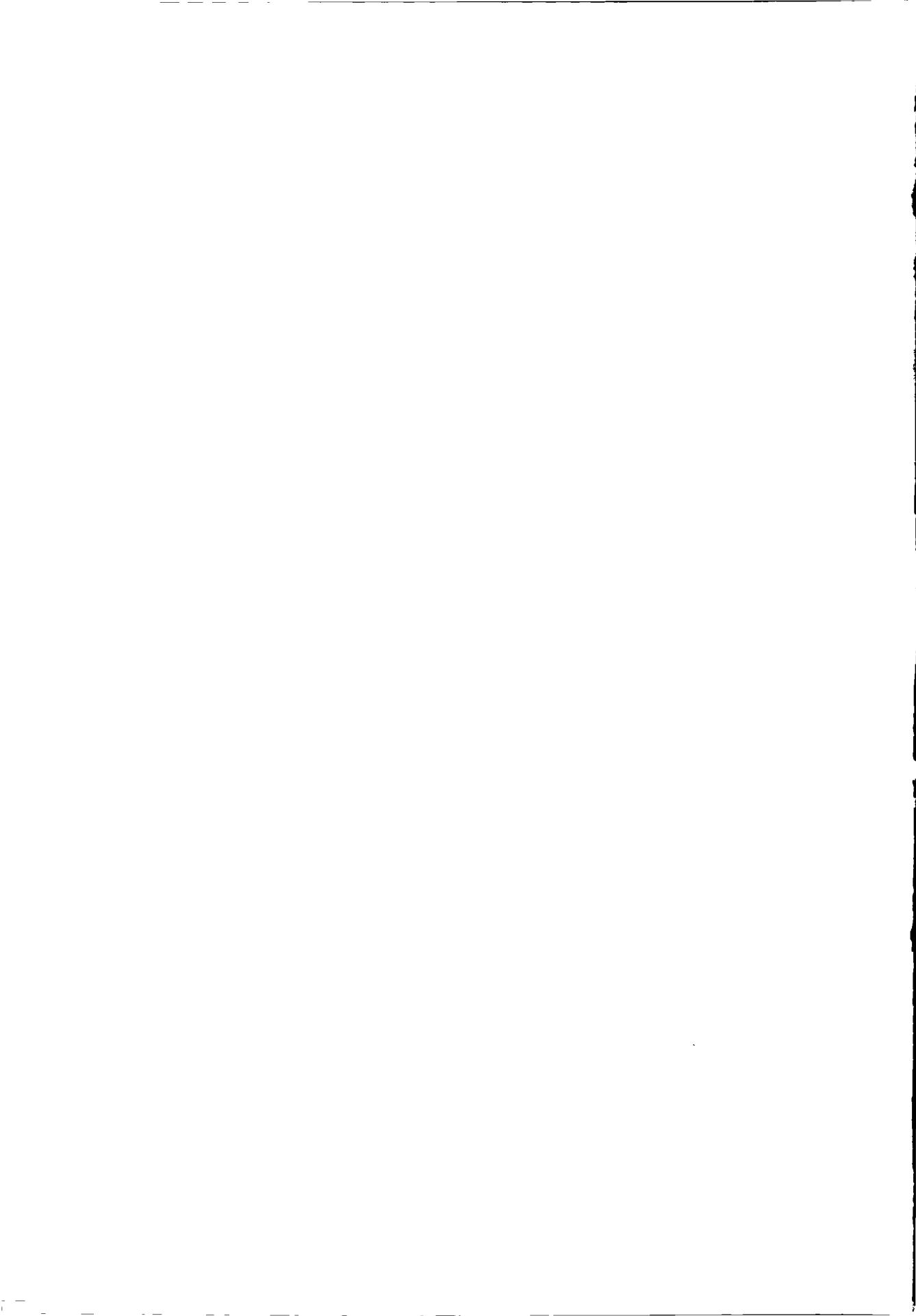
Signature:



ABBREVIATIONS

ACP	African Caribbean and Pacific
ACP-EU	African Caribbean and Pacific-European Union Partnership Agreement
AIDS	Acquired Immune Deficiency Syndrome
ARIPO	African Regional Intellectual Property Organization
ASAL	Arid and Semi-Arid land
4C's	Citizens Coalition for Constitutional Change
CAG	Controller and Auditor General
Cap	Chapter (of the Laws of Kenya)
CBI	Cross Border Initiatives
CET	Common External Tariff
CITES	Convention on International Trade in Endangered Species
CKRC	Constitution of Kenya Review Commission
COMESA	Common Market for Eastern and Southern Africa
DP	Democratic Party
EAC	East African Community
ECK	Electoral Commission of Kenya
EFA	Education for All
EU	European Union
FAO	Food and Agriculture Organization
FPTP	First-Past-the-Post System
GDP	Gross Domestic Product
IBEA	Imperial British East Africa
ICJ (K)	International Commission of Jurists (Kenya Section)
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICPSK	Institute of Certified Public Secretaries of Kenya
IDs	Identification Cards
IGAD	Inter-Governmental Authority on Development
IPK	Islamic Party of Kenya
IPPG	Inter-Parties Parliamentary Group
JSC	Judicial Service Commission
KADU	Kenya African Democratic Union
KANU	Kenya African National union
KAU	Kenya African Union
KCSE	Kenya Certificate of Secondary Education
KHRC	Kenya Human Rights Commission
KICC	Kenyatta International Conference Centre
KIPO	Kenya Industrial Property Office
Km	Kilometres
Ksh.	Kenya Shillings
LN	Legal Notice
LSK	Law Society of Kenya
MP	Member of Parliament
NAFTA	North America Free Trade Areas
NCCK	National Council of Christian Churches
NEIC	National Ethics and Integrity Commission

NGO	Non-Governmental Organization
NPEP	National Poverty Eradication Plan
PAC	Public Accounts Committee
PC	Provincial Commissioner
PCK	Peoples Commission of Kenya
PR	Proportional Representation
PRSP	Poverty Reduction Strategy Paper
PTA	Preferential Trade Area for Eastern and Southern Africa
RIF	Regional Integration of Facilitation Forum
s/sec	Section
UDHR	Universal Declaration on Human Rights
UN	United Nations
UNHCR	United Nations High Commission for Refugees
USA	United States of America
WHO	World Health Organization
WIPO	World Intellectual Property Organization
WTA	Winner-Takes-All



PART ONE

INTRODUCTION

CHAPTER ONE

THE CONSTITUTION OF KENYA REVIEW COMMISSION

1.1 Appointments and Membership

For over a decade, a debate on whether or not Kenya's current Constitution should be reviewed or overhauled raged. After many years of intense negotiation among political parties, organs of the civil society, religious groups and other stakeholders, a legislative framework for reviewing the Constitution was finally agreed on in November 2000.*'The current Constitution of Kenya Review Act (Cap 3A) is annexed as Appendix I.*

The Constitution of Kenya Review Commission (hereinafter the Commission) as established under the Constitution of Kenya Review Act was subsequently appointed and gazetted on 10th November, 2000, with the following members:

▪ Prof. Yash P. Ghai	- Member and Chairperson
▪ Ms. Kavetsa Adagala	- Member
▪ Mrs. Phoebe M. Asioyo	- Member
▪ Pastor Zablon F. Ayonga	- Member
▪ Mr. Ahmed I. Hassan	- Member
▪ Mr. J. Mutakaha Kangu	- Member
▪ Bishop Bernard N. Kariuki	- Member
▪ Dr. Githu Muigai	- Member
▪ Prof. H. W. O. Okoth-Ogendo	- Member
▪ Mr. Domiziano M. Ratanya	- Member
▪ Prof. Ahmed I. Salim	- Member
▪ Dr. Mohamed A. Swazuri	- Member
▪ Mr. Keriako Tobiko	- Member
▪ Mr. Musili P. Wambua	- Member
▪ Mrs. Alice Yano	- Member
▪ Hon. S. Amos Wako	- Attorney-General <i>Ex officio</i> Member
▪ Mr. Arthur O. Owiro	- <i>Ex officio</i> Member and Secretary

A number of "Alternate Commissioners" were also gazetted as follows:

1. Christopher G. Ali
2. Bishop (Dr) Gerry Kibarabara
3. Justice (Rtd) Benna Lutta
4. Mrs. Mercy M. Mwamburi
5. Dr. Abdirizak A. Nunow
6. Timothy O. Omato
7. Dr. Wilson Sitonik
8. Johnston B. Wepakhulu

The rationale for this gazettlement was to simplify the procedure for replacing any Commissioner should a vacancy arise. This category was, however, later abolished and the power to fill vacancies vested in the Commission itself.

At its first meeting, the Commission elected Prof. Ahmed I. Salim as its Vice-Chairman. This was followed by the establishment of two *ad hoc* committees, namely:

- the Budget and Logistics Committee and,
- the Drafting Committee.

These were to recommend appropriate operational infrastructure and budget. Other Committees were later established to facilitate the development of strategic options in various matters.

The Commission's affairs were conducted through these Committees until more structured standing organs were established upon the publication of the Constitution of Kenya Review (General) Regulations, 2001 (LN. 12/2001) on 23 July 2001, which are annexed as Appendix II.

1.2 Negotiating a Common Review Process

When the Commission was established, a parallel initiative to review the current Constitution had already been started by civil society organizations, religious groups and other non-governmental stakeholders. The *Ufungamano Initiative*, as this came to be known, was founded on the premise that the structure and mandate of the Commission as finally established by legislation was not inclusive, comprehensive and people-driven.

The *Ufungamano Initiative*, therefore, appointed a People's Commission of Kenya made up of the following as members:

• Dr. Oki Ooko-Ombaka	Chair
• Abida Ali-Aroni	Vice-Chair
• Abubakar Zein Abubakar	Member
• Said Athman	Member
• Dr. Charles M. Bagwasi	Member
• Nancy Baraza	Member
• Al-haj Ali Baricha	Member
• Dr. Wanjiku Kabira	Member
• Amina Sheikh Kassim	Member
• Juma Kiplenge	Member
• Isaac Lenaola	Member
• Ibrahim Lethome	Member
• Geoffrey Gachara Muchiri	Member
• Salome W. Muigai	Member
• Adelina Mwau	Member
• Pheroze Nowrojee	Member
• Godfrey Masanya Okeri	Member
• Riunga Raiji	Member
• Joyce Umbima	Member
• Erastus Wamugo	Member

The existence of the Commission and the *Ufungamano Initiative* side by side was evidence of a serious fracture in the political landscape. The Commission was perceived as an instrument of the ruling political party and the *Ufungamano Initiative* as that of those in opposition to it. This was a clear indication of lack of consensus and commitment to what was to be perhaps the most fundamental political project in Kenya's forty-year history as an independent state.

Consequently, the Chairperson of the Commission undertook to broker an agreement between all relevant stakeholders with a view to facilitating a merger of the two institutions and starting the review of the Constitution a unified process. Further negotiations were conducted with all relevant stakeholders, resulting in an agreement in December 2000, to merge the Commission with the *Ufungamano Initiative*. Among the elements of the common review process agreed to in the merger included commitment to the following principles:

That the Government of the Republic of Kenya, the organs of review of the Constitution, political parties, non-governmental organizations and all Kenyans would:

- (i) recognise the importance of building confidence, engendering trust and developing a national consensus for the review process;
- (ii) agree to avoid violence, threats, or other acts of provocation during the review process;
- (iii) undertake not to deny or interfere with any one's right to hold or attend public meetings or assemblies, the right to personal liberty, and the freedoms of expression and conscience during the review process, save in accordance with the law;
- (iv) ensure that the police would protect the safety of all persons who “
- (v) attended meetings or exercised other rights from violence from whatever source;
- (vi) guarantee that the meetings of all organs of review were held in peace;
- (vii) respect the independence of the Commission and its members; and
- (viii) desist from any political or administrative action that would adversely affect the operation or success of the review process.

To facilitate the incorporation of that agreement into legislation, the Attorney-General, at the request of the Parliamentary Select Committee on Constitutional Review and the Steering Council of the *Ufungamano Initiative*, established a drafting committee consisting of: –

- Prof. H. W. O. Okoth-Ogendo;
- Dr. Oki Ooko-Ombaka;
- Mr. J. Mutakha Kangu, and
- Mrs. Abida Ali-Aroni

That committee produced a draft to formalise the merger. Enacted in May 2001, the Constitution of Kenya Review (Amendment) Act (No. 2/2001) reconstituted the Commission and expanded its membership from seventeen to twenty-nine. The ten members gazetted from the Peoples Commission of Kenya on 11th June 2001 were:

- Dr. Oki Ooko-Ombaka
- Mrs. Abida Ali-Aroni
- Dr. Charles M. Bagwasi
- Ms. Nancy M. Baraza
- Dr. Wanjiku M. Kabira
- Mr. Isaac Lenaola
- Mr. Ibrahim A. Lethome
- Ms. Salome W. Muigai
- Mr. Abubakar Zein Abubakar
- Mr. Riunga L. Raiji

At the same time the following Commissioners, as nominees of the Parliamentary Select Committee, were gazetted:

- Dr. K. Mosonik arap Korir
- Dr. ABDIRIZAK A. NUNOW

The legislation created two more offices of Vice-chairpersons, one to be designated as First Vice-Chair and another to be held by a woman Commissioner.

At its first meeting, the reconstituted Commission elected Dr. Oki Ooko-Ombaka as its First Vice-Chair and Mrs. Abida Ali-Aroni as Vice-Chair. To facilitate its operations, the reconstituted Commission established standing committees with the following membership:

(a) The Steering Committee

- | | | |
|-------------------------------|---|-------------------|
| • Prof. Yash Pal Ghai | - | <i>Ex officio</i> |
| • Late Dr. Oki Ooko Ombaka | - | <i>Ex officio</i> |
| • Prof. Ahmed I. Salim | - | Vice-Chairman |
| • Ms. Abida Ali-Aroni | - | Vice-Chairperson |
| • Prof. H. W. O. Okoth-Ogendo | - | Commissioner |
| • Ms. Nancy Baraza | - | Commissioner |
| • Dr. Charles Maranga Bagwasi | - | Commissioner |
| • Prof. Wanjiku Kabira | - | Commissioner |
| • Mr. Domiziano Ratanya | - | Commissioner |
| • Mr. Arthur O. Owiro | - | Secretary |

(b) Civic Education, Publicity and Information Committee

- | | | |
|-------------------------------|---|---------------------------------|
| • Prof. Yash Pal Ghai | - | <i>Ex officio</i> |
| • Prof. A. I. Salim | - | Vice Chairman (Committee-Chair) |
| • Mrs. Abida Ali-Aroni | - | <i>Ex officio</i> |
| • Mr. Abubakar Zein Abubakar | - | Commissioner |
| • Ms. Kavetsa Adagala | - | Commissioner |
| • Dr. Charles Maranga Bagwasi | - | Commissioner |

- Ms. Salome W. Muigai – Commissioner
- Mr. Paul M. Wambua – Commissioner
- Mr. Arthur O. Owiro – Secretary

(c) Research, Drafting and Technical Support Committee

- Prof. Yash Pal Ghai – *Ex officio*
- Prof. A. I. Salim – *Ex officio*
- Mrs. Abida Ali-Aroni – *Ex officio*
- Prof. H. W. O. Okoth-Ogendo – Committee Chair
- Ms. Kavetsa Adagala – Commissioner
- Dr. Oki Ooko-Ombaka – Commissioner
- Ms. Nancy Baraza – Commissioner
- Ahmed Issack Hassan – Commissioner
- Prof. Wanjiku Kabira – Commissioner
- Mr. Mutakha Kangu – Commissioner
- Bishop Bernard N. Kariuki – Commissioner
- Dr. K. Mosonik arap Korir – Commissioner
- Mr. Isaac Lenaola – Commissioner
- Mr. Githu Muigai – Commissioner
- Mr. Keriako Tobiko – Commissioner
- Hon. Amos Wako – Attorney General (*ex officio*)
- Mr. Arthur O. Owiro – Secretary

(d) Resource Development and Budget Committee

- Prof. Yash Pal Ghai – *Ex officio*
- Mrs. Abida Ali-Aroni – Committee Chair
- Prof. A. I. Salim – *Ex officio*
- Hon. Mrs. Phoebe Asiyo – Commissioner
- Dr. Abdirizak Nunow – Commissioner
- Mr. Riunga Raiji – Commissioner
- Mr. Domiziano Ratanya – Commissioner
- Mrs. Alice Yano – Commissioner
- Mr. Arthur O. Owiro – Secretary

(e) Mobilisation and Outreach Committee:

- Prof. Yash Pal Ghai – *Ex officio*
- Prof. A. I. Salim – *Ex officio*
- Mrs. Abida Ali-Aroni – *Ex officio*
- Prof. Wanjiku Kabira – Committee Chair
- Pastor Zablon Ayonga – Commissioner
- Bishop Bernard N. Kariuki – Commissioner
- Mr. Ibrahim Lethome – Commissioner
- Dr. Abdirizak Nunow – Commissioner
- Dr. Mohammed Swazuri – Commissioner
- Mr. Arthur O. Owiro – Secretary

Since June 2001, three significant changes occurred in the membership of the reconstituted Commission. The first was the resignation of Mr. Arthur O. Owiro as Secretary to the Commission and his replacement on 4 October 2001 with Mr. Patrick L. O. Lumumba. The second was the sudden and sad demise of the First Vice-Chairperson, Dr. Oki Ooko-Ombaka on 15th July 2002. The vacancy of a Commissioner thus created was filled with the appointment and subsequent gazettement of Dr. Andronico O. Adede on 16th August 2002. The third significant change was the resignation on 30 June 2004 of Prof. Yash Pal Ghai as Member and Chairperson of the Commission and his replacement on 7 July 2004 with Mrs. Abida Ali-Aroni, formerly one of the Vice-Chairpersons of the Commission. The vacancy thus occasioned by the elevation of Mrs. Abida Ali-Aroni was filled by the election of Prof. Wanjiku Kabira.

The vacancy of a Member of the Commission occasioned by the resignation of Prof. Yash Pal Ghai has not been filled to date.

At the presentation of this Report, therefore, the full membership of the Commission is as follows:

• Mrs. Abida Ali-Aroni	—	Member and Chairperson
• Prof Ahmed I. Salim	—	Member and First Vice-Chairperson
• Prof. H.W.O.Okoth-Ogendo	—	Member and Vice-Chairperson
• Prof. Wanjiku Kabira	—	Member and Vice-Chairperson
• Mr. Abubakar Zein Abubakar	—	Member
• Ms. Kavetsa Adagala	—	Member
• Dr. Andronico O. Adede	—	Member
• Mrs. Phoebe M. Asiyo	—	Member
• Pastor Zablon F. Ayonga	—	Member
• Dr. Charles M. Bagwasi	—	Member
• Ms. Nancy M. Baraza	—	Member
• Mr. Ahmed I. Hassan	—	Member
• Mr. J. Mutakha Kangu	—	Member
• Bishop Bernard N. Kariuki	—	Member
• Dr. K. Mosonik arap Korir	—	Member
• Mr. Justice Isaac Lenaola	—	Member
• Mr. Ibrahim A. Lethome	—	Member
• Prof. Githu Muigai	—	Member
• Ms. Salome W. Muigai	—	Member
• Dr. Abdirizak A. Nunow	—	Member
• Mr. Riunga L. Raiji	—	Member
• Mr. Domiziano M. Ratanya	—	Member
• Dr. Mohamed A. Swazuri	—	Member
• Mr. Keriako Tobiko	—	Member
• Mr. Musili P. Wambua	—	Member
• Mrs. Alice Yano	—	Member
• Hon. S. Amos Wako	—	Attorney-General <i>Ex officio</i> Member
• Dr. Patrick L. O. Lumumba	—	Secretary and <i>Ex officio</i> Member

The Mandate of the Commission

The consolidated version of the Constitution of Kenya Review Act (Cap. 3A) sets out the mandate of the Commission and of other organs of review in very clear and specific terms. The primary mandate is to ensure a comprehensive review of the current Constitution “by the people of Kenya”. Specifically, the Act provides that the object and purpose of the review is to secure provisions therein:

- (a) guaranteeing peace, national unity and integrity of the Republic of Kenya in order to safeguard the people’s well being;
- (b) establishing a free and democratic system of government that enshrines good governance, constitutionalism, the rule of law, human rights and gender equity;
- (c) recognising and demarcating divisions of responsibility among the various state organs including the Executive, the Legislature and the Judiciary so as to create checks and balances between them; and, to ensure accountability of the Government and its officers to the people of Kenya;
- (d) promoting the people’s participation in governance through democratic, free and fair elections and devolution and exercise of power;
- (e) respecting ethnic and regional diversity and communal rights, including the right of communities to organize and participate in cultural activities and the expressions of their identities;
- (f) ensuring provision of basic needs of all Kenyans by establishing an equitable framework for economic growth and equitable access to national resources;
- (g) promoting and facilitating regional and international co-operation to ensure economic development, peace and stability and to support democracy and human rights;
- (h) strengthening national integration and unity;
- (i) creating conditions conducive to a free exchange of ideas;
- (j) ensuring full participation by people in managing their affairs; and
- (k) enabling Kenyans to resolve national issues based on consensus.

In performing their functions under the Act, the Commission and all other organs of review must, *inter alia*:

- (a) be accountable to the people of Kenya;
- (b) ensure that the review process accommodates the diversity of the Kenyan people, including socio-economic status, race, ethnicity, gender, religious faith, age, occupation, learning, persons with disabilities and the disadvantaged,
- (c) ensure that the review process:
 - (i) provides the people of Kenya with an opportunity to actively, freely and meaningfully participate in generating and debating proposals to alter the Constitution;
 - (ii) is subject to the Act, conducted in an open manner; and
 - (iii) is guided by respect for the universal principles of human rights, gender equity and democracy; and

- (d) ensure that the outcome of the review process faithfully reflects the wishes of the people of Kenya.

In particular, the Commission is under an obligation to ensure that, in reviewing the Constitution, the people of Kenya will:

- (i) examine and recommend the composition and functions of the organs of state, including the Executive, the Legislature and the Judiciary and their operations, to maximise their mutual checks and balances and secure their independence;
- (ii) examine the various structures and systems of government, including the federal and unitary systems, and recommend an appropriate system for Kenya;
- (iii) examine and recommend improvements in the existing constitutional commissions, institutions and offices and the establishment of additional ones to facilitate constitutional governance and respect for human rights and gender equity as an indispensable and integral part of the enabling environment for economic, social, religious, political and cultural development;
- (iv) examine and recommend improvements in the electoral system of Kenya;
- (v) without prejudice to sub-paragraph (i), examine and make recommendations on the Judiciary, generally, and, in particular, the establishment and jurisdiction of courts, aiming at measures necessary to ensure judicial competence, accountability, efficiency, discipline and independence;
- (vi) examine and review the place of local governments in the constitutional organization of the Republic of Kenya and the degree of the devolution of powers to them;
- (vii) examine and review the place of property and land rights, including private, Government and Trust Land, in the constitutional framework and the law of Kenya and recommend improvements to secure the fullest enjoyment of land and other property rights;
- (viii) examine and review the management and use of public finances and recommend improvements;
- (ix) examine and review the right to citizenship and recommend improvements to ensure, in particular, gender parity in conferring those rights;
- (x) examine and review the socio-cultural factors that promote various forms of discrimination, and recommend improvements to secure equal rights for all;
- (xi) examine and review the rights of the child and recommend mechanisms to guarantee their protection
- (xii) examine and review succession to office and recommend a suitable system for a smooth and dignified transfer of power after an election or otherwise;
- (xiii) examine and note recommendations on treaty-making and treaty-implementation powers of the Republic and any other relevant matter to strengthen good governance and observance of Kenya's obligations to international law;
- (xiv) examine and make recommendations on the necessity of directive principles of state policy;
- (xv) establish and uphold the principle of public accountability by holders of public or political offices; and

- (xvi) examine and make recommendations on any other matter connected with or incidental to the foregoing and achieves the overall objective of the constitutional review process.

A detailed presentation and analysis of this mandate is given in Chapter Four of this Report.

1.4 The Commission's Method of Work

The broad principles governing the Commission's method of work are stated in section 17 of the Act which requires the Commission to:

- (a) conduct and facilitate civic education in order to stimulate public discussion and awareness of constitutional issues;
- (b) collect and collate the people's views on proposals to alter the Constitution and, on that basis, to draft a Bill to alter the Constitution for presentation to the National Assembly; and
- (c) carry out or cause to be carried out such studies, researches and evaluations on Kenya's and other constitutions and constitutional systems as, may, in the Commission's opinion, inform the Commission and the people of Kenya on the state of Kenya's Constitution.

Section 18 further requires the Commission to:

- (a) visit every constituency to receive the people's views on the Constitution;
- (b) without let or hindrance, receive memoranda, hold public or private hearings throughout Kenya and in any other manner collect and collate people's views and opinions, whether resident in or outside Kenya and, for that purpose, the Commission may summon public meetings of the inhabitants of any area to discuss any matter relevant to the functions of the Commission; and
- (c) summon any public officer to appear in person before it or before a committee or to produce any document, thing, or information that may be considered relevant to the functions of the Commission.

Pursuant to these principles and to ensure that its full mandate was discharged, the Commission spent considerable time and resources on establishing an elaborate national infrastructure for stimulating, discussing and collecting public views.

It consisted, inter alia, of Documentation Centres in all administrative districts, district co-ordination machineries, Forum Committees in all 210 constituencies into which Kenya is divided, civic education and outreach programmes in the print and electronic media. The Commissioners collected views by operating in panels of three to five and visiting all constituencies in provincial clusters throughout the country.

A detailed description of the Commission's method of work, including analysing data, writing the report and drafting the new Constitution, discussing the report and draft Constitution at the National Constitutional Conference and presenting it to Parliament, is presented in Volume III of the Commission's Report.

CHAPTER TWO

A BACKGROUND OF KENYA

2.1 Geopolitical Parameters

2.1.1 Main Features

Kenya lies across the equator on the East Coast of Africa. It borders Somalia to the north-east, Ethiopia to the north, Sudan to the north-west, Uganda to the west, Tanzania to the south, and the Indian Ocean to the east.

Kenya covers an area of 583,000 sq. km. (225,00 sq. miles). Nairobi, Kenya's capital, has a population of approximately 2.5 million people. Kenya's other main urban areas are Mombasa, a port on the Indian Ocean with an estimated population of 700,000; and Kisumu on the shores of Lake Victoria being on the Western border and with an estimated population of 450,000.

Kenya is divided into eight administrative provinces, namely, Central, Coast, Eastern, Nairobi, North-Eastern, Nyanza, Rift Valley and Western. Each Province is subdivided into districts.

In terms of political representation, the country is currently divided into 210 constituencies. A map of Kenya's administrative and political boundaries is attached as Figure 1 to this Report.

2.1.2 Demographic Characteristics

The population of Kenya is estimated at 31.9 million with a growth of 1.9% per annum. The birth rate is estimated at 34.6 births per 1,000 and the death rate is about 4.7 deaths per 1,000. The net migration rate is approximately 0.34 per 1,000 persons. Kenya's infant mortality rate is estimated at 59.07 per 1,000 live births.

About 44% of the population is in the age group of 0-15 years, while 53% is in the age group of 15-64 years. Those aged 65 years and above are estimated at one million and are projected to increase to 1.3 million by the year 2008. The ratio of the sexes is approximately 1 male to 1.2 females. The average life expectancy is 49.3 years with a slight variation from province to province. The demographic trends since 1969 are shown on Table 1.

Figure 1: Kenya's Political Boundaries

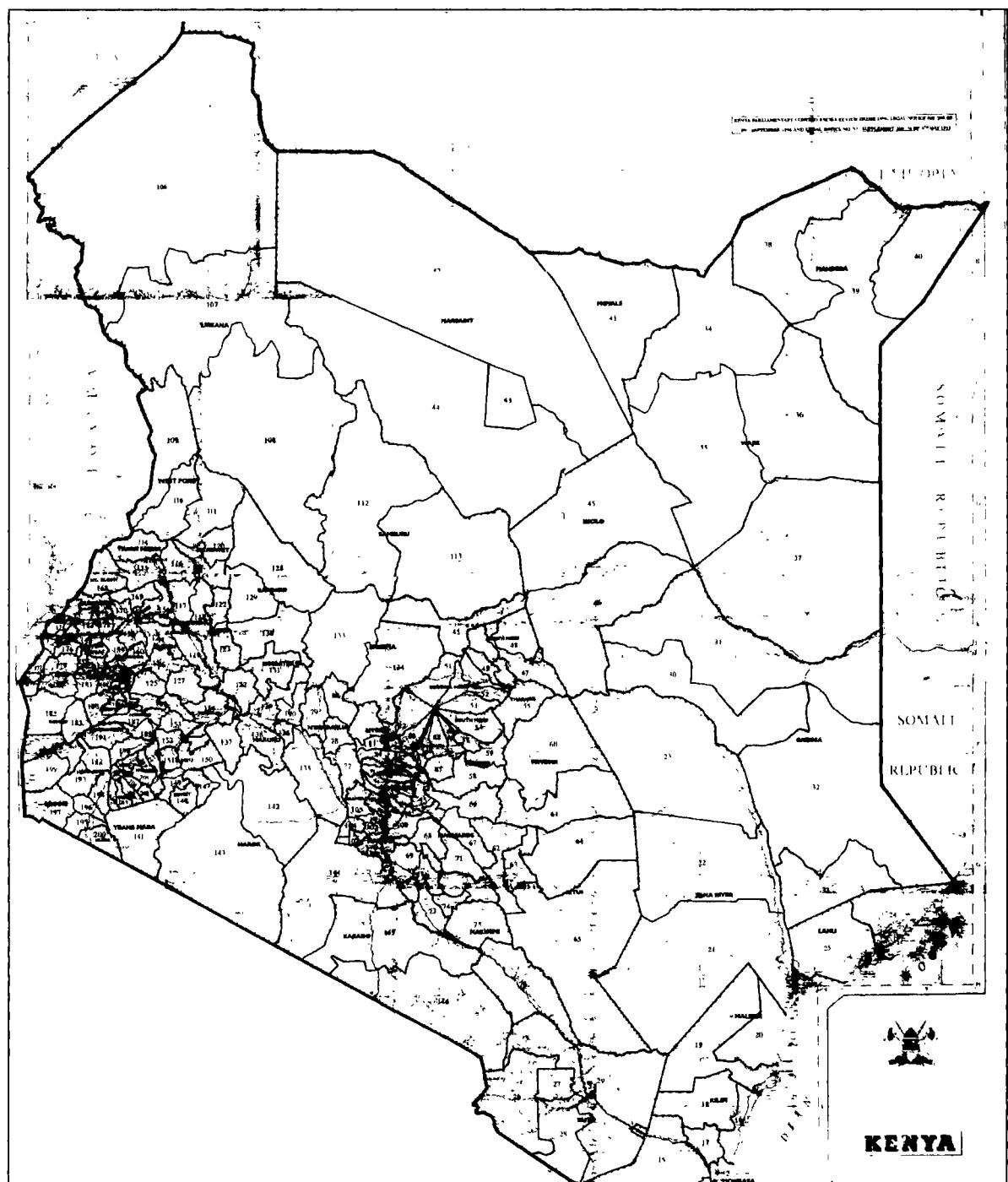


Table 1: Demographic Trends Since 1969

Indicators:	1969	1979	1989	1999	2002
Population (millions)	10.9	16.2	23.2	28.7	31.9
Density (pop/km ²)	19.0	27.0	37.0	49.0	
Percent urban	9.9	15.1	18.1	34.0	34.0
Crude birth rate	50.0	54.0	48.0	34.6	-
Crude death rate	17.0	14.0	11.0	4.7	-
Growth rate	3.3	3.8	3.4	2.9	1.9
Total fertility rate (children per woman)	7.6	7.8	6.2	4.7	4.15
Infant mortality rate (per 1000 live births)	119.0	88.0	66.0	74.0	59.0
Life expectancy at birth (years)	50.0	54.0	60.0	M-51.1 F -53.0	M-48.7 F -49.9

Key: M=Male F =Female

Sources:

- Central Bureau of Statistics, Ministry of Finance and Planning (1970), *1969 Population Census Vol. 4, Analytical Report*, Nairobi.
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- Central Bureau of Statistics, Ministry of Planning and National Development, (1991) The 1989 Population Census Provisional Results Chapter 3 in *Economic Survey 1991*, Nairobi.
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- NCPD, Central Bureau of Statistics, Macro International (1999), *Kenya Demographic and Health Survey 1998*, Nairobi.
- UNFP (1999), *The State of the World's Population 1999*, New York.
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- UNFPA (2002), *The State of the World's Population 2002*, New York.

2.2 Natural Resources Characteristics

Only 17% of Kenya's land is arable. About 2.2% of the arable land is covered by forest reserves. Nearly 80% of the country is arid and semi-arid land (ASAL), supporting 85% of the wildlife population, and about 30% of the population practise pastoralism and ranching. The ASAL suffers increasing desertification. Due to the low carrying capacity of such land, a relatively small increase in the population may result in over-exploitation of natural resources. As a result of climatic changes in the last few years, the rainy seasons have been erratic. This is likely to have disastrous effects on Kenya, a country that depends on its natural resources for food and industry.

Kenya's total water resource potential exceeds the present annual demand. Yet, it is limited in space, time and quality. Kenya's fresh water sources include: rivers, lakes, wetlands and wells. The demand for agricultural land has, however, caused encroachment on water catchments and wetlands, thereby reducing the flow of springs and streams and lessening the land's ability to adjust to floods and droughts. The Lake Victoria basin alone sustains nearly half of Kenya's population.

Although the area with irrigation potential is estimated at 539,500 hectares, only about 10% of this potential has been exploited. Moreover, irrigation, particularly on government land, has since 1989 been declining at the rate of 7% annually.

The coastal and marine resources, which include harbors, deltas and creeks, forests, beaches, mangroves and coral reefs, are under increased pressure. The coral reefs are particularly threatened by pollution from factories, hotels and siltation. The fish resources are exploited unsustainably. This is sometimes done by vessels outside national control.

Although it has over 35,000 identified species of animals, plants and micro-organisms, Kenya has, over time, lost some of her well known biodiversity mainly due to the population increase, habitat destruction, land degradation, desertification, over-exploitation of species and conversion of wetlands to agriculture and settlement. The ecosystems that store water protect the soils, or shelter unique plants and animals have been degraded or converted to other uses. Some plants and animals are over-harvested, and a few have actually become extinct. Despite an impressive 80% of the land being a wildlife-protected area, a number of important species are not protected. This problem is compounded by limited mechanisms for monitoring and regulating importation of invasive species and genetically modified organisms.

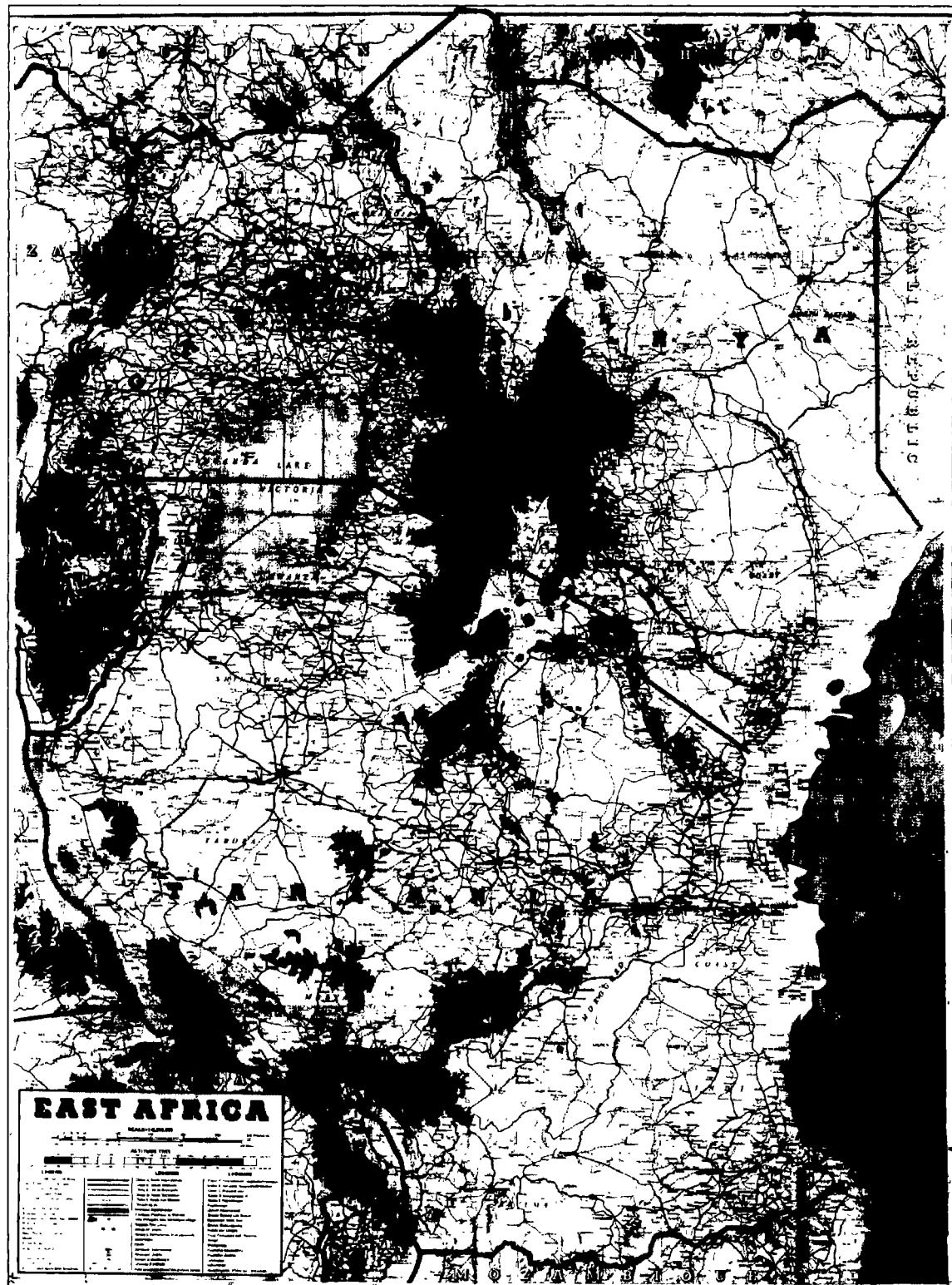
The protected forest cover is only about 2.5% of the total land surface. Yet, the forests contain 50% of the tree species, 40% of the mammals and 25% of the birds. Land covered by forests has drastically declined from 28.9% in 1993 to about 2.5%. This is expected to decline to 2% by the year 2005. The plantation cover will, by the year 2005, have reduced by 25% (120,000 hectares) from the 1995 value of 160,000 hectares.

The gazetted indigenous forests are losing about 5,000 hectares every year. The forests are concentrated in small areas where competing land uses are reducing their cover. Other forests, which fall under the Trust Land and common resources, are being degraded at a fast rate.

2.3 Regional Parameters

Of the three East African countries, Kenya was the last (in 1963) to regain independence from the United Kingdom of Great Britain and Northern Ireland. Tanzania (then Tanganyika) and Uganda had done so in 1961 and 1962 respectively. A map showing the international boundaries is attached as Figure 2 to this Report.

Figure 2: International Boundaries of The East Africa Countries



PART TWO

CONSTITUTIONAL DEVELOPMENT AND CONSTITUTIONAL REVIEW

CHAPTER THREE

CONSTITUTIONAL DEVELOPMENT IN KENYA

3.1 The Pre-independence Phase

The evolution of developments leading to Kenya's current written Constitution can be traced to 1887, when the British East African Association (later to be known as the Imperial British East Africa Company) signed an Agreement with the Sultan of Zanzibar granting a fifty-year lease over the coastal strip. This lease was converted to a concession in 1890 and the Company was given power to appoint Commissioners to administer districts, make laws, operate courts of justice and acquire and regulate land. Upon receiving a royal charter as Imperial British East African Company (IBEA) in 1888, the Company became the principal instrument of British imperial policy in East Africa. In 1895, the British government took over the territory from the IBEA and declared it a protectorate under a separate treaty. The territory thus acquired was named East African Protectorate in 1896. In 1897, the East Africa Order in Council was formulated establishing a judicial system and increasing the powers of the Commissioner over the natives, while recognising that, in law, they were not British subjects and their territory was foreign.

While establishing the initial government machinery, the Order became the first comprehensive constitutional instrument for the protectorate. In 1902, it was repealed and replaced with a new Order-in-Council empowering the Commissioner to create provinces and districts and expanding his legislative powers. The acts of legislation he made were to be called Ordinances as opposed to Regulations. In 1905, the responsibility of supervising the protectorate was transferred from the Foreign Office to the Colonial Office and a 1905 Order-in-Council established the positions of a Governor, an Executive Council and a Legislative Council. This period saw the beginning of serious white settlement in the protectorate, the principal desire being to create a colony.

The years 1905-1923, the next phase of constitutional development under colonialism, saw the transformation of the protectorate into a colony. Although the responsibility of supervising the protectorate had been transferred to the Colonial Office, it was not until 1920 that the protectorate was declared a crown colony. Letters of Patent under the Great Seal and Royal Instructions under the Sign Manual and Signet established the colony's new constitutional order. The Legislative Council Ordinance of 1919 gave effect to European settler representation in the Legislative Council and, under the Royal Instructions of 1919, Indians were permitted two nominated members while Arabs had one unofficial nominated member to represent their interests.

The Devonshire White Paper of 1923 made the important policy declaration that the British government viewed the interests of the natives as paramount. It noted, however, that time was not yet ripe for direct native representation in the Legislative Council. In 1924, Dr. John Arthur, a Presbyterian Church missionary was nominated to represent African interests in both the Legislative and Executive Councils. In general, the Devonshire White paper set the tone for future constitutional negotiations.

The period between 1924 and 1951 witnessed the consolidation of colonial rule against a tide of competing political claims by various races. While the White Paper failed to draw up specific lines of constitutional evolution, the period between 1924 and 1951 saw major changes in the country's constitutional make-up. This period witnessed increased African political activities through the formation of African political associations. The formation of the East Africa Association in 1921 and the Young Kavirondo Association in 1922 added a new dimension to the already existing political struggles between the Europeans and the Indians. Africans increasingly agitated for direct political representation. As a result, in 1924, the government established the Local Native Councils (LNCs) under the Local Authority Ordinance to control African politics at the local level. The LNCs, which were under the District Commissioners, were not elective and European Field Officers nominated Africans who sat in it.

The Hilton Young Commission, operating between 1929 and 1930 to consider the prospects of greater Union in Eastern Africa, presented the opportunity for various racial groups—Europeans, Indians and Africans—through 37 political associations to present their grievances. The African groups complained particularly of political marginalisation, lack of direct representation in both the Legislative and the Executive Councils, and the land questions arising out of the 1915 Crown Lands Ordinance that effectively reduced Africans to squatters on their own land.

The Young Commission was of the view that Africans were not, and could not be, in a position to protect their own interests in the central legislature. However, Sydney Webb, the New Colonial Secretary under the Labour Government, agreed in 1929, to allow two people to be nominated to represent Africans and increased the importance given to the Local Native Councils. The spirit of his constitutional vision remained that it was not yet time for Africans to actively participate in the Legislative Council as they still lacked the necessary capacity to do so.

It was not until 1944 that the first African, Eliud Mathu, was nominated to represent Africans in the Council after L.J. Beecher, a European missionary, resigned from that post. This was followed by the nomination of F.W. Odede in 1946 and B.A. Ohanga in 1947. In 1948, the number of nominated Africans in the Council was increased to four. The political pressure exerted by Africans increased with the return from England of Jomo Kenyatta in 1946, thereby shifting the mantle of political leadership from Eliud Mathu and his Kenya African Study Union, renamed Kenya African Union (KAU). KAU sought greater African participation in the affairs of the colony. While KAU became the centre of African political activity, the Electors Union became the principal mouthpiece of the settler community in Kenya. In 1948, the Electors Union declared that its objective was to entrench European supremacy in Kenya towards self-rule while remaining part of the British Commonwealth. KAU, on the other hand, fought for the total emancipation of the Africans towards full independence from British rule.

The period between 1952 and 1960 was, therefore, one of increased political reforms against the backdrop of increasing racial tensions and increased African agitation for

self-rule. The lack of committed constitutional response to African grievances led to the outbreak of armed conflict, the Mau Mau uprising and in October 1952, the Governor declared the state of emergency in the country. Jomo Kenyatta and six other political leaders were arrested and detained. Between 1953 and 1956, there was a total ban on African political organization countrywide. However, the Mau Mau uprising not only forced the imperial and colonial authorities to undertake significant constitutional reforms to contain the African discontent but also brought the imperial government in London to play a greater role in the governance and management of the affairs of the colony.

Two important initiatives took shape in response to the failure by the constitutional system to accommodate the legitimate demands especially by Africans. These were the Lyttleton and Lennox-Boyd Constitutions. The 1954 Lyttleton Constitution, named after Sir Oliver Lyttleton, the new Colonial Secretary under the Conservative Government, sought to effect the principle of multi-racialism, correct the anomaly in the powers and composition of the Executive Council and regulate African political participation by providing for separate racial representation. The Lyttleton Constitution established the Ministerial system by creating the Council of Ministers, of which for the first time, one Minister was an African, in charge of community development. In 1954, a British Parliamentary delegation visiting Kenya recommended permitting Africans to participate in politics and to cultivate a multi-racial society. The delegation also recommended that an acceptable basis for electing African representatives to the Legislative Council at the next General Election be found. A Commission was, therefore, established in 1955 to study how African representatives could be elected to the Legislative Council.

The Imperial government, however, decided that there would be no changes to the communal basis of franchise until the next General Election expected in 1960. In 1956, the government allowed the formation of district political associations. In March 1957, under the new electoral laws, elections were held in which for the first time eight African members were elected to the Legislative Council. This was a new and more assertive group, led by Jaramogi Oginga Odinga and Tom Mboya. The African members formed the Africa Elected Members Organization to make demands on the colonial government. They rejected the Lyttleton Constitution and demanded fifteen more seats for Africans. They demanded other, far-reaching reforms across the board and refused to take up the position reserved for them in the Council of Ministers, thus precipitating a crisis. Although the Lyttleton Constitution was to last until 1960, the new Colonial Secretary, Lennox-Boyd, was forced to take a fresh look at the colony's constitutional arrangement. He called for the resignation of all ministers, effectively nullifying the basis upon which the Lyttleton Constitution was founded. The result was the new Lennox-Boyd Constitution.

While retaining the principal tenets of the Lyttleton Constitution, especially the multi-racial principle, the Lennox-Boyd Constitution made far-reaching changes in the constitutional order. It abolished the Executive Council and replaced it with a Council of Ministers. It also increased the number of Africans elected to the Legislative Council from eight to fourteen, the same number as Europeans; and provided for an electoral college consisting of elected members to choose twelve specially elected members to represent all communities (four each for Europeans, Africans and Asians). Further, it established a Council of State to protect minority

rights. The number of Africans in the Council of Ministers was increased to two; Asians had two; four Europeans were Ministers without portfolio; and eight Ministers were Europeans. The powers of the Governor remained largely unchanged.

The African representatives in the Legislative Council rejected the Lennox-Boyd Constitution and demanded total control of government, given their numerical superiority. They also demanded a common electoral roll (as opposed to the communal roll) and unrestricted universal suffrage. They refused to co-operate in implementing the new constitution and even boycotted the Legislative Council; only the Council of Ministers was spared. In June, 1958, Mr. Odinga, addressing the Legislative Council, astonished Europeans by stating that Jomo Kenyatta was a respected nationalist leader. Tom Mboya demanded in September, 1958, that October 20th, the day in 1952 when Kenyatta and others were detained, should be observed as a national day.

When, later in 1958, the Governor, Sir Evelyn Baring, refused to accept changes in the constitutional arrangements, all African legislators walked out and effectively withdrew from participating in all proceedings thereafter. Arising from the legislative crisis occasioned by the withdrawal, all African members, one Asian and one European formed the Constituency Elected Members Organization, which sent a multi-racial delegation to London to demand the appointment of a Constitutional Adviser and a Constitutional Conference to discuss a new constitution to lead to majority rule. The British government acceded to these demands and in early 1959 appointed Professor W.J.M. Mackenzie of Manchester University to be the Constitutional Adviser. Following consultations between Prof. Mackenzie and the various parties, the first Lancaster House Constitutional Conference was convened in 1960. The beginning of the Independence Constitution had begun in earnest and it was all too clear that Kenya was never to be a settler country.

3.2 Independence Constitution

3.2.1 Essential Features

The origin of the current Constitution is the Independence Constitution, which came into force on 12th December, 1963. Since then, it has been amended 38 times. In its values and orientation, the current Constitution is different from the Independence Constitution, despite legal continuity. The Independence Constitution was the product of intense negotiations among various Kenyan political parties and the British Government. The result was that the Independence Constitution reflected the interests of the different negotiating parties and the manner in which these interests were balanced and harmonised.

Kenyans, particularly Africans, were fairly united during the struggle for independence. But once Britain conceded the principle of independence at a conference in London in 1960, and discussions on the Constitution of an independent Kenya began, differences started to emerge.

Before the sixties, the principal differences on constitutional development took racial lines. Constitutional arrangements up to then were based on racial electorates and

seats and on the balancing of claims by Europeans, Asians and Africans. Once it was obvious that Kenya was destined for independence, racial politics became less relevant to its future than divisions among African politicians that arose with the prospects of power.

Though a group of European farmers fought a rearguard battle, Asians and Europeans in the civil service confined their activities to protecting their specific interests rather than attempting to claim a share in political power. For the most part, Europeans concentrated on establishing the principles of compensation for white farmers and civil servants who wanted to leave Kenya, and for security to those who wished to stay on.

Asians had similar interests to protect, though, as they were a larger community that had no chance of going abroad, their primary interest was to establish their right to reside and work in the country under conditions that favoured them.

The divisions among Africans were, in part, the result of restrictions, which prevented them from establishing countrywide political parties. Parties were district-based and inevitably tended to attract strong ethnic or tribal following. Tribal consciousness was stimulated, while the spirit of nationalism was hindered by the colonial policy of using the tribe as the unit of administration and restrictions on the movement and communication among Africans.

After restrictions on countrywide political parties were removed, attempts were made by African leaders to create a national party. By the time serious negotiations on the Independence Constitution started, there were two major political parties, the Kenya African National Union (KANU), supported principally by the Kikuyu and the Luo (seen as ‘large tribes’) and the Kenya African Democratic Union (KADU). This resulted from a merger of a number of parties representing “smaller tribes”: the Kalenjin Political Alliance; the Maasai United Front; the Coast People’s Union, the Baluhia Political Union and the Somali National Assembly.

The “smaller tribes” feared domination by the “larger tribes” which supported KANU and, at the constitutional conference in London; their concerns were mainly directed at ensuring minority rights, and, in the case of coastal Arabs and Somalis in the north-east, secession. Both Africans and the British rejected these secessionist claims and demands by the Maasai that their areas remain under British rule.

Under considerable pressure from the British government, however, KANU agreed to a number of provisions for protecting minorities. Among these provisions were, at the 1960 Lancaster House conference, the delegates agreed that Kenya would be a democracy secured through a parliamentary system of government. Consequently, the two major themes or principles of the Independence Constitution were parliamentary democracy and devolution of power as an instrument of minority protection. They are discussd below.

(a) *Parliamentary Democracy*

The system of Parliamentary Democracy as agreed at independence was based on the classic British model in which the Head of State is separate from the Head of Government. The Head of State, who may be a monarch, a governor-general or a

president, has a largely ceremonial role although he or she plays an important role in forming and dismissing the government and in dissolving the Legislature. The Head of State appoints the Head of Government, often called Prime Minister, although there is little choice if a party or a coalition of parties has a majority of members in the legislature.

On most other matters, the Head of State supports the Prime Minister's directives. Members of the Executive, the Prime Minister and the cabinet ministers, are appointed from among, and remain, members of the Legislature, drawn from the majority.

Although the Prime Minister, as the Head of the cabinet, can appoint and dismiss its members, the powers of the government lie with the whole cabinet. In this way, those powers are exercised collectively and not by one individual.

The Executive is thus accountable and responsible to the Legislature, which means that it must explain its policies to the Legislature and defend them, answer questions on its conduct and secure parliamentary support for its legislative programme.

One important mechanism to ensure that the Executive remains responsible to the Legislature is the Legislature's motion of no confidence in the Executive. If such a vote is passed, the government has to resign or ask the Head of State to dissolve the Legislature.

Initially, a link was retained with the British Crown. The British Queen remained Kenya's Head of State, represented by a Governor-General. The Governor-General had some critical powers to ensure that the government remained accountable to the Legislature and to maintain the stability and continuity of administration. These included the power to:

- remove the Prime Minister, if, after a vote of no confidence in the government, he or she had not resigned or requested a dissolution of the Legislature within three days of the vote; and
- refuse the Prime Minister's request to dissolve the Legislature on a vote of no confidence or at any other time if the Governor-General considered that the government could carry on without dissolution which was not in the public interest.

Parliament consisted of two houses, the House of Representatives, which represented national constituencies, and the Senate, which represented regions (as provinces were so renamed). Fears of majority rule ('majoritarianism'), led the Kenyan Legislature and Executive to be more subject to restrictions than is normal in a parliamentary system.

The Legislature was expected to check the Executive, and in several ways, the Senate represented interests different from those in the House of Representatives. The Senators had a fixed tenure of six years. In spite of the fact that the law-making powers of the Senate were limited, the need to secure approval for Bills in both houses meant that legislation could not be rushed through Parliament.

The Senate was given the critical role of protecting the Federal System, under which there were several restrictions on the powers of the central government. The usual safeguards of free and fair elections, an independent Judiciary, and a neutral public service were codified and institutionalised to a remarkable degree. For example, although there was no express provision for a multi-party system, this was, in fact, guaranteed by the Bill of Rights which protected the freedom of expression and association.

In addition, the right to contest elections regardless of party affiliations and the right to vote were guaranteed. The conduct of elections was entrusted to an independent Electoral Commission, which also had power to draw constituency boundaries and supervise the registration of voters.

The independence of the Judiciary was protected by an independent Judicial Service Commission which appointed judges, who could not be dismissed except as determined by a committee of Commonwealth judges, for misconduct or inability to discharge their functions. An independent Public Service Commission was established to protect the neutrality of the public service. The Commission had the power to appoint, discipline and dismiss all but some specified public servants. The independence of the police was secured through a combination of functions vested in the Public Service Commission and an independent Police Service Commission. Detailed provisions were made to ensure the operational autonomy of the Inspector-General of Police and to remove political directions in discharging such functions. Important offices such as those of the Attorney-General and the Controller and Auditor-General were also accorded independence in the Constitution.

Finally, the Bill of Rights protected a wide range of individual civil and political rights, liberties and freedoms, such as non-discrimination and protection against torture; and freedoms of conscience and religion, expression and movement. These rights were, however, subject to limitations or suspension in case of emergency. In the case of North Eastern Province, the Constitution empowered the Governor-General to modify, qualify, exempt or suspend the provision of the Bill of Rights or of any other law as appeared to him to be necessary and to administer the area by decree.

(b) *Devolution of Power*

(i) *The Majimbo System*

The British considered that a Bill of Rights, ensuring all citizens equality of rights, would be sufficient to protect minorities. However, minority communities, encouraged by the white settlers, were more interested in a share of state power and thought this could best be secured by devolving powers to the provinces.

Their efforts were successful. The resulted was a regional or *majimbo* constitutional structure, in which each of the seven regions acquired its own Legislative Assembly and executive, with guarantees of certain powers and revenue. The Senate was established at the centre to safeguard provincial powers and interests, mainly by protecting constitutional provisions on *majimbo* against repeal.

The regional legislative assemblies, had own elected and specially elected members. The qualifications required of voters ensured that only those with a genuine connection with the region had the vote. No election candidate could be validly nominated unless he or she was registered in the region as a voter. The central authorities could not unilaterally alter the borders. This could be done only through a complex procedure that included the initiative and consent of the locals affected by the changes.

The Executive authority of the region was given to the Finance and Establishment Committee of the Assembly, assisted by a Chief Executive. The regions had their own public service and police contingents, control of the latter being shared with the central authorities and the Inspector-General. Thus the regions had their own exclusive powers, while others were shared with central authorities. The regions were guaranteed transfers of funds from national revenues and had limited powers to raise money directly through local taxes.

However, compared with the elaborate institutional infrastructure of regions, their exclusive powers were not extensive or particularly significant. Powers that the regions had concurrently with the central authorities were of greater significance and could have become the source of considerable authority in regions if the central authorities had supported the development of regional government.

Regional assemblies had competence over local authorities and could direct certain aspects of their work. They exercised general supervision over their affairs. The Constitution guaranteed the system of local government providing it with a basic structure. It directly gave it considerable authority over land, especially Trust Land.

The federal system required the central government to consult with and, in some cases, secure the consent of regional authorities before the central authorities could make certain decisions (for example, about land, the Judiciary, and police). This was despite the fact that the regions' exclusive powers were limited, that central authorities had several powers of intervention in regional affairs and the power to direct some of these affairs. Decisions over specific matters required a large majority for the decision-maker to mobilise significant support for its policy. These rules played the role of facilitating consensus decisions and reducing arbitrariness.

(ii) *The Electoral System*

At both the national and the regional levels, members of the legislature were elected based on single-member constituencies. The method of voting was not specified in the Constitution, but the legislation provided that the candidate who obtained the largest number of votes would win – even if the largest number did not amount to a majority (that is, more than 50% of the votes cast).

Historically, this voting system (often described as ‘First Past the Post’) does not favour minority representation. Regardless of their large numbers, women in this system remain minorities and are not well represented.

In Kenya, where different communities live in separate and discrete geographical areas, this system could ensure their representation, but not representation of small communities living in constituencies dominated by larger communities. Nor would it ensure minority representation in urban areas where populations are composed of different ethnic origins. People with special needs, such as those with disability, remained unrepresented, too. However, there seems to be little evidence that other systems of election or voting were demanded or discussed.

(iii) *Amendment Procedure*

The complex arrangements under the Independence Constitution were, for the most part, controversial. Therefore, the Constitution provided that they could not be easily altered or removed. For the purposes of amendment, the provisions of the Constitution were divided in two categories, ordinary provisions and specially entrenched provisions.

The ordinary provisions were amended by an affirmative vote of three quarters of all the members in each house of Parliament. If a Bill failed to secure this degree of support, it could be referred to a referendum of all registered voters, and if it was supported by two thirds of all those who voted, it could then be reintroduced in Parliament and enacted by a simple majority of the members present and voting of each house.

The specially entrenched provisions could only be amended by a vote of three quarters of all the members in the House of Representatives and nine tenths of all Senators. These provisions, which included the chapters on citizenship, fundamental rights and freedoms, and the Judiciary, were principally concerned with *majimbo* and the Senate.

Although both procedures represented a high degree of entrenchment, in practice, it proved quite easy to amend the Constitution – because soon after independence, KADU merged with KANU and Parliament became a one-party legislature.

In 1965, the government had enough parliamentary support to amend the amendment procedure itself so that in future a vote of two thirds of all the members was sufficient for any constitutional provision, thus also removing the distinction between ordinary and specially entrenched provisions.

3.2.2 General Assessment of the Independence Constitution

The Independence Constitution was inherently defective in a number of respects. First, it did not refer to the people's struggle for independence, nor did it specify national values or aspirations or the principles for exercising the powers of state or its organs.

Second, although the Constitution did incorporate important values, most of these were obscured by the style of drafting, which made it inaccessible to most Kenyans, including some lawyers!

Third, while the Constitution provided for a democratic system, there were inadequate provisions for separation of powers and insufficient participation by the people in the affairs of state.

Fourth, the system of *majimbo* and local government, which was the primary feature of the Constitution, was so detailed and complex that it required, for its operation, the will of political leaders at all levels to compromise, as well as high administrative skills. It also permitted extensive intervention by the central government in regional affairs, and this would undoubtedly have been a source of great conflict.

Finally, the Bill of Rights was marked by a limited vision; it had room for too many limitations, and ignored social and economic rights. Although its dominant theme was distrust of state power, there were few mechanisms for complaints against public authorities.

3.3 Constitutional Changes after Independence

3.3.1 The Nature of Constitutional Changes

Constitutional changes since independence can be divided broadly into three categories. The first category was directed at restoring the authority of the central government throughout the country, on all matters, with subsequent heavy reliance on provincial administration and removal of *majimbo*.

The second category comprised amendments directed at strengthening the powers of the Executive, particularly those of the President, often at the expense of the constitutional principles of democracy and accountability.

The third category was directed at reversing some of the provisions introduced to increase Executive and presidential powers by restoring elements of democracy and accountability.

The first two categories were introduced at the initiative of the government of the day, and the last was in response to pressure from civil society and political opposition as well, more significantly, as the international financial institutions and national donors who demanded that certain conditions be met.

(a) *Restoration of the Centralist State*

A fundamental change on the first anniversary of independence converted Kenya from the status of a Parliamentary Dominion into a Republic with an executive President. Consequently, the Queen, represented by the Governor-General, ceased to be the Head of State.

More important, however, was a change in the system of government. The amendment merged the offices of the Head of State and the Head of Government and transferred the powers of the Queen to the Prime Minister, Jomo Kenyatta.

The changes did not, however, introduce common safeguards usual in a presidential system, such as the complete separation of powers between the Executive and the

Legislature or impeachment of the President. Instead, the President now had power to dissolve Parliament at any time in his or her absolute discretion. He or she obtained a veto over legislative Bills, a power which the Governor-General did not have.

The merger of the offices of the Prime Minister and the Governor-General created a powerful presidency. It was further reinforced by subsequent amendments to be discussed below. In the somewhat hybrid nature of the political system that resulted, the President, who is also a Member of Parliament, was liable to a vote of no confidence. This introduced conflicts of interest and blurred the lines of responsibility, diminishing, among others, the role of the Legislature and its ability to control or monitor the executive.

On *majimbo*, the central government made it impossible for the regional governments to be properly established by denying them their independent secretariats and financial resources.

Further, there seems to have been an understanding among leaders that those provisions that they disapproved of or regarded as imposed by the British would be repealed once independence was granted. Consequently, most of the powers of the regions, which were not specially entrenched, were repealed on the first anniversary of independence. Powers over the police and public services were restored to the central government. Soon after, provisions guaranteeing fixed revenue for the regions were removed. Thus the *majimbo* system was effectively destroyed in little more than a year after independence.

The constitutional protection against the redrawing of regional and district boundaries or the creation of new regions or districts was removed in 1964 and 1968. In 1968, regional institutions, now effectively bereft of all power, were finally abolished. The Senate, originally established to protect *majimbo*, was abolished in 1968 and all senators got seats in the new Assembly, whose life was extended by one year.

An important consequence of the abolition of regional structures and governments was to reinstate the system of provincial administration which had enabled the central authorities to dominate affairs in all parts of the country – thus power was intensely centralised again.

(b) *The Rise of Presidentialism*

Once the regional structure of government was dismantled and the basic characteristics of the colonial state restored, constitutional changes were redirected towards strengthening presidential power. This was done by first, weakening the authority of Parliament, restricting the arena of political discourse and secondly, subordinating the holders of constitutional offices to the whim and pleasure of the President.

The first of these was achieved in a number of ways. Under an amendment in 1966, a new station was enacted requiring a Member of Parliament elected with the support

of a party and who leaves that party and forms or joins another political party, to resign and seek a fresh mandate from his/her constituents.

Although an attempt was made to justify this principle on the basis of theories of democracy and representation, the amendment was motivated by the desire to curb the emergence of opposition to KANU led by Oginga Odinga who had formed the Kenya People's Union, a party that had attracted a number of KANU MPs. The amendment was rushed through Parliament in a day by suspending Standing Orders which required notice of Bills.

A further amendment in early 1967 was, however, necessary to catch the MPs who had defected and who had petitioned the court against vacating their seats as the amendment was not retrospective. This other amendment, specifying that the original amendment operated retrospectively, was taken through Parliament in an equally rushed manner. This was done as the court was still considering the MP's petition. In 1966, too, an amendment had led to loss of the seat of any member who was absent from the House for eight consecutive meetings without the Speaker's permission.

In an unusual move, the President was given power to waive this rule in any particular case. The fact that the President, rather than the Speaker could waive the rule, suggested that the motive for the amendment was to deal with 'difficult' members. It was another device to increase the powers of the President. Another amendment led to disqualification of a Member of Parliament convicted of an offence and sentenced to a prison term of six months or more. Given the effective control the government had over prosecutions, it was widely assumed that this amendment was also motivated by narrow political considerations.

That same year, the checks and balances system established in the Independence Constitution and designed to limit the use of emergency powers was severely diminished. Whereas for a resolution authorising the use of emergency powers, the executive originally had to go to Parliament within 7 days after a declaration of an emergency, a constitutional amendment in 1964 increased this period to 28 days.

In addition, the 65% majority required to approve such emergency powers was lowered to a simple majority. Originally, emergency powers were valid for only two months at a time, but an amendment in 1965 extended this to three months and, in 1966, removed this time restriction altogether so that these powers became available to the Executive indefinitely.

The National Assembly could bring the use of these powers to an end only if a majority of all its members voted to do so. The 1966 amendments allowed much greater divergence from protecting of fundamental rights and freedoms than previously.

Thereafter, what were intended to be special powers to be used in emergencies became residual powers of the administration. In respect of North-Eastern Province, these powers were set out in the North-Eastern Province and Contiguous Districts Regulations of 1966, which were used to suppress fundamental rights and freedoms and perpetrate atrocities for more than two and a half decades. These atrocities

included the Bula Kartasi Estate Massacre in Garissa in 1980, the Wagalla Massacre in Wajir in 1984 and the Malka Mari Massacre in Mandera in 1987.

In 1968, the Constitution was amended to give the President further leverage over the National Assembly, giving him the power to appoint the twelve nominated members of the Assembly. Previously, such members, then known as specially elected members, were elected by the Assembly itself.

In 1975, the Constitution was amended to give the President the power to disregard, in any case, the rule that if a person was found guilty of an election offence, he or she could not contest elections for five years. This amendment was passed, in one afternoon, after Paul Ngei was found guilty of an election fraud. The President used the amendment to lift the restriction on Ngei.

The arena of political discourse was severely restricted when Kenya was converted from a *de facto* into a *de jure* one party-state. This was achieved through an amendment in 1982 that prohibited the operation of political parties other than the Kenya African National Union. This amendment was made to forestall attempts by Oginga Odinga, George Anyona and others to form an opposition party, and ended a long period when Kenya was a *de facto* one-party state.

As a result of this amendment, anyone aspiring to political participation or a political office had to become a member of KANU. All political opposition was banned (and leading politicians and others opposed to the government were detained without trial). In this way, crucial pillars of a democratic system – the right to form political parties or similar associations, to lobby for alternatives in law and policy, to mobilise public opinion, to scrutinise and criticise the acts of the administration, and to seek change in government through a vote of no confidence or in a General Election were destroyed. The subordination of holders of constitutional office to the pleasure of the Executive was achieved by removing safeguards necessary for maintaining fair administration, neutrality of public institutions, accountability of government, and the protection of rights in general.

First, a series of amendments eroded the neutrality of the public service. In 1964, the power to appoint members of the Public Service Commission was taken from the Judicial Service Commission and given to the President. In 1966, the President was given the power to appoint and dismiss public servants. In 1968, the prohibition on public officers from appointment to the Commission was retracted. In 1988, the security of tenure of Commission members was removed.

Second, the independence and integrity of the Police Force was severely dented by abrogating in 1966, the Police Service Commission and the operational autonomy and security of tenure of the Inspector-General of Police. This led to rapid politicisation of the way in which police functions were discharged and led, especially to the suppression of opposition rights.

Third, in 1986, a far-reaching amendment removed the security of tenure of the Attorney-General. Hence, he or she, could be dismissed by the President. The exercise of the functions of that office, which include providing independent legal advice to the government, and impartial prosecution, were henceforth exposed to

political influence. In 1986, too, the security of tenure of the Controller and Auditor-General was vetoed, thus reducing the independence of that office. In 1988, the security of tenure of judges of the High Court and the Court of Appeal was repealed, making their continuation in office dependent on the President's will.

(c) Deconcentration of State Power

The Independence Constitution had established a regional system of parliamentary government, with an executive, an independent judiciary with security of tenure; and an independent Electoral Commission; a multi-party system of government; a Bill of Rights and freedoms; and safeguards for minority rights, including majimbo.

The separation of powers and checks and balances were central to it. By 1988, most of these provisions had been removed or diminished and replaced by a powerful presidency and party. There is no doubt that the Independence Constitution was complex and over-elaborate and that some simplification was necessary. But the reformulation of the Constitution went beyond the objective of simplification. There was enormous concentration of power.

The Constitution was used to undermine and ban the opposition. The rights of individuals and communities were diminished, detention without trial being a frequent method to break up the opposition. The Constitution was not treated as an important document which established either a contract or formed the fundamental charter of government. Constitutionalism was not valued.

Changes were directed at ensuring political advantages for the ruling party or to deal with political dissidents. Amendments were made retrospective when it suited the purposes of the ruling party. Many amendments were introduced without adequate notice and rushed through the National Assembly in a matter of hours by suspending the Standing Orders. Far from being a contract or a device for democracy and accountability, the Constitution was rapidly turned into an instrument of control and oppression. Under these circumstances, corruption also became rampant.

Consequently, Kenyans lost respect for the Constitution and confidence in the political system. Few public institutions enjoyed legitimacy and most lost the ability to resolve differences among the people or political parties and develop a consensus. Kenyans were unable or unwilling to defend the constitutional values and processes – largely because they had played no role in determining them. The demand for reviewing the Constitution arose from the dissatisfaction with the way in which its valuable aspects had been removed and the nature of political power that had emerged as a consequence.

Many political, social and economic problems that the country faced were attributed to the Constitution and the political system. This was at a time when contemporary societies were dismissing military or one-party regimes elsewhere. Talk of perestroika (the reforms then taking place in the Soviet Union) was ordinary. With increasing awareness in the civil society of these developments and agitation for reform and pressures from ‘donors’ for reform, the government found it hard to resist change. In the 1990s, therefore, many of the amendments passed in the first three decades of independence were revised.

The security of tenure of the Judges, the Attorney-General, the Controller and Auditor-General and the Commissioners of the Public Service Commission were restored in the next two years after 1990. The provision for a one-party state was repealed and a subsequent amendment prescribed that no person could hold the office of the President for more than two terms of five years each. Further, s.127 of the Constitution and the North Eastern Province and Contiguous Districts Regulations of 1966, which allowed for the application of emergency law over those areas was repealed. In 1997, the Constitution explicitly declared Kenya a multi-party state. In that year:

- (i) the power to nominate members to the National Assembly effectively passed to political parties, which nominated their representatives in proportion to their share of elected seats, ‘taking into account the principle of gender equality’.
- (ii) the membership of the Electoral Commission was increased to up to twenty-four to ensure its independence from any political party.
- (iii) the anti-discrimination provision was amended to include ‘sex’ as a prohibited basis for discrimination; and
- (iv) a number of Acts which restricted civil and political rights were repealed or amended. These included: the Vagrancy Act (Cap 58), the Outlying Districts Act (Cap 104), the Special Districts (Administration) Act (Cap 105), and the Preservation of Public Security Act (Cap 57). Others were the Penal Code (Cap 63), the Societies Act (Cap 108), Public Order Act (Cap 56), the Chiefs Authority Act (Cap 128), the Film and Stage Plays Act (Cap 222), and the Kenya Broadcasting Corporation Act (Cap 221).

3.4 Assessment of the Present Constitution

Although the amendments outlined above represented significant progress towards democratisation and a better protection of rights, and there was considerable liberalisation and expansion of the media, it was, nevertheless, clear that these were piecemeal changes, their function being to lay the foundations for a thoroughgoing review necessary for full democracy, a vibrant civil society and people’s participation.

The most outstanding of these problems remained the dominance by the President over the constitutional structure. Quite apart from the many powers given to the President by ordinary laws, the Constitution vests numerous powers and functions in the President exercisable at her or his absolute discretion. The most important of these are that the President:

1. Is the Head of State and Commander-in-Chief of the Armed Forces, is the Head of Government and repository of the executive authority of the state, is a member of the National Assembly and may attend its sessions as a Member of Parliament. He/she is defined as part of Parliament and has immunity from legal processes while in office, may declare a state of emergency in accordance with the preservation of public security Act and remains in office for several months after the formal end of his or her term of office.
2. Appoints the Vice-President and Ministers and controls their movements in and out of the country. He also appoints Permanent Secretaries, all holders

of constitutional offices including the Chief Justice, judges, members of the Electoral Commission, the Commissioner of Police, the Attorney-General, the Controller and Auditor-General, members of the Public Service Commission and members of tribunal to investigate the removal of holders of these offices.

3. Has power to create public offices and to make appointments to them.
4. Has considerable power over Parliament including veto power over legislation, which the National Assembly can only override by two-thirds majority of all members; may prevent Parliament from considering a Bill or amendment to a Bill with financial implications. He/she may summon, prorogue or dissolve Parliament at any time, may direct that a Member of Parliament who loses his or her seat by missing eight consecutive sessions or having been convicted of an offence retain his or her seat;
5. Exercises the prerogative of mercy; and
6. May take over any Trust Land for specified purposes (s. 118).

The consequence of this concentration of power in the President is that he or she dominates all other organs of the state, negating the principles of separation of powers and checks and balances.

The powers of proroguing and dissolving Parliament and vetoing legislative Bills weaken the National Assembly, which is supposed to supervise and hold the Executive accountable.

The lack of independence of the police force and its lack of accountability to the public means the force can easily turn into an instrument of oppression of the opponents of the regime.

The Civil Service has been totally subordinated to the President and lost its neutrality. The Judicial Service Commission is no longer regarded as truly independent, so that the Judiciary is seen as vulnerable to government pressures.

The combination of the roles of the Attorney-General as an *ex officio* member of Parliament, Cabinet Minister and Chief Legal adviser to the Government has put in jeopardy his independence as a prosecutor.

The absence of any mechanism of impeachment means that a President may violate the Constitution and the law, and abuse powers, with impunity.

The present Constitution encourages personalisation of power, which is the very opposite of constitutionalism. The lack of any functioning accountability mechanism encourages growth of corruption and abuse of public resources. In addition to excessive concentration of power, the Constitution is defective in the following several ways:

First, it does not specify any principles for exercising state powers or national goals and aspirations, nor does it have adequate mechanisms for making and considering complaints against Ministers or officials; the only institution for dealing with complaints is the Judiciary, which is not easily accessible to most Kenyans.

Second, power is highly centralised in the national government, there being no provisions for local government. The provincial administration, the primary instrument through which the central Executive authority is exercised, has no status under the Constitution.

Third, the Bill of Rights is deficient in that:

- Rights can be easily limited or suspended;
- It does not recognise the principle of gender equity;
- It does not protect economic and social rights, which are essential for the basic needs of a large section of the people;
- It does not have adequate mechanisms for enforcing of rights; and
- the duties of citizens and officials are not specified.

Fourth, the Electoral System is based on single-member constituencies with the '*First Past the Post*' system of voting and does not facilitate representation of minorities.

Fifth, rules for citizenship discriminate against women, and the way the rules are exercised discriminates against minorities.

Sixth, no methods or institutions exist for public participation in the affairs of the State, apart only from elections every five years.

Finally, no framework exists for determining of policies on a wide range of critical issues such as land, foreign relations, treaty-making and education. The rules for amending the Constitution neither sufficiently protect important institutions or procedures nor recognise some provisions as more fundamental than others and give them greater protection.

3.5

Conclusion

The primary purpose of the Independence Constitution was to acknowledge and assert the sovereignty of the people of Kenya and to transform the colonial state from an instrument of domination to a democratic state for the people's welfare. Due to the primacy given to the administrative practices of the colonial period, and with numerous amendments to give an elected President the powers of the colonial governor, the basic characteristics of the colonial state were reinstated and reinforced. These included organization of administration and politics on the basis of ethnicity, distracting attention from social and economic policies, discouraging full and direct people's participation in government, bureaucratic control of resources, absence of independence of security forces, lack of accountability by the state and, most significantly, lack of commitment to any fundamental constitutional principles.

CHAPTER FOUR

THE CONSTITUTION REVIEW DEBATE AND PROCESS

4.1 Pressure for Constitutional Review

4.1.1 The Global Context

Pressure for reform, especially in the last decade of the 20th Century, was not unique to Kenya. It was part of an evident global wave of democratisation and constitutional reform. The collapse of the Union of Soviet Socialist Republics and its satellite states in the late 1980s and the consequent reorganization and realignment of geopolitical relationships in Europe, the Americas and Asia proved a most important phase of that wave for Africa.

The New World Order, dominated by the global capitalist market, increasingly allowed states and societies to participate fully in the international system only if they accepted and practised the free market economy. Many states had undergone revolutionary changes, either with the overthrow of Communism or with the end of one-party or military regimes; and there was a need for new constitutional instruments, which were often a result of struggles and efforts by the civil society, that placed high values on public participation in governance. Thus, due to both international and domestic circumstances, concepts of a liberal Constitution were adopted in numerous countries. Particular emphasis was placed on democratising constitutions, constitutional norms, and institutions that would facilitate the full establishment of democracy.

More specifically, emphasis on constitutional reform was placed in three main areas:

- (a) Parliamentary democracy, whereby new constitutions were designed to confer full legislative authority on an elected assembly responsible for installing and sustaining the executive arm of government. Political parties became the main instruments of representation and rule.
- (b) Diverse efforts to decentralise, arising from the fact that emphasis on highly centralised states in pre-Second World War Europe had been one of the causes of the war. However, federal models varied from state to state, depending on each one's historical underpinnings.
- (c) Greater demand for the recognition of civil and political rights, with most of the post-war constitutions proclaiming, in different ways, respect for basic civil and political rights.

4.1.2 The African Context

The developments mentioned above had a profound effect on African politics in at least two ways:

- (a) They led to disengagement by the Eastern bloc of countries and, to some extent, the United States of America from African affairs. In some countries, this led to the collapse of economic, military, and political support for domestic elite.

- (a) They led to disengagement by the Eastern bloc of countries and, to some extent, the United States of America from African affairs. In some countries, this led to the collapse of economic, military, and political support for domestic elite.
- (b) They led to a spread of liberal ideas on state organization, thus challenging in a most fundamental way, the ideology of the developmental state still prevalent among African elite.

The immediate consequence of these was to open political space for internal dialogues in most African countries, leading rapidly to pressure for constitutional reform. Often called Africa's "second liberation," this pressure was exerted by civil society organizations and disenchanted political elites. They engaged in demonstrations, media campaigns and politics to force ruling regimes to embrace liberal constitutional values.

From the early 1990s, there was considerable political change on the African continent. The spectre of coups and counter-coups that characterised much of the 1970s and 1980s began to give way to other processes of transfer of power. Hence, by the end of the decade, the majority of African states had undertaken constitutional reforms to introduce legalised political oppositions. Moves had been made towards electoral reforms and there had been a general relaxation of government controls on the political activities of citizens, accompanied by an increase in the freedoms of expression, press and association.

Building upon the gains made in the 1990s, Africa seems to have entered a new phase of constitutional development; namely, concern with ensuring that constitutional values were indeed internalised and adhered to. Three main features largely marked this phase:

- (a) Perceived lack of commitment by the ruling parties to the new political or constitutional orders developed in the last decade.
- (b) Weak commitment to legal review to bring about greater consistency between constitutions and existing laws.
- (c) Continued frequent violation of existing laws, including constitutional provisions, and with impunity.

Particular concerns in this respect were the issue of levelling the playing field for all political actors. Another was the attainment of independence and impartiality of vital institutions such as the Judiciary and electoral bodies charged with managing and overseeing the constitutional process. A major characteristic of this phase in the process was the attention paid to the importance of constitutionalism by insisting that the constitutional review process produce constitutions that, while adhering to universally proclaimed rights, also suit each country's peculiar political, social and economic realities. Kenya's current constitutional review process grapples with these issues.

4.1.3 The Kenyan Context

Years of a national clamour by the people of Kenya for a constitutional review to make the Constitution a better instrument in their service have passed. There has been dissatisfaction with the way in which valuable sections of the Independence Constitution were changed and power concentrated in the President. Indeed, the many political, social, and economic problems facing the country were attributed to deficiencies in the Constitution. As noted earlier, the reform movement was after 1990, influenced by a global pro-reform wind. The call for reform was motivated by the need to update and improve the current Constitution. It was not, as in Uganda, South Africa and Eastern Europe, a call for a radically new Constitution.

Demands for a systematic review of the Constitution were made as early as 1990 to the KANU Review Committee, headed by the Vice-President Prof George Saitoti. Amendments that caused concern were: one-party rule, detention without trial, removal of security of tenure from judges, the Attorney-General and the Auditor-General, and the weakening of the principle of separation of powers. However, no action was taken as the KANU Review Committee considered these matters to be outside its mandate.

The pressure for a review heightened as the movement for the restoration of multi-party politics started in the early 1990s, led by the Citizens' Coalition for Constitutional Change, (4Cs) and religious organizations. A large number of organizations, religious and secular, NGOs and political groups joined this movement. Some examples are the National Council of Christian Churches (NCCK) the Episcopal Conference of Catholic Bishops, the Law Society of Kenya (LSK), the International Commission of Jurists Kenya Chapter (ICJ(K), and the Kenya Human Rights Commission (KHRC). Immense pressure was also brought to bear by women's organizations for provisions on affirmative action to be adopted during negotiation and review.

Some groups unsuccessfully demanded comprehensive reform of the Constitution before the General Election of 1992. The demand for a comprehensive review gained momentum after that election. It was clear that the provision in December 1991, to repeal the one party-rule before the Election was, by itself, insufficient to democratise politics, increase accountability by officials and ensure policies that are more responsive. In 1994, Catholic Bishops issued a pastoral letter calling for a new constitution to truly make meaningful changes.

Meanwhile, a proposed new Constitution, titled *Proposal for a Model Constitution*, was prepared and circulated by the Kenya Human Rights Commission, the Law Society of Kenya and the International Commission of Jurists Kenya Chapter. This proposed Constitution formed the basis of extensive consultations and workshops from 1994 onwards, organized by civic, religious and political organizations.

The *Model Constitution* claimed the civil society's right to demand a constitutional review. In view of the popular support for a review, the Government in January 1995, announced plans to invite foreign experts to draft a Constitution for consideration by the National Assembly. However, this proposal came to nought and civil society pressure for review through a people's convention was on a high tempo. Mass action was resorted to, leading to violence and deaths. In August, 1997, reacting to a stagnation in the efforts, parliamentary political parties, including those that supported the initiatives

of the National Convention for Constitutional Change, formed their own forum, the Inter-Parties Parliamentary Group (IPPG).

The IPPG agreed to a number of reforms to be implemented before the General Election of 1997. These included the independence of the Electoral Commission, repeal of a number of laws restricting civil and political rights, such as freedoms of association and expression by political parties and annulment of the offence of sedition that was being used to clamp down on people who agitated for their rights. But these were only interim reforms to ensure fair elections, after which a comprehensive review would be undertaken in accord with the Government's position. As a result of the early dissolution of Parliament, not all the proposed reforms were enacted. However, as part of the IPPG package, the Constitution of Kenya Review Act (1997) came into force as the machinery required to meet the goals of post-election constitutional review.

The 1997 Act did not satisfy all the interested parties. For, being initiated by the Government through the Attorney-General, without consulting either the Official Opposition or the civil society on substantive issues legislated by the Act, Kenyans thereby rejected the review process. They viewed it as a self-serving governmental mechanism. They demanded an opportunity to participate in the constitutional review process. Consequently, negotiations with a large number of stakeholders were entered into at Nairobi's Bomas of Kenya and the Safari Park Hotel between June and October, 1998. The aim was to identify an acceptable framework for the process. The result was that the Act was amended in 1998 to reflect the consensus reached during these negotiations. The salient features of these amendments were provisions for:

- 1) A Review Commission made up of twenty-five members nominated proportionately, by stakeholders, not the President;
- 2) A time-bound procedure for nominations;
- 3) Appointment of nominated Commission Members by the President;
- 4) Implementation of the one third policy for women representation; and
- 5) Structures of the review process to reflect the "bottom-up" approach, a people-driven, constitution-making process.

These principles were not, however, implemented since the major parties (particularly Parliamentary political parties) disagreed on the process of nominating of Commissioners. The ensuing stalemate resulted in each protagonist resolving to proceed singly guided by distinct approaches.

One group, the *Ufungamano Initiative* backed by national religious organizations and organs of the civil society, appointed a People's Commission of Kenya (PCK) structured on the provisions of the amended review Act. Despite constraints, such as limited financial resources and lack of parliamentary support, the *'Ufungamano Initiative* proceeded, nonetheless, to collect the views of the public on constitutional issues.

The other was a parliamentary process backed essentially by KANU and allied political parties. This group established a Parliamentary Select Committee to determine what

instruments would be necessary for a comprehensive review of the Constitution. This led to further amendments to the Review Act in 2000. The amendments introduced substantial changes in the legislative framework as agreed in 1998. Among these were that:

- the size of the Commission was reduced from twenty-five to fifteen Commissioners plus two *ex officio* members;
- these Commissioners would be appointed on merit, after the Parliamentary Select Committee had considered applications and conducted interviews;
- ethnic, geographical and social diversity would be considered during the selection process; and
- the President would appoint the Commissioners following their nomination by the Parliamentary Select Committee.

Following this amendment, the Constitution of Kenya Review Commission was finally established and fifteen Commissioners appointed in November, that year. The existence of two separate processes was obviously unsatisfactory. There was a danger that two opposed review Commissions would intensify political conflict, even cause violence, and that their results would not be adopted as the expected new Constitution since neither party had sufficient votes in the National Assembly. Efforts to bring about a merger of the two processes were undertaken by the Chairperson of the CKRC by facilitating negotiations between the Steering Committee of *Ufungamano* and the Parliamentary Select Committee. Sensing the deep and widespread wish by Kenyans for a common process to promote national unity and peace and to produce a Constitution enjoying nationwide support, the negotiating parties took several courageous decisions that led to the merger.

The Review Act was again amended in May, 2000, to incorporate the terms of the merger agreement. Twelve Commissioners were, as a result, added to the membership of the CKRC. Neither commission had stood still during the negotiations. At the time of the merger, the PCK had held hearings in all but one province and had collected a large number of views and recommendations from organized groups and individuals. The CKRC had set up an elaborate committee system, most of which had met several times to discuss programmes for civic education, publicity, research and drafting, and the fiscal and logistical requirements of the Commission. The Commission benefited greatly from synergy once the two groups merged.

One advantage in the long drawn out negotiations for a common process was that during this period, there were numerous meetings and workshops to scrutinise the current Constitution and debate the goals of reform. A national consensus was reached on the principal goals of reform. A number of organizations, mostly NGOs, were established to research on and lobby for reform on specific matters, such as the electoral system, land, the legislature, human rights, gender and minorities, disability, poverty and basic needs, the environment, corruption and public accountability and the economy.

4.2 The Legislative Framework for the Review

4.2.1 The Spirit of the Review Act

We have already seen that: -

- The Independence Constitution was not made directly by the people. When Kenya became independent, it was negotiated at Lancaster House in London between the British government and representatives of Kenya's political parties who were members of the Legislative Council.
 - The people of Kenya were not consulted and the Constitution itself was adopted by the British Parliament, not by Kenya's Legislature.
 - Since then, the Constitution has been changed many times, though some changes have been reversed. The people had no say in the making of these changes, most of which were rushed through Parliament; no public discussion was allowed.

The spirit and approach of the Review Act was fundamentally different. The Act placed people at the centre of the review process, referred to in popular terms as '*people-driven*'. It aimed to be a participatory and inclusive process. Since a Constitution is a contract between the people and the State for the governance of society, two aspects of Constitution-making are vital. The first is the *process and procedure* by which the contract is negotiated and adopted. The second is the *content* of the Constitution, that is, the outcome of the process.

On the process, the Constitution of Kenya Review Act prescribed, in detail, the organs of review and the procedure they had to follow. On the content, the Act set out the object and goals of review based on a prior consensus among the key stakeholders. The object and goals of review, which were fairly comprehensive, were binding on all organs of review. But the rules and institutions to achieve the goals were to be decided by the people.

4.2.2 The Object and Goals of Review

All modern Constitutions have a great deal in common, covering certain standard topics. There is a global consensus on the uses and limits of public power and a growing convergence of views as to how these objectives might be secured through laws and institutions. However, constitutions must also reflect local cultures and realities. We begin by looking at the guidelines set out to ensure achievement of the Review object. It is not unusual, as Kenya has done, to prescribe certain values that must be safeguarded in the Constitution.

The objectives of the Review address, what are generally considered to be the weaknesses of the present Constitution, and are binding on all organs of review, as outlined in section 3 of the Act.

(a) *National Unity and Ethnic Identity*

The most important object of the review is to *guarantee peace, national unity and integrity* for the Republic of Kenya in order to safeguard the well being of the people (sections 3(a) and 3(h)). The same objective underlies another purpose of the review. It seeks to enable Kenyans to resolve national issues based on *consensus* (section 3(k)).

Similarly, the Act requires the new Constitution to respect ethnic and regional diversity and communal rights, ‘including the right of communities to organize and participate in cultural activities and express their identities’ (section 3(e)). This goal recognises that people have many identities, apart from their national identity and citizenship, based on ethnic or regional backgrounds, religious or linguistic affiliations, gender or even profession.

The importance of such identities is now being increasingly recognised, as are the rights of minorities, and it is realised that they need not threaten national unity. On the contrary, if acknowledged, they may serve to strengthen national unity and enrich society through diversity.

However, if too much scope is given to ethnic or regional identities, they can threaten national unity, as happened in Yugoslavia, and in some countries neighbouring Kenya. Therefore, an important challenge for the review process is to balance the national identity with these sub-national ones. The act of trying to achieve this balance, which many countries strive for, can give rise to controversy, indeed bitterness. The constitutional concepts used are those of citizenship and individual and groups rights.

Citizenship is an important basis of membership of the national community and, therefore, of a national identity. For a just society to exist that commands respect, it is important that all citizens enjoy the same rights and have the same duties. The Review Act requires an examination of and improvements on the right to citizenship (section 17(d)(ix)).

The principle of equal citizenship may be challenged when ethnic or social minorities demand special rights, which acknowledge and facilitate their cultures or distinctive ways of life. They may regard ‘equal’ or uniform rights as a form of discrimination. Particular groups may even feel that their community values and organization should prevail in the form of ‘group rights’ over the individual or citizenship rights of their members.

The principle of equality is also challenged by the demands that groups make for special assistance or measures, such as affirmative action, in order to overcome discrimination or hardships suffered in the past.

(b) Democracy, Good Governance and the Rule of Law

The new Constitution must establish a democratic system of government, and the Act identifies some methods for achieving this goal (section 3(b)). First, there must be good governance, which means that:

- the process of government must be transparent;
- public authorities must be accountable to the people;
- the administration must be fair;
- public officers, including ministers, must be free from corruption or other forms of abuse of power;

- state resources must be well managed; the Act requires that the system of managing and using public finances be improved (section 17(d)(viii)); and
- civil society organizations should have a role in managing public affairs (section 17(d)(xv)).

Second, there must be separation of powers; the powers of state must be divided among its various organs. These organs should be independent and there should be maximum ‘checks’ and balances between them [(section 3 (c) and section 17(d)(i))]. ‘Checks’ mean that one organ of state restrains another (thus the courts review and can declare invalid laws passed by Parliament). ‘Balance’ means that the power of one organ must be balanced by that of another (an example is that the Executive has the power to appoint senior officials but the appointment requires consent by the Legislature).

A democratic system of government must be based on free and fair elections (section 17(d)(iv) and include constitutionalism, the rule of law, human rights and gender equity. The rule of law requires that the exercise of state powers must not be arbitrary or discriminatory and that all state organs must act in accordance with the law.

The Judiciary should be independent to ensure that the government acts lawfully at all times. The powers and organization of the Judiciary are expressly made a topic for review by the Act, ‘aiming at measures necessary to ensure the competence, accountability, efficiency, discipline and independence of the Judiciary’ (section 17(d)(iv)).

The closely related concept of constitutionalism is broader, implying that the spirit as well as the letter provide for fair and good government and should be respected by all, including the government. It requires that the powers of state organs must be limited. One way in which the Act envisages that constitutional governance is be facilitated is by the establishing or improving *independent constitutional commissions* (section 17(d)(iii)) (see below).

(c) Human Rights

All modern Constitutions guarantee human rights. In addition, several international and regional treaties commit states to protect rights within their borders. The Review Act regards the protection of human rights and gender equity, along with constitutional governance, ‘as an indispensable and integral part of the enabling environment for economic, social, religious, political and cultural development’ (section 17 (d)(iii)). The importance of human rights is shown in another objective creating conditions conducive to a free exchange of ideas (section 3(i)).

Through international treaties, Kenya has undertaken to protect human rights, and the Act requires these and other international obligations to be implemented (section 17(d)(xiii)). These include the rights of women and children, to which the Act directs special attention (section 17 (d)(iii) and (xi)). One of the purposes of another review goal, regional and international co-operation, is to ensure support for democracy and human rights (section 3(g)).

(d) *Equal Rights for All*

The Act places special emphasis on the essential principle of human rights. On equal rights, the review process is expected to ‘examine and review the socio-cultural factors that promote various forms of discrimination and recommend improvements to secure equal rights for all’ (section 17(d)(x)). This wording shows that the review is not concerned merely with formal guarantees of rights, but is required to examine and remove practical obstacles to human rights, such as poverty, corruption, police brutality, or arbitrary acts by the provincial or district administrations.

(e) *Gender Equity*

The Act has gender equity as an important goal of review. Gender equity is the equal treatment of men and women, especially on opportunities to participate in public affairs, commerce and social life, including the family. The call for gender equity assumes that people (traditionally women) are treated unfairly because of their genders.

Family law or customary law may at times discriminate against women, in the rights to inheritance, custody of children in the event of the family breaking down, commercial law or practices, especially concerning loans, etc. There may also be social prejudices against participation by women in politics or commerce. Women in Kenya are victims of such laws and prejudices. Gender equity should guarantee that women are enabled, through legal reform and social practices, to overcome these obstacles and enjoy the same rights and opportunities as men, even if this means adopting special measures, such as affirmative action, in women’s favour.

The Act places special emphasis on gender equity, which is seen as part of a democratic system (section 3(b)) and as essential for social and economic development (section 17(d)(iii)). For example, Kenya’s citizenship rights and laws have to be examined to ensure gender parity (section 17(d)(ix)).

(f) *Basic Needs of All Kenyans*

An important objective of review is to secure a provision in the Constitution for basic needs of all Kenyans (section 3(f)). Basic needs are those, which are essential to human life in comfort and dignity. They include adequate food, health, shelter, education, a safe and clean environment, culture and economic security. These needs are usually secured by the state, protecting social, economic and cultural rights.

The Act explicitly states that this goal should be achieved by setting up an equitable framework for economic growth and equitable access to national resources. This is extremely important in view of the situation in Kenya, where nearly 60% of the people live in poverty. The situation of the poor is made worse by economic policies associated with globalisation, which, as expressed in structural adjustment policies and aid conditionalities, oppose state subsidies to education, health and shelter. Meeting social and economic rights also requires us to address the enormous disparities of wealth and access to resources by a certain class and some regions that is obvious in Kenya.

(g) People's Participation in Government

Connected to both democracy and human rights is the goal of ensuring people's full participation in managing public affairs (section 3(j)). The Act emphasises accountability by the government and its officers to the people (section 3(c)). Among other measures, people's participation in governance is to be promoted through democratic, free and fair elections, devolution and exercise of power (section 3(d)).

Most world Constitutions lack provisions for direct people participation in public affairs. Switzerland, India, the Philippines, Thailand and California are exceptions. It is clear, however, that periodic elections are not a sufficient valve for people's participation; their engagement has to be more active and continuous.

(h) Devolution of Powers

The review process is required to examine and review the place of local government in the Constitutional organization and the degree of devolution of power to local authorities. The review is required to consider whether Kenya should be a federal or a unitary state (section 17(d)(ii)).

Devolution means that some constitutional powers are given to structures at a lower level than the central government. This can be done in many ways. There may be law-making bodies at a local level; there may be just administrative decisions and implementation at local levels. The level may be (in the Kenyan context) provincial, district or lower or at more than one level. The significance of this is that some degree of control is in local hands and that the Constitution should enshrine these powers.

Devolution would be consistent with the general emphasis on the objectives of constitutionalism, public participation and government accountability to the people, which are easier to achieve the more power is brought closer to the people.

(i) Constitutional Commissions and Offices

The Act requires the review process to examine existing constitutional commissions, institutions and offices and to make recommendations for improvement and for new bodies to "facilitate constitutional governance and the respect for human rights and gender equity" (section 17(d)(iii)).

Examples of such commissions include the Judicial Service Commission, which advises the President on appointing most judges; the Public Service Commission, which is responsible for appointing and disciplining most public servants. Others are the Electoral Commission, which has responsibility for conducting national and local elections; and the Controller and Auditor-General, whose tasks include ensuring that the government follows regulations on finances and the conduct of financial audits. However, the scope of their tasks as well as their independence can be increased to make them more effective.

New commissions might include the one to receive and investigate complaints about abuse of power by officials or public authorities; another to implement and supervise

protection of human rights, especially promoting the rights and welfare of women and children.

Modern constitutions have gone beyond the traditional division of powers into the Executive, the Legislative and the Judicial establishing independent commissions and offices. These are supposed to act independently on politically sensitive matters, such as demarcating electoral boundaries, conducting elections and deciding on prosecutions. Commissions should ensure accountability by ministers and public officials, too, by enforcing codes of ethics and other anti-corruption laws. Commissions such as these are instruments for enhancing the protection of people's rights. Institutions such as that of the ombudsman, human rights or equality commissions supplement the protection by the Judiciary.

(j) *Foreign Affairs, Regional, and International Co-operation*

The Act requires the Constitution to promote and facilitate regional and international co-operation to ensure economic development, peace and stability and support democracy and human rights (section 3(g)).

More specifically, the Review must make recommendations on treaty-making and implementation powers of the Republic "and any other relevant matter to strengthen good governance and observance of Kenya's obligations under international law" (17(d)(xiii)).

This indicates commitment to the rule of law in international relations, and provides a basis for strengthening the role of the National Assembly and other national institutions in a manner, which fulfils Kenya's international obligations, which is vital to strengthening international co-operation.

Currently, a constitution cannot be purely a matter of national concern. Most states are members of regional and global organizations, which confer rights and impose obligations on states and their nationals, concerning many subjects. States are bound by international treaties on matters that traditionally form part of constitutions, for example, human rights. The ways in which these obligations are adopted and implemented by a state have profound consequences for national policy and institutions.

4.2.3 The Process of Review

(a) *The Modalities of Review*

One secret of success in a constitutional review process lies in the sequential perfection of the review stages as follows:

- (i) Establish and agree on the need for terms of reference. This initial stage cost Kenya years of negotiation.
- (ii) Agree on the method. Here, Kenya faced even greater controversy. On the one hand was the Government's preferred approach; that the review should be made from the "top", i.e., principally by the political elite as represented in Parliament and assisted by experts, and, on the other hand, the civil society and religious leaders, who wanted a "people-driven" process. The

latter, in which ordinary persons, referred to simply as “Wanjiku”*, would be the main decision-makers, both by presenting their views and electing representatives to a Constituent Assembly to adopt the new Constitution. The dichotomy between the two views was probably false. The review and adoption of the Constitution is a complex and many-sided process in which various skills, talents and different forms of participation are necessary. There is a role for the elite as well as for ordinary people, experts as well as lay people.

- (iii) The other secret of a good process is in a right combination of all the components establishing the balance between them. The principal constituents of the process are to draft constitutional amendments or a new Constitution, and their adoption. Normally, drafting is best left to an expert body while adoption must be the responsibility of a representative body, whether Parliament or a specially convened assembly. The drafting can be left to the expertise of a committee (or even an individual) working in a degree of isolation from the raging national debate and formal submissions to the expert body
 - Historically, almost the world over, constitution-making, both drafting and adoption, was the business of the elite. In contemporary times, the notion of people’s sovereignty is so dominant in public rhetoric that the process has to be participatory, transparent and inclusive. The role of experts is now narrowed to listening to the people and translating their views into constitutional terms, within the mandate of the Review. If necessary, people must be educated on constitutional issues – given civic education– to facilitate their participation in the Review process.
 - The people must subject the draft produced by experts to keen scrutiny, before it is submitted to the Legislature or a specially elected assembly.
- (iii) Finally, the people must endorse the draft in a referendum, or at least vote on those matters that cannot be resolved by the assembly. This more limited form of referendum was provided in South Africa and Uganda, although in both cases, the referendum was avoided due to a broad consensus in the assembly.

The importance attached to people’s participation follows from the nature of the Constitution as a compact among the people on governance. The benefits of public participation are said to include:

- increasing people’s knowledge of constitutional issues;
- enabling people to become familiar with the new Constitution;
- establishing a proper set of agenda for reform (public participation tends to broaden the agenda, especially on social justice issues);
- enabling them to exercise their rights and fulfil their duties under the Constitution;
- facilitating the implementation of the Constitution; and

* “Wanjiku” is a common Kenyan female’s name, and during the review process, it was adopted to refer to the ordinary or average Kenyan person.

- ensuring the legitimacy of the new Constitution and its acceptance as the framework for development of consensus on the formulation and implementation of national policies and settlement of differences.

The Review Act, as successively amended, meets almost all the standards of contemporary constitution-making. It is worth underlining a few fundamental principles required by the Act.

- (i) The review process should be comprehensive, meaning that, apart from the values and institutions, mentioned in the Review Act for specific examination, any other matter can be examined if necessary or desirable.
- (ii) The review process must be inclusive, accommodating the diversity of the Kenya's people, "including socio-economic status, race, ethnicity, gender, religious faith, age, occupation, learning, persons with disabilities and the disadvantaged" (section 5 (b)). As we have seen, the composition of the organs of review is designed to reflect this diversity. The June 2001, merger of the two commissions made the review process achieve this feature.
- (iii) The process must be *open, democratic and accountable* to the people (section 5(a) and (c) (ii)). Meetings of the Commission to receive the public's proposals must be held in open sessions (section 21(3)). The records of the Commission must be made available to the public through public libraries, district documentation centres and the media (section 22).
- The entire review process must be guided by respect for the universal principles of human rights, gender equity and democracy (section (5) (c))
- The Third Schedule to the Act sets out the Principles for a Democratic and Secure Process for the Review of the Constitution, which the Government, political parties, NGOs, Kenyans and the organs of review have undertaken to observe.
- They recognise the importance of confidence-building, engendering trust and developing a national consensus for the process. They agree to avoid violence or threats of violence or other acts of provocation during the review process, and not to deny or interfere with any one's right to hold or attend public meetings or assemblies, or other rights and freedoms.
- (iv) The whole process must be based on *consensus* after all the views have been allowed to be expressed freely and openly, so that the process, as well as its outcome, enjoy the widest measure of national support.
- Apart from the above undertakings, the rules of decision-making in the organs of review reflect the importance of consensus. Decisions on constitutional changes must be made by consensus. If consensus is not reached on any point, decisions must be made by a two-thirds majority of all members of the relevant body (section 21(6) for the Commission, section 27(5) for the Conference and section 47 of the Constitution for the National Assembly).
- The emphasis on consensus reflects the view that the Constitution must be acceptable to the widest cross-section of the country; for it is the basis of governance, laws and policies that affect all Kenyans. If decisions can be reached by a consensus, national unity would be strengthened.
- (v) The highest importance is attached to participation by the people. The organs of review must provide the people 'with an opportunity to actively, freely and

meaningfully participate in generating and debating proposals to alter the Constitution' (section 5(c)(i)). Moreover, they must ensure that the 'final outcome of the review process faithfully reflects the wishes of the people of Kenya' (section 5(d)).

These principles underlying the review process are important not only to ensure a good and acceptable outcome, but also to generate the habits of rational and honest debate, to heal divisions in society, to settle differences through discussion and negotiation and to strengthen national unity and national resolve to identify and tackle the problems facing Kenya.

If the process succeeds in these objectives, it will also ensure a favourable environment and a political culture in which the new Constitution is able to take root and flourish.

(b) *The Organs of Review*

The Review Act establishes several organs of review and gives them specific functions and responsibilities. These are:

- The Constitution of Kenya Review Commission ("Commission" or "CKRC");
- The Constituency Constitutional Forum;
- The National Constitutional Conference;
- The Referendum; and
- The National Assembly.

(i) *The Commission*

The Commission, which is the primary organ of review, consists of 29 Commissioners (of whom two, the Attorney-General and the CKRC Secretary are *ex officio*). Commissioners are appointed by the President upon nomination by the National Assembly, account being taken of Kenya's regional and ethnic diversity. The President appoints the Chairperson from among the Commissioners. The Commission thus reflects Kenya's ethnic, geographical, cultural, political, social and economic diversity, and the principle of gender equity (section 6(5)).

Commissioners are appointed because of their legal qualifications or experience in public affairs (section 8(i)(a) and (b)). The Commission is intended to be independent and cannot be instructed by anyone in carrying out its functions. The tenure lasts until the conclusion of the review process (section 33). Members can be dismissed only by the Commission itself, for a good cause (section 15). They are bound by a code of conduct to prevent conflicts of interests and other improprieties. These characteristics are necessary for discharging of its functions, the principal one being preparation of a draft Constitution.

(ii) *Constituency Constitutional Forum*

A Constituency Constitutional Forum was established for every constituency to debate, discuss, collect and collate the views of members of the public (section 20).

The forums also provided a basis for consulting with the Commission, which facilitated the structural setting up of the forums, but the composition of each forum was determined by the people of each constituency, their political and other leaders.

(iii) The National Constitutional Conference

The National Constitutional Conference ('Constitutional Conference') was to be the most representative body assembled to agree on the Constitution. It consists of 629 members:

- 223 members of the National Assembly;
- 210 representatives of districts elected by the county councils;
- 29 members of the Commission (as non-voting members);
- 41 persons each representing a political party; and
- 126 representatives of religious, professional, women's groups, trade unions and NGOs (section 27(2)), and other interests chosen in accordance with regulations made by the Commission.

(iv) The Referendum

A Referendum is akin to a general election. However, instead of voting for people to represent them, the voters give their views on one or more specific questions. A referendum will be held only to decide those issues not resolved in the National Constitutional Conference.

(v) The National Assembly

The National Assembly will ultimately enact changes to the Constitution, assisted by the Select Committee on Constitutional Reform (section 10).

(c) Stages of Review

The Act anticipated that the review process would be conducted in the following stages, which are described in detail in Volume III of this Report. These were: -

Stage I – Civic education: preparing the people for participation

The first stage was to prepare the Commission as well as the people for the review. The Commission was to examine its mandate and terms of reference, conduct and facilitate civic education in order to stimulate public discussion and awareness of constitutional issues (section 17(a)).

The public was to be enabled to understand and evaluate the present Constitution as well as the constitutional experience of other countries (section 17(c)).

People's awareness of constitutional issues and the review progress were to be facilitated by establishing documentation centres in every district (section 23), as well as through the electronic and print media. The Commission fulfilled this mandate through its own efforts and professional input into its progress.

Stage II – Research, studies and seminars: defining the issues

The Commission conducted many studies on constitutional and socio-political issues with a view to defining and operationalising its mandate. It also held many seminars, the proceedings of which are reproduced in Volume V of the Commission's report.

Stage III– Public consultations: listening to the people

Next, the Commission consulted individuals, groups and organizations. In this process, the Commission was required to visit every constituency (section 18(1)(a) and to write memoranda and record oral presentations in urban and rural areas. After the consultations, the Commission was to prepare its report and recommendations, including a draft Bill to alter the Constitution (section 26(7)).

The Act required that the Commission’s report and recommendations must reflect the people’s wishes as expressed to it (section 5(d)). The expertise as well as the independence of the Commission should ensure that the objects of review stipulated in the Act are given effect and that the national interest is given priority over party or factional interests.

Stage IV– Writing the report and preparing the draft bill

The Commission was required to analyse and collate the views of the public and, on the basis of these, to write a report and prepare a draft Bill to alter the Constitution. Pursuant to this aspect of its mandate, the Commission developed an analytical scheme enabling it to process all data received by it and to present them at the national, provincial, district and constituency levels.

Stage V – Debating the Commission’s Report and Recommendations

The next stage of the review was distribution of the report, recommendations and the draft Bill prepared by the Commission to the public and the civil society.

4.3.

Conclusion

The Review Act set out one of the most detailed legislative frameworks for reviewing a constitution. The procedure outlined above emphasises the independence and autonomy of the review process. The Act specifies the composition and responsibilities of different organs of review. It prescribes a timetable for the different tasks, the most independent of these organs being the responsibility for observing the procedure and the timetable. Once the draft Constitution and the Commission’s final report are ready, the draft Constitution goes straight to the National Assembly, and not through the government. The Commission Report (and other documents) are released by it directly to the people. During the whole process, a central role is given to the people. The goals of review – democracy, the rule of law, diffusion and accountability of state power, protection of rights and freedoms, meeting the basic needs of all Kenyans – have the people’s support. The emphasis throughout is on consensus.

CHAPTER FIVE

SOCIO-ECONOMIC AND POLITICAL CONTEXT OF THE REVIEW PROCESS

5.1 Defining the Context

The constitutional review process took place at a time of serious socio-economic and political stress at all levels of the polity. Although most of this was the result of several decades of poor economic management and bad governance, the general economic recession in Africa also had much to do with the hardship.

We examine in this chapter, the salient features of this tension as a backdrop to the many fears and concerns which Kenyans expressed to the Commission in the process of public hearings and presentation of memoranda.

5.2 The Social Context

An important feature of that stress was and remains the social environment in which livelihood concerns are contested and resolved. Of particular concern here are issues such as social welfare, food security, health and health care, education and shelter.

5.2.1 Social Welfare

Although the Government had set, as its primary goal, to attain universal coverage in basic social services by the end of 2015, all indications are that this is unlikely. For a start, spending in the social sector as a percentage of the gross domestic product has been falling rapidly in the last ten years. There has also been a decrease in per capita investment in the social sector.

At the beginning of the economic reforms, the government promised to provide social safety nets for the poor but this has not been realised due to poor economic performance and declining external funding. A study on *Basic Social Services in Kenya* in 1998, records that public expenditure on basic social services declined from 20% in 1980 to about 13% in 1995. The share of government expenditures on Basic Social Services in the GDP declined from 5% in 1980 to around 4.5% in 1995. The result has been a steady increase of human rights violations, corruption and criminal activities as well as social and religious intolerance leading to instances of communal/ethnic violence.

5.2.2 Food Security

Hunger eradication was targeted soon after independence, as recorded in *Sessional Paper No. 10 of 1965*. The Paper stated that hunger could be eradicated only through increased food production and land reform involving adjudication, consolidation, transfers and resettlement.

The need to address the micro-level food security issues is discussed in Sessional Paper No. 1 of 1986 on Economic Management for Renewed Growth, the Household Food Security and Nutrition Policy of 1988 and the National Development Plan 1984-1988.

Past and present analyses show that Kenya has retained the capacity to feed its people, produce surplus food for the market and be broadly self-sufficient in food. Yet, a large segment of the population remains hungry and malnourished. The gains made in gross increases in food supplies have been unevenly distributed with a significant proportion of the population experiencing extreme food insecurity and undernourishment. As a result, the increasing intensity of hunger, malnutrition and food insecurity remains a threat to the efforts aimed at meeting the national development and poverty eradication goals.

The prevalence of chronic under nutrition from 32.1% in 1987 to 34% in 1998 (*National Development Plan 1997-2001*). Based on the FAO/WHO recommended daily allowance of 2,250 calories per day per adult, the incidence of food poverty was estimated at 51% in rural areas and 38% in urban areas in the year 2000. Although Kenya has realised modest improvement in per capita daily calorie intake from 1887 calories per day in 1990 to 1968 calories per day in 1998, this is still far below the minimum target of 2,300 calories per day.

While policy ineptitude has been blamed on the worsening food security and nutrition situation in Kenya, the impact of poverty is complicating the situation further. Due to depressed investment in the agricultural sector, Kenya no longer enjoys the advantage of regular food surpluses to cushion the impact of crop failure often attributed to highly variable climatic conditions and natural disasters, such as droughts and floods. Moreover, the rapid increase in the cost of agricultural inputs has led to structural deficits in food production.

5.2.3 Health and Health Care

In the early 1980s, it was clear that the politics pursued by the government had a direct impact in the improvement of Kenyans' health status. The cumulative gains showed that the crude death rate dropped from 20 per 1,000 at independence to 12 per 1,000 in 1993; and the crude birth rate dropped from 50 per 1,000 to 46 per during the same period. Similarly, the infant mortality and life expectancy as basic indicators of the health status improved dramatically. This was accompanied by massive expansion of the health infrastructure. There was, therefore, a lot of hope to meet the Health for All goal by the year 2000.

However, the 1990s recorded deteriorating health situations set against a backdrop of complex epidemiological, social, economic, political and globalisation factors that posed equally complex problems in health needs and services. Kenya is ranked as one of the countries with the poorest health status and public health service deliveries in the world. The infant mortality rate increased from 70 per 1,000 live births in 1990 to 74 per

1,000 live births in 1999. The goal was to reduce the rate to 47 per 1,000 by the year 2000 below the target of 50 per 1,000. The under-5-years child mortality rate increased from 97 per 1,000 in 1990 to 118 per 1,000 live births, well below the global target of 70 per 1000 by the year 2000. The target for 2015 was set at 39 per 1,000 live births.

The maternal mortality rate is estimated at 549 per 100,000 live births compared with the global average of 193 per 100,000 live births. Kenya set a goal of 295 per 100,000 for the year 2000 and 148 per 100,000 by the year 2015.

Malaria accounts for nearly 30% of morbidity and government commitment is to reduce the mortality and morbidity due to malaria by at least 30% of the 1995 level by the year 2004. Malaria and respiratory diseases combined account for almost 50% of all reported diagnoses in public health facilities with diarrhoea increasing this to 60% (National Development Plan 1997-2001). Pre-natal and maternal health complications account for 27% of the total disease burden when measured in terms of life years lost.

An estimated 2.2 million Kenyans live with HIV/AIDS, while close to 700 people die every day due to the pandemic. Currently, HIV prevalence is about 7% among adults but in urban areas it is estimated to be between 12 and 13%. In recognition of the growing HIV/AIDS problem, the government declared HIV/AIDS a national disaster towards the end of 1999. Life expectancy dropped from 60 years in 1993 to about 48 years today because of HIV/AIDS. The advent of HIV/AIDS has aggravated the TB burden. Persons with HIV/AIDS get infected more easily with TB. Kenya is one of the 22 most heavily burdened countries, collectively accounting for 80 per cent of TB cases globally.

5.2.4 Education

The government has always stated its commitment to education and allocates 87.2% of its social spending on basic education. However, despite the optimism of the articulated government commitment to education for all (EFA), access to education has been declining.

Over the 1990s, the gross primary school enrolment rate declined over time and across regions from an all-time high of 95% in 1989 to 86.91% in 1999. It declined from 92.19% in 1990 to 87.84% in 1993 and 78% in 1996. This means that many eligible children are still out of school.

Similarly, the school dropout rate has been increasing. For example, only 43.2% of the girls and 45.1% of the boys enrolled in Standard one in 1989 completed standard eight in 1996. Completion rates have remained below the 50% mark.

Although the gender gap at the primary school level is almost bridged with gross enrolment of 49% and 51% for girls and boys, respectively, women's enrolment in national universities was only 30%. Secondary school enrolment has also remained low, at 22.8%. Many primary school learners do not pursue higher education due to poverty and limited public secondary school capacity. Between the 1960s and 1980s,

the government subsidised education in terms of books and equipment and this enabled families to retain their children in school.

5.2.5 Shelter

Over the last decade the urban population grew from 3.8 million in 1989 to 9.9 million in 1999, 34% of the total population. The urban population is projected to grow to 16 million by 2005. As a result of rapid urbanisation, the country is currently experiencing major problems of proliferation of informal urban settlements, insecurity and violence, environmental degradation, and deteriorating public health standards.

Despite this, shelter and human settlement development have remained one of the least priority areas. During the 1990s, the national housing budget averaged not more than 1%. This has been attributed to lack of a clear urban management policy, compounded by archaic and complicated legislation, inadequate development control policies and strategies.

In general, there has been poor performance in the formal housing sector for the last three decades. Available data indicate that over 50% of the urban population live in informal settlements, occupying 5% or less of residential land. This segment of the population lives under unsanitary, overcrowded and environmentally dangerous conditions. Of the urban housing units, 60-80% is being provided by the informal sector, the majority of which is without adequate infrastructure.

Close to 60% of all new housing units are developed on land without legal titles and that tenancies account for 80%. Formal financing accounts for only 20% of the required urban housing, while the remaining 80% is financed informally. Comparable data on rural housing are absent even though housing conditions in rural areas are worse than in urban areas.

5.3 The Cultural Context

The diverse and complex cultural terrain of the population often compounds the social environment described above. Although exact figures vary, Kenya consists of more than 70 ethnic communities clustered into at least 42 groups exhibiting diverse cultures, history, territory, traditions, language and even religion.

Although, historically, cultural communities have lived in harmony and mutual respect, recently, cultural identity has been politicized, thus creating serious inter-ethnic conflicts in many parts of the country. Such conflicts have been fuelled, *inter alia*, by historical differentiations arising from the divide-and –rule tactics pursued by the colonial authorities.

For example, the differing colonial and post-colonial access to modernisation through education and employment has been used to polarise communities against one another. This has led to certain levels of attitudinal, perceptual and prejudicial problems across Kenya's cultural landscape and some very strong feelings of marginalisation by a number of communities.

Indeed, the political establishment has since independence sought to pronounce ethnic identity as a constant threat to national unity while using the same to cause conflict, tension and even civil wars (ethnic clashes). Further, the new state, taking citizenship as the principal unity of state organization, did not explicitly recognise ethnic groups as a locus of political expression and social life. Citizenship was, and is still, seen to provide for the direct relationship between a person and the state. The basic principle of such a state is the formal equality of all citizens, as individuals, not members of communities.

The new government emphasised individualism and the importance of national unity at the expense of cultural diversity and communal rights because indigenous cultures were seen as an impediment to forging national unity and modernism. As a result, no special provisions were made either in the Constitution or in other laws on customary rights on the basis of ethnic, linguistic or cultural policy. Consequently, there is no common, rallying and distinctive national cultural identity. Wearing “cultural” dresses in “official” places such as the National Assembly is banned.

Cultural institutions of governance, such as councils of elders, have similarly been discouraged, not recognised, or ridiculed. National intolerance to given traditional economic activities, such as nomadic pastoralism and hunting – gathering, is all evident in various policy statements and laws.

Nonetheless, as part of the reform movement, there is a growing awareness that affirmation of people’s experiences, values and beliefs is as much a part of building a rich and pluralistic national democratic governance system as is nourishing the cultural manifestation of Kenya’s own identity as a nation-state. It is for this reason that one of the objectives of the Constitution of Kenya Review Act is to ensure respect for ethnic and regional diversity and for communal rights, including the right of communities to organize and participate in cultural functions and expression of their identities. It is in this perspective that the review process must look at:

- the community norms of behaviour attached to customs, laws and beliefs which can constitute serious impediments to realising the objectives of national development;
- the cultural norms and values that may be harnessed for development for the proposed paradigms of governance and development to convincingly, harmoniously and generously guide the process of adaptation and change; and
- clearer delimitation of the responsibilities of both the state and the community and cultural norms in facilitating and stimulating national and local, social, economic and political life and development.

5.4

The Economic Context

Underlying the social and cultural stresses of contemporary society has been massive regression in all sectors of the economy. During the first decade of independence, Kenya earned herself the enviable reputation as the fastest growing and best-managed economy in the region. Indeed, Kenya was at the same level as the Asian tigers now firmly placed among the newly industrialised countries. Rapid expansion of the production (GDP growth) – averaging 7% per annum–generated welfare of the people. Notably, the economy sustained an increase in real purchasing power by the people by

more than 3% every year as the GDP, at 7%, was expanding faster than the rate of population growth, estimated at 3.5% -4% per year.

However, Kenya's economy has been on the decline for the last two decades, with growth spiralling over the last five consecutive years from 4.6% in 1996 to negative growth of 0.3% in 2000. Similarly, over the last three decades, the GDP rate has continued to decline from an average of 5.2% per annum between 1974-1979 to 4.1% in 1980-1985, 2.5% between 1990 and 1995, reaching 1.9% between 1996 and 2000. Kenya is now ranked as one of the countries with the fastest declining economies, after Zimbabwe. The growth of per capita income has been less than the average population growth (2.8% per annum). Agricultural share of the GDP fell from 35% to 28% between 1970s and 1990s, and the share of industry in the GDP declined from over 20% to 16% during the same period. The growth of government services and official safety nets have been minimal, at 0.8% in 1997 and 1.2% in 1998. By 2000, one of the major social development indicators, unemployment, stood at 36%.

The recession in economic growth has occasioned a corresponding decline in all sectors of the economy, leading to low employment creation and thus increased unemployment, fluctuating interest rates, which create uncertainties, widening trade deficits (high imports and low exports), an increasing debt, with adverse effects on investment, a depreciating shilling and increased poverty.

It has been indicated that a growth rate of 7% per annum is necessary for Kenya to achieve its poverty reduction and development goals and targets. However, the likelihood of achieving this level of performance in the immediate future against an average 2% growth rate recorded in the 1990s is practically remote.

5.5 The Political Context

The most important stress factor has been in the political arena. At independence, Kenya inherited a political system based on the principle of state sovereignty. This entailed jurisdiction and control over territory, freedom to organize the institutions of the state, a capacity to determine internal affairs and the right to participate in international affairs.

The Kenyan Constitution envisages a democratic and plural state in which the government is founded on the rule of law, equality, social justice and republicanism. Based on the republican principle, general elections have been held regularly and power transfer after the results were announced have been orderly and relatively peaceful since independence.

A glimpse of the new state of affairs shows, however, that, although the democratic base is beginning to stabilise and that the inherited exclusive and autocratic political system is slowly transforming itself into an open participatory political system, ethnic salience in competitive politics has created an ascriptive majority-minority problem.

In the absence of a strong state ideology to combine the fine web of kinship-based political and governance system that characterises the lives of many Kenyans with modern state authority relations, ethnicity provides the focus of political life for the majority of citizens. Ethnic ties often override loyalty to the state and the national political dispensation oscillates, rather uneasily, between ethnic groups and “national” political parties. As a result, ethnic groups find themselves trapped in an oppressive, predatory polity, a colonial bequest they did not underwrite or bargain for.

As a consequence, there has emerged a deep-seated crisis of confidence in political leadership as leaders are seen to owe allegiance to narrow partisan or sectarian interests and strive for short-term political gains, rather than broad and common national purposes and good. The enormity of electoral corruption is but one of the symptoms of the degradation of political processes resulting in poor –quality national and local level governance.

The democratic processes of the post-colonial era have not, therefore, promoted self-governance and the people of Kenya, in such circumstances, have failed to recover effective control over their social, political and economic destiny. The political system has not only reduced the people’s sovereignty to a mere right to exercise their franchise at the elections every five years but the state, through its bureaucratic machine, has further subordinated society to itself and deprived the people of any real capacity to develop themselves. In many respects, Kenya’s pluralism or diversity is not reflected in and captured by its democratic institutions. Participation by the majority, including women and minority groups, in managing public affairs is not proportionate to their numbers.

As such, full realisation of the goals of social and economic justice and political freedom promised at independence have remained unrealised. This has created a feeling of permanent exclusion by the majority locked out of the socio-political and economic system.

The alternative to the exclusive state political system has been to belong to community-nurtured kinships, informal and civil society systems, which operate parallel to the known modes of state welfare groups, traditional political organization and ethnic-based political associations and groupings, which are becoming the landmarks of the national political practice.

5.6 The Context for Women

An important dimension of the socio-economic and political stress that Kenya has been going through in the last decade concerns women’s status.

5.6.1 Women in the Kenyan Economy

Kenya’s women have consistently struggled to contribute to economic development. Many at the grassroots level have formed groups to try to address the basic needs of their families, while others formed organizations and networks to influence policies that ensure gender mainstreaming in policy formulation.

Women have not gone very far in influencing the economic policies because it is a difficult task to systematically link a gender-relations analysis to an economic-policy framework. The problem is blindness to gender issues in economic discourse.

Gender relations can be defined in terms of interplay between historical practices that are distinguished according to masculine and feminine theories and ideologies, institutional practices and material conditions which refer to distribution of resources along gender lines. Gender relations are social constructions that differentiate and circumscribe material outcomes for women and for men.

The relation between the policy instruments and the targets has not been analysed for a long time in gender-disaggregated terms that recognise the inputs of unpaid labour, particularly by women, as well as paid labour. Women are persons with social rights; they are not just factors of production. This way of introducing gender-awareness into the design of economic policies is likely to benefit some men as well as women if it takes into account women's needs and rights in policy development and implementation.

Gender-blind policy formulation and implementation has contributed to the under-valuation and devaluation of women's work. Yet the reality of economic and social life is that it is women's productivity that has historically cushioned the economy of this and other countries. Women's work has been invisible and immeasurable. The austere and abstract definition of productivity as received by economists and planners fails to account adequately for women's work. A new definition, one more supportive of women's participation in the economy, needs to be drawn up. This is bound to involve conceptual, methodological and technical issues if women are to fully influence the economy for the good of all.

The efforts at gender sensitive economic policy formulation, as reflected in the '*Poverty Reduction Strategy Paper*', basically reflect the new economic vision, which starts with the argument that economic policies have far-reaching implications in transmitting and reproducing gender biases. Another line of analysis in gender-aware economics is the relationship between growth patterns and the different dimensions of gender inequality. While the relationship between gender inequality and growth is complicated, it is by now well established that some dimensions of gender inequality, such as in education and health, have adverse effects on the rate of an economy's growth.

5.6.2 Feminisation of Poverty

The feminisation of poverty in Africa may be a combination of many factors:

- limited skills and knowledge;
- unfriendly market structures that concentrate women in lower-paying and time-consuming work and restrict their access to capital and credit;
- traditional family structures perpetuating gender inequality through patriarchal norms of property ownership and inheritance;
- discrimination in the public domain; and
- failure to recognise the value of women's work.

Economic, demographic, and political trends are changing the rural landscape, affecting women's activities. They have less capacity than men in terms of education and training, less time to devote to productively resources, and less control over important resources,

such as land and capital. In Kenya, gender division of labour prevents women from growing crops for sale, although women remain responsible for the bulk of agricultural labour.

It is clear that women have had little access to knowledge and technologies that would help them participate more in productivity. It is important to eliminate legislative, administrative, socio-economic and attitudinal barriers to women's access to and control of resources and promote gender-aware economic policies.

5.6.3 Women in Politics

Beyond lack of effective participation in the economy, women have made little progress in politics. This is clear from the information provided on Table 2 below. The primary reason for this has been the way in which Kenya, a male-dominated society, treats women in the political arena. In theory, the right to stand for elections, to become a candidate, and to get elected, is based on the right to vote. The reality is, however, that women's right to vote remains restricted principally because, in most cases, the only candidates to vote for are male. Women do not often offer themselves for elective posts for reasons that have been thoroughly discussed by many scholars. These reasons include culture, patriarchal systems, political institutional structures, and mode of elections.

This unequal rate of participation in legislative bodies signifies that women's representation, rather than being a function of democratisation, is more a function of preserving the status quo.

Table 2 : Members of National Assembly by Sex 1969-1999

Year	Women	Men	Total	% Women
1969	2	165	167	1.2
1974	7	162	169	1.4
1979	4	166	170	2.4
1983	3	167	170	1.8
1988	3	197	200	1.5
1992	7	193	200	3.5
1997	8	214	222	3.6
1998	9	213	222	4.1

Source: Electoral Commission, 1998

Although Kenya has consistently followed the majoritarian electoral process, the results of women's participation-majority voters-have been dismal. Affirmative action for greater representation in the legislature and local authorities has not borne any fruit.

The low representation of women in the political decision-making process can be attributed to several factors, *inter alia*, socio-cultural perceptions and inhibitions; lack of finances; lack of political commitment, lack of consciousness and goodwill, and poor rural infrastructure.

In the circumstances, the majority of women are denied the opportunity to play to the fullest extent their economic and intellectual roles, roles other than being wife and mother. Although most women participate in the electoral process as voters, very few

offer themselves as candidates. Another impediment to women's participation in political decision-making is their high illiteracy rate. This has repercussions on women's awareness, as well as on their level of participation in political life.

Women's limited participation in political life is closely associated with such less visible factors as uneven distribution of roles and responsibilities between men and women, persistent differentiation in training and occupation and women's economic dependency. Above all, clear political will, development of appropriate policies, such as affirmative action policies, and a determined effort to make the electoral system and institutions such as political parties, gender-sensitive would go a long way towards ensuring gender equity in representation in the legislature, local authorities and other institutions. The Constitutional review processes offers a great opportunity for women to negotiate the double covenant. The nation will have to make strategic choices to ensure greater economic and political empowerment and promotion of gender equality for its own benefit.

5.7

Conclusion

In the course of its public hearings countrywide, the Commission confirmed that most of these issues were perceived by Kenyans not merely as fundamental outcomes of bad governance but also as consequences of a defective constitutional structure. In Chapter six, we examine some of the concerns to these issues which the people thought should be resolved in the framework of a new constitutional dispensation.

CHAPTER SIX

OWNING THE PROCESS

6.1 A People-Driven Process

The Commission's guiding principles under section 5 of the Review Act are to be accountable to the people to ensure that the process accommodates their diversity. Also, to provide Kenyans with an opportunity to actively, freely and meaningfully participate in generating a debates conducted in an open manner and guided by respect for the universal principles of human rights, gender equity and democracy. The outcome ought to faithfully reflect the people's wishes.

Section 17 (d) also requires the Commission to ensure that the people give consideration to and make recommendations on various issues, including on the compositions and functions of the organs of State, government structure, constitutional commissions, electoral systems, local commissions, the Judiciary, local government, property and land rights, management and use of public finances, citizenship and socio-cultural obstacles, among others. It calls for a consultation between the review bodies and the people.

The people's views as submitted to the Commission were broad and diverse and influenced by a variety of factors and situations, such as concern for the process itself, their way of life and other factors. Indeed, the people's views were essentially shaped by their expectations, fears and concerns and the constraints and limitations of the process itself.

6.2 People's Expectations

6.2.1 Expectations about the Process

The people's expectations were wide and varied. On the whole, however, Kenyan people expected the review process to accord them an opportunity for a national catharsis and to evaluate government performance. This was in the belief that sovereignty resides in the people and that they, therefore, have the right to govern themselves in accordance with the Constitution they have created, enacted and given to themselves, and which only they had the legitimacy to create.

The primary expectation, therefore, was that the new Constitution would be a faithful reflection of their wishes, and that it would create a new political dispensation. It would also create a new legislature and a new judiciary, and that it would enhance transparency and accountability, natural justice, respect for human rights, and democracy. Further, it would create full participation in governance; ensure provision of basic needs, eradication of poverty, and promotion of public welfare.

The above expectations and aspirations form the content of the mandate of the constitutional review as laid out in section 3 of the Constitution of Kenya Review Act. The people expected the process to be conducted in an open manner, guided by the principle of respect for human rights, gender equity and democracy. They

expected the process to accommodate their diversity, including their disparate socio-economic status, race, ethnicity, gender, religious faith, age, occupation, learning, persons with disabilities and the disadvantaged. The people expected the Commission and its organs to be committed to impartiality, independence, integrity, punctuality, sincerity, good faith and dedicated to their interests.

As owners of the process, they expected to be provided with an opportunity to actively, freely and meaningfully participate in generating and debating the proposals to alter the Constitution. They expected the Commission to listen to their views and take them on board and that, based on those views; the Commission would come up with a report that would be implemented. Specifically the people wanted assurance that:

- the taxpayers' money would be accountably and prudently used in the carrying out of the review;
- everybody would be allowed unlimited time to air their views and that the Commissioners would be attentive and punctual;
- all citizens would participate in the hearings, (though in practice many of the elite did not give their views);
- the process would be completely independent from interference from the State and its organs;
- the people would be the final adopters of the Constitution; and
- they alone would determine the duration of the process.

The uncertainty surrounding the Moi regime transition and the political conflicts on whether or not the review process should be conducted made it difficult for the Commission to conduct the review strictly in accordance with the people's expectations.

6.2.2 Expectations about Outcomes

The people expected the new Constitution to be accessible to them in user-friendly language – in a language they could easily understand. For a large number of people, a Constitution written in legalese was unlikely to serve their interests well. They expected that the new Constitution would take into account the needs and aspirations of the disadvantaged and marginalised members of society. In many respects, they expected the new Constitution to solve a myriad of socio-economic problems and create a drastic improvement in their livelihood, especially alleviate poverty, eradicate corruption, create employment opportunities and provide adequate food, shelter, health, education, water and land for every Kenyan.

Fourteen main points from the people:

- | |
|---|
| (a) Give us the chance to live a decent life: with the fundamental needs of food, health-care, water, clothing, shelter, security and basic education met by our own efforts and government assistance; |
| (b) We want peace and stability and a crime-free society; |
| (c) We want a fair system of access to land and justice for the wrongs of the past; |
| (d) Let us have more control over the decisions that affect our lives, bringing government closer to us, and let us understand better the decisions we |

- can't make ourselves but which affect us deeply;
- (e) We don't want power concentrated in the hands of one person;
 - (f) We want to be able to choose leaders with intelligence, integrity and sensitivity to make them worthy of leading;
 - (g) We want an end to corruption;
 - (h) We want police who respect the citizens – and who can be respected by them;
 - (i) We want women to have equal rights as men;
 - (j) We want children to have a future worth looking forward to – including orphans and street children;
 - (k) We want respect and decent treatment for people with disability;
 - (l) We want all communities to be respected and free to observe their cultures and beliefs; and
 - (m) We assert our rights to hold all sections of our government accountable – and we want honest and accessible institutions to ensure this accountability.

6.3 The People's Fears and Concerns

In presentations to the Commission, the people raised various concerns and fears both on the process of review and on various issues affecting them. Some of the concerns were of a constitutional nature, while others were of an ordinary legal character, yet others were of a policy and administrative nature.

6.3.1 Those Relating to the Process

On the process, a number of fears and concerns were carefully expressed:

- (a) The first and most important of these was that the Commission was not entrenched in the Constitution. They thought that, without entrenchment, the Executive could wind up the Commission at any time.
- (b) There were initial doubts as to the independence of the review process. People feared that it was not possible to have an impartial process without Government interference.
- (c) Concern was expressed that the process would not be inclusive, that, because of ignorance, the process was likely to be hijacked by the elite and that the reviewed Constitution would be a reflection of elite views. With the passage of time, these fears and concerns appear to have dissipated and the people's confidence correspondingly enhanced.
- (d) There was fear that there was not enough time for the Commission to complete its work. In their perception, the Commission was working with a deadline pegged to the life of a Parliament which could be dissolved at the President's whim and whose mandate, in any event, was fixed by the current Constitution. The majority thought that a thorough review was not possible in these circumstances.
- (e) The fact that this country has had a large number of Commissions whose reports have never been released to the public or implemented was reason for particular public concern. They feared that the process was just another Government gimmick. According to one member of the public,

"There are more than five reports and one is outstanding from the Njonjo Land Commission. They have not been approved by anybody. Nobody works on them and people are complaining to every Committee that comes to this region. Until when ? (sic)."

- (f) There was also concern that the review process might fail to accommodate the diversity of values of the Kenyan people. They emphasised that their cultural values were unchangeable even by the Constitution. According to one presenter, "*...why tell us that we are not educated, we have scholars, but when we say that we want to go to madrassa as muslims, there is somebody is (sic) the Constitution Review says, 'Ah!' What are muslims? We want our values, we want them recognised for that.*"
- (g) There was concern about transition politics and fear that the views were being collected at a time when the debate on the presidential succession was at its climax and when Kenyans expected to be going to elections later in the year. As a result, many of the views collected were coloured by the Commissioners' own political preferences and choices.

6.3.2 Those Relating to Issues

In expressing their views, the people were influenced by two important factors. The first was expectation that, on producing a new Constitution, their lives would drastically change and their standards of living be greatly improved. As a result, their concerns were pegged on governance vis-à-vis livelihoods.

In their submissions, many people were firmly convinced not only that bad governance was the cause of their poor livelihood but that this could be cured by a new Constitution. They complained that the Government had failed to implement policies designed to promote social wellbeing. They, therefore, hoped that new constitutional arrangements on governance would improve their social, political and economic lives. They needed assurance that the Government would in future uphold their rights and hoped that, with a new Constitution, their livelihoods would be elevated and their problems come to an end.

Specific concerns relating to governance as the key to improving the people's livelihoods were:

(a) Lack of Equal Access to Resources

An important concern was about the manner in which resources are distributed and managed. They called for gender equity in managing and transparency and accountability in distributing resources.

(b) Absence of Economic and Social Justice

Fears were expressed on the problems of access to the means of economic and social development, in particular, access to education, shelter, health, food, social security and other basic needs. They sought liberation from the chains of poverty as well as the inequities caused by bad governance that had isolated sections of society from the mainstream of development. One old man in Moyale put this predicament as follows:

“We heard that independence came 40 years ago and that it has arrived in Isiolo. We do not know when it will get here (sic).”

(c) Lack of Transparency and Accountability

Transparency and accountability in Government were major concerns for the people. In their view, the Government of the day had failed to be accountable and transparent in running public affairs, decision-making, use of national resources, expenditure, tendering and management of public projects, running of Government bodies, elections, administration of justice and law enforcement. The people called for a Constitution that would make government accountable to them and in which everyone would be subject to the rule of law.

(d) Lack of Respect for the Rule of Law

On numerous occasions, the people told the Commission that nobody should be “above the law”. They wanted all citizens without exception to be equal before the law and hoped the new Constitution would guarantee justice and rule of law for all Kenyans. They feared that unless State power is exercised in accordance with the law, good governance would be compromised.

6.4 Taking the People Seriously

6.4.1 Analysing the People’s Views

The people’s very high expectations from the process was an important drive in conducting the hearings, analysing the data and drafting the Commission’s report and the Bill. The Commission employed a large number of researchers, analysts, data clerks and shorthand typists to transcribe the hearings and analyse these and other submissions. Reports of Constituency Constitutional Forums, including summaries as well as transcripts of public views, were prepared and sent to them. Through computer programmes specially devised for the CKRC, all the submissions were analysed and tabulated. This enabled the Commission at a glance to determine Kenyan’s preferences on a host of issues by constituency, district, province and nationally. The preferences were also broken down by gender and the nature of the person or group making submissions. Aggregated and disaggregated tables were made available to the Commission when it began its deliberations. Commissioners took very careful note of public views and made every effort to reflect them in the report, the recommendations and the draft bill.

The detailed analysis of submissions, the goals of review, in particular areas, and the current provisions were conducted in nine thematic committees established by the Commission. Their reports and recommendations were discussed by the Commission in plenary, which made the final decisions. Committee reports were revised to reflect the comments of the Commission. A drafting team sat with the Commission throughout its proceedings and produced the first draft of the Constitution, which the Commission examined clause by clause. The revised draft was considered and approved by the Commission.

To the extent possible, the people’s voices have been accurately recorded and given due weight in designing the new Constitution. Where the people’s views have not been taken into account, it is largely because the Commission considered alternative formulations more practical and in accord with the general principles of constitutionalism and democracy. The Commission has, in addition, carefully

considered the fears and concerns of the people and fully taken them into account in designing the new Constitution. Although many of these fears and concerns cannot be resolved in the context of constitution-making, care has been taken in the report to indicate alternative policy and the administrative and political modalities of dealing with them.

6.4.2 The People's Views in Constitutional Design

In order to incorporate the goals in the Review Act and the public's views, it is necessary to have a fundamentally new document. The Commission considers that the role of a Constitution in Kenya's governance is not to consolidate the existing power relations and structure; it is to facilitate social and economic changes that the people want. These are necessary to ensure a democratic, participatory and just society. We believe that many of these changes will come about through the new institutions and procedures of government, decision-making and accountability that we are recommending. But, given our constitutional experience, we have to go beyond institutions. We have laid down national goals and aspirations and the principles that should govern the exercise of State power.

We propose using the Constitution to strengthen the sense of belonging to a common political community. The Constitution provides incentives to move beyond narrow ethnic politics, through electoral laws and rules for the structure and formation of government. We must ensure that the recognition of Kenya's ethnic, regional and religious diversity is not purchased at the expense of national unity. The place for celebrating diversity and difference is the social and private spheres, not the political. Equally, we recognise national unity will not come about unless all our communities are treated justly - and feel that they are treated fairly. We propose that the communities that have been denied opportunities to benefit from social and economic development should be assisted to achieve the living standards of other Kenyans. We recommend that, in land and other matters, injustices of the past must be redressed, and propose the principles and machinery for redress.

6.5 Conclusion

The Commission is very happy with the way the people responded to the chance to participate in the review and grateful to them for their support that has enabled the Commission to overcome several hurdles and to resist attempts to derail the process. We believe that the review process has been more than merely agreeing on the terms of the new Constitution. It has also been about self-discovery and identity and has given the people an opportunity to affirm their sovereignty. The process has been a engagement in our national and constitutional history in order for Kenyans to agree on, and strengthen, national values and goals. The function of a Constitution is not merely to provide a framework for society but also to create and consolidate it. We believe that the review process has been critical to the success of these objectives.

PART THREE

VIEWS FROM THE PEOPLE

CHAPTER SEVEN

THE CONSTITUTIVE PROCESS

7.1 The Mandate of the Commission

The primary reason that the people of Kenya want to review the current Constitution is that they feel it no longer protects them. In view of the numerous amendments it has undergone since 1963, it has operated more like ordinary legislation than as the supreme law of the land. An important goal of the review, therefore, was to re-establish the constitutive character and supremacy of the Constitution. Consequently, various issues were put to the public for debate, namely constitutional supremacy, constitutional interpretation, sovereignty of the people, nationality and citizenship, the nature of the republican state, state values and goals and the legal system.

7.2 Constitutional Supremacy

7.2.1 General Principles

The rationale behind constitutional supremacy is that government is a creation of the people. It is the people who create its organs, clothe them with their powers and, in so doing delimit the scope within which they operate. The people's expression of authority, intent and wish takes place through the Constitution. Thus, the Government is a creation of the people by means of a Constitution. Being, therefore, an emanation of the will of a superior body, it is a law that is in itself supreme.

The extent to which a constitution is regarded as supreme law depends on the ease with which its provisions may be amended. Experience in Africa and elsewhere shows that, while it may not be so difficult to make a good constitution, it is very difficult to implement and observe it and all too easy to alter or even overthrow it. This was an important concern during the public hearings, during which the following issues were frequently raised:

- Considering how quickly and fundamentally the independence Constitution was amended, how can we protect the new constitution from a similar fate?
- How can we prevent the decay of constitutional institutions and state organs, as has happened with the institutions of the present Constitution?
- How can we be sure that the changes introduced by the new Constitution will be implemented?
- How can we ensure that the powers bestowed by the Constitution are not abused?
- How can we hold ministers and other public servants accountable for their policies and actions?
- What remedies will the people have against violations of their rights?
- How can we be sure that judges will interpret the law and decide cases impartially?

- What do we need to do to ensure free and fair elections?
- How can we protect constitutional values, like consensus, people's participation, the independence of constitutional offices and bodies? and
- How can we eliminate corruption, which is responsible for the denial of so many rights and is an important reason for our poverty?

There is need to protect the Constitution against indiscriminate amendments. If the amendment procedure is too simple, it reduces public confidence in the Constitution. The converse, however, is also true. If the amendment procedure is too rigid, it may encourage revolutionary measures to bring about change instead of using the acceptable constitutional means. Thus, a balance must be struck between these two extremes.

Under constitutional law, a broad categorisation is, therefore, made between rigid and flexible constitutions.

In the case of rigid constitutions, the entire constitution, or a part of it, is safeguarded from amendment by prescribing certain special procedures or majorities required before it can be amended. These prescriptions include:

- (a) specifying that the legislature's approval of an amendment must be by a particular majority;
- (b) approval by the legislature both before and after an election; and
- (c) approval by the legislature and the people in a referendum.

A flexible Constitution requires no special procedure or majorities for an amendment to be made. This is in tandem with the principle of parliamentary sovereignty, whereby parliament is vested with the power to amend any legislation, the constitution included. No special procedures or majorities or other legal procedures are required to effect constitutional amendments. This is the position in the United Kingdom.

7.2.2 Supremacy in the current Constitution

The independence constitution provided for various protection and enforcement mechanisms of its provisions.

First, it provided for two categories of amendment – ordinary amendments and amendments to specially entrenched provisions. The ordinary or non-entrenched provisions could be altered by a vote of three quarters of all members in either house of the National Assembly.

The specially entrenched provisions could not be altered except by a Bill secured by three quarters of the votes of all members on the second and third readings in the House of Representatives and nine tenths of the Senate on the same number of readings. The entrenched provisions related, *inter alia*, to fundamental rights, citizenship, elections, the Senate, the structure of regions, the Judiciary and the amendment process itself.

Section 3 of the current Constitution provides that:

“This Constitution is the Constitution of the Republic of Kenya and shall have the full force of the law throughout Kenya and, subject to Section 47, if any law is inconsistent with this Constitution, the Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void.”

Section 47 provides for alteration of the Constitution by Parliament. It requires the support of at least 65% of Members of Parliament (a special majority). Parliament has the power to alter any section of the Constitution.

The supremacy of the Constitution demands that courts should hold void any exercise of power which does not comply with the prescribed manner and form or which is not in accordance with the Constitution, from which the power is derived.

7.2.3 Supremacy in other Constitutions

Provisions pronouncing the supremacy of the Constitution are common in many jurisdictions. The most recent examples appear in Uganda, South Africa and Ghana. According to Article 2 of the Ugandan Constitution (1995),

- (1) This Constitution is the supreme law of Uganda and shall have binding force on all authorities and persons throughout Uganda.
- (2) If any law or any custom is inconsistent with any of the provisions of this Constitution, the Constitution shall prevail and the other law or custom shall, to the extent of the inconsistency, be void.

In a somewhat different rendition, the South African Constitution (1994) provides in Article 2, that

This Constitution is the supreme law of the Republic; any law or conduct inconsistent with it is invalid, and obligations imposed by it must be fulfilled.

In the case of Ghana, the supremacy clause is buttressed by the entrenchment of certain provisions, which may be amended only through a referendum.

7.2.4 What the People Said:

What the people told the Commission may be summarised as follows:

- (i) a constitutional amendment should require 75% of the vote in Parliament;
- (ii) the power of Parliament to amend the Constitution should be limited, e.g., where it cannot get the 75%, a referendum organized by the Judiciary should be called to decide; this should be done only after a thorough awareness creation;
- (iii) the public should be involved in changing certain provisions of the Constitution through referenda, especially as concerns religions, marriages, divorce and inheritance;
- (iv) a distinction should be made between entrenched and non-entrenched provisions of the Constitution, with a stringent mechanism being set up for amending the former entrenched provisions which should include supremacy of the Constitution, the Bill of Rights, land, the Judiciary, security, finance, the system of government.
- (vi) on the question of who should conduct the referendum, proposals ranged from: the Electoral Commission, an independent constitutional commission, and the members of Parliament, non-governmental organizations and religious bodies.

7.2.5

Commentary

The large number of Kenyans who made submissions to the Commission proves that the Constitution lies at the very heart of Kenyans. Generally, it was submitted that the Constitution should remain supreme. This immediately raised the issue of amending the Constitution and how this should be done. Many Kenyans expressed fears that even after a comprehensive review of the Constitution, Parliament may thereafter sit and make substantial amendments that would water down all their efforts. In addition, it was generally felt that the current provision for amending the Constitution was too simple and had, therefore, been used to consolidate power in the Executive.

The people, therefore, wanted a fairly rigid arrangement, the amendment of which would require their participation in some form. In their view, the new Constitution should only be amended in the same way in which it is made.

7.2.6 Recommendations

The Commission therefore, recommended that:

- (a) the new Constitution should have some entrenched provisions – for example, on human rights, that Parliament does not have power to amend;
- (b) the new Constitution should address the issue of the relationship between the various organs of State and must deal with checks and balances;
- (c) the new Constitution should have a supremacy clause that could state that the Constitution is binding on all the people and all organs of State and at all levels;
- (d) the Constitution should only be amended by at least 75 % of members of parliament; and
- (e) the amendment procedure should make the following distinction:
 - (i) A Bill seeking to amend an entrenched provision should not be passed unless:
 - it receives the support of two thirds of members of Parliament at the second and third readings; and subsequently
 - it receives approval at a referendum.
 - (ii) The entrenched provisions should include:
 - the procedure on amending the Constitution itself;
 - the provisions establishing the Republic of Kenya;
 - the provisions on sovereignty of the people;
 - the provisions on supremacy of the Constitution;
 - the Bill of Rights;
 - separation of powers; and
 - provisions on existence and powers of independent commissions and bodies.
 - (iii) A Bill seeking to amend these provisions should not be passed unless:
 - it receives the support of two thirds of Parliament at the second and third readings; and
 - it receives the support of two thirds of bodies at national or sub-national levels (this is tied to the question of devolution).
 - (iv) Non-entrenched but special provisions would include:
 - provincial, district or constituency boundaries; and
 - change in the number of constituencies.

- (v) A Bill seeking to amend the provisions of the Constitution should require a two-thirds majority at the second and third readings.

7.3 Constitutional Interpretation

7.3.1 General Principles

Central to the doctrine of the supremacy of the Constitution is the question of how and by whom the constitutional text is to be interpreted. Constitutional interpretation is a means by which the normative character of the Constitution is given effect as the supreme law. Although, in essence, a judicial function, constitutional interpretation lies at the interface between politics and law since it is a clear encroachment on the competence of the Legislature. The broad principle governing this issue, in jurisdictions, which draw their tradition from the English common law, is that the Constitution, like any other law, must be interpreted in such a way as to give effect to the intention of those who framed it. Over time, however, that principle has given way to jurisprudence that requires that constitutional text must be so interpreted as to advance the contemporary aspirations of the society which it is serving. As the supreme law of the land, the Constitution must accommodate changes within and across generations. On the question of who has the final authority to interpret the Constitution, this is now generally reserved to the highest judicial forum in the legal system by whatever name.

7.3.2 Interpretation in the current Constitution

Save for pronouncing constitutional supremacy and declaring inconsistent laws void, the current Constitution is silent on canons of interpretation. The courts, therefore, have unfettered discretion to interpret the Constitution as they deem fit. The Constitution does not provide for a constitutional court to deal with issues concerning interpretation of it. However, the High Court, which, has unlimited original jurisdiction in all civil and criminal cases, has been the forum which determines constitutional interpretation by way of a constitutional reference from a lower court. Whenever an issue affecting interpretation of the Constitution arises in a lower court, either party usually files a constitutional reference in the High Court. The Chief Justice then appoints a bench of two or three judges of the High Court to sit as a Constitutional Court to hear and determine the case. The decision of the court is final and is not subject to appeal to the Court of Appeal.

7.3.3 Interpretation in other Constitutions

Constitutional instruments do not, as a rule, prescribe how specific texts or provisions may be interpreted. Rather, what they establish is a forum competent to render or a medium to initiate authoritative interpretation in either abstract or concrete circumstances. Very rarely do they establish the principles, which should guide such interpretation. A wide variety of such forums or media exist worldwide. The typical tradition in constitutional interpretation in Anglo-American jurisdictions is by way of judicial reviews of legislation or interpretation of constitutional provisions in litigation. Although the power of review or interpretation is normally exercised by all superior courts of record, it is generally understood that only the highest court in the jurisdiction can give authoritative opinions on constitutional issues. This is the role, which the Supreme Court of the United States of America is perhaps best known for. The Central and Eastern European tradition is to reserve all matters relating to constitutional interpretation or adjudication to a specialised constitutional court. This may be conducted in abstract terms, as in France,

before specific legislation is enacted; or in the context of litigation. A third tradition is to confer a specific jurisdiction on constitutional issues on superior courts of record, while, at the same time, reserving the authority to conduct judicial review. In French-speaking Africa, jurisdictions follow the second tradition, while in English-speaking Africa, it is the third.

7.3.4 What the People said:

- (i) concern was raised about the generally restrictive approach to constitutional interpretation which the High Court has adopted, especially in the area of human rights litigation; this, it was suggested, has hampered the growth of proper jurisprudence, case law or precedent in this area;
- (ii) complaints were also raised about the lack of a right of appeal from a High Court decision on constitutional matters; this was seen as a denial of the right of appeal of the aggrieved party;
- (iii) some High Court decisions were further criticised for being made against the public interest and being influenced by factors outside the law, e.g., declaring the Kenya Anti-Corruption Authority unconstitutional and terminating criminal cases against persons charged with corruption.

7.3.5 Commentary

Constitutional interpretation is a highly technical matter and one not amenable to direct evaluation by the people. The fact that Kenya's courts have not developed any jurisprudence on the matter also means that even lawyers are not able to address this important issue. Nonetheless, it is evident, from the people's evaluation of the Judiciary, that they were concerned about what many of them saw as blatant inconsistencies in the interpretation of law by judicial officers even in similar circumstances.

7.3.6 Recommendations

The Commission, therefore, recommended that:

- (i) an interpretation clause should be worded in a manner that assists the interpreters to appreciate the fundamental values of the Constitution without taking away the judicial creativity that permits the Constitution to be a living document;
- (ii) there should be a provision that sets out the principles governing interpretation, which should include the promotion of values that underlie an open and democratic society, based on human rights, equality and freedom; and
- (iii) the Constitution should constitute the Supreme Court as the final arbiter on interpreting the Constitution .

7.4 Sovereignty of the People

7.4.1 General Principles

Sovereignty of the people is the power by which the State is governed. It is the supreme political authority; the supreme will; paramount control of the Constitution and frame of government and its administration. It is the source of all political power, from which specific political powers are derived. When the people/citizens surrender to the State the right to govern in exchange for protection, the Government becomes an agent of the people. The Government's power is less absolute, established to implement the people's will and accountable to them.

It is very important for the Constitution to make it clear who the final authority in a country is. It is equally important to define the relationship between the authority and the key institutions of State, including the Constitution itself. An acknowledgement of people's sovereignty makes the people identify with the Constitution and regard it as one of their own. It is useful in expressing the people's residual powers to whom all resort is made and in whom all authority resides. Such acknowledgement is an expression of rule by the people and shows a commitment to democracy. The key ultimate crucible of power is its acceptance by all within the system.

The Review Act obliges the Commission to secure provisions that ensure free participation by the people in their governance and in managing public affairs (section 3 (d) &(j). The Act has set the stage for making a Constitution that responds to the people's voice, one that reflects national needs as perceived by the people.

7.4.2 The People in the current Constitution

The current Constitution does not acknowledge the people's sovereignty as the fountain from which the power to govern flows; nor does it provide any role to the people in the constitutional structure.

7.4.3 The People in other Constitutions

Many written Constitutions recognise and acknowledge that sovereignty resides in the people. The Constitution of the United States of America, promulgated in 1789, acknowledges this in its preamble, as do many modern constitutions. In a more elaborate fashion, the latter generation of constitutions now defines what the doctrine of sovereignty of the people means and entails. The French Constitution, 1958, specifies that "national sovereignty belongs to the people, who shall exercise it through their representatives by way of a referendum."

The Ghanaian Constitution, 1992, provides at Article 35(1) that

"Ghana shall be a democratic state dedicated to the realisation of freedom, justice and sovereignty; sovereignty resides in the people of Ghana, from whom Government derives all its powers and authority through this Constitution".

A more elaborate provision is contained in Article 1 of the Constitution of Uganda, as follows:

- (i) All power belongs to the people, who shall exercise their sovereignty in accordance with this Constitution;

- (ii) Without limiting the effect of clause (1) of this article, all authority in the state emanates from the people of Uganda and the people shall be governed through their will and consent;
- (iii) All power and authority of Government and its organs derive from this Constitution which in turn derives its authority from the people, who consent to be governed in accordance with this Constitution.
- (iv) the people shall express their will and consent on who shall govern them and how they should be governed, through regular, free and fair elections of their representatives or through referenda.

7.4.4 What the People Said:

The people told the Commission that:

- (i) All power and authority should derive from the people of Kenya, and the people should be governed through their will and consent;
- (ii) The State and its security organs should at all times recognise the supremacy of the people and remain subordinate to the people; and
- (iii) The people reserve to themselves all the power and authority that they do not expressly delegate to the State and its organs.

7.4.5 Commentary

It is not surprising that all post-independence constitutions in Africa did not acknowledge the people's sovereignty. These constitutions were "given" by metropolitan powers as instruments with which to "constitute" the post-colonial state. It is now standard practice in new constitutions, especially those necessitated by revolutionary circumstances or popular uprisings to acknowledge the sovereignty of the people. The reason for this is the need to acknowledge in the Constitution the fact that ultimately it is a product, of and must serve the aspirations of the people.

7.4.6 Recommendations

The Commission recommended therefore that:

- (i) there should be recognition in the preamble that the people are exercising power over the Government;
- (ii) in the directive principles of State policy, government has to recognise that it derives all power from the people; and
- (iii) a number of key constitutional issues should be so entrenched in the Constitution that they could be amended only by a referendum.

7.5 Nationality and Citizenship

7.5.1 General Principles

The question of nationality is fundamental to the development of internal cohesion and external stability of the State. In that issue lies not only loyalty but also the regeneration and survival of the State through time.

7.5.2 Nationality and Citizenship in the current Constitution

Under the current Constitution, citizenship can be acquired by birth, naturalisation, registration and descent. There are, however, a number of anomalies in the current citizenship provisions that the Commission set out to review. The first was the question of dual citizenship. Both the present and the Independence Constitution do not allow dual citizenship. If a person who has attained 21 years had the citizenship of another country, he or she is required to renounce that citizenship otherwise he or she may lose the Kenyan citizenship. Furthermore, if a person who has attained 21 years acquires the citizenship of another country by a voluntary act other than marriage or through any other manner and does not renounce it, he or she automatically ceases to be a Kenyan citizen.

The second is gender discrimination in conferring of citizenship. According to section 89 of the Constitution, “Every person born in Kenya after 11th December, 1963, shall become a citizen of Kenya, if at the date of his birth one of his parents is a citizen of Kenya...” Section 90, on the other hand, provide that a person born outside Kenya after 11th December, 1963, shall become a citizen of Kenya at the date of birth if at that date his father is a citizen of Kenya. Section 91 further provides that a woman who has been married to a citizen of Kenya shall be entitled to be registered as a citizen of Kenya. The effect of the above provisions is that a man who is a citizen of Kenya can:

- pass citizenship to his female spouse who is not a Kenyan citizen; and
- pass citizenship to his children whether or not those children were born out of Kenya.

While a woman in the same position

- cannot pass citizenship to her male spouse if she marries a non-Kenyan, and
- can pass citizenship to a child whose father is a foreigner only if the child is born in Kenya. In other words, if the child is born outside Kenya to a non-Kenyan father, this child does not get the Kenyan citizenship.

Some Kenyans from minority groups and those living along the borders with neighbouring countries have been denied such basic entitlements as identity cards (ID) and passports. They have had to be screened before being given these documents. Those who have not been able to get these documents have, consequently, been denied their rights, such as the vote.

7.5.3 Nationality and citizenship in other Constitutions

Nationality and citizenship requirements are generally standard across most jurisdictions. Indeed, the two concepts are often used and applied interchangeably; the latter being of more common usage in constitutional texts. As a rule, most constitutions accord the citizenship (nationality) status based on birth (or descent), marriage, naturalization or registration. This is the position in Zambia, Namibia and Nigeria; among many others. Most African countries, however, prohibit dual citizenship except in restricted circumstances, such as where prior citizenship is obtained by birth or on marriage.

A typical provision prohibiting dual citizenship is contained in Article 15 of the Ugandan Constitution, as follows:

- (i) Subject to this Article, a Ugandan citizen shall not hold the citizenship of another country concurrently with his or her Ugandan citizenship; and
- (ii) A citizen of Uganda shall cease forthwith to be a citizen of Uganda if, on attaining the age of eighteen years, he or she, by a voluntary act other than marriage, acquires or retains the citizenship of a country other than Uganda.

7.5.4 What the People Said:

What the people told the Commission may be summarised as follows: -

(a) General principles:

- (i) Citizens should have equal rights regardless of their way of acquiring citizenship;
- (ii) All documents whose issue required production of an ID should be used as evidence of citizenship;
- (iii) Communities living in international border areas should be accorded a dual citizenship;
- (iv) Subjecting ethnic Somalis to screening cards for IDs to end;

(b) Automatic Citizenship

- i) Child born of a Kenyan man;
- ii) Child born of a Kenyan woman;
- iii) Woman married to a Kenyan man;
- iv) Man married to a Kenyan woman;

(c) Citizen by Registration

- i) People residing in Kenya for more than 10 continuous years;
- ii) Businessmen with over sh.10 million investment in the Kenyan economy, preceded by their denouncing of their former citizenships;
- iii) Anyone born to at least one Kenyan parent shall be a Kenyan citizen.

(d) Naturalisation

- (i) A person shall be eligible to be naturalised as a Kenyan citizen when that person has attained eighteen years and has been lawfully resident in Kenya for seven years preceding his or her application; and satisfies that he or she is of good character and intends, if naturalised as a Kenyan citizen, to reside in Kenya.

(e) Marriage

- (i) Any person who marries a Kenyan citizen shall have the right to become a Kenyan citizen by virtue of that marriage.

(e) Dual Citizenship

- (i) Should be permitted, especially for communities living along international borders or those resident overseas

7.5.5 Commentary

The issue of nationality and citizenship was of particular concern to women and transborder communities, particularly those on the Ethiopian and Somali boundaries. The fact that many Kenyans have married across nationality lines often created unusual problems for spouses of Kenyan women

and children of Kenyan women married to non-citizens. Further, the fact that many communities straddle borders, e.g., the Maasai, Teso, Borana and Somali, often creates special problems of identification and citizenship certification. In practice, the application of existing law was generally unfair and discriminatory. In a number of cases, this often led to harassment and brutality at border points.

7.5.6 Recommendations

The Commission therefore, recommended that

- (i) the Constitution should treat men and women equally on conferring of citizenship;
- (ii) the Constitution should state that all citizens have a right to a national identity card and a passport;
- (iii) the Constitution should provide for dual citizenship, naturalisation, registration and the permanent residence status;
- (iv) an independent body should be created and entrenched in the Constitution to take responsibility for citizenship issues to prevent interference with citizenship rights;
- (v) the Constitution should provide for citizenship by adoption and legitimation;
- (vi) in recognition of a child's right to a nationality, the Constitution should provide that children under a certain age found within Kenya whose parents cannot be found should be accorded citizenship; and
- (vii) the equality of all citizens regardless of race, ethnic origin, age, place of birth, gender or any other difference should be firmly entrenched in the Constitution.

7.6 The Republican State

7.6.1 General Principles

The character of the State – its territory and symbols and how its security and integrity can be protected from internal and external aggression is – an important constitutive factor. Indeed, the process of imperial conquest depended, to no small extent, on appropriation of specific territorial boundaries.

7.6.2 The State in the current Constitution

Apart from pronouncing Kenya a sovereign State, the current Constitution has very little to say on the juridical character of that State. For a start, no mention is made of Kenya's international boundaries, even though these more or less follow the colonial administrative lines, which delimited Kenya's territory from those of Uganda, Ethiopia, Somalia and Tanzania. This is a serious lacuna in Kenya's international relations.

Similarly, the current Constitution has very little to say on issues of security and integrity of the State. This is despite the fact that, in practice, a very large corps of security forces has been established for purposes of internal security, and maintenance of law and order.

7.6.3 The State in other Constitutions

For very good reasons, the constitutions of most independent African countries proclaim the sovereignty of the State. Having emerged from years of colonial

dependency, it became more than a mere symbolic gesture to acknowledge this in the primary instrument constituting the polity. That formulation continues even in the more recent revolutionary or people-driven constitutions. Thus, the Constitution of Uganda states, in Article 5(1), that Uganda is a sovereign state and a Republic. Similar provisions exist in the Constitutions of South Africa, Ethiopia, Eritrea and Nigeria. Many of these recent instruments then go on to define the character of the state, especially its boundaries, official language(s), secularity, national symbols and political philosophy. The Constitution of Ethiopia, 1995, for example, states in Article 1 that -

“This Constitution establishes a Federal and Democratic state structure. Accordingly, the Ethiopian state shall be known as the Federal Democratic Republic of Ethiopia”.

Article 2 adds that

“The territorial jurisdiction of Ethiopia shall comprise the territory of the members of the Federation and its boundaries shall be as determined by international agreements”.

7.6.4 What the People Said

The Commission received a large number of submissions on the issue of integrity of Kenya's territorial boundaries and the maintenance of external and internal security. Border communities, in particular felt that security forces should be subjected to a code of conduct designed to curb excesses, instill discipline and ensure accountability to the public.

(a) *On boundaries, they said that:*

- i) the Government should review the current boundaries and make the necessary changes;
- ii) the boundaries with Uganda and Tanzania in Lake Victoria should be redrawn to accord Kenya and her people more access to the lake's resources;

(b) *On internal security they said that:-*

- i) arbitrary police searches and arrests were rampant and must stop;
- ii) there was a general breakdown of law and order, as shown by rising violence and crime;
- iii) action should be taken against the circulation of illegal guns and ammunition in certain parts of the country;
- iv) violation of human rights, including rape, by security forces during operations must be investigated and stopped; and
- v) general idleness by members of the armed forces in times of peace.

7.6.5 Commentary

The issue of boundaries was particularly emotive for communities living around Lake Victoria. They reported constant harassment by Ugandan security forces and lamented lack of swift or any response from the Kenyan Government. Some thought that this was evidence of lack of care and protection by the Government. Hence, the

need to overhaul state structures. It is not entirely surprising that the Kenya-Uganda boundary was the one never fully demarcated and agreed upon.

7.6.6 Recommendations

The Commission recommended, therefore, that:

- (a) *steps should be taken to*
 - i) define Kenya's boundaries using geographical co-ordinates;
 - ii) resolve all outstanding territorial claims with or against its neighbours;
 - iii) include a schedule of those boundaries in the new Constitution; and
 - iv) declare in the Constitution Kenya's absolute sovereignty over its territorial boundaries.
- (b) *The Constitution should have clear provisions binding the security forces to*
 - i) political neutrality;
 - ii) respect for the rule of law, democracy and human rights;
 - iii) commitment to upholding the Constitution;
 - iv) transparency and accountability;
 - v) fidelity to lawful orders only;
 - vi) discipline and patriotism; and
 - vii) civilian control.

7.7 State Values and Goals

7.7.1 General Principles

Many constitutions prescribe values and goals against which the performance of governance structures is expected to be measured. These are usually contained either in the preamble or in formalities naturally described as directive principles of State policy.

A preamble is an introductory statement that sets out the vision or guiding principles. A preamble is, therefore, supposed to speak to legislators, judges, administrators and ordinary people, declaring the collective national vision, ideals, aspirations and shared values.

A preamble serves to assert the basic philosophy, principles and national goals to which a people are committed. Whatever structures of governance set up by the people, or whatever engagements these structures enter into on behalf of the people and the manner in which the engagements are entered, the reference point ought to be the national goals set out in the preamble.

A preamble is premised upon the understanding that all members of a state are bound together by certain common ideals, historical origins or experiences of great significance to the people. A preamble can reassure the people of the ground covered in trying to do away with bad experiences, for example, colonialism in Kenya or apartheid in South Africa; such a reassurance paves the way for progress and development.

Preambles generally fulfill several functions:

- state the source of authority for the Constitution; it may claim this authority for the people and may even attribute it to God;
- state the ideals, values and aspirations of the people that the Constitution seeks to promote;
- May state the history of the Constitution and the constitutional process (more so if the Constitution is written just after the struggle for independence or for a democratic change);
- May state the reasons the Constitution is being enacted or re-enacted;
- May define the character of the state constituted, e.g., whether secular, democratic, multi-party, etc;
- May set out the political, social and economic context of the Constitution; and
- Where a preamble is designed to overcome divisions, may exhort joint commitment to its values.

Directive principles of State policy are more precise norms by which the conduct of government ought to be evaluated.. Directive principles have several objectives. The first is to define the character of the State. The second is to create obligations on policy upon the State. State directive principles are obligations of the State intended to promote the welfare and quality of life for the people. They provide a framework for government policy and legislation, particularly for realising economic, social, cultural and environmental rights, committing the government to securing and protecting them as effectively as possible in all spheres of national life. In a nutshell, the principles call upon the State to direct its policy towards achieving welfare for the people as a fundamental objective. Although generally non-justifiable, many constitutions require that such principles be taken into account by all organs of the State in exercising power.

7.7.2 Values and Goals in the current Constitution

The current Constitution does not contain a preamble or a statement of directive principles of State policy. The closest the Constitution comes to a statement of values and goals is in Sections 1 and 1A, that proclaim Kenya a sovereign Republic and a multi-party democracy.

7.7.3 Values and Goals in other Constitutions

Many constitutions (old and new) prescribe the values and goals upon which the state is founded and according to which it is expected to operate. These are contained either in preambular provisions or in articles specifically dedicated to this purpose. Examples of such prescriptions are to be found in numerous constitutions, among them those of the United States, Uganda, Ghana, South Africa, Fiji and Nigeria. For example, in its preambular provisions, the constitution of Eritrea extols

“with Eternal Gratitude..... the scores of thousands of..... martyrs who sacrificed their lives for the causes...of rights and independence,

during the long and heroic revolutionary struggle for liberation and...the courage and steadfastness of....Eritrean patriots..."

The Constitution then proceeds in Chapter II to define the country's national objectives and directive principles. These are given, *inter alia*, as

- unity in diversity;
- national stability and development;
- conditions for equitable economic and social progress;
- democratic ideals;
- conditions for developing of a national culture;
- an independent, competent and accountable justice system;
- an efficient, effective and non-corruptible civil service; and
- loyal defence and security forces.

Similar provisions are found in many other non-European constitutions.

7.7.4 What the People Said

The people told the Commission that they want a constitution which records their history, declares their hopes for the future and prescribes the collective principles by which they would wish to be governed.

(a) *as regards the preamble that*

- i) The Constitution should recognise that our country Kenya is not a nation but a conglomeration of many nations; the preamble should reflect this reality and the Constitution should accommodate that diversity;
- ii) We consider ourselves equal, regardless of political opinion, race colour and creed or social status and will unite to build a peaceful and strong nation;
- iii) The Constitution should salute those who have fought for Kenya's freedom;
- iv) It should extol the democratic values of transparency, accountability, respect for human rights and social justice;
- v) By way of example, the public suggested that the Commission include statements in the preamble as follow:
 - "We, the people of Kenya, in order to form a multi-party democracy, establish justice, ensure domestic tranquillity, protect the rights of citizens, promote the general welfare and secure the blessings of liberty to ourselves and our posterity, do hereby ordain and establish this Constitution and any person acting under the authority of this Constitution will be doing so with the blessing of the people."
 - "We, the People of Kenya...
AWARE that governments are created to serve humankind in the pursuit of peace, prosperity, security, happiness, environmental integrity and dignity of human life;
NOTING that the goals have been violated in the past by tyrannical, despotic, fascist and authoritarian governments;
KNOWING that the sustainability of democracy requires constant vigilance by the people to ensure the growth of civil society and the institutions of good governance, such as an independent judiciary, a professional civil service and a truly representative legislature establish....."

(b) *that directive principles be included to*

- i) guide all citizens, local authorities and Parliament, the Executive, the Judiciary and all other State organs and officials in applying or interpreting the Constitution or any other law and implementing any policy decisions to establish and promote a truly democratic system and rational economic order;
- ii) recognise that power and authority is derived from the people and that the people shall be governed by their will and consent;
- iii) direct that Kenya shall always be a plural democracy (all forms of non-plural democracy outlawed, especially one-partyism and militarism) with clear separation of powers and a just rule of law;
- iv) relate to political education, culture, constitutionalism, rule of law and accountability, protection of the rights of women, national unity, human rights, protection of the rights of people with disability, international relations, social objectives, educational objectives, cultural objectives, economic objectives, land rights, State intervention in economic affairs, environmental protection and constitutional supremacy.

7.7.5 Commentary:

Except for those modelled after the 1958 French Constitution, post-independence instruments contain no preambles or directive principles of state policy. With the pervasive influence of Cold War politics, particularly in the late 1960s and 1970s, a number of African countries started including directive principles in their constitutions. In the constitution-making phase following the collapse of the Soviet empire, it is now standard practice to include a preamble in constitutions. Because the Commission addressed this matter specifically, many people thought it was a good idea.

7.7.6 Recommendations

The Commission recommended, therefore, that the new Constitution should

- (a) *contain a preamble which, inter alia,*
 - i) acknowledges the significance God to the Kenyan people;
 - ii) recognises the struggle for independence and the role of freedom fighters;
 - iii) recognises the sovereignty of the people in establishing the Constitution and in setting up the means of governance for themselves and posterity;
 - iv) affirms the religious, cultural and ethnic diversity of Kenyans;
 - v) reaffirms the indivisibility of Kenya as a nation'
 - vi) seeks to heal post-independence wounds caused by political conflict.
 - vii) reaffirms commitment to social justice; and
 - viii) reaffirms commitment to democracy, constitutionalism and the Rule of Law.
- (b) *also contain directive principles of state policy requiring all persons and organs of state to*
 - (i) respect the Rule of Law, protect democracy, democratic institutions, freedoms and rights of citizens; and
 - ii) respect the letter as well as the spirit of constitutional provisions of fairness and good governance.
- (c) *require state organs not to exercise power arbitrarily or in a discriminatory manner.*

- (d) guarantee freedom, equality and justice for all persons.
- (e) require state organs to manage the country's resources sustainably, to respect ethnic, regional diversity and communal rights, including the rights of communities to organize and participate in cultural activities and the expression of their identities.

7.8 **The Legal System**

7.8.1 General Principles

The nature and structure of the legal system is important for at least two reasons. First, the legal system, as it is now, preceded the independence Constitution, and was not created by it. Second, although inherent authority exists in exercising the judicial function to develop a uniquely Kenyan jurisprudence, that has not materialised over the years.

7.8.2 The Legal System in the current Constitution

While providing that the Constitution is supreme and bestowing powers on the Legislature to enact laws, the current Constitution does not have any provision on the legal system or on the place of other laws.

Among the qualities of a legal system is acceptability and obedience by the people. To get such acceptance and obedience, the people must be in agreement with the laws and the system in general and with the Constitution as their own will, the Constitution must therefore define the legal system.

In lieu of a constitutional determination of the nature of Kenya's legal system, the Judicature Act (Cap. 8) lists the following as the sources of the laws of Kenya:

- The Constitution;
- Legislation, which includes Acts of the Parliament as contained in Kenya's statutes and specific Acts of Parliament of the United Kingdom cited in the schedule of the Judicature Act;
- Subsidiary legislation;
- Substance of common law, the doctrines of equity and statutes of general application in force in England on 12th August, 1897;
- African customary law in civil cases, so long as it is not repugnant to justice and morality or inconsistent with written law.

Since the people are the source of the power by which the legal system operates, it is imperative that the system be defined in the Constitution as an expression of their will and to guide them in ordinary interaction. A number of modern constitutions, such as that of Papua New Guinea, have established such a basis.

7.8.3 The Legal System in other Constitutions

Although most constitutions leave the issue of the character of the legal system, including choice of a forum or of law rules, to statutes, or to case-by-case determination by the courts, some of the more recent instruments, especially those of multi-cultural societies now provide for this. The reason is to ensure legitimacy to

the sometimes-plural jural traditions which constitute the national legal system. The Constitution of Papua New Guinea provides, for example, that its laws consist of

- this Constitution;
- the organic laws;
- the Acts of Parliament;
- emergency regulations;
- the provincial laws;
- laws made under or adopted by or under this Constitution;
- the underlying law; and
- none other.

Other constitutions merely provide for affiliation of specific laws as part of the legal system. Thus Article 186 of the Constitution of the Fiji Islands, 1997, provides that

- (i) Parliament must make provisions for applying customary laws and for dispute resolution in accordance with traditional processes.
- (ii) Parliament must, in doing so, have regard to the customs, traditions, usages, values and aspirations of the.... people.

7.8.4 What the People Said

Although this issue was not specifically put to the people, there was a clear desire for the application of indigenous and religious laws in certain discreet areas.

The people told the Commission that

- (i) Customary law which differs from one ethnic community to another should be paramount in settling disputes on customs and traditions of the concerned community;
- (ii) All customary laws should be codified and regarded as by-laws and adjusted to be relevant to the new Constitution;
- (iii) The customary law should not be used to deny individuals their rights; and
- (iv) The Law Reform Commission should repeal misplaced colonial laws before the Constitution is reviewed.

7.8.5 Commentary

The fact that Kenya's legal system derives most of its principles and values from English law has wittingly or unwittingly led to suppression of indigenous laws, practices and values. This has led, *inter alia*, to a widespread extra-legal culture, especially in personal and land relations. A number of cases in recent times, for example those arising from burial disputes, have brought to the forums just how finally established this extra-legal culture is. Since little or no attempt has been made since independence to develop a rational framework for evolving indigenous law, the legal system remains riddled with internal conflicts.

7.8.6 Recommendations

The Commission recommended, therefore, that:

- (a) *the Constitution should state the sources of law as consisting of -*
 - i) The Constitution, and subject thereto;
 - ii) Acts of Parliament;

- iii) African Customary Law;
 - iv) Personal Islamic Law;
 - v) Personal Hindu Law;
 - vi) The East African Community Law; and
 - vii) International Law.
- (b) *on Islamic, Hindu and customary laws as sources of law, these must be limited to personal law.*
- (c) *the legal system should ensure equality for all before the law and an equitable legal process.*
- (d) *courts will ensure the creation and development of a common law of Kenya.*

CHAPTER EIGHT

CULTURE

8.1 Mandate of the Commission

The Commission in Section 17 (d) (x) was mandated to examine and review the socio-cultural obstacles that promote various forms of discrimination and recommend improvements to secure equal rights for all. Section 3(h) mandated the organs of the review to include provisions that aim at "... strengthening national integration and unity." A key objective of the Review Act in section 3 (e) was to secure provisions therein "...respecting ethnic and regional diversity and communal rights including the right of communities to organize and participate in cultural activities and the expression of their identities."

8.2 General principles and concepts

8.2.1 Definition of Culture

The relevant literature defines 'culture' as the symbolic and learned, non-biological aspect of human society, including language, custom and convention, by which human behaviour can be distinguished from that of other primates. Culture therefore includes customs, values, language, attitudes, behaviour patterns, belief systems, systems of production as well as social and political organization. Culture is thus the totality of people's way of life.

8.2.2 Multiculturalism

Applying the principle of multiculturalism is now considered as a key approach to managing cultural and ethnic diversity. Multiculturalism as principle embodies the ideals of reconciling respect for diversity with concerns for societal cohesion and the promotion of universally shared values and norms. Multiculturalism involves managing differences in culture from the point of view of understanding different cultures. It also involves managing power relations among people of different cultures. It takes into account being aware of an individual's own cultural background and values and more importantly, the contribution that their values, perceptions and expectations can make to nation building. It further tends to promote co-existence of diverse ethnic groups in the general social structure of society and hence recognizing that all ethnic communities are equal.

Whereas multiculturalism confronts a critical perspective in the co-existence of different cultures, it also functions as a program for integration for a nation in a crisis. Experiences of states, which have explicitly espoused multiculturalism as a state policy in response to ethnic diversity, have shown their considerable durability with positive attempts of alleviating deeply entrenched social injustice.

It is also important to mention that in societies where sub-national regions have a considerable role in policy-making and implementation, multicultural initiatives at

this level are of particular significance. For example, where minorities are concentrated in certain regions, local initiatives are extremely valuable on what can be achieved through an explicitly multicultural policy.

8.2.3 Globalizations and Culture

Globalization has now become a common term, used to characterize, explain and justify many current economic, social and cultural developments. Globalization is a phenomenon describing the processes characterizing the multiplicity of linkages, interconnection and interdependence in the world between states, societies and peoples. The driving force behind globalization and in particular, cultural globalization is information and communication technology.

The aggressive spread of communication technologies (often controlled by western multinationals) however, now poses new challenges to local cultures and values in Africa and other non-Western Societies. The global media, music and film and publishing companies have permeated the world with unprecedented verve.

While globalization trends are expected to lead to cultural homogeneity, however, the reality is that globalization is not a homogenous process that can be mutually transferred across national boundaries without a devastating visitation on local cultures.

8.2.4 Culture in International Instruments

Several international instruments provide for the promotion and protection of culture and cultural rights. These include the International Covenant on Economic, Social and Cultural Rights (ICESCR); Universal Declaration of Human Rights; United Nations Education, Scientific and Cultural Organization Documents, Convention Concerning the Protection of the World Cultural and Natural Heritage; and the African Charter on Human and Peoples' Rights. These international instruments make provision for the right of self determination and the right of everyone to take part in cultural life; enjoy the benefits of scientific progress and its applications; and benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production.

The instruments also emphasise the necessity of ensuring establishment of policy measures for effective and active actions for the protection, conservation and presentation of the cultural and natural heritage. The United Nations Education, Scientific and Cultural Organization (UNESCO) has developed a number of instruments and documents aimed at facilitating international circulation of visual and auditory materials of an educational, scientific and cultural character. They aim at prohibiting and preventing the illicit import, export and transfer of ownership of cultural property; and facilitating participation by the people at large in cultural life and their contribution to it. UNESCO notes that cultural development not only complements and regulates general development but is also a true instrument of progress.

The African Charter on Human and People's Rights in Article 29 provides for the duty to preserve the harmonious development of the family and to work for the cohesion and respect of the family. It also provides for the duty to respect ones parents at all times, to maintain them in case of need; to preserve and strengthen

positive African cultural values in ones relation with other members of the society. All this is done in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well being of society.

8.2.5 Culture, Linguistic Diversity And Language Policy

(a) Definition of Language and its Role

Language is a creative human attribute vital in interpersonal communication, national unity and regional integration. It has both symbolic and instrumental functions. At the symbolic level, language is important in defining identities and the intrinsic well being of communities. Instrumentally it is a central tool for national dialogue and development.

As an aspect of culture, language plays an important role in determining the extent of mass involvement in national affairs, education and the diffusion of knowledge. The choice of a language has a lasting impact on political, cultural, social and economic development of a nation. Choices that are sensitive to aspirations of a people are lasting; they are likely to ensure the realization of basic and fundamental rights of individuals and communities. Of necessity such choices must be guided by a concern for the people's involvement in national life as well as the need to improve their social economic status.

(b) Language Situation in Kenya

Kenya is a multi-lingual and multi-ethnic country. There are over 90 languages in Kenya spoken by over 90 distinct ethnic, sub ethnic and foreign linguistic groups, which have their own traditions, customs and history. In the absence of reliable statistical data, there is no precise knowledge of the demographic size of the languages spoken in Kenya. What is however known is that the distribution by language is very uneven ranging from a few hundred to about three (3) million speakers.

In Kenya, according to a recent report by UNESCO, sixteen out of Kenya's '42' languages (*though this number is not representative as there are over 90 languages in Kenya*) are at a serious risk of disappearing. The Centre for Endangered languages (CEL) has also argued that minority communities experience intense pressure - economic, social and political – and are threatened to abandon their cultures, including their languages. Some of these minorities include the *Ogiek, Elmolo, Sengwer, Yaaku and Waata*, most of them traditionally hunters and gathers.

8.3 Culture in the Current Constitution

The current Constitution of Kenya has very few provisions that directly refer to, and deal with culture. These are those that deal with:

- The making of Swahili an official language in the National Assembly as in Section 53,
- The creation of the Kadhi Courts as in section 66,
- The right to be informed of the charges made against one in a language that one understands as in Section 77,
- The right to the application of one's personal law in matters of personal law including adoption, marriage, divorce, burial, inheritance of property on death as in section 82.

- The requirement to know Swahili before one is naturalized as in Section 93.
- The holding of Trust Land by the county council, for the benefit of the persons ordinarily resident on that land under the African Customary law as in Section 115.
- The payment of full compensation to an owner of land under the African customary law before his land is set apart as in section 117.
- The extinguishing of the land rights accruing under customary law to a family, tribe, group or individual, once the county council has set apart that particular area of land as in section 118.

An assessment of the current constitution in relation to treatment of culture in the colonial and post independence Kenya reveals a deep-seated attitude that African cultures by their very nature are backward, immoral and repugnant to justice unless proven otherwise. The Constitution's perception is that African cultures significantly contribute to attitudes of polarization and inter tribal (ethnic) conflicts instead of playing the role of unifying, edifying and addressing petty antagonisms. The Constitution therefore takes an approach that seeks to subvert and curtail the African cultures and to that extent even their positive value may after all be questionable.

8.4 Culture in Other Constitutions

An analysis of various constitutions of the world show that most of the countries that have directly provided for culture in their constitutions have done so in the chapters on the directive principles of state policy and/or in the Bill of Rights. An assessment of the various constitutions as they relate to culture reveals three distinct approaches. The first approach is that which treats culture as a retrospective phenomenon, which is intrinsically profane, backward, primitive, immoral and repugnant to justice and must be curtailed unless proven otherwise. The present Kenya constitution and other former British colonies such as Gambia have provisions in their constitutions on culture, which reflect this attitude.

The second approach is that which recognises and affirms culture as the most important aspect of national life. One that seeks to preserve, promote and protect culture as part of national goals. In this approach, culture and cultural diversity are clearly provided for in the directive principles of state policy for purposes of building a blend of good traditional institutions and practices and the modern systems of open and democratic society and social, economic and cultural development of the nation. Among these are Uganda, South Africa, Ethiopia and Swaziland.

The third approach links culture, science and technology and this is found in most western countries such as Italy, Canada as well as Vietnam. The constitutions provide for research and culture and stipulate the responsibility of the state to promote the development of culture, and scientific and technical research including safeguarding the natural beauties and the historical and artistic heritage of the nation.

What Kenyans Said

The people of Kenya gave their views to the Constitution of Kenya Review Commission on various aspects of life as they relate culture. The historical and the present political, economic, social and cultural factors influenced the views they expressed. These views may be summarized as follows:

(a) *On diversity of the Kenyan people:*

- (i) The Constitution should recognise and celebrate diversity of Kenyan People.
- (ii) “Our differences should be seen as a strength and not a weakness”
- (iii) The Kenyans collective experience and shared values should form the basis for development of national culture.
- (iv) That national celebrations, symbols, designs etc, have Kenyan Values this include national days, national currency, Coat of Arms etc.
- (v) Establish national holidays that symbolize national and shared values. Do away with parochial or divisive holidays.
- (vi) The state should promote co-existence peace and solidarity among all Kenyan communities.

(b) *On languages:*

- (i) Recognise and respect all Kenyan linguistic communities.
- (ii) That all Kenyan languages should be respected, promoted, reserved, protected and developed.
- (iii) Kiswahili should be the national language.
- (iv) Kiswahili and English should be the official languages.

(c) *On compensation and restitution:*

- (i) All Kenyan peoples, cultural, linguistic and religious communities, right to organize, practice and manifest their culture, identity and heritage.
- (ii) All Kenyan peoples, cultural, linguistic and religious communities have right to maintain, protect and develop their culture (past, present and future) this include historical, archaeological and religious sites, material culture, designs, ceremonies, festivals, knowledge, folklore, literature, creative, visual and performing arts, artifacts, ornaments, customs, traditions, rites, rituals and names.
- (iii) Establish a mechanism to deal with historical claims and rights: including property rights, land rights, appropriation, access and visitational.

(d) *On recognition of heroes:*

- (i) Kenyan’s resistance and fight against oppression, and colonialisation should be recognised, documented and preserved:
 - records being held by Kenyan government and other governments should be made public;
 - we should establish a mechanism to recognise and celebrate all freedom fighters, past, present and future;
 - we should establish a freedom fighters acre (as a burial site).

(e) *On nationalhood:*

- (i) Nairobi be the capital of the nation and should have special status.

- (ii) The name Kenya should be retained.
- (iii) Cultural institutions should be recognised and the state should facilitate their development and reform, preservation, promotion and protection.
- (f) *On media and culture:*
- (i) The state should recognise, remote and facilitate the work of cultural workers e.g. artists.
- 1. The state should promote creative, visual and performing arts.
- (iii) The state should promote the development of radio, television and film industries.
- (iv) The state should promote and facilitate the media and encourage the development of local content and programming.
- (g) *On discrimination*
- (i) That all Kenyan communities should be respected and treated equally and should not be discriminated upon. Establish a mechanism to establish number of communities “not mythical 42 only.”
- (ii) Ethnocentrism, racism and other forms of discrimination should not be allowed.
- (iii) Culture and cultural heritage, norms, customs, traditions, beliefs, rituals, rites etc should be respected, recognised, promoted, preserved and protected so long as they are not harmful, oppressive and discriminatory and or forced on an individual.
- (iv) All Kenyan people, cultural, linguistic and religious communities have a right to compensation and or restitution for cultural, intellectual, religious, spiritual and other properties taken without their free will and consent or in violation of their laws, traditions. Special efforts should be made to return property appropriated by colonial forces.
- (v) All Kenyan peoples, cultural, linguistic and religious communities have a right to compensation, and or restitution for cultural crimes committed against them including crimes:
 - committed during the colonial and post colonial period;
 - to include crimes against, humanity, murders, rapes, collective communal punishment and humanitarian, torture and other crimes.
- (h) *On traditional knowledge*
- (i) The Constitution should recognise and respect traditional land tenure and use.
- (ii) Traditional knowledge on land should be recognised, preserved, protected and respected.
- (iii) Traditional knowledge on the environment including utilization use and conservation should be recognised, preserved, protected and respected.
- (iv) Cultural knowledge and technology should be taught in schools.
- (v) The state to promote cultural and cultural related industries such as textiles, fashion, food, architecture, film, radio and television, theatre, visual arts and design and publishing.

8.6

Commentary

As evident in the above views and the profiles of Kenyan communities, the historical and the present political, economic, social and cultural factors have greatly influenced the views expressed to the Constitution of Kenya Review Commission. It is noteworthy that the colonial experience greatly demeaned Kenya's culture and cultural heritage as it systematically imposed foreign political, economic, legal and social order to an extent that

Kenyans had reached a point that they started regarding their cultures as retrogressive, backward and incapable of being incorporated in the modern society.

However, many African societies are still governed by political, economic, social and cultural norms that are well known and observed even if they are uncodified. These norms are geared towards maintaining social order. These basic norms are the forerunners of the modern day constitutions. With the societal developments, came the development of these norms such that they were distilled and codified into complex laws i.e. constitutions that could govern complex social orders e.g. countries.

As part of the second liberation therefore, there has been an increasing recognition and appreciation of African culture in constitutional and national reconstruction. This nonetheless still requires radical change in people's brainwashed minds and perceptions as to the true meaning of culture

8.7 Recommendations

The Commission, therefore, recommended that:

- (a) *There should be a chapter entitled "CULTURE" in the Constitution.*
- (b) *On recognition and respect of Kenyan communities:*
 - Identification and acceptance
 - Equality
 - Non-discrimination
 - Inclusion
- (c) *On rights to manifest and practice:*
 - Right to maintain, protect and develop the past, present and future cultural manifestations
 - Right to observe, practice and reclaim customs, traditions, rituals, convention including dress mode, food.
- (d) *On history and heritage:*
 - Right to transmission to future generations, histories, languages, oral traditions, philosophies writing and other communication, systems, and literature.
 - Cultural Heritage will include monuments, artifacts, architectural works, elements or structure of archaeological nature, creative and artistic works, designs, inscriptions, caves and forest dwellings, other structures or features which are of outstanding value from the point of history, art or science.
- (e) *On historical and religious sites:*
 - Recognition, respect, preservation, protection and promotion of religious, historical, sacred and archeological sites.
 - Acceptance of rights and claims including property rights, access and visitations and other related rights.
- (f) *On rights to be involved in national life:*
 - All communities to have equal opportunity in decision-making process particularly when decisions may affect them directly or indirectly,
 - That national institutions should reflect the national character of diversity such as in education, employment, recruitment into police and

the armed forces, and in national institutions e.g. parliament, judiciary and executive,

- Measures including affirmative action to be used to re-dress past injustices, and/or neglect.

(g) *On national culture, identity, values and symbols:*

- Designate certain days as cultural days when various communities celebrate their cultures,
- That our shared experience and values should form the basis for building our national cultural identity ,
- To promote African and other Kenyan cultures,
- To promote Pan-Africanism and the integration of African (East African) nations,
- To safeguard and promote the national anthem and flag,
- To recognise and respect freedom fighters past, present and future,
- To establish a heroes and heroine acre,
- To establish institutional framework to promote the national culture and shared experiences e.g. KBC,
- To affirm the use of African and other Kenyan values and symbols in national institution including:
- Mode of dress or dress code, in parliament, Judiciary,
- Formal and national government functions,
- For avoidance of doubt cultural dress codes will be highly encouraged.

(h) *On family and marriage:*

- All marriages including cultural, religious etc. should be recognised by law and issued with marriage certificate,
- Recognise marriage under any tradition or system of religious, personal or family law,
- Recognise marriage only between individuals of opposite sex,
- Outlaw same sex unions,
- Recognise the extended family and its role as a social support system.

(i) *On cultural institutions:*

- Recognise and facilitate reform and development of traditional institutions,
- Use strengths of cultural institutions in promoting peace, negotiations and dispute settlement, solidarity and conflict resolutions,
- Strengthen and devolve national institutions that promote and preserve various aspects of culture:
 - Museums,
 - National archives,
 - KBC,
 - Kenya Cultural Centre,
 - Kenya National Library.

(j) *On the National Council for the Promotion and Protection of Cultural Heritage:*

- The Constitution provides for the establishment of the National Council for the Promotion and Protection of Cultural Heritage whose functions should be clearly defined.

- (k) *On conflict management and resolution:*
- Encourage the use of traditional conflict resolution mechanism where applicable,
 - Allow alternative conflict resolution on civil matters where both parties consent,
 - Recognise the traditional oathing system in the judicial system.
- (l) *On the media:*
- Make KBC an independent institution as a primary information and cultural source for the Kenyan people,
 - Propose how to govern media houses to include quality Educational and local content,
 - Information about the existing cultural heritage laws and how these impact on culture and intellectual property rights.
- (m) *On multiculturalism:*
- The Government of Kenya and her people must make a commitment to multiculturalism as a principle in the sense of tolerance and respect for plurality of cultures.
 - There is need for protection of cultural rights of minorities and need for a real national commitment to stamp out ethno-centricism, racism, xenophobia, prevention of politicisation of religion and concomitant rise of extremism and general empowerment in education and communication.
- (n) *On education:*
- The State shall take all necessary measures to design and develop a national education system that will nurture and emphasize creativity, *knowledge acquisition*, talent development, innovativeness and functional application of learned skills through formal and non-formal means for sustainable development and *the greatness and security of Kenya*. The education system shall be designed in such a manner as to adequately prepare every citizen to lead productive and dignified life.
 - There shall be a National Education Service Commission that shall continually review the terms and conditions of service, training and qualifications of public officers in the education system and matters connected with their management and welfare.
- (o) *On intellectual property of the people of Kenya:*
- There is need to cover indigenous and local knowledge and know-how including: folklore, design, creative and performing arts (including song, music, dance, drama, storytelling, stories, painting, sculptures, ceremonies, festivals, games and symbols).
 - There is need to include knowledge of scientific, agricultural, technical and ecological, including cultigens, medicines and sustainable use of flora and fauna, seeds and other biodiversity.
 - There is need to include human genetic material including DNA and tissues.
- (p) *On science and technology:*
- The Constitution should recognise that innovation, intellectual property rights, Science and technology are essential for national development and progress.

- The State shall give priority to research and development, invention, innovation, and their utilization; and to promote science and technology education, training, and services.
- The State shall support indigenous, appropriate, and self-reliant scientific and technological capabilities, and their application to the Republic's productive systems and national life.
- The State shall take appropriate policy, legislative and program measures to:
 - Encourage or provide incentives for innovation, disclosure and commercialization of innovations, and protecting and rewarding innovators,
 - Fostering Kenya's export of value-added products
 - Identifying, trapping, nurturing and developing a national reservoir of creative and innovative talent
 - Regulating and promoting innovation, technology, Intellectual Property and trade
 - Promoting and investing in research and development in information technology and services
 - Protecting and securing respect and appropriate compensation or reward for creativity, innovation and intellectual property.

CHAPTER NINE

AFFIRMATIVE ACTION

9.1 The Mandate of The Commission

The Review Act provides an expansive agenda for affirmative action and the inclusion of the historically marginalized and minority groups into the national fabric. Section 3 of the Review Act demands that all organs of the review process must ensure that the final outcome guarantees and safeguards the well being of the people of Kenya. In particular, the review process must ensure the following:

- Gender equity;
- Equal citizenship;
- Equality and redress of the discrimination or hardships suffered in the past;
- Respect of human rights and fundamental freedoms;
- Equitable access to national resources;
- Full and inclusive participation in public affairs; and
- the provision of basic needs to all Kenyans through the establishment of an equitable framework for economic growth.

9.2 Affirmative Action: General Principles

Affirmative action and positive discrimination are often used synonymously. Affirmative action suggests positive steps to achieve the improvement of the conditions of a section of the people who for various reasons have been excluded from enjoying the benefits of development. On the other hand, positive discrimination suggests treatment that assists one group of people to catch up with the rest in the society. Both concepts therefore have in common, the notion that there are certain sections of society that are disadvantaged and whose condition must be redressed.

Positive discrimination has been the subject of a great deal of controversy, not least litigation, especially in the United States. It tends to become more controversial when one identifiable individual can argue that he or she has suffered because of a programme or decision and that exercising positive discrimination could benefit another identifiable individual. It is in relation to this fact that often emotions tend to run high, and individuals so discriminated are prompted to litigate. In this case, it is not just the risk of privileged sections of the society resisting erosion of that privilege, but positive discrimination is seen to pose a threat to those being discriminated against even if the benefits are societal.

It is hence argued that the way to deal with the disadvantaged in society is not by adopting protective and discriminative measures but by providing equal opportunities and level playing ground for all. This argument is prevalent in the neo-liberal ideologies based on the free market principles as reflected in the policies of the World Bank and the International Monetary Fund.

These policies in their character do not favor subsidies or public funded social services. This approach is therefore hostile to the basic principles of welfare-based affirmative action as well as to positive discrimination.

Affirmative Action in the context of the review process is seen as a direct response to historical concerns of gross inequalities that characterize Kenya's social and economic environment. The key concerns include:

- a) Exclusion of whole regions and communities from enjoying the benefits of national development;
- b) Unequal development;
- c) Unequal distribution of national resources; and
- d) Unequal participation in decision-making and management of public affairs especially by women, people with disabilities, the youth, pastoralists and minority communities.

Conceptually, affirmative action is about a whole range of interconnected issues including remedying historical injustices; providing level playing ground and equal opportunities to all; promoting inclusive participation by all in decision making; providing special assistance to the marginalized areas and communities; and ultimately, ensuring dignity, equality, justice and unity.

9.3 Affirmative Action in the Current Constitution

The 1963 Constitution of Kenya was in a way alive to the idea of affirmative action as it made direct provisions for the protection and inclusion of minority communities in the governance system. As to equality of citizens, reference was made to Sections 14 and 26, which briefly stated that every person in Kenya was entitled to the fundamental rights and freedoms.

The current Constitution however, makes no direct assertions on the place of minorities and the disadvantaged other than making provisions under Chapter Five on the protection of fundamental rights and freedoms of the individual, which by their very nature, are not justifiable. At the same time, the language and tone adopted in the Constitution do not reflect the idea and philosophy of affirmative action. Nonetheless, Section 82 provides for the protection of individuals from discrimination on the grounds of race, tribe, place of origin or residence or local connection, political opinions, colour, creed or sex.

9.4 Affirmative Action in other Constitutions

Virtually all other Constitutions make provisions for equality before the law, and for non-discrimination. Most Constitutions provide for equality rights to be limited or derogated in specified circumstances or in general, if these are reckoned to be justifiable in a democratic society. Few Constitutions specifically contemplate that such limitation or derogations may provide for some form of Affirmative Action. Even more rare are the classes of rights for which such affirmative action may be taken.

The Constitution of Canada provides a provision in law whose object is the improvement of conditions of disadvantaged individuals or groups. Such a provision in law would be consistent with the Charter of Rights and Freedoms and not contrary to it. The provisions of Section 15 of the current Constitution do not impose any duty on the State to put in place any, programme or activity that has its object the improvement of conditions of disadvantaged individuals or groups'. It simply prevents any such programme from being unlawful thereby making provisions for Affirmative Action.

The Constitution of Malaysia makes provisions that require special treatment of the Malays especially in the areas of education in public institutions, employment in public service and licenses among others for economic activities. Article 153 aims to mainly benefit the indigenous inhabitants of Malaysia who constitute the majority of the population. There is an obligation on state to exercise the government functions generally to protect the interests of the Malays.

The Indian Constitution makes a number of provisions on the possibility of programmes aimed at benefiting those in certain castes, tribes and backward classes generally. These are coupled with a general non-justifiable duty on the State to take affirmative action, which may nonetheless, be potentially enforced by the courts. Article 14 on equality before the law and Article 15 on prohibition of discrimination on grounds of religion, race, caste, sex or place of birth prohibit discrimination by the State. Article 16 on equality of opportunity in matters of public employment provides for reservations of quotas, if the state is satisfied that there is inadequate representation for certain section of society. The provision is however, not mandatory or obligatory. As a directive principle of state policy Article 38 makes provisions on securing a social order for the provision of welfare of the people.

The South African Constitution makes an exception to the general equality provision as it relates to the victims of past discrimination in addition to obligations in the area of land, education, housing and health among others, which are not limited to past discrimination provisions. Article 9 on equality and non-discrimination makes it clear that positive measures may be taken to fulfill the general equality provisions especially as they relate to situations of past unfair discrimination. Article 25 on property imposes a duty on the state to take steps to foster equal access to land. Of greater implication is the duty of the state to take steps to realise the rights to housing and to health with no reference to past discrimination.

The Commission received a large number of views regarding the issue of marginalization. Their views may be summarized as follows:

(i) *On marginalized communities, that*

- Pastoralists feel their way of life is despised, and their need for land is misunderstood.
- Communities who live near game parks (especially those who used to live or graze their cattle in the park areas) feel marginalized by their exclusion from that land, and also by what they see as the preference for wildlife over human life.
- Communities living in the coastal province see that non-local people occupy their valuable plots of land.
- Slum dwellers are deprived of basic sanitation.
- People in the Northern districts of Eastern, North- Eastern and Rift Valley Provinces are deprived of the same chances for education, of access to water and of security in comparison with those in most other parts of the country.
- Poor people generally are deprived of access to basic needs especially education, medical care, housing, transport, sanitation, and full participation in decision-making.
- Some communities have been deprived of access to land as a result of past historical injustices.
- Majority of the marginalized communities lack access to basic amenities such as water, food and shelter.

(ii) *On minority communities, that:*

- The Ogiek face eviction from the forest where they live, and effectively from their way of life.
- Muslims feel they are religious minorities who have suffered discrimination and whose rights have been trampled on, and values and institutions eroded.
- Asians feel politically marginalized, even though not economically (Goans specifically are economically weak, and, by reason of historical chance, often stateless).
- Communities near the boarder feel their loyalty is doubted, and that the services and facilities they receive from government are inferior and often inappropriate, their needs are not appreciated.
- A recent report stated that 16 Kenyan languages are in danger of extinction.

(iii) *On People with disabilities, that:*

- Kenyans with disabilities feel marginalized: unable even physically to participate in social life because buildings, footpaths (where they exist), transport are inaccessible. Their needs in terms of communication (for example through sign language and Braille) and education needs are not met.
- People with disabilities are deprived of education, or job opportunities and of the chance to participate fully in society.
- Facilities at working places including all working aid should be made more appropriate for use by persons with disabilities.
- The Constitution should provide for appropriate legal definitions of person with disabilities and protection against discrimination.

- Every institution, company and organization should employ at least two disabled persons.
- People with disabilities (or with conditions that are not disabling like albinism and HIV/AIDS) are denied the same rights as others, either by positive act or by neglect.

(iii) On women, that:

- Women feel marginalized: one of the lowest proportions of female legislators in the world, a lower rate of participation in education than men and otherwise not adequately involved in business and government to the same extent as men.
- Customary law denies women inheritance of land and often leaves widows and their children destitute.
- The State should provide facilities and opportunities to enhance the status of women to enable them realise their full potential and advancement.
- Women ought to be integrated in all levels of decision making, be allowed to express their views and a women's bureau be established to monitor progress.
- The Constitution should outlaw religious and cultural practices that discriminate against women indirectly or directly.

(iv) On the elderly people in the society, that:

- The elderly are relegated on the sidelines of life in many ways, especially when they are frail.

(v) On the youth, that

- The youth believe they are being denied full opportunity to participate in employment and more broadly in government and society.

9.6

Commentary

Issues of social justice and exclusion are basic to affirmative action, and constitute some of the major concerns raised by Kenyans in their submissions to the Constitution of Kenya Review Commission. Social justice suggests a notion of a positive effort to achieve an equitable system of governance and society that affords everyone access to basic goods and services necessary for essential livelihoods. The word justice in itself suggests that the objective must be the removal or reduction of inequality in the society.

The analysis of the views presented to the Constitution of Kenya Review Commission and indeed the analysis of the context of the Review revealed that both the governance and the economic system exclude a large proportion of the people of Kenya. This is reflected in the high levels of poverty estimated at over 60% of the total population. The worst hit are women, people with disabilities and minority communities.

While democracy is about inclusion and ensuring justice to all, in recent years there has been a growing divide between the haves and the have nots with a large section of the society feeling left out or excluded from sharing the benefits of development.

It is these concerns that the review process seeks to address through affirmative action and other interventions including the rationalization of the power and decision making structure of the Kenyan society.

Many submissions called for affirmative action on behalf of women, people with disabilities, the youth, and pastoralists and for all those people on whose areas of this country have suffered discrimination in part or are in special need of development. It is proposed, however, that programmes of affirmative action, justified by full data and using appropriate means and goals, be transparently operated, limited by time, adequately monitored. In addition, they should not amount to unfair discrimination.

The objects of review and the people's recommendations place great emphasis on social justice and the basic human needs. The Commission is convinced that these can only be achieved if economic and social rights are made justifiable. This then is the place for Affirmative Action.

Women's issues were very prominent in the submissions to the Commission. They ranged from the fact that women hold only 4.1% of seats in Parliament, domestic and general sexual violence, discrimination in inheritance, to low enrolment in school. It has been proposed that there be a provision setting out women's rights clearly. Women's claims for fair treatment, supported in many places by men, have been so clearly expressed and the sense of past injustice is so great that, although there is an element of overlap with the general non-discrimination provision, it is felt this is justified, in the interests of ensuring a clear statement of the position of the over 50% of the population who are female. It is for these concerns raised that women aired their proposals for the new Constitution.

The principle of equality of men and women was insisted on as a basic requirement for the enjoyment of rights. Women insisted on the entrenchment of women's rights in the Bill of Rights. Among the rights echoed by most submissions and memoranda by women's organization, groups, individuals and resource persons include: -

- Abolish discrimination under exception of section 82 of the Constitution in regard to marriage, divorce, burial, inheritance, and personal law issues, with a view to removing cultural concessions.
- Eliminate customary and religious laws that violate women's rights and are in conflict with the rights and duties protected under international laws that Kenya has ratified.
- Constitution should establish a Domestic/ Family Court at a District level managed by majority women to deal with domestic violence.
- There should be a mandatory cabinet posts reserved for women.
- Value be put on women's work as family care providers and national builders through formal and informal work.
- Establish rehabilitation centres for lactating imprisoned mothers rather than put them up in jail.
- Reintroduction of the affiliation Act.
- Outlaw retrogressive socio- cultural practices that impede on women's rights to participate, access and control resources.

- Respect for and upholding of cultural, ethnic, regional and communal rights and diversities but out law traditional harmful practices.
- Mandatory but guaranteed testing HIV/AIDS before solemnising marriages.
- Equal opportunity Act should be passed, giving women access to education and gaining employment.
- Establish a gender commission for gender equality as a Constitutional and an autonomous statutory body with a framework that will provide for mandate.
- Women should be allowed to control their sexual and reproductive lives.
- Women should be entitled to their children and property within and outside marriage.
- Individual spouses entitled to their own funds, businesses or industries that are not claimable by other spouses.
- Measures be taken to protect women refugees and children as they are most disadvantaged by wars and displacement.

The elderly in society have in the past felt marginalized. The justification for treating older persons separately causes them to be ignored hence making them in some ways, a vulnerable section of the community. From the collection and collation of views from the people the Commission established that there is evidence that many older persons suffer neglect and abuse as well as being excluded from full participation in society. There is a need for a general recognition of the rights of the older persons including a special mention of the rights to participate, to pursue personal development, to work, to be free from all forms of exploitation and abuse, to live with dignity and respect, and to retain autonomy and to reasonable care and assistance of family and State. There is also the need of a special plan for their retirement, to share their knowledge and skills with others, and remain active in society.

On the basis of submissions from individuals and organizations, Persons with Disabilities have felt marginalized. The memorandum from people with disability is that they do not want or need to be treated as objects: as objects of pity or charity or even of policies decided exclusively by others. They need respect, rights, a voice and recognition of their full citizenship. The definition of disability needs to be clearly defined in the Constitution. This definition should also include conditions like epilepsy, albinism, HIV/AIDS and other conditions which form the basis of discrimination but which objectively do not necessarily cause any reduction in abilities.

9.7 Recommendations

The Commission, therefore, recommended, that:

- The Constitution should include a clear statement of obligation to embark on a fully researched, carefully structured and properly funded rolling programme for positive action to strengthen equality, or affirmative action, and of meeting the basic needs. This statement should then go into the Human Rights Chapter, thus turning the power to carryout Affirmative Action into a duty in some circumstances.

- The Constitution should propose criteria for objectives, methodology and process, including emphasis on transparency, participation, emphasis on genuine need, monitoring, clear criteria for success, and time limits.
- The Constitution should:
 - a) State that the diversity of the nation should apply in the executive, public service and judiciary;
 - b) State clearly that the ethnic diversity of the nation should be reflected in the police and correctional services;
 - c) State clearly that the principle of ethnic diversity applies to all constitutional commissions and offices;
 - d) Ensure balanced development, including compensating for past neglect of certain areas;
 - e) Ensure obligation on part of the state to foster Kenyan languages, including the obligation, where feasible, to make public information available in local languages;
 - f) Recognise and promote the principles applicable to constitutional commissions to have regard to the interests of disadvantaged sections;
 - g) Emphasize affirmative action for the historically marginalized and disadvantaged groups and areas including women, people with disability; the youth, pastoralists; older people, and minority communities, in representation, management of public affairs and sharing benefits of development;
 - h) Provide for the principle of inter-generational equity;
 - i) Make it clear that regard for future generations extends to resources as well as to the environment generally;
 - j) Provide and define criteria for allocating resources to marginalized areas in order to ensure equalization of opportunities and access to development;
 - k) Make provisions on institutional, legislative and policy arrangements for the implementation of affirmative action for the marginalized, disadvantaged and minority groups and areas; and
 - l) Make provisions on redress, reparation and compensation for historical injustices committed on the people of Kenya.

CHAPTER TEN

THE BILL OF RIGHTS

10.1 The Mandate of the Commission

The Review Act gives a high priority to human rights and basic needs and provides for an expansive agenda for inclusion in constitutional reform. That agenda includes

- Protection of human rights and democracy;
- Gender equity;
- Gender parity in the right to citizenship;
- Provision for basic needs by establishing an equitable framework for economic growth and equitable access to national resources;
- Accountability to the people of public officials;
- People's participation in governance and public affairs;
- Free and fair elections;
- Recognition of diversity and ethnic and regional identity and communal rights;
- Conditions conducive to a free exchange of ideas;
- Securing equal rights to all (removing the barriers of discrimination);
- Rights of the child;
- Observance of Kenya's international human rights obligations;
- Regional and global co-operation for democracy and rights; and
- Improvement in judicial competence and independence.

10.2. The Scope of the Bill of Rights

10.2.1 General Principles

(a) *An Expanding Horizon*

Historically, rights emerged with the rise of strong states and markets (due to the realisation that the state and the market placed individuals at risk of exploitation and oppression and that certain guarantees were essential to the working of the market economy). In recent years, the concept of rights has broadened to include a variety of entitlements, including material needs, which are considered necessary for protecting and fulfilling the individual in the present world.

Solidarity rights (i.e., rights which belong to the whole community) were recognised next: right to a clean, healthy and sustainable environment, to peace, to nurturing of one's culture and to development. These rights are as important to the community as to the individual.

These categories represent different dimensions of rights and, to some extent, represent different economic and philosophical ideologies – though, as we shall see, the distinctions should not be overstated.

- Civil and political rights are directed to ensuring a secure space for individuals to pursue their values and interests and are aimed at limiting State intervention in their lives.
- Economic, social and cultural rights, on the other hand, may require the State to take specific action to facilitate the enjoyment of the rights and, therefore, assume an active State. The State is not required necessarily to provide free education or medical services, etc., but to pursue policies that enable individuals, families and groups to earn a living and ensure these facilities for themselves by providing an honest administration, equitable distribution of resources, and appropriate policies.

The third category of rights also requires an active role by the State, in part as a regulator. It requires the State and other authorities to pursue sensible policies which do not exhaust or destroy natural resources or waste money on weapons, but instead create conditions for peaceful and consensual living and establish opportunities for individuals and groups to pursue economic and social interests in fair and equal conditions conducive to peace.

Constitutional provisions on human rights have gradually become more complex and comprehensive. National provisions on human rights have been supplemented and reinforced by international treaties which impose obligations on States and other entities to promote and protect rights and establish a machinery for international supervision of national implementation of these obligations. Human rights define and limit the scope of State powers and provide guidance for exercising those powers. They are some of the most important ways to declare national values and express the purpose of a State. Today, it is hard to imagine a Constitution without a Bill of Rights.

Rights are central to the constitutional and political systems for a number of reasons.

First, they are regarded as inherent in the human being and are not surrendered to the Government when people form a political community. Second, rights are necessary for human beings to live in dignity, to fulfil their potential, to satisfy their physical and spiritual needs. Third, people form a political community in order to ensure that their rights, especially of physical security, property and family, are fully protected. Fourth, rights define the State relationship to the people. In this way, they provide a framework for the entire Constitution.

Fifth, rights empower citizens and residents, by giving them a central role in decision-making, in organs of the State and the right to associate and by protecting their vital interests against violation by the State. Sixth, rights limit State power and protect against the excesses of ‘majoritarianism’. Seventh, rights justify special treatment of minorities and other disadvantaged communities. Eighth, rights are necessary for establishing and protecting democracy, including accountability

of public authorities. In addition, respect for rights limits internal and external conflicts and strengthens national unity.

The protection of rights in modern constitutions has gone through a number of phases. At first, the rights which were protected were individual ones, mainly of a civil and political nature, i.e., protection of life and liberty, association, assembly, expression, voting rights, the right to stand for elections and the right to participate in public affairs. Later, a new category of rights, social, economic and cultural, found protection in international instruments and national constitutions. These rights were given prominence in the socialist systems; they attached great importance to social justice and fair living conditions for all. These included the right to education, employment, shelter, health, and food.

Finally, recognition was given to what are now referred to as solidarity rights, i.e., those pertaining to whole communities. These included the right to a clean, healthy and sustainable environment, to peace, to cultural identity and to development in broad terms. It is important to recognise that this evolutionary process does not represent a hierarchy of values. Today, it is recognised that all categories of rights are equally necessary for a life of dignity and peace and that they are indivisible and interdependent. For example, education and literacy (which are classified as social rights) are necessary for freedom of expression (which is classified as a civil right) in order to read and communicate. Similarly, a clean environment is necessary for health and the right to life generally. Freedoms of expression and association are essential to protect individuals and groups from government harassment.

(b) Dimensions

Today, human rights are no longer a matter only of concern or interest to the State. There is an elaborate international and regional system of rights binding all States, consisting of international norms and treaties. Implementation of these norms is supervised by international and regional committees, although, in most cases, these committees, while able to interpret State obligations, are unable to enforce their decisions. In addition, an international machinery exists to help promote rights. Humanitarian intervention is possible in cases where international tribunals have been established to facilitate the punishment of serious violations of rights, the latest tribunal being the Rome treaty setting up a permanent international criminal court. More recently, a new doctrine, universal jurisdiction, proclaiming the competence of national courts to try and punish nationals of any State for crimes against humanity (the Pinochet Doctrine) is fast gaining acceptance.

10.2.2 The Bill of Rights in the current Constitution

Provisions on human rights, entitled 'Protection of Fundamental Rights and Freedoms of the Individual', are contained in Chapter 5 of the Constitution, although the right to vote and stand for elections is dealt with in section 5 (qualifications to be a presidential candidate); section 34 (qualifications to be a parliamentary candidate); and section 43 (qualifications to vote in presidential and parliamentary elections). The provisions guarantee:

- the rights to life and liberty;
- the right to be protected against slavery; forced labour; torture, and inhuman or degrading treatment;
- protection of the right to private property;
- the right to be protected against arbitrary search and seizure;
- protection of the rights of conscience, expression, assembly, association and movement;
- the right not to be discriminated against on the basis of sex, race, tribe, place of origin, residence or other local connections, political opinion, colour or creed.
- the right to a fair trial before an independent tribunal established by law in a criminal case, including the right to be considered innocent until proved guilty; and right to a lawyer.

The Bill of Rights as contained in the current Constitution is problematic in a number of respects.

First, the scope of protection is rather limited in terms of those protected, in the types of rights protected and in the range of those bound by the duties associated with those rights. Only civil and political rights are protected; there is no provision on social and economic rights; there is nothing, either, in the form of directive principles or rights that require the State to ensure the basic needs of Kenyans. No mention is made of solidarity rights (peace, development or the environment). Such cultural rights as exist are somewhat negative. Only a limited category of collective or communal rights on land and customary law is recognised. No special law exists for minorities, children, the older persons or persons with disability. Finally, the protection against discrimination applies only to citizens. Other limitations of the current Bill of Rights include the fact that:

- the right of an accused to a fair trial does not oblige the State to provide a lawyer to the accused even in cases where the death penalty may be imposed;
- there is no recognition of privacy or the right of political or other forms of people's participation;
- some of the rights are rather narrowly defined and would be clearer and perhaps more effective if they were more detailed, for example, on the media;
- nothing is said of particular social and economic categories, such as pastoral communities, consumers, prisoners and people on remand, refugees and trade unionists;
- it does not give citizens a right to obtain information held by the Government;
- it places no obligations on corporations or private actors to respect or promote fundamental rights; and
- it is not clear how far the Bill of Rights must be observed by the courts in applying and developing the 'common law' made by the judges and not by Parliament.

Second, the Constitution itself provides for a large number of exceptions, even to those rights which it does create. Thus the following rights can be suspended during a war or a declaration of 'emergency':

- personal liberty;.
- protection against arbitrary search or entry;
- freedom of expression;
- freedom of assembly and association ;
- freedom of movement; and
- protection against discrimination.

In practice, whether these rights are suspended depends on the President, for it is he who declares war or ‘emergency’. The President declares an emergency by bringing into operation Part III of the Preservation of Public Security Act (Cap 57). The presidential order has to be approved by the National Assembly within 28 days. But, once approved, there is no limit to its duration. This is most unusual and seriously erodes certain rights. Under the Act, the President can detain individuals without the right to a fair trial; declare parts of the country under emergency, thereby suspending all the rights and freedoms guaranteed by the Constitution and licensing security forces to take measures that would otherwise be inconsistent with the fundamental rights and freedoms guaranteed by the Constitution.

Third, by modern standards, the Bill of Rights is weak in enforcement procedures and in terms of institutions. For example, it has no specialised bodies like an Ombudsman or a Human Rights Commission to promote or enforce rights. It also has severe limits on the judicial protection and enforcement of rights. Furthermore, since the Bill was drafted, new international procedures have been developed for enforcing of human rights and these should be reflected in the Constitution.

Fourth, Government response even to the obligations it has in the Constitution has not always been very positive. There has been poor performance of Kenya’s international and regional obligations. In particular, her reporting obligations have not always been honoured.

In addition:

- Court decisions have been restrictive of rights;
- The administration has been accused of deliberate disregard of rights;
- At various periods since independence, detention without trial and the use of torture have been common;
- Key institutions for the protection of rights, like the police and the Judiciary, instead of being protectors of rights, have become the cause of major violations of rights.
- Public authorities have not always been accountable to the people;
- People are ignorant of the rights which they possess and of how to enforce them; and
- Enforcing the Bill of Rights under section 84 of the Constitution has been hampered by lack of rules of court, which the Chief Justice did not gazette until 2001.

10.2.3 The Bill of Rights in other Constitutions

There is hardly any written constitution that does not have provisions for a Bill of Rights. The only difference is that, while the earlier, essentially pre-1966, instruments emphasise

civil and political rights, the more recent ones are comprehensive, incorporating, as they do, the values, principles and norms embodied in international treaties and conventions. The following table synthesises a few of the Bill of Rights provisions in other constitutions:

Category:	Content:	Jurisdiction:
Civil and political	Life, liberty, dignity, equality, privacy, freedoms, etc.	All jurisdictions where constitutions contain a Bill of Rights.
Economic, social and cultural	Social services, economic participation, language, nationality, etc.	Eritrea, Ethiopia, Uganda, Brazil, South Africa, Ghana
Family	Right to marry and found a family.	Eritrea, Uganda, Ethiopia.
Women	Rights to full and equal dignity, right to affirmative action.	Uganda, South Africa, Ethiopia.
Children	Protection from violence, oppression, abuse, right to health and nationality, etc.	South Africa, Brazil, Uganda, Namibia, Ghana
Development and Environment	Right to a healthy environment, sustainable development, equitable access to resources and labour.	South Africa, Uganda, Eritrea, Ethiopia, Malawi, Tanzania.
Property	Protection from expropriation without compensation.	Vast majority of jurisdictions.
Access to justice	Right to affordable and expeditious justice system.	South Africa, Eritrea, Ethiopia, Uganda.

10.2.4 What the People Said

Most submissions touched on human rights, directly or indirectly. Complaints and or demands were received on:

- (i) the need to remove restrictions on rights;
- (ii) greater accountability of police and an end to police harassment;
- (iii) arbitrariness of officials, particularly chiefs;
- (iv) access to information held by the Government;
- (v) discrimination by the Government against minorities and prejudice by the public;
- (vi) discriminatory legislation and other measures used to harass the public, especially in North-Eastern and Eastern provinces;
- (vii) inadequate protection of religious freedom, days and modes of worship and even styles of dress;
- (viii) demand for affirmative action to enable disadvantaged groups to catch up with other groups in social and economic development;
- (ix) tribalism or ethnic prejudice;
- (x) Government favour of particular communities and discrimination against others;
- (xi) better protection of property, particularly land;
- (xii) better distribution of land;
- (xiii) degradation of the environment and destruction of forests;

- (xiv) access to and guarantees of preservation of their cultural sites and shrines;
- (xv) secure land for shelter;
- (xvi) guarantees of shelter;
- (xvii) lack of transport facilities and poor road conditions, especially in the rural areas;
- (xviii) equal (and equitable) rights and access to land;
- (xix) protection of the rights of people with disability;
- (xx) special status and protection of rights of older persons;
- (xxi) protection and rehabilitation of street children and orphans;
- (xxii) recognition of workers' rights;
- (xxiii) protection of journalists and of freedom of press in general;
- (xxiv) free and compulsory primary education and subsidised education thereafter;
- (xxv) free or subsidised health facilities;
- (xxvi) lack of safe and clean water;
- (xxvii) malnutrition;
- (xxviii) opportunities for employment or self-enterprise;
- (xxix) better access to courts;
- (xxx) lack of an institution to which they can take their complaints about arbitrary administration;
- (xxxi) more humane treatment in prisons for inmates;
- (xxxii) torture at the hands of the police;
- (xxxiii) long periods of remand pending trial;
- (xxxiv) respect for international treaties on human rights;
- (xxxv) more effective machinery for protecting their rights;
- (xxxvi) more involvement in decisions which affect their daily lives;
- (xxxvii) protection of children generally;
- (xxxviii) arbitrary arrests and searches;
- (xxxix) insecurity;
- (xl) failure to recognise certain groups during census;
- (xli) full rights to citizenship, including to obtain identity cards, voting cards and passports;
- (xlii) exclusion from public employment of some citizens, e.g., Goans and Nubians.

10.2.5 Commentary

It is clear from these views that the new Constitution should have -

(a) *An Expanded Bill of Rights*

The recommendations have far-reaching implications for the design of a new Bill of Rights for Kenya. The objects of review and the people's recommendations place great emphasis on social justice and the basic human needs. The Commission is convinced that these can be achieved only if economic and social rights are made justifiable. We have examined economic and juridical developments in South Africa, which decided to treat all types of rights as equally enforceable; and are persuaded that no essential differences in their characteristics justify a different constitutional status for them.

The rights recommended here include those to be found in the current Constitution, in some cases elaborated in the light of modern understandings of human rights. Some rights are not referred to at all in the existing document. All the proposals take account of the submissions made to the Commission, of the provisions in and experience of other countries, of recent legislation and proposals for legislation, and, especially, of the obligations that Kenya has undertaken under the various human rights treaties, including on economic, social and cultural rights and on women and children.

The Commission is proposing, therefore, that the first provisions should try to achieve the 'mainstreaming' of human rights into national policy-making and decision-making by public bodies. In addition, to providing for standard and relatively non-controversial matters, such as are included in the current Constitution, it is proposed that provisions be also made in the Constitution for the following matters:

- (a) The dignity of the human person;
- (b) Equality, equity and non-discrimination, especially on ethnic or cultural minorities, the older persons, people with disability, trans-border communities and citizenship categories; and
- (c) Affirmative action in appropriate circumstances.

Many submissions called for affirmative action on behalf of women and people with disability, and for areas of the country which have suffered discrimination in part or are in special need of development.

It is proposed, however, that programmes of affirmative action, justified by full data and using appropriate means and goals, be transparently operated, limited by time, adequately monitored. In addition, they should not amount to unfair discrimination.

(i) Rights of Women

Women's issues were very prominent in the submissions to the Commission. Issues which women – and men on their behalf— raised were very wide. They ranged from the fact that women hold only 4.1% of seats in Parliament, domestic and general sexual violence, discrimination in inheritance, to low enrolment in school. There were contrary views, too. Some men said that biblically, the man was the head of the household; that, as the majority of the population, women should compete for political positions, etc, with men; that women should not inherit property from their fathers, if not married, or from their husbands; and that women should get land in places where there is wildlife.

It is proposed that there be a provision setting out women's rights clearly. Women's claims for fair treatment, supported in many places by men, have been so clearly expressed and the sense of past injustice is so great that, although there is an element of overlap with the general non-discrimination provision, it is felt this is justified, in the interests of ensuring a clear statement of the position of the over 50% of the population who are female.

(ii) The Rights of Older Persons

The justification for treating older persons separately lies in that they are often ignored and that they are, in some ways, a vulnerable section of the community. Most societies, especially African, insist that they have a particular respect for age. Yet it is not uncommon for older persons to feel they are not treated with a suitable degree of respect or as full members of the community with a right to be fully involved. And there is evidence that many older persons do suffer neglect and even, sometimes, abuse as well as being excluded from full participation in society.

There should be a general recognition of the rights of the older persons to share with other members of the community, plus special mention of the rights to participate, to pursue personal development, to work, to be free from all forms of exploitation and abuse, to live with dignity and respect, and to retain autonomy and to reasonable care and assistance of family and State. They should plan for their retirement, to share their knowledge and skills with others, and remain active in society. Public organizations should take special care to equip them to understand and deal with issues affecting the older persons.

(iii) The Rights of Children

The existing Constitution does not say anything specific about children. A new legislation, the Children's Act passed in 2001, introduced into the law the principles of the International Covenant on the Rights of the Child and the African Charter on the Rights and Welfare of the Child. Although this legislation has its heart in the right place, there is need to go beyond it. Acts of Parliament can be repealed in the same way as they are made. So the Constitution should require that the law protect children. Although the Act says that the Legislature shall make the interests of children a primary consideration, this could have no power to affect Parliament as it makes any law in future. A mere Act cannot limit a future Act – only the Constitution can do this. The Act does not clearly place legal obligations on the State; the Constitution will do this.

(iv) The Family and Personality Rights

A general provision on the importance of the family, equal rights to marry, and in marriage, and the general duties of family members towards one another would reflect the concerns of Kenyans. There should also be a general right to a name and nationality, and to have their births, if in Kenya, registered.

(v) Rights of Persons with Disabilities

On the basis of submissions from individuals and organizations, from literature already available from various sources, and from the Report of the Task Force set up by the Attorney-General and chaired by Mr Justice Aganyanya which reported in 1997, it is apparent that people with disability face a wide range of difficulties. Some of these result from laws that are positively discriminatory or operate in a discriminatory way. Some result from lack of resources devoted to those with

disabilities. Some are the result of prejudice, insensitivity or even positive cruelty by their fellow citizens and institutions. Some are the result of misguided pity or kindness. These attitudes may themselves be the outcome of ignorance, myth or fear of the ‘different’; or they may reflect tradition in certain communities. The message from people with disability today is that they do not want or need to be treated as objects: as objects of pity or charity or even of policies decided exclusively by others. They need respect, rights, a voice and recognition of their full citizenship.

Although the Government drafted a Persons with Disabilities Bill in 1997, it has yet to be introduced into Parliament. It is important that the Constitution include requirements to have legislation of this type. The definition of disability should include conditions like epilepsy, albinism, HIV/AIDS and other conditions which form the basis of discrimination but which objectively do not necessarily cause any reduction in abilities.

(vi) Rights of Refugees

Although there is no specific reference to refugees in the Review Act (or in the current Constitution), they are relevant to issues such as national security and Kenya’s obligations under international law, which are mentioned in the Act.

In common with many African countries, Kenya receives a large number of refugees – using that word in the sense of people who have fled their homelands for whatever reason. At the beginning of 2002, according to the United Nations High Commission for Refugees (UNHCR), there were 239,221 refugees in Kenya, of whom 69,804 were from Sudan, 144,249 from Somalia and 13,541 from Ethiopia. Most live in camps close to the border (Dadaab in North-Eastern Province and Kakuma in Rift Valley Province). The classic definition of a refugee is a person who has left his or her own country because of a well-founded fear of persecution. However, the OAU Convention on refugees applies the term also to those compelled to leave their places of habitual residence because of among other things—“events seriously disturbing public order in his country of origin”, which would cover the refugees in Kenya.

There are certain universally applicable principles that are germane to the acquisition of citizenship by refugees in a host country. First, if there is a right to apply for naturalisation after a certain period of residence, then refugees would have the right to apply in the same way as any other resident. Second, if birth in Kenya gave an automatic right of citizenship, children born within the country to refugees would be citizens. Under a 1951 convention, a refugee with a child who has the nationality of the country where he or she is resident should not be subject to measures which restrict refugees from employment. A further implication for refugees with Kenyan children is that treaty obligations, and a national constitutional provision on family rights, including the right not to split up families, would come into play.

In the absence of specific laws on refugees, the immigration laws, as contained in the Immigration Act (Cap 179), are applied to the refugees, even though this is clearly inappropriate, as the Act is intended to regulate the entry into Kenya of persons who voluntarily come from other countries for some specified purpose.

Refugees in Kenya basically stay in designated camps and cannot travel out of there except with permission from the local administration or unless in a specified cause, such as medical treatment or to attend an official UNHCR sanctioned activity in Nairobi. The UNHCR also provides to the refugees ration cards to enable them to get their monthly food rations and a “protection letter” which identifies a person as a refugee out of a designated camp for a specified reason.

The situation in the refugee camp is very similar to that of a prison. Refugees cannot, without permission come out of the camps to settle in other parts of the country, intermingle with the Kenya citizens, look for work or do business outside. The lucky ones are the few who get employed by NGOs and UN agencies, which then seek permission for them from the government. However, some refugees have managed to avoid or leave the camps and live in urban centres like Nairobi and Mombasa. These are mostly the affluent ones who manage to persuade the Immigration Department to give them a legal status - an investor or business visa (which is renewed regularly) or some resident or alien registration permit. There have been allegations of corruption and bribery in issuing such visas or permits. A substantial number of refugees also live in the urban centres without any permit or other recognised legal entry document. These are usually under the mercy of the immigration and police departments and are arrested during regular police “swoops” or “operations”, such as those carried out in Eastleigh, Nairobi, and then released, depending on the whims of the officers in charge of those operations. Few of those arrested are ever taken to court and the majority usually buy their way out of the police custody. The same activity is repeated all over again whenever there are “police operations”.

Widespread complaints have been made against the police by various political leaders, civil society and human rights organizations, the UNHCR and international agencies as a result of harsh police treatment of refugees. Police brutality and harassment have featured as some of the major complaints of Kenyans. The situation is even worse for the refugees, who are much more vulnerable since they have nowhere to complain, unlike the others – even if this is only in theory. The police have been accused of committing atrocities and gross violations of the basic rights of refugees in the camps and in the urban centres. African Rights, a human rights NGO, conducted a study of the refugee situation in Kenya in the early 1990s and published a report prepared by Alex de Waal and Rakiya Omar entitled: *“Seeking Refuge, Finding Terror – The Case of Somali Refugees in Kenya”*. Recounted in the report are harrowing tales of arbitrary searches, arrest, extra-judicial killings, kidnappings and disappearances, theft of money and jewellery and rape by the Kenyan security forces against refugees. Regrettably, the Government has not taken any step to address any of the complaints made by or on behalf of refugees against its security forces, who appear to operate with impunity.

There has been a lot of inconsistency in police and courts’ conduct and practice when dealing with refugees. When any refugee is arrested, either because he/she is found outside the camp or he has no permit to stay out of the camp, the police and immigration tend to treat the refugee as any other alien despite his or her status. Such a refugee is either handed over to the UNHCR or sent back to the refugee camp, in the first instance, or, at other times, is charged in a criminal court for the offence of being in the country illegally. Where the refugee pleads guilty, as is

usually the case, the courts, in recognition of the status of the accused, would initially order the refugee to be taken back to the camp. But in recent times, the practice has been to convict the accused and sentence him or her to some months in prison. This is in addition, or as an alternative, to a prescribed fine, and after the sentence is served or the fine is paid, the accused is ordered to be repatriated. This court's repatriation order is duly carried out by the police, who escort the convict up to the 'No-man's Land' on the border. This repatriation order is in total violation of the non-refugent principle of international law, which forbids the forcible return of a refugee to his or her home country.

It is proposed, therefore, that the rights and obligations of refugees be set out in the Constitution

(vii) *Abolition of the Death Penalty*

Apart from the normal provision of the right to life, it is proposed that the death penalty be abolished. A number of African countries have recently done this, including South Africa (judicially). A number of other constitutions also ban the death penalty (for example, Portugal and Brazil). In many countries, a majority of citizens believe the death penalty is necessary. Evidence suggests that the death penalty does not deter criminals any more effectively than imprisonment.

As there has been no execution in Kenya since 1984, abolition would not be removing any existing deterrent. In fact, the existing situation gives rise to great suffering for those condemned to death and their families, for they may languish on 'death row' for many years without being either executed or formally reprieved.

(viii) *Protection of Privacy*

A provision should also give general protection to privacy of the home, person, correspondence and other forms of communication. This is relevant to the behaviour of law enforcement agencies, and of fellow citizens.

(ix) *Access to the Media*

Strictly speaking, perhaps it is not necessary to give special recognition to the media. But their importance in modern life, and the fact that governments are often strongly tempted to interfere with the media justifies a special provision. To this must be added the fact that many people making submissions to the Commission called for 'liberation of the airwaves' – in other words, that licensing of radio and television should not be used to deprive people of the chance to hear or see programmes by companies which have the capacity, and the wish, to broadcast more widely. Free expression and democracy thrive on a free exchange of ideas, not ideas from only one source. On the other hand, the power of the Press is great and not all media are responsible. So it should be clear that freedom of expression is accompanied by responsibility.

(x) *Access to Health, Sanitation, Water and Food*

As for economic or social rights, it is recognised that the State does more than its resources reasonably permit. Given the abject poverty in this country, it is

important for the Constitution to take account of these rights. In addition, deprivation of these rights has implications for other rights. For example, the burden placed particularly on women by the necessity to walk long distances for water means that the question has importance for gender equity and for human dignity. Sanitation is an aspect of health and was a matter of great concern to many who made representations to the Commission, especially slum dwellers. Evidence also made clear the prohibitive costs of burying the dead for many people – surely an aspect of human dignity. These rights were among the most forcefully demanded by ordinary people.

(xi) *The Right to Social Security*

This was also the subject of frequent submissions: protection for the older persons, the destitute, persons with disabilities and the unemployed. Again it is only possible to provide for reasonable measures, within available resources. This should include recognition of the informal sector.

(xii) *The Right to a Healthy Environment*

Many submissions were received on the need to protect the environment. There were complaints ranging from waste disposal in Nairobi to toxic waste in North-Eastern Province and deforestation in many parts of the country. Here, a provision is proposed setting out basic principles: the right to a healthy environment, and to sustainable development. Further provisions on environmental protection appear in this report under “Land and Natural resources”.

(xiii) *The Right to Shelter and Housing*

Slum dwellers and farm workers are very vulnerable to eviction and harassment by landlords and others. It is not possible for the Constitution to set out a scheme for slum rehabilitation. But the very significant proportion of the urban population who live in slums (perhaps 69% in Nairobi) should be able to look to the Constitution as the starting point for asserting their right to a better quality of life. It is not only town dwellers who face eviction or live in squalid conditions. The Ogiek or the Metava squatters evicted from the Chyulu hills can testify to this.

(xiv) *The Right to Education*

This was one of the basic needs repeatedly stressed in submissions to the Commission.

(xv) *Protection of Language and Culture*

The Review Act requires recognition of and promotion of religious, cultural and ethnic diversity, as well as national unity. It is important, for example, that Kiswahili be promoted as a national language. National unity will be encouraged if people feel that their cultures are respected. This, therefore, is one of the provisions that will be important in responding to the concerns of ‘minorities’ and communities, discussed under ‘Equality and non-discrimination’, earlier. General freedom of religion and non-discrimination will go some way towards achieving

these aims. But it is proposed that the Constitution go further and recognise rights to language and the expression of culture.

(xvi) *Access to Information*

Kenya inherited from its colonial regime a tradition of secrecy which persists, though many countries have in recent years adopted a more open approach to informing the public. The present secrecy laws are based on British legislation, which has been there and elsewhere fundamentally altered in the last 20 years. Freedom of information is vital to people's participation, informed public debates, etc. People complained to the Commission about "secrecy" most vehemently in connection with the government tendency to deny the public the results of inquiries it has set up with the taxpayers' money.

(xvii) *The Need for Just Administrative Action*

Submissions complained not only of corruption in the public service – a major problem – but also of incompetence, unfairness and general lack of a caring approach. The South African Constitution offers a useful precedent in the form of a right to just administrative action – lawful, reasonable and procedurally fair. It is proposed that a similar provision be adopted in Kenya. Such a provision would tackle the problem at its root and thus reduce pressure on courts or other institutions to deal with complaints. It should also lead to better decision-making by the administration.

(xviii) *Rights of Detained Persons*

Among the submissions to the Commission, there were many who observed that prison conditions are not fit for human beings. A number complained of treatment contrary to religious convictions, such as not permitting women to wear clothing of a sort that their religion requires; another example was shaving beard of Muslim, Sikh or Akorino church men. The number of submissions from ordinary citizens, prisoners and remand inmates about terrible conditions in jail speaks very well for the average Kenyan's awareness of the need for human dignity for all. Even prison officers said how bad the conditions are for inmates; and we should remember that many detained people are not convicts, but are awaiting trial. The Standing Committee on Human Rights reported in 2002 that over 40% of those in prison were in this category. Many are detained in police cells. Evidence suggests that in the end, many people are not convicted at all – so they must be presumed innocent – but, meanwhile, they have often been kept in these conditions for a long time. Further, the very fact of losing one's liberty is the punishment: as is often said, "prisoners are in prison as punishment, not for punishment". Most prisoners will eventually be released. One of the main purposes of imprisonment should be to prepare the prisoners for that day in the hope that they will have become responsible members of society. Prison conditions should be appropriate to achieve that aim. In a society that respects human rights, it is wrong that basic human dignity should be denied to prisoners. As the Standing Committee says, "inmates are not lesser social beings than anyone else".

(xix) *Consumer rights*

Everyone in society is a consumer – of goods and services produced by the Government or private enterprises or non-governmental organizations. While there is truth in the saying “you get what you pay for”, it is equally true that in Kenya today, consumers do not get many of the services they pay for especially those offered by government bodies in return for taxation and rates. Consumers themselves have a responsibility to be observant, to demand what they are entitled to. But it is also appropriate that in a Constitution such as this, which is intended to provide a comprehensive framework, protection should be extended to consumers.

(b) *Comprehensive Enforcement Provisions*

It is important to give adequate powers to institutions aimed to enforce rights. People must be able to go to court; yet this is expensive and time – consuming. The bright to bring an action must be stated in the Constitution, and in a way which is not restrictive. The courts have interpreted the current provision in a very limiting way. Specifically, it is suggested that this provision envisage the development of a form of litigation which emphasises substantial justice over formal requirements, where human rights are at stake. An important mechanism for enforcing the Bill of Rights is compliance with international reporting and monitoring obligations. Although the reports are discussed by the treaty bodies concerned, and sometimes harsh observations may be made, an important function of the system was intended to be to require the individual States Parties to review their own performance. Writing on the system, someone has observed that, in order for the reporting mechanism to be effective, the preparation of the reports should become much more of a national event, with the civil society being given the opportunity to participate and to comment on the process. In the case of Kenya, unfortunately, even preparation and submission of reports has not been carried out fully.

It is proposed that the Constitution try not only to make the Government report (to make it a constitutional duty to do so) but also oblige it to put the report to positive advantage at the national level. It should involve the civil society and Parliament actively. It should also be designed to require the Government to collect and disseminate the information, and prepare the monitoring concepts and criteria necessary to make the reporting and analysis process valuable. So it should give some precision to the general requirements to mainstream human rights provided at the beginning of the Bill of Rights.

(c) *Necessary Limitations*

In some Constitutions, each right in the Bill of Rights is accompanied by a statement about when it may be limited. This is a cumbersome approach and there is the risk of loopholes. It is proposed that there should be a general provision which says that rights may be limited but that the requirements should be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, and the major factors should be indicated for the guidance of courts.

Special circumstances may arise necessitating the temporary limitation or abridgement of rights. Many constitutions have very detailed provisions on all these points. The general principle that the Constitution must be applied and interpreted with a view to achieving the spirit in which it is intended will apply to any unusual situation that cannot be fitted precisely within the words of this provision.

(d) *Provisions laying down Fundamental Duties and Obligations*

While it is important for the Constitution to provide for full protection of fundamental rights, it is necessary to acknowledge the duties and responsibilities of citizens and residents. We must not become over-dependent on the State, nor must we see ourselves (or always see ourselves) in an antagonistic relationship with the State. The responsibility to ensure a caring, just and humane society is shared by the Government, the civil society and individuals. The obligations of an individual to his or her family and the community are characteristic of our traditional African societies (just as is the welfare of individuals). The apathy of the individual as regards the respect by themselves and others for national and democratic values has been a principal cause of the decline of the Rule of Law and of corruption in our country. The new Constitution will take root only if citizens commit themselves to it and take responsibility to protect and implement it.

10.2.6 Recommendations

The Commission recommended, therefore, that the new Constitution:

- (i) *as a general rule should*
- a) guarantee the right to life;
- b) ensure protection of human dignity;
- c) protect the rights to choose one's occupation and to join associations;
- d) provide the rights of access to bail unless there are substantial grounds for believing that the person would not turn up for trial;
- e) bar evidence obtained through police torture and evidence obtained through illegal searches;
- f) enshrine the basic principles contained in the United Nations Standard minimum rules for treating prisoners;
- g) make a provision for protecting consumers;
- h) make a specific provision to guide courts and other bodies in the general approach to interpreting the Bill of Rights, taking into account the general features of the Constitution and customary international law.
- i) state that the Bill of Rights be "horizontal", i.e., apply not just to people in the Government but between the people;
- j) move away from the cumbersome approach of limiting each right to a general provision stating that rights may be limited but that the requirements should be demanding;
- k) restrict the circumstances in which state of emergency can be used, the time and those who may declare it;
- l) ensure that persons detained under state of emergency -
 - have access to courts; and

- have access to such institutions as the Commission on Human Rights and Administration of Justice;
- m) establish specialised bodies such as an Ombudsman to promote and enforce rights;
- n) ensure that all State organs must regard the Bill of Rights as a central part of their objects, the State must state the precise objectives and develop appropriate benchmarks;
- o) give the civil society the opportunity to participate in and to comment on the process of monitoring and reporting on international treaties and instruments;
- p) ensure that not only does the Government do reports but that the obligations to report are turned to positive advantage at the national level; and that the new constitution
- q) prescribe the duties and responsibilities of citizens, emphasise the responsibilities that individual citizens have for a caring and humane society and require compliance with a code of good citizenship in the public service code;
- r) provide mechanisms for domesticating international norms and treaties;
- s) guarantee all workers the right to trade unions, etc;
- t) recognise the indivisibility and interdependence of all the civil, political, economic, social and cultural rights and environmental and development rights and guarantee them;
- u) establish policies and institutions which facilitate the people's endeavour to provide education, health, shelter and food to themselves;
- v) establish a framework for economic, social and cultural rights, which requires the State to allocate resources more carefully to ensure minimal wastage while aiming to realise the basic needs of Kenyans; and
- w) prohibit discrimination in the social and economic spheres on the basis of sex, pregnancy and marital status;

(ii) as regards women the new constitution should:

- a) recognise and protect women as a special category of persons with special rights and needs, including their unique status as mothers;
- b) provide women with reasonable facilities to realise their full potential and advancement;
- c) recognise the right of affirmative action for women to redress the imbalances created of history, tradition or law – in particular, by ensuring that:
 - at least 1/3 of all elective and constitutional office holders are women;
 - there is an equal and equitable right to inheritance and citizenship;
 - harmful cultural practices which undermine women's dignity, health and status are prohibited.
 - women with special needs, including Muslim women observing *eddat* (period of seclusion after death or divorce), women prisoners, women with disabilities, widows, street women, female older persons, etc, are recognised and entitled to special protection by the State and society;
 - marriages by whatever manner solemnised are recognised and registered and certificates issued;

- a gender commission is established to oversee mainstreaming and gender rights; and
- women exercise individual identity, including the right to choose a name.

(iii) *as regards children, it should*

- a) provide specifically for the rights and needs of those who are a special category of our population;
- b) entrench certain provisions of the Children's Act of 2001;
- c) impose an obligation on a child's mother and father, whether married to each other or not, to protect and provide for the child; and
- d) provide specifically for every child to have the right to:
 - life;
 - a name and a nationality from birth and to have its birth registered;
 - parental care, or to appropriate alternative care if the child is separated from its parents;
 - free basic education which shall be compulsory;
 - be protected from discrimination, harmful cultural rites and practices, exploitation, neglect or abuse;
 - be protected from all forms of exploitation and any work likely to be hazardous or adverse to the child's welfare;
 - adequate nutrition, shelter, basic health care services and social services;
 - freedom from corporal punishment or other forms of violence or cruel and inhumane treatment in school or other institutions responsible for child care;
 - not taking part in hostilities or to be recruited into armed conflict;
 - not being arrested or detained except as a measure of last resort; and, if arrested or detained, being kept only for the shortest time, separate from adults and treated with due regard to age and gender, accorded legal counsel, and given the right to be heard; and
 - parental care through legislation imposing an obligation on fathers and mothers to take responsibility to provide for and protect a child, whether they are married or not.

(iv) *on persons with disability, it should:*

- a) make a provision recognising the rights of persons with disabilities as a special category of people with special needs requiring special recognition and protection by the State and society;
- b) comply with the international conventions that touch on the right of persons with disabilities;
- c) require that persons with disabilities be provided with reasonable facilities and opportunities to realise their potential and advancement; and
- d) recognise that persons with disabilities have a right to affirmative action to redress imbalances created by history, tradition or law; by ensuring that
 - the rights to respect and human dignity are given to persons with disabilities;

- society is educated on the cause of disability and on the need to respect and treat them with dignity;
- education, institutions and facilities for persons with disabilities are integrated into society as a whole, in step with the interests of persons with disability;
- there is adequate access to all places, public transport, information and communications and housing for persons with disabilities;
- the development and use of sign languages, Braille and other appropriate measures of communications are supported;
- official usage in any language of words that are demeaning when applied to persons with disabilities is eliminated;
- easy and cheaper access to gadgets for persons with disabilities is assured;
- persons with disabilities exercise their rights to vote and participate fully in the electoral process;
- persons with disabilities serving jail terms are accorded the special rights provided for in this Constitution; and
- persons with disabilities are accorded job opportunities commensurate with their skill and training.

(v) *as regards the older person, its shoul :*

- a) Make a provision to recognise the right of the older persons as a special category of people with special needs requiring recognition and protection by the State and society.
- b) Require the State to take legislative, administrative and other measures to ensure that the older persons:
 - participate fully in society;
 - pursue their personal development;
 - exercise their right to work;
 - are free from all forms of discrimination, exploitation and abuse;
 - live in dignity and respect;
 - retain their autonomy;
 - Enjoy all other rights as are set out in the Bill of Rights; and
 - when unable to support themselves and/or their dependants, are entitled to assistance by society and the State.

(vi) *as regards refugees, it should:*

- a) require the State to make a provision recognising the rights of refugees as a special category of people with special needs requiring recognition and protection by the State; and
- b) require the State to take legislative, administrative and other measures to ensure that:
 - the right to asylum for refugees is recognised and granted in accordance with international law and practice;
 - no person may be extradited from Kenya to another country if he is to be charged with an offence whose punishment is the death penalty;

- within one year of the new Constitution coming into force, there is full compliance with the international law and practice governing the procedures of granting asylum to refugees;
- the international conventions dealing with the rights of refugees will be ratified and domesticated;
- refugees have the right not to be returned to a country where they have a well founded fear of prosecution or of other treatment which would justify their being regarded as refugees.

(vii) *as regards marginalized groups, the new constitution should:*

- a) require the Government to take affirmative action on groups marginalised on the basis of gender, numbers, disability, age or any other reason created by history, tradition or custom; and
- b) provide that programmes of affirmative action, both justified by full data, using appropriate means and goals, transparently operated, limited by time, and adequately monitored, are not unfair.

CHAPTER ELEVEN

THE STATE AND THE POLITICAL SYSTEM

11.1. Mandate of the Commission

The Commission's mandate under the Act is to ensure that provisions are made in the Constitution:

- establishing a free and democratic system of government that enshrines good governance, a constitutionalism, the rule of law, human rights and gender equity;
- promoting people's participation in governance through democratic, free and fair elections.

The Act requires that provision be made in the Constitution: "...respecting ethnic and regional diversity and communal rights including the right of communities to organize and participate in cultural activities and the expression of their identities." Furthermore, section 3(h) mandates the Commission to include provisions strengthening national integration and unity.

The Commission is also required to "...examine and recommend on the treaty-making and treaty-implementation powers of the Republic and any other relevant matter to strengthen good governance and observance of Kenya's obligations under international law."

11.2 The Ideology of The State

11.2.1 General Principles

The Commission is persuaded that the new Constitution must be founded not only on a sound philosophy of life but also on an ideology which ensures sustainable peace, security, unity, prosperity, freedom, welfare and well-being for all the people. Ideology is a set of beliefs and principles of social laws that a political movement or group articulates to achieve its goals. In this sense, ideology is a body of co-ordinated cultural or even national interests, beliefs and concerns that help shape people's thinking for adopting a common philosophy or common approach to issues affecting them.

Ideology is, therefore, an effective tool for marshalling the necessary public awareness of certain fundamental social, legal and political responsibilities that society faces on a daily basis for it to accomplish its mundane objectives in the spirit of its already declared intents embodied in the social covenant. Ideology provides the vision and mission of a nation as well as the means of moving to achieve these.

11.2.2 Ideology in the current Constitution

(a) *The Independence Constitution*

At independence, Kenya was declared a Republic and one of the conditions for independence was that the independent state had to put in place a government founded on the people and a decentralised (*majimbo*) system. This was meant not only to provide political protection for everyone but also to ensure ethnic minorities shared power and participated in governing the new State. The decentralised system was however, not very popular with the new leaders and, as a result, the *majimbo* system was dismantled soon after independence to be replaced with a centralised system based in Nairobi.

The exit of *majimbo* system saw the ushering in of *African Socialism*, whose driving force was the principle of self-help or *Harambee*. Developed as a response to the increasing attraction toward Communist and Socialist ideologies from the Eastern European bloc, *African Socialism* emphasised the best of Kenya's African social heritage and the colonial economic legacy. It sought to mobilise people towards a concerted and carefully planned attack on poverty, disease and ignorance. The overarching goal was to obtain *freedom from want, disease and exploitation; achieving social justice, human dignity, equal opportunity, political equality, economic equity and social welfare for all through careful planning, direction, control and co-operation*.

Despite its clear disposition, however, African Socialism was never developed into a full-fledged ideology of State-driven political, social, cultural and economic dispensation. The political practice and governance soon became fundamentally parallel to the overarching principles and goals of African socialism, with corruption, ethnicity, political intolerance and other elements of bad governance, such as concentration of power and wealth in a few hands taking root.

When Mr. Moi took power as President in 1978, he developed and popularised what became known as *Nyayoism* (following in the footsteps) anchored on the notion of *being mindful of other people's welfare*. *Nyayoism* advocated *Peace, Love and Unity* and there was an attempt, especially during the first 10 years of the Nyayo era, to popularize this as the rallying national political philosophy of governance. But even this did not fully captivate the collective thought and behaviour of the Kenyan mass. During the Nyayo era, Kenya remained a *de jure* one-party State (1981) only dropped in 1992, and the ills of ethnicity, political intolerance, corruption and poverty reached crisis levels.

The 1990s saw the rise of internationally driven neo-liberal ideology steered by globalisation. The neo-liberal ideology did not only attack any form of market regulation by the State but also argued that inequality was a positive value since it encouraged growth and accumulation of private wealth. It was thus considered absolutely, necessary to break the power of trade unionism and, in general, the workers movement.

Clearly, neo-liberal ideology is anti-popular and affirms on the one hand, the total market, with, on the other hand, a non-interventionist State, which does nothing to

redress social imbalances and is basically a technocracy in the service of transnational capital. It is an ideology adopted for the Third World by the World Bank, the International Monetary Fund and other international agencies. It is noted that countries such as Japan, South Korea or Taiwan do not follow and have never followed the neo-liberal model.

Kenya's cumulative ideological experience since independence is thus generating growing interest, particularly the context of the Constitution Review, especially on the question of the relationship between the State and the people, including the values and philosophy that should direct the State functions.

While the 1960s and 1970s were a period of optimism and nationalism, the 1980s and 1990s have seen despair on the State, characterised by the failure by a huge majority of people, to walk successfully through the arduous path of "progress" and persistence of pervasive poverty. Serious doubts have emerged as to the legitimacy of that State in exercising the authority and power it derives from the people if it cannot respond to their welfare needs.

(b) The Current Constitution

Section 1 of the Constitution of Kenya states that "*Kenya is a Sovereign Republic*". Section 1A, adds that "*the Republic of Kenya shall be a multi-party democratic state*". These two provisions provide the ideological road map to managing the affairs of the Republic and the role of the sovereign people of Kenya. The direct implication of these two provisions is that the fabric of the Republic of Kenya ought to rest on the solid basis of the people's consent. The stream of national power and authority thus ought to flow from the people, who deserve respect. The entire consolidation of diverse Kenyan communities into one complete national sovereignty implies wilful and collective delegation to the State of people's power and strength, which is expected to promote and guarantee their welfare. Being a Republic, the State is expected to be an instrument in the name of the welfare of all members of society. The primary characteristics of such an institution is that it ensures:

- the welfare and self-preservation of each member of the society;
- proper management and equitable distribution and redistribution of resources;
- a reasoned response to the needs of society;
- appropriate and timely intervention on behalf of all, particularly the weaker members of society;
- common interest in the people, maintaining immediate dependence on, and an intimate empathy with the people;
- effective representation of the people; and
- maintaining of constitutional order and the Rule of Law.

11.2.3 Ideology in other Constitutions

Explicit stipulation of the ideological principles upon which the state is founded first emerged in the constitutions that came out of the 1917 Bolshevik Revolution in Russia. Typical of these (as amended in 1992) is the Constitution of the Republic of Cuba, which provides as follows:

1. Cuba is a socialist state of workers, independent and sovereign, organized with all and for the good of all, as a united democratic republic....;
5. The Communist Party of Cuba, Martian and Marxist-Leninist, the organized vanguard of the Cuban nation, is the superior leading force of the society and the state organising and guiding the common efforts aimed at the highest goals of the Constitution and Socialism and advancement towards the Communist society.

Although the era of socialist or communist ideology is virtually gone, many constitutions, even in neo-liberal systems, loudly pronounce the fundamental ideology of the states they create. Thus the Constitutions of Uganda, Ethiopia, Ghana, Eritrea, Tanzania and South Africa, among others, declare that the state shall be founded on democratic principles, social justice and the rule of law. Says the Constitution of Tanzania:

- 3(1) The United Republic is a democratic and socialist state, which adheres to multi-party democracy;
- (9) The object of this Constitution is to facilitate.... the pursuit of the policy of socialism and self-reliance, which emphasises the application of socialist principles while taking into account the conditions prevailing in the United Republic.

11.2.4 What the People Said:

Although the issue of the nature of State has not been put to the people in terms as abstract as above, there is no doubt that Kenya has been devoid of those values. Presentations in many parts of the country started with a catalogue either of what the government should do, but was not doing, for the people, the horrors it had perpetrated on the people or what the new Government – that the Commission was now organizing – should do!

Indeed, the vast majority of the people thought that the instruments of government were:

- (i) oppressive and uncaring;
- (ii) distant from them;
- (iii) extractive of the meagre resources they were still able to generate;
- (iv) inefficient, corrupt; and
- (v) generally incapable of looking after their welfare.

11.2.5 Commentary

Through public hearings and submission of memoranda, the people of Kenya have overwhelmingly asked for a caring and concerned government to protect and promote their welfare.

In addressing the people's will, cognisance should be taken, therefore, of two matters. First, the natural and instinctive will and wish of every human being to survive and preserve himself and to be secure and safe. This will is common to all,

regardless of age, sex, ethnicity, race, social status or religion. The threat to this particular will was what prompted the rise of the political society, of law and government. Second, the temporary desire by a few to represent the people must be informed by the first will – the people’s interests. This should be the foundation of any government.

11.2.6 Recommendations:

The Commission recommended, therefore, that —

- (a) Kenya should adopt a Republican ideology founded on and driven by the common good and common benefit, welfare and well-being;
- (b) The Constitution shall entrench the Republican principles of governance;
- (c) Kenya is a sovereign Republic that *derives all its powers from and shares in the common interest of her people*;
- (d) The Republic shall be a multi—party democratic State committed to promoting full participation by the people in managing public affairs either directly or indirectly; and
- (e) The Constitution should clearly state and outline our basic national ideological principles and values, which should include:
 - i) the Rule of Law;
 - ii) respect for human rights, including civil, political, social, economic and cultural rights;
 - iii) national integrity;
 - iv) gender equity;
 - v) good participatory governance;
 - vi) transparency and accountability;
 - vii) defined level of universal access to the people’s welfare needs;
 - viii) recognition of the creative capacity of our people;
 - ix) separation of powers;
 - x) checks and balances,
 - xi) participatory governance;
 - xii) democratic elections; and
 - xiii) control of public office holders by making them hold office for a limited period of time, at the people’s pleasure depending on their behaviour.

11.3 Political Parties

11.3.1 General Principles

(a) *Definition*

For democracy to flourish, there must be strong and a well-organized political party system. This would ensure political stability and overall national peace and security, which, in turn, would stimulate investment and spur sustainable economic growth and development. Apart from serving the interests of members, parties should serve the common good of a nation and ensure that the welfare of all members of society is assured. This they do by ensuring equitable distribution and proper management of resources.

Although the Review Act does not directly address the question of political parties, it says a great deal about the objects and mode of exercising State power. Since the ruling party, or its leadership, is the main instrument for exercising State powers, and since the opposition party holds the government accountable, many implications can be drawn from the provisions on the modalities of exercising State power, on the forming and regulating of parties. Indeed, the Review Act requires the Commission to put in place a constitutional system to safeguard the people's well-being.

Most definitions of a political party have tended to be made from a functional point of view, namely, from the functions and purposes they serve or are meant to serve. Generally, they are said to be associations of citizens through which to seek to influence public affairs and governance processes. Kenya's Draft Bill on Political Parties defines a political party as:

Any association or organization of persons which has for its objects or purposes or one or more of its objects or purposes the proposition or support of candidates for national or local authority elections, with a view to forming or influencing the formation of the Government of Kenya or any local authority in Kenya

As creations of the social-political environment in which they are embedded, parties are either stigmatised as harmful to unity, greatness and sovereignty of the nation or viewed as the channel through which people exercise both their sovereign right and duty to govern themselves via their elected representatives, as in liberal, pluralistic and republican democracies. If parties see their primary role as aggregation and articulation of narrow sectional interests, such as ethnicity, they will divide society, rather than integrate it. If they see their main objective as access to power, rather than safeguarding moral values, common good or national interests, they will engage in intimidation and violence, fundamentally compromising democratic practices. In these circumstances, individual politicians also become self-serving and lose personal integrity or sense of commitment to their constituents, frequently changing parties to suit their personal conveniences and ambitions. In this way, politics and politicians become discredited. People lose confidence in democracy, which they associate with parties and politicians. Many people become alienated and withdraw from politics. In these conditions, a *coup d'etat* becomes possible and is often welcomed by the people.

The defining characteristic of parties, therefore, as political institutions is that they serve as mechanisms which link the institutions of state to those of society. As such, parties are allowed to operate like representative organs by which society governs itself in a democratic republican State through Parliament's right to control the State and the interchange of communication between Parliament and the public or citizenry.

As instruments of public governance and management, political parties provide the civic space for the people to ensure that public resources are used and shared equitably.

Political parties are, therefore, critical instruments and means through which people express their will and decide what kind of government is formed. In this sense, political parties, unlike other associations or organizations such as trade unions or non-governmental organizations that may be involved in the political arena, are an important institution which, like the Judiciary, Parliament or the Executive, determine how the Government is formed, constituted and run.

Political parties play a fundamental role in the developing and operating of the Constitution, democracy and the political system. As instruments of regime change, the role of political parties is to help democratise and constitutionalise governance as a means of ensuring the welfare of all people in society. Their role is to make governance more democratic, constitutional and republican. Broadly, it is the role of political parties to:

- mobilise opinion, as, for example, in the struggle against colonialism;
- bring together opinions and resources enabling people with similar views or interests, whether economic, social, religious, etc., to organize and co-ordinate their activities and lobbying;
- provide the principal means through which ordinary people can participate in political and constitutional processes and exercise many of their civil and political rights;
- mediate in several ways between civil society and State institutions;
- secure the representation of the people in State institutions, particularly the legislature, offer them political, social and economic choices, especially through the electoral process, and bring public opinion to bear on government policies;
- Provide the means which bring a section of the people to power and provide cohesion and discipline to the Government; and
- Hold the Government accountable to the Legislature and the people, especially as opposition parties.

In these ways, parties play a key role in national integration, bringing people in different parts of the country or from different linguistic or religious affiliations together in common organization and with a common purpose, and help to develop a national outlook and values.

(b) *Evolution of Political Parties in Kenya*

Upon attaining independence, the struggle for State control between the ruling party and the opposition ones assumed violent proportions in some countries, which ultimately provided a conducive setting for justifying the single-party phenomenon, either *de facto* or *de jure*, or intervention by the military. In the circumstances, the political orientation implicitly criminalised the emergence of competing political formations. The party, as a weapon in the hands of those in power, became an instrument of State power and not the popular will.

As part of the global system, Kenya has been exposed to situations where, at one point, the political party was regarded as an extra-governmental organization fully separated from it, which is why the Independence Constitution, popularly referred to as the *Majimbo* Constitution, did not make any reference to political parties. But, with the emergence of a *de facto* one-party state during 1964-1981(except for a

short period in 1966-1969), the ruling party (KANU) emerged as the unchallenged party. This, however, did not necessitate transforming the party into an organ of State. The situation remained unchanged even during the period Kenya was a *de jure* one-party State (1982-1991). It is important to note that the single-party system did not enhance the ruling party's governance role as to its being incorporated into a power-sharing structure, and making it a State organ.

The repeal of Section 2A of the Constitution in 1991 saw the re-introduction of multi-party democracy. Though Kenya practises multi-party democracy, there are no direct provisions in the Constitution on forming of political parties, their organization, funding, role, functions and operations.

There are now about 47 registered political parties, but only eight are represented in Parliament. The majority exist only in name. For the active ones, the problem of internal governance has persisted over the years and there is increasing demand for their internal democratization. They are characterised as arbitrary, autocratic and unaccountable. In nearly all, the leadership tolerates no healthy dissent and democratic elections are rarely held or, when held, are perfunctory. Even membership rolls may not be available. Furthermore:

- party leaders are utterly unaccountable to their members as well as the public on contributions and expenditure;
- party leaders behave as if the party is the property of the leader and, therefore, do not perceive of a situation in which they will ever cease to be the leaders of their party;
- parties exist mostly to serve the personal political interest of the leaders; they use them as bargaining chips in the struggle for power and material benefit;
- the leadership interferes in party electoral processes, especially in nominating candidates for elective positions at the national and local levels; and
- most parties are founded along ethnic and sectarian lines and interests, and national issues are rarely addressed.

Because of the impact parties have on the constitutional system and the important role they play in governance, considerable attention has focussed in recent years on how to make parties more nationally oriented, promote their commitment to justice and democracy, increase their responsiveness to their constituents and ensure good governance. Since the organization and operation of parties are so closely connected to the electoral system, one way to influence parties is to reform the electoral systems. Another approach is to regulate the formation, management and dissolution of parties by law. Traditionally, political parties have been regarded as private associations and there has been little formal regulation. But now, parties have to be seen as public institutions and their regulation a matter of national concern.

Most parties source their funds from members' contributions, donations from "well wishers", fund raising activities and sales of documents, publications and souvenirs. It is usually assumed that political parties can, on their own, manage to raise enough funds for activities without state intervention. This has, however, made them become vulnerable to "forces of evil" that try to capture them for selfish

ends rather than in the public interest. Because political parties play a critical role in nurturing, maintaining and sustaining democracy, including organization, formation and political legitimisation of State organs through Parliament, there has been pressure on the State to provide some form of party financing. This would free them from the mercy and influence of their donors (sponsors), which, in many ways, is detrimental to their own operational freedom and to national democratic development.

In Kenya, the problems of party finances are aggravated by the general poverty of the people, which means that membership per se is not a real source of finance for parties and correspondingly heavier reliance on corporate funds. While party costs can be reduced by limiting election expenses, parties would still need extra funds to ensure proper organization and management of their business. In order to eliminate unfair influences on parties, some subsidies should be provided by the State in an open, impartial and fair manner.

An examination of the characteristics of parties makes it obvious that their contribution to a healthy, stable and democratic society is likely to be generally negative, for the following reasons:

- there are too many parties; perhaps the rule requiring party nomination for parliamentary and presidential candidates encourages this and promotes the tendency towards picking parties off the shelf;
- many parties are inactive;
- it is both too easy and too difficult to register parties—too easy in the sense that there are few legal requirements; too difficult in that registration is politically motivated. For example, on what basis did the registrar refuse to register the Islamic Party of Kenya (IPK)?
- political parties are bound by a statutory code of conduct for the purposes of election, and can even be fined or barred from elections in case of serious violations of the Code of Conduct, though, in practice, these sanctions have not been invoked despite widespread violations;
- most parties have an ethnic base; even the recent mergers or attempts at merger are powerfully influenced by ethnic considerations;
- many parties are the personal property of individuals;
- there is no strong sense of party loyalty as far as most members are concerned;
- parties are not ideological and are seen by politicians as avenues to personal power;
- few parties have clear or consistent social, economic, financial policies.
- parties have rarely contributed ideas of governance, social justice or a development vision;
- parties become active only in connection with elections;
- constitutional or legal rules about connections with, or exits from, parties are rarely observed; and
- many parties are alleged to have militias and are not averse to using violence.

11.3.2 Political Parties in the current Constitution

Although the Constitution does not contain a systematic set of provisions on political parties, it establishes important roles for parties. The right of association, however, would presumably allow people to form political parties although the practice has been that administrative controls are exercised over registration of parties, which is done under the Societies Act. In 1982, the Constitution was amended to prohibit any party but KANU.

However, after considerable agitation, this provision was repealed in 1991 and the multi-party system effectively restored. In 1992, a section was thus inserted in the Constitution which declared that the '*Republic of Kenya shall be a multi-party democratic state*' (*section 1A*). But the legislative framework for the registration, management and deregistration of parties was not altered. In the same year, the restriction that the President must appoint ministers from his or her party was removed, but some restrictions were introduced in 1997, which could make the Constitution relevant to parties. These include:

- the Constitution merely defines a party as one which has been duly registered. There is no special procedure for forming parties; parties are registered under the Societies Act and it is not necessary to show any degree of popular support for the party;
- candidates for presidential elections must be nominated by a political party.
- candidates for the National Assembly must be nominated by a political party;
- political parties nominate candidates to be nominated to the National Assembly in proportion to their seats in the Assembly;
- an elected or nominated member of the National Assembly loses his or her seat if that member resigns from the party that supported his or her election or nomination while that party is still a parliamentary party; if such a member were to join another party when his or her original party has ceased to exist, he or she would lose the parliamentary seat;
- there are no State subsidies to political parties, although allegations are frequently made that the ruling party gets State assistance in diverse ways;
- the standing orders of the National Assembly recognise parliamentary parties in the committees and procedures of the Assembly;
- although the President makes appointments to the Electoral Commission, the understanding seems to be that he or she consults with the leaders of political parties before making appointments; and
- The National Assembly and Presidential Elections Act provides that a person who is elected or nominated as a member of the National Assembly with the support of a political party (other than the party whose candidate has been elected President at an election) cannot be appointed a minister (under s. 16 of the Constitution) without the concurrence of the party which supported him for election or nomination (s. 17(5)).

11.3.3 Political Parties in other Constitutions

It is now recognised worldwide that political parties play a crucial role in democratic governance. As a general rule, however, many constitutions merely provide for authority

to legislate for regulating political parties. Thus Article 3(2) of the Constitution of the United Republic of Tanzania merely states that

“All matters pertaining to the registration and administration of political parties in the Untied Republic shall be governed by... a law enacted by Parliament for that purpose”.

Articles 69–75 of the Constitution of Uganda are even more obscure on this matter other than to explicitly outlaw the one-party state. Except for jurisdictions still subscribing to the Marxist-Leninist or Maoist ideologies and which, therefore, recognise and entrench the institution of the vanguard party in the constitution, very few constitutions carry elaborate provisions on political parties.

The Basic Law of the Federal Republic of Germany is one of the few exceptions to this. According to Article 21 of the Law,

- (1) The parties shall help form the political will of the people; they may be freely established; their internal organization shall conform to democratic principles;
- (2) Parties which.... seek to impair or do away with the free democratic basic order... shall be unconstitutional;

11.3.4 What the People Said

What the people told the Commission may be summarised as follows:

- (a) *on whether the Constitution should regulate the formation, management and conduct of political parties, the people were of the view that*
- i) tribalism in political parties was rampant;
 - ii) there are too many political parties;
 - iii) politicians have at times used the armed forces wrongly making them look like terrorists;
 - iv) the current Constitution does not compel political parties to conduct proper internal elections or practice democracy; as such, we have ended up with autocratic parties with self- interest as their main cause of existence;
 - v) nowadays there are ‘briefcase’ parties ready for sale;
 - vi) parties are nowadays formed for personal enhancement;
 - vii) the Government may suppress the opposition and freedom of association by regulation, formation and management;
 - viii) political thuggery has taken root;
 - ix) the Constitution should regulate the formation and management of political parties;
 - x) the formation of political parties should not be based on ethnic grounds;
 - xi) political parties should have a national outlook;
 - xii) political parties should have autonomy on party registration, membership and manifesto;
 - xiii) the formation and management of political parties should be gender —sensitive in that there should be gender equity in membership;
 - xiv) before any political party can be registered, it should be scrutinised,

- especially with regard to its manifesto;
- xv) political parties should have a clear manifesto, i.e. what it intends to do for the people when it's in power. The issue, which came out strongly, was promotion of democracy and advocacy for peace and national unity;
 - xvi) the formation of political parties should be regulated by the Electoral Commission; and
 - xvii) there should be a code of conduct, adhered to by all party members.
- (b) *on whether the number of political parties should be limited and; if so, how; the people were of the view that*
- i) many political parties have created divisions among Kenyans;
 - ii) so many political parties have encouraged the system of divide and rule.
 - iii) there is a lot of confrontation and confusion among Kenyans and uncontrolled and unnecessary defections;
 - iv) multi-party politics has led to increased ethnic chauvinism;
 - v) most of the political Parties duplicate one another's policies;
 - vi) many political parties are used as a means for getting into Parliament; and
 - vii) having many political parties has led to the decline of the economy.
- (c) *On whether there should be limitation on the number of political parties, the people were of the view that*
- i) political parties should be limited to five;
 - ii) the country could have more than five political parties; some felt we could have as many as 40 political parties;
 - iii) alternatively, there should be no limitation on the number of political parties; we could have as many as we can possibly have.
- (d) *On whether political parties play roles other than political mobilisation, the people were of the view that*
- i) most parties easily degenerate into hooliganism when there is a contest;
 - ii) checks and balances to help root out corrupt and careless practices are not in place;
 - iii) the administration and the police have abused licensing of political meetings to punish those whom the State does not favour;
 - iv) political parties often are tools for fighting the Government and international organizations;
 - v) political parties should be more involved in initiating development programmes, to promote the people's socio-economic status;
 - vi) should be more involved in mobilizing people on politics;
 - vii) political parties should be involved in civic education;
 - viii) political parties should carry out the role of governance;
 - ix) a political party's major role should be promotion of national unity;
 - x) political parties should be involved in disaster management programmes.
- (e) *On whether public funds should be used to finance political parties and if so on what terms; people were of the view that*
- i) Kanu should not own Kenyatta International Conference Centre as it belongs to the nation;
 - ii) particular individuals, on account of their financial standing, dominate

- political parties;
- iii) most political parties lack finances and, therefore, cannot run their affairs efficiently;
 - iv) the more money a party has, the higher its chances of winning an election;
 - v) if not funded, political parties will end up begging from external sources and losing their independence due to influence;
 - vi) the Government should be responsible for financing political parties;;
 - vii) political parties should fund themselves from membership fees;
 - viii) political parties should be funded by donors and other well-wishers;
 - ix) financing of political parties should be based on a party's system of transparency and accountability;
 - x) the relevance of party manifestoes should be demanded before funding is given;
 - xi) the parties should also have sufficient members before funding is given;
 - xii) funding political parties should be based on parliamentary representation, i.e., how many party members are in Parliament;
 - xiii) political parties should be funded equally regardless of their manifestos or parliamentary representation; and
 - xiv) political parties should be funded only for the General Election.
- (f)
- On general political issues the people were of the view that*
- i) the exercise of presidential powers during elections can unfairly manipulate the election process;
 - ii) Government harassment should be banned.
 - iii) by being a member of a political party, the President is tempted to use public resources to promote his party's activities;
 - vi) the functions of the ruling party and those of the Government should not be mixed up;
 - vii) there should be co-operation between the State and the opposition political parties;
 - viii) the head of State should not be affiliated to any political party; and
 - ix) the ruling party should not use State machinery for its own campaigns and, if it does, all political parties should be allowed to carry out their campaigns through State machinery.

11.3.5 Commentary

Political parties, as institutions of democratic and republican governance, are very important and should be regarded as constitutional organs that should be provided for in and regulated by the Constitution. They are categories of institutions that should be clearly defined and their role and functions elaborated in the Constitution in the same way that the other three organs of State (the Judiciary, Parliament and the Executive) are spelt out.

The responsibilities of these organs should be clearly spelt out in the Constitution. If political parties are to play a role in democratisation and constitutionalism, their structures, organization and activities ought to be properly provided for in and regulated by the Constitution with details provided by a law founded on the Constitution. The Commission therefore recommended that the Constitution should entrench political parties. The provisions should include the right to form or join

parties, regulation of the conduct of political parties, which seek to contest elections, and State financing of political parties.

The Commission takes the view that because Kenya entered the new phase of democratisation only a decade ago, people should not be discouraged from forming political parties or from associating politically. The Commission, therefore, does not support any restriction on the number of political parties (for the reason given above), although we agree that too many parties are undesirable.

However, the Constitution or the law on political parties should set clear conditions for forming and registering parties to effectively regulate them. We consider that the number of parties will decrease if it is no longer necessary for presidential and parliamentary candidates to be nominated by political parties, as we have recommended in the chapter on Electoral System and Process. The number of parties will also decrease if stringent conditions are set for registering of parties (as we recommend below).

The Commission recognises that democracy means that citizens have the freedom to form political parties at their own discretion and that the State should respect the people's right to associate. The law on political parties and elections should set up a mechanism to protect national unity, peace, security, the rule of law, justice, democracy and human rights from powerful sectarian or ethnic forces that can easily subvert these principles and values, for which our country has been constituted.

11.3.6 Recommendations

The Commission recommended, therefore:

- (a) *On the Right to form Political Parties that -*
- i) the right to form political parties should be protected, subject to the provisions of the Constitution; and
 - ii) political parties which intend to contest elections should be required to register with the Electoral Commission; qualifications for registration should aim at ensuring internal democracy and accountability as well as external accountability.
- (b) *On Qualifications for Registration as a Political Party, that*
- i) the Electoral Commission should be the registration agency;
 - ii) in seeking registration, parties should satisfy the following criteria and undertake to meet the following conditions after registration. The party should be required to:
- promote and uphold national unity; every political party should have a national character and its executive committee should be representative of all parts of the country;
 - abide by democratic principles, undertaking to promote and practise democracy within the party by holding regular, free and fair party elections;
 - follow democratic decision-making procedures;

- not expel any member from the party except for a good reason and after due process; and the party should respect the Constitution and laws of the land; and
 - promote and respect human rights, including gender equity;
- iii) provide that at least one third of candidates put up for geographical constituency seats must be women; the party should be encouraged to field women candidates in constituencies which the party may consider safe constituencies in which party is assured of winning;
- iv) the party should not be founded purely on a religious, linguistic, racial, ethnic, gender, corporatist or regional basis; it must also promote the objects and principles of the Constitution and laws of Kenya; political parties are forbidden from engaging in propaganda based on these considerations;
- v) political parties are forbidden from engaging in or encouraging violence or intimidation of members, supporters or opponents; they should not establish or maintain a paramilitary militia or any such organization;
- vi) the party must keep proper accounts that must be audited annually; the audited accounts must be filed with the Electoral Commission and be available to the public for scrutiny; the Electoral Commission may, in consultation with the Auditor-General, prescribe regulations for the form and standards of accounts of political parties; the Auditor-General may examine books and accounts of any political party that receives funding from the State (see below for State funding);
- vii) the party, once registered, should be obliged to subscribe to a Code of Conduct (similar to the one in the Presidential and Parliamentary Elections Act) that imposes legal obligations on the party to observe its terms; a party in breach of the Code should be liable to penalties; and
- viii) the party shall be required to publish a manifesto before elections.

(c) On Temporary Registration,

- i) the Electoral Commission may give temporary (interim) registration, valid for 12 months, to political parties which meet the laid down rules and procedures of registration and to participate in elections;
- ii) the rights of parties during the temporary registration should be distinguished from those under full registration, such as concerning participation in elections by presenting candidates and campaigning.

(d) On deregistration of Political Parties, that

- i) the law must provide for deregistration of a registered party found in breach of its own constitution or of this Constitution or of a Code of Practice for the Conduct of Elections or any law relating to elections;
- ii) the law may give the Electoral Commission the power to give the party reasonable warning; but if the party shows no willingness or ability to comply with its obligations, the Electoral Commission must be obliged by the law to institute proceedings for deregistration; the party should have the right of appeal to the High Court;
- iii) as a lesser penalty, the Electoral Commission should withhold State subsidies from parties in breach of their obligations;
- iv) such an action should also be open to members of the party who have failed to secure redress through the internal machinery of the party; and

- v) parties which have not put up any candidates for two General Elections in succession should also be deregistered.
- (e) *On the Right to join a Political Party, that*
- i) everyone is free to join a political party;
 - ii) no one can be compelled to join a party;
 - iii) a person who has been convicted of an electoral fraud, as a result of which he is debarred from voting for a period, is also debarred from party membership for that period;
 - iv) only citizens can become members of a political party.
- (f) *On Functions and Roles of Political Parties, that*
- i) political parties are free to participate in shaping the political will of the people, to disseminate political ideas and social and economic programmes of a national character, sponsor candidates for election to any public office and facilitate participation in public affairs;
 - ii) a party should have the principal objective of enhancing the wellbeing of the people of Kenya as well as the common good and welfare of society, whether it is ruling or in opposition, and all the ideals of good and republican governance;
 - iii) the State should observe strict neutrality *vis-a-vis* all lawful political parties; the State should provide a fair opportunity to all political parties to present their programmes to the public by ensuring equal access to State – owned and private media; and
 - iv) state functions or powers cannot be delegated to political parties.
- (g) *On Financing of Political Parties, that*
- i) state funding should be provided only for
 - covering election expenses;
 - broadcasting of party policies and programmes through public and private media;
 - civic education in democracy and electoral procedures;
 - in addition, an amount not exceeding 10% of the total of these expenses may be given to parties for organizational expenses; and
 - parties that receive not less than 5% of national votes cast;
 - ii) corporate bodies (foreign or national) should be prohibited from donating financial, material or other contributions to political parties, except in circumstances that may be prescribed by the Electoral Commission;
 - iii) individual contributions should be restricted to a maximum amount to be determined periodically by the Electoral Commission;
 - iv) parties registered with the Electoral Commission should be entitled to State subsidies;
 - v) the formula for entitlements to parties and the modalities for disbursement should be prescribed by law on the recommendations of the Electoral Commission;
 - vi) the formula should take into account the support received by the party at the previous General Election; where a political party received insufficient support at the previous election to entitle it to any funding, but succeeds without public funding in reaching that level of support at the succeeding

- General Election, it should be entitled to have a contribution to its election expenses paid retrospectively;
- vii) contribution from public funds should be limited to approved election expenses on public education on elections and voting, plus a further 10% of the sum on the above basis which may be made available for the party's running expenses between elections.
- (h) *On Supervision of Political Parties, that*
- i) elections to party offices and committees should be conducted or supervised by the Electoral Commission;
 - ii) parties must submit an annual report on their activities and accounts to the Electoral Commission, in its capacity as the Registrar of Political Parties, to which the public should have access;
 - iii) the Commission should use its power to secure the deregistration of parties to ensure the promotion of rights, democracy, fair competition and fair elections;
 - iv) the Electoral Commission should promote civic education to educate people on their constitutional rights, particularly as these pertain to the electoral process on its own as well as in conjunction with political parties, other State institutions and organs of the civil society; and
 - v) the Electoral Commission should prescribe the maximum amount a party or candidate may spend on electoral campaigns, the amount to be determined to ensure that elections do not become too expensive as to favour the wealthy and restrict participation by parties and independent candidates in the electoral process.
- (i) *On disciplining Party Members, that*
- i) the Constitution should require political parties to establish an internal machinery for ensuring discipline consistent with the principles of democracy, justice and the rule of law; and
 - ii) Members of Parliament not be punished or victimised by their sponsoring parties for the contributions they make in Parliament, including voting in a manner that may be contrary to the sponsoring party's position.
- (j) *On the Relationship between the Ruling Party and the State, that*
- i) the State or Government resources should not be used to promote party activities by those holding public offices;
 - ii) The President and other senior Government officials should not hold any official positions in their respective political parties; once appointed to a senior public office, one should resign immediately from any party position one may be holding other than membership in the party;
 - iii) cabinet ministers should be appointed outside Parliament and should immediately resign from any party position they may be holding at the time of appointment;
 - iv) party manifestos, constitutions, by-laws or any other policies should be consistent with the constitutional provisions on the directive principles of the State;
 - v) all parties (either winning or losing party) should be required by the Constitution to conduct their political activities in the interest of the welfare and common good of society; and

- vi) members of Parliament or representatives to the local authorities once elected should owe their allegiance and loyalty to the Constitution of Kenya and all the members thereof.
- (k) *On Defections, that*
 - i) members of Parliament and local government representatives who decide to cross the floor or defect from their sponsoring parties should seek a fresh mandate from the electorate; and
 - ii) participation in a coalition government should not *per se* constitute defection.
- (l) *On the Law on Political Parties, that*
 - i) provision be made in some detail on the condition that a party seeking registration under the act should satisfy;
 - ii) the functions and roles of political parties in democratic governance be defined;
 - iii) internal democracy and governance of political parties be streamlined;
 - iv) sanctions associated with failure to comply with the law be provided;
 - v) type of institutions that cannot engage in political and electoral activities be prescribed;
 - vi) unofficial membership of or dual association with political parties be abolished;
 - vii) the circumstances under which a political party should dissolve itself or be proscribed be clarified;
 - viii) the Electoral Commission's authority to register or deregister political parties be defined;
 - ix) inter-party co-operation inside and outside Parliament be encouraged;
 - x) state funding of political parties and legitimacy of sources and ceiling of funds to be received from any given source, particularly to donations and regulation of the receipt of financial support from foreign sources be established; and
 - xi) accountability of political parties and appropriate sanctions for not complying with the law, etc., be established.

11.4 The State in the Global System

11.4.1 General Principles

(a) *Meaning and Relevance*

The word globalisation is used to refer to the accelerated growth of economic activity transcending politically defined national and regional boundaries. It is normally facilitated and stimulated by lowering impediments to cross-border activity through technological progress, as in communication and transportation or by lowering political or policy impediments, such as tariffs, investment restrictions conflicting national standards and regulations on the environment, labour etc.

In general, globalisation is driven by the private sector usually in pursuit of profit and often spurred by competitive pressure. Globalisation is proceeding rapidly,

particularly in international finance, and this has had the effect of not only bridging the economic gap between countries but also disrupting the economic and political *status quo* at both country and international levels.

(b) Globalisation and the Economy

The phenomenon of globalisation is not new. By its very nature, globalisation is a by-product of the integration of the entire planet into a capitalist system.

Building upon the effects of the previous waves of globalisation, which began in the 1980s, the current wave of globalisation, is distinguished only by the specificity of its content attributed to the dynamics of change in the micro-economic forces that drive it. They include:

- deregulation of markets in developed countries;
- the advent and spread of new micro-electronics based information and communication technologies;
- globalisation of finance; and
- change of policy orientation in the development of former socialist countries.

These are the elements that define the framework in which the law of globalisation and globalised values operates. And in this framework, one can begin to understand the disruptive nature of globalisation, including today's global hierarchy of inequalities in the distribution of resources, and the subordinate role of poor countries in the global market. Indeed, the poor countries are reduced to sub-contractors in the global economy.

The proponents of globalisation, however, see it as an unstoppable and inevitable instrument that can only bring about benefits, such as jobs, technology, income, investment, wealth, etc., to countries. The countries willing to submit to the discipline of the free market, by namely, limiting public spending, privatising public services, removing barriers to foreign investment, strengthening export production, controlling inflation, and so on, are the greatest beneficiaries. The countries that cannot effectively compete for foreign investment and export earnings in the world market thus fall behind in the accelerating race.

As to the distribution of resources, globalisation benefits have been unevenly distributed among people, within countries and between countries. The top 20% of the world's population earn 74 times more than the bottom 20%, and the 200 richest people in the world have more money than the combined income of the lowest 40% of the world's population.

(c) Regional Integration And Cooperation

The international policy debate has over the last decade, actually focused on both regional integration and globalisation as two sides of the same coin. Regional integration is seen as an instrument either of creating trade or reinforcing globalisation by lowering policy impediments to trade within a region, or diverting trade and work against globalisation by favouring trade within a region at the expense of trade with countries outside the region.

Much of the economic policy debate over regional integration has, therefore, focused on whether regional agreements are trade-creating or trade-diverting or whether they work for or against a more open world trading system. In practice, regional integration tends to be mutually reinforcing – but only in so far as regional integration stimulates internal and intra-regional competition. Functional regional co-operation can, however, take place without any formal economic integration process. But, in most practical situations, the logic of regional integration in developing countries today is one of strengthening their participation in the global economy.

The political preconditions for successful regional integration include peace, security, respect for human rights, democracy and good governance. The economic preconditions include sound macro-economic management, particularly on monetary, budgetary and fiscal policy. The increased interest in regional integration has been variously attributed to:

- the resurgent political will expressed in the Abuja Treaty of 1991;
- forming and strengthening various regional blocs outside Africa, such as the East Asian Economic Caucus, the European Union and the Mercosur and NAFTA in the Americas;
- small national markets under marginalisation in a world dominated by powerful trading blocs; African markets are small and limited because *inter alia*, of the dominance of the subsistence sector; without a strong industrial and technological base, expanded intra-African trade is highly restricted;
- liberalisation initiatives, which have created a conducive environment for outward-looking economic policies;
- the need to address the longstanding problems of the land-locked economies, and conflicts; and
- the need to attract Foreign Direct Investments.

(d) Kenya's Regional Integration Policy

Kenya, Uganda and Tanzania have had close ties since the first Custom's Union was formed between Kenya and Uganda in 1917 joined by Tanzania in 1927. Other arrangements followed, including the East African High Commission (1948-1961); the East African Common Services Organization (1961-1967) and the East African Community (1967-1977). After the collapse of East African Community in 1977, the three East African states did not have any exclusive formal co-operation arrangement until 1992-1993, when fresh attempts were made to restore the East African Community. Although it remains a policy objective of Kenya and other countries at the continental and regional levels to achieve full regional integration, none of the efforts has realised the ultimate objective of forming a common market or even a well-functioning Customs Union.

Kenya's regional integration policy is based on the principles of non-alignment, non-interference in internal affairs of other States, good neighbourliness, peaceful settlement of disputes and adherence to the charters of the United Nations and the African Union. The driving factor in Kenya's regional integration policy is the need

to create and promote a favourable environment for trade and investment in response to the emerging challenges of globalisation and liberalisation.

One key feature of Kenya's regional policy is its membership to multiple regional integration schemes briefly described below. This tendency, however, hinders integration because of duplication of efforts and resources and lack of harmony in such policies as rules of origin and customs procedures, information gaps and changing political positions.

(i) *Cross Border Initiative (CBI)*

CBI, also known as Regional Integration Facilitation Forum (RIF) was started in 1992 to foster regional integration and give impetus to restoring East African co-operation. The members of the CBI are Burundi, Comoros, Kenya, Madagascar, Malawi, Mauritius, Namibia, Rwanda, Seychelles, Swaziland, Tanzania, Uganda, Zambia and Zimbabwe. Within the CBI framework, member countries (including the EAC) in 1993 adopted a trade liberalisation programme that involved:

- removal of all Non-Tariff Barriers on all imports from participating countries (a list of a few imports for health and security are exempted);
- timetable for intra-regional tariff reduction requiring a 60% reduction by October 1993, 70% by October 1994, 80% by October 1996, 90% by October 1999, and 100% by October 2000;
- movement towards CET by adopting import duties on third countries of members with the lowest rates;
- harmonising of tariff rates (3-4 tariff bands, including zero, average trade weighted tariff of at most 155, and a maximum tariff of not more than 20-25);
- harmonising of customs procedures and the possibility of forming a Customs Union.

(ii) *East African Community*

Efforts begun in 1993 to restore the East African Community (EAC) among the three East African countries of Kenya, Uganda and Tanzania with the formation of a Permanent Tripartite Commission, which culminated in an EAC secretariat in March, 1996. Subsequently, the Treaty establishing the EAC was signed on November 30, 1999, and the Community was officially launched in January, 2001.

The objectives are to develop policies and programmes aimed at widening and deepening co-operation among the partner States in political, economic, social, and cultural fields, research, technology, defence, security and legal and judicial affairs for their mutual benefit (Article 5 of the EAC Treaty).

The key principles that govern the East African Community (Article 6) include:

- mutual trust, political will and sovereign equality;
- peaceful co-existence and good neighbourliness;
- peaceful settlement of disputes;
- good governance, including adherence to the principles of democracy, the Rule of Law, accountability, transparency, social

- justice, equal opportunities, gender equality and respect for human rights;
- equitable distribution of benefits; and
- co-operation for mutual benefits.

(iii) Common Market for Eastern and Southern Africa (COMESA)

COMESA was formed as a Preferential Trade Area for Eastern and Southern Africa (PTA) in 1981, transformed to COMESA in 1994. COMESA has 20 member states, among them, Kenya and Uganda. The COMESA member states are in the process of forming a Customs Union with a Common External Tariff (CET) by 2004. It is designed to deal with the structural and institutional weaknesses of its member states by pooling resources. COMESA focuses on the following priority areas:

- increasing productivity in industry, manufacturing, processing and agro-industries;
- increasing agricultural production;
- promoting, expanding and facilitating trade;
- developing transport, communication and other services; and
- developing a comprehensive, reliable and up-to-date information database.

The COMESA region is the leading destination of Kenya's exports. Over the last four years, exports to COMESA increased from KSh. 51.4 billion in 1997 to KSh. 56.7 billion in 2000, a total increment of 10.3%. The COMESA region, however, remains an insignificant source of import for Kenya, imports decreasing from KSh. 6.6 billion to KSh. 5.2 billion between 1997 and 2000 (Republic of Kenya 2002).

(iv) Inter-Governmental Authority on Development (IGAD)

To tackle the problems of drought and desertification regionally, the Inter-Governmental Authority on Drought and Desertification (IGADD) was formed in 1977 by Djibouti, Ethiopia, Kenya, Somalia, the Sudan and Uganda. Eritrea became the seventh member in 1993. Soon after, the name IGADD changed to Inter-Governmental Authority on Development (IGAD) with focus on economic, political and security co-operation. Regional integration for food security, environmental protection, natural resource management, economic co-operation and promotion of peace and security were particular concerns. IGAD has three divisions: Economic Co-operation, Agriculture and Environment, and Political and Humanitarian affairs.

Its main preoccupation for the last few years has been to resolve the conflicts in the Southern Sudan and Somalia. During its 8th Summit of Heads of State and government in 2000, members undertook to encourage facilitation and expansion of intra-state trade among IGAD member countries, and the Sudan has drafted a trade protocol now being studied.

(v) *African, Caribbean and Pacific (ACP)–European Union (EU) Partnership Agreement (ACP-EU)*

Kenya is a signatory to the ACP-EU Partnership Agreement signed in Cotonou on 23rd June, 2000, that brings together 15 European and 77 ACP states. The central objectives of ACP-EU partnership are poverty reduction and, ultimately, eradication; sustainable development; and progressive integration of the ACP countries into the world economy. To achieve these objectives, the Agreement emphasises regional co-operation and integration with the aim of:

- fostering gradual integration of the ACP States into the world economy;
- accelerating economic co-operation and development both within and between the ACP regions;
- promoting the free movement of persons, goods, services, capital, labour and technology among ACP countries;
- accelerating diversification of the economies of ACP States; and co-ordinating and harmonising regional and sub-regional cooperation policies; and
- promoting and expanding inter – and intra-ACP trade with third countries.

The key areas of regional economic integration include capacity-building to promote regional economic co-operation and integration; establishing regional markets and sharing the benefits from there; implementing reform policies; liberalising trade and payments; promoting cross-border investments, and so on.

11.4.2 Global Relations in the Current Constitution

Three issues are considered here. The first is Kenya’s treaty-making competence, the second its conduct of diplomatic and consular relations, and the third, the authority to declare war.

(a) *Treaty-making Competence*

Kenya’s treaty-making competence is a function of its adherence to the theory that international treaties are a separate legal system as opposed to domestic or municipal law. Thus, a treaty by which a state has expressed consent to be bound does not automatically become domestically applicable. A transformation process must occur. Appropriate national legislation must be enacted to enable the treaty to become domestically applicable. This approach, known as the dualist position, is adopted by nearly all states that were colonised by the United Kingdom. The mode of domestication or “transformation” normally occurs through direct incorporation of the treaty rules through a drafting technique which gives the force of law to specified provisions of the treaty or the whole treaty. Thus, most jurisdictions will merely schedule the treaty to the transforming Act.

A second perspective, known as the monist approach, makes no distinction between international and domestic law. Many jurisdictions now adhere to this approach.

Kenya is a party to some 93 multilateral treaties on various subjects. Another 69 multilateral treaties fall within subject-matters which Kenya should arguably be interested in, but to which it is not a party. At independence, the President inherited all the prerogative and executive powers that the Queen could exercise over to Kenya. These powers did not make any express reference to the conduct of international law. This remains the position to date.

The conduct of international law issues is deemed and implied to fall under the powers accorded to the President under section 23 of the Constitution. In addition, the powers and functions of the legislature do not expressly provide for domestication of international law but again it is implied as one of the legislative powers.

Kenya's treaty-making practice borrows heavily from English practice. Treaty-making is an exclusively Executive function. The negotiation, signing and final consent to treaties is made by the Executive, through the President, involving the Ministry of Foreign Affairs and the parent ministry that may be concerned. Parliament is involved in the process only when the treaty is finally brought before it for domestication in order to give municipal effect to its provisions. Thus, the Executive commits the State on the international plane before domestic legislation can be put in place to enable the treaty to be given effect. We may, therefore, be required to honour our international commitments long before Parliament has domesticated their international provisions.

(i) The Pre-Independence Treaties

By his Note EXT.237/003A of 25th March, 1964, addressed to the Secretary-General of the United Nations, the Prime Minister made a Declaration which was to determine the legal status of treaties entered into between the Government of the United Kingdom and other Governments and applied or extended to Kenya. Kenya declared her willingness to succeed to the pre-independence treaties for 2 years, i.e., from 12th December, 1963, to 12th December 1965. During the two years, the Government had to review the treaties in question and decide whether or not the relationships formerly established with other Governments by the United Kingdom on behalf of Kenya should continue.

With regard to bilateral treaties, this period was, in the words of the Declaration, "intended to facilitate diplomatic negotiations to enable the interested parties to reach satisfactory accord on the possibility of the continuance or modification or termination of the treaties".

On multilateral treaties, the Government intended within the two years from independence, or such later date as may be notified, to indicate to the depositary State or organizations the step the Government wished to take on each multilateral treaty. The notification was to be over either a confirmation of termination or a confirmation of succession or accession. During the interim period of review, any party to a multilateral treaty applied or extended to Kenya prior to independence, might on the basis of reciprocity, rely against Kenya on the terms of such a treaty.

In the two-year period of review, it was not possible to finalise matters with the interested foreign States. Hence, a supplementary declaration was issued extending the period for a further two years to 12th December, 1967. During this second period, *Review Notes* were addressed for the Government to various governments inviting them to agree to continued application of the treaties in question pending conclusion of new treaties, negotiated directly between the Government and other governments.

Responses to the *Kenya Review Notes* were received from various governments indicating their willingness to continue the relationship established under the treaties in question. Such treaties remained thus in force beyond December 12th, 1967, pending modification or termination as the case might be. But the treaties on which no responses were received from the governments concerned ceased automatically to be in force in Kenya after 12th December, 1967. The same policy applied to the continuation of multilateral treaties of which the Government did not notify the depositary State or organization. Such multilateral treaties, to which Kenya has not acceded, may also be said to have ceased to be applicable to Kenya on 12th December, 1967.

(ii) *Contemporary Practice*

Kenya has, over the years, exhibited a rather haphazard treaty-making practice that needs to be streamlined in the Constitution. The question of how Kenya elected to be party to some treaties and not others needs an answer. This indeed reflects the troublesome issue of Kenya's attitude and position on the so-called "colonial treaties", such as on the controversial use of the Nile Waters, about which there has been a major debate.

(b) **Diplomatic and Consular Relations**

Diplomatic and consular relations are key to furthering a State's interests. They are tools for obtaining maximum national advantage peacefully and without causing resentment. The functions of diplomatic missions are clearly spelt out in the 1961 Vienna Convention on Diplomatic Relations as

- (a) representing the sending State in the receiving State;
- (b) protecting, in the receiving State, the interests of the sending State and of its nationals, within the limits permitted by international law;
- (c) negotiating with the Government of the receiving State;
- (d) ascertaining by all lawful means conditions and developments in the receiving State, and reporting from there to the Government of the sending State; and
- (e) promoting friendly relations between the sending State and the receiving State and developing their economic, cultural and scientific relations.

States, being legal entities, can only act through individuals as agents or representatives. The chief representative of a State is the Head of State. In addition, there are diplomatic agents, defined in the Vienna Convention as "*the head of a mission or a member of the diplomatic staff of the mission*".

Heads of mission are categorised as follows:

- (a) ambassadors or *nuncios* accredited to Heads of State and other heads of mission of equivalent rank – ambassadors hold the highest rank among diplomatic representatives; ambassadors were initially exchanged only between the principal monarchies, with envoys or charges d'affaires sufficing to conduct relations within the less powerful States;
- (b) envoys, ministers and inter-*nuncios* accredited to the Heads of States;
- (c) charges d'affaires accredited to the Minister for Foreign Affairs - Charges d'affaires may be appointed permanently or on a temporary basis, for instance, where the head of mission is absent or where his appointment is pending.

The power of and responsibility for appointing diplomatic agents varies from one jurisdiction to another.

The power is *exclusive* where it is vested in a sole appointing entity of State, usually the Executive. The Executive would then be responsible for appointing diplomatic agents. In some countries, the power may be vested solely in the President or Head of State as head of the Executive. Countries such as Germany, Spain, Argentina, Iraq, Indonesia, Cameroon and Zambia are in this category.

Section 111(2) of the current Constitution provides that:

“The power to appoint a person to hold or act in the office of Ambassador, High Commissioner or other principal representative of Kenya in another country and to remove from office a person holding or acting in any such office shall vest in the President.”

Kenya's position is, therefore, totally exclusive in nature as the President exercises absolute authority in appointments.

(c) Declaration of War and Commitment of Kenya's Forces Abroad

In many countries, the issues of who may declare war and what amounts to war is the subject of great debate. Few constitutions make any reference to these issues.

The current Constitution does not discuss the issue of declaring war or committing Kenya's forces outside the boundaries of the State. This is, however, implied as one of the President's powers and functions under section 23.

11.4.3 Global Relations in other Constitutions

Three specific issues were of concern to the Commission on this matter, namely: treaty-making competence, diplomatic and consular relation, and the authority to declare war or commit the armed forces of the Republic to engagement abroad. These, as have been indicated, are not issues normally dealt with in constitutions. In the United Kingdom, for example, they are reserved by custom to Executive privilege or royal prerogative. The Constitution of the United States of America, however, has very specific provisions on treaty-making competence by the President. Article II (2) provides that the President

"has power, by and with advice and consent of the Senate, to make treaties, provided two thirds of the Senators present consent".

Once so made, treaties form part of the Supreme law of the United States. In somewhat different language, Article 55 of the Constitution of France provides that

"treaties or international agreements regularly ratified or approved have, from the date of their publication, an authority superior to municipal law".

More recent constitutions, such as those of Uganda, Ghana and South Africa, contain principles incorporating treaties and customary international law into their national legal systems. On appointing diplomatic and consular officers deploying the armed forces, most jurisdictions confer exclusive authority upon the Executive. Only in restricted cases is such authority shared with the Legislature.

11.4.4 What the People Said

The people told the Commission that :-

- (a) *in respect of treaty-making, a provision be made*
 - i) specifically addressing treaty-making, rather than leaving it to be implied in the functions of various organs of State;
 - ii) involving bodies other than the Executive in treaty-making;
 - iii) treaties be implemented only after being vetted and ratified by Parliament;
 - iv) once vetted and ratified, treaties and conventions and the regional and bilateral agreements should have automatic effect in domestic law;
 - v) treaties should be subject to public scrutiny before implementation; but a good number of people thought that the Executive should retain a free hand in treaty negotiation; and
 - vi) the issue of pre-independence treaties, such as on using waters feeding into the Nile, e.g., Lake Victoria, was raised, largely by the people living around and relying upon the Lake.
- (b) *)in respect of diplomatic and consular affairs -*
 - i) the current diplomatic and consular arrangements are inadequate;
 - ii) the conduct of foreign affairs should not exclusively be an Executive function;
 - iii) Parliament should be involved in vetting and appointing diplomatic agents; others submitted that the Executive should play no role, that this should be a purely legislative role; and
 - iv) Parliament should play some role in appointing diplomatic agents.
- (c) *in respect of a declaration of war, provision be made*
 - i) denying the Executive exclusive power to declare war; Parliament should be involved; some suggested that this should be an exclusively Legislative function;

- ii) requiring the involvement of both the Executive and the Legislature and requiring that Parliament's approval be sought by the President before declaring war;
- iii) requiring Parliament's approval to be by a two thirds majority vote to declare war; and
- iv) denying the use of the armed forces in foreign countries.

11.4.5 Commentary

There was widespread awareness of the extent to which Kenya's internal affairs are influenced and, to some extent, conditioned by global political and economic developments. Similarly, the people thought that decision-making on international relations ought to be shared by the Executive and the people's representatives in Parliament. The notion that the former should be in a position to saddle the people with obligations without the approval or even scrutiny of the latter was clearly rejected.

11.4.6 Recommendations

The Commission, therefore, recommended that:

- (a) *On Globalisation and Regional Integration,*
 - i) in order to maintain consistency in negotiation, follow-up and implementation, the Executive organs or ministries involved in the new ministerial trade committee or multilateral trade agreements should be required by the law to be responsible for negotiating, designing and implementing trade policies;
 - ii) the Constitution should provide that, as a member of the United Nations, Kenya should use her position to challenge inequities in the global social, economic and financial structure, external debt, militarism and lack of transparency in international decision-making processes;
 - iii) the Constitution should require Parliament to enact a piece of legislation on international trade and economic integration in order to:
 - facilitate and guide the country's bilateral and multi lateral trade negotiations;
 - ensure that economic policies remain focused on the people's sovereign interests, welfare and needs in accordance with the Constitution's provisions;
 - ensure that trade agreements to which Kenya accede remain consistent with the provisions of the constitution laws as well as strategic interests and vision of the nation;
 - ensure informed and strategic integration of the economy into the global and regional economy; and
 - establish a mechanism to monitor; regulate and, if necessary, control the international financial flows especially if speculative and short-term in nature.
- (b) *On Treaty-Making,*
 - i) the Constitution should provide that Kenya should adopt the dualist approach to treaty-making that includes a specific role for Parliament as part

- of its “input” into or supervision of the treaty-making powers of the Executive;
- ii) a timeframe should be specified within which Parliament has to act to transform treaties into domestic law for the people’s benefits for their rights to be protected under a specific instrument;
- iii) customary international law should be applicable to Kenya, unless it is inconsistent with the Constitution and laws;
- iv) the Constitution should specify, in addition to mentioning international law generally – as part of the applicable law in Kenya — that international agreements to which Kenya is a party will form part of the system of laws to be interpreted and applied by the courts as such throughout the country;
- v) treaty negotiation and signing should be an executive function (through the President or his agent), subject to the Constitution’s provisions;
- vi) Parliamentary approval should be sought before the Executive gives consent to any treaty;
- vii) participants approval should be by a simple majority in Parliament, subject to the Constitution’s provisions;
- viii) a distinction should be made between self-executing and non-self-executing treaties, with domestication being required only for the latter;
- ix) non-self-executing treaties to which consent has already been given should be incorporated into the body of national laws by Parliament within 12 months from the date of consent;
- x) pre-independence treaties applied to Kenya should remain in force only on condition of reciprocity (as is the case in France);
- xi) Parliament may identify treaties to be consented to by the Executive and approved by Parliament only after a referendum or other means of securing direct citizen approval, as may be prescribed by law;
- xii) the Constitution should provide a treaty clause which identifies specific activities, such as those affecting Kenya’s international boundary; those requiring a substantial budgetary allocation for implementation; those committing Kenya’s armed forces to any external action or, in peacekeeping activities, those concerning Kenya’s commitment to a public debt from foreign sources;
- xiii) Parliament should authorize the Executive to commit the Government to a public debt from bilateral or multilateral international sources; and
- xiv) Parliament should define the process of constituting a Kenyan delegation to bilateral or multilateral negotiations and conferences.

(c) On Diplomatic and Consular Relations,

- i) Kenya should adopt the shared method of appointment – the President should appoint heads of mission (ambassadors or high commissioners) with Parliament’s approval;
- ii) the President should receive foreign envoys or heads of mission accredited to Kenya;
- iii) The Constitution should, *inter alia*, ensure reliance upon professionalism and integrity among the cardinal qualifications for appointment to public office at home or abroad, applicable to diplomats and representatives at either bilateral or multilateral forums;

- iv) the Constitution should cause Parliament to enact a law on Diplomatic and Consular Immunities and Privileges consistent with the provisions of the Constitution, taking into account:
- the Vienna Convention on Diplomatic and Consular Relations;
 - the United Nations under its convention on privileges and immunities;
 - Specialised United Nations agencies under their respective conventions on privileges and immunities;
 - inter-governmental organizations' agreements;
 - multilateral finance institutions;
 - bilateral agreements;
 - that the law shall also address the question of exemptions to international organizations which operate in Kenya and are not entitled to the range of diplomatic and consular privileges and immunities; and
 - that the law shall state that such privileges, immunities and exemptions are subject to the Constitution and the general welfare of Kenyans and shall respect the sovereignty of the Republic.
- (d) *On Declaration of War and Commitment of Kenya's Troops Abroad,*
i) the President should declare a war in consultation with the Defence Council and with Parliament's approval through a simple majority vote;
ii) any commitment of Kenya's forces outside the international boundaries, any participation in peace-keeping operations should require Parliament's approval through an absolute majority vote;
iii) Parliament should prescribe the terms and conditions under which Kenya shall commit its troops to participate in peace-keeping, cross-border or international action, including the question of determining the benefits from participation in the peace-keeping operations.

CHAPTER TWELVE

PARTICIPATORY GOVERNANCE

12.1 The Mandate of the Commission

The mandate of the Commission under the Act is to ensure that provisions are made in the Constitution:

- guaranteeing peace, national unity and integrity of the Republic to safeguard the people's well-being;
- establishing a free and democratic system that enshrines good governance, the rule of law, human rights and gender equity;
- promoting people's participation in governance through democratic, free and fair elections and devolution and exercise of power;
- strengthening national integration and unity;
- examining the various structures and systems of government, including the federal and unitary systems, and recommending an appropriate system for Kenya; and
- examining and recommending improvements to the electoral system;

12.2 Participation and Governance

12.2.1 General Principles

The idea that people – all people – must be involved in all the governance and development processes is extremely important. The notion of people's participation in their own governance and development is this one of the hallmarks of a republican and democratic society. At the heart of nation-building, therefore, lies the ultimate and overriding goal of people-centred governance and development that ensures their wellbeing. Through full and effective participation, people assume both the right and the responsibility to be involved in charting their own national goals, values, policies, laws and programmes that aim to sustain and improve their wellbeing.

Participation is, in essence, empowering the people to actively and effectively involve themselves in creating the structures, systems, policies, laws and programmes that serve the interests of all; as well as effectively implementing and contributing to the development process and sharing equitably in its benefits.

Participation is thus a means and an end. As an instrument of democratic governance and development, participation provides the driving force for collective commitment based development processes and will to make sacrifices and expend social energies on governance and management. Participation entails:

- control–actually determining what a policy or a decision should be;
- Involvement–being part of the decision-making body;

- influence— affecting decision-making;
- consultation—being asked what one thinks about a decision to be made or an action to be taken;
- information—being informed of what the factors are and what decisions are being made and how they are being implemented; and
- monitoring—being involved in watching and assessing how decisions are effected and how processes, such as elections, work.

Enhancing participation has thus been a major theme in the Constitution review process, including concerns raised by the people, governmental and non-governmental organizations and the civil society. In part, this has stemmed from a sense that citizens are generally disillusioned with Government structures, specifically with politics. Representative democracy is widely thought to have been fundamentally a failure. Poor people, especially, find that public institutions are corrupt, distant and unaccountable.

Further, it has been realised that democracy has a tendency to exclude as well as include. Women and minorities are often under-represented, for different reasons, as are the poor. The will of ‘the majority’— which actually may mean that of a minority – may be oppressive, as much as the will of a monarch or dictator. Indeed, not all attempts to involve the people are successful. Each method has its enthusiasts, its doubters and its detractors. There are risks inherent in the whole idea of popular participation. For example:

- the chance to participate may be hijacked by the elite if not very carefully planned;
- problems may arise because those who set up participatory mechanisms may not know how local institutions work; sometimes they may not understand how people respond, who comes to meetings and when;
- there are the risks of deliberate manipulation; for example, village assembly meetings in India have sometimes been held at such times and places that they have been quite ineffective;
- many participation initiatives have had a particular desire to involve women; however, simply having a certain proportion of women may not have any, or even the desired effect. The issues, which centre on interaction between women and men may be ignored; not all women’s issues are exclusively ‘women’s issues’; women may accept cultural limitations – is it right to deny them?
- the introduction of fully participatory methods at the village level or into societies with rigid social structures may give rise to tensions in the community; and
- not everyone involved in participatory exercises has the same agenda; local and foreign NGOs, foreign donors, local government, local communities the central government etc., may differ in their aims; there may be instances of some bodies bringing in inappropriate foreign ideas – or inappropriate ideas from elsewhere in the country or from the governmental system; local bodies may end up, perhaps unwittingly, being tools of the central Government.

While participation may not be the panacea to all evils of governance, it is looked upon as providing a way of making government more accountable, of making it more effective and responsive to the public needs – and of making it more just. Accountability and effectiveness should mean less waste of resources and more intelligent prioritisation of government action. More effective and accountable government should mean more satisfied citizens and ultimately greater social stability – or at least stability that stems from commitment rather than from sullen submission.

There is no gainsaying the fact that people's participation is the foundation of good governance. This implies a universal sense of the politics of consent, consensus, representation, conviction, commitment, compassion and accountability. Consensus politics involves people in the process by which policies, laws, plans and programmes are developed and practised. It entails listening to what people have to say and adapting the approach of leadership and government in the light of these. By so doing, the Government is most likely to win the trust, confidence and consent of the majority, if not of all the people, to the course of action being pursued for the common good.

Good governance encompasses efficient and effective people-based management of the political system, societal relations and resources, for maximum and equitable societal benefits. Good governance is the major mechanism for transforming society to a people-centred development and decision-making. Its role is to create an enabling environment for inclusive development to protect the socially disadvantaged and vulnerable.

The need to develop appropriate governance systems and structures is, therefore, critical, particularly if we are to understand and appreciate the conditions under which national goals are to be realised. Creation of enabling systems and structures not only ensures proper and efficient use of resources, but also to deliver quality and responsive services by creating the necessary boundaries of operations and functions of the various structures, organs and levels of the State.

12.2.2 Participatory Governance in the current Constitution

Apart from the generalised nature of freedom of assembly and association, as found in the current Constitution, there is no specific provision on participatory governance. On the whole, the Constitution does not provide for direct popular participation in public affairs.

In common with other constitutions of its generation, the Constitution assumes that people's participation is achieved through the electoral process. The only provisions that address participatory democratic process are, therefore, those on:

- constituency boundaries;
- the functions of the Electoral Commission (especially voter education);
- the role of the nominated members of Parliament as representing 'special interests';
- the requirement of a national spread of support in presidential elections; and

- provisions on the rights of expression, assembly and association are also relevant.

But there are no constitutional provisions on local government and no provision for any other institution that provides for accountability to or participation by the citizenry.

12.2.3 Participatory Governance in other Constitutions

In recent years, concern about participatory governance has gained prominence in the constitutions of many jurisdictions, including South Africa, Uganda, Portugal, Madagascar, Finland and Ethiopia. Even the United Kingdom that espouses no single written constitutional text has proposed recently that public bodies be under a general duty to consult with the public on important matters affecting them. Article 57 (1) of the Constitution of South Africa provides that the National Assembly may make rules and orders concerning its business:

“with due regard to representation and participatory democracy, accountability, transparency and public involvement”.

The Constitution of Ghana provides, more specifically, in Article 35 (6) that the state shall take appropriate measures to

“make democracy a reality by... affording all possible opportunities to the people to participate in decision-making at every level of national life and in government”

In Article 37 (2), that Constitution provides further that the state shall enact laws to ensure

“the enjoyment of rights of effective participation in development processes, including... rights of access to agencies and officials of the state necessary in order to realise effective participation in development processes”

Similar provisions exist in the constitutions of Uganda, Portugal, Madagascar, Finland, Ethiopia, Brazil and Mozambique, among others.

12.2.4 What the People Said

The views from the people may be summarised as follows:

- (a) *On Women, that*
 - (i) women are poorly represented in governance and other areas of decision-making;
 - (ii) women are rated 2nd class citizens since they cannot be cleared to travel abroad without their husband's consent;
 - (iii) women are weak physically and should thus be given special treatment;
 - (iv) some cultural beliefs and customs discriminate against women;
 - (v) married women are restricted to family matters, hence little participation

- in governance;
- (vi) women should be involved in governance through a quota system;
 - (vii) $\frac{1}{3}$ of all public servants in all areas should be women;
 - (viii) the Government should fund women's groups to teach them their rights and obligations in governance;
 - (ix) women should be accorded 50/50 participation in all areas of governance;
 - (x) a department should be established to deal with women's affairs;
 - (xi) unmarried women should not represent married women; and
 - (xii) women should be given incentives for economic and political participation.

(b) On People with Disabilities, that

- (i) people with disabilities are looked down upon by able persons;
- (ii) people with disabilities are discriminated against in employment, schools and other institutions;
- (iii) people with disabilities are not catered for in recreation facilities, transport, communication facilities and general infrastructure;
- (iv) people with disabilities are poorly represented in all organs of the State, and the private sector;
- (v) people with disabilities are financially weak since they have a low output;
- (vi) people with disabilities should be encouraged and motivated to participate fully politically, socially and economically;
- (vii) people with disabilities should be consulted and included in the decision-making process;
- (viii) a welfare fund should be established for the people with disability;
- (ix) people with disability should be helped to form representative groups; and
- (x) Parliament should reserve seats for people with disability.

(c) On the Youth that

- (i) youth are given a raw deal in governance, yet they are the majority;
- (ii) youth do not have funds like others to push for their concerns, e.g., campaigns;
- (iii) youth can be moulded into good citizens and leaders;
- (iv) youth are represented by old people who do not understand their problems;
- (v) seats should be reserved for the youth in Parliament;
- (vi) a quota system should be used to appoint public servants and the youth should be entitled to their quota;
- (vii) young people who present themselves for elections should be funded in addition to being given incentives to contest;
- (viii) the skills and talents of the youth should be tapped by incorporating them in governance; and
- (ix) the youth should manage and control their own affairs by establishing a youth department in governance.

(d) On Minority Groups, that

- (i) minority groups have been neglected in education, health and general infrastructure in their regions;
- (ii) the minority are not represented in governance, hence their issues are not

- addressed;
- (iii) minority groups are oppressed and discriminated against;
 - (iv) minority groups, such as the Ndonoro and the Ogiek, who live in forests, should not be interfered with;
 - (v) minority groups should be represented in Parliament and government;
 - (vi) the Constitution should protect the minority; and
 - (vii) the minority should be given special treatment in education, health and finance.
- (e) *On The Older persons, that:*
- (i) the older persons are not represented in governance;
 - (ii) the older persons suffer a lot because they do not have a source of income;
 - (iii) illiteracy among the older persons is alarming;
 - (iv) people no longer have respect for the older persons;
 - (v) the older persons should be represented in both Parliament and governance;
 - (vi) a welfare fund and a universal social security system should be set up to cater for the needs of the older persons; and
 - (vii) the Constitution should protect the older persons.
- (f) *On other groups that:*
- (i) professionals, religions, the business community, refugees, farmers, pastoralists and other specialised groups should be incorporated in governance; and
 - (ii) special seats should be reserved for these groups.

12.2.5 Commentary

In their presentation to the Commission, the people of Kenya demanded full involvement in the running of public affairs and in making decisions on issues which affect them, such as spending public money, managing natural resources, dispute-resolution, making laws, including amending the Constitution, policy-formulation and planning of development programmes. They want a government closer to the people. They want women, the youth, people with disability and minority and vulnerable groups to be involved.

12.2.6 Recommendations

The Commission recommended therefore that:

- (i) the Constitution should affirm the importance of the people and their institutions in promoting democracy and republican principles, values and practice. The state should promote and encourage direct and indirect public participation in decision-making and in managing of public affairs at all levels of government.
- (ii) the Constitution should give the people the right to participate in solving State matters, both directly and indirectly, and through freely elected

representatives. Every citizen of voting age has the right to participate in political or electoral activities to influence Government composition and policies.

- (iii) the State should at all times promote participation by the people in formulating, monitoring and evaluating national and local development policies and programmes and support initiatives by the people in their development endeavors.
- (iv) public authorities should promote individual and communities opportunities to participate in social activities to influence decisions affecting them.
- (v) the State shall establish appropriate mechanisms to ensure Government accountability at all levels and afford people the opportunity to participate effectively in.
- (vi) direct participation by citizens in managing their affairs should be safeguarded by referenda, opinion polls and by other means specified in law.
- (vii) the Constitution should require public institutions to consult the people. Reports by all public institutions should state whether the obligation to consult with the people has been complied with.
- (viii) people should exercise popular and informed participation in the administration of justice through public and customary tribunals and through the jury and assessor systems. The State should take necessary steps to enhance the rights of citizens to go to court, to present friends-of-the-court arguments (*amicus curiae*), to approach public institutions for redress etc.
- (ix) all citizens should have the right individually or jointly, to submit, petitions, representations, claims and complaints to the organs of supreme authority or any other, to defend their rights, the Constitution, the laws, or the general interests of society and to be informed of the result as provided by law.
- (x) the state should promote and protect the interests and equal rights of women, the youth, people with disability, older persons, orphans, widows, destitutes, children and minorities to ensure their full and equal participation in all political, economic and social endeavours; including access to all services and opportunities.
- (xi) the devolution or any form of decentralisation required by the Constitution should have positive effects for participation at all levels of governance.
- (xii) the Constitution should require Parliament to enact a law guaranteeing the role of traditional leadership, customary law and community customs; establishing councils of traditional leaders and any such provisions that may be deemed appropriate.

- (xiii) the Constitution should require the Legislature to establish mechanisms to enable:
- a) and empower citizens to discuss draft laws/Bills to initiate amendments and formulation of Bills; to petition Parliament for legislation; to ask to appear before parliamentary committees discussing or investigating particular issues of national or public significance; legislative proposals to access either individually or through civil society groups;
 - b) Parliamentary Committees should hold public hearings and consult with and seek technical assistance from policy think-tanks, including research institutions; and
- (xiv) the Constitution should create a mechanism to enable people to monitor the performance of elected representatives and to recall them if their performance is not up to standard.

12.3 The Electoral System and Process

12.3.1 General Principles

The cornerstone of participatory governance is to hold free, fair and periodic elections. Elections serve not only to choose people's representatives, but also to elect or determine government election or appointment. They demonstrate the people's sovereignty and accountability by politicians. They lend legitimacy to governments. For this to occur, a number of prerequisites must be in place, including agreement on the system of elections to be used, equitable delimitation of electoral boundaries and transparent management of the electoral process.

(a) *The Electoral System*

An electoral system here means the method used to determine how votes are cast and translated into seats won by parties and/or candidates. The electoral system thus consists of mediation between votes and representation as established by the electoral law. On the other hand, the electoral process refers to the management and administration of the whole electoral system.

Critical to electoral system stability are the following:

- the electoral system must be well understood by voters if it is to facilitate their effective and meaningful participation in the electoral process. Complicated electoral system may disenfranchise many potential voters, especially the illiterate.
- the choice of an electoral system should take into consideration the cost of running the system. The cost may be too high and out of a country's reach and may plunge the entire electoral system into chaos.
- the system must also take into consideration the uniqueness of the country's political system and history, social and demographic structure, ethnic diversity, education, cultural, religious diversity, the civil society structure, the economy, and so on, in its basic design and operation.

In designing an electoral system, such factors as the country's political history, social forces at play, such as ethnic and religious diversity, the vigour of social movements, such as labour, NGOs, etc., the level of political and/or civic awareness, the literacy levels, geographical accessibility, religious composition, and level of economic and technological development are critical.

Electoral systems vary. The most common ones include:-

- (a) The Majoritarian system, also known as First-Past-the-Post (FPTP) or Winner-Take-All System (WTA), is what is currently in use in Kenya. The candidate who obtains the highest number of votes cast in an election, compared with his/her competitor, wins the seat and thus becomes the representative of the constituency. The winner needs to get only most of the votes and not necessarily an absolute majority. It is called FPTP simply because only one candidate can be declared the winner. The system has many variants, depending on the formula used to determine the winner.
- (b) The proportional representation (PR) system. Parliamentary seats are located proportionately to the votes cast for each party that wins seats in the Legislature. The idea at both the constituency and parliamentary levels is to ensure that the results reflect more closely the voters' wishes. The basic principle underpinning the system is that a party should receive seats in proportion to its share of the total vote. Typically, at the constituency level, there would be several Members of Parliament from each (large) constituency. Thus, if a party wins 10% of the votes in a Parliament of 100 seats, the party will be awarded 10 seats. Or where there are 5 members in a constituency, if a party wins 40% of the votes, it gets 40% of the seats, to be allocated to the top two candidates on its constituency list. At the national level, therefore, the make-up of Parliament would reflect the national support for the various parties. If another party wins 1% of the votes, the party will be awarded only one seat. The most commonly used variant of PR is the Party List Proportional Representation, in which people vote for a party rather than a candidate and the parties receive parliamentary seats in proportion to their overall share of the national vote. Thus, each party wishing to participate in the elections draws up its list of candidates up to the number of seats to be filled. The names on the list are arranged in order of preference. If the party wins only five seats, the first five party candidates on the list become the party's representatives in parliament. In this system, the party machinery draws up the list from among members. The party must, therefore, develop acceptable criteria for choosing candidates and the order in which they will appear on the party list.

An ideal electoral system should ensure or promote representation of the people and all major interests in a political system. The system operating in the framework of a republic should, therefore, be as inclusive as possible by making it possible for as many of the divergent interests and concerns as possible to be represented. Identifying these interests is critical to ensure no one interest group dominates the rest, as this would be unrepresentative and undemocratic.

In liberal democratic systems, such as Kenya's, political parties provide the channel by which different shades of citizenry and interest groups are organized and compete for representation in the legislative body. In this sense, an electoral system can determine what kind of political parties are formed. In situations where parties may not provide an adequate channel for interest aggregation such as on the basis of religion, labour, gender, etc., the electoral system should facilitate their representation in a proportional manner. In this case, the manner of electing the representatives would be indirect, e.g., by nomination.

In general, therefore, the principal functions of the electoral system include:

- promoting and ensuring effective representation in the Legislature and other organs of governance and decision-making;
- registration of the people's views;
- choice and formation of government;
- provision of the mechanism for holding people's representatives and the government accountable;
- providing people with choices about public policies, plans and programmes; and
- promotion and facilitation of a competitive political and party system.

Kenya's electoral system does not; however, seem to fulfil most of these functions. Doubts have also been expressed whether the electoral framework, or the way it is operated, is truly for a neutral framework where all parties and candidates have equal opportunities to be elected. The main problems of the current system are:

- lack of proportionality—the President as well as the ruling party may well have obtained a minority of votes in the election; there is particular resentment that a person can be elected president when a majority of Kenyans did not vote for him or her;
- support for parties is concentrated in specific geographical areas; the candidate of the party in such an area is sure to win; the country is thus divided between parties in a kind of electoral “zoning”; there arises the notion that different parts of the country are preserves of particular parties and competing parties face obstacles, including intimidation, in campaigning there;
- this notion of ‘safe areas’ or ‘safe seats’ means that parties make no serious efforts to win support in areas deemed to be strongholds of other parties; the people there have no genuine choice between candidates;
- the First Past – the Post – system is adversarial and candidates or their parties have no incentive to co-operate;
- fundamentally, voting has become ethnic, although this is not the only factor; and this is reflected in the nature of party membership, for example, in 1997, in constituency elections, people voted predominantly for a local candidate, based on his ethnic affiliation, but, in the presidential elections, gave few votes to the leader of that candidate's party who belonged to a different ethnic group. Rivalries between individuals have turned into competition among ethnic groups, yet it is essential for national unity and integration to move away from ethnic voting;

- the dominance of ethnicity means that social or economic issues seldom feature in electoral campaigns; so voters are offered little choice about these matters, although these issues are more vital to their lives than ethnicity;
- Kenya has a large number of parties—deemed to be undesirable for electoral and democratic politics—although many are inactive, and there are recent trends towards merger/co-operation/alliances; these, however, may have more to do with presidential elections than with constituency support;
- bribery and patronage are prevalent; support for candidates and parties depends more on their ability to offer individual benefits than on their promised or proven ability to benefit the country;
- there is very considerable gerrymandering—manipulating constituency boundaries with marked differences in the number of voters among the constituencies in violation of the general principle of equal suffrage -one person, one vote, one value;
- the system disadvantages the smaller and newer parties that may represent interests not catered for by the bigger parties;
- there are complaints about inadequacies in the registration of voters, which leave many eligible citizens without a vote;
- occasionally, obstacles are placed in the path of persons seeking to present their nomination papers as candidates;
- there are complaints about rigging;
- elections become occasions for violence and ethnic cleansing, intimidation by provincial administration and other officials or private armies, manipulation of electoral boundaries and other aspects of the electoral system, corruption and bribery;
- the electoral system tends to encourage both inter – and intra-party conflicts as each party and candidate tries to do all within his or her power and means, including violence and such other illegal means as bribery, to win election;
- parties disregard policy choices in pursuit of ethnic and sectarian support, thereby promoting ethnic conflict during electioneering and;
- the current electoral system gives equal weight to votes not taking into account the value of various categories of voters, including parties.

Thus, far from strengthening democracy, elections have put democratic practices under great strain; and far from emphasising national unity and integration, they tend to fragment the people along ethnic and other sectarian cleavages.

(b) *Electoral Process*

The electoral process consists of all activities designed to ensure that the electoral system functions in a manner which truly reflects the people's will. The components of the process include:-

- the right to vote and stand as candidates;
- compilation of a register of voters;
- nomination of candidates;
- timing of elections;
- accessibility of voting arrangements;
- the electoral rules set to ensure free and fair elections;
- election campaigns and control of expenses;

- system of voting and counting of votes;
- supervision of the conduct of political parties and disqualification or penalties for candidates or political parties;
- smooth and dignified succession to office,
- system of settling electoral disputes; and
- election observation.

(c) *Delimitation of Electoral Boundaries*

The delimitation of constituency and other electoral boundaries remains central to fair and free elections so long as elections are based on single member constituencies. The first parliamentary constituencies totalling 117 were established in 1963 as a result of the Report of the Constituencies Delimitation Commission. These were formalised into law by the Lower House Constituencies Regulations of 1963 and followed by amendments in the (Elections) (Amendments of Laws) Regulations of 1963.

When the Independence Constitution was transformed, between 1965 and 1966, the existing parties agreed to create new parliamentary constituencies for the Members of the Senate, which was to be abolished. These constituencies were created through the Constitution of Kenya (Amendment) (No. 4), 1966, *vide* section 6, and the Third Schedule, which the Electoral Commission adopted in the legal Notice No. 344 of 19.12.66.

By 1996, there were 188 constituencies and Parliament directed the Electoral Commission to create an additional 22 constituencies, increasing the number to the present 210. The constituency voting population varies greatly, from less than 4,000 in Mandera West and 7,631 in Wajir North to 113,848 in Embakasi (1997, figures). Many people believe that urban constituency numbers need to be increased – Nairobi, with 10% of the national population, has 3.8% of the seats. Clearer guidelines should therefore be provided to the Electoral Commission.

(d) *The Management of Elections*

The Electoral Commission (ECK) is Kenya's election managing body. It is responsible for election conduct (s. 42A, s. 17A of the National Assembly and Presidential Elections Act, (Cap 7)). The Constitution says the Commission shall consist of not less than four, or more than 22, members, appointed by the President; the current membership is 22. In order to ensure its independence, members cannot be MPs, civil servants or military officers. Their independence is also secured through a special procedure for their dismissal. The Constitution says: "in the exercise of its functions under this Constitution the Commission shall not be subject to the direction of any other person or authority" (section 42(9)).

The functions of the Electoral Commission are to:

- determine the number of constituencies (within the limits prescribed by Parliament);
- determine the constituency boundaries;
- register voters and maintain and revise the register of voters;

- direct and supervise the presidential, National Assembly and local authority elections;
- ensure free and fair elections; and
- promote voter education throughout Kenya.

Unfortunately, the Electoral Commission does not enjoy the reputation among political parties or civil society organizations of independence or impartiality. One important reason is that it is appointed by the President, without any requirement that he follows – or even seeks – the advice of any other person or body. In such a situation, the provision that the Commission is not to be subject to direction from any other person or authority is not sufficient to remove suspicions about its independence.

While the ECK seems to have the necessary authority and power to ensure free and fair elections. S.42(A)(c) of the Constitution, s.s. 3(3), 17, 17(A), and 34(A)(5) of the National Assembly and Presidential Elections Act, it claims it is powerless for the following reasons:

- no independent Police Force has been set up under the command of the ECK;
- its prosecutions are liable to be taken over or stopped by the Attorney General under s. 26 of Constitution; and
- its powers under paragraphs 8 and 9 of the Election Code are liable to a review or depend on court orders – the element of timely intervention, therefore, ruled out.

The ECK claims may not be entirely justified (it could, for example, set up a mechanism to monitor election campaigns the speeches of candidates and supporters and their acts for infringements of the Code).

But there is a case for giving it greater authority to enforce the Code and other provisions designed for free and fair elections. The responsibility to enforce the Code of Conduct has to be the ECK's. It has asked for powers to deal with infractions of the law which do not necessarily amount to electoral offences, so that it can resolve disputes of a technical or mathematical nature but whose resolution or determination would enhance the conduct of elections in terms of transparency and expedition (quoting the Uganda Constitution (s. 65(f)), which gives the ECK the power '*to hear and determine election complaints arising before and during polling*'). No appeal from these determinations should be allowed, except as petitions after the elections.

The Electoral Commission may need to take over the registration and deregistration of political parties from the Registrar of Societies. The law allows the Registrar to register any political party even if it has no following beyond its subscribers (discussed in the section on political parties).

12.3.2 Electoral System and Process in the current Constitution

The right to vote is dealt with in the chapter on Parliament (s. 32(2)) in the current Constitution. The right is given only to a person who 'is registered in a constituency as a voter in elections of elected members' (s. 32(2)). To be entitled to registration, a person must be a citizen of at least 18 years of age (s. 43(a)). He or

she should also have been ordinarily resident in Kenya for at least one year immediately preceding the registration or for four years in the preceding eight years (s. 43(b)) and must have been a resident in, or have other prescribed connection with, the constituency in which registration is sought (s. 43 (c)).

The Constitution provides that “at intervals of not less than 8 years and not more than 10 years, and whenever directed by an Act of Parliament, the Electoral Commission shall review the number, the boundaries and the names of the constituencies and may, by order, alter the number, the boundaries or the names, subject to and in accordance with this section, to the extent that it considers desirable in the light of the review”.

Detailed provisions for election conduct are made in the National Assembly and Presidential Elections Act (Cap 7).

12.3.3 Electoral Systems and Process in other Constitutions

Although detailed provisions on country’s electoral process, including the procedure for delimiting boundaries and managing elections are usually found in ordinary legislation, an increasing number of constitutions now provide for these matters in articles dealing either with representation generally or, more often, election of representatives to legislative organs. For example, Chapter Five of the Constitution of Uganda provides, *inter alia*, for the right to vote, the establishment of an independent Electoral Commission, delimitation of constituency boundaries and system of voting. On the electoral system, Article 66(1) of the Constitution of Tanzania provides, for example, that

There shall be the following categories of Members of Parliament:

- (a) members elected to represent constituencies;
- (b) women members being not less than fifteen *per cent* of the members mentioned in paragraphs (a), (c) and (d) elected by the political parties represented in the National Assembly, ... on the basis of proportional representation among those parties;
- (c) five members elected by the House of Representatives (i.e., the Zanzibar Parliament) from among its members;
- (d) the Attorney-General, the President and the Vice-President shall not be a Member of Parliament.

Chapter Six of the Constitution of the Fiji Islands makes detailed provisions, *inter alia*, for distributing electoral seats among different electoral rolls, delimiting of electoral boundaries by a Constituency Boundaries Commission, voting and other matters, nominating candidates for elections, and composition of the House of Representatives and the Senate. Similar provisions have been included in the constitutions of Nigeria, Ghana and South Africa, among others. These provisions also empower the Legislature to enact specific legislation on these matters.

12.3.4 What the People Said

The Commission received a lot of views on the electoral system and process from the public. The majority were of the view -

- (a) *On representation that:*
 - (i) the current majoritarian system, based on simple majority rule, be retained;
 - (ii) there was a need to increase representation of such marginalised groups as women, the disabled, ethnic minorities, the youth and other vulnerable groups in Parliament and the local authorities;
 - (iii) seats should be reserved for some of these special groups in percentages ranging from 33 to 40, particularly for women in Parliament and local authorities;
 - (iv) the electoral system should be computerised;
 - (v) the disabled are discriminated against through the current system at both the parliamentary and local government levels and would, therefore, wish to be given special attention and representation opportunities;
 - (vi) youth should be adequately represented at all levels of decision-making, including parliamentary and local governments;
 - (vii) the category of nominated members of Parliament be abolished; and
 - (viii) elections be held regularly on a fixed date.
- (b) *On voting, that:*
 - (i) the current voting system that links the right to vote to a national identity card and a voter registration card be abolished;
 - (ii) that the voter's and identity cards be issued simultaneously but continuously rather than periodically or that one side of the national identity card be a voter's card;
 - (iii) women who get married before getting ID's or those who marry after getting IDs but find it difficult to change their names are most disadvantaged, as are divorced women who cannot easily revert to their maiden names;
 - (iv) the youth who have just attained majority age are also excluded by their inability to get IDs;
 - (v) The infamous screening card among the Somali community is a major impediment to meeting their voting rights and duties;
 - (vi) Voting rights and residence be delinked. Many complained that the voting date finds them in places other than where they are registered as voters; this was the case among nomadic communities; and
 - (vii) transparent ballot boxes should be used.
- (c) *On eligibility for elections, that:*
 - (i) independent candidates should be allowed to contest elections;
 - (ii) only people with proven leadership qualities should contest elections; quality being indicated by age, intellectual, moral and ethical standing and gender;
 - (iii) there should be a lower-age and upper-age limit for various positions;

- (iv) for the president the lower-age limit should be raised from 35 years to between 40 and 45 years and the upper-age limit should be between 70 and 75 years;
- (v) minimum academic qualifications for various positions be set;
- (vi) for the president, minimum academic qualifications should be a university degree;
- (vii) for MPs, at least a secondary school certificate or a university degree certificate should suffice;
- (viii) for councillors academic qualifications might vary between at least Standard 8, a primary school certificate or its equivalent or a minimum of a secondary certificate;
- (ix) women should be exempted from these academic qualifications on the grounds that, for many areas, women have been marginalised in education and may not meet these basic qualifications;
- (x) leaders should be morally and ethically upright; here, proposals on declaration of wealth and its sources and a proof of stable family were made;
- (xi) Candidates seeking elective positions should not be required to resign their civil service positions; instead, they should be allowed to take leave and resign only when they win the seat;
- (xii) the language test once the qualifications above have been met should be abolished; and
- (xiii) there should be a leadership code.

(d) On Election Results, that:

- (i) the president should win an election by more than 50% of the votes cast;
- (ii) the 25% rule in five provinces be retained in addition;
- (iii) alternatively, a simple majority with at least 25% votes in at least 4 provinces should suffice;
- (iv) there should be a run-off in case none of the candidates wins more than 50% of the total vote in presidential elections;
- (v) a presidential candidate should not run for a parliamentary seat but, on failing to win the presidency, should be allowed to become a member of Parliament if he has secured a certain percentage of the vote;
- (vi) alternatively, a presidential candidate should run for both the presidential and parliamentary seats and the one who wins the presidency should cease to be an MP and a by-election should be called to fill in the vacancy; and
- (vii) the president should always be elected directly by the people.

(v) On the Conduct of Elected Representatives, that:

- (i) non-performing representatives should be subject to
 - recall as a manifestation of the people's sovereignty;
 - increase people's participation in the political process and reduce voter alienation;
 - promote a more vigilant electorate and provide and incentives for it to monitor the MP's performance; and
 - emphasise the MP's accountability to the electorate and encourage

- him or her to perform well.
- (ii) the recall process should be protected from abuse since this would
- destroy representative government by restraining energetic MPs;
 - discourage qualified persons from seeking public office;
 - allow the losing political party a second opportunity to win office; and
 - encourage frivolous harassment of MPs; and permit removal of officers for inadequate reasons.

12.3.5 Commentary

The views expressed here have far reaching implications for designing a new system of elections and managing the process. It is clear, for example, that many people wanted to see a more predictable, transparent and efficient system. They also wanted to see more educated and morally upright leaders elected to serve them. A large number of those who appeared before the Commission expressed great dissatisfaction with the conduct of their representatives, accusing many of disappearing, once elected to Nairobi only to return five years later. Many hoped a new system would be in place for the next General Election. But most felt so tired of the current group of leaders that they wanted new elections at any cost.

12.3.6 Recommendations

The Commission recommended, therefore, that:

- (a) *On the structure of representation, that*
- (i) Parliament should be composed of two elective chambers at the national level; namely, the National Council and the National Assembly;
- (ii) there should also be provincial and district councils for purposes of power devolution;
- (iii) the National Assembly should:
- adopt the Mixed Member Proportional system for electing representatives to the National Assembly;
 - retain the current 210 constituencies to which representatives can be elected directly by the people through the single – constituency system using majoritarian system;
 - introduce additional 90 seats for proportional representation;
 - for the proportional representation seats political parties be required by law to nominate men and women candidates on a 50-50 basis; within each gender category, people with disability, the youth, ethnic minorities and other interest groups as are determined by the electoral law will be represented;
 - require political parties to place one third of the candidates to be women on the single constituency party list and 50% on the proportional representation list for the National Assembly;
 - use the zip system in preparing proportional representation party list; political parties to nominate at least one third of their candidates from among women for single constituency seats for the National Assembly; and

- abolish the current system of nominations.
- (iv) the National Council:
- should consist of 100 representatives;
 - 70 representatives should be drawn from each of the 69 existing districts and Nairobi;
 - the 70 should be elected from the districts through a method to be determined by the electoral law;
 - 30 women representatives, four elected from each of the seven provinces and two from Nairobi; and
 - the women representatives, elected through a method determined by electoral law.
- (v) the Provincial Council:
- should consist of two representatives from each district and other stakeholders and interest groups elected in a manner determined by at least one third of the provincial representatives who shall be women;
 - professional groups as may be determined by the District Electoral Commission;
 - Chairperson, treasurer and other officials of the Provincial Council be elected from among the voting members to form the Provincial Executive Committee;
 - the Provincial Chief Administrator (Provincial Secretary) elected directly by the people;
 - persons wishing to be elected to the council nominated by political parties or to run as independent candidates; and
 - the Provincial Council is the decision-making and policy-making, and legislative organ of the province.
- (vi) the District Council:
- the electoral unit should, as now, be the ward;
 - at least one third of the representatives elected from all districts wards should be women;
 - political parties should be required to nominate at least a third of their candidates from among women for direct election to the council;
 - the chairperson, treasurer and other officials of the district Council should be elected from among the elected members by the voting members of District Council to form the District Executive Committee;
 - the District Chief Administrator (District Secretary) should be elected directly by the people;
 - the District Council should be the decision-making, policy-making and legislative organ of the district
- (vii) the Location Council of Elders:
- the Location Council should consist of two elders elected from each village through a method to be determined by electoral law;
 - the administrator of the Location Council should be elected directly by the people;
 - at least one third of members of the Location Council should be women; and

- the Village is based on the existing cultural or neighbourhood groupings.
- (b) *On the Electoral Process, that*
- (i) Parliament shall stand dissolved automatically five years from the date of the last General Election;
 - (ii) a General Election should be held 45 days before the dissolution of the National Assembly;
 - (iii) except for the prevailing one (2002) next one, the General Election should be held on the first Tuesday of the second full week of August after every five years;
 - (iv) when the office of the President falls vacant due to resignation, death, incapacity, or impeachment, an election should be held within 30 days. The Speaker of the National Assembly should be the acting President in the meantime;
 - (vi) in other circumstances, the election should be held 45 days before the termination of office of the incumbent president;
 - (vii) the principal message of the Code of Conduct needs to be reflected in the Constitution;
 - (viii) severe penalties for a breach of the Code should be provided for;
 - (ix) no use of Government facilities by candidates to campaign;
 - (x) fair time on State media for all parties;
 - (xi) all State media should be required to ensure a balance between political parties; all parties should be required by law to broadcast and debate their policy messages through the State media;
 - (xii) restriction on the expenditure of money and resources on elections;
 - (xiii) counting of votes should be carried out at the polling stations; for future purposes, the constitution or relevant statute need to set up a voting machine to enable vote – counting to take place at some central computer centre;
 - (xiv) a general statement by the Electoral Commission should ensure that polling booths are accessible to all and that all reasonable steps are taken to ensure that all voters can vote in secret;
 - (xv) the Constitution should recognise the value of election observation and monitoring and oblige the EC to facilitate it;
 - (xvi) the Constitution should refer to a necessity to take account of international standards and experience of effective observation and/or monitoring;
 - (xvii) the Constitution should recognise and facilitate the right of civil society to participate in election observation and monitoring, even offer financial subsidies;
 - (xviii) there should be a statement in the general introductory article on principles of elections that votes should not be bought;
 - (xix) the principle of limitation of election expenditure should be in the Constitution;
 - (xv) the Constitution should state that every citizen has a fundamental right to vote; the right should be included in the Bill of Rights;
 - (xvi) voting should be seen as both a right and a fundamental duty of every citizen and should not be abused but exercised responsibly for the common good;

- (xvii) the State has a duty to enable every citizen to exercise his/her democratic right and duty to vote and to remove all impediments to voting;
- (xviii) the Constitution should entrench the principle that elections should be by secret ballot;
- (xix) proof of citizenship and age required for registration as a voter should be based on any credible evidence, not only the ID or passport;
- (xx) the Constitution should provide that registration of voters should be a continuous process, not confined to particular periods;
- (xxi) remand inmates and those in hospitals, schools and other institutions should be allowed to vote by making the voting stations as accessible and convenient as possible;
- (xxii) polling stations for people with disability should be made as accessible and convenient as possible;
- (xxiii) in nomadic pastoralist areas, the Electoral Commission may establish mobile polling stations;
- (xxiv) bankrupts should be allowed to vote;
- (xxv) disciplined forces should be allowed to exercise their voting rights;
- (xxvi) conviction of an election offence or a guilty ruling in an election petition case should bar one from only one General Election, except in serious cases of violence, bribery, vote rigging, incitement to violence and hate;
- (xxvii) the residence requirements should be retained but be subject to periodic reviews by the Electoral Commission, as election technology changes;
- (xxviii) voters should be allowed to vote for the president anywhere in the republic;
- (xxix) the Constitution should state that the electoral law may impose reasonable residence requirements, taking into account the devolved structures;
- (xxx) the President's power to annul disqualification imposed on a candidate for an electoral offence from registering as a voter or standing as a candidate should be repealed;
- (xxxi) the Constitution should guarantee citizens living, studying, visiting or working outside the country who satisfy the general rules, the right to vote in elections;
- (xxxii) the election day should be declared a public holiday; but if the election continues the following day (s), the subsequent day(s) should not be public holidays;
- (xxxiii) the Constitution and laws should ensure free and fair elections, which are fundamental to democracy;
- (xxxiv) the franchise should be equal and secret;
- (xxxv) the electoral system should aim at proportionality and inclusiveness;
- (xxxvi) all candidates and parties should be free to campaign without hindrance; and
- (xxxvii) all candidates and parties should avoid violence.

(c)

On Candidature, that

- (i) the nomination papers at all levels of the electoral system should require candidates to state the precise level of their educational and professional qualifications.
- (ii) They should also be required to provide information on:

- all their past convictions and sentences, and whether any charges are pending;
 - their assets, including transfers carried over a period of three years preceding the date of nomination;
 - liabilities, if any, particularly those due to public authorities, as has been decreed in India by the Supreme Court; this information must be readily available to the electors; and
 - a medical Certificate;
- (iii) participation in governance at different levels requires basic qualifications; this is necessary to ensure quality and effective governance that can properly serve the welfare of the people;
- (iv) independent candidates for the presidency, the National Assembly and all councils should be permitted, i.e., it should not be necessary for nominations to be made by parties only;
- (v) presidential candidates should be at least 35 years and at most 70 years at the time of seeking office;
- (vi) a candidate for an elective position can be disqualified for a number of reasons, which may include being
- under a death sentence or a sentence of more than six months;
 - of unsound mind;
 - an undischarged bankrupt;
 - the holder of an interest in a contract with the Government, such as may be prescribed by Parliament; and
 - the holder of a public office, including in the Judiciary, a local authority or be in the armed forces
- (vii) Parliament may also provide that a person who has held an office, which is a ground for disqualification, may be disqualified for a period not exceeding six months after he/she has ceased to hold such office;
- (viii) persons seeking an elective civic and parliamentary position must have the minimum of a secondary school certificate or equivalent;
- (ix) a presidential candidate should have the minimum of a university degree;
- (x) under lawful and reasonable limitations, representation at the national and lower levels of governance must be open to merit of every description, whether young or old, and without regard to poverty or wealth or any particular religious faith, ethnicity, sex or race;
- (xi) a person who has been convicted for corruption or dishonesty or any other offence under the Constitution and laws for a period of over of three years should be excluded from standing for elections for a period equivalent to one term after his or her release from prison;
- (xii) any breach of a Leadership Code should also disqualify a person for 10 years.
- (xiii) except for those individuals debarred by the Constitution, civil servants should be allowed to take leave of absence to seek elective offices unless and until they are elected;
- (xiv) a retired President should not stand for any elective position.
- (xv) the Constitution should define the following:
- those totally debarred (possibly some of these should be debarred even for some time after leaving office);

- those debarred from standing for geographical constituencies but could be on a party list for ‘topping up’ seats based on the MMP electoral system;
- those who can stand for any type of seat they would have to resign if elected; and
- those who may stand but would have to take leave without pay if elected.

(d) On term of office of the President, that

- (i) the President’s term of office should be no more than five years;
- (ii) no person should hold the office of the President for more than two terms of not more than five years each;
- (iii) if the President resigns, is impeached or dies in office, and less than thirty months of his term remain, the remainder of that term should not count as a ‘term’ for the purpose of calculating the entitlement of the person who takes over;
- (iv). restrictions on the President’s term should apply retrospectively and apply to previous holders of the office; and
- (v) the running presidential candidate should have secured 20% votes in more than half of the provinces and more than 50% of the national vote. If no candidate satisfies these criteria, the top two candidates should go for a runoff in which the simple majority rule will apply.

(e) On impeachment and recall, that

- (i) the President should be liable to impeachment proceedings for a breach of the Constitution or law or serious misconduct on charges brought by a majority of members of the National Assembly and determined by the National Council. The President of the Supreme Court should preside over the proceedings;
- (ii) there should be adequate mechanisms to avoid the risk of impeachment being used for purely political motives;
- (iii) the Constitution should specify the grounds for recall; which may include:
 - a physical or mental condition rendering the MP incapable of discharging the functions of the office;
 - misconduct or misbehaviour likely to bring about hatred, ridicule, contempt or disrepute to the office; or
 - persistent desertion of the electorate or persistent neglect of parliamentary duties without reasonable cause.
- (iv) recall be done before two years have elapsed after election, except in cases of physical or mental infirmity;
- (v) to initiate the process of recall, at least one fifth of the electorate in the constituency or any other electoral unit specified by the law should petition the Speaker (at the provincial, district or location levels a petition the relevant Chairperson), setting out the grounds for the recall; the authority aforementioned should request the Electoral Commission to inquire into the allegations; if proven to the satisfaction of the Electoral Commission, the Speaker/Chairperson should declare the seat vacant; apart from losing the seat, the MP or councillor should be prevented for a further term of five years from standing for election;

- (vi) clearer guidelines and procedures be developed by the Electoral Commission to determine when a member has defected (whether by writing, actions or even speeches) from a political party, and that they be applied strictly.
- (f) *On the Management of Elections, that*
- (i) the words ‘independent and impartial’ should appear in the Constitution in relation to the Electoral Commission;
- (ii) appointment to the Commission should follow after a short-listing mechanism, vetting by the National Assembly, with advice of the National Ethics and Integrity Commission (NEIC) and any appointment should be by the President, who must accept the names recommended, as with judicial appointments;
- (iii) the Commission should be financially independent; the expenses should come from the Consolidated Fund (like judges – this means that there does not have to be a vote in Parliament and a debate and that payment is assured);
- (iv) the Commission should have its own accounting officer;
- (v) it should have the corporate status – a separate legal person with the right to bring legal actions and defend them;
- (vi) criteria for membership should be spelt out and should include having not been involved in any recent active political party activity;
- (vii) political parties should not play any role in appointments, given political hostilities and the danger of bringing these to the Commission itself;
- (viii) the number of commissioners should be reduced to not less than seven and not more than eleven – most countries have found it expedient to do with a smaller commission, much of the detailed work being done by a competent staff;
- (ix) the term of office should ensure that a commissioner sits through two elections, so experience is not wasted; membership should be staggered;
- (x) the commissioners should have security of tenure; removal should be by an inquiry by a genuinely independent tribunal;
- (xi) the commissioners should be persons of personal integrity, proven good behaviour and conduct, a good measure of public service and an education level to be defined;
- (xii) that the results of a presidential election are to be declared by the Commission should be stated in the Constitution;
- (xiii) police officers should not be present in a polling station; this is against international standards;
- (xiv) the Constitution should accord the Commission adequate power to make rules aimed at improving effectiveness and efficiency by the electoral process;
- (xv) the Commission should be devolved to the district level to support the electoral process at that level;
- (xvi). retired or former commissioners should not stand for any elective office for a period equivalent to one term;
- (xvii) the Commission should be accorded the power to deal with certain electoral disputes or offences immediately; it should devise a way of resolving disagreements that arise in the voting process, if possible, without waiting until a full-scale election petition hearing takes place. In

some countries, the Election Commission has the power to deal with such disputes; for example, in Uganda the Election Commission is given this role; and

(xvii) with regard to election disputes:

- it should be possible (as it was until a Court of Appeal decision) for the petition to be drawn to the attention of the MP or President or councillor whose election is challenged by a notice in the Government *Gazette* and a daily newspaper – it is all too easy for that person to avoid receiving the document in person;
- the court could consist of two rather than three judges;
- the court should sit in the province from which the petition has arisen; and
- all election petitions should be heard within one year from the date of election.

(g) *On Election Boundaries:*

- (i) a special Electoral Boundaries Commission should be appointed within two years of coming into force of the new Constitution to address:
 - the existing boundary disputes;
 - petitions for new electoral (single-member constituencies, location/ward) boundaries; and
 - creation of new electoral units as a result of devolution of power to the province, district, location and village levels.
- (ii) The Constitution should clearly establish a norm for constituency sizes by dividing the national population by the number of constituencies required. The Electoral Commission should be allowed a deviation of approximately 10% either way from the norm; very exceptionally a wider deviation should be tolerated; candidates and MPs from geographically large constituencies (as in North Eastern Province) should be provided with special logistical and financial assistance to cover the constituency; and
- (iii) the process of reviewing or delimiting electoral boundaries should occur every 10 years using the results of the population census as a basic resource; the process should be transparent and opportunity for public consultation, debate and input should be guaranteed; the Constitution should make it difficult for Parliament and/or Executive to be able to change electoral boundaries at will.

CHAPTER THIRTEEN

ORGANS OF GOVERNMENT

13.1 The Mandate of the Commission

An important object of review under the Act is to:

... recognise and demarcate divisions of responsibility among the various State organs, including the Executive, the Legislature and the Judiciary so as to create checks and balances between them and to ensure accountability of the Government and its officers to the people of Kenya.

Consequently, the Commission was required to

.... examine and recommend the composition and functions of the organs of State, including the Executive, the Legislature and the Judiciary and their operations, aiming to maximise their mutual checks and balances and secure their independence.

In addition, the Commission was specifically mandated to

.... examine and make recommendations on the Judiciary generally and, in particular, the establishment and jurisdiction of the courts, aiming at measures necessary to ensure the competence, accountability, efficiency, discipline and independence of the Judiciary.

13.2 The System of Government

The most important decision in constitution-making and the conventional function of constitutions is to design the power map of the state i.e., the system of government. The map determines the composition and powers of State organs, the manner in which they exercise those powers, particularly as relates to governance, and the allocation of resources and opportunities within the State. Government systems are determined by the powers and functions of principal organs of State, the structures of these organs and the relationship between them. The principal organs are the Legislature, the Executive and the Judiciary.

Therefore, it is important to define a country's system of government because this influences its basic function, the organization of politics, accommodation of group interests in society, participation by the people in governance and implementation of the principles of efficiency, transparency and accountability. In addition, the system can be structured to achieve and enhance national values, promote democracy, facilitate social and economic advancement and strengthen and safeguard national unity and integrity.

Consequently, the Commission framed a number of questions to the people on the three organs of state namely, the Legislature, the Executive and the Judiciary. An important concern of the Commission was to access people's views on separation of powers between these organs.

The doctrine of separation of powers means that there should be a demarcation in the functions and powers of the three organs, so that no organ has excessive powers and there are checks and balances between them to ensure accountable government free of overlaps and bureaucratic conflicts and inefficiency.

13.3 Legislature

13.3.1 General Principles

Legislatures may be divided into two broad types: unicameral and bicameral. Unicameral legislatures consist of one chamber, while bicameral ones are composed of two. In the latter case, the composition and functions of the upper chamber differs from country to country.

In federal systems, such as India, Nigeria and the United States, the bicameral legislatures represent regions. In unitary political systems, such as Kenya, Uganda and Eritrea, unicameral legislatures have been adopted. Bicameral legislatures represent diverse interests, facilitating a more deliberative approach to legislation and thus a higher quality of laws. They also provide enhanced oversight and control over the Executive. In contrast, unicameral legislatures may be faster in decision-making, cost less in terms of resource and time and be more effective in representing homogenous and less populous nations.

Legislatures perform three main functions, namely:

- Representation;
- Law-making; and
- Supervision of government conduct.

The representation function of legislatures is derived from the fact that, in most jurisdictions, legislators are elected by the people and have the mandate to propagate their views. Legislatures, therefore, represent popular sovereignty. Effective legislatures must have effective ways of bridging the gap between the people and their government and must creatively represent people's vision of their life. Legislature must strive to effectively represent the people and their interests, a task that requires constant outreach to ensure people's views are reflected in every government issue.

The law-making function of legislatures also derives from the fact that laws should express the people's sovereignty. By making laws, the legislature ensures that people's visions and aspirations are promoted and safeguarded. Therefore, it should have the capacity and expertise to appropriately and accurately transform those ideals into enforceable norms. The law-making function of Parliament is by far the most sensitive as it hinges on power allocation, equitable distribution of the national resources and services among all citizens and at all places and, as a correlative, social optimisation of resources and opportunities to benefit all citizens and regions. To some extent, the Legislature shares this role with the Executive.

The supervisory function of the Legislature has become most significant in recent times. The Legislature acts as a watchdog over the Executive. Oversight involves monitoring policy and allocation and use of resources to ensure that there is social optimisation. Monitoring ensures that policies relate to people's priorities and that revenue and expenditure procedures and processes are appropriately designed to achieve those priorities. The Legislature's ability to perform this role effectively depends on the formal supervisory powers it draws from the Constitution and the laws it makes, the resources – including expertise at its disposal, and the political will and consciousness of the Members of Parliament themselves. One salient mechanisms for parliamentary control over the Executive is the confidence/motion or censure procedure. In developed parliamentary democracies, these are cited for the government survival.

13.3.2 The Legislature in the current Constitution

(a) *Background*

The Independence Constitution provided for a Parliament made up of the Queen in Parliament and the National Assembly. The National Assembly was bi-cameral, consisting of the House of Representatives as the Lower House and the Senate as the Upper House. There were 41 Senators elected from 41 senatorial districts, specified in the Constitution as the Nairobi Area, Tana River, Lamu, Kwale, Kilifi, Mombasa, Taita, Marsabit, Isiolo, Meru, Embu, Kitui, Machakos, Kiambu, Thika, Murang'a, Nyandarua, Kirinyaga, Nyeri, Turkana, Samburu, West Pokot, Trans Nzoia, Elgeyo-Marakwet, Baringo, Laikipia, Nandi, Nakuru, Uashin Gishu, Narok, Kajiado, Central Nyanza, South Nyanza, Kericho, Kisii, Bungoma, Kakamega, Busia, Mandera, Wajir, and Garissa. The Senate was meant to be a political safeguard for regionalism had a crucial role to play in constitutional amendments in that at least sixty-five per cent of all the members of both Houses had to vote in favour of a motion for it to succeed. The Senators elected their Speaker and Deputy Speaker from among themselves or from persons qualified to be elected as Senators. Senators were elected for a period of six years. The elections were conducted by an independent Electoral Commission, which registered the electorate for each electoral district.

The House of Representatives consisted of members elected on the basis of constituencies demarcated by the Electoral Commission in accordance with the Constitution, and members specially elected by Members of the House themselves after the General Election or after the occurrence of a vacancy in the office of a specially elected member. The number of specially elected members was the total number of elected members divided by ten (10); their number was between 11 and 13 since the number of constituencies at independence was fixed by the Constitution at a minimum of 110 and a maximum of 130. The Governor-General (the Queen's representative in Parliament) had, on the Prime Minister's advice, the power to call sessions and to prorogue and dissolve Parliament. Legislative power lay in the National Assembly and was exercised by way of Bills. These could originate from either House; however, money Bills would constitutionally originate only from the House of Representatives. The Regional Assemblies also shared legislative power. The Constitution provided for a list of

exclusive and concurrent matters in which the national and regional assemblies would exercise their power.

(b) *The Current Constitution*

Chapter III of the current Constitution provides for a Parliament which is unicameral, composed of the President and the National Assembly. Members of the National Assembly are either elected periodically on the basis of constituencies established by the Electoral Commission of Kenya or nominated by parliamentary parties according to their proportions in the House.

The Constitution provides for 12 nominated Members of Parliament. The total number of constituencies is 210. The Speaker and the Attorney-General are *ex officio* Members. The National Assembly elects the Speaker and the Deputy Speaker in its first sitting. The Speaker is not an elected Member of Parliament. The High Court constitutes itself into an Electoral Court to hear disputes relating to the election of Members of Parliament, including the President. The Constitution also provides for the office of the Clerk to the National Assembly and other staff, which, before the 1999 amendment to the Constitution, were Public Service offices. That amendment created the Parliamentary Service Commission, to which the Clerk now belongs.

The summoning, prorogation and dissolution of Parliament lies in the hands of the President. Otherwise, Parliament stands dissolved on the fifth anniversary of the date on which it was sworn in after the last General Election. On dissolution, the election must be held within three months. The Constitution envisages *no Confidence* motions in the Government. It provides in Section 59 that if the National Assembly passes a no confidence Resolution supported by a majority of the members to which not less than seven days notice had been given, the President must dissolve Parliament within three days. Otherwise, Parliament stands dissolved on the fourth day. The legislative power of Parliament is exercised by way of Bills it passes and forwards to the President for assent within 21 days. The President may decline to assent to a Bill in that case, he must, within 14 days. State the reasons for his refusal in the form of a memorandum to the National Assembly. The latter then has to reconsider the Bill, taking into account the President's comments and either approve the President's recommendation and convey the Bill for assent or refuse the President's recommendations and approve the Bill in the original form. In this case, it must be supported by not less than 65% of all members of the National Assembly. The President must then assent to the Bill within 14 days. Only Ministers of the Government may initiate money Bills in Parliament.

Parliament has power to make Standing Orders of procedure for the orderly conduct of its business and to establish committees to facilitate its work. To achieve this, Parliament has made for itself National Assembly Standing Orders detailing its procedure and internal organization. The Standing Orders establish several Committees of Parliament, including the watchdog Committees (Public Accounts and Public Investment) and the departmental committees (Agriculture; Lands and Natural Resources, Energy; Communication and Public Works, Education Research and Technology, Health, Housing, Labour and Social

Welfare, Administration, National Security and Local Authorities, Finance, Planning and Trade, Administration of Justice and Legal Affairs, and Defence and Foreign Relations). There are also in-house Committees (House Business, Estimates, Library, Speaker's, Liaison, Standing Orders, Ways and Means), the Committee of the whole House and *ad hoc* Committees.

The most important Committees are the Departmental ones. According to Standing Order 151, extracted here below, the functions and powers of Departmental Committees are:

...to investigate, inquire into, and report on all matters relating to the mandate, management, activities, administration, operations and estimates of the assigned ministries and departments;

to study the programme and policy objectives of the ministries and departments and the effectiveness of their implementation;

to study and review all legislation after First Reading, to study, assess and analyse the relative success of the Ministries and departments as measured by the results obtained as compared with its stated objectives;

to investigate all matters relating to the assigned ministries and departments as they deem necessary, and as may be referred to them by the House or Minister, and;

to make reports and recommendations to the House as often as possible, including recommendations of proposed legislation.

In their deliberations,

...The Departmental Committees shall enjoy and exercise all powers and privileges of Parliament, including the summoning of witnesses, and the request for and receipt of papers and documents from the Government and the Public...

The powers, functions and privileges of the legislature and legislators are further defined:

- The National Assembly Remunerations Act (Cap 5);
- The National Assembly (Powers and Privileges) Act (Cap 6);
- The National Assembly and Presidential Elections Act (Cap 7); and
- The Parliamentary Service Act (No. 10 of 2000).

13.3.3 The Legislature in other Constitutions

Whether written or unwritten, all Constitutions have provisions for some form of legislature. What would be useful is to survey the major types of legislatures that most constitutions provide for. Unicameral legislatures are common in jurisdictions based on a unitary system of government, whether or not exercise of power is purely parliamentary or a hybrid between a parliamentary and presidential

system. Many African constitutions, including those of Uganda, Tanzania, Zambia, Botswana, Malawi, Zimbabwe and Ghana, are essentially unicameral. Some of these countries such as Zimbabwe and Botswana, also have special chambers (e.g., the House of Chiefs), which in reality are not, considered part of the Legislature. Bicameral legislatures, on the other hand, are common in jurisdictions based on federal or substantially devolved systems of government. In these jurisdictions, legislative authority is shared between a “lower house” and an “upper house” although the degree of responsibility between them varies. These jurisdictions include Ethiopia, South Africa, Nigeria, the United Kingdom, India, the United States of America and the Federal Republic of Germany.

The decision to adopt a unicameral or bicameral system is often conditioned by a desire to ensure effective representation of diverse social interests. That, in turn, is often determined by the dominant ideology of the state. Thus, centralised or planned economies, on the one hand, have always preferred unicameral systems. More liberal and diverse political orientations, on the other hand, lean towards bicameral systems, especially where these are accompanied by extensive devolution of power. The point to emphasise is that the nature of the legislature adopted in any jurisdiction generally reflects the political and economic ideology espoused by the state itself.

Consequently, the composition of the legislatures will also vary depending on the interests sought to be protected by or reflected in that system. Thus, whereas in the United Kingdom the historical baggage of feudalism continues to justify the existence of the House of Lords, in the United States, the Senate, which was originally designed as the symbol of equality of States within the Union, now performs very different governance functions for instance?. Other variations include chambers designed to protect cultural or special authorities or “nationalities”, as is the case of the House of the Federation under the Constitution of Ethiopia.

The primary functions of legislatures, however, are similar despite variations to type or composition. These are:

- representation of the constituent power;
- enactment of legislation; and
- supervision and control of the Executive.

13.3.4 What the People Said on Legislature

The people told the Commission

(a) *that Parliament should*

- i) take over the vetting and approval of senior appointments to various constitutional and public offices from the President, for example, the Attorney-General, the Auditor-General, Permanent Secretaries, the Chief Justice, Judges, and so on;
- ii) be strengthened through the Committee system to enable it to perform its functions efficiently and effectively; for example, establishing an estimate committee to scrutinise Government budget proposals in order

- to enhance control over State finances; other suggestions were that a stronger Committee system be secured;
- iii) have a calendar of its own procedures;
 - iv) have its proceedings broadcast live on radio and TV, where applicable; and
 - v) have a higher quorum.
- (b) *that Members of Parliament should*
- i) satisfy moral and ethical standards for elections to Parliament;
 - ii) be subject to recall;
 - iii) work full-time;
 - iv) not be nominated or alternatively, nomination be restricted to marginalised groups, such as women, the disabled and minorities;
 - v) have their remuneration packages determined by an independent commission.
 - vi) be required to have a minimum education level of Form Four.
- (c) *that*
- i) measures be taken to increase women's participation in Parliament; the consensus was that at least 1/3 of MPs and Cabinet ministers be women;
 - ii) there is need for a second chamber, although views differed on its role and composition; and
 - iii) that Parliament has the power to dismiss the Government of the day through a vote of no confidence and to impeach a sitting president.

13.3.5 Commentary

The people told the Commission that they wanted Legislature or the Legislative Assembly to be more responsive to their needs, to share power with the Executive and to manage its own affairs free of executive interference.

13.3.6 Recommendations

The Commission recommended, therefore that:

- (a) *the establishment of a bi-cameral legislature consisting of:*
 - (i) an Upper House called the National Council, composed of
 - Sixty-nine Members from each district,
 - One Member from Nairobi.
 - Thirty women members made up as follows
 - Four from the provinces, and
 - Two women from Nairobi - for a total of one hundred members.
 - (ii) a Lower House composed of 210 elected representatives from all constituencies and 90 nominated through the Mixed Member Proportional election system.
- (b) *the term of Parliament:*
should last from election to election, i.e., start from swearing in MPs and run until the next General Election.
- (c) *to qualify for election to Parliament a member must:*

- i) have at least a Secondary Certificate of Education;
- ii) be proficient in both English and Kiswahili;
- iii) be a person of high moral integrity; and
- iv) be of a minimum age of 21 years.

(d) the functions of Parliament should be to:

- i) represent the people in governance and provide a platform through which the people's needs may be articulated;
- ii) make laws and policies for the better running of the Government and pass Bills that are then forwarded to the President for assent in his/her capacity as the Head of State;
- iii) act as a watchdog over the Executive; this would be an effective system of checking the excesses of the executive;
- iv) vet and approve key presidential appointments to public and other constitutional offices; for instance, appointments of the Attorney-General, the Auditor-General, permanent secretaries, the Chief Justice, heads of commission, and so on.
- v) control and oversee prudent use of State finances by establishing appropriate committees;
- vi) participate in treaty-making;
- vii) designate and constitute ministries, where appropriate; and
- viii) That the political party with the majority votes form the government. In the event that there is no majority, the parties could form a coalition government

(d) the following principles should govern the operations of the government:

- i) Parliament shall have unlimited powers over its own procedures;
- ii) Parliament would have its own calendar of when to convene, go on recess and be dissolved;
- iii) Parliament shall regulate its procedures through Standing Orders;
- iv) being a Member of Parliament should be a full-time occupation;
- v) all Ministers, except the Prime Minister and his/her Deputies, should be appointed from outside Parliament;
- vi) members of Parliament be subject to the power of recall by the electorate in their respective electoral areas;
- vii) to overcome the deficiency of representation of women and guarantee effective participation of women, minorities, people with disabilities and other interest groups, the Mixed Member Proportional Representation system be adopted;
- viii) at least one third of the representatives be women;
- ix) Parliament should have power to dismiss the Government through a vote of no confidence;
- x) Parliamentary proceedings be broadcast live on television and radio;
- xi) there be a Speaker and a Deputy Speaker for each chamber;
- xii) there be constituency offices for Members of Parliament;
- xiii) Parliament should have powers to pass a vote of no confidence in the President;
- xiv) Members of Parliament from Opposition parties' should choose the Leader of the Official Opposition;

- xv) the Leader of the official Opposition should be accorded a senior position in the hierarchy of State offices and be given appropriate honour on State occasions;
 - xvi) the Leader of the official Opposition should appoint a shadow cabinet; and
 - xvii) the office of the Auditor-General should assist parliamentarians to scrutinise Government expenditures and assess their efficiency and effectiveness.
- (e) *the following principles be adopted to enhance people's participation in the legislature*
- i) requirement that all legislative proposals be submitted to relevant social groups for comment;
 - ii) there be a right to petition Parliament for legislation, for redress of grievances or for information (the last could be to ask Members to raise a question with relevant ministers, perhaps if the question is of general national importance, or if a local MP has not been responsive to the issue);
 - iii) provisions be made under which groups or citizens can ask to appear before Parliamentary Committees discussing or investigating particular issues (a sort of *amicus curiae* function);
 - iv) more use be made of parliamentary committees to enhance participation by the people, through, for example, public hearings, in Nairobi and other parts of the country; and
 - v) MPs be encouraged to seek assistance from organizations, and academics for research, etc.

13.4 The Executive

13.4.1 General Principles

(a) *Types of Executive Systems*

There are two major types of executive systems: the *pure presidential executive*, where the President is not a part of the representative assembly; and the *pure parliamentary executive*, where the Executive is part of the Legislature and is a ceremonial Head of State.

- (i) In the *pure presidential executive*, executive power is vested in the President who:
 - Is not a member of the Legislature but is directly elected by the people;
 - Has a fixed term in office, which may not be altered by the Legislature except through a restricted procedure of impeachment;
 - Names and directs members of his/her government, who are also not members of the Legislature.
- (ii) In the *pure parliamentary executive*, Parliament has the executive authority:
 - all members of government are also members of the Legislature.
 - the State President or Monarch performs the representative duties of State, thus manifesting a clear demarcation of power;

- After an election the majority party in the Legislature forms the government and its leader assumes the role of head of government; and
- the Cabinet performs the executive functions and is subject to the confidence of the Legislature.

The major differences between parliamentary and presidential systems are:

- in a parliamentary system, the separation between the Executive and the Legislature is not as sharp as in the presidential system;
- there are more checks and balances in the presidential system, though there is continuing accountability of government to the Legislature in the parliamentary system as the Prime Minister and ministers sit in Parliament, have to defend their policies and are subject to a vote of no confidence;
- Ministers are members of the Legislature in the parliamentary system while in the presidential system, a legislator cannot become a minister unless he/she resigns;
- in the presidential system, there is a fixed term for both Executive and Legislature;
- in the parliamentary system, the head of state is not the head of government;
- in the presidential system, the head of government is elected directly, but he is appointed in parliamentary. The head of government in a parliamentary system shares responsibility with the rest of the Cabinet, but he is the sole authority in presidential system.

(iii) The other executive type is a variation or combination of these two and is called the *mixed presidential and parliamentary executive*. Many countries fall under this category. Under this system, the President is elected by popular vote and may or may not be a member of the Legislature. In most cases, however, the President has the power to dissolve the Legislature.

It is also the practice in the mixed system for the President to deal directly with the Cabinet, members of whom he may appoint or dismiss according to his will. The Cabinet consists of members of the Legislature. They are subject to parliamentary confidence and may individually be voted out if a motion of censure is passed. Sometimes, there is a Prime Minister who is a Member of Parliament and becomes the Head of Government. He, too, is subject to the confidence of both the assembly and the President.

In other circumstances, the Executive may be formed in a power sharing arrangement in which different political groups are represented. This situation arises when no party emerges with a large enough majority of members in the Legislature to form the government. Consequently, like-minded political parties coalesce and the coalition forms the Government. The mechanisms for such power sharing are negotiated and agreed upon by the parties concerned and, in most cases, may not be a matter of constitutional elaboration. However, certain constitutions make direct mention of the matter.

(b) *The Nature of the Power of the Executive*

The executive is the branch of government that carries out the work of governing by implementing laws and policies. Public policies are made and implemented by the Executive, which is responsible for managing state revenues, internal and external security, foreign relations and enforcing laws as some of its principal tasks. To an extent, the Executive is the most powerful State organ.

Executive authority is personified in the head of State, who may be a president in a republican state or a monarch in a monarchical state. The authority may be divided between a president and a prime minister. However, in practice, it is exercised by a broader group of persons, among whom are persons in charge of vital Government departments, including the civil service, the police, the armed forces, the provincial administration and, to some extent, the local authorities.

The character of the Executive has a significant impact on the power it exercises and the means for control of that power. A pure parliamentary executive would lend itself to a more direct control by and enhanced accountability to the Legislature through the confidence motion process. Conversely, the mixed executive, like Kenya's, exhibits a higher level of control over the Legislature by the presidency.

13.4.2 The Executive in the current Constitution

(a) *Background*

At independence, executive authority was vested in the Queen of England and exercised on her behalf by the Governor-General. A Prime Minister was appointed by the Governor-General from among the members of the House of Representatives. Ministerial offices were established by Parliament. The Prime Minister and other Ministers constituted the Cabinet, which was collectively responsible to the two Houses of Parliament and which was to advise the Governor-General in the performance of his duties. The Governor, on advice from the Prime Minister, had the power to appoint Parliamentary Secretaries to assist Ministers in the performance of their duties. There was a Cabinet Secretary whose office was in the Public Service and who was to administratively conduct the Cabinet offices as directed. The executive authority in the regions was exercised by what was referred to as the Finance and Establishments Committee, established by the Regional Assembly.

A regional President headed the Committee and a Vice-President was appointed by the Regional Assembly, which had authority to establish other committees to effectively superintend the regional affairs.

It is worth noting that the institution of Presidency of the Republic of Kenya was a creation of the first Constitutional Amendment (Act No. 28 of the 24th November, 1964). From 1964 to 1969, the House of Representatives elected the President. This changed with the 10th Amendment (Act No. 45 of the 12th July, 1968) that provided that the President was to, henceforth, be directly elected by the national electorate.

Important observations may be made in respect of the Executive at independence. First, the powers exercised were varied but effected after consultation with either the Cabinet or other independent Constitutional officers. The unilateralist, who characterises the powers of the presidency in the current Constitution, is a result of the whittling away of the safeguards by the 11 amendments that took place between 1964 and 1969. The effect of those amendments was to consolidate immense powers in the Presidency and form a potential loophole for abuse and misuse of power.

(b) The Current Constitution

Section 23 of the Constitution vests executive authority of the Government in the President authority, which may be exercised by persons subordinate to him. Sections 4-21 establish the Executive, which consists of the President, Vice- President, Ministers, and Assistant Ministers, who are all members of the National Assembly. The Cabinet, established under Section 17, is the highest decision-making organ of State and advises the President on governance. The President is, however, not bound by Cabinet decisions. The Cabinet is composed of the President, the Vice- President and Ministers.

The Executive as mirrored in the Presidency exercises immense powers. Some of the powers are that the President:

- Is the Commander of the Armed forces;
- Is responsible for creating and abolishing all offices in the public service;
- Is the Chancellor of all public universities;
- Appoints members of government including the permanent secretaries;
- Appoints the Attorney-General and the Solicitor-General, whose offices are in the Public service;
- Appoints the Controller and Auditor-General;
- Appoints ambassadors or principal representatives of Kenya to other countries;
- Appoints the Chief Justice and other judges of the High Court and the Court of Appeal;
- Appoints the Police Commissioner and other senior members of the Police force;
- Exercises the prerogative of mercy of the Republic;
- Has power to prorogue and dissolve Parliament;
- Assents to all Bills made by Parliament and possesses a limited veto power over legislation;
- Appoints Electoral Commissioners;
- Appoints Public Service Commissioners and other senior civil servants;
- Is immune from legal proceedings while in office;
- Is entitled as Head of State to address Parliament at any time he/she so wishes and, as Head of Government, attends all meetings of the Assembly and takes part in the proceedings of the House, including to vote in all matters put to the vote.

In addition to the Constitution, other statutes have granted the President various powers. Under the Commissions of Inquiry Act (Cap. 102), the President has power to constitute, at any time, a Commission of Inquiry to consider certain matters of public concern and to appoint the holders of the offices of such Commissions. The Government Lands Act, (Cap. 280) gives the President special power to make grants or dispositions of any estate, interests or rights in or over unalienated government land.

13.4.3 The Executive in other Constitutions

An analysis of executive systems has already been given. What requires elaboration here is how other constitutions treat such issues as:

- the character and composition of the Executive;
- power-sharing with other organs of state; and
- accountability of executive organs.

On the character of the Executive, a number of jurisdictions, such as Australia, Canada, Germany, the Netherlands and the United Kingdom, provide for a ceremonial head of state (by whatever name) and a strong head of government (usually designated as Prime Minister). In these and similar jurisdictions, the head of state is often (although not always) a hereditary monarch, while the head of government and most cabinet ministers are elected members of the Legislature. In other jurisdictions, such as the United States, Nigeria and El Salvador, the President and cabinet ministers are not members of the Legislature. Hybrid systems, in which the head of state shares significant executive powers with the head of government (as in France), or in which the former, though retaining full executive authority, also appoints a Prime Minister (as in Tanzania and Uganda), are also common.

Issues of power-sharing, especially with the Legislature and the Judiciary, and accountability, are usually dealt with by an elaborate system of checks and balances. These include confirmation by the legislature of high-level Executive appointments, impeachment of the head of state/government by the Legislature, and judicial review of executive action. These are common features in many English-speaking jurisdictions.

13.4.4 What the People Said:

What the people told the Commission:

- (a) *with respect to the system of government:*
- i) ensure that the organs are totally independent of one another;
 - ii) the Constitution should adopt a parliamentary system of government with a Prime minister as the Head of Government and a largely ceremonial President be the Head of State. This was suggested by a majority of people;
 - iii) the President would play the role of an Elder of State serving as a

- symbol of national unity and identity. To advance this position, a higher minimum qualification age was suggested, ranging from 40 years to 50 at the lower limit, and between 70 and 75 years as the upper limit;
- iv) there should be great flexibility in the Constitution to allow for a coalition government or power-sharing.
- b) with respect to the office of the President, that*
- i) the President should not be above the law, a majority asserted; their concerns were that it should be possible to prosecute him/her for offence while in office. In this regard, it was also suggested that the Constitution provide for the President's removal for misconduct;
 - ii) the powers of the President should be curtailed; Kenyans felt the President should not have the exclusive power to appoint senior government officers; it was suggested that for many of the appointments be vetted by Parliament; that the President should not have the power to determine the election dates was a specific concern of many Kenyans;
 - iii) the powers of the President and Prime Minister need to be elaborated in the Constitution;
 - iv) the President should not be a Member of Parliament;
 - v) the President should be elected directly. Here it was suggested that the candidate must garner more than 50% of the total valid votes cast countrywide; in case there is a tie, there should be a run off between the two leading candidates, in which case the one who obtains a simple majority be declared the winner;
 - vi) the President should have 25% support in five provinces was a disputed recommendation. There was considerable support for it, although others felt it should be at least 20% in four provinces, while others suggested that 50 % national support was sufficient;
 - vii) apart from education and age, the President should be a married person with a stable family and impeccable character;
 - viii) the President should possess minimum education qualification to enable him/her to manage the affairs of State. The majority was of the view that the President should possess the minimum of a first degree;
 - ix) the Vice-President should be elected directly by the people as President's running mate;
 - x) both the President and Vice- President should not be Members of Parliament.
- (c) with respect to Ministries of government that*
- i) the number of Government ministries should be reduced to 15 and be approved by Parliament; and
 - ii) ministers should be appropriately qualified to match their ministerial responsibilities. Views went both ways on whether members of Government should also be part of Parliament.

13.4.5 Commentary

It is clear that what the people want is a mixed system very different from the divisions and power structures under the existing Constitution. The parliamentary system, which is recommended, provides for collective leadership and better

accountability. It, however, also implies greater separation of powers than is usual in parliamentary systems by the rule that Ministers may not be members of the National Assembly. This recommendation takes into account that a large majority of Kenyans have expressed a preference for some form of parliamentary system.

A purely presidential system, in which all power is vested in the President, is unlikely to assist in overcoming the culture of authoritarianism. That office would continue to be the focus of elections, the lynchpin of party organization and the fount of all power. Given Kenya's history, an over-powerful presidency would retard the effective separation of powers and the system of checks and balances or a better distribution of power. It would also continue to foster ethnic politics, for each ethnic group would want a member of its own community to occupy that office. It would promote fears of 'ethnicisation' as well as personalisation of state power. A partisan presidency would undermine the role of national unity.

Equally, a purely parliamentary system may not serve Kenya's interests. It would shift most of the powers to the Prime Minister, and lessen people's control of the choice of government leaders. The stability often associated with a presidential system may be hard to secure, given the intrigues of parliamentary politics and the possibility of motions of no confidence.

A well functioning party system is critical to the success of a parliamentary system. A parliamentary system, with the Cabinet as the principal decision-making body, allows collective decision-making and accommodation of diverse interests, including multi-ethnic interests. It is, therefore, more inclusive and participatory than a presidential system. It would also be a more accountable system, since retention of power by the Government would depend on its ability to maintain the National Assembly's support.

On balance, a modified form of parliamentary system is best able to achieve the principles of government outlined above. The aims of the modifications would be a more balanced Executive, with internal checks; to establish a collective form of government to facilitate coalition – building across ethnic lines. It would cut across geographical areas and provide a basis for effective as well as accountable government through greater separation of powers. There are three principal elements of the modification.

(a) The Presidency: the Head of State, must be more than ceremonial. He/she should have reasonable powers. However, those powers should be limited. Excess powers upset the internal balance within the Executive. The principal function of the presidency would be to symbolise national unity and promote national integration, security of State and the protection of the Constitution, and to provide an element of administration stability.

(b) The Cabinet would be drawn largely from outside Parliament to promote effective government and the separation of powers. Ministers would have to be qualified for the portfolios assigned to them, and not be burdened with constituency business or suffer conflict between national and constituency interests. They would be able to devote all their time and energies to their ministry. However, in order to ensure proper ministerial accountability to the National Assembly, Deputy Ministers would be

expected to play an active role in the National Assembly. Ministers themselves would have to appear before the National Assembly to explain major policies and to answer questions when the National Assembly requires them to. There would be a close relationship between Ministers and relevant Parliamentary Committees.

(c) Parliament must be strengthened, with more control over its calendar and resources, and the ability to exercise greater supervision over and accountability by the Government. In order to achieve this, Members of Parliament must be full time legislators and being a parliamentarian should be seen as a career, rather than a stepping stone to ministerial or other forms of promotion. It is important to recognise that in a parliamentary system, unlike the US presidential system, it is not possible to have a strict parliamentary control over its dissolution and the dates for General Elections. A key element of the parliamentary system is Legislature's right to get rid of the Executive or at least force a General Election on a vote of no confidence.

The trend worldwide is that the Executive dominates the Legislature, as a function of government, and the revenue that passes through it as well as the bureaucracy that serves it increase. This erodes democracy; the elected legislative bodies are less and less able to take their own legislative and policy initiatives or scrutinise and control the Executive. In many countries, including Kenya, few politicians see their career as purely being parliamentarian, or professional politicians committed to their party manifesto or the good of the constituency or the country. They regard Parliament as a stepping stone to ministerial or other high office. Consequently, they do not take enough interest in the work of Parliament. As a consequence of this trend, a number of proposals have been made to strengthen the role and capacity of the National Assembly in many parts of the world.

13.4.6 Recommendations

The Commission recommended, therefore, that a new structure be adopted as follows:

(a) The President:

- (i) that a presidential candidate must have the following attributes:
 - Age minimum 35 and maximum 70 years;
 - Should be a graduate from a recognised university and or relevant experience as a Member of Parliament or leader;
 - Should be married with a stable family;
 - Must be a person of high integrity;
 - Shall serve for a maximum of two five-year terms; and
 - Shall not be a Member of Parliament.
- (ii) Presidential candidates be elected directly by the people through universal suffrage, and
 - Presidential aspirants be nominated (sponsored) by registered political parties or run as independent candidates.
 - A presidential candidate who obtains 20% of the votes cast in at least 5 Provinces and an overall 50% of total valid votes cast countrywide shall be declared the winner. In case there is no outright winner, there will be a runoff in a month's time between the two candidates with the highest number of votes, in which case the candidate with a simple majority is declared the winner.

- (iii) the President should have and exercise the following functions:
 - symbolise and enhance national unity; He/she should defend the country's integrity;
 - upon election, sever links with political parties; he/she will not hold any elective office or be an active member of any political party;
 - protect national sovereignty and territorial integrity;
 - safeguard the Constitution and uphold the rule of law;
 - assent to Bills before they become law;
 - have power to ask the Supreme Court for an advisory opinion on a constitutional question;
 - preside over the National Security/Defence Council;
 - declare a state of emergency on consultation with the Prime Minister;
 - have the power to declare war on consultation with the Cabinet and the National Security Council, subject to approval by Parliament.
 - appoint judges in accordance with the recommendations of the Judicial Service Commission and Parliament's consent;
 - ratify treaties that have been approved by the Government and approved by Parliament; and
 - preside over the opening of Parliament.
- (iv) the President should
 - enjoy such other powers as may be derived only from the Constitution.
 - be liable to impeachment for gross misconduct, breach of the Constitution or economic sabotage.

(b) The Vice-President:

- i) each Presidential candidate shall nominate a Vice-President who shall be his/her running mate;
- ii) the Vice-President shall assist the President in the execution of presidential functions, subject to the provisions of the Constitution;
- iii) in the event of the death, impeachment or resignation of the President, the Vice-President, upon approval by Parliament, shall assume the office of the President for the remainder of the term. If the remainder of the term exceeds two and a half years, that term shall count as the first presidential term of the person having been so appointed by the President.
- iv) if the office of the Vice-President becomes vacant, the President shall appoint a Vice-President from among elected members of Parliament.
- v) in the event of the death of both the President and the Vice-President, the Speaker shall act as President.
- vi) the Vice-President shall act as President when the President is out of the country.

(c) The Cabinet:

- i) Prime Minister:
 - the Prime Minister should be the Chief Executive–Head of Government and leader of the Cabinet;
 - the Prime Minister should be responsible to Parliament;
 - the Prime Minister should be the leader of the largest political party in Parliament or a coalition of parties represented in Parliament;
 - the Prime Minister should exercise the following authority:
 - develop and implement national budgets and policy;

- o implement and administer legislation; and
 - o prepare and implement Government legislation;
 - the Prime Minister should chair all Cabinet meetings and keep the President informed of government business;
 - the Prime Minister's term should continue unless he/she resigns, dies or is dismissed; and
 - Parliament may dismiss the Prime Minister by passing a vote of no confidence in him/her.
- (ii) Deputy Prime Ministers:
- there should be two deputy Prime Ministers appointed by the President and confirmed by Parliament; and
 - the function of the deputies is to aid the Prime Minister in performing the duties prescribed by the Constitution.
- (iii) Ministers:
- there should be Ministers of the Government;
 - the offices of ministers should not be less than 7 and not more than 15;
 - ministers should not be Members of Parliament but must attend Parliamentary proceedings as ex officio members;
 - ministers should be professionally qualified for the Ministries to which they are appointed;
 - ministers should be appointed by the President as nominated by the Prime Minister and confirmed by Parliament.
- (iv) The Attorney-General:
- there should be an Attorney-General appointed by the President with Parliament's approval;
 - the AG would be the principal legal adviser to the Government;
 - Functions of the Attorney-General would include:
 - o representing the Government in courts or any other legal proceedings;
 - o drawing contracts, treaties, agreements, etc, to which the Government is a party;
 - o other duties of a legal nature as may be referred or assigned to him/her by the Prime Minister.
- (v) Director of Public Prosecutions
- there should be a Director of Public Prosecutor appointed by the President on recommendation by the Public Service Commission;
 - the Functions of the Director of Public Prosecutor would include:
 - o directing investigations of a criminal nature;
 - o instituting criminal proceedings; and
 - o taking over and continuing any proceedings, etc.

13.5 The Judiciary

13.5.1 General Principles

The courts play a fundamental role in upholding constitutionalism and legality. The most important element of the courts is the people who staff it – the Judiciary. The principal functions of the Judiciary are to:

- Make authoritative interpretations of the law without directions or pressure from the executive or other sources;

- Ensure the supremacy of the Constitution by declaring void all laws which are inconsistent with the Constitution;
- Develop constitutional norms and help adjust them to changing social and economic circumstances; (the US Constitution has been amended relatively few times because the courts have given new interpretations to its provisions more consistent with changing values);
- Provide guidance to the organs of State, private corporations and individuals on the rules of the Constitution and the law;
- Inculcate respect for constitutional procedures and values, in part through persuasive and learned judgments;
- Keep both the legislature and the executive within their lawful authority, and prevent arbitrariness and unfair procedures within the Government and encourage rules for good decision-making;
- Protect the rights and freedoms of the people as well as protect the public interests;
- Settle legal disputes that are referred to it; and
- By settling disputes in accordance with the law and generally enforcing the principle of legality or the Rule of Law, help create stability and maintain peace, and provide the predictability necessary for people to make contracts and other transactions.

A number of specific issues concerning the Judiciary may be highlighted here. These are judicial independence, accountability, integrity and accessibility to justice.

Judicial independence consists of two main elements as follows:

- *Decisional independence*, i.e., the Judiciary should be independent of extraneous influences; this enables it to render impartial and objective decisions in individual cases; the law and the law alone must guide the court in determining the issues before it;
- *Institutional independence*, i.e., the Judiciary is an independent organ of state, and is equal and co-ordinate to the other organs of government. The judiciary is not to receive instructions or be controlled by any other organ of government. This has a particular bearing on appointing and removing judicial officers, their security of tenure, their financial independence in terms of budgetary allocation and remunerations, and judicial discipline.

Judges must be accountable to the society in the manner in which they exercise their judicial power. The following are some of the considerations in respect to judicial accountability:

- The higher principles of natural justice and the ideal of human dignity call upon judges to exercise and dispense objective justice;
- Judicial precedent and constitutional supremacy remain important benchmarks for decisional independence;
- An effective appeal process ensures that the exercise of judicial power is kept under effective review by peers;
- Publicity of judicial proceedings and decisions subjects the judiciary to public scrutiny and criticism; and

- Judicial removal and disciplinary procedures remain important processes ensuring that errant judicial officers are dealt with; the efficiency of such systems is a critical component of accountability.

The conduct and work ethics of individual members of the Judiciary must reassure the public. This involves the following:

- The competence, diligence and output of judges;
- The requirement that judges retain a high level of judicial propriety in the way they relate to other members of society;
- The requirement that they avoid complicity in corruption and other vices; and
- The formulation and obeisance of a Judicial Code of ethics to ensure respectable behaviour of the judges in all places.

A properly functioning judicial system must ensure that it is accessible to all persons. This ensures and promotes the equality of all persons before the law. Accessibility of justice has a number of requirements, some of which may be outlined as follows:

- The physical accessibility of courts to all persons, including those physically impaired;
- The question of legal aid to those who cannot afford court fees;
- Alternative dispute resolution mechanisms;
- Civic education programmes; and
- Information technology and publicity of the court process.

13.5.2 The Judiciary in the current Constitution

(a) *Background*

The Independence Constitution provided for an impartial and independent Judiciary made up of subordinate courts, the Supreme Court, the Court of Appeal and the Judicial Committee of Britain's House of Lords.

(i) *The Superior Courts of Record*

The Supreme Court was established with original and unlimited civil and criminal jurisdiction. It also handled constitutional interpretation and matters relating to enforcing fundamental rights. Members of the Court were the Chief Justice and other puisne judges. The Chief Justice would be appointed by the Governor-General in consultation with the Prime Minister, who was enjoined to consult with all the Presidents of the regional assemblies, at least four of whom had to support the candidate. The Governor-General appointed other judges in consultation with the Judicial Service Commission. The number of judges and their tenure was prescribed by Parliament. There were removal procedures in case either the Governor-General, the President of a Regional Assembly or the Chief Justice had made a representation to that effect; in which case, a judicial committee was put in place. The Public Service Commission in the case of the Chief Justice and, the Chief Justice, in the case of other puisne judges, appointed members of the Committee.

The Constitution also envisaged a Court of Appeal to hear appeals from the Supreme Court on all matters, including the interpretation of Constitution and enforcement of fundamental rights and freedoms. There was also envisaged an inter territorial Court of Appeal to hear matters referred to it by the member States. The East Africa Court of Appeal served as the Appeal Court for all the three East African countries until it was dismantled in 1977.

The Judicial Committee of the House of Lords handled appeals from the East African Court of Appeal on constitutional and fundamental rights issues and civil and criminal matters, the only distinction was between matters that lay as of right and those that had to be preceded by leave granted by the Court from which they emanated.

(ii) *The Subordinate Courts*

Also established by the Constitution were the subordinate courts and the Kadhis' courts. Their numbers, jurisdictions and procedures were to be prescribed by Parliament. They were to exercise their functions subject to the Constitution, but the Supreme Court played a supervisory role over them.

(iii) *The Judicial Service Commission*

The Independence Constitution also provided for an Independent Judicial Service Commission, whose membership was the Chief Justice as Chairman, two judges and two persons appointed on advice by the Public Service Commission.

The primary function of the Service was to make appointments to the Judiciary including the registrars of the various courts. The Commission's decisions required concurrence by a majority of all the members. The Judicial Service Commission also advised the Governor-General on the composition of the Public Service Commission. In exercising of its functions, the Commission was not subject to any person's direction or control.

The overriding characteristics of the independence Judiciary was that it was the final constitutional arbiter. It was staffed by officers enjoying security of tenure, and the appointment procedures were rigorous enough to secure competence by the judges appointed.

(b) The Current Constitution

The current Constitution provides for a number of matters on the judiciary:

(i) *The Superior Courts of Record*

It establishes the High Court and grants it unlimited civil and criminal jurisdiction on all matters. It provides that the number of judges of that court shall not be less than eleven, subject to Parliament providing for other judges. The details on organization, jurisdiction and procedure are provided in the Judicature Act (Cap 8).

The procedure for appointing the judges is stipulated. The President appoints the Chief Justice. On advice from the Judicial Service Commission., he appoints other judges. Removal, in case of infirmity or misbehaviour, is preceded by a tribunal appointed by the President on advice from the Chief Justice to consider the issue and report to him for action.

The Constitution grants Parliament the power to prescribe judges' retirement age, which the Judicature Act prescribes as 74 years.

It also establishes the Court of Appeal to determine such appeals from the High Court as may be conferred by law. The substantive law on appellate Court procedure, powers and organization are found in the Appellate Jurisdiction Act (Cap 9).

(ii) Subordinate Courts

Sub-ordinate courts are established, and subject to the supervisory powers of the High Court. Pursuant to that provision, Parliament enacted the Magistrates Courts' Act (Cap 10) to lay down the jurisdiction and procedure of these courts. The levels of the magistracy are: chief magistrates courts', senior principal magistrates courts, principal magistrates' courts, senior resident magistrates courts, resident magistrate courts and district magistrate courts of classes I, II and III.

(iii) Kadhi's Courts, Chief Kadhi and Kadhi's

• **A background**

Kadhis' courts existed in the East Coast of Africa long before British colonisation. In Kenya, they existed along the Coast, which, during colonisation, was under the Sultan of Zanzibar. In 1895, the Sultan gave the British power to administer a 10 mile coastal strip provided that they would respect the existing Kadhis courts, among other things. The British did so and declared a protectorate over the coast while the rest of Kenya was a colony proper. The Sultan, however, retained sovereignty over the 10 – mile coastal strip. During the last years of the independence struggle and at the start of the Lancaster House Constitutional talks in 1961, the status and fate of the coastal strip came up for determination. The British organized separate talks for the delegates from sultanate and those from the colony. The British government and the Sultan also appointed a Commissioner, Mr. James R. Robertson, to study the issue of the coastal strip, consult all those concerned and report to them. In The Kenya Coastal Strip – Report by the Commissioner, he reported that opinion was divided as to whether the coastal strip should join an independent Kenya, or be declared independent on its own, or reverted to the Sultan of Zanzibar. He, however, recommended that it should join Kenya subject to the Kenyan Government guaranteeing respect for Kadhis' courts, among other conditions. Prime Minister Jomo Kenyatta and Zanzibari Prime Minister Shamte (on behalf of the Sultan of Zanzibar), signed an agreement in October, 1963, in the form of an exchange of letters whereby the Sultan surrendered his sovereignty over the coast of Kenya in return for Mzee

Kenyatta guaranteeing the continued existence of Kadhis' courts, among other things. When the independence Constitution was written, Kadhis courts were enshrined under a rubric on the Judiciary.

Kadhi's Court, the Chief Kadhi and the other Kadhis are constitutional offices established under the Constitution. A Kadhi is, strictly speaking, a judicial officer, a judge or magistrate presiding over an Islamic court called Kadhi's Court, where Islamic law or Sharia is applied and, subject to the court's jurisdiction, all the parties before it profess the Islamic faith. But a Kadhi is not necessarily a spiritual leader or imam.

The Constitution provides for the office of the Chief Kadhi and such number of other Kadhis, not less than three, as may be prescribed by the law. Parliament may prescribe for subordinate courts to be held by Kadhi. The jurisdiction of the Chief Kadhi and the other Kadhis is to hold a court with jurisdiction within Kenya and extending to determining questions of Muslim law on to personal status, marriage, divorce or inheritance in proceedings in which all the parties are the Muslim .

The Chief Kadhi and the other Kadhis are appointed by the Judicial Service Commission.

The qualification for Kadhis (who include a Chief Kadhi) is under section 66, sub-section 2 of the Constitution, that one must profess the Muslim religion and possess such knowledge of the Muslim law applicable to any Muslim sect as is satisfactory to the Judicial Service Commission.

Pursuant to these provisions of the Constitution and for the Kadhis to better carry out their functions, Parliament has passed the following Acts:

1. The Kadhis Courts Act (Cap 11);
2. The Mohammedan Marriage and Divorce Registration Act (Cap 155);
3. The Mohammedan Marriage, Divorce and Succession Act (Cap 156); and
4. The Law of Succession Act (Cap 160) .

Under the Kadhi's Courts Act, Parliament has established twelve courts. The Kadhis' Courts Act, passed in 1967, initially established six Kadhis' courts, subordinate to the High Court, four having jurisdiction within the former Protectorate, one in Nyanza, Western and parts of Rift Valley provinces and the last one having jurisdiction over the former Northern Frontier Districts of Garissa, Wajir and Mandera.

An appeal from a Kadhis' court usually goes to the High Court; which sits in appeal with the Chief Kadhi or other Kadhis as assessors. Their opinion as assessors is not, however, binding on the judge in deciding the appeal, especially if he disagrees with their opinion. An appeal also lies in the Court of Appeal from the High Court and, in that final court, the Chief Kadhi or any other Kadhi does not sit even as an assessor.

- The current status of Kadhi's Courts

Although the Kadhis' Court Act states that Islamic law and rules of evidence shall be applied in the court, this does not happen in practice for the Islamic law and rules of evidence have not been made by the Chief Justice. Instead, Kadhis use the law and rules of evidence as provided for under the Evidence Act (Cap 80). Yet, section 2 of the Evidence Act clearly states that it shall apply to all other courts, except the Kadhis' courts. There appears to be a conflict between section 6(iii) of the Kadhis' courts Act, which permits the application of the law of evidence under the Evidence Act and section 2 of the Evidence Act which excludes Kadhis' courts from its application.

Again, the Kadhis' courts Act states that the Chief Justice shall make rules of practice and procedure for the court but, to date, this has not been done. Instead, Kadhis use the procedures of the Civil Procedure Act (Cap 21). This is provided for under section 8(2) of the Kadhis' Courts Act; which just as section 6(iii) discussed above, appears to violate the spirit of section 66 of the Constitution. In practice, the two sections have acquired the character of claw –back or derogatory clauses to the extent that they have been used in lieu of the Islamic law and rules of evidence and the practice and procedure of the court as ideally envisaged under sections 6(1) and 8(1) of the Kadhis' Courts Act.

Since Kadhis are not trained lawyers who necessarily understand the Evidence and the Civil Procedure Acts it is not desirable for them to use these Acts to administer their courts. There is now an urgent need for the Chief Justice to provide for correct Islamic law procedures, practice and evidence for Kadhis' courts, in order for Kadhi's to effectively and competently fulfil their mandate. In view of the Chief Justice's failure to make and provide for these rules for Kadhis' courts, it may be worthwhile to follow the examples of other countries which give Kadhis' courts or that of the Chief Kadhi the power to make their own rules.

(iv) *The Judicial Service Commission*

The Judicial Service Commission (JSC) is established under the Constitution. It is composed of the Chief Justice as chairman, the Attorney-General, two judges appointed by the President and the Chair of the Public Service Commission. The JSC appoints the magistracy and staff of the High Court and the Court of Appeal other than the judges.

The Constitution vests the role of constitutional interpretation and enforcement of the Bill of Rights in the High Court.

13.5.3 The Judiciary in other Constitutions

The structure and organization of the Judiciary differs from one jurisdiction to another. Certain principles, such as on the administration of justice and independence of the Judiciary, however, do not vary. Most constitutions establish a hierarchy of courts usually commencing at the local (village, county or district) levels to an apex that is the highest court usually styled Supreme Court or Court of Appeal. In many jurisdictions, such as South Africa, India, Nigeria, Ghana, United

States of America and Uganda, the apex court is also the final court on constitutional matters. In yet others, the apex is the constitutional court.

The level of decentralisation and nature of jurisdiction of courts varies not only with the system of government (i.e., whether unitary, federal or confederal), but also with the level of social and cultural complexity. Thus, Nigeria has a complex structure of Islamic and customary law courts within and across the various federal states. Indeed, apart from providing for a hierarchy of courts with civil and criminal jurisdiction, the Constitution of Nigeria provides for a complete hierarchy below the Federal Court of Appeal of Sharia and customary courts, with original and appellate jurisdictions on personal law. This level of detail, however, is not usual in jurisdictions which maintain strict separation between state and religion. In these contexts, personal law based on religion or custom is generally dealt with at the subordinate court levels. Thus, Article 129(1)(d) of the Constitution of Uganda provides, *inter alia*, for the establishment of such subordinate courts as Parliament may, by law, establish, including Kadhis' courts for marriage, divorce, inheritance of property, and guardianship..

13.5.4 What the People Said

The people of Kenya expressed extensive views on the structure of the Courts, the appointment of the Chief Justice and other judges, the organization and structure of Kadhi's Courts, and general principles of administration of justice. These views may be summarised as follows:

- (a) *On the Judiciary in general, that*
 - (i) the independence of the Judiciary should be entrenched in the Constitution;
 - (ii) the Constitution should ensure that there is no interference in the Judiciary by the Executive and by politicians;
 - (iii) cases should be determined expeditiously;
 - (iv) judges should be qualified for their jobs;
 - (v) court procedures should be simplified;
 - (vi) all people should be treated fairly and equally before the courts.
 - (vii) access to courts could be improved by:
 - free legal aid;
 - reducing court fees or paying fees in instalments;
 - simplifying probate procedures; and
 - increasing the number of judges and magistrates and decentralising the court system to the districts;
 - (viii) on the structure of courts, a majority expressed a need to establish a constitutional court, supreme court, and village tribunals.
- (b) *On the appointment of the Chief Justice,*
 - i) it was also suggested that the appointment of the Chief Justice and other judges be undertaken by Parliament on recommendation by the Judicial Service Commission; and
 - ii) minimum qualifications were suggested for all judges and basically that judges should be graduates of law.
- (c) *On the question of discipline by judicial officers, that*

- (i) the Judiciary should have its own code of ethics enforceable and barring members from private business;
 - (ii) an effective complaints procedure be entrenched in the Constitution;
 - (iii) judges should be disciplined through interdiction, dismissal, suspension, sacking and prosecution;
 - (iv) corrupt judges should be sacked; and
 - (v) a judge should not remain in one station for more than 3 years.
- (d) *On the Chief Kadhi and Kadhi's courts, that*
- (i) Muslims must be consulted in appointing the Chief Kadhi and other Kadhis; they should either elect them or be members of the appointing authority, i.e., the Judicial Service Commission; that Muslim organizations, such as Supreme Council of Kenya Muslims, should be consulted;
 - (v) there should be some minimum academic qualifications for the Chief Kadhi and the other Kadhis, e.g., a degree in general and Islamic Law from a recognised university;
 - (vi) Kadhi's Court be empowered to come up with a scheme of service, improve terms of service and conditions of employment, e.g., salaries, staff, communication facilities, etc;
 - (vii) the Chief Kadhi be given the same status as a High Court judge and the Kadhis as a chief magistrate.
 - (viii) the number of Kadhis' courts be increased and such courts be set up in every province and district;
 - (ix) Kadhi's Court should have a separate appeal court and no appeal should lie in the High Court;
 - (x) Muslim judges skilled in Islamic law be appointed to the High Court to hear appeals from Kadhis' courts;
 - (xi) Kadhis' courts be empowered to determine both the substantive and the procedural law on inheritance and succession for Muslims;
 - (xii) Kadhis' courts be expressly empowered to deal with not only divorce in Islamic marriages but also on issues arising out of such divorces, e.g., maintenance and custody of children, guardianship, adoption, division of matrimonial properties after divorce and other matters incidental and connected with.
- (e) *On subordinate courts, that*
- (i) the Constitution should recognise traditional and local courts with jurisdiction over small claims and matters of personal law; and
 - (ii) the authority of traditional elders be recognised.

13.5.5 Commentary

Serious allegations were made against the Judiciary, including inefficiency, incompetence and corruption. Besides, it was fairly evident that the people had lost faith in the Judiciary's ability to dispense justice fairly, impartially and without fear. Similar sentiments had been expressed by a committee established by the Judiciary itself – the Kwach Report and a Report by Commonwealth Judicial panel of experts.

In the case of Kadhis' courts, however, it was clear that, for Muslims, these had become an indispensable symbol of their Islamic faith and culture. But, more importantly, for the Muslim women, the courts had become an important site for resisting the oppression experienced in marriage and in domestic circumstances in a traditionally patriarchal and male-dominated society. Through these courts, Muslim women have succeeded in fighting protection and enforcement of their rights as guaranteed under Islamic law and to challenge negative cultural practices and customs of Muslim communities that tend to undermine these rights. Islamic law does not permit a woman to be a Kadhi, but this does not prevent a woman from being appointed an assistant to the Kadhi to help in those instances where women litigants find it difficult to explain to the male Kadhi the delicate and intimate details of some of their domestic problems.

13.5.6 Recommendations

The Commission recommended, therefore,

(a) *on the judiciary, that*

- (i) The Chief Justice should be the head of the Judiciary and president of the Supreme Court;
- (ii) There should be an independent Judicial Service Commission (JSC) whose functions are to
 - recommend to the President persons for appointment as judges;
 - review and make recommendations on terms and conditions of service for judges, magistrates and other judicial officers, other than salaries and remuneration, to be determined by a tribunal covering all public services;
 - appoint, discipline and remove registrars, magistrates and other judicial officers, including paralegal staff, in accordance with the law as prescribed by Parliament;
 - receive and investigate complaints against judges in accordance with the Constitution;
 - prepare and implement programmes for educating and training judges, magistrates and paralegal staff;
 - advise the Government on improving efficiency in the administration of justice and access to justice, including legal aid; and
 - encourage gender equity in the administration of justice.

(b) *as regards courts, that*

- (i) there should be a Supreme Court whose functions are to -
 - arbitrate over civil and criminal cases.
 - act as a referral court in cases arising from disputes between district and provincial councils;
 - act as the final court of appeal in all matters;
 - give advice to the Executive or Parliament on the interpretation of the Constitution;
 - Solve disputes arising from presidential elections; and
 - exercise original jurisdiction as provided by Constitution and the by legislation;

- (ii) there should be a court of appeal to hear appeals from the High Court on all matters;
 - (iii) the High Court should have unlimited criminal and civil jurisdiction in all matters; the courts should include specialised courts where appropriate, among which would be
 - the Family Court (as now);
 - the Children's Court (as now);
 - Commercial courts (as now);
 - a constitutional and administrative Division;
 - an industrial Division;
 - a criminal division;
 - Kadhis Courts; and
 - subordinate courts (magistrates court);
 - (iv) there should be such would specialized tribunals as may be established by legislation;
 - (v) there should be village elders tribunals—for each village or related villages with jurisdiction to
 - hear and determine land disputes; and
 - hear and determine matters relating to personal law;
 - (vi) the Constitution should provide further that
 - courts be generally accessible to disabled people;
 - court proceedings be conducted in a language that the people understand;
 - courts be equipped with noticeboards and adequate signs for members of the public to read what is happening and, if they have business, or simply wish to watch the system of justice in operation, know where to go;
 - cases be determined expeditiously; and
 - Judges and magistrates dispense justice speedily, especially to render judgments, orders and rulings within 21 days after the close of the case or application.
- (c) as regards qualifications of judicial officers that -
- i) the minimum qualification for appointing the Chief Justice or a judge of the Supreme Court be fifteen years' experience; be a judge of the High Court or Court of Appeal, be a practising advocate or a full-time law teacher in a recognised university;
 - ii) the minimum qualification for appointment as a judge of the Court of Appeal should be ten years' experience as a judge of the High Court, a practising advocate, or a full-time law teacher in a recognised university;
 - iii) the minimum qualification for appointment as a judge of the High Court should be ten years' experience, a qualified magistrate or a practising advocate;
 - iv) the JSC should also consider the candidate's intellectual ability, measured by criteria such as academic qualifications; and
 - v) the retiring age for all judges and magistrates should be 65 years.
- (d) as regards the Kadhi's Courts, that
- i) they should continue to handle cases on personal status, marriage, divorce or inheritance in proceedings in which the parties profess the Muslim

- religion; however, apart from civil cases, they should be empowered to handle commercial cases involving Muslims only;
- ii) the Chief Kadhi and other Kadhis should be appointed by the Judicial Service Commission in consultation with Muslim organizations, such as SUPKEM;
 - iii) the Chief Kadhis and Kadhis minimum academic qualification should be a university degree on Islamic law from a recognised university;
 - iv) the Chief Kadhi should have the same status, privileges and immunities as a High Court judge; the senior Kadhi as a chief magistrate and the Kadhi as a resident magistrate.
 - vi) the Chief Kadhi:
 - must be a Muslim; aged 35 years and above but below 65 years.
 - be an advocate of the High Court or qualified to be appointed as one and has been a legal practitioner for not less than 10 years; and
 - have obtained at least a degree in Islamic law from a recognised university; or
 - have had not less than 10 years' practical experience of Islamic law, has held the office of Kadhi's court for the same period and has at least a degree in Islamic law from a recognised university;
 - vii) if a Kadhi is the qualification as (a) above, the exception shall be 5 years under each of the categories of qualifications;
 - viii) the number of Kadhi's courts should be increased and they should be set up in every Province and District;
 - ix) Kadhi's courts should have appellate jurisdiction.
 - x) each Kadhi Court should have a Muslim female assistant to handle cases involving women;
 - xi) Muslims of the Shia sect should be appointed as kadhis to cater for the interests of the Shia Muslims; and
 - xii) Kadhi's courts procedures should be simplified without impeding dispensation of substantive justice.

(e) *as regards transitional provisions, that*

- i) all judges should retire at 65;
- ii) all judges: Puisne judges, judges of Court of Appeal, judges of the Industrial Court, the Chief Justice and the Chief Kadhi, currently serving in the judiciary and have attained 55 years be entitled to retire with all benefits with additional pension the equivalent of 5 years' service; this right should be exercised within 30 days of the coming into force of this Constitution;
- iii) subject to (b) above, on the coming into force of this Constitution, any judge against whom a formal complaint is pending with the JSC, the Anti-Corruption Authority, the Advocates Commission or the Advocates Disciplinary Committee should proceed on paid leave, pending hearing and determination;
- iv) where, after this Constitution has come into effect, a judge has not exercised any option under (b) above, and is not the subject of (c) above, he/she should, within 60 days, file with the Judicial Service Commission all documents and evidence required under the leadership code provided for in Chapter sixteen;

- v) where, after receipt of the documents and evidence set out in (d) above, and if the JSC thinks that the judge does not satisfy the criteria under the leadership code, the JSC should dismiss the judge without loss of accumulated benefits;
- vi) no judge should have his/her pension or other benefits paid, if she/he has not delivered all pending rulings and judgments and accounted for all funds and property of the Judiciary;
- vii) No judge who has retired under this Constitution should be eligible for reappointment;
- viii) after the new Constitution has come into force, the JSC should be reconstituted, no matter whether representatives of the High Court and the Court of Appeal have not been appointed; the Parliamentary Judicial Committee shall, within 30 days of the opening of Parliament, ensure the constitution of the JSC;
- ix) within 30 days of the Constitution coming into force, the JSC should advertise such positions of High Court or Court of Appeal judges as should require filling and prepare short a list to be presented to Parliament to fill the positions not later than a month;
- x) in respect of the Supreme Court, the President should, in consultation with the Prime Minister, nominate suitable persons within 45 days of coming into force of this Constitution, subject to approval by the Parliamentary Judicial Committee;
- xi) subject to the Advocates Act, any judge leaving office under these provisions should be at liberty, without hindrance, to practice law as an Advocate of the High Court; and
- xii) the President should appoint a Chief Justice from among those persons appointed to the Supreme Court.

13.6 The Public Service

13.6.1 General Principles

Although not normally regarded as an arm of government, it is obvious that the public service carries the burden of public administration. It was important, therefore, that this institution be examined. Indeed, by requiring the Commission to examine and make recommendations on the establishment of mechanisms to enhance good governance and democracy, an implied mandate to examine the public service was given.

The public service is an important component of the executive organ of government. It consists of persons in-charge of vital functions and the delivery of public services, including formulation of policy. The Public Service is crucial for national cohesiveness and independence.

The Public Service has two main functions:

- implementation of Government policies and laws; and
- provision of manpower to deliver public services.

Kenya's Civil Service currently consists of the following major offices and departments:

- All Permanent Secretaries;
- Staff of all ministries, including the Office of the President, and their departments and training institutes;
- The provincial administration;
- The disciplined forces;
- The Police and other security services;
- Local government officials;
- Officers in parastatals and state corporations; and
- Officers in constitutional commissions and other constitution Offices.

In 1999, the public servants were of various types distributed as follows:

<u>Departments:</u>	<u>Number of Public Servants:</u>
Central Government	208,500
Teachers Service Commission	105,200
Local Government	78,000
Business in which the Government holds a majority share	48,000

According to the Constitution, Parliament enacted the Service Commissions Act (Cap.185) to provide for the composition and mode of operation of the Public Service Commission.

13.6.2 The Public Service in the Constitution

(a) Background

The Independence Constitution provided for a Public Service Commission for the Republic and a Public Service Commission for each region.

Membership of the Commission consisted of a chairman, a deputy chairman, two members appointed by the Governor-General, acting in accordance with advice by the Judicial Service Commission, and 3 representative members appointed by the Governor-General, acting in accordance with advice by the President of the Regional Assembly of that region.

The qualification requirement prohibited the appointing of any public officer and any member of the National Assembly (or any previous member or any person ever nominated for election as a member of the National Assembly or Regional Assembly of local authority).

The Public Service Commission had the following mandate:

- to appoint persons to hold or act in offices in the public service;
- to discipline and control persons holding or acting in such offices; and
- to remove such persons from office.

The Commission also advised the Governor-General on the appointing of the following persons:

- the Auditor-General;
- the Attorney-General;
- Permanent Secretaries and the Secretary to the Cabinet; and
- *Liwalis* and *Mudirs* of the Coast Region.

There was security of tenure for the members; they could be removed only on investigation by a tribunal set up for that purpose. The Governor-General had the authority to establish the number and kinds of offices for the country the Public Service Commission supplied the staff. The provisions of other Constitutions dealing with the Public Service generally concern themselves with the following value matters:

- Professionalism;
- Independence and political neutrality;
- Recruitment and promotion procedures;
- Terms, schemes and conditions of service;
- Training and continued education;
- Pensions rights and retirement benefits of public servants and employees of private establishment and retirement;
- Staffing and retrenchment, size and propriety of service; and
- Official secrets and the right to public information.

(b) *The Current Constitution*

The current Constitution provides for a Public Service Commission. The public service functions are stated to include appointing, disciplining and removing civil servants, including those in the local government, save those specifically left to the discretion of the President or other authorities.

The Public Service Commission is composed of the Chairman and sixteen members, all appointed by the President. A member has a 3-year term but may be relieved of his/her duties by the President. The Commission is not subject to the control of any person or authority in exercising its functions. The President is empowered to compulsorily retire any expatriate member where a suitable Kenyan exists to replace him.

The Constitution also deals with public service pension benefits, protecting pension rights by providing that it is a charge upon the Consolidated Fund and that the Public Service Commission must consent to reducing, withholding and suspending benefits. Majority of the pension clauses deal mainly with protecting the pensions of the pre-independence expatriates by providing/allowing export of the pensions without application of any charge or levy.

13.6.3 The Public Service in other Constitutions

Because of their centrality in government operation, most constitutions define the principles governing the appointment and discipline of public servants,

establishing an independent institution to recruit and discipline them or both. Those provisions usually cover central and local government, and parastatal offices. That is the case in Ghana, Singapore, India and Uganda. While many jurisdictions merely create a single “Public Service Commission” with responsibility over the entire service, others set up sector-specific commissions. The constitutions of Ghana and Uganda provide, respectively, for the former and latter categories. Thus, in Uganda, the Constitution creates, in addition to a Public Service Commission,

- an Education Service Commission;
- a Health Service Commission; and a
- District Service Commission.

The choice of model usually depends not only on the degree of independence desired for each sector of the service but also on the complexity of the system of government in a given jurisdiction.

13.6. What the People Said

What the people of Kenya told the Commission may be summarised as follows:

- (a) as regards appointment, that
 - i) Civil servants should be appointed and promoted on merit after regular interviewing procedures;
 - ii) all public service employees should be appointed by the Public Service Commission;
 - iii) the positions of permanent secretaries should be advertised;
 - iv) the President should appoint Public Service Commission members.
- (b) as regards independence, that
 - i) the Public Service Commission should be an independent body;
 - ii) there be no political appointments so as to strengthen the Commission’s management and discipline roles;
 - iii) public servants should have security of tenure; and
 - iv) the Commission should be an independent body be composed of nominees from the ruling party.
- (c) as regards terms and Conditions of Service, that -
 - i) the Government should improve the terms and conditions of service, especially the salaries of all civil servants, including teachers;
 - ii) police should be well remunerated and well housed; and
 - iii) the civil service needs to offer desirable benefits to its employees to attract competent Kenyans.
- (d) on *Declaration of Wealth and Code of Ethics*,
 - i) all public officers should be required to declare their wealth; and
 - ii) public officers should have a binding code of ethics.
- (e) on Discipline and Efficiency,

- i) those who misuse Government resources should be investigated and if found guilty be prosecuted and all the resources confiscated;
 - ii) Parliament should vet members of the Public Service Commission to ensure they are not corrupt and incompetent;
 - iii) persons with bad records should not be entrusted with public offices;
 - iv) the Public Service Commission should transfer public servants after regular intervals to maintain efficiency and discipline;
 - v) public servants charged in court should be suspended pending determination of suits;
 - vi) public servants who do not perform should be dismissed by the Public Service Commission and not transferred to other stations;
 - vii) action should be taken against senior civil servants(s) who malign, intimidate and victimise junior officers without any just cause; and
 - viii) the Public Service Commission should not infringe on the rights of civil servants;
- (f) *on excluding Civil Servants from Private Business, that*
- i) Government officers should not be allowed to operate business;
 - ii) Government doctors should not run private clinics;
 - iii) the Ndegwa Commission report on the public service should be reviewed.
- (g) *on Regional Representation in the Public Service Commission;*
- i) the public service should have regional representation at the membership level and be gender-balanced.
- (h) *on Retirement and Pension Benefits:*
- i) Views on retirement age varied between retaining it at 55 and extending it to 65;
 - ii) many were of the view that retirement benefits should be reviewed for both retired and serving public officers;
 - iii) Others recommended that those who have retired should be granted their benefits promptly;
 - iv) A considerable number said there was a need to give special status to retired civil servants by classifying them as senior citizens with full social welfare benefits.

13.6.5 Commentary

It is clear that what the people were asking for was the re-establishment of principles of public service neutrality, impartiality, and independence. The people of Kenya want to see appointment processes that are transparent and offices that are not only accountable to the people but also capable of guarding public wealth and resources. There was considerable disquiet about the apparent inability of public officers to exercise powers independent of political pressure, and of the fact that appointment procedures even where clearly set out in the law, were often subordinated to demands of patronage. The clear impression being projected was that public service appointments were often based on criteria other than merit, competence or relevant experience. To restore public confidence in the service,

demands were justifiably being made for security of tenure, adequate remuneration, and strict neutrality.

13.6.6 Recommendations

The Commission recommended, therefore, that:

- (a) *as regards the establishment of a Public Service Commission-*
- i) there is need to establish an independent Public Service Commission.
 - ii) powers and functions of the Public Service Commission should :
 - to advise the Prime Minister in performing his or her functions.
 - to appoint, promote and exercise disciplinary control over persons holding office in the public service of Kenya.
 - to review the terms and conditions of service, training and qualifications of public officers and matters connected with personnel management and development of the public service and make recommendations to the Government.
 - to guide and coordinate District Service Commissions.
 - to hear and determine grievances from persons appointed by Districts Service Commissions.
 - to perform such other functions as may be prescribed by the new Constitution or any other law.
 - iii) The Commission would make a report to Parliament in respect of each year on the performance of its functions.
 - iv) Parliament would, by law, empower the Public Service Commission to make regulations for the effective and efficient performance of its functions under the new Constitution or any other law.
 - v) the Directorate of Personnel Management should be abolished.
 - vi) the President, should subject to approval by Parliament, appoint members of the Commission.
 - vii) The Commission should consist of
 - between 8 and 10 commissioners serving for a term of 5 years (renewable subject to review by Parliament).
 - persons reflecting the diversity of the Kenyan people.
 - viii) all Public Servants shall sign a Code of Conduct / Ethics which shall bind them to observe it as a part of their employment obligations.
 - viii) to qualify for appointment to the Commission, one should be of high moral character and proven integrity. Appointments to the Public Service Commission should be based purely on merit; considering academic qualifications and professional experience.
 - ix) public service employees should be entitled to favorable terms of service as a mechanism to attract competent Kenyans to work in the civil service.
 - x) a person holding any of the following offices shall relinquish his or her position in that office on appointment as a member of the Commission.
 - a Member of Parliament
 - a Member of District and Provincial Council.
 - an executive member of a political party, or political organizations; and

- a public officer.
 - xi) the emoluments of the members of the Commission should be prescribed by Parliament and should be charged on the Consolidated Fund.
 - xii) in the absence of both the Chairperson and the Deputy Chairperson, the President may designate one of the members to act as Chairperson.
 - xiii) A member of the Commission may be removed from office by the President only for:
 - inability to perform the functions of his or her office arising from infirmity of body or mind.
 - misconduct; and
 - incompetence.
 - xiv) public servants should retire at the age of 65.
- (b) *On pensions and other benefits, that*
- i) the Constitution should guarantee pension rights and retirement benefits to public servants;
 - ii) a public officer should be entitled to his/her terminal dues on retirement;
 - iii) the Pension Act should state that civil servants who have attained retirement age should be retained in the service until they are paid their full benefits, pension and allowances;
 - iv) senior citizens, (old retirees) should be entitled to State welfare benefits (housing and healthcare);
 - v) senior citizens (retired civil servants) need formal recognition/ identification;
 - vi) pension laws and protection rights should be reviewed (pension is a right not a privilege);
 - vii) pension benefits should remain a charge of Consolidated Fund.

CHAPTER FOURTEEN

LEADERSHIP AND INTEGRITY

14.1 The Mandate of the Commission

The Review Act in Section 3 (a) (b) and (c) provided that the object and purpose of the review was to secure provisions therein:

- guaranteeing peace, national unity and integrity of the Republic of Kenya in order to safeguard the people's well-being;
- establishing a free and democratic system of government that enshrines good governance, constitutionalism, the rule of law, human rights and gender equity; and
- recognising and demarcating divisions of responsibility among the various state organs including the Executive, the Legislature and the Judiciary so as to create checks and balances between them; and, to ensure accountability of the Government and its officers to the people of Kenya respectively.

The Commission, in Section 17 (d) (xv), was also required to ensure that in reviewing the Constitution, the people of Kenya establish and uphold the principle of public accountability by holders of public and political offices. These provisions required the Commission to establish a public appointment system that is transparent and based on competence and integrity, and to ensure the establishment of a public leadership and integrity system that is clearly guided by defined codes of conduct and public ethics infrastructure.

14.2 The Importance of Leadership and Integrity

Leadership is the backbone of the success of any undertaking, be it at village level, community project, business, a local authority or even the country. More importantly, leadership at its very best, determines the continued support of the people, national unity, growth and development of a country.

Integrity on the other hand, plays an important role in ensuring that leadership remains focused on the interest of the people and desired by the people. Leaders are faced with moral and ethical dilemma everyday. In this light, integrity, which basically involves leaders consistently behaving in an honest, ethical, and professional manner, promoting and advocating the highest standards of personal, professional and institutional behaviour, is of utmost importance in their tenure.

A common word used to define integrity is "incorruptibility". Yet leaders are faced with situations, which require them to make expedient, but not necessarily morally and ethically right decisions. Leading with integrity is pragmatic, but it is essential to remember that it is not the reason for acting with integrity. Integrity is its own reason. Courage, honesty and keeping one's word to the people are just some of the few values leaders are required to uphold. Leadership integrity basically involves:

- Selfless service based solely on the public interest and not in any way motivated by personal interest.
- Maintenance of public confidence in the integrity of the office
- Strict adherence, to the law and oath of office.
- Instilling discipline and commitment in the public service in order to facilitate national development.
- That Nepotism or favoritism do not influence objectivity and impartiality in decision-making and in particular, ensuring those decisions.
- Accountability for decisions and action to the public and submission to scrutiny in the manner prescribed by law.
- Maintenance of absolute honesty, in the execution of public duties and the declaration of any personal interests, that is likely to conflict with official duties.

14.3 Leadership and Integrity in the Current Constitution

There are no provisions under the current constitution made for leadership and integrity. Every public office however functions under their own code of regulations that outlines duty and the maintenance of office in a manner that spells integrity.

14.4 Leadership and Integrity in other Constitution

Most countries have made provisions for leadership and integrity in their constitutions. The titles seem to vary from constitution to constitution but the sentiments are the same. The most recent examples appear in the Ugandan and South African Constitutions.

Article 14 of the Ugandan Constitution speaks about the leadership code of conduct. It states clearly that all public officers and servants are required to declare their incomes, assets and liabilities from time to time and how they acquired or incurred them, as the case may be. Further, the article prescribes penalties to be imposed for the breach of the code, without prejudice to the application of criminal penalties prescribed for the breach in question.

In the South African Constitution, article 96 provides for a code of conduct for Cabinet and Deputy Ministers. It states that members of the Cabinet and Deputy Ministers must act in accordance with a code of ethics prescribed by national legislation.

14.5 What the People Said

- All offices in the public and private sector should be required by law to be accountable for their reputation.
- Those people who accept bribes should be taken to court and accused for encouraging corruption.
- Public servants should not be involved in business or have relationships that generate conflict of interest.
- Those put in office should not have been convicted of serious felonies in the past.
- All public assets acquired through corruption must be reclaimed by state or sufficient compensation must be sought.
- All public servants should be individually accountable to their superiors and to the public.
- Appointment process for public servants should be transparent.
- There should be a code of conduct.

14.6 Commentary

The people want their leaders to be accountable for their actions. They want mechanisms to be put in place that assures them that if leaders step out of bounds, there are consequences to be met. This will be determined by their compliance to a code of conduct that they want fully established in the new Constitution.

14.7 Recommendations

- a) That there should be an ethics and integrity code of conduct that should apply to all leaders including:
 - The President
 - The Vice President
 - The Prime Minister, the Deputy Prime Minister, the Ministers and the Deputy Ministers.
 - All members of the National Assembly and the National Council. All members and employees of the devolved government
 - All Permanent Secretaries.
 - All other public officers
 - Other persons, within the public or the private sector, or the civil society as may be determined by parliament.
- b) That the code of conduct should:
 - i) Require the specified officers to declare their incomes, assets and liabilities from time to time showing how they acquire, acquired, or incurred them as the case may be.

- ii) Prohibit conduct
 - Likely to compromise the principles set out.
 - Likely to lead to corruption in public affairs.
 - That is detrimental to the public good, welfare or good governance.
- iii) Prescribe the penalties to be imposed for breach of the code, without prejudiceto the application of criminal penalties prescribed for the breach in question, and may, in addition, provide that a person dismissed or removed from office by reason of breach of the code shall be disqualified from holding any other public office.
- iv) Prescribe powers, procedures and practices for the effective enforcement of the code.
- v) Make any other provisions necessary for ensuring the promotion of the principles of leadership and integrity set out and the protection of public funds and other public property.
- c) That there should be an Ethics and Integrity Commission.
 The Commission should consist of:
 - The chairperson
 - Six other members all of whom should be persons of integrity and high moral standards
- ii) The functions of the Ethics and Integrity should be to:
 - Receive declaration in accordance with the Leadership and Integrity code of conduct.
 - Retain custody of the declarations and make them available for the inspection by any citizen on the terms and conditions prescribed by parliament.
 - Ensure compliance with and where appropriate, enforce the law relating to the Leadership and Integrity Code of Conduct.
 - Receive complaints about non-compliance with or breach of the Leadership and Integrity code of conduct or a law in relation to the Leadership and Integrity Code of Conduct, to investigate the complaint and where appropriate refer the complaints to the relevant authorities for action where it is called for.
 - Investigate whether persons who have availed themselves for appointment as public officers or who avail themselves or are prepared to stand for public elections for offices are free of corruption and therefore fit and proper persons for those offices.
 - Disqualify on investigation as in the paragraph above those who are found not suitable for public office in terms of the Code or in terms of the law.
 - Appoint, promote, dismiss, manage and exercise disciplinary control over the staff in accordance with an Act of Parliament.
 - Perform any other function conferred on it by parliament, or an Act of parliament.

- Put in place measures aimed at the prevention of corruption.
 - Investigate issues of corruption.
 - Exercise the practices and procedures of public bodies and should ensure that they are not conducive to corruption.
 - Advice the heads of public bodies, on the changes, necessary, to eliminate the likelihood of corruption.
 - Educate the public on the dangers of corruption.
- d) A declaration of wealth provision should be made. It should function as follows:
- In the case of a person then in office, within three months of the commencement of the Leadership and Integrity Code of Conduct.
 - In any other case within three months of the assumption of office by any person.
 - Thereafter on annual basis.
- e) The commission should not investigate any matter:
- Pending before a court of competent jurisdiction or a judicial tribunal.
 - Relating to the legislative power of parliament.
 - On the prosecution of which lies in the discretion of the Director of Public Prosecution.
 - Relating to the granting of honours or a pardon.

CHAPTER FIFTEEN

DEVOLUTION OF POWERS

15.1 The Mandate of the Commission

In addition to examining and making recommendations on organs of government, the Review Act requires the Commission to examine and make recommendations on:

- structures and systems of government, including the federal and unitary systems;
- the place of local government in the constitutional organization of the Republic; and
- the extent of devolution of power to local authorities.

Further, the Act requires the Commission to ensure that the review process:

- promotes people's participation in national governance by devolving power;
- respect ethnic and regional diversity and communal rights, including communities' rights to enjoy their cultures and express their identities;
- establish a free and democratic system based on good governance and the separation of powers and checks and balances; and
- promote the accountability of public authorities.

At the core of this mandate is the challenge of devolution of power.

15.2 Levels of Devolution

15.2.1 General Principles

Traditionally, it has been assumed that only a strong national State, with a unitary system of government, could deploy resources and capacity. The argument is often made that only a strong centre can

- assure national unity;
- achieve growth and redistribution;
- promote democracy; and
- satisfy the people's liberty and self-actualisation.

However, due to frequent failings by unitary or centralised systems, manifested by increased marginalisation of minority groups, abuse of power, inequitable distribution and mismanagement of national resources, there have been calls in the last two decades to decentralise government powers and functions.

Decentralisation refers to geographic transfer of authority, whether by deconcentration of administrative authority to field units of one department or level of government, or by political devolution of authority to local government units or special statutory bodies.

Decentralisation has thus political and administrative aspects. The exact character takes in different countries depends very much on the specific circumstances and experiences. Underpinning the concept of decentralisation is the idea of distribution of state powers between the centre and the periphery. The key questions being debated are:

- the form and extent to which the power and authority of the State to tax, spend, regulate, provide and deliver services, distribute and redistribute, define and enforce rights and control land and other resources should be decentralised; and
- the extent to which power should be concentrated in the hands of a single set of institutions or the extent to which such powers should be dispersed across a range of sub-national or local institutions, each possessing or controlling some level of authority or autonomy.

Decentralisation can be applied to both unitary and federal governments. Thus, it may not be necessary, for example, to create a federal system or structure in order to devolve power to lower levels, regions or units. Decentralisation of state power and authority, in its wider sense, takes two forms: deconcentration and devolution.

(a) Deconcentration

Deconcentration refers to administrative decentralisation and involves the transfer of administrative authority, perhaps co-ordinated by a representative of the central government in that area, from the centre to the field. It is the delegation of authority to public servants working in the field and responsible in varying degrees for government policy within their territories to make administrative decisions on behalf of the central administration.

There are no legal guarantees for exercising transferred powers. The government may at any time recall them. In practical terms, this involves dispersion of government bureaucracies to the field. Deconcentration is thus at the heart of the daily administration by the Executive and is realised through the public services. Kenya's provincial administration system is a good example of deconcentration.

Public administration in this sense has a very real impact on the people's lives and the manner in which it is carried out has constitutional relevance. The general rule is that the authority must be exercised within the law, both procedurally and substantively, and without any ill will as to disentitle a citizen of what he is by law entitled and, as a corollary, to grant benefit to one who is not in law entitled to receive it. Closely associated with public administration is discretion. By constitutional standards, discretion ought to be exercised objectively and after careful consideration of the relevant factors. It is required of the Constitution to legitimise and create checks on this power and to design mechanisms for convenient adjudication for validity.

(b) Devolution

Devolution is the practice in which the authority to make decisions in some sphere of public policy is delegated by law to sub-national territorial assemblies (e.g., a local authority). Devolution entails transferring governmental or political authority – with

the powers of the constituent units determined by legislation rather than by the Constitution.

Thus, devolution is by all means, a political device for involving lower-level units of government in policy decision-making on matters that affect those levels while deconcentration is its administrative counterpart. Devolution, as a specific category, refers to the arrangement where the powers and structures of decentralisation are provided in the ordinary law and can thus be modified or repealed more easily than can federal arrangements and does not normally require the consent of the devolved unit. London's devolution to Scotland is of this type.

The term, "devolution", is commonly used to refer to those situations in which a previously unitary state distributes power to other territorial units (as in India, Nigeria or Kenya at independence).

A large number of states today are federal or have elements of devolution. One estimate is that 40% of the world's population lives under some form of devolution. In the Commonwealth, these include: Canada, India, Malaysia, Australia, South Africa, Nigeria, Pakistan and Britain. In Africa, there are the Nigerian and Ethiopian federations. Some of the longest surviving Constitutions - the US, Switzerland and Canada, are federal. The European Union is a modern example of several important and well-established states delegating large elements of their sovereignty to a common political and administrative entity. The current moves towards a federation of East Africa and the ambitious plans of the African Union are examples of this latter tendency. In every one of these efforts, there is an overarching orientation to devolution.

(i) *Rationale*

For many reasons, devolution is popular. The examples given above represent separate sovereign States coming together to form a federation to strengthen their defence capacity or to create economies of scale (that is to say, create larger markets and pool resources) or to manage sovereignty over large distances. In Africa, at various times, the appeal of devolution was to give expression to the desire for a continental or regional unity.

When devolution takes the form of power distribution from a unitary centre, the reasons are usually different. In India, Nigeria and Ethiopia, for example, devolution was a response to demands by ethnic groups, usually minorities, for a bigger share in the affairs of the State, which they considered they could not achieve in a unitary State.

Modern instances of devolution are usually examples of accommodating and consolidating ethnic, regional, linguistic or religious diversity, as in Bosnia-Herzegovina, the Russian Federation, Puerto Rico and the USA, Spain and the Philippines, and the recent recognition of autonomous areas of Canadian natives in Canada. In these instances, power is sometimes devolved to geographical areas to safeguard ethnic and cultural interests and identities. Devolution is thus seen as the response to the multi-ethnic or multi-nationality character of the national population, an attempt to retain intact the sovereignty and unity of the State.

In these situations, the aim has not been to eliminate diversity, but rather to accommodate, reconcile and manage it within an overarching harmony and unity. This suggests that many federal political systems by reconciling the need for a large-scale political organization with the recognition of ethnic, linguistic or historically derived diversity, have the advantage of a closer institutional approximation to the multi-national reality of the contemporary world.

Apart from these broad considerations, it has been argued that, by dispersing power to different levels, devolution promotes good governance, enhances separation of powers, multiplies the incidence of checks and balances and enhances bureaucratic effectiveness, transparency and accountability of governmental power.

However, the extent to which devolution succeeds to limit power and to achieve these values has a lot to do with the design of devolution itself. The ideal is always a discrete model that ensures effective separation and check on power and functions at all levels and units of devolution, as opposed to a system in which institutions, powers and functions overlap. Essentially, the different levels and units of devolution act as locations of power and enlargements of democratic space, thus enhancing and deepening democracy, democratic methods and people's participation in government processes. Location of power closer to the people also achieves public accountability since power is easier to control at the local rather than at the national level.

One of the vital characteristics of ideal devolution models is not only that the residents are constantly consulted on decisions but also are part of the decision-making process. Constant popular consultation and participation nurtures the spirit of ownership of development processes and is, therefore, able to achieve a more responsive and more effective management of resources and government processes.

The other value of public participation is that it nurtures the spirit of ownership of resources and the development process and, therefore, has the potential to lubricate the distribution of resources by fostering need based development criteria.

Devolution has served as an invaluable development mechanism in many ways. Various units of devolution are in themselves autonomous development regions and, as such, are points for a more equitable distribution of development funds. In any event, they encourage experimentation, localisation and flexibility in the more general national policies and institutions, to meet identified priorities.

(ii) *Disadvantages*

However, devolution may not necessarily translate into greater democracy because, in a number of instances, it may serve only to put power in the hands of local autocracy. This is why it is necessary, while considering the options, keep in mind the need to ensure that the subjects of devolution are sufficiently motivated and organized to participate vigorously in managing local affairs and that appropriate mechanisms are in place to underpin democratic values.

Similarly, devolution may undermine national unity and inflate ethnic, religious and cultural diversities. It has capacity to lead to an even greater marginalisation of minorities, especially the minorities within minorities.

Again, poorly designed devolution units may mean expensive duplication of ineffective government; over-bureaucratizing the decision-making process as well as weakening the process of accountability. Moreover, the unjustifiable multiplication of machineries and processes of intergovernmental consultations may result in government rigidity and the accompanying resource and opportunity costs.

In other respects, devolution diminishes the national government's power and value to redistribute resources. This necessarily creates disadvantage for less developed units and may thus generate dependency and, where this is chronic, result in instability.

In general, it is difficult to generalise the form, structures, method, extent, and consequences of devolution since each experience has its own historic or specific context. Nevertheless, the result is a combined system of 'shared rule' at the centre and 'self-rule' in the regions. Some matters are dealt with by the central government in which all communities participate, while others are to be dealt with by the communities, usually in specified geographical areas, in various combinations between unity and diversity.

(iii) Considerations in Devolution Process

The primary purpose of devolution varies from place to place, with implications for structure, distribution and degree of co-operation between different levels of government. Logically, therefore, the level and form of devolution adopted must be informed by the peculiar circumstances of each case and the underlying reasons for its establishment. There are, however, important considerations that are instructive in the decision process.

First, there must be a consideration for the levels of devolution. First, the units to which power is devolved should be identified. As much as possible, the units should experience equal or near-equal social, economic, demographic and geographic circumstances.

Second, it is always necessary to consider the broad principles and values to guide devolution and the operation of devolved units. The values reiterate the general standards to be applied on such issues as allocation of resources, delivery of services and regulation of the relationship between the governors and the governed.

Third, the devolved powers must be clearly defined. Some powers may be exercised exclusively by the units or concurrently by both the units and the national government. Greater power to the units means greater autonomy for them. However, there is always an imperative need to ensure that autonomy is balanced against the need for a unified homogeneous State.

Fourth, and perhaps most important consideration is the financial arrangement between the centre and the units. It is helpful that the details on sharing resources and opportunities, the division of power in relation to raising, spending and transfer revenue, and more so, the establishment of criteria for assisting less endowed units, be set clearly in the constitutive document. The manner in which the resources are mobilised and spent goes to the heart of the viability of the devolution itself and thus

the need to design devolution structures that makes the best use of resources and distributes them equally.

Finally, and equally important, the framework of the relationship between the central government and the units should be explained. It may be achieved by reiterating the powers and functions of each unit and by explaining clearly the areas of interface. Equally, the mechanism for settling any disputes that may arise requires to be provided for. Closely related to the relationship between the units and the centre is the need to clearly demarcate and balance between the interventionist power that the national government may exercise over the units and the latter's desirability for some level of independence and autonomy.

Although devolutions throughout the world have been modelled at the state level, it is important at the regional, provincial, district, municipal and village levels, to consider in choosing a model, the factors outlined above be considered together within the context of a political consensus to ensure viability. Consensus is the single most crucial factor in deciding on the powers, functions, and structural arrangements of the devolved units.

(iv) Forms of Devolution

Devolution may take one or several forms, namely, federation, confederation or local government. Federation is considered the highest form of devolution and refers to the arrangement existing in federations. Federations are compound polities combining strong constituent units of government and a strong central government, each possessing powers delegated to it by the people through a Constitution, each empowered to deal directly with the citizens in exercising legislative, administrative and taxing powers; and each directly elected and accountable to its citizens.

By complex mechanisms, federations enable strong federal and strong sub-federal governments, each directly responsible to the citizens. What distinguishes them from constitutionally decentralised states is that each level of government derives its full authority from the Constitution, not the other level of government, and that the Constitution cannot be amended unilaterally by one level of government.

The other fundamental and distinguishing characteristic of federal systems is that the central and the regional governments are not subordinate to each other but are, instead, co-ordinate. It is also the case in a federal system that, once established, the powers are distributed to all units equally. Federal units constituting the system can have a local government system. In this case, it is the responsibility of the sub-national units constituting the federation to determine the scope of the responsibilities of the local government authorities. The parliaments of the sub-national units can alter the distribution of power between it and the State governments in the same way as is done in the unitary systems.

Federalism provides a technique of political organization that permits action by a shared government for certain common purposes together with autonomous action by regional or local units for other purposes that relate specifically to maintaining their distinctiveness. More recently, federations have been viewed as utilities for uniting

constituent units based on different ethnic nationalities and as a way of forestalling the pressures of fragmentation.

Confederations as opposed to federalism, embody two or three constitutional orders of government. The centre is created by the constituent units and the centre exercises power delegated by its constituting units.

Under a federal system, the various sub-national units can have a local government system. In this case, it will be the responsibility of the sub-national units, to determine the scope of responsibilities of the local government authorities.

The Parliaments of the sub-national units can, in other words, alter the distribution of power between them and the State governments in the same way as under unitary systems.

Devolution, then, may, in principle, take widely different forms, ranging from very limited legislative powers granted to assemblies in one selected province only to a comprehensive decentralisation of government granted to assemblies in all provinces, wielding extensive powers to legislate and to control provincial governments, and therefore, implying a great reduction in the scope of the central legislature and government. Thus, even with such forms of decentralisation, a country could till have local government systems by creating local authorities in each province or region. A local government system can thus operate both under a unitary system and under a federal structure.

Traditionally, local government systems developed to deal with specific urban problems. This has changed over time. In contemporary state organization, local governments concern themselves not only with urban matters, but also with delivery of a number of services to rural as well as urban communities. Local governments serve the following principal functions:

- Establish representative government institutions through which appropriate services and development activities can be made more responsive to the local wishes and initiatives;
- Enable the people to exercise the right to self-government;
- Mobilise local resources by involving local communities; and
- Provide a two-way channel of communication between local communities and the central Government.

Local government structures, character and functions differ from country to country. So does the level of autonomy they exercise. In developed countries, the local government system is nothing but a complementary to the national government providing services, mobilising and administering people and local resources towards development goals.

15.2.2 Devolution of Powers in the current Constitution

(a) Background

At independence, Kenya was a constitutionally devolved State. Significant power was devolved to regions and entrenched in the Constitution. Regions enjoyed certain tax and financial powers and had both legislative and executive authorities. Regional government dealings with the national Government were deeply entrenched in the Constitution and Kenyans had a right to live and settle anywhere in the country; discrimination was expressly prohibited. This system of devolution was popularly referred to as *majimbo*. In constitutional terms, *majimbo* can be seen as a form of federalism (more precisely, semi-federalism), even though it could be, and was, abolished purely by a decision of the National Assembly.

Today, it is not clear what is meant or involved when people talk of *majimbo*. Sometimes, it is discernible from the way people talk or react to issues relating to decentralisation that the term is used or interpreted to mean the division of the country into autonomous ethnic homelands. On other occasions, it is used to refer to the unit of devolution, for example, the province as opposed to the district. Some of those interpretations are clearly out of tune with the values ingrained in the *Majimbo* system at independence.

The main values and characteristics of the independence *majimbo* system were as follows:

- division of the country into seven regions, namely, Coast, Eastern, Rift Valley, Nyanza, Western, Eastern and the Nairobi Area;
- a regional assembly composed of elected members and specially elected members, the number of which was the elected members divided by ten; one had to show a genuine connection with the region to vote;
- the president of the region, elected by the elected members from among themselves or from those qualified to be elected; the candidate had to garner a 2/3 majority of the Electoral College, and was removable by a vote of 3/4 of the members;
- a vice-president was elected and dismissed in a manner similar to that of the president;
- the region's executive power was known as the Finance and Establishments Committee, and was mandated to establish one or more committees to deal with commerce and industry, education, health, land agriculture and forests, local government administration, public order and safety, works and communication, the region had authority to levy tax on a number of minute commercial and commerce – related activities, while the central Government was under obligation to transfer certain percentages of revenues to the regions;
- a regional civil secretary appointed by the Public Service Commission in consultation with the regional president in charge of the civil servants largely deployed by the national Public Service Commission in consultation with the region;
- a regional police force, headed by a regional police commissioner, appointed by the Police Service Commission in consultation with the region; and

- a list of detailed areas of legislative competence for the regions, providing for matters that the Regional Assembly may exclusively legislate and others in which there was concurrent competence with the National Assembly.

Regional boundaries could only be altered by the Regional Assembly's approval and upon a resolution by both Houses of the National Assembly.

The Constitution also provided for a local government system. Each Region was divided into local authority areas headed by elected Local Authority Councils. There was a Regional Local Government Staff Commission charged with the welfare of the Local authorities' staff within the Region. There was a national Minister in charge of Local Government areas, who ensured that they exercised propriety in their affairs.

The Regions were dismantled by carefully orchestrated constitutional amendments in the 1964 –1969 period. The first of these was an amendment in 1964. It amended a schedule of the Constitution by removing all, except the specifically entrenched powers, from the Regional Assemblies. Thereafter, another constitutional amendment deleted certain specially entrenched clauses concerning the Regions, especially those on financial arrangements between the centre and the regions. The amendment also made less rigid the method of altering of Regional Assemblies.

In June, 1965, the Constitution was amended for a third time to abolish the special entrenchment of certain sections on to the executive powers of the Regional Assemblies. It also renamed the Assemblies as Provincial Councils. In 1968, the Upper House of Parliament, the Senate, was merged with the House of Representatives to establish the unicameral House. Parliament's life was extended by two years while senatorial districts were reorganized to merge them with certain constituencies. Later, the Provincial Councils were abolished and the provisions protecting provincial and district boundaries from erratic alterations were deleted.

(b) *The Current Constitution*

The current Constitution does not provide for any form of devolution or make any reference to the local government system. The only mention of local government is in the provisions vesting trust lands in the county councils. A local government system is, however, in place.

(i) *The System of Local Councils*

The Local Government Act (Cap. 265) establishes a full-fledged system of local councils headed by a Minister.

There are various types of council: county councils, a city councils, municipal councils, town councils and urban councils. Further provisions are made in the Act establishing local government boundaries, constitution of authorities and elections, proceeding general administration and committees, powers, duties and functions and finances. They provided for the reporting, investigation and control of local authorities. The Minister for Local Government exercises immense powers over the councils including the power to establish any area to be or cease to be a municipality, county, or township; to define the boundaries of a municipality, county or township, to

assign or alter the name of a municipality, county or township; to alter the boundaries of a municipality, county or township, by either adding or subtracting from its area; to amalgamate two or more counties into one county; to investigate the affairs of local authorities and to issue an order for the winding up of a local authority and to appoint a commission, among others.

These authorities are constituted by such a number of councillors as may be elected, nominated or appointed. The Electoral Commission establishes the electoral areas and boundaries from which the councillors are elected. The nominations are based on the proportion of political parties in the respective councils.

Elections to local councils are based on wards. The Electoral Commission has stepped in to rationalise the number of wards. The Commission, after a public hearing, drastically reduced the number of wards that had been created unjustifiably and for political reasons.

At their first meeting after election, the councillors elect their leaders; in the case of the city and municipal councils, the mayor, deputy mayor; and in the case of county and town councils, the chair and deputy chair.

Local authorities are run by Government officers from the Public Service Commission. This arrangement has often created a lot of problems for the local authorities since the Government officials seconded to the authorities do not owe any allegiance to the elected councillors. Conflicts are, therefore, commonplace.

The primary function of local authorities is to render services to residents. These include markets and social welfare, regulating liquor sales and certain businesses and land use planning.

Local authorities are largely funded by the central Government, even though they may raise their own revenue by licensing business premises. The Local Authorities Transfer Fund (Act no. 8 of 1998) establishes the Local Authorities Transfer Fund to which the Government remits 5% of all income tax collections to fund affairs of local authorities.

A commission of Inquiry into the Affairs of Local Authorities (the Omamo Commission) and other bodies, including submissions to this Commission, have identified various problems affecting local authorities. Among these are:

- the functions of local governments are mainly administrative and regulatory, having little to do with self-determination;
- local development strategies are based on central planning;
- centralisation of power in national Government ministries has led to a wide variety of constraints on local government development;
- Central Government grants to local authorities are increasingly inadequate; a general lack of managerial and technical expertise precludes the formation of effective local government institutions and a desirable working relationship between the central and local governments;

- creation of councils is erratic and done without any consultation with the residents; indeed, urban, municipal, and town councils have been created without any objective criteria. Thus, there is much in-congruency throughout the country.
- the Act lacks uniform application throughout the country and is inadequate in several areas - for example, it does not state the consequences of particular designations-Nairobi has had a city council since 1950, yet there is no provision for a city council, nor does the Act state what special responsibilities and privileges a city council has, the law does not say that each district area has to be a county council.
- the criteria for composing local authority areas are superfluous and result in a bloated and largely inefficient council, it gives no criteria or qualifications for nominating and appointing councillors; neither are special interest groups defined; nominated councillors serve merely the interests of nominating parties or individual politicians;
- the Ministry of Local Government has no facilities or capacity to supervise local authorities, the minister has wide powers exercised without consultation with and participation by the people; ministers have used such powers to create new haphazard counties and municipalities; and
- the fact that local government powers and finances are not protected by the Constitution has exposed the system to manipulation, high-level corruption and unbridled plenary powers to the minister.

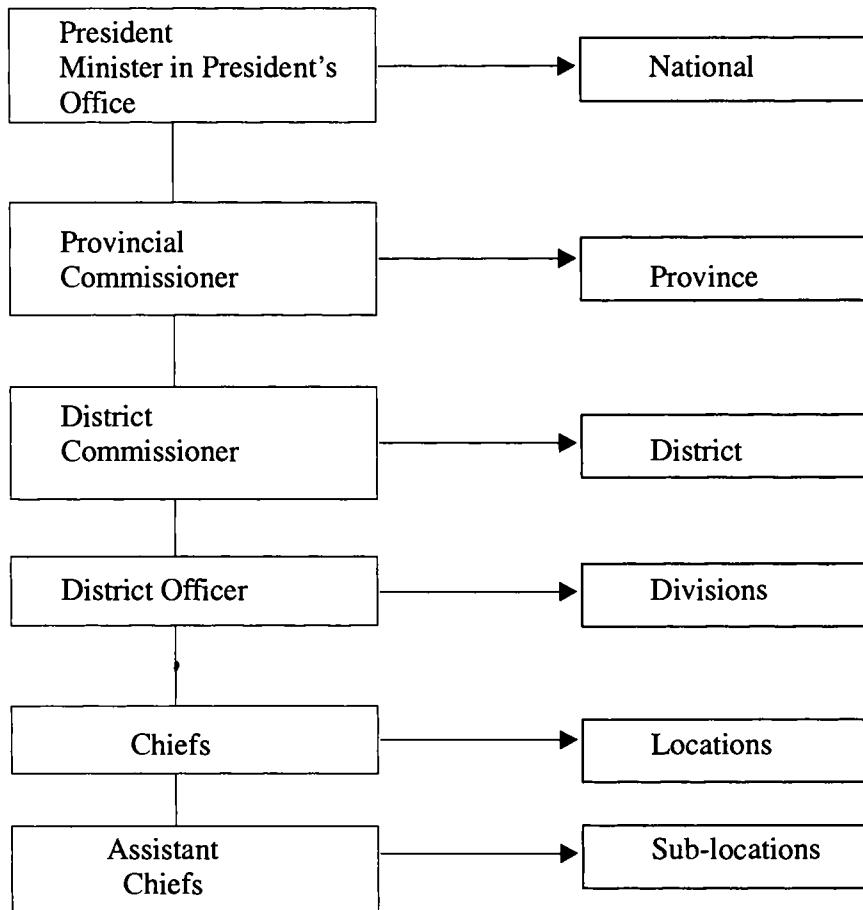
(ii) *The Provincial Administration*

In addition to local government authorities, there is a provincial administration system, although the Constitution makes no mention of it. Historically, it is a replica of colonial administrative institutions developed to ensure that the colonial regime knew what was happening throughout the country. It was, as now, a system of deconcentration, in which the central government agents were posted to the various administrative divisions. One of the glaring legacies of the system is that it did not allow for public participation and has, in the submissions to the Commission, by the people, been referred to as the "...antithesis of people's right to govern themselves..."

Today, its role and orientation has not changed significantly, except that it has, in addition, continued to play a key role in the planning and implementation of Government policies, public administration and security enforcement from the province to the village. All provincial administrators attend security training for six months to enable them deal with law and order. For example, in the Poverty Reduction Strategy Paper, it was said that: 'the provincial administration is responsible for providing leadership, policy direction and secure environment in order to achieve social, economic and political stability.'

The structure of the Provincial Administration as given in Figure 3 below, consists of the provincial commissioner, the district commissioner, the district officer, chiefs and sub-chiefs. Under the Chiefs Act (cap 128), chiefs and assistant chiefs have a wide variety of administrative and law and order powers. They have functions in connection with public health (like preventing water pollution), preventing crime (like arresting people and seizing stolen cattle). A minister may order a chief to require people to perform community service in emergencies or to conserve natural resources.

Figure 3: Kenya's Provincial Administration Structure



The administration has been severely criticised as both authoritarian and paternalistic. Complaints of misuse of power, corruption and abuse of citizens' rights have been levelled against it. It has also been used to repress political plurality. Although some of the most objectionable features of the system were removed when the Chiefs' Act was amended in 1997, in practice, provincial Administration's operations have not changed.

15.2.3 Devolution of powers in other Constitutions

As we have indicated, devolution of powers can take many forms. The distribution of functions between the various government units and the extent to which power is shared among and across those units will depend, therefore, on the structure of devolution in any given jurisdiction. The most extensive systems of devolution are those associated with systems of government whereby several states unite such as Switzerland and the emerging European Union. These are called *confederal systems*. They permit independent political units to come together for strictly limited purposes, usually foreign affairs and defence and, more recently, economics. Next are *federal systems*, such as the United States, India, Nigeria, Malaysia and Brazil. In federations, units or states are usually strong and equally strong general government, each exercising powers delegated to it by the

people. Some 23 countries around the world were formally federal. Then there are *decentralised systems* operating on the basis of regional or local government structures. The extent of devolution in *decentralised systems* varies depending on the issues the national government intends to manage. The constitutions of most African countries have adopted this system. Whatever system of devolution of power in any country , constitutional provisions normally provide, *inter alia*, for:

- a clear structure for each level of devolution;
- specific areas of responsibility for the national government at those levels;
- a clear definition of independent functions and powers vested in the various levels of devolution;
- inter-governmental relations among devolved units and the national government;
- financial and resource control by devolved government units; and
- the system of representation by the people in the organs of devolved units.

15.2.4 What the People Said

Many people spoke on the issue of devolution. Their views may be summarised as follows:

- (a) *On structure, that*
- i) Government should be required to divide resource benefits between the national Government and the communities where such resources are found;
 - ii) while some said that powers should be devolved to provinces, others favoured districts as the principal units of devolution;
 - iii) many people, especially in Coast Province and parts of the Rift Valley, recommended *majimbo*; on the other hand, many opposed *majimbo*.
 - iv) there was wide support for local government, which people said should be strengthened to support the State in local administrative, management and development activities;
 - v) There was also a widespread feeling
 - of alienation from central government power since power is concentrated in the national Government, and to a remarkable extent, in the President; power is also concentrated spatially in the capital .
 - that local authorities have been weakened;
 - of marginalisation and neglect, indeed, of victimization, for their political affiliation;
 - of unjust deprivation of resources;
 - that their problems arise from government policies over which they have no control;
 - that devolution (perhaps resulting in a different constituency structure) would give them parliamentary and local representation and greater control of resources, especially land;
 - that there should be more communal forms of organization, including the role of elders; and
 - that they should be enabled to determine their own choices,

lifestyles, e.g., pastoralism.

- (b) *On election of councillors; that*
 - i) all councillors should be elected none should be nominated;
 - ii) Mayors and chairs of local authorities should be elected directly by the people;
 - iii) Councillors should be required to have a set minimum educational qualifications;
 - iv) there should be a certain proportion of women in local councils; and
 - v) local elections should not be on a party basis.
- (c) *On land administration, that*
 - i) chiefs should be elected;
 - ii) a role should be found for traditional institutions, including elders;
 - iii) establish a council of elders to handle village administrative and development matters;
 - iv) the provincial administration should be abolished entirely or retained only at the district level and below but not at the province level; and
 - v) replace Provincial Administration with strengthened local authority administrations, or with elected bodies, to make them answerable to the people.
- (d) *On other matters, that -*
 - i) the local community should control/regulate land;
 - ii) districts should not have 'tribal' appellations, e.g., Kuria, Kisii and Embu;
 - iii) local councils should be involved at the centre of decision-making through/ by establishing a senate;
 - iv) Local authority budgeting should be done at the grassroots level;
 - v) local communities should be involved in resource management; they should also benefit from resources developed locally, and taxes collected from citizens; other residents and companies should be justly distributed between the central Government and local authorities and that local authorities should enjoy financial independence and no interference by Parliament.
- (e) *On decentralisation in general, that*
 - i) central government powers and functions should be decentralised;
 - ii) there should be an end to the colonial and post-colonial history of excluding communities at the grassroots from participating in local governance;
 - iii) Organs of devolution should include
 - a Provincial Council – an elected provincial commissioner and his deputy and two district representatives.
 - two types of local authorities rural counties and urban county councils;
 - local government supervision councils, oversight councils working in consultation with provincial councils to supervise the functions of local authorities;
 - iv) The functions of local authorities should include
 - provision of social services;

- maintenance of local infrastructures, such as roads, hospitals, schools and recreation parks;
- promotion of cultural activities; and
- promotion of participatory democracy within the local community.

(f) *On the Provincial Administration system, that*

- i) because district commissioners and district officers are not usually local people, they have little understanding of the local situation and concerns;
- ii) There has been a tendency recently for staff recruited to the provincial administration to be from specific ethnic groups and political shades which support the President; the current Provincial Commissioner (PC) of North-Eastern Province is the first from the area and this has made a big difference to the role of that office;
- iii) there are complaints that the Chiefs have failed to take account of the fact that the Chiefs' Act has been amended;
- iv) the use of the provincial administration system, with its close association with the ruling party, was felt to be an obstacle to fair voting - because it keeps order at polling stations and essentially conducts elections and the Electoral Commission relies heavily on it,
- v) although people do look to the provincial administration for help, women, particularly, have sometimes complained of lack of attention, especially where reports on domestic violence are made.
- vi) people complained of rampant corruption, inadequate personnel, poor equipment, poor management and lack of skills to resolve conflicts, inadequate capacity to manage cross-border activities, poor service delivery and poor co-ordination of rural development.
- vii) the District Development Committees, as currently set up, are not representative of the local community; most members are civil servants who do not come from the area and who often stay there for only a short while;
- viii) the system has a stifling impact on local government; on many occasions, the provincial administration has refused to co-operate with the local authorities, ignoring their views, refusing them licences and central Government funds;
- ix) the overall structure of decision-making bodies at the local level is under-funded, bureaucratic and excessively centralised.
- x) establish a gradual process of abolition of provincial administration and transfer its functions to a new local government system;
- xi) if the provincial administration is retained, it must be more accountable to the people or be replaced with a strengthened elected local authority administration answerable to the people; and
- xii) any development, planning, policy formulation and budgetary allocation should involve local communities.

15.2.5 Commentary

There is a broad consensus among the people that state power and authority should be devolved.

It was also obvious that the people want the functions carried out by the provincial administration to be given to the local government agencies. There was a general

agreement that the provincial administration, in its current form, needs to be phased out.

Although there was a general agreement among Kenyans that devolution is necessary, there was less agreement on its form and levels. While many people in provinces such as Coast and parts of the North Eastern and Rift Valley, proposed a federal form of devolution (*majimbo*), many people in Central, Nairobi, Eastern, Western and parts of Nyanza provinces proposed devolution within a unitary system. In either case, few submissions to the Commission provided details.

Nonetheless, the people feel they are subjects, not citizens. At present, they feel disempowered and alienated from the government. They feel that decisions about their lives are being made in places remote from themselves and without consultation with them. They consider that they are discriminated against and that they have been unjustly deprived of their resources. There was a widespread wish for people to take charge of their own lives. They want to use community institutions for land management and other local affairs; they want power closer to where they live and to participate in public affairs.

The Commission, therefore, has no doubt that — consistent with the goals of review and people's views — there has to be a transfer of very substantial powers and functions to local levels. It is also very clear to us that the transfer has to be to bodies which are democratic and participatory. People will not be content with mere administrative decentralization (deconcentration).

The Commission believes that the way forward is to design a system of devolution which agrees with the reasons given for it by the people.

These demands, expressed in terms of devolution, are as much criticisms of the present political system and how it has been used as amounting to a desire for a particular alternative structure. The Commission considers that some of the problems of alienation and unjust distribution of resources would be taken care of by the system of government we now recommend. The new system would be participatory and people would have possibilities and procedures to influence policy and institutions to which they can make complaints and seek redress. The oppressive weight of provincial administration would be taken off their back.

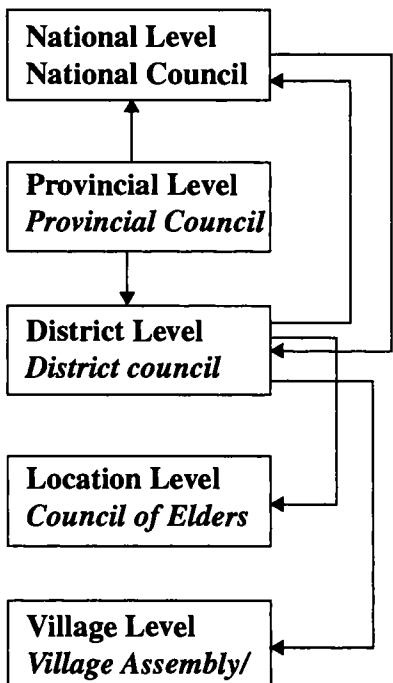
15.2.6 Recommendations

The Commission recommended, therefore

- (a) *On principles of devolution, that*
 - i) the model of devolution adopted should reflect a cost-benefit analysis of devolution and what devolution is meant to achieve;
 - ii) the levels of devolution and the powers to be exercised by the devolved units would be clearly defined by an Act of Parliament;
 - iii) the model of devolution should reflect the following broad principles:
 - discrete demarcation of the functions and powers within and across the units of devolution in a way that checks power and reduces conflict in its exercise;
 - efficient and equitable mobilisation, allocation and management of resources;

- a need to enhance participatory governance and accommodate diversity; and
 - including cultural diversity, the needs of vulnerable groups, such as women, children, the disabled, minorities and the marginalized;
- iv) the financial arrangements for funding devolved units and for the relationship between the national Government and the unit, including the mechanisms to co-ordinate the interlink between the various levels of government (national, provincial, district and location) fashioned in a way that ensures autonomy and accountability by the devolved units;
- v) the new Constitution should set up transitional mechanisms for phasing out the *status quo* and replacing it with the new order;
- vi) there should be an ingrained dispute settlement mechanism;
- vii) devolved units are entitled to an equitable share of revenue raised nationally to enable them to provide basic services and perform their responsibilities;
- viii) national Government institutions and departments should be arranged to ensure equitable distribution of resources throughout the country; and
- ix) the details of the functioning of the different units of devolution would be clearly spelt out in an Act of Parliament.
- (b) *On the structure of devolution, that*
- i) there be a five-tier devolution system involving national, provincial, district, locational and village institutions, with the district as the principal unit of devolution below the national levels indicated in figure 12b;
 - ii) separate provisions for urban areas;

Figure 4: Proposed Devolution Structure



- iii) the system of devolution based on elected councils and elected executives accountable to the councils at each level, characterised by the separation of powers;
 - iv) at least one third of the members of each Council be women;
 - v) the electoral system to ensure representation of all cultural communities at each level;
 - vi) an Act of Parliament to provide for recall of a council by voters;
 - vii) the village and location to have executive powers only — they shall relate largely to implementation of the policies of the district council, but shall include initiatives of a local nature and settlement of disputes like a small claims court;
 - viii) District and provincial councils to have both legislative and executive powers;
 - ix) the interests of the provincial and district councils be complementary, not antagonistic; and
 - x) electoral units be determined by electoral laws.
- (c) *On functions of units of devolution,*
- i) that village councils would -
 - mobilise residents on local issues as the point of contact between the village and the location/wards; and
 - be managed and administered by village elders.
 - ii) that Locational Councils would
 - enable communities to manage their own affairs;
 - exercise only executive functions in particular,
 - administration at the location level;
 - initiation of development projects;
 - advice to the district council on matters affecting the community;
 - solve disputes like a small claims court;
 - mobilise people around local units;
 - mobilise and manage community resources and development funds and processes; and
 - implement policies approved by the district council to develop the location;
 - be run by a council of village elders, two from each village in the location; the elected representatives shall elect among themselves the chairperson, treasurer and other officials;
 - the location executive would consist of the councils, officials and the administrator as an *ex officio* member;
 - there would be a small secretariat to assist the location council to manage its affairs; and
 - the location administrator would be elected directly by the people, as prescribed by the district council;
 - (iii) that District councils would
 - be the principal level of devolution;
 - perform both legislative and executive functions;
 - have as its district council the legislative organ;
 - have an executive organ responsible to the district council; and
 - have power to hire and fire their staff;
 - have power to:
 - formulate policies within their areas of jurisdiction;
 - provide public services and infrastructures;

- execute development programmes;
 - raise and spend revenue locally by levying taxes, rates and duties;
 - liaise with central authorities; and
 - recruit, retain and dismiss staff;
 - be composed of councillors drawn from the number of wards in the current county councils elected as follows:
 - the councillors to be elected for a term of 4 years;
 - the elections to be conducted by the Electoral Commission of Kenya;
 - the candidates must have attained KSCE level education;
 - nomination of candidates to be through political parties, but the provision of independent candidates to apply at this level; and
 - candidates for nomination shall be of the minimum age of 21 years;
 - in principle, be permitted and able to operate under national legislation in concurrent laws, but be authorised to adopt national laws to local circumstances within limits to be laid down in an Act of Parliament; thus, the content and style of drafting central legislation should allow for modification and implementation by districts;
 - in principle, be the vehicle through which the national government implements policy;
 - in principle, be able to seek assistance from the national Government to discharge their responsibilities;
 - be subject to the jurisdiction of a national ombudsman, the human rights Commission, etc;
 - at their first sitting, elect one of their own as chairperson;
 - be administered by a district governor;
 - the governor to be the political head of the district;
 - elected directly by universal adult suffrage of the entire District for a term of 4 years renewable once;
 - who must be a resident of the respective districts;
 - who is not less than 35 years and not more than 70 years old and a graduate from a recognised university;
 - who shall run the affairs of the district with the assistance of persons with appropriate qualifications drawn from the district; the number of persons to assist the governor shall be ten to form a District cabinet;
 - answerable to the people in the District directly; and
 - removable by the electorate or by a vote of no confidence by the council;
- (iv) that Provincial councils would consist of chairpersons of district councils and other stakeholders; members of the provincial council would determine their chairperson on a rotational basis, have both executive and legislative powers on subjects within their executive responsibilities among which would be to
- promote co-operation between districts;
 - increase the capacity of districts and facilitate the effective discharge of their functions;
 - co-ordinate issues that affect districts;
 - deal with trans-provincial issues/concerns;
 - manage provincial institutions and resources;
 - plan the province's development;
 - develop and monitor the provincial infrastructure; and
 - provide technical assistance to district councils, where necessary;

- (v) that urban councils operate within the district councils in which they are located, although they may be allowed to retain a special administrative mechanism since they are complex ecosystems; and
- (vi) that Nairobi shall be treated as the national capital territory and be administered in accordance with an Act of Parliament.

(d) On the relationship between District and Provincial Councils

That they may co-operate in discharging their functions; for this purpose, they may set up joint committees or joint authorities; the majority's support of the members of each council shall be necessary for co-operation; cooperation arrangements may be terminated on a majority vote of district councillors.

(e) On the sharing of natural resources between the District and the Central Government

That legislation should entitle districts to a substantial share of the revenue from local resources; provisions would be made for allocating a fixed percentage to the communities in whose area the resources are located.

(f) On financial arrangements in general, that

- i) the national Government be responsible for collecting major sources of revenue;
- ii) District councils may impose taxes or levies to be specified in an Act of Parliament;
- iii) the national revenue be shared equitably with the district councils;
- iv) detailed legislation be enacted providing for
 - allocation of a fixed percentage to the communities in whose area the resources are located;
 - a ratio for sharing the national resources in district councils' territories;
 - taxes and levies which the district council may impose;
 - financial and accounting procedures of accounts;
 - provision of equalisation grants or grants-in-aid to marginalised communities;
- v) Provincial secretariats be funded from the Consolidated Fund, District contributions and revenue raised from provincial utilities;
- vi) Districts be funded by Government grants, Government transfer funds and revenue raised from local utilities;
- vii) accounts of devolved funds be audited by the Auditor General; and
- viii) national revenue be shared equitably between districts and the national Government.

(g) On intergovernmental relations,

- i) the national Government should establish a ministry [of devolution/district governments] to deal/liaise with the provincial and district councils.
- ii) establish a ministry of devolution to deal/liaise with provincial and district councils;
- iii) the central Government's public servants posted in provinces and districts liaise with district and provincial councils to exchange information and co-ordination of policies and administration;
- iv) a district council may be suspended in case of emergencies, war or corruption or gross inefficiency; except for the first two cases, no council may be suspended unless an independent commission of inquiry has investigated allegations against

- it and the President is satisfied that the allegations are justified; during the suspension, arrangements for discharging of the functions the District council's functions, as specified in an Act of Parliament, should be put in place; the authority should closely liaise with the relevant provincial council; no suspension can last for more than 90 days, during which new council elections must be held if necessary;
- v) the functions and resources to be transferred to district councils be phased out to ensure that councils have the requisite ability; and
 - vi) no one may hold public or political office in both the central Government and a devolved government.
- (h) *On abolition of Provincial Administration, that*
- i) the provincial administration be abolished;
 - ii) the central government may station its officials in provinces and districts to carry out central Government functions.
- (i) *On entrenchment, that*
- i) the devolution structures and levels be entrenched in the Constitution;
 - ii) the Constitution should list the names of the districts and provinces to which power is to be devolved; and
 - iii) the already established Boundaries Commission should have power to establish, abolish, create, recreate, align and realign provincial and district boundaries for the purposes of the Constitution;
- (j) *On dispute Settlement Mechanisms, that*
- i) all disputes between district councils and the provincial councils, and between district councils and the national Government be first determined by the High Court; and
 - ii) the right of appeal should lie in the Court of Appeal and the Supreme Court in that order.

CHAPTER SIXTEEN

NATIONAL SECURITY

16.1 The Mandate of the Commission

The mandate of the Commission under the Act is to ensure that the Constitution secures provisions therein for:-

- Establishing security and defence forces that are politically neutral, disciplined, patriotic and totally under civilian control;
- Establishing defence forces that guarantees the well being of the people of Kenya sovereignty, peace, national unity and integrity of the Republic;
- Providing mechanisms within the defence forces that safeguard the rights of the people against these security and defence organs.
- Examining threat against national security that is defining security threat.

Further, the Act requires the Commission to ensure that the review process :-

- Specify the circumstances under which the declaration of war may be made.
- Specify the circumstances under which defence forces of the Republic can be committed to options outside the borders of state.

16.2 National Security System of Kenya

16.2.1 General Principles

a) Definition of National Security

The issue of a country's defence and national security system is of great importance to the people. This is attributed to the fact that security is at the core of the country's ability to attain and maintain prosperity and development. The well being of a nation can only be achieved through its continued stability and peace. In light of this, most, if not all defence and security systems of the world are created to enforce laws, eradicate crime, offer forms of protection against outside threat and maintain order.

Security is basically about the protection of basic and innermost values of the actors. It is also stated that the concept of security is dependant on who defines it and in what context. Security has therefore been elaborated to include all the levels of the society namely: political level, the economy and the social well being of the community. Consequently, true security is achieved if all levels are seen to be secured. However, the focal point observed by this part of the constitution is at the social level. Organs of National Security provide services that ensure societal cohesiveness. It therefore implies that if security is achieved at this level, then it is safe to state that political and economical security must follow.

National Security is then seen as essentially ensuring that there is existence of national stability, civil order, safety of the individual property and other national

and international interests against threats emanating from within and without. National Security basically entails that : -

- Individuals are free to go about their business without fear of domestic or foreign peril;
- The Prevention and suppression of rebellion, mutiny, violence, intimidation, disorder and unlawful attempts of conspiracies to overthrow the government or current constitutions;
- Creation of an environment that promotes free exchange of ideas; and
- Organs of national security to be able to perform their duty without prejudice, keeping in accordance with the constitution and law including customary, international laws and agreements binding to Kenya and that they have a platform to air their grievances ensuring harmony.

b) Organs of National Security

In Kenya today, we have several organs vested with the responsibility of guaranteeing the country's security. They are as follows: -

- The Armed Forces, comprising of the Kenya Navy, the Kenya Air Force, and the Kenya Army;
- The Kenya Police;
- National Security Intelligence Service; and
- Administration Police.

The above mentioned organs of national security have a distinct interrelationship, which operates to guarantee security at all levels of society. Subsequently, it is imperative to note that these organs operate at different levels of security. The Armed Forces Act (Cap 199) establishes the Armed Forces and they are charged with the defence of the Republic of Kenya. They further enhance order through the support of civil power.

The Kenya Police are established under The Kenya Police Act (Cap 84). The primary function of the force is the maintenance of law and order, the preservation of peace, the protection of life and property, the prevention and detection of crime, the apprehension of offenders, and the enforcement of all laws and regulations bound to the country.

The Administration Police Act (Cap 85) establishes the Administration Police. The Force operates at the lower levels of government, such as the District, Location, Sub-location and even at the Village levels. Their principal function is to preserve the public peace, prevent the commission of offence and apprehend all offenders at the district level. The Administration Police are under the direct administration of the District Commissioner and the District Officer, subject to directions of the Provincial Commissioner. The Administration Police officers also give assistance to the chief and sub-chief when called upon.

The National Security Intelligence Service is an organ or agent of state established to monitor any activities, events or circumstances which may upset national stability and in effect the security of the state. It serves an early warning system designed to maintain surveillance and collect information on all activities, which may prejudice national security for the Government to take timely action. In its activities, the National Intelligence strides over the responsibilities of the Civil

Police and Defence Forces. It therefore compliments the Defence Forces and the Police.

16.3 National Security under the Current Constitution

The constitution of Kenya as it is today does not contain a systematic set of provisions on defence and National Security. It merely establishes the guidelines that govern the existing organs of National Security meaning they are regulated by ordinary legislations. The Kenya Police operate under The Police Act (cap 85). It outlines the following:-

- Establishment and membership
- Procedure for appointment
- Qualifications and disqualifications of appointment
- Procedures to be followed on executing the law
- Training
- Code of conduct

The same goes for the Administration Police Act (cap 85) and the Armed Forces (cap 199). Until recently, there was no existing legislation for the National Security Intelligence Service. This was due to the fact that the NSIS, which was originally known as The Special Branch, was a section under the Kenya Police. To improve its image and distinguish it so that it becomes an entity of its own it was evolved to its current status. It now operates under The National Intelligence Service Act (no. 11 of 1988).

Although not much has been stated on National Security, a provision has been made in the current constitution under (s. 85 (1)) which states that, "The President may at any time, by order published under The Kenya Gazette, bringing into operation, generally or in any part of Kenya part 3 of the preservation of Public Security Act or any of the provisions of that part of the Act". Most of the legislation pertaining to public security can be found in the Public Security Act (cap 57). It basically states the protection and property.

In addition, the president who is stated as the Commander-in-Chief of the Armed Forces, appoints the Commissioner of Police (s.(86)) while other senior police officers are appointed by the Public Service Commission (PSC). There is however a section in the constitution which prevents disciplinary steps under law with respect to Armed Forces, Police and the NSIS being challenged on the basis of some of rights provisions (s.86 (2)).

This is a very different situation from that which prevailed at the time of independence.

In 1963, the constitution provided expressly for a separate Police Service Commission (s.160). There was a National Security Council consisting of (minister and the chairman of the law and order committee of each Regional Assembly) to keep under constant review, all matters relating to the organization, maintenance and administration of the Police force (s.157). The head of state acting on the recommendation of the Police Service Commission (s.162) appoints the Inspector General of police (equivalent to the Commissioner of Police). The

Governor-General was the commander in chief, but this was a purely ceremonial position because he exercised almost all his functions on the advice of the Cabinet or Minister (s. 79).

16.4 National Security in Other Constitutions

Contrary to the situation in Kenya, other countries such as South Africa and Uganda provide for the establishment of their National Security Organs in their constitutions. In Uganda, a whole chapter (cap 12) is dedicated to Defence and National Security. The different security organs are highlighted, their functions and their systematic code of work.

The ideology of civilian control of their defence forces is also adopted in other countries. The nature of civilian oversight varies according to the responsibilities of the force. But some degree of oversight is observed for any services.

16.5 What the People Said

- (a) *On establishment of the disciplined forces by the constitution:*
 - (i) The disciplined forces should be established as an independent commission, institution or body;
 - (ii) The disciplined forces should be under the ministry of defence;
 - (iii) The disciplined forces should be abolished;
 - (iv) The disciplined forces should be under the ministry of Home Affairs;
 - (v) The Federal government should establish the disciplined forces;
- (b) *On the mechanisms to be used to discipline The Armed Forces:*
 - (i) Court martial should be used to discipline the forces;
 - (ii) Parliament should discipline the Armed Forces;
 - (iii) Armed Forces should be disciplined through sacking;
 - (iv) The Armed Forces should be re-trained;
 - (v) A Defence Security Commission should discipline the Armed Forces;
- (c) *On whether The President should be The Commander-in-Chief of the Armed Forces: -*
 - (i) No, The President should not be The Commander-In-chief;
 - (ii) The Chief of General staff should be the Chief of The Armed Forces;
 - (iii) The Prime Minister should be the Commander-in-Chief;
 - (iv) A professional in the force should be the Commander-in-Chief;
 - (v) A commission be in charge of The Armed Force;
- (d) *On who should have the authority to invoke emergency powers:*
 - (i) The Supreme Defence Council should have authority;
 - (ii) The War Council should have authority;
 - (iii) Parliament should have authority;
 - (iv) The citizens should have authority;
 - (v) The cabinet should have authority;
 - (vi) An independent established body should have authority

16.6 Commentary

The people seem to want a defence system that is not wholly shouldered on one individual. In the same light, they want a defence force that is civilian controlled. The people are demanding a defence system, which derives its authority from an established body consisting of persons from the existing defence forces.

16.7 Recommendations

The commission recommends, therefore:

(a) On all the Defence Forces

- (i) A statement of values and principles applying to all the Defence Forces.
- (ii) A statement specific to each service setting out its principles and constitutional responsibilities.
- (iii) There should be National Security Organs, which should comprise the following:
 - The Defence Force;
 - The Kenya Police Force;
 - The National Security Intelligence Service; and
 - Administration Police.
- (iv) An agency established or any other organization concerned with National Security should not be established except by or under an act of parliament.
- (v) The National Security Organs be subordinate to civil authority.
- (vi) There should be a National Security Council, to ensure the integration of the domestic, foreign and military services, departments and agencies to co-operate effectively in matters relating to national security consisting of :
 - The president;
 - The vice president;
 - The prime minister;
 - The minister in charge of Defence;
 - Minister Internal Affairs;
 - Minister Foreign Affairs;
 - The Inspector-General;
 - Director Kenya Correctional services;
 - Director of National Security Intelligence Service; and
 - The Attorney General.

(b) On the National Security Council:

- (i) The National Security Council should make rules of procedure to guide the conduct.
- (ii) The president should preside at the meeting of the council and the absence of the president, the vice president, and in absence of vice president, the Prime Minister.
- (iii) The National Security Council should elect or appoint its secretary.
- (iv) The National Security Council should inform parliament of the state of security of the Republic through relevant committees.

- (v) Where the president declares a state of emergency, the National Security council should be the authority responsibility, subject to the constitution, for taking and implementing the measures that are reasonably justifiable for dealing with the situation that had arisen.
- (vi) The National Security Council may with the approval of parliament:
- Deploy national forces outside Kenya for United Nations and other peace support operations.
 - Deployment of foreign forces in Kenya Defence Force.
- (c) *On the defence force:*
- (i) There should be an established Defence Force consisting of:-
- The Kenya Army
 - The Kenya Air Force
 - The Kenya Navy
- (ii) Defence Council should be established consisting of:
- Minister of Defence; to be chairperson;
 - Assistant Minister of Defence; to be vice chairperson ;
 - The Chief of General Staff;
 - The Navy Commander;
 - The Army Commander;
 - The Air Force Commander; and
 - The Permanent Secretary for Defence.
- (iii) The defence should appoint its secretary.
- (iv) The defence council should be responsible for the overall polity control and supervision of Defence Forces and such other functions as may be specified by Parliament.
- (d) *On commanding officers*
- (i) The president who is the Commander-in Chief of the Armed Forces shall, in consultation with the Defence Council, appoint the Chief of general staff, the Army Commander, the Air Force Commander, and the Navy Commander.
- (ii) The Chief of General Staff and the Service Commanders should exercise command over the defence forces and perform such other duties as may be specified by Parliament.
- (e) *On the National Security Intelligence Service:*
- (i) There should be service to be known as The National Security Intelligence Service.
- (ii) The National Intelligence Security Service should be under the command of the Director General who shall be appointed by the president with the approval of Parliament.
- (iii) The National Security Intelligence Service should be under the command of the Director General who should be appointed by the President with the approval of Parliament.
- (iv) The National Security Intelligence Service should be responsible for security, intelligence and counter intelligence.

- (v) Subject to the constitution; the National Security Intelligence Service should be organized and administered in such manner and should exercise such functions as Parliament may prescribe.
- (vi) The National Security Intelligence Security Service in its function observe respect of human rights, fundamental freedoms and the rule of law.
- (vii) No intelligence service other than an intelligence division of the defence force or the Kenya Police shall be established except by or under an Act of Parliament.
- (viii) There should be an established Security Intelligence Council consisting of:-
 - The minister for the time being responsible for matters relating to national security and intelligence, who should be the chairperson.
 - The Minister for Foreign Affairs.
 - The Minister for Finance.
 - The Attorney General.
 - The Permanent Secretary, Secretary to the Cabinet and head of Public Service.
- (ix) The Director-General of the National Security Intelligence Service should be the secretary to the National Security Intelligence Council.
- (x) The functions of the National Security Intelligence Council should be:-
 - To advise the National Security on matters pertaining to:-
 - National Security and Intelligence policies;
 - The Administration of the service; and
 - The expenditure of the service.
 - To perform such other functions as are conferred on the Council by an Act of Parliament.

(f) On the administration police service:

- (i) There should be an established service known as Administration Police Service, and it should be a separate service from the Kenya Police Service.
- (ii) Parliament may enact legislation for the organization, administration and discipline of the Administration Police Service including the appointment of persons to offices or ranks, their removal from office, the punishment of breaches of discipline and determining their conditions of service.
- (iii) The Administration Police Service should be a national service and the division of its function should be organized to take into account the structure of devolution.

(g) On the Kenya Police Service:

- (i) There should be an established service known as the Kenya Police Service.
- (ii) Subject to the constitution, The Police Service should be organized and administered in such manner and shall have such functions as Parliament may prescribe.
- (iii) The Police Service should be professional and disciplined.
- (iv) The Police service shall remain a National Police Force, and the division of its function shall be organized to take into account the structure of devolution.

- (v) The Police Service should work closely with communities to ensure security and safety for the people of Kenya.
- (vi) There shall be an Inspector General of the Kenya Police Service who should be the head of the Kenya Police Service.
- (vii) Subject to the provisions of the Constitution, the Inspector General should, in exercise of this functions, not be subject to the direction or control of any person or authority.
- (viii) Subject to the constitution, the Inspector General may be removed from office by the president for just cause.
- (ix) The Inspector General should not be removed from office except on the recommendation of a tribunal appointed by the president comprising of the following:-
 - The chairperson of the Kenya Police Service Commission;
 - A high court judge; and
 - One other person.

CHAPTER SEVENTEEN

ENVIRONMENT AND NATURAL RESOURCES

17.1 The Mandate of the Commission

Although no express mandate is given on the environment, the Review Act requires, *inter alia*, that the Commission ensure that there are provisions in the Constitution fore establishing an equitable framework for economic growth and access to national resources. The state of natural resources and the environment is an important parameter of this challenge.

17.2 The State of Kenya's Natural Resources

17.2.1 General Principles

Natural resources play a major role in modern social and economic development. At the macro-level, African countries rely on resources such as water, minerals, forests and wildlife as a source of much needed revenue. At the micro-level, communities depend entirely on them for their livelihood. Regulation of natural resources is necessary mainly because of their scarcity, increasing demand and increasingly varied uses of natural resources.

Kenya is relatively well endowed with natural resources. These include energy, water, minerals, fisheries, wildlife and forests. Approximately 19% of the total energy consumed by the domestic and industrial sectors is biogas, i.e., fuel-wood derived from forests, woodlands, shrubs and farm trees.

Consumption of wood for fuel both depletes the nation's forest cover and is a factor in global warming. In the drought prone areas, devegetation has outstripped the ecosystem's ability to sufficiently renew wood. This has been made particularly grave in the arid and semi-arid lands (ASALS) of Northern Kenya — Kakuma in Turkana and Dadaab in Garissa—— where hundreds and thousands of refugees have been settled for over a decade.

Hydroelectric power produces most of Kenya's electricity, but large dams have their social and environmental costs. Solar power is perhaps the best alternative energy source. Some constitutions contain obligations on the State to develop and encourage the use of renewable energy.

Kenya's water resources consist of:

- Inland saline or fresh water lakes;
- The Indian Ocean;
- Permanent and seasonal rivers;
- Wetlands;
- Boreholes;
- Dams; and
- Ponds.

Of special mention are wetlands, marshes, fens, peatland or waterlands. Wetlands serve many functions and have a number of important benefits, including ground water recharge, flood control, erosion control, water supply and biodiversity reserves. The major threats to wetlands are reclamation into farmland and pollution.

Water resource use is estimated to be distributed as follows:

- Agriculture 65%;
- Domestic use 18%;
- Industrial use 13%; and
- Other functions 4%.

Water use conflicts arising from shortages for domestic, industrial and irrigation use abound. Critical issues of equity in extraction and supply of water, conflict on riparian rights and ecological balance, therefore, proliferate. In particular, there is the issue of upstream extraction of water for irrigation and hydro-power, etc., and the effect on the river regime, volume of flow and hence, the impact on the downstream beneficiaries of river water. This is particularly the case with the Tana and the Uweso Nyiro rivers. While the latter has dried up due to over-extraction upstream, the former has had its volume of flow reduced significantly due to the many hydro-power projects on its upstream and other uses there. This has affected the livelihood of pastoralists who make the majority - if not all - of the downstream beneficiaries of both rivers.

There is also the issue of the 3 mile strip of the Tana River placed, as well with Garissa, and in Coast Province by the colonial government giving rise to conflict over access to the river's water.

Population growth, currently at 2.9% per annum, and the over dependence on a diminishing water resource, will push Kenya beyond the water barrier of less than 5m per capita per annum by 2025. Kenya is already categorised as one of the "chronic water shortage states", by the World Resources Institute Report of 2000. It is obvious that water needs to be used efficiently and effectively and that the Constitution ought to provide an equitable and sustainable balance between competing interests.

Kenya has a wide variety of mineral resources, both metallic and non-metallic, including: titanium, silver, lead, soda ash, salt and sand. These may be found in land under any type of tenure. Exploiting them presents a clear and common dilemma. On the one hand, it offers a valuable source of revenue for the nation and opportunities for local income generation, but, on the other, mineral exploitation virtually always involves environmental damage. It means destruction of vegetation, water bodies and biodiversity and land pollution, disturbance to human and wildlife populations and loss of cultural and aesthetic sites. The dilemma is encapsulated in the fact that, while the submission to the Commission by the Ministry of Environment and Natural Resources proposed a number of measures to remove bureaucratic and legal obstacles to mineral exploitation, the Government's 1999 Sessional Paper committed it to enhancing protection against environmental damage impacts by mining. The challenge is to reconcile these aims and to define the respective roles, responsibilities and rights of the State and local communities on minerals.

Significant incomes are generated from fishing for local consumption and export, or as sport. Countrywide, around one million people derive their livelihood from fisheries — directly or indirectly through supplementary services like fish processing, marketing, boat building and repairs, etc. There must be sufficient safeguards on the use and management of fisheries to ensure sustainability. The nature of nets and the regulation of catch should be laid down.

Kenya's wildlife is found in national parks, game reserves and other protected areas — covering about 44,564 km² or 75% of the country's land mass. However, a significant population of wild game is found outside the protected areas. Ninety per cent of these areas are in the ASALS. Community-based privately owned game parks are also emerging in recent years.

Conflicts between human and wildlife interests are common in these areas and take two main forms:

- Damage by wildlife to human beings, crops and livestock; and
- Humans causing damage to wildlife through poaching and destroying the habitat.

Ineffective management of these conflicts may lead to loss of property, life and interest in wildlife conservation. Forests are being lost through excisions every year. Forest resources are pivotal to sustaining both the local and national economies. Locally, forests are the source of food, fodder, wood fuel, construction material, spiritual and cultural nourishment and traditional medicines, among others. At the national level, forest plantation is a major source of industrial forest products. The environmental and ecological functions and employment value of the sector are also critical. The forest policy affirms that forestry ranks as one of the country's most important national assets.

Traditionally, forests belonged to communities, and approximately 15,000 traditional forest owners live in indigenous forests, including the Somek of Mt. Elgon, the Ogiek of the Mau forest, the Mijikenda of the Kaya forests and the Boni of Boni forest in Lamu and Ijara districts. It is also estimated that the 2.9 million people who live next to indigenous forests directly depend on forest resources for their livelihood. The current forest policy contains provisions that recognise the role of local communities in conserving and managing forests and forest resources. The management practices under the Forest Act, however, still reflect the firm application of command and control principles instituted during the colonial period.

17.2.2 Natural Resources in the current Constitution

The current Constitution has very little to say about natural resources. Under the 1963 Constitution, all minerals, water bodies, national (i.e., gazetted) forests were the property of the State or, in restricted circumstances, the regions. With the abolition of regionalism, most of these resources reverted to ownership and control by the President as the guardian of State property. That is the situation today.

17.2.3 Natural Resources in other Constitutions

Provisions for managing and controlling natural resources, i.e., water, forests, wildlife, biodiversity and marine resources, among others, are now common in many constitutions. These are found in the bills of rights, the directive principles of state policy or special chapters.

For example, the Constitution of Uganda provides in the section on National Objectives and Directive Principles of State Policy that

The State shall protect important natural resources, including land, water, wetlands, minerals, oil, fauna and flora on behalf of the people of Uganda.

The Constitution of Ghana provides in Article 268 (1) that

Any transaction, contract or undertaking involving the grant of a right or concession by or on behalf of any person, including the Government of Ghana, to any other person or body of persons howsoever described, for the exploitation of any mineral, water or other natural resources of Ghana, made or entered into after the coming into force of this Constitution, shall be subject to ratification by Parliament.

The general approach in these and similar constitutions is to

- create an obligation to protect and manage natural resources substantially; or
- otherwise regulate the appropriation or exploitation of these resources.

17.2.4 What the People Said

Public views on ownership, control and management of natural resources were extremely candid. They may be summarised as follows:

- (a) *On Water:*
- i) the Government should take up the responsibility of providing clean piped water to all its citizens;
 - ii) every Kenyan should have access to clean piped water;
 - iii) the Government should protect all water catchment areas;
 - iv) dams should be cleared and reclaimed;
 - v) adequate resources should be allocated to rehabilitate depleted water schemes and facilitate the harvesting of rain water;
 - vi) the Government should dig up boreholes and dams in arid and semi-arid areas, especially in northern Kenya and North-Eastern Province;
 - vii) water should be provided in at least every 2 km radius;
 - viii) environmentally friendly water projects should be implemented;
 - ix) residents should benefit from water resources originating from their areas, for example, the people of Taita Taveta and the Mzima Springs;
 - x) rivers passing through a region should be used to supply the people of that region and river courses should not be diverted to serve other regions for example, the Uwaso Nyiro River in North-Eastern Province.

- b) On Minerals:*
- i) mineral exploitation should benefit the communities around such resources, i.e., 50% of the incomes generated should be left in such areas to develop them;
 - ii) the laws pertaining to mineral exploitations should be in line with local needs;
 - iii) the Government should put more research into mineral exploration and excavation for the benefit of the people;
 - iv) mineral mining rights should be given to the local communities;
 - v) communities residing where minerals are discovered should be properly compensated; and
 - vi) the mining policy should be reviewed to benefit the public.
- (c) On Fisheries:*
- i) the fishing industry has been faced with problems of:
 - Insecurity: foreigners fishing in Kenya's waters;
 - Restrictions: Kenyans were not free to access all parts of the beaches available; and
 - Poor fishing skills.
 - ii) Kenyans felt that security should be granted to fishermen and that the fishing industry should be revived;
 - iii) Restrictions on fishing should be imposed only on foreigners;
 - iv) Small-scale fishing should also be legalized; fishing protection laws should be enforced; and
 - v) the Government should provide fishing equipment and skills to fishermen, and fishing nets.
- (d) On Wildlife:*
- i) wildlife be protected from poaching;
 - ii) national parks should be fenced;
 - iii) new and rare wildlife species should be added to the parks;
 - iv) the size of national parks be reduced and the land recovered distributed to people;
 - v) one third of the revenue generated from the national parks be reserved for the local area;
 - vi) damage caused by wildlife to the communities around should be compensated; and
 - vii) human deaths caused by wildlife be compensated at Ksh.3 million while compensation for property damage should be over Ksh.100,000; the Act on national parks should be repealed to incorporate game reserves in total.
- (e) On Forests:*
- i) the Government should undertake massive afforestation to prevent desert encroachment;
 - ii) forest land should not be allocated to individuals or illegally acquired;
 - iii) environmental protection issues, such as prohibition of clearing of the remaining natural forests, should be included in the Constitution;

- iv) stiff penalties should be meted out to individuals and companies involved in environmental degradation, like deforestation;
- v) agro-forest tree nurseries should be established for trees to be planted throughout the country;
- vi) forest land should not be degazetted; and
- vii) the local community should have a role in the managing and protecting forests and be consulted about all excisions.

17.2.5 Commentary

The people want to own and control their resources. They demand a constitutional dispensation to ensure that the incomes and other benefits derived from those resources are used for, and applied to, development programmes in their local areas. Specifically, they emphasise that many of these, resources are essential to eradicating poverty. They argued, for example, that, since it is a basic need, the Government should ensure that every Kenyan has access to clean water. Many submissions from the arid and semi arid regions emphasised the fact that pastoralists had suffered a great deal searching for water in other areas. They lamented that no water projects had been established in their regions. It was also pointed out that most of the tribal clashes in their regions were caused by the struggle for access to water poits. Regarding minerals, they lamented that communities around whom minerals are found had not benefited from such excavation and had lost their lands and properties with minimal or no compensation at all. Foreigners appear to have had more rights than the indigenous people where mining is concerned. On wildlife, many decried the fact that under current laws, wildlife is better protected than human beings near protected areas. Indeed, wildlife appears to be more valuable to the Government than the communities and so large tracts of land were reserved for them while humancommunities remained landless.

17.2.6 Recommendations

- (a) *The Commission recommended, therefore, that*
 - (i) natural resources including minerals, water, land, forests, fisheries and wetlands, within Kenya's jurisdiction belong to the people, except where ownership is expressly vested in other persons or people by the Constitution; any such other person or people hold any such natural resources as are formally vested in or managed by it in trust for the people;
 - (ii) Parliament should be the public trustee over natural resources and exercise the overall control of transactions, contracts or undertakings in granting rights or concessions, to ensure protection and sustainable use by the present and future generations;
 - (iii) any transaction, contract or undertaking involving the grant of a right or concession by or for any person, including the Government, to any person or body, however described for the exploitation or use of any minerals, petroleum and oils, water, forest or forest products, fisheries, flora and fauna or other natural resources, including major changes in land use, be subject to ratification by a two thirds majority of Parliament;

- (iv) whenever Parliament considers ratification of any transaction, contract or undertaking under the foregoing, it decides by a resolution supported by not less than two thirds of its total membership, that there is, where applicable, satisfactory preparation of the following plans:
- an environmental management plan;
 - an environmental restoration plan;
 - a resettlement plan;
 - a revenue management plan, ensuring that the proceeds from exploiting the natural resources will be used for effective national socio-economic development;
 - an industrial development plan, ensuring that the natural resources promote national industrialisation and that, in every case, value is added before export;
 - a socio-economic development plan, establishing that the transactions and use of the natural resources, including revenue management, shall result in sustainable socio-economic development and benefit local community; and
 - an environmental impact assessment.
- (v) the State promote protection of natural resources to ensure that the management of energy, water, land, air, wetlands and other resources is done in such a manner as to promote sustainable development for the present and future generations; and to create the right conditions for securing participation by the people to safeguard the environment;
- (vi) it be the duty of the State, through appropriate bodies and with recourse to popular initiative, to:
- prevent and control pollution and its effects and all harmful forms of erosion;
 - have regard in regional planning to creating balanced biological areas;
 - create and develop natural reserves, parks and recreational areas and classify and protect landscapes and sites to ensure conservation of nature and preservation of the cultural assets of historical or artistic interest; and
 - promote rational use of natural resources and safeguard their capacity for renewal and ecological stability;
- (vii) the State must take steps to carry out assessments of the existing ecological and other natural resources of the nation and maintain a data bank, to be revised every ten years;
- (viii) in developing management strategies, the precautionary approach, including a precautionary principle, environmental impact assessment, environmental audit and environmental monitoring, should be applied so that, where there are threats of irreversible damage, lack of full scientific certainty should not be used as a reason for postponing cost-effective action to prevent environmental degradation;
- (ix) the State should protect, establish and develop natural reserves, national parks, as well as recreation areas and ensure conservation of flora and fauna and preservation of biological diversity for the present and future generations;

- (x) decisions on protecting and exploiting natural resources must pay special heed to people's interests, especially of communities affected by virtue of their historic connection with the areas involved or by residence;
- (xi) persons and communities who suffer harm as a result of conservation or preservation measures on natural resources should be adequately compensated by the State;
- (xii) as reasonably as possible, the administration of natural resources must involve participation by the local community, while not losing sight of the need for natural resources to be protected and developed for the benefit of the nation as a whole; these principles are to be applied to all projects, including national parks, mineral exploitation, tourism development, dam and irrigation projects;
- (xiii) there should be no arbitrary restrictions on the period in which Trust Land should be set aside for mineral exploitation, such as is now found in S. 115 (3) of the Constitution (2 years);
- (xiv) include in the Constitution a provision that the law regulating mining should be reviewed and streamlined, incorporating provisions which reflect environmental and resource preservation and social justice/affirmative action;
- (xv) anyone who exploits mineral resources should be obliged to restore the damaged environment by such technical means as may be legally required by the appropriate public agency.

17.3 The State of Kenya's Environment

17.3.1 General Principles

The term “environment” is used here to refer to all natural resources and the context in which they exist and interact as well as the totality of the infrastructure constructed to support human socio-economic activities. The impact of technology, human consumption and an increasing population has led to pressure on and imbalances in the environment which require management interventions.

The primary challenge is to manage the environment sustainably. The most famous statement of what sustainability means is: “*development which meets the needs of the present generation while not compromising the ability of future generations to meet their needs.*” The same concept is to be applied between the present generations. In practice, this concept has been translated into a number of governance principles and structures and enacted into legislation in many African jurisdictions.

The sustainable management of the environment requires fidelity to a number of values and principles; including precocity, trans-generational equity and responsibility for and prevention of environmental damage. More recently, public participation in decision-making affecting the environment, including the right to receive information, has become an important principle in environmental governance.

17.3.2 The Environment in the current Constitution

The current Constitution makes no mention of the environment as such. Some have argued, based on court decisions in other countries, that the right to life includes a right to an environment not dangerous to health. The Environmental Management & Co-ordination Act (Act No. 8 of 1999), provides, however, that 'Every person in Kenya is entitled to a clean and healthy environment.' In addition, Kenya is a signatory to many of the major environmental treaties and non-binding agreements, including:

- The International Convention for the Prevention of Pollution of the Sea by oil;
- The Convention on the High Seas (London), 1954;
- The African Convention on the Conservation of Nature and Natural Resources (Algiers) 1968;
- The Convention on Wetlands of International Importance, especially as Waterfowl Habitat (Ramsar), 1971;
- The Convention Concerning the Protection of the World Cultural and Natural Heritage (Paris), 1972;
- The Convention on International Trade in Endangered Species (CITES) of Wild Fauna and Flora (Washington), 1973;
- The United Nations Convention on the Law of the Sea (1982);
- The Vienna Convention on the Protection of the Ozone Layer (Vienna), 1985;
- The United Nations Convention on Biological Diversity (Nairobi), 1992;
- The United Nations Framework Convention on Climate Change (Rio de Janeiro), 1992;
- The United Nations Convention to Combat Desertification (Paris), 1994;
- The Declaration of the United Nations Conference on Human Environment (1972); and
- The Rio Declaration on Environment and Development (1992).

Mount Kenya is a World Heritage Site under the Convention for the Protection of the World Cultural and Natural Heritage, and Kenya must "ensure the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage." Lakes Nakuru and Naivasha are protected wetlands under the Ramsar Convention.

A number of countries, including Brazil, South Africa, Uganda, Namibia, Malawi, Thailand and India, have elevated the kind of entitlement in the Act to the level of a constitutional obligation.

17.3.3 The Environment in other Constitutions

Most modern constitutions now have extensive provisions on the environment. Such provisions, apart from being contained in statements of Directive Principles of State Policy or the Bill of Rights, also appear in articles dealing with land and natural resources. In more recent constitutions, environment is usually treated as a separate issue. The general approach in such constitutions is to:

- create a right to a clean and sustainable environment;

- impose an obligation on the state, individuals and other juristic entities to preserve and conserve the environment;
- accord a *locus standi* to any person to protect and defend environmental values through recourse to the courts;
- establish infrastructure for environmental governance;
- require that mechanisms be established for general environmental education; and
- require that an environmental impact assessment be conducted and the results built into decision-making prior to the exploitation of any environmental resources.

Constitutions which entrench these and other principles include Brazil, South Africa, Uganda, Malawi, Portugal, Ethiopia and Ghana.

17.3.4 What the People Said

Many people told the Commission that:

- (i) environmental protection should be enshrined in the Constitution;
- (ii) a limited amount of environmental resources with irreplaceable value, e.g., indigenous forests and endangered species, should be protected;
- (iii) the Constitution should protect the environment against deforestation, pollution, poaching and soil erosion;
- (iv) the community and Government should be stakeholders in environmental protection;
- (v) laws protecting the environment should be enforced by the Government;
- (vi) natural resources exploited from a region should benefit the local communities of that region, the local community, as a stakeholder getting at least 60% of the benefits;
- (vii) communities residing where natural resources are discovered should be adequately compensated and resettled;
- (viii) natural resources to be protected should include minerals, forests, wildlife, water catchment areas and land;
- (ix) the Government should own all the natural resources but the management, revenue collection, preservation and protection should be entrusted to the local communities; and
- (x) Forest land grabbed by politically correct people should be reposessed.

17.3.5 Commentary

It is evident that, although the level of public awareness of environmental issues was quite high, it tended to vary from region to region. This is to be expected since environmental concerns cannot be uniform throughout the country or between urban and rural areas. Nevertheless, a desire to preserve and protect the quality of environmental resources was evident among all categories of people who addressed the Commission.

17.3.6 Recommendations

The Commission recommended, therefore, that:

- (a) The new Constitution must provide for environmental rights and duties as well as conservation and sustainable use of Kenya's natural resources as well as intra — and inter-generational equity;
- (b) The Constitution should require that the following principles guide all administrative and judicial decisions on the environment and natural resources to ensure development:
 - i) the principle of public participation in the development of policies, plans and processes for managing the environment;
 - ii) the principle of inter-generational equity, ensuring that the present generation uses and enjoys environmental and natural resources without jeopardising the interests of future generations;
 - iii) the "polluter-pays" principle, which requires that those responsible for degrading environment and natural resources are responsible for the costs of redress including reparation/compensation;
 - iv) that social and cultural values traditionally applied by any community to manage the environment or natural resources be observed so long as they are relevant and are not repugnant to justice, morality or any written law;
 - v) the principle of international co-operation in managing the environment and natural resources, where such resources are shared with other States or where management measures in one State may have adverse or positive consequences in another State;
 - vi) the precautionary principle which requires a precautionary approach, includes an environmental impact assessment and, where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing cost-effective measures to prevent new or continuing environmental degradation;
 - vii) the principle that exigencies of sound environmental protection should be integrated in all development planning and management;
 - viii) the principle that for every aspect of environmental planning, there should be an institutional policy framework to implement it;
- (c) the Constitution should contain provisions giving every person in Kenya a right to protect the environment through reasonable legislative resources protected, for the benefit of present and future generations;
- (d) the State should promote progressive and rapid improvement of the quality of life for all Kenyans;
- (e) the Government should be under a duty to:
 - i) protect Kenya's wildlife, genetic resources and biological diversity;
 - ii) protect forests and encourage and carry out reforestation;
 - iii) practise, encourage and, where practicable, require waste minimisation and recycling;
 - iv) practise, encourage, and where practicable, require water conservation, specifically, protection of water catchment areas, water bodies and groundwater conservation areas;
 - v) practice, encourage, and where practicable, require use and development of energy-efficient technology and renewable energy sources;

- vi) legislate to protect the environment, giving priority to preventing environmental damage and degradation, but also providing for restoration in case of existing or unavoidable damage and for compensation to those affected;
 - vii) set up and ensure an effectively functioning system of environmental impact assessment which:
 - applies to all projects likely (alone or with other projects) to have a significant impact on the environment or natural resources, including government projects;
 - is open to and gives adequate opportunity for public comment;
 - is scrutinised by a body independent of the project's proponent, the views of which must be taken into consideration when deciding whether or not to approve the project.
 - viii) set up systems of environmental audit and monitoring;
 - ix) ensure that environmental standards keep up to par with developing standards internationally; and
 - x) promote environmental education at all levels of instruction and help increase public awareness of the need to preserve the environment.
- (f) behaviour activities and deemed injurious to the environment should subject the culprits, whether individuals or legal entities, to criminal and administrative penalties, apart from obligating them to repair the damage;
- (g) notwithstanding the provisions of any written law authorising individuals to seek redress in a court of law for environmental violation, any Kenyan may petition the High Court to require the Minister and the project's proponents to comply with the conditions already presented to Parliament if there is evidence of deviation from these;
- (h) the State must ensure that environmental protection is accorded sufficient significance in the minister's responsibilities, and that enforcement agencies are sufficiently resourced to enable implementation of this aspect of the Constitution;
- (i) the minister(s) responsible for the environment and natural resources should present reports to Parliament every two years, or any time frame deemed fit, providing details of progress made in implementing environmental operations and plans and may, by resolution, order modification or variation of the procedure for implementation;
- (j) where Parliament, after receiving a report, is convinced that there are gross violations of the plan originally ratified, may, by a resolution supported by a simple majority, order cessation of activities until a subsequent report confirms that the conditions are being complied with;
- (k) the State should seek co-operation with other States and, where appropriate, competent organizations to develop treaties for protecting the environment and promoting sustainable development at the regional or global levels for the present and future generations, and set up appropriate mechanisms for implementing the treaties, provided that, where observation of the State's international obligations will cause environmental damage and harm, the environment's safety and preservation should prevail;
- (l) the office of the Director-General of the National Environmental Management Authority should be established with security of tenure; and

- (m) the Director-General be appointed from among three distinguished experts in the environmental field after a public search for a candidate from among leading national authorities and exercise powers in accordance with the Environment Management and Co-ordination Act.

CHAPTER EIGHTEEN

LAND AND PROPERTY RIGHTS

18.1 The Mandate of the Commission

The Commission's mandate under the Act is:

...to examine the place of property and land rights, including private, government and first land in the constitutional framework and the law of Kenya and recommend improvement that will secure the fullest enjoyment of land and other property rights.

That mandate must be read together with other aspects of what the Act requires the Commission to examine, especially concerning the economy, the environment and natural resources.

18.2 The Land Question in Kenya

18.2.1 General Principles

(a) *Land in Economy and Society*

The land question - its ownership, access and use - has come to occupy a central place in public policy and political discourse in Kenya. This is because land has been the crux of cultural, economic and socio-political change. In fact, Kenya's political, economic, social and cultural history since the Arabs arrived at the Coast; and European settlers later in the 19th century, has been largely dominated and influenced by questions of access to, and control over land. Kenya's independence struggle was rooted in land. Furthermore, the management of the household, community and national economies is closely tied to land.

Following years of systematic imposition of Western land tenure and management systems, a large segment of the population continues to have difficulties not only in adapting to the modern agrarian economy but also in coping with the increasingly fragile and marginal environment, land degradation, low agricultural output and intensifying conflicts over access to and control of land and pervasive poverty. This situation has generated an increasing interest in land tenure and land use issues by scholars, policy-makers, politicians, the international community, governments and some international organizations for the last decade. They have invested heavily in land reform schemes. In Kenya, the Njonjo Commission on land laws is an example.

The advent of colonialism led to radical changes in land relations in Kenya and, especially, in the system of ownership, control and use by indigenous communities. By little more than a declaration, the communities were deprived not only of ultimate ownership but also of the most fertile areas of the country.

These were turned over to European settlers. Indigenous communities were, in turn, shunted to reserves, from which they were managed as labour pools for European agriculture.

In Kenya's coastal area - the ten - mile strip stretching inland from Vanga in the south to Kisimayu in the north - the story was very different. Here, the Sultan of Zanzibar acquired sovereignty over land on the mainland and, in 1895, the Coastal strip was the subject of a lease from the Sultan to the British government. Some pre-1895 land titles were recognised. At independence, some indigenous peoples were disappointed to discover that this did not mean land was to be returned to them. With independence, the problem of absentee landlords remained and the majority of indigenous coastal peoples have remained squatters on their own lands.

(b) *The Land Economy*

Kenya's economy is and will, for a long time, remain primarily dependent on agricultural and pastoral land uses. Current estimates indicate that agriculture and pastoralism not only provide livelihoods for over 75% of the population, they support 70% of all wage employment and contribute over 80% of export earnings. Crops that dominate the agricultural economy include coffee, tea, cashew nuts, sugar-cane, rice, citrus fruits, maize, sorghum, millet, cotton, horticulture and sisal. These are grown for both cash and subsistence by large and small-scale farmers in the medium to high-potential areas. Livestock farming for dairy and beef production is also a significant undertaking, especially in the ASAL, where over 50% of Kenya's livestock is located. Major land uses outside agriculture and pastoralism include harvesting of forest products timber and fuel wood - tourism, mining, fisheries and infrastructure. These together define the environment in which Kenya's land economy functions.

According to the economic survey for 2000, the economy has been in recession for the last three years. All major indicators recorded negative growth rates between 1997 and 1999. Growth in manufacture slumped primarily due to competition from cheap imports, dilapidated infrastructure and lower aggregate demand. In agriculture, growth rates fell from 1.5% to 1.2% between 1997 and 1999. Production of all major crops, except horticulture and coffee, declined sharply in the same period. Even where production increases were recorded, actual gross earnings declined. A national poverty survey indicates that the prevalence stands at 52.2%, meaning that this proportion of Kenyans cannot achieve the minimum expenditure needed to acquire basic food and other items. The survey also indicates that overall poverty stands at 53.9% and 49% in rural and urban areas, respectively. In rural Kenya, the incidence remains intricately linked to the state of the land economy.

A number of factors explain this rather dismal performance. First, there is inadequate rain in major food-growing areas following severe El Nino downpours only a few years earlier. Second the cost of agricultural inputs and labour shortages in an otherwise labour-intensive enterprise. This constraint was, among other things, a function of the escalating morbidity and mortality among the rural labour force due to the spread of HIV/AIDS infections. Third, there are exceptionally high pre-harvest and post-harvest losses due to inefficient production

and storage technologies. Finally, the effect of more systemic problems, the most important of which is decimation of land quality and destruction of associated resources through deforestation, encroachment on marginal lands, an increased population pressure, poverty-induced land use responses and a general absence of sound land and resource use policies.

(c) Land Politics

Beyond economic parameters, however, it is important to recognise that land issues are, in addition, deeply emotive for political and socio-cultural reasons.

The political parameters that have shaped the nature and characteristics of issues surrounding land are intricately intertwined with the country's history. A distinction must be made here between the ten-mile coastal strip (now part of Coast Province) and the rest of the country. Because the former was, until 1964 controlled and administered by colonial authorities for the Sultanate of Zanzibar, the politics of access to and control of land has always been and remains a complex issue, involving, interaction between the indigenous populations, Arab landlords and the State.

Although the control and administration of the rest of the country, including areas that were not under European settlement, was more direct, the land question remains an important factor in the political dynamics there as well. As a settler enclave, political relationships among white settlers *inter se* and between them and Africans were always determined by the land question: acquisition, ownership, control, use and distribution.

Thus, being central to political discourse throughout the country, the land question was, not surprisingly, the primary drive in the independence struggle. Beyond independence, in 1963, the land question quickly asserted itself as the fundamental factor in the dynamics of power and wealth allocation among the elite, who were now in control of the instruments of State. The land question, therefore, remains high on the political and development agenda.

18.2.2 Land in the current Constitution

(a) Background

Under the 1963 Constitution, any land rights of the colonial government were given to the region in which the land was situated. This meant that Crown Land, and the interest in leased land, when the lease ended, reverted to the Government. At the same time, all land in the "native reserves" became Trust Land vested in the county councils. The councils had to hold that land for the benefit of those who lived on it, and were required to recognise rights under customary law, which applied to that land.

When the regional structure was abolished, trust land remained with the county councils.

(b) The Current Constitution

Land is dealt with in the current Constitution at two levels. First, rights in land, as property, are protected by section 75, hence may not be expropriated without prompt compensation. Second, chapter IX of the Constitution vests trust land - ownership, control and management in county councils, which must hold and use them for the benefit of the communities entitled to them in accordance with customary law. Under the Trust Land Act (Cap 288) this trust is held by the Commissioner of Lands for county councils.

Trust land may, at a county council's request, be adjudicated and registered as individual property. When that happens, such land ceases to be trust land and may be disposed of free from any obligation. Trust land may also be set apart either by the county council or by the President in consultation with the relevant county council for use and occupation by a public body or authority or for public purposes.

Besides the Constitution, more elaborate provisions on land and land management are found in many other legislative instruments. Kenya's present legal framework for land management may broadly be said to recognise three categories of land, namely: government land, private land and Trust Land. These are the subject of a morass of legislation which may be categorised into those creating and defining substantive property rights in land (the Registered Land Act (Cap 300), the Indian Transfer of Property Act, 1882); those providing for transition from customary land tenure to individualisation of tenure systems by registration (the Land Adjudication Act (Cap 284), the Land Consolidation Act (Cap 283), the Registration of Titles Act (Cap 281)); and those regulating transactions in land (the Land Control Act (Cap 302)). Regulation of land use is governed by a number of statutes, including the Agriculture Act (Cap.318), the Public Health Act (Cap 242), the Chief's Act (Cap 128), the Local Government Act (Cap.265), and the Physical Planning Act (Act No. 6 of 1996). Customary law remains part of Kenya's legal system and applies in so far as it is not inconsistent with any written law.

Of these statutes, the Agriculture Act and the Physical Planning Act deserve particular mention. The former, which is the primary instrument for rural land use regulation is concerned with promoting, sustaining and conserving agriculture, protecting soil and its fertility, and stimulating the development of agricultural land in accordance with the accepted management and husbandry practices. The Act vests wide discretionary powers in the minister, including the power to make regulations on preservation, use and development of agricultural land. Rules under the Act use authorised persons to prohibit clearing vegetation and depasturing livestock and requiring tree planting to prevent soil erosion. Failure to comply with the requirements is a criminal offence. Further, powers are vested in the Director of Agriculture to issue land preservation orders requiring landowners to take conservation measures or prohibit activities incompatible with good land management. These provisions may be used to enforce proper land use and management, a necessary condition for sustainable development.

The latter legislation is an instrument of development control throughout the country, especially in urban areas. The Act is applicable at the regional level, to any Government land, Trust Land or private land under a county council to improve the land and provide for the land's physical development. The Act can also be applied to secure a suitable provision for infrastructure, such as transportation, public utility and commercial, industrial, residential and recreational areas, including parks, open spaces and reserves and to make a suitable provision for using the land for building. The Act provides for planning, replanning or reconstructing the whole or part of a given land area under a regional physical development plan and for controlling the order, nature and direction of local development. In Urban areas, including cities, the Act provides for short-term and long-term physical development, renewal or redevelopment to guide and coordinate the development of infrastructure and services, and specifically to control the use and development of land or to provide any land in such areas for public purposes. In general, the Act provides for preparing regional and local physical development plans, controlling development including development permission or approval, subdivision and disposal of land, extension of leases, etc., subject to the Government Land Act, the Trust Land Act, and any other written laws on land administration.

It is important to note that, under the Physical Planning Act, local authorities will continue to control and prohibit land development and use in the interest of proper and orderly development in their areas of jurisdiction but in a manner consistent with the provision of the physical development plan (s) approved by the Director of Physical Planning. To ensure that land sub-division in local authorities areas is orderly, registered physical planners must carry out the sub-division.

18.2.3 Land in other Constitutions

Constitutions generally deal with land issues in one or both of two ways. The first is to include it in the general provisions which protect property rights; hence, to make no distinction between land and other forms of property. Most constitutions handed down by the British colonial authorities to independent governments around the world have tended to take this approach. The right to property in land in such constitutions, therefore, is treated as an inherent (or fundamental) right. The second is to separate land (i.e., immovable property) from other forms of property and to classify it as a national asset requiring a special and more elaborate constitutional treatment. More recent constitutions, especially those enacted in Africa in the last decade, have, in general, taken this approach. The Constitution of Uganda states in article 237(1), for example, that

“Land in Uganda belongs to the citizens of Uganda and shall vest in them in accordance with the land tenure systems provided for in this Constitution”.

“The right to ownership of rural and urban land as well as natural resources is exclusively vested in the State and in the people of Ethiopia. Land is the common property of Nations, Nationalities and Peoples of Ethiopia and shall not be subjected to sale or other means of exchange”.

Because of a long history of political subjugation founded on land expropriation, the Constitution of South Africa has, understandably, very elaborate provisions on land. For example, article 25 (5), (7), (8), provides, *inter alia*, that

“The State must take reasonable legislative and other measures within its available resources to foster conditions which enable citizens to gain access to land on an equitable basis...”

“A person or community dispossessed of property after June, 1913, as a result of past racially discriminating laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress;”

“No provision of this section shall impede the State from taking legislative and other measures to achieve land... and related reform to redress the results of past racial discrimination... “

18.2.4 What the People Said

There were extensive views on the land question and, in particular, the constitutional status of Trust Lands. These may be summarised as follows:

(a) *as a general rule, that*

- i) all land should belong to the people, not to the Government;
- ii) all Government land which has been “grabbed” should be reposessed;
- iii) trust land should be vested in local communities directly;
- iv) land distribution should be equitable;
- v) land unjustly expropriated by the colonial or current Government should be restored to the rightful owners or, where this is not practicable, reparations should be made; and
- vi) restitution should be made for damage arising as a result of land conflicts or clashes, especially in the Rift Valley, Coast, North-Eastern province and parts of Eastern province.

(b) *in specific terms, that*

- i) forest areas being ‘de gazetted’, allocated to individuals and deforested for environmental and resource considerations or even of resident communities would effectively destroy the livelihood of the people, (for example, clearing parts of the Mau forest would finally deprive the Ogiek people and ultimately destroy the community itself);
- ii) the effects of unjust deprivation of land during the colonial period are still felt by some communities;
- iii) some communities are deprived of access to important cultural sites;
- iv) There is a good deal of land lying idle while others are crying out for access to land;
- v) some hold land as a symbol of power, rather than for productive use;
- vi) many asked for an upper limit on the amount of land that can be held by an individual; land held above this ceiling to be expropriated and re-distributed to landless people: and

- vii) women should have better rights to land: in terms of control of the land they cultivate, inheritance rights, and matrimonial property rights.

18.2.5 Commentary

Ample evidence of the importance of land reform and the land question has been provided to the Commission in its hearings throughout the country. Indeed, there is hardly a part of the country that does not suffer land conflicts.

The underlying causes of land-related conflicts include:

- colonial and post-colonial legacy;
- downgrading of customary law on the imposed English law;
- use of powers over land allocation to further political and ethnic interests;
- widespread manipulation and deeply rooted corruption in the alienation of Government land;
- deprivation of the poor of their land and displacement of people;
- concentration of land ownership in a few hands;
- increasing privatisation and commoditisation of land and erosion of people's rights to use and occupy land, to bury the dead and to have access for gathering natural products;
- growing poverty and human misery created by landlessness and tenure insecurity in both rural and urban areas;
- environmental degradation due to a breakdown in natural resource management, particularly common property resources;
- degazetttement and alienation of forest reserves, in some cases long used and occupied by indigenous people;
- lack of State organs to address complaints and to resolve land disputes in a timely and even-handed manner;
- gender and age discrimination in both customary and statutory law in land administration; and
- lack of a coherent national land policy.

To these factors must be added population growth, which in some areas has led to farms being sub-divided many times over to levels that are sub-economic and to economic decline. The HIV/AIDS pandemic is causing many demographic changes and normal patterns of land holding and transfers. Many people are unexpectedly deprived of the support of relatives. Parents are inheriting land from their children, not the other way round. Women are left with young children and their only form of support is the land they till but which they cannot own.

18.2.6 Recommendations

The Commission recommended, therefore, that the following principles, elaborated at 18.3.6 *infra*, be embodied in the new Constitution:

- (a) All land should belong to the people and that
 - i) the people should hold such land in accordance with systems of tenure defined by legislation; and
 - ii) non-citizens of Kenya should be prohibited from acquiring land except on the basis of leasehold tenure;

- (b) Land should be classified as either public, private or community and that
 - i) public land be clearly delineated and held in trust for the people in terms of legislation defining the nature and extent of such trust;
 - ii) private land be acquired and held by individuals or other juridical persons in accordance with systems of tenure defined by legislation;
 - iii) community lands be clearly delineated and vested in communities or their agents, in accordance with systems of tenure defined by legislation;
- (c) property rights lawfully acquired be protected and be freely alienated without gender discrimination, subject only to such restriction as are inherent in the tenure systems creating them;
- (d) all land, however acquired or held, be subject to the inherent power of the State to acquire or regulate in the public interest or for the public benefit;
- (e) there be established a land commission whose functions will include:
 - i) holding title to public land;
 - ii) a periodic review of land policy and law;
 - iii) developing principles for sustainable use and management of land; and
 - iv) exercising residual land administration functions.
- (f) Parliament to make law within two years of its first sitting under the new Constitution providing for:
 - i) incorporation of the above principles;
 - ii) mechanisms for resolving land disputes under different tenure categories;
 - iii) the system of land administration under different tenure categories;
 - iv) an expeditious and cost-effective system of land alienation -transfers and transmissions;
 - v) equitable distribution of land, including resolution of problems of landlessness, or spontaneous urban settlement;
 - vi) investigation and resolution of historical claims, especially in the Coast, Rift Valley and North-Eastern provinces and other areas;
 - vii) introduction of tax on idle and underused land; and
 - viii) co-ordination and simplification of land laws.

18.3 Tenure and Administration of Land

18.3.1 General Principles

(a) Systems of Land Tenure

Land tenure refers to the terms and conditions under which access rights are acquired, retained, used, disposed of or transmitted. An examination of land tenure is, therefore, central to the formulation of an adequate land policy; there are three ways of classifying land tenure regimes in Kenya.

The first concerns the location of the radical title to specific territorial land units, i.e., whether as “government” under the Government Lands Act (Cap 280) or as Trust Land. As a form of tenure, the classification of land as “government” means that such land is “private” to the Government and may be and has, in practice, been

used and disposed of as such. Indeed, there is no legal requirement under the Act, or any other principle of law, for the Government to respond to any public obligation on the stewardship or use of land so classified. There is, therefore, no category of land that is public in the sense that it is held for and meant to be used for the benefit of the citizens. Thus, being an “estate” exclusive to the Government, it is not surprising that Government land has, in the last four decades, been the object of speculative disposition, wrongful appropriation and wanton destruction.

The classification of land as “trust” means, at least in terms of the Constitution and the Trust Land Act, that such land must be held for the benefit of the residents of those territorial units. The legal regime governing tenure relations in all Trust Land units is, therefore, customary law. Vesting both radical title and control of Trust Land in county councils, coupled with allocation of administrative responsibility for it, in the Commissioner of Lands, means, however, that customary tenure principles are hardly ever respected. Indeed, the constitutional contempt for Trust Lands evidenced, *inter alia*, in the lack of security for customary land rights and its perception as a transitory domain to be phased out at the earliest opportunity by privatisation of ownership rights, has led to expropriation of community property in many parts of the country.

The second way in which tenure regimes may be classified is in the legal regime governing land relations, i.e., whether that regime is statutory or customary. And the third is in the quantum of rights held, i.e., whether as freehold, leasehold or commonhold. As in the case of the first, these two regimes are also governed by distinct bodies of law made up of their own unique modes of derivation, alienation and ascertainment. As a result, Kenya’s property law remains one of the most fragmented, complex and inflationary in the region.

(b) Problems relating to Tenure

In addition to the fact that the law regime governing land tenure is complex and virtually inoperable, it has long been conceded that a number of problems will need to be resolved for Kenyans to have equitable access to land.

(i) *The Status of Women*

The first of these is to resolve women’s status. Women constitute over half the population and play a central role in agriculture: sixty-nine percent of the active female population work as subsistence farmers compared with 43% of men. Yet they own less than 10% of the available land. Women form the majority of the poor, and families headed by women are significantly poorer than those headed by men. Lack of ownership of property by women reduces production incentives, retards development and contributes to poverty and low self-esteem.

African customs support patrilineal inheritance and male control of decision-making that frequently exclude females from land ownership. Women are regarded as belonging neither to their natal nor to their marital clans, and get land from neither. Even where women do have rights to family land, male relatives take advantage of the adjudication and land titling process to deny women their share. Sometimes women support these traditions.

Widows are often disowned by their in-laws and rendered homeless. Since many wives have little control over income, during marital discord many women are sent away with little, if any, means of survival. Even when they have taken care of their parents, brothers often evict sisters when the parents die. Ten per cent of women slum dwellers left their rural homes because their marriages broke down, 8% because they were widowed and 8% due to pressures of single motherhood.

HIV/AIDS is seriously affecting the rights of surviving widows and orphans to customary land. In some cases, women are dispossessed of their land and property after their husbands' death. Widows are often unjustly condemned as the ones who have infected their husbands and are subsequently under pressure to leave their marital homes. Widows are mere trustees of the property, on behalf of the children. They cannot mortgage away the land and they lose the right to it on remarriage. Where such women are married without children, the norm is for them to be sent back to their parents as soon as the spouse is buried. Children, irrespective of their ages, are the most affected. Orphans are often disinherited by their adult male relatives. The rights of children of single mothers who die of AIDS are at the greatest risk due to the mother's uncertain position in her community and the stigma associated with the disease.

Although the Constitution prohibits discrimination on the basis of sex, s. 82 (4) makes exceptions on matters of personal law, including devolution of property upon death (which means that customary, Islamic and Hindu law, where applicable, and statutes which discriminate, are not contrary to the Constitution). The Law of Succession Act (Cap 160), which provides for dependants if a husband dies but there is no will, tries to expand the notion of dependants to include widows and children in polygamous as well as monogamous unions. However, there is an exception in s. 32 for agricultural land, livestock and crops in gazetted areas, which means that customary law, even if discriminatory, applies. Muslim law is also now excluded from the Act. If a man dies without leaving a will, his wife gets an interest in his property but this lasts only until she dies or remarries. If a man dies before his parents and leaves no will, his property goes first to his father, but, if the father is dead, to the mother - in other words, the father gets precedence. A child whose parents were not married (an illegitimate child) can inherit property from his or her father only in certain circumstances. Some of these laws can be considered discriminatory, but it is possible that they are not unconstitutional.

Kenya does not have a local statute on dividing of matrimonial property. The law is the 1882 Married Women's Property Act of England. Although this law says that when a woman marries she keeps her own property, the position on about the family house is unclear. The law tends to assume that land belongs only to the person in whose name it is registered; even if the wife has contributed by her remuneration from employment, or by her domestic work, to acquiring or developing the property, she may have no rights to it at all. When there is a divorce, or the husband decides to sell the house, the wife may find she has no rights and can be thrown out of the house. This may seem unfair, but it is not clear that it is discriminatory contrary to the Constitution.

(ii) Pastoral Communities

The second relates to the rights of pastoral population. The way in which pastoralists use land is rather different from the way in which settled communities do. There is even more emphasis on community land use. Pastoral people hold that land belongs to a group or "family" linked by descent or cultural affiliation. It is not owned in the sense that users enjoy unlimited rights to exploit and dispose of it at will. It is held in trust by the living for future generations, and the living have rights of use only, or "usufruct", which limits the intensity of use. This is the right to enjoy the product of land only if it does not cause damage and reduce its long-term productive capacity. Today, this concept is little understood and even less respected. The result has been the overriding customary pastoral land tenure systems to the great disadvantage of pastoral peoples. Land, once used sustainably, has been alienated and have often become degraded.

In 1968, with the support of donors, Kenya introduced group ranches in the semi-arid regions, which conferred formal and legal land tenure on a community of co-residents. Some pastoralists accepted the group ranch concept as a way to acquire legal tenure that would enable them to qualify for loans. However, the programme was unsuccessful because none of the group ranches was viable as an ecological or social unit. In the 1980s, the Government encouraged subdivision of the group ranches for individual owners. This created a stampede for individual titles, widespread fraud and land theft. Today, land use patterns and holding units are not able to meet subsistence and social needs or enhance sustainable resource management.

Despite a great deal of research, which has demonstrated the value of the pastoral way of life and the inappropriateness of past Government policies and interventions aimed at settling pastoralists, the negative image and poor understanding of the pastoral way of life continues. Pastoral communities, such as the Pokot, were among those who made the strongest presentations to the Commission on the damage done to their way of life by loss of land. The Government committed itself in its 1999 Sessional paper No. 6 to supporting pastoralism, where environmentally appropriate.

Any attempt to secure pastoral land rights should, however, be informed by a clear understanding of the reality of pastoral land use. Pastoral communities should thus be effectively involved in making decisions that have a direct bearing on their livelihood. Securing pastoral land rights, therefore, entails giving legal recognition to the existence and validity of their community-based property rights. These are rights that derive their authority from the community in which they are practised.

(iii) The Needs of the Urban Poor

The Third problem relates to the land needs of the urban poor. Of Nairobi's population of 2.5 million, about 60% live in slums. Kibera, Africa's largest slum, is in Nairobi and is home to an estimated 0.75 million people. Nairobi's municipal waste collection rates dropped from 90% in 1978 to 33% in 1998.

When it rains, storm water washes the accumulated waste into water sources used by the poor. Despite this, poor, landless, people continue to move to the city. Similar problems occur in and around Mombasa and other major towns.

Of the many lessons being learnt from past urban development failures, the most important is that improvements must involve local people in a meaningful way. Building trust and co-operation between Government officials and residents of informal settlements and creating the conditions for delivery of basic services (e.g., water and sanitation, waste management, safety and security) will take time. The efforts made by residents of informal settlements to improve their lot and organize services in the absence of any official assistance should be acknowledged. They find ways to clear and remove rubbish and construct latrines without official assistance. Community leaders emerge and small amounts are collected for services that people organize for themselves. These bottom-up developments in urban management and service delivery can be built on by the authorities and facilitated as part of a programme to bring about informal tenure arrangements within the ambit of the law. New ratepayers with property rights are in a much stronger position to improve their own social and economic well-being by investing in their holdings, in the knowledge that shelters will not be bulldozed and that they will reap the benefits of their labours.

Family members in informal settlements need to be assured that they will not be evicted without compensation; that they can improve their houses to protect themselves against weather, thieves, fire, floods, etc; that their children can inherit this property or that they can sell or otherwise transfer it. They may need to borrow money using the property as collateral. They may seek a reduction in property disputes, to have access to potable water, electricity, waste collection, basic health services, safe playing areas for children and upgraded roads. They need an inexpensive and accessible system of administering their property rights and escape exploitation from "slumlords". There is a great deal of experience in other countries that can be drawn on.

If a system preventing eviction is instituted as an interim measure, it may be advisable to provide that from the date on which the new Constitution is enacted (or perhaps even from an earlier date) no evictions at all should take place for a specific period to avoid a rush of evictions from landowners or public bodies trying to defeat the constitutional protection.

(iv) *The Status of Farm Dwellers*

The fourth problem relates to the status of farm dwellers, otherwise known as "squatters". Farm workers and their families and so-called 'squatters' often live on land owned by others. Landowners often infringe their basic human rights (e.g., human dignity, freedom and security, protection from servitude and forced labour). The redistribution of farms in the former White Highlands has resulted in complex land use and tenure arrangements. Due to spontaneous settlement, poor people are frequently without title deeds and are subject to eviction, as landowners (often absentee) seek to assert proprietary control over their land. An inevitable result of the sale or transfer (or redistribution) of large farms and certain types of Government land is that farm-worker tenants and their families as

well as other beneficial occupiers are subject to summary eviction without compensation.

Kenya should introduce effective measures to protect from eviction farm dwellers and people in long-term beneficial occupation of land. Due to poverty, there is a need for State legal advisory services to the poor who have little or no recourse under the present legal system. Illiterate and poorly served by public information services, they remain unaware of their rights under the existing or any new Constitution and other new laws. The few rural legal advisory offices, operated by NGOs, will be inadequate for the immense task of providing advice, information and representation in rural areas.

(v) *Past Land Grievances*

The fifth problem relates to grievances on land expropriations in colonial and post-colonial Kenya. The most important of these concerns ethnic Arab occupation of land in the Coastal strip and the massive expropriation of Maasai land under the guise of "agreements" signed with colonial authorities in 1804 and 1911. In more recent times, expropriations have occurred as a result of ethnic clashes in the Rift Valley, Coast and parts of Western and Nyanza provinces.

To reverse the process of land dispossession and return land to the descendants of previous users presents major practical difficulties. Today's communities are much larger than those originally evicted. It would be necessary to determine the situation prior to eviction and to identify the qualifying descendants of former owners. To what precise point in history should the clock be turned back? What criteria should be used to evaluate claims? It is not necessarily the case that all communities, or all individuals within communities, are equally disadvantaged. To give special treatment to a community on the sole basis that it was historically deprived of land may result in benefiting certain communities at the expense of people who are even more deprived. Again, certain land reforms which took place following independence on the basis of the willing-buyer, willing-seller principle have resulted in areas being occupied by communities who were not the original, pre-colonial, occupants.

(vi) *Land Tenure Reform*

The sixth problem relates to the impact of land tenure reforms; a comprehensive programme started in the mid-1950s with the sole purpose of individualising land holding in the African, i.e., Trust Land areas. That programme was and still is based on an old orthodoxy, namely, that, by changing tenure *per se*, rather than the agrarian structures and conditions under which production relations operate, it is possible to generate efficient land use practices. This proposition is founded on the thesis that ownership, *per se*, especially if it is individualised and is secure against State interference, is the foundation of economic initiative.

The above argument has been sold by free-enterprise economists and planners in Africa on two complementary fronts. First, it has been offered as the explanation for the alleged inability of indigenous tenure institutions to stimulate agricultural development, it being contended that, because of their communal nature, these

institutions are inherently incapable of accommodating modern production methods, techniques and practices. Second, it has been offered as the panacea for the morass of underdevelopment that continues to plague agriculture throughout Africa. The implication, therefore, is that salvation lies along the path of privatisation of land ownership rather than in the public control of land use.

Although a number of African countries have accepted this and, invested staggering resources in tenure reform programmes, there is evidence that its wider political and economic consequences have not always been assessed or fully appreciated. In particular, the impact of tenure reform on the economic, political and social organization of rural society has never been fully weighed against its alleged contribution to rapid growth in the agricultural sector. More recent studies, including a major empirical exercise by the World Bank, have now established that these assumptions are misleading. They demonstrate beyond any doubt that what is required is a comprehensive agrarian reform; that is to say, that beyond the property structure, there is a need to reform production structures and support service infrastructures.

(c) *Issues Relating to Land Administration*

Land administration embraces all activities relating to procedures for delivering land rights, systems of land rights, security; including demarcation, survey and registration, regulation and control of land use, land use planning, land market regulation, and the processing of land disputes.

The main weaknesses of the current land administration is lack of transparent and effective institutions to deal with public land and customary land, the administration of which is perceived to be corrupt, highly over-centralised and remote from the resource users. The Government needs the system to be nationally uniform and sustainable. It needs a basis for implementing local taxation, land use and building control and to provide infrastructure. It requires a flexible means of administering property rights (e.g., the ability to accommodate individual and group rights, the rights of the middle class, business people and poor people). It needs to deliver land titles to the people in an accessible and user-friendly manner and to allocate land titles that are not perceived as inferior.

The land survey and title deeds registry for private land will have to be thoroughly overhauled if confidence in private land titles is to be restored and the land market and investment area is to flourish. Decentralisation of the land registry is essential. The current situation, in which titles are issued to strangers without any reference to the informal rights holders, using and occupying the land is intolerable and represents a gross violation of basic human rights.

18.3.2 Tenure and Administration of Land in the current Constitution

As indicated above, only trust land is addressed specifically in the Constitution. That provision, however, is concerned mainly with administration rather than tenure. Consequently, the complex questions surrounding the manner and conditions in which land may be held are left largely to general law.

Here, a distinction must be made between statutory and customary tenure regimes. The former has several pieces of legislations, the most important of which are:

- the Transfer of Property Act of India, 1882;
- the Registered Land Act (Cap.300);
- the Registration of Titles Act (Cap.281); and
- the Registration of Documents Act (Cap.285) and the Land Titles Act (Cap.282).

The latter is made up of rules and norms governing land relatives recognised by indigenous African communities.

All land held under any tenure may be compulsorily acquired by the State for public purposes or if the public interest requires it. The acquisition procedure for land held under statutory tenure is set out in the Land Acquisition Act (Cap.295). For land held under customary tenure, the procedure, referred to as “setting apart”, is indicated, in the Constitution and the Trust Land Act (Cap.288).

18.3.3 Tenure and Administration of Land in other Constitutions

Most constitutions, except those of South East Asian countries, do not address issues of tenure of land. Land administration, however, is often taken care of by establishing land commissions or similar institutional structures at the national and local government levels. The Constitution of Uganda provides for both of these issues as follows

237 (3) Land in Uganda shall be owned in accordance with the following land tenure systems

- (a) Customary;
- (b) Freehold;
- (c) wakfs; and
- (d) leasehold...

238 (1). There shall be a commission to be known as the Uganda Land Commission...

239. The Uganda Land Commission shall hold and manage any land vested in or acquired by the Government in accordance with the provisions of this Constitution

241 (1). There shall be a District Land Board for each district...

241 (2). In the performance of its functions, a District Land Board shall be independent of the Uganda Land Commission and shall not be subject to the discretion or control of any person or authority...

Generally speaking, therefore, issues of land tenure and administration is left to ordinary legislation or custom.

18.3.4. What the People Said

The Commission heard detailed and extensive views from the people on land tenure and land administration. These may be summarised as follows:

- a) land may be held under customary, private or public tenure systems;
- b) all such land used and/or occupied by local residents and from which they derive their daily livelihood should be vested in them on the basis of either private or customary tenure, as such, determined by the local land body, which, in making that determination, should take into account all the prevailing circumstances;
- c) any other such land not used or occupied, or set apart as above, should be reserved as a land bank for future use in the interest of public order, morality, health and development;
- d) the Constitution should establish principles for a coherent policy on land, which includes:
 - i) respect for individual and community rights under customary law;
 - ii) just reconciliation of customary and statutory rights;
 - iii) sufficient flexibility to permit tenure changes in the public interest and not detrimental to existing rights holders;
- e) the responsibilities hitherto exercised and rights held by county councils should be vested in the National Land Commission;
- f) all land hitherto known as trust land, which is still unadjudicated and unregistered, should be referred to as land held under customary tenure;
- g) all such land used and/or occupied by local residents and from which they derive their livelihood should be vested in them on the basis of either private or customary tenure, depending on the prevailing circumstances;
- h) such land not occupied or not in the immediate use by local residents should be set apart for and vested in the indigenous communities as commonage;
- i) any other such land not used or occupied, or set apart as above, should be reserved for future use in the public and/or communal interest;
- j) any trust land for which the lease has expired should immediately revert to the National Land Commission for reallocation by the land board and reclassification as stated above; and
- k) private property should be protected.

18.3.5 Commentary

Although a more comprehensive inquiry into land issues is under way by a different Commission, this Commission is convinced that radical changes are necessary on land. There is a need, in particular, for a comprehensive statement of land policy, revision and rationalisation of land laws, and a more efficient and transparent land administration system.

18.3.6 Recommendations

The Commission recommended, therefore, that:

- (a) *a new land policy should be designed to take into account the reasonable expectations of the existing owners and occupiers specifying, in particular, that*
- i) private landowners should enjoy security of tenure, save for considerations of public interest, good order, morality, health and development, which may take precedence over individual rights;
 - ii) no one may be deprived of his/her land or right to land except as provided for under this Constitution;
 - iii) no one may be deprived of property on the basis of gender, marital status, age or any other reason created by history, tradition or custom; and
 - iv) extinction of a private landowner's rights will take place only in accordance with the requirements of the Constitution;
 - v) all land hitherto referred to as unalienated Government land should belong to the people in their sovereign status;
 - vi) all public land should be used only for public purposes and in public interest; privatisation of public land should take place only if it promotes public interest; the Government or a local government may acquire land in public interest in a manner prescribed by Parliament;
 - ix) the Government should, as determined by Parliament, protect lakes, rivers, wetlands, forests, game reserves and national parks and hold them in trust for the common good;
 - x) any alienation and disposal of protected areas, including forest reserves, should be done in a manner that maintains biological diversity, productivity and capacity for regeneration as well as paying due regard to its future ecological, economic and social functions and to the local people's land needs;
 - xi) land is a national resource and should be used in a manner that enhances the interest of present and future generations;
 - xii) ownership carries a social obligation to serve the larger community;
 - xiii) the State should recognise, respect and protect the rights of indigenous cultural communities to preserve and develop their cultures, traditions and institutions on land; it should consider these rights in formulating national plans and policies;
 - xiv) the system of land marketing be efficient, cost-effective, accessible, secure, transparent and free of unnecessary disputes;
 - xv) the policy respects
 - customs and traditions and the importance of land in the culture of many communities;
 - sacred and culturally important sites even where the community no longer occupies large parts of the land;
 - efficient land use in both urban and rural areas; and
 - the constitutional principles of human rights, including gender equity.
- (b) *The state right to compulsory land acquisition should clearly conform to the following principles:*
- i) the public interest must be clearly defined and be sufficiently compelling to justify compulsory acquisition; it should not cause undue hardship to individuals or communities deprived of land;

- ii) land acquired but not used for public purposes should revert to the original owners;
- iii) an acquisition should be subject to challenges by the owner/occupier;
- iv) the Constitution should provide for compensation to reflect a variety of factors along the lines of the South African provision.
- v) it seems unnecessary to have a detailed provision - such as now appears in the Constitution - to the effect that quite ordinary legal measures, such as seizing property for non-payment of tax, or in execution of judgment of a court, are not unconstitutional.
- vi) the amount of the compensation and the time and manner of payment should be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to the relevant circumstances, including the history of the acquisition and land use; and
- vii) it might, however, be desirable to include a statement to the effect that regulation of land use in the interest of conservation, environmental protection and planning does not amount to acquisition of rights, to avoid the risk that individuals, drawing on US cases, especially, might try to argue that they are constitutionally entitled to resist such regulation or seek compensation.

(c) A National Land Commission be established to

- i) hold and administer all public land to be held in trust for the people, including future generations;
- ii) exercise trusteeship in terms of legislation defining its nature and content;
- iii) perform the following functions, to:
 - ensure faithful implementation of the constitutional provisions on land, including the directive principles of state policy and national goals;
 - provide space for unhindered public dialogue on various land issues on a continuous basis;
 - oversee a new beginning in land tenure administration, review and verification of the title deeds already provided;
 - oversee creation and management of land banks/public aimed at servicing new, emerging and future development needs of the country;
 - ensure efficient, orderly, optimal and sustainable land use for various identified purposes;
 - follow up areas where consensus has not developed, including redressing past wrongs through restitution, where appropriate, resettlement in alternative land, monetary compensation, among other things;
 - promote public education on land matters, particularly constitutional and legal ones;
 - be the trustee for the Kenyan people and protector of their rights, including the rights of indigenous communities to preserve and develop their cultures, traditions and institutions on land; and
 - advise Parliament and other organs of State on land matters of constitutional significance, including legislative, legal and policy matters.

(d) Provision should be made in the Constitution on legislation to:

- i) recognise customary law;

- ii) give greater recognition to the interests of dependants in the case of death, including the rights of women who have been cultivating land;
 - iii) protect the matrimonial homes of all parties to a marriage during, and at the conclusion, of the marriage;
 - iv) protect equal rights of men and women in marriage, during marriage and at its dissolution;
 - v) enjoy the common ownership of spousal land as long as such land is the family's principal residence or is principal source of income or sustenance;
 - vi) prohibit discriminatory access to land by reason of gender, marital status, age or other distinction;
 - vii) recognise and protect pastoral community rights;
 - viii) ensure participation by pastoral communities in decisions that have a direct bearing on their livelihood;
 - ix) set out the manner and process by which to redress of past wrongs;
 - x) establish conditions, including providing necessary finance, to enable people to gain access to land on an equitable basis;
 - xi) ensure that all irregularly acquired public land immediately reverts to the National Land Commission, unless the holder pays to the authorities compensation considered reasonable in the circumstances; and
 - xii) establish a permanent Land Claims Tribunal to investigate claims of past land injustices to individuals or communities; this must be done within two years from the date of enactment of the new Constitution.
- (e) *A system of land administration be established which*
- i) is independent of political forces;
 - ii) involves local communities in ways that genuinely permit them to make a significant input into establishing local priorities and into decisions at all levels;
 - iii) is transparent; in this context, interests in private property must be subordinated to the need to maximise effective and constitutionally principled use of a national resource, and to control corruption;
 - iv) is supported by local land boards and committees; these bodies should reflect local interests, including the interests of women and other disadvantaged and vulnerable groups;
 - v) incorporates a system of tribunals or courts to deal with land issues; organizations representing the interests of the local or national community must be able to present arguments before such bodies ,where appropriate.

18.4 Intellectual Property Rights

18.4.1 General Principles

Often discussions on property only cursorily touch on intellectual property issues. Intellectual property is recognised as a major instrument for innovation and socio-economic development. Intellectual property comprises:

- patents - to protect inventive information;
- copyright - to protect original information in the expressive sense;
- trade marks – to protect symbolic information;

- trade secrets - to protect information on trade released in confidentiality;
- utility models - to protect novel innovations;
- industrial designs - to protect designs of a visual nature; and
- traditional or indigenous knowledge.

The main national institutions dealing with intellectual property issues are the Kenya Industrial Office (KIPO) and the Copyright Section of the Attorney-General's office. KIPO established, under the Industrial Property Act, (Act No. 2 Of 2001), is responsible for industrial issues. Its functions include registration of trademarks, technology transfer and granting patents and utility model certificates. The Copyright Section deals with copyright in music, art, film and publishing, among other things. The Copyright Act (Act No. 12 of 2001) creates a Kenya Copyright Board that brings together the diverse interests in the Copyright industry. It generally directs, co-ordinates and oversees the implementation of copyright law.

18.4.2 Intellectual Property Issues in the current Constitution

Although there is no provision in the current Constitution on intellectual property, Kenya is a signatory to a number of international conventions on the issue, including the Biodiversity Convention and conventions establishing the World Intellectual Property Organization (WIPO) and the African Regional Intellectual Property Organization (ARIPO).

18.4.3 Intellectual property Issues in other Constitutions

Specific recognition and protection of intellectual property rights is rare in most constitutions. The reason is that the general protection of property clause is thought to be sufficient even for this very special domain. The fact that not many jurisdictions agree on what constitutes "intellectual" property has, however, led to many disputes to how much protection a general property clause can confer.

The 1987 Constitution of the Philippines is among the few that have tried to address this matter. Article 13 thereof provides that –

The State shall protect and secure exclusive rights of scientists, inventors, artists and other gifted citizens to their intellectual property and creations, particularly when beneficial to the people, for such a period as may be provided by law.

Nothing is said, however, of indigenous knowledge pools and similar resources that are often transmitted from generation to generation.

18.4.4 What the People Said

What the people told the Commission may be summarised as follows:

- (i) inventors of things e.g., medicines and aircraft, be promoted by the Government;
- (ii) the Constitution should provide intellectual property rights for inventions by our citizens;
- (iii) a law should protect Maasai intellectual rights;
- (iv) patent rights on technology should be waived after 25 years;
- (v) the Constitution should take cognisance of social dynamism, advancement of human knowledge and technology;
- (vi) the Constitution should protect and promote intellectual property rights and innovation;
 - inventors should be rewarded by the Government;
 - patent laws should be strengthened to protect Kenyan inventions; the inventors should also be rewarded and their ideas put into place;
- (ix) encourage patenting to protect local investors;
- (x) all our discoveries should be patented;
- (xi) registration of patents should be reviewed to allow for cheap and easy ways of registering inventions;
- (xii) investors should be allowed land in rural areas;
- (xiii) the Government should encourage technological developments and assist inventors; and
- (xiv) plagiarists of research and innovation should be punished; some taxes should be directed towards research.

18.4.5 Commentary

There is no doubt that people of all walks of life understand and appreciate the importance of intellectual property, in particular, cultural property. Very strong views were presented by indigenous neutralists who decried the destruction of forests by multinationals searching for medicinal plants. Preservation was thus seen not only as a heritage issue; it is to them a livelihood matter as well.

18.4.6 Recommendations

The Commission recommended, therefore, that:

- a) provision be inserted in the Bill of Rights entitling each Kenyan to freely participate in the cultural life of his/her community, enjoy the arts and share in the benefits of scientific advancement;
- b) provision be made in the law to protect all interests accruing from any scientific or artistic endeavour by any Kenyan;
- c) Parliament should formulate legislation to promote cultural, industrial and scientific innovations, and the appropriation of the benefits to the inventors or authors;
- d) provision be made in the Constitution to protect indigenous knowledge.

CHAPTER NINETEEN

PUBLIC RESOURCES AND CAPACITY BUILDING

19.1 The Mandate of the Commission

In addition to land and natural resources, the Commission was required by the Act to examine and make recommendations on management of public resources crucial to establish an equitable development framework. Specifically, the Act mandated the Commission to examine and review the management and use of public finances and recommend improvements. In pursuit of its general mandate, the Commission also examined capacity building, particularly human resource development and science and technology.

19.2 Public Finance and Revenue

19.2.1 General Principles

(a) *The Role of Government*

The importance of financial control and accountability hardly needs emphasising. In most countries, the government is the largest employer. Much money moves in Government activity. It has the power to tax; use and abuse of financial resources causes more complaints than perhaps any other aspect of Government. Normally, the complaints are about allocation on the basis of political loyalties, not need, the siphoning of resources (which ultimately means money) from places which generate them to those more politically favoured, the plundering of the State by means of corruption or - more bluntly- theft.

Money is easily linked to evil, especially when it becomes first priority. Without it, Government activities cannot run smoothly. But it needs extraordinary vigilance as Government resources are prone to great abuse. The financial resources available to the Government are generated from three main sources; namely, taxation and other levies, internal loans and external loans and grants.

Currently, there are not - but there should be - provisions requiring those charged with raising and spending public money to generate appropriate vision, mission, objectives, strategies, programmes and activities to ensure optimisation of revenue and expenditure programmes. There is no provision for efficient programme implementation and monitoring, evaluation and feedback to engender value for money as a component part of the execution of the social contract between the governor and the governed. The provisions are essentially about ensuring that money is collected and spent by those who have the authority to do so, but there lacks a real effort to ensure wisdom in financial decisions.

Overall, the role of Parliament is very limited. This is partly due to the pressure of time, partly to want of expertise by individual MPs, and partly as a result of a lack of a proper committee system. There are some uncertainties, too, on how far Parliament can change elements in the Budget, and whether expenditures from funds other than the Consolidated Fund are subject to the audit process. There is also the Westminster tradition, which is one of limited involvement of Parliament in the system - especially at the budgetary formulation stage. Finally, where the Government has a large majority in the House and party discipline is exercised, as will be on the Budget, debate is unlikely to be robust; this is another product of the parliamentary system.

(b) Allocation of Financial Resources

Financial Government resources from various sources need to be allocated on the basis of a proper balance between efficiency and equity. The role of the public sector is also to create an enabling environment to facilitate savings, investment production and service delivery by the private sector. This calls for continual improvement of communications and informational infrastructure, delivery of certain essential services that cannot be delivered by the private sector and generally taking measures to reduce the practice of rent seeking and increase economic efficiency.

(c) Custody and Withdrawal of Public Finances

Once money has been raised for the Government, it is important to keep it securely and used only for the purposes for which it is raised, as the law provides. Most of Government revenue is placed in the Consolidated Fund, from where it may not be withdrawn except on authority. The Government is also empowered by the current Constitution to create a contingency and other funds, as it deems necessary, where to deposit revenue from certain sources. It is important to ensure that not too many funds are created, as that might cause confusion in the execution of custody. There must also be a set of financial rules to ensure safe custody, appropriate withdrawal and sound use of such money.

(d) Expenditure of Public Funds

Revenue should be applied effectively, efficiently and with the highest degree of economy to maximize the national benefits of such expenditure. Sound strategic planning is required to ensure that these objects are attained. Excessively stringent provisions for revenue custody and withdrawal would slow down and ultimately choke Government expenditure programmes and hence become a source of inefficiency. However, liberal provisions would leave the funds open to manipulation and misuse. It is, therefore, important to strike a balance between these extremes.

(e) Resource Appraisal and Audit

It is important that the level and state of the national financial resources be known at any time to facilitate sound planning and decision-making. This calls for

proper application of appropriate systems of assessing and appraising the financial resource base.

Exercising the above functions requires control and audit to ensure prudence, accountability, diligence, efficiency, effectiveness and economy. This calls for appropriate financial and programme audits to prevent misbehaviour and correct any mistakes in time.

(f) Expenditure Audit and Report

Expenditure audit and reporting enables checks to be made to ensure that public resources are expended as authorised by Parliament. It involves the following activities:

- (i) Deciding what must be audited, how and by whom, and establishing the machinery for auditing;
- (ii) The auditing process; and
- (iii) The scope of auditing (for example, does it deal with efficiency and effectiveness?)

The questions of what is done with the reports of the auditing body, to whom they go, by whom they are considered and who acts on them are pertinent and important. There is, therefore, a need for an expenditure audit and a reporting mechanism on public funds.

(g) The Budgetary Process

Estimates of revenue and expenditure are traditionally submitted to Parliament through the annual Budget speech and the accompanying Finance Bill. The Budget preparation process has traditionally been shrouded in secrecy. The minister's proposals are unveiled only in the Budget speech. Certain lobby groups present their views to the ministry and may be accorded an opportunity to discuss such proposals. But there is no forum for openly informing the Budget through participation of various interest groups. Some secrecy is justified, but there should be room for a public input.

When the Budget is presented to Parliament, usually on or before June 30 each year, the House transforms itself into a Committee of the Whole House (the Committee of Ways and Means) and it gives precedence to the Budget for most of the next 7 days. This debate is a general one on the policy that the Budget is intended to support. On Budget Day, the House passes a resolution which endorses tax changes and this is to bring the changes into effect immediately to prevent tax evasion, and chaos as people try to avoid the consequences of new taxes, or refuse to carry out transactions until new reductions come into effect. This resolution is given the final force of law when the Finance Act is passed. At the end of this debate, the House passes a motion that authorises the use of half the estimated expenditure. Twenty days are allocated to do a detailed consideration of the Budget by another Committee of the Whole House called, the Committee of Supply. All this is completed by October 31 and on the final day all votes must be passed. Some will not have been discussed because of the

use of the guillotine that enables debate to be curtailed. It is possible for the House to alter specific sub-heads of expenditure, though this rarely occurs.

Once approved, all withdrawals from the Consolidated Fund must also be approved by the Controller and Auditor General, (CAG).

At the end of the financial year, the Treasury prepares accounts by the end of October. The Controller and Auditor General then audits them and, at the end of 7 months (a period which may be extended by the National Assembly), sends the report to the minister, who tables it in the National Assembly. In fact, in many years, it is more like 2 years before the report reaches Parliament. The report is then discussed by the Public Accounts Committee, which highlights important issues. The committee reports to Parliament as a whole, and the Treasury is required to explain what action it has taken on the PAC recommendations. In reality, though the PAC comments often cause immediate reaction in the Press, this is brief, and abuses go unremedied. There is a similar process for state corporations involving the Auditor-General and the State Corporations and the Public Investment Committees.

(h) Taxation:

Revenue is raised to finance Government recurrent and development expenditure. There is always the tendency to attempt to raise as much revenue as possible. This has led to the charge that the country is heavily overtaxed. The cost of raising revenue consists of the direct cost of financing the personnel and operational expenses and, in addition, the indirect cost of crowding out the private sector, in the sense that tax revenue is not available for private investment. There is, therefore, the need to strike a balance between these costs and the revenue raised, otherwise beyond a certain level, raising additional tax revenue becomes counter-productive and hence injurious to the economy. It is a challenge for the tax authorities to seek and attain that balance.

(i) Public Debt

The need for external loans arises principally for financing development expenditures which cannot be financed from taxation, and other revenue of the Government. In some cases, external loans could be used to finance short-term adjustments, as in the case of loans from the IMF.

The use of external financing should ideally help ensure that tax rates do not escalate and that control on taxation level is not achieved at the expense of Government programmes. In the absence of external borrowing and, given controlled taxation levels, the other alternative available to the Government would be a reduction in expenditure programmes to achieve a balanced budget. Internal borrowing could close the financing gap. Internal borrowing, which is typically finance raised by issuing Treasury Bills and Bonds, may also be used to control the level of money supply through open market operations - sale and purchase of Government securities - and hence control of inflation. Due to the ease with which money can be raised through this source, it needs to be controlled to ensure that only such levels of domestic debt as are truly required

for the legitimate source are raised and that the terms of such debt are not inimical to economic performance.

(j) *The Central Bank*

The Central Bank of Kenya is one of the most important national institutions. Yet it does not have a home in the Constitution. This is an anomaly that must be corrected. The Central Bank of Kenya Act (Cap 491) establishes the Bank and the Kenyan currency. The Act defines the principle objects of the bank as:

- (i) to regulate the issue of notes and coins;
- (ii) to assist in developing and maintaining a sound monetary, credit and banking system conducive to economic development and currency's external stability;
- (iii) to serve as banker and financial adviser to the Government;

(k) *Retirement Planning*

Pensioners have the disadvantage of changing economic circumstances, as their pension entitlements do not change with the times. Unlike salaries, pensions are not subject to increment to cushion the rising cost of living.

Many persons retire to receive a minuscule pension, which cannot by itself maintain such persons and their families. Unless one benefits from a substantial contribution during employment one also invests wisely during that period, one is adversely affected by the small size of the pension, which is further diminished by the effect of inflation unless one can also find some viable opportunity upon retirement. One is not likely to make ends meet without downsizing their consumption basket. This situation often leads to non-use of productive human capacity, exposes employees to severe psychological risks, and their families to financial risks. This is particularly aggravated in the case of early retirement and retrenchment unaccompanied by appropriate outplacement programming. It is, however, recognised that, should pensions be made subject to increment, account also has to be taken of the additional financial burden that would have to be assumed by the employers, and in the specific case, of public employees were such resources to be drawn from the Consolidated Fund. However, with better management and prudent investment of pensions and provident funds, such funds could grow appreciably in time to create opportunities for improved payment to pensioners. This is a better and more viable option than soliciting funds from an already overburdened Consolidated Fund. Employers should also be required to provide training to employees on retirement planning so that employees can make the necessary investments (e.g., share investments) while still in employment which can generate a useful personal investment fund upon retirement.

(l) *Fiscal and Monetary Matters*

Matters related to national fiscal and monetary affairs are of paramount importance in executing the social contract between the governors and the governed. They determine the extent to which the Government of the day provides opportunities and an enabling environment for mobilising resources to

facilitate the meeting of the people's basic needs and improved welfare. Such important matters call for the highest attention in order to be handled at the highest possible degree of efficaciousness to discharge the obligations imposed on the Government in the social contract. This can be achieved by entrusting the responsibility to a high-powered independent group of appropriately qualified and experienced persons in the form of an economic and financial affairs commission entrenched in the Constitution to provide for such a body and clearly define its powers and responsibilities. Such a commission would continually assess the state of design and implementation of fiscal and monetary policy and monitor, evaluate and advise on the policy's dynamics. Five years ago, the Government announced a Planning Commission, which did not materialise. Given the concerns expressed from time to time, it is suggested that the time has come for such a Commission.

19.2.2 Finance and Revenue in the current Constitution

Section 48 of the current Constitution prohibits the National Assembly from proceeding with a Bill or a motion proposing taxation measures, a change on or withdrawal of money from the Consolidated Fund, or composition or remission of a debt due to the Government except on a recommendation by the President signified by a minister. Part VII of the Constitution makes elaborate provisions for establishing and appropriating the Consolidated Fund, establishing a Contingencies Fund, managing the Government's public debt, and the office of the Controller and Auditor-General.

These provisions are further elaborated in specific Acts of legislation, among which are:

- The Exchequer and Audit Act (Cap.412);
- The Kenya Revenue Authority Act (Cap. 469);
- The Paymaster General Act (Cap.413);
- The Government Contracts Act (Cap.25); and
- The Central Bank Act (Cap.491).

19.2.3 Finance and Revenue in other Constitutions

Provisions on finances and revenue management are standard in all constitutions, old or recent. Responsibility for fiscal policy, taxation, approval of appropriations and prudent management of public revenue is usually shared between the Executive and the Legislature. The general principle is that, although responsibility for raising revenue and incurring expenditure vests in the Executive, this can only be exercised with approval by or concurrence of the legislature. Some constitutions, such as that of South Africa, also establish a commission to advise the Legislature and/or the Executive on financial and fiscal matters.

19.2.4 What the People Said

People who spoke on public finance and revenue were concerned mainly about the following issues:

- (a) strengthening the independence and powers of the Auditor-General;
- (b) better controls over expenditure of State revenue out of the Budget;
- (c) greater transparency of the process;
- (d) greater involvement of the public and Parliament in preparing and approving the budget;
- (e) more transparency over tax waivers;
- (f) senior officers of the Kenya Revenue Authority to be appointed by Parliament;
- (g) establishing the Budget Office of Parliament;
- (h) separating the two functions of Budget control and audit;
- (i) tightening Parliamentary control of Government borrowing;
- (j) Constitution to include principles of fair and prudent taxation;
- (k) office of the Governor of the Central Bank to be established by the Constitution and given security of tenure and independence of operations;
- (l) systemising the financial provisions; gathering them in one place;
- (m) the nation's currency should have a national image, not an individual's portrait;
- (n) revenue should be shared between the central Government and lower levels at certain percentages, between 10 and 20% to the central government.

19.2.5 Commentary

The people were acutely aware of the fact that taxation is the main source of Government revenue. But they were also aware that the current taxation rates are too high and, indeed, punitive. Further, the fact that a politically correct elite evades tax with impunity was widely noted.

So, the people wanted their Government to ensure that all citizens pay all the taxes irrespective of their social status. There was an outcry for the Government to revise the prevailing tax rates and improve collection systems.

On equity in national wealth distribution, the Government was implored to apportion the benefits from the resources (tax included) in a given area between the people and the central Government. The majority of the Kenyans want the Government to take only 20% of the benefits and leave 80% for developing the area in which the resource is found.

In addition, the people were critical of government borrowing, in particular, of accumulation of a large internal and external debt, as now. The Government, they

urged, must live and spend within its means. The need for vigilance by Parliament was, therefore, emphasised.

19.2.6 Recommendations

The Commission recommended, therefore:

- (a) *On budgeting, that*
- (i) the budget-making process should allow for participation by all key stakeholders, taking into account the need for affirmative action for disadvantaged economic groups;
 - (ii) statement of principles should clarify the basis of the Budget submissions to help the stakeholders appreciate the Budget assumptions and objectives and the constraints that may be encountered in implementing such proposals;
 - (iii) the Constitution should provide for a Parliamentary Budgetary Committee to work closely with the Treasury in developing the Annual Financial Bill with the mandate of monitoring the National Budget's development, taking into account the need to ensure efficiency and equity, as reflected by the capacities and needs of various groups and regions;
 - (iv) the Constitution should provide for a Parliamentary Budget Office in the form of a Secretariat to render technical assistance to the Budget Committee on financial control and audit;
 - (v) the Budget Office should have a capacity for independent research, adequate research staff and enough flexibility in using consultants for it to best assist the Parliamentary Budget Committee to:
 - answer specific queries by MPs on public expenditure;
 - seek and process public and expert opinions/views on budgetary matters;
 - produce independent evaluations of budget proposals;
 - co-ordinate amendments to the Budget;
 - promote compliance with a framework that ensures Budget balance;
 - produce technical studies on the Budget; and
 - provide an analytical backup service to parliamentary committees working on different sectors of the economy;
- (vi) all revenue generation and fund-holding and spending Government units should prepare a detailed 3-year strategic rolling plan to accompany and serve as the basis preparing the annual revenue and expenditure estimates;
 - (vii) Parliament should debate the strategic plan along with the Budget and propose such improvements as, in its opinion, ought to be made, and should, if not satisfied with the strategic plan of a particular unit, instruct that a revision be made and resubmitted to it within one calendar month; and
 - (viii) Parliament may also require the minister for the time being responsible for finance and planning to prepare such other longer-term plans as he may deem necessary.
- (b) *On the Office of Controller and Auditor-General, that*
- (i) the President, on the recommendations from an appropriate constitutional commission, should appoint the Controller and Auditor-General subject to ratification by the National Assembly;

- (ii) the office of the Controller and Auditor General should enjoy security of tenure and there should be entrenched in the Constitution severe consequences of interfering with such tenure;
- (iii) the duties of the Controller and Auditor-General provided in Section 7 (1-2) of the Exchequer and Audit Act (Cap 412) should be entrenched in the Constitution;
- (iv) the Controller and Auditor-General should be a certified public accountant and a registered member of the Institute of Certified Public Accountants of Kenya, among other qualifications to be specified by the appointing body;
- (v) the Controller and Auditor-General should not have attained the age of 65 years on first appointment and should not exercise the duties of that office beyond 75;
- (vi) the office of the Controller and General be run by two independent officers as follows:
 - Budget Controller, to oversee the Budget implementation as approved by Parliament by ensuring money is actually spent according to plan and to provide accounts of actual versus budgeted expenditure on a rolling basis;
 - the Auditor General to audit expeditiously the expenditures and revenues of all Government departments and state corporations and to provide timely reports to Parliament on the extent to which the budgetary regulations, procedures and achievement have been adhered to;
- (vii) Parliament should not go on recess before debating the report and if it is on recess by the time the Auditor-General's report is submitted, it should be recalled immediately to discuss it;
- (viii) Parliament should, within six months of the report's submission, debate and take appropriate action;
- (ix) the Auditor-General should submit his/her report directly to Parliament with a copy to the minister for the time being responsible for finance; and
- (x) The Auditor-General should give his/her report quarterly to Parliament in sequence, with each quarterly report being subjected to a time-frame.

(c) On Taxation, that

- (i) there should be a clear basis for imposing any form of tax and a set of general principles to be followed in the process, which should include the following:
 - there should be no taxation without representation;
 - taxation should, to the extent practicable, achieve a balance between the people's needs and their ability to pay tax;
 - every effort should be made to ensure that the same institution or individual is not burdened with many different taxes as to make the overall tax burden unbearable;
 - the principle of tax payment, as a civic duty, should be inculcated taxpayers minds;
 - a proper balance should be struck between the services required to be rendered by local authorities and the their revenue base in tax, etc;

- Parliament should expressly determine those cases deserving of a tax waiver and only such waivers should be allowed; and
 - every effort should be made to promote investment as the most sustainable source of tax revenue;
 - (ii) a simplified statement on tax levying and collection, indicating the extent of powers conferred on the different organs of Government, should be provided for;
 - (iii) the power to impose or vary taxes should be expressly vested in Parliament which should establish
 - an authority or organ to discharge this responsibility, but with Parliament maintaining its control over their actions; and
 - a tax tribunal to handle all tax matters, including a waiver or varying of tax by an Act of Parliament.
- (d) On Public Debt, that*
- (i) section 103 should be amended to require that all public debts be approved by Parliament before they are incurred and that, to this end, Parliament should provide appropriate guidelines for contracting debts (external and internal);
 - (ii) the terms and conditions for borrowing must be tabled before Parliament for approval thirty (30) days before the contract is effected.
 - (iii) Parliament should, by a majority vote, authorise the Government to enter into an agreement to lend money out of any public funds or commit the country to any debt, external or internal; and
 - (iv) a ceiling on total Government borrowing should be set at 30% of the GDP of the financial year immediately preceding the year in which the Budget proposals have been made.
- (e) On the Central Bank, a that provision be made in Constitution*
- (i) establishing the Central Bank of Kenya as an independent institution and as the Supreme Monetary Authority of the Republic;
 - (ii) establishing of the Office of Governor of Central Bank of Kenya, appointed by the President from among persons with qualifications in economics, finance and/or accounting, the appointment subject to approval by Parliament;
 - (iii) the person appointed Governor of the Central Bank to serve for two five-year terms, during which he cannot be removed from office except with approval of Parliament for inability to perform his functions or for gross misconduct;
 - (iv) The principal objects of the Central Bank should be to:
 - protect the value of the currency in the interest of a balanced and sustainable economic growth;
 - issue notes and coins;
 - act as banker of and financial adviser to the Government;
 - conduct the monetary policy of the Government in a manner consistent with the relevant provisions of the law; and
 - encourage and promote economic development and efficient resource use; and
 - (v) Parliament should pass legislation providing for a method by which the Bank may be organized and run.

- (f) *On Retirement Planning, that*
(i) a Retirement Benefits Authority be entrenched in the Constitution by providing that:
(ii) Parliament should establish a Retirement Benefits Authority with a mandate to regulate the management and investment of pensions and provident funds for the employees for whose benefit such funds have been invested, in a manner consistent with the regulations for the time being allowed for trust investment and providing appropriate sanctions in default; and
(iii) such funds should be paid out in regular monthly intervals to the employees for whose benefit the funds are invested upon retirement; employers should be requested to provide such minimum training in retirement planning as may be prescribed by appropriate legislation.
- (g) *On Fiscal and Monetary Issues, that*
(i) there be established an Economic and Financial Affairs Commission consisting of a chairman, a director-general, a deputy director-general and 3 such other members as may be appointed by the President with the National Assembly's approval;
(ii) Such a Commission should recommend to Parliament that
 - criteria and standards for formulating, implementing, monitoring and evaluating policies and strategies for optimising expenditure of revenue from taxation and other measures, domestic and external debt acquisition and disposal of Government assets and institutions and related matters;
 - innovative ways and means of raising additional revenues for the exchequer as well as measures to generate revenue for local authorities and other levels of government devolution;
 - measures required to promote domestic and foreign investment to enhance the national revenue base;
 - measures required to attain equity in raising and expending revenue, including measures to achieve a desirable level of affirmative action for disadvantaged groups and regions;
 - ways and means of monitoring domestic services and labour in the informal sector of the economy.
 - transparent and accountable ways and means of acquisition and disposal of government assets, property and institutions and for privatisation and commercialisation of government services.
 - ways and means of developing viable linkages between taxation and representation and taxation and the delivery of services.
 - systems for evaluating the performance of all institutions that have been charged with financial responsibilities; and
(iii) Parliament may make appropriate legislation providing for the effective operation of the Commission.
- (h) *On Development Planning that-*
(i) all revenue generation, fund holding and spending units of Government should prepare a detailed strategic 3-year rolling plan which should form the basis of, and accompany preparation of annual estimates of revenue and expenditure.

- (b) Parliament should debate the strategic plan along with the budget and propose such improvements as in its opinion that ought to be made and should if not satisfied with the strategic plan of a particular unit instruct that a revision thereof be made and resubmitted again within one calendar month.
- (ii) Parliament may also require the Minister for the time being responsible for finance and planning to prepare such other longer terms plans that he may deem necessary.
- (i) *On the Consolidated Fund and the Contingency Fund that-*
- (i) the Constitution should require Parliament to authorize withdrawals from the Consolidated Fund and prescribe the manner in which such withdrawals may be made;
- (ii) the annual budget estimates, should be accompanied with detailed strategic plans providing clear definition of outputs, monitoring and evaluation indicators, standards and means of verification; to this end, Parliament should set criteria to be used for;
 - o programmes and plans for economic and social development which should be included in the budget estimates.
 - o estimates of revenue and expenditure covering periods exceeding one year be included in budget estimates.
 - o establishment of a high-powered committee (within the Parliament) that vets estimates of revenue and expenditure made for an item or vote on other than for the contingency.
 - o an overall ceiling for supplementary estimates, (proposed at the level of 10% of annual estimates for the current financial year) be set.
- (iii) the Constitution should limit the total amount authorised for withdrawal from the Consolidated Fund in advance or appropriation of an amount not exceeding one third of the appropriation made for the ordinary services of the Government in respect of the immediate preceding year.
- (iv) the constitution should provide that such sums be advanced within 3 months of the financial year or the coming into operation of the Act, whichever is earlier.
- (v) Parliament should make laws to provide for regulations for the operation of the Contingencies Fund to ensure operational transparency and accountability.
- (vi) Parliament should make rules for the establishment of criteria for determining the type of contingencies that will be allowed for purposes of the Consolidated Fund.
- (vii) the spending units should be allowed flexibility to reallocate their approved budgets by up to 10% above and below any budget line in order to allow for a midstream reordering of priorities and maintain appropriation integrity.
- (viii) Parliament should make laws to provide for safe custody, appropriate withdrawal and sound use of the resources of the Contingencies Fund.

19.3 Human Resource Development

19.3.1 General Principles

Human resources are required in practically every situation to combine with other resource systems -finance, technology, materials, facilities, land, premises- to

execute development intervention and social welfare improvement programmes. The human resource is the most important of these resource systems, endowed, as it is, by its Creator with the power of thinking, reasoning and action. Consequently, the manner in which a country acquires, develops, allocates, mobilises, motivates, treats and rewards its human resources determines the quantum, quality, and direction of development and social welfare generation.

The proper management and use of human resources optimises all other resource components. The need to optimize the planning, development enhancement allocation, mobilization and motivation of the human resource base cannot, therefore, be underestimated.

Kenya currently has a population of 30 million, which is growing at an average rate of 3% per annum. The growth of the human resource in terms of numbers has been a centre of controversy for some time.

On the one hand, there are those who view it as representing a burden to the country's economy, to the extent that it represents an additional challenge in the fulfillment of basic needs for all. They argue that the answer, therefore, lies in controlling the growth of the population, so that there are fewer mouths to feed and fewer people to provide shelter, education, health, infrastructure, services and other basic needs for.

On the other hand, there are those who see the growth in the population as representing a potential pool of labour and enterprise that is required by the economy in the future as the new-borns grow into adulthood and are able to participate effectively in the delivery of development intervention and social welfare programmes. They argue that it is not the numbers *per se* that matters, but rather the manner in which all the resources of the Nation are marshaled. They say that if these are properly mobilised, it is possible to cater for the growth in population. They further argue that the preponderance of opinion lies in favour of placing resources into development programmes rather than wasting them in population control, since it, as well established by study, manages itself and tends to become lower and lower as society develops in accordance to the natural law of social balance.

Both arguments have merit in principle. A large population presents both a burden and a resource. It is a burden in the early years of the development of a child, up to the age of 18 years. It is a potential resource for the balance of life from age 18, to later years of life between the age of 18 years and 25 years on the lower end of the scale, to between 50 and 75 years on the upper end but only if it is properly mobilised. Beyond age 75, in the greater majority of cases, the population may again become net consumers of the Nation's wealth and therefore dependent on the productive population.

The overall state of the human resource base should be known at all times. It all begins with the population census which is carried out every 10 years and which consists of detailed information on the population fulfilling certain standardised characteristics. This is a very important baseline.

At the centre of optimal development of human resources, lie issues of health, education, occupational engagement, and the provision of shelter including adequate social infrastructure.

(a) ***Health***

The people's health is paramount during all stages of life. A healthy population is able to grow and mature into productive adulthood where good health becomes paramount in laying the ground for productive employment or entrepreneurial engagement. An unhealthy population is not only relatively unproductive, but also presents an economic and social burden to both the sick and those responsible for looking after them. It contributes to the drain of natural resources, particularly where health facilities, resource equipment and machines have to be sourced from outside the country, in case of Kenya, most of the time.

Kenya has an unfavorable distribution of health services that continues to widen with observed disparities in access and affordability across the country. Currently, according to National Development Plan (2002-2008), only 42% of the population has access to health facilities within 4 km. and 75% within 8kms radii. Disparities also exist in the distribution of medical personnel. There is only one doctor for every 33,000 of rural population compared to one doctor for every 1,700 urban residents. Retention of medical personnel in the public health facilities has remained a major challenge due to poor remuneration.

The Kenya Health Policy framework launched in 1994, was to purposely articulate the Government's commitment to improve the health of the population. This was translated into actionable policy framework, the National Health Strategic Plan (1998-2004). Given the proper mechanisms, constitutional or legislative, the efforts in the National Health Strategic Plan (1999-2004) would streamline the provision of health services to rural areas, with more emphasis on preventive and promotional health services. The issues that would need to be addressed by the Government in conjunction with development partners include: nutrition, efficiency improvement, health care financing, training and research, health standards and regulatory framework.

The impact of the Acquired Immune Deficiency Syndrome (HIV/AIDS) cannot be ignored in addressing health issues. The AIDS scourge has become a major threat to the welfare of poor families and to the agricultural and industrial labour force. The care of Aids patients has put the already limited health care resources under severe pressure.

Access to adequate and reliable supply of clean water and sanitation is key to public health, especially for low-income groups. Water sanitation impacts significantly on family welfare and quality of life. To curb this problem, there is need for appropriate technical services, community management, and realistic poverty focused planning and social appraisal. According to the National Poverty Eradication Plan 1999-2015, the current estimates of water supply indicate that

75% of the country's urban population has access to safe drinking water, while 50% of the rural population has access to potable water from various schemes.

In the rural areas, deep well sinking and spring protection works are mostly required. Poverty and lack of water are often linked. In the dry areas, and in dry season periods, women spend half of their day traveling and queuing for water as water sources dry up. This is a heavy cost on their time.

In setting sector delivery targets for safe water, the key social indicator for achievement will be the impact on women's workload, since collection of water has predominantly been women's labour and it affects their priorities for family care. There are various on-going water schemes by the Ministry of Water Resources, and it is anticipated that once completed, they will reduce poverty by giving all households access to safe potable water systems within 3 km radius by year 2010. The Sessional Paper No.1 of 1999 on National Policy on Water Resources Management and Development presently guides water resource management. The overall goal of the national water development policy is to facilitate the provision of water in sufficient quantity and quality and within a reasonable distance to meet all competing users in a sustainable, national and economical way.

(b) *Education and Manpower Development*

A conceptual distinction is usually drawn between education and manpower development. Education is generally used to refer to the academic process of improvement, the cultivation of a person's intellectual prowess in preparation for the life's challenges. Manpower development proper refers to the aspect of training for the purpose of impartation of skills required to prepare or improve a person's output as a professional or deliverer of services. Both education and manpower development thus involve the impartation of knowledge and experience that enables the recipient to be a relatively more productive person in terms of work. They should help persons to face the challenges of life with a greater state of preparedness absent if one does not receive such knowledge or experience.

Improving access to education for children of low-income groups will require a combination of policy and management initiatives and a rigorous focus on increasing primary school enrollment and completion rates for disadvantaged groups, especially girls from low income families. The policy and management initiatives might include a primary school curriculum focused on key universal skills, more effective and decentralised primary school management, and a teaching cadre committed to lead in the search for broad based social development. The key poverty reduction target in education reflects mainly financial and qualitative aspects of primary school teaching and learning.

(c) *Occupational Engagement*

One of the greatest challenges facing the nation is that of creating employment opportunities for a growing population. Upon attaining an appropriate age, individuals endeavour to secure some sort of engagement either by being employed or starting their own businesses. This is necessary both for the purpose of securing gainful employment and also for the enhancement of self-esteem and

human dignity. To the extent that individuals are prepared by the social system to take up engagements in society are they in a position to make a useful contribution to their own existence and to the welfare of society. To that extent, and also as far as such individuals are allocated tasks and provided with the necessary and appropriate tools and a facilitative environment to work will they be able to optimize their contribution to the overall societal welfare and quality of life in a significant way.

(d) ***Shelter and Infrastructure***

Access to shelter, infrastructure and services will have the potential to enhance welfare and the quality of life of the people in a profound way. This will greatly improve their productivity in the delivery of goods and services and will thus greatly contribute to economic growth and social welfare. The current state of shelter leaves much to be desired. Yet there are numerous opportunities for improving the situation through securitisation of mortgages and introduction of mortgaged-backed securities. There is also ample scope for improving the state of shelter through application of appropriate technologies for the fabrication of inexpensive but durable housing materials, products and designs. Similar improvements could also be made in respect of infrastructure and services that have been in a deplorable state for the last two decades.

19.3.2 Human Resource Development in the current Constitution

The current constitution does not address the issue of human resource development; not even as elements of fundamental rights and freedoms. There are, however, legislations dealing with these issues. These include:

- The Education Act (Cap. 211).
- The Universities Act (Cap. 210 B).
- The Higher Education Loans Fund Act (Cap. 213).
- Legislations setting up public universities (Caps. 210, 210A, 210C, 214 etc).
- The Public Health Act (Cap. 242).
- The Housing Act (Cap. 117); and
- Employment Act (Cap. 226)

19.3.3 Human Resource Development in other Constitutions

Provisions relating to human resources development, particularly on education, training, professional development, job-creation and employment mobility are usually part of the Bill of Rights in most constitutions. Occasionally, however, some constitutions establish or provide for the establishment of infrastructure for the development and management of broad human resource issues. One of the functions of Uganda's Education Service Commission, for example, is under Article 168(1)(c), to –

“review the terms and conditions of service, standing orders, training and qualifications of public officers in the education service...”

As a general rule, therefore, detailed prescriptions on human resource development will be found in legislation enacted by Parliament.

19.3.4 What the People Said

What the people said on human resources development and related issues may be summarized as follows:-

(a) *On Education, that:*

- i) University Senates should appoint Chancellors and Vice- Chancellors;
- ii) needy students should get bursaries, and the bursary programme should be run by independent committees or Chiefs;
- iii) the Constitution should require the Government to provide food and all learning materials to all schools;
- iv) the Constitution should provide that the Government should assist in building schools and furnish them with the necessary learning equipment and facilities;
- v) the Constitution should provide free education up to secondary level.
- vi) education is very expensive thus most students cannot afford it and end up dropping out of schools;
- vii) the 8-4-4 education system is too theoretical thus not enhancing practical skills;
- viii) institutions of higher learning are accepting unqualified students thus lowering the standards of the institutions;
- ix) the number of universities is not adequate to accommodate the large number of qualified students;
- x) establishment and maintenance of schools is very costly thereby becoming a burden on parents;
- xi) Teachers do a lot of work and are not adequately remunerated and motivated;
- xii) students are not conversant with the Constitution and its content;
- xiii) basic education should be free for all;
- xiv) the Constitution should be taught in schools;
- xv) the Constitution should provide that the Government should assist in building schools and provide them with necessary learning equipment and facilities;
- xvi) corporal punishment should be encouraged in schools because it previously worked well in the student discipline;
- xvii) the Government should fix secondary school fees and subsidize them;
- xviii) sign language should be introduced in all school curricula;
- xix) admission to institutions of higher learning should strictly be on merit;
- xx) salaries of teachers should be reviewed and increased;
- xxi) the education system should be revised to meet the demands of today's dynamic world and should involve teachers;

- xxii) the quota system should be abolished;
 - xxiii) the 8-4-4 system of education should be abolished and replaced by 7-4-2-3 system;
 - xxiv) nursery school teachers be paid by the Government;
 - xxv) teacher's salaries should be commensurate with their qualifications;
 - xxvi) the Constitution should provide that the Government establish universities in all Provinces.
- (b) *On Employment that:*
- i) one person to one job employment policy should be adopted;
 - ii) the Constitution should guarantee employment as a basic right for all Kenyans;
 - iii) men and women should have equal employment opportunities;
 - iv) pension should be increased when salaries are being increased;
 - v) jobs should be awarded on basis of merit and academic qualifications.
- (c) *On Health that:*
- i) drugs are inadequate due to siphoning;
 - ii) Hospitals are poorly staffed;
 - iii) drugs are available in private hospitals and not public hospital at a very high prices;
 - iv) medical facilities often have no equipment;
 - v) most poor people cannot pay hospital bills;
 - vi) cost sharing has done more harm than good to the citizens;
 - vii) there is congestion in hospitals due to lack adequate facilities;
 - viii) corruption is endemic among the medics especially in mortuaries;
 - ix) there is harassment in public hospitals;
 - x) medical personnel have a negative attitude against the public;
 - xi) the number of hospitals is inadequate to meet the large population;
 - xii) government employed officers should not be allowed to own private clinics;
 - xiii) government should provide adequate staff in hospitals;
 - xiv) cost sharing in public hospitals should be stopped;
 - xv) the Government should build more health centres and hospitals at the grassroots level;
 - xvi) the Government should provide enough drugs in hospitals;
 - xvii) hospitals charges should be reduced in the whole country;
 - xviii) private clinics and chemists should be scrutinised and their establishment regulated by the Government;
 - xix) National Hospital Insurance Fund should be encouraged to work hand in hand with hospitals in the country;
 - xx) Kenyans should enjoy better medical services;
 - xxi) government should address remuneration of the hospital personnel;
 - xxii) mobile clinics should be established in arid areas;
 - xxiii) mortuaries should be free;
 - xxiv) the Ministry of health should get 20% of the total annual budget and other funds be given to it;
 - xxv) doctors' conduct towards their patients should be monitored;
 - xxvi) hospitals should have a policy of identifying people with disability and seeing if anything can be achieved by early interventions;

- (d) *On Water and Sanitation that:*
- i) the government should revive water projects initiated along time ago, so as to provide clean water to all citizens;
 - ii) the government should provide proper drainage systems throughout the country;
 - iii) the government should ensure proper and adequate sewerage systems in Kenya;
 - iv) the Government should provide all public utilities with toilets, and waste disposal sites;
 - v) the Government should provide clean piped water to all Kenyans;
 - vi) each district should be provided with a borehole drill to alleviate water shortages;
- (e) *On Infrastructure, that:*
- i) the Government should create an atmosphere of economic development by developing good transport and communication infrastructure;
 - ii) transport and communication facilities should be provided in North Eastern Province and other pastoral areas to attract investors;
 - iii) rural roads should be tarmacked;
 - iv) railway communication should be improved for accessibility purpose;
 - v) the government should ensure that there is a proper communication network in the country;
 - vi) infrastructure should be equally spread out.

19.3.5 Commentary

The importance which the people attach to human resource development is clear from the very emphatic positions which they took on various aspects of the issue. The general state of dilapidation of social infrastructure was lamented across the country. Indeed to many people that was evidence of either inability or unwillingness of government to discharge its functions. Particular attention was paid to education, health and employment, which people saw as the getaway to the improvement of living conditions and enhancement of the quality of life. The need to channel more resources towards the sector was, therefore, given very high priority.

19.3.6 Recommendations

The Commission recommended, therefore, as follows:

- (a) *On Economic and Social Planning that -*
- i) the State should restrict private wealth and privately operated enterprises, if they are deemed detrimental to the balanced development of national wealth and people's livelihood;
 - ii) the Constitution should provide that the people of Kenya collectively, or individually have the right to improve their standard of living;
 - iii) the Bill of Rights should be expanded to include social and economic rights;

- iv) the Charter for Social Integration should be entrenched in the Constitution;
 - v) the new Constitution should establish a national systems of planning that facilitates the attainment of national objectives in economic and social matters;
 - vi) The new constitution should provide for an appropriate accounting and management systems and procedures for effective control of the use of resources.
- (b) *On Education, that -*
- i) there be established an Education Service Commission that shall continually review the terms and conditions of service, standing orders, training and qualifications of public officers in the education service and matters connected with their management and welfare to make recommendations on them to Government;
 - ii) the state should be responsible for promoting free and compulsory basic education;
 - iii) the state should take appropriate measures to afford every Kenyan an equal opportunity to attain the highest education possible.
- (c) *On Health, that -*
- i) the state should develop a National Health Policy which meets the basic health needs of the people of Kenya;
 - ii) a Health Service Commission should be established;
 - iii) in order to deliver subsidized health services to all citizens, innovative strategies be adopted to improve efficiency in revenue collection to balance the "revenue generation" and "access" objectives to assure quality services, and to direct government financial support;
 - iv) as a constitutional right, health to all is being advocated, so should the legal framework be restructured to promote those in medical practice.
- (d) *On Water and Sanitation that*
- i) the state should preserve, conserve and protect available water resources and its allocation in a sustainable, rational and economical way due to its uneven distribution both in space and time;
 - ii) adequate water supply to meet the various water needs be provided;
 - iii) the safe disposal of wastewater and protection of the environment be ensured;
 - iv) an efficient and effective institutional framework to achieve systematic development and management of the water sub-sector for sustainable economic growth and poverty reduction be established;
 - v) sound and sustainable financing mechanism for effective water resources management as well as water supply and sanitation development and management be developed;
 - vi) the state should ensure that all Kenyans have access to clean and safe water;
 - vii) the state should provide for legislation and instrumental framework to achieve systematic development and management of the water sub-sector for sustainable economic growth and poverty reduction and to oversee the implementation thereof.

- (e) *On Roads, that -*
i) public roads should be commercialized for better management and maintenance;
ii) an autonomous executive road board, with majority private sector participation, to administer the Road Maintenance Levy Fund be established.
- (f) *On Employment Opportunities that -*
i) the new Bill of Rights should declare that Kenyans have the right to:
 - work under satisfactory safe and healthy conditions;
 - equal pay for equal work;
 - reasonable rest days and entitlement to public holidays;
 - form or join a trade union and for every employee, to join a trade union; and
 - to collective bargaining.
ii) innovative policies for employment generation be formulated and implemented.

19.4 Science and Technology

19.4.1 General Principles

Broadly speaking, technology is an association of methods, techniques and equipment, which together with people using them can contribute, significantly to solving varieties of human development problems. Appropriate technology, therefore, means that besides being scientifically sound, technology is also acceptable to those who apply it for purposes of sustenance. Appropriate technology thus, incorporates, reflects and perpetuates value systems and it not only influences society which imposes limits on the choice and development of it.

The role of science in industrial production is still very marginal in Kenya. This can be partly explained by the fact that the industrial sector is largely linked to the parent firms in the industrialized countries from which it draws scientific knowledge. Indeed, nearly all the contractual arrangement entered between Kenya and foreign technology supplies guarantee the transfer of new scientific and technological knowledge. However, when plants become operational, they face localized problems, which require the generation of localized scientific knowledge. It is in fact through the accumulation of local scientific and technological knowledge that a country develops and becomes self-reliant.

Growing areas in science and technology include information transmission, medicine, nutrition, agriculture and biotechnology. Constitution making must recognise the revolution in social and economic life, which is occurring as a result of advances in science and technology.

19.4.2 Science and Technology in the current Constitution

The current constitution makes no reference to science and technology. Legislations do, however, exist, for a limited form of technology production and management. These include the Factories Act (Cap 514), and the Industrial

Property Act (Cap 509 and Act No. 2 of 2001). Constitutions of many countries now makes provision for science and technology.

19.4.3 Science and Technology in other Constitutions

Constitutional provisions regarding science and technology is not common in most jurisdictions. The rapidity with which the domain of science and technology is developing is probably one reason why specific provisions are seldom fossilized in constitutional text. Jurisdictions, which include these concerns, therefore, do so in terms of encouraging investment in research and the development of new technologies. The Constitution of Ecuador, for example, expects priority to be given by universities, polytechnics, superior technical institutes and schools, to research in and teaching of science and technology. That Constitution also expects research institutions to incorporate science and technology issues into productivity and the sustainable management of natural resources. It also guarantees the right of access to sources of scientific and technological information, and to seek, receive and utilize such information. Article 71 of the Constitution of the Philippines provides, *inter alia*, that -

“Science and technology are essential for national development and progress. The state shall give priority to research and development, invention, innovation, and their utilization, and to science and technology education, training and services”.

Nearer home, Article 12 of the 1998 Constitution of the Republic of the Sudan provides that -

“The state mobilises its official resources and the popular institutions for combating illiteracy and ignorance, strengthening educational systems, and promoting science, research, scientific co-operatives and facilitating access to education and research....”

19.4.4 What the People Said

Although issues of science and technology were not put to the people directly, views were indeed expressed on related matters. These may be summarized as follows:

- (a) *On Energy Development and Use that -*
 - i) the Constitution should ensure that the government provides electricity to all citizens in both rural and urban areas, and makes it more affordable by removing VAT from electricity bills;
 - ii) the government should also allow other private companies to compete with Kenya Power and Lighting Company to remove monopoly;
 - iii) the Constitution should take into consideration the aspect of social dynamism, advancement of human knowledge and technology;
 - iv) the Government should lower electricity tariffs to ensure lower cost of production by the industries;

- v) Power generating and supply companies should position themselves to meet the demands of the technologically advanced industries. This supply should be affordable, efficient and reliable;
 - vi) electricity to be taken to more customers to substantially improve the economy, as well as Kenyans' living standards, and hence development in general.
- (b) *On Industrialization that -*
- i) industries in Kenya should be decentralised, and evenly distributed across the Provinces and 60% of income generated by them used there;
 - ii) the Government should ensure that the industrialization process is achieved using local resources e.g. coconut tree and its by-products;
 - iii) local industries should be protected against undue competition from external industries, by enacting policies to this effect;
 - iv) policies should be put in place to restrict exportation of raw materials, which are locally available, at the same time to set up policies that will boost competition among the local industries;
 - v) sugar and cashew nuts industries should be revived to create jobs for the locals and new industries set up for mango and coconut to process those products;
 - vi) the Government should support all agro-based industries to prevent them from collapsing e.g. Kenya Co-operative Creameries, Kenya Meat Commission, Rivatex ,etc.;
 - vii) more attention should be given to the *Jua Kali* sector by the Government through financial facilities e.g. loans and promotion of *Jua Kali* products;
 - viii) processing industries should be located at the agricultural areas of production, and that these industries should be established in each Province;
 - ix) the Government should license independent energy producers in Kenya;
 - x) the government should look into possibilities of establishing nuclear energy plants, expand wind and geothermal energy;
 - xi) fish processing plants should be established next to water bodies to benefit the local communities; while the Kenya Meat Commission, now in Nairobi, should be located in the North Eastern Province for easy accessibility of the animals and slaughter houses;
 - xii) the Government should be compelled by the Constitution to financially assist Kenyans who come up with original inventions and innovations, and should protect and promote their intellectual rights and innovations;
- (c) *On Information Technology that -*
- i) the Constitution should ensure that the media, both print and electronic are fully liberalized in their operations, as long as the media operates independently and free from any manipulation whatsoever;
 - ii) the public media should not, at the expense of other political parties/ politicians, give all or most of the attention only to the ruling party;
 - iii) all political parties, and regions should get equal coverage by State owned media;
 - iv) the media should cater for persons with disability, e.g., interpretations for the deaf persons and in all vernaculars, as well as Newspapers published in Braille;

- v) private entrepreneurship should be allowed to establish radio and television stations at cheaper rates;
- vi) although the Constitution should grant the media the liberty to report events, it should put forward mechanisms to regulate the kind of programmes they bring;
- vii) the media should be restricted from bringing immoral programmes that have consequently diluted the morals of Kenyans, and continue to do so.
- viii) there should be no restrictions in licensing of broadcasting stations, but a probation period of 30 days should be given;
- ix) all statutory restrictions imposed on radio and television broadcasting should be removed;
- (x) the government should allow the establishment of a Media Regulatory Council headed by professionals from media services;
- (xi) the Government should support media that promotes democracy;
- (xii) women should not be used as sex objects on television; television and radio programmes should be censored to protect children from negative information;
- xiii) private entrepreneurship should be allowed to establish radio and television stations at cheaper rates. Internet service provision should not be restricted;
- xiv) there should be a Media Bill ensuring that two copies of each newspaper are taken to the Attorney-General before the street vendors start selling;
- xv) media advertisement of cigarettes and alcohol should be stopped;
- xiv) there should be live coverage of parliamentary proceedings;
- xv) public mass media houses should be impartial in their coverage in the election campaign;
- xvi) consumers should be provided with facts needed to make informed choices and be protected against dishonest or misleading advertising and labeling through the developments of consumer information programmes;
- xvii) business language should be simple.

- (d) *On Science Research and Training, that -*
- i) there is a crisis in science education in Kenya consequently, there should be a lot of motivation to study science at school, especially among girls, through provisions of practical experiences that involve the use of appropriate toys and games;
 - ii) The Government should allocate more funds to research and development in information technology.

19.4.5 Commentary

Developing countries, including Kenya, may gain especially high rewards from new technologies, but they also face especially severe challenges in managing the risks. Moreover, while some risks can be assessed and managed globally, others must be taken into consideration locally.

The key problem Africa is facing today is under development that manifests itself in terms of poverty, diseases, ignorance and many other forms. It is regrettable to have to recognise that due to apparent lack of funds and other resources, many African countries have remained impoverished over the years. The weak fiscal status and the dim prospects for drastic economic improvement coupled with mismanagement, corrupt and despotic regimes in the continent also militate against any significant local support to alleviate the problems of underdevelopment in the near future.

Talented Kenyans working in aspects where local materials are used do not receive recognition by the Government in terms of rewards and promotion. Very few of such Kenyans are given loans to improve production.

19.4.6. Recommendations

The Commission recommended, therefore, that:

- (a) *On policy development, that -*
- (i) the Kenyan Government should make provisions in the form of directive principles of the State in order to incorporate science and technology as the basis of industrialization and, hence economic growth and development, particularly, in the health sector;
 - (ii) a set of policy considerations should be adopted, relating to long-term strategic measures, which can help Kenya consolidate its technology base as a tool for raising the living conditions of the people and enhancing its competitiveness in the international market;
 - (iii) the government should appoint Parliamentary Science Fellows so that they can provide Parliament with the necessary technical knowledge of science and technology;
 - (iv) appropriate technology should be adopted and seen as a means to stimulate economic progress by making optimum use of available resources. It should be conducive to social progress by enabling the mass of the population to share the benefits and not just a privileged few;
 - (v) a Science & Technology policy should be put in place in order to improve the effectiveness of the national system of innovation, supporting public research and education, and sustaining the competitiveness in the business sector.
- (b) *On Information, Education & Training, that -*
- (i) since the amount of quality information available on industrial activities is crucial to the formulation and implementation of viable projects, technological undertakings should be subjected to independent evaluations as a way of reducing the possible biases that may lead to cost over-runs or project failure;
 - (ii) given the current rate of technological change in the international market, it is important to constantly monitor development and identify the various options that are available and suitable for Kenyan conditions;
 - (iii) education should be designed to play a deliberate role in demystifying the negative attitude towards work and locally manufactured goods;
 - (iv) colonial attitudes, ways and relics should be removed from educational materials and textbooks;
 - (v) modalities should be put in place to ensure that technical and vocational education and training programmes are implemented without delay if technological goals and accelerated industrial development are to be achieved;

- (vi) there is need to improve domestic technological bargaining skills to improve domestic capacity to absorb and adopt foreign knowledge;
- (vii) the Government should encourage the growth of a technological culture by encouraging technical training, possibly up to the university level;
- (viii) middle level institutions should be strengthened to produce the required manpower;
- (ix) the curriculum for courses in middle level institutions should be re-designed to promote entrepreneurship and self-employment;
- (x) the government should ensure that more active collaborative mechanisms between industry and training institutions are put in place to ensure relevance of technical training;
- (xi) when the curriculum is being revised, examinations should be re-designed to place emphasis on talent development, creative thinking and promotion of innovativeness;
- (xii) indigenous technology is important; therefore, the government should encourage and promote it through education, training and research as a basis for accelerated growth of the economy and industrialization;
- (xiii) the teaching staff should be adequately trained and regularly in serviced;
- (xiv) the Government should recognise talented Kenyans by giving them a ‘push’ through financial assistance, i.e., loan facilities and/or promoting them and their inventions or innovations.

(c) *On Research, that -*

- (i) there should be more and stronger links between public sector and research institutions and the private sector so as to increase the application of their research output in the domestic industrial sector;
- (ii) the government should offer incentives to the private sector to increase its funding and support for research and development activities;
- (iii) the government should increase the proportion of total public research expenditure allocations to industrial research and development activities and opening such funding to competition from both private and public research institutes.

CHAPTER TWENTY

MANAGING CONSTITUTIONALITY

20.1 The Mandate of the Commission

An important concern in Constitution making is to develop structures and principles that would facilitate the internalization and supervision of constitutionality. The review Act required the Commission, to examine and make recommendations on:

- existing constitutional Commissions, institutions, offices and the establishment of additional ones to facilitate constitutional governance;
- succession to office and a system for the dignified transfer of power after an election or otherwise;
- any other matter incidental to the foregoing.

In pursuit of this mandate, the Commission examined the following specific issues

- Constitutional Commissions;
- Constitutional offices;
- Succession and transfer of power.

Other aspects of this mandate such as jurisdiction and powers of courts, constitutional adjudication and amendment procedure are dealt with in other chapters.

20.2 Constitutional Commissions

20.2.1 General Principles

Constitutional commissions serve an extremely important function in any given constitutional system. These bodies independently seek to protect and enforce the constitutional provisions as laid out in the Constitution and further ensure their implementation. In order to do so, the commissions must be seen to be totally independent from the influence of the State organs in all aspects.

Constitutional Commissions share common goals and objectives. Thus, in considering any given constitutional commission, regard must be given to the following broad principles, against which proposals are made which apply to all commissions.

The first is independence. An effective commission is one capable of acting independently of Government, of party politics and all other entities and situations that would be in a position to affect its work.

The independence of a commission is determined by several factors.

- mode of establishment,
- financial autonomy, and
- appointment dismissal procedure.

The second is the definition of powers and functions. These must be clear. This avoids overlap

in the functioning of the commissions and ensures that the commissions complement rather than compete with one another. The legislation establishing a Commission must also ensure that it can effectively perform its functions.

The third is accessibility. It is important for the provisions establishing the commission to specify the persons who may lodge a claim to the commission. This may be either individuals who are personally aggrieved, family members on behalf of victims, Non-Governmental Organizations or aggrieved groups. In addition, the procedure of lodging a claim to the institution should be simple, clear and devoid of technicality. The ideal situation would be one whereby the aggrieved party merely needs to lodge an oral complaint.

The fourth is accountability. This aspect is usually dealt with through reporting obligations. Commissions are required to submit detailed reports of their activities to Parliament and/ or to the State through the President for consideration. The commission should also be accountable to the public. Its reports must be open to public scrutiny.

20.2.2 Constitutional Commissions in the current Constitution

The current Constitution establishes the following constitutional Commissions:

- the Electoral Commission,
- the Parliamentary Service Commission,
- the Judicial Service Commission, and
- the Public Service Commission.

Although established by the Constitution and supported by complementary legislation defining their powers and functions, most of these Commissions enjoy little independence from the executive arm of Government. Appointments are made by the President, dismissals, are initiated by him/her and their finances are controlled by government ministries.

20.2.3 Constitutional Commissions in other Constitutions

Most commissions entrenched in Constitutions are administrative or managerial in that they are expected to facilitate the work of, or advice specific organs of government e.g. the legislature, executive, judicature or the public service. The most common of these include commissions on elections, the judicial service, the public (including local government) service, and salaries and remuneration. Virtually all modern constitutions make provisions on these matters. More recently, a new category of commissions with a more general mandate have found their place in constitutions. These latter, are assigned the function of “supporting democracy or “supervising constitutionality”. Commissions of this genre are normally responsible to the legislature. Says Article 181(5) of the Constitution of South Africa.

"These institutions are accountable to the National Assembly and must report on their activities and the performance of their functions to the Assembly at least once a year".

Common among such commissions are those on human rights, ethics, gender, language, public protection, corruption and economic crimes. The Constitutions of South Africa, Uganda, Ghana have, at various levels of detail, created commissions of this genre.

20.2.4 What the People Said

The people had a lot to say about constitutional commissions, their powers and functions, mode of establishment and financing. These views may be summarised as follows:

- (a) *On Commissions generally, that -*
- i) the commissions should have their powers and functions clearly set out in the legislation creating or establishing them;
 - ii) they should be independent;
 - iii) they should have the power to enforce their recommendations;
 - iv) where necessary, they should be given powers to prosecute;
 - v) they should be empowered to enforce the law in the different sectors of government;
 - vi) they should, in conducting their affairs, follow the laid down procedures;
 - vii) they should be vigilant in protecting citizen's rights;
 - viii) the chairpersons of these Commissions should have security of tenure;
 - ix) their role is to bring people together in their respective areas of operation to identify, mobilise and decide on the usage of resources and to share information with the communities to enable them make informed choices;
 - x) they should have public information and education programmes in their respective areas.
- (b) *On existing Commissions that -*
- i) the Public Service Commission should be required to eliminate
 - corruption, discrimination and nepotism in employment;
 - lack of transparency in the recruitment process;
 - insincere advertising for job vacancies;
 - unfair promotions;
 - retrenchment without a human face.
 - ii) the Electoral Commission should be staffed by educated Kenyans appointed by Parliament, not the executive, and
 - ii) the Judicial Service Commission should:
 - have its membership drawn from the legal fraternity, the judiciary, professional bodies, the clergy and interest groups;
 - the appointments to the Commission will be made by the President, after Parliament, in the form of a parliamentary judicial committee, approves;
 - The Commission will deal with disciplinary matters.

- (c) *On the establishment of new Commissions, that*
 i) the following new Commissions be established:
- the Commission for Human Rights and Administrative Justice,
 - the Gender Commission,
 - Disciplined Forces Complaints Commission.
 - the Ethics and Integrity Commission,
 - the Salaries and Remuneration Commission,
- ii) In asking for a Commission on Human Rights and Administrative Justice, the people submitted that it should:
- act as a watchdog against the existing widespread violation of human rights;
 - ensure protection, development and attainment of human rights;
 - investigate allegations of human rights violations;
 - carry out programmes to educate the public on their rights;
 - handle the 1991 - 1997 land clashes;
 - deal with past human rights abuses;
 - deal with past political assassinations;
 - investigate and redress historical injustice among the pastoralists in North-Eastern Province during colonial and post colonial era;
 - promote dialogue and peaceful conflict resolution through mediation and arbitration;
 - deal with losses and displacement of land;
 - deal with poor political representation and exploitation;
 - deal with social and economic injustices such as ethnicity, corruption and nepotism committed against Kenyans since colonial times; and
 - deal with those who have looted public funds since 1963 and ensure that they make restriction.
- iii) In asking for a Gender commission the people submitted that
- the Commission should develop a policy on protection and promotion of women's rights and facilitate the repeal of all laws that have provisions discriminative in terms of gender;
 - most customary laws and practices which clearly discriminate against women in general and the girl child should be eradicated.
- iv) In asking for a Disciplined Forces Complaints Commission the people submitted that
- policemen who do not follow the process of the law should be sacked;
 - there should be no extra-judicial killings of suspects, as everyone is presumed innocent until proved guilty;
 - corrupt police officers should be brought to book.
 - there should be a special unit in the police forces to investigate corruption;
 - the police and other members of the disciplined force should be politically neutral;
 - the Police Commissioner should be independent and appointed by the President with approval from Parliament;
 - victims of police brutality or those tortured by the police should be compensated;

- there should be no arbitrary arrests and suspects should be informed of the reason for their arrest;
 - there should be no arbitrary search of premises and affected parties be given the search warrant;
 - action be taken against police officers who engage in crime or aid and abet in the commission of crime.
- v) In asking for an Ethics and Integrity Commission the people submitted that
 - an independent Anti-corruption Commission should be formed and entrenched in the Constitution;
 - the defunct Kenya Anti-Corruption Authority should be revived.
 - an Ethics Commission should be established;
 - there should be anti-corruption committees whose members shall be elected and shall have a predetermined security of tenure; the members should be drawn from religious organizations, administrative and professional bodies;
- vi) In asking for a Salaries and Remuneration Commission, the people submitted that it should;
 - determine the salaries of various employees both in the civil service and public sector so as to check corruption and the incidences of strikes;
 - review the benefits, salaries and working conditions of Members of Parliament;
 - review salaries every three years;
 - administer pensions for retired workers;
 - look into the terms of workers in county councils and municipalities.

20.2.5 Commentary

Many Kenyans see constitutional commissions as mechanisms that would rid the country of corruption, discrimination, unfair treatment in access to employment, police brutality and harassment, human rights abuses and others. Although they may have placed too much faith in these mechanisms, their diagnosis of contemporary Kenyan policy is clearly accurate. Indeed, the Commission received first hand information on many of these ills and in respect of all levels of Government and civil society.

20.2.6 Recommendations

The Commission recommended, therefore, that -

- (a) *the establishment of constitutional commissions should conform to the following principles-*
 - (i) Mode of establishment
 - the constitutional commissions proposed should be established by the Constitution and subsequently provided for by legislation.
 - (ii) Financial autonomy
 - the budget of commissions should not be linked to the relevant Government ministry or department;

- the budget of each commission should be prepared by the commission members and submitted directly to Parliament for approval;
 - the commission should be accountable to Parliament for its expenditure.
- (iii) Method of appointment
 - the number of members of each commission will vary depending on the nature of the commission, however, such numbers should not exceed ten;
 - The members of the commission should be appointed by the President subject to the approval of Parliament through the relevant Parliamentary committee;
 - Appointment of members should take into account the diversity of the Kenyan people including: socio-economic status, race, ethnicity, gender, religious faith, age, occupation, learning, persons with disability and the disadvantaged.
 - the staff of the commission should be appointed by the commission in consultation with the Public Service Commission;
 - the staff should be paid by the relevant commission.
- (iv) Criteria and qualifications for appointment
 - the composition of the commission should also be representative in nature and should have a wide range of members drawn, *inter alia*, from non-governmental organizations, trade unions, professional and religious organizations;
 - generally, the members should be persons of recognised knowledge in the particular field covered by the commission;
 - the members should also be persons of impeccable integrity and objectivity;
 - full-time members of the commission should hold no other office at the same time;
 - the members must comply with the provisions of the Leadership Code.
- (v) Duration of appointment
 - appointments should be for a term of five years;
 - the term may be renewed once;
 - the retirement age should be pegged at sixty-five.
- (vi) Dismissal of members
 - removal from office should be for misbehaviour, incompetence or inability to perform the functions of the office arising from infirmity of the body or the mind;
 - the question of removal of the member should be presented to the parliamentary committee that shall inquire into the matter and make the decision whether to remove the member or not.
- (vii) Functions and powers
 - Generally, all commissions should seek to educate the public on their role, purpose and function;
 - the commissions should have powers to conduct investigations;
 - the commissions should have power to *subpoena* officials, individuals or organizations;
 - bodies or individuals under investigation should be under a duty to produce all necessary information, be it oral or written;
 - in cases of non-compliance the commission should have the power to cite the person or group before a competent court for contempt;

- the bodies should possess the powers necessary for conciliation, mediation and negotiation with the aim of producing a settlement that is agreeable to the complainant;
 - the members should have immunity for acts done while in office unless these are done in bad faith;
 - the commissions should have the power to award compensation.
- (viii) Accessibility
- complaints may be lodged directly by aggrieved individuals, their family members or interest groups - such as Non-Governmental Organizations;
 - complaints may be lodged orally or in writing, with no requirements on formality or technicality or language;
 - the commission should be able to initiate investigations or inquiries on its own initiative;
 - branches of the commission should be established at district/ or provincial level;
 - the services of the commission should be free.
- (xi) Accountability
- commissions should be accountable to Parliament and to the President;
 - the commissions should prepare annual reports on their overall performance - in terms of meeting their objectives and their financial position;
 - specific reports may also be made as and when required;
 - once a report is submitted to Parliament and to the President, Parliament and the President should give a response indicating whether any action has been taken based on the report, and if not why;
 - Parliament should utilize its committees to scrutinise the reports in depth.

- (b) *the following specific Commissions be established:*
- i) the Commission for Human Rights and Administrative Justice comprising:
- the Peoples Protector;
 - Human Rights Commissioner;
 - Gender Commissioner with a general mandate to:
 - investigate and establish, as complete a picture as possible, of the nature, causes and extent of gross violations of human rights committed;
 - give an opportunity to victims and their families to relate the violations they suffered through hearings or other means;
 - address the question of granting of amnesty to persons who were involved and who make the disclosure of all the relevant acts associated with the crimes;
 - make recommendations on reparation and the rehabilitation of the victims or families of the abused;
 - propose measures aimed at the restoration of the human and civil dignity of victims;
 - report its findings to the Nation;
 - promote respect for gender equality and equity;
 - investigate and seek to resolve any gender — related complaints;
 - participate in the formulation of national development policies and exercise general supervision over implementation of national policy on gender and development;
 - formulate programmes and advise on the establishment and strengthening of institutional mechanisms which promote gender

- equity in all spheres of life and in particular, in education, employment and access to national resources;
- plan, supervise and co-ordinate education programmes to create public awareness and support for gender issues;
- liaise with Government Ministries and Departments on gender issues;
- advise the Government on appropriate allocation of resources to ensure gender mainstreaming;
- monitor and evaluate policies, practices and adherence to domestic and international law by
 - organs of State at all levels;
 - statutory bodies;
 - public bodies, enterprises and institutions;
 - private bodies, enterprises and institutions;

The Commissioner for Human Rights and Administrative Justice should also:

- receive and investigate complaints against disciplined forces officers - including police officers, army officers etc. on issues such as harassment, negligence, complicity in handling a matter etc;
- investigate and conciliate complaints on its initiative;
- conduct public education on the role and functions of the police force vis-à-vis the role and functions of citizens;
- issue summonses requiring the attendance of any person, group or organization before it;
- issue summonses requiring the production of any relevant documentation to it;
- require full disclosure of any information required;
- cite a person or group or individual before a court for contempt for failure to attend, produce relevant information or make full disclosure of information;
- recommend prosecution or disciplinary action on any individual police officers;
- order compensation to any victim of police torture, harassment etc;
- provide accessible machinery and prompt remedies for the people;
- improve the standards of competence, honesty, integrity and transparency in the services provided to the public.

(ii) the Public Service Commission with a general mandate to:

- include not just the public service but also the police, teachers and parliamentary employees;
- include the function of reviewing various aspects of the public service and reporting and recommending on this to Parliament and to the President;
- make appointments in consultation with relevant public service sectors;
- have between eight and ten members, spread across the different sectors.

(iii) the Electoral Commission with functions similar to those in the present Constitution.

(iv) the Judicial Service Commissions composed as follows:

- Judge elected from the Supreme Court by judges of that court;
- Judge elected from the Court of Appeal by judges of that court;
- Judge elected from the High Court by judges of that court;
- the Chief Kadhi;
- two magistrates from the subordinate courts nominated by any organization(s) representing magistrates;

- two practising advocates nominated by the Law Society of Kenya to represent the society;
 - two lay members of the public nominated by the members outlined above at their first meeting;
 - two members elected by faculties of Law of the universities in Kenya;
 - one member representing the Public Service Commission;
 - the Attorney-General who should be an *ex officio* member and with a general mandate to review, process and investigate complaints against judges and magistrates lodged by members of the public or any organization(s) representing magistrates. At present, only the Chief Justice can initiate and investigate against the judges;
 - initiate investigations against judges and magistrates on its own initiative;
 - coordinate continuous education and training of all judicial officers;
 - advise the Government on improving the efficiency of the administration of justice and access to justice;
 - make recommendations to the President on the appointment of the Chief Justice and Judges.
- (v) the Ethics and Integrity Commission with a general mandate to –
- to enforce the leadership code and to check corruption;
 - ensure that all specific officers (all constitutional office holders and members of all commissions and Members of Parliament) declare their wealth and that of their spouses:
 - within three months of commencement of the Code;
 - within three months of assumption of office;
 - thereafter, on an annual basis.
 - compliance with aspect of the code aimed at prohibiting conduct that is likely to compromise honesty, impartiality and integrity of the officers - such conduct shall be fully defined in subsequent legislation;
 - put in place measures aimed at prevention of corruption;
 - investigate instances of corruption;
 - examine the practices and procedures of public bodies and ensure that they are not conducive to corruption;
 - educate the public on the dangers of corruption.
- (vi) the Salaries and Remuneration Commission with a general mandate to set:-
- the salaries, allowances and benefits of all constitutional office holders and members of Constitutional Commissions including: the President, Vice-President, Prime Minister, Ministers, Assistant Ministers, Judges, Attorney-General, Director of Public Prosecutions, Auditor General, and all Commission members;
 - the salaries, allowances and benefits of Members of Parliament;
 - the salaries, allowances and benefits of all public servants as well as employees of parastatals;
 - the pensions of the Constitutional office holders.
- (vii) the Constitution Commission with a general mandate to -
- ensure that constitutional provisions requiring legislation and administrative action are fully implemented within the time frame established in the transitional provisions efficiently and effectively;
 - work closely with heads of constitutional commissions and office holders to ensure that the letter and the spirit of protective provisions of the Constitution are respected;

- ensure that the operation of the constitution is left constantly under review.
- recommend on legislative or administrative measures to ensure the values of the Constitution.
- report on any proposed constitutional amendments before or after the introduction of a bill for amendment, and for this purpose hold public hearings;
- hold regular consultations with the President, one of whose principal functions under our recommendations is to safeguard the Constitution;
- report on semi-annually basis to the public through the National Assembly on the progress of implementation and should outline any special difficulties that obstruct the timely implementation of the Constitution;
- ensure that five members are appointed by the president with the approval of parliament and consisting of members drawn from various disciplines including administration, economics, politics, cultural and social issues. It should authorized to employ consultants and to set up working committees, including persons from outside.

20.3 Constitutional Offices

20.3.1 General Principles

The goals and objectives of constitutional Commissions as set out above apply equally to the establishment of constitutional office holders who enjoy security of tenure.

20.3.2 Constitutional Offices in the current Constitution

Apart from constitutional offices forming part of the legislative or executive organs of the Government, the Constitution establishes the following other offices:

- The Chief Justice
- Judges of the Court of Appeal
- Judges of the High Court
- The Chief Kadhi
- Kadhis
- Attorney-General
- The Commissioner of Police
- The Controller and Auditor General
- Permanent Secretaries
- Ambassadors
- Secretary to the Cabinet
- Director of Personnel.

As a general rule, holders of these offices are expected to perform their functions without interference from any quarter. This, however, is hardly the case in Kenya where the President wields enormous power over all other organs of government.

It is worth noting that the Constitution says nothing about the qualifications necessary for appointment as Chief Justice. For High Court and Court of Appeal Judges, however, these are stated as follows:

- one must be or have been a judge of a court having unlimited jurisdiction in all matters in some part of the commonwealth or in the Republic of Ireland or in a court having jurisdiction in appeals from such a court; or
- one must be an advocate of the High court of Kenya of not less than seven years standing; or

As regards the Chief Kadhi and Kadhi, the Constitution is clear that one must -

- profess the Muslim religion, and
- be in possession of such knowledge of Muslim law as would satisfy the Judicial Service Commission.

The Attorney-General must be a

- person qualified for appointment as a judge of the High Court.

Nothing is said in the Constitution of the qualifications necessary for appointment as Commissioner of Police, Controller and Auditor-General, Permanent Secretary, Secretary to the Cabinet, Ambassador or Director of Personnel.

20.3.3 Constitutional Offices in other Constitutions

Constitutional offices are generally of two kinds. The first are those that are part and parcel of the architecture of a constitution and which, therefore, form part of the description of the functions, powers and values which a constitution seeks to establish. Such offices include those constituting the executive, the judiciary, and the legislature. The second are offices which support other constitutional functions, especially where the relevant Constitution also creates values, the internalization of which is necessary for the maintenance of constitutionality. Such offices include those of the Ombudsman or Parliamentary Commissioner, and the Public Defence. This category of offices are sometimes created *in lieu* of Commissions especially where a large bureaucracy is not necessary.

Holders of constitutional offices are protected from interference with the performance of these functions, have security of tenure and their remunerations (or resources needed for the operation of those offices) charged directly on the Consolidated (or equivalent) Fund. As regards appointment, most constitutions now require that this be made by the executive and approved by or with the concurrence of the legislature. That is the principle adopted in the Constitution of Uganda, South Africa, Ghana, and Nigeria. In the Constitution of Ethiopia, holders of some of these offices e.g. the President and Vice-President of the Federal Supreme Court are, appointed by the legislature.

20.3.4. What the People Said

The majority of the people lamented the lack of impartiality and independence in the discharge of functions by holders of constitutional offices. In summary they demanded that:-

- i) constitutional office holders should be accorded protection from political interference through:-
 - proper security of tenure;
 - a guaranteed income and benefit;
 - an enabling working environment.
- ii) there should be a code of ethics governing the conduct of all constitution office holders;
- iii) as regards the office of the Attorney-General there should be clear separation of powers and, in particular, the holder of that office should not:
 - perform the roles of independent prosecutor, legislator and member of the executive,
 - be an executive appointee of the president, and
 - interfere with private prosecutions.

20.3.4 Commentary

The protection of holders of constitutional offices is clearly central to management of constitutional order. The fact that the people appear to have lost so much faith in existing holders is a matter of grave concern. There is need therefore for a thorough shake-up in the structure and composition of existing constitutional offices.

20.3.6 Recommendations

The Commission recommended, therefore, that

- (a) *In addition to existing constitutional offices, the Constitution should also create the following:*
 - i) The Director of Public Prosecutions
 - ii) The Public Defender
 - iii) Controller of Budget
 - iv) The Auditor - General
 - v) The Governor and Deputy-Governor of the Central Bank
 - vi) Director of the Kenya Correctional Services
 - vii) Director of the Central Bureau of Statistics
 - viii) Director of the Kenya Police Service
- (b) *the Chief Justice and Judges:* be appointed by the President on recommendation by the Judicial Service Commission and in consultation with the Parliamentary Committee responsible for this docket.
- (c) *the Director of Public Prosecutions:*
 - i) be responsible for criminal investigations and prosecutions.

- ii) be appointed by the President in accordance with the recommendation of the Public Service Commission and with the approval of the Parliamentary Committee responsible for legal and constitutional matters;
 - iii) should have qualifications equivalent to those of a High Court Judge;
 - iv) should shall have security of tenure and shall be removed from office only in the same manner and for the same reasons as a High Court Judge;
 - v) should ensure that in all courts in Kenya prosecutions are conducted by legally qualified persons operating under the direction of the DPP.
- (d) *the Attorney-General should –*
- i) give legal advice and legal services to the Government on any subject – the principal legal adviser to the Government;
 - ii) draw and peruse agreements, contracts, treaties, conventions and documents to which the Government is a party or in respect of which the Government has an interest;
 - iii) represent the Government in courts or in any legal proceedings to which the Government is a party;
 - iv) be appointed by the President with approval of the Parliamentary Committee responsible for legal and constitutional affairs; and
 - v) have qualifications equivalent to those of a High Court Judge.
- (e) *in addition to issues specific to particular offices it is recommended that:*
- i) once the new Constitution comes into effect, all current Constitutional officers must comply with its provisions, including these provisions as to qualifications and the Leadership Code.
 - ii) officers who do not comply with the new Constitutional provisions or do not qualify to hold office under the new constitutional provisions shall be entitled to payment of their pensions, gratuities, compensation or such other like allowances as shall be determined.
 - iii) the law to be applied with respect to pension, gratuities, compensation, or other such like allowance in respect of holders of a constitutional office shall be the law that was in force at the date on which those benefits were granted.

20.4 Succession and Transfer of Presidential Powers

20.4.1 General Principles

By requiring the Commission to examine issues related to succession and transfer presidential powers, the review Act obviously had its sights on the transition from the current President to his successor. That is an issue which has consumed the energies of Kenyans ever since the Constitution was amended in 1992 to limit Presidential term of office to two five- year terms. The Commission has, nonetheless taken liberty in other chapters to examine a secondary but equally important aspect of transfer, namely, the measures needed to transit through the old to the new Constitution.

20.4.2 Succession and Transfer of Presidential Powers in the current Constitution

The current Constitution, for obvious reasons, does not contemplate the second aspect of the transfer. It does, however, address the question of transfer of power from one

President to the next. First, the Vice-President is expressly stated being in the line of succession of power, and where he is unable to discharge such function, a Cabinet Minister, appointed by the Cabinet shall do so. However, there is no provision to compel the President to appoint a Vice-President following Presidential elections or if a vacancy arises in the Vice-President's Office.

Second, the Constitution provides that a person elected as President shall assume office as soon as he is elected and shall, unless his office becomes vacant by reason of his death, his resignation or his ceasing to hold office by virtue of any other cause, continue in office until the person elected as President at a subsequent presidential election assumes office. From these provisions it is apparent that there are no express provisions for a handing over period between the outgoing and the President-Elect.

There is however, no provision in the Constitution for the temporary transfer of presidential powers other than expressly, in writing, to the Vice-President.

20.4.3 Succession and Transfer of Presidential Powers in other Constitutions

There are perhaps three issues to consider here. The first is transfer of power in situations of absence or temporary incapacity of the holder of office of President. This is usually dealt with in terms of the definition of a clear line of succession. Thus section 90(1) of the Constitution of South Africa provides that in situations of temporary absence of or vacancy in the office of the President, the powers of that office will devolve in an acting capacity, in the following order shown:—

- the Deputy President;
- a minister designated by the President;
- a minister designated by the cabinet, and
- the Speaker of the National Assembly

The second is the transfer of power on death, removal or resignation of the holder of that office. This is dealt with in one of two ways. A limited number of Constitutions such as that of the United States of America and the more recent Central European countries provide for automatic assumption of office by the Vice-President. Article 25 of the Constitution of the United States for example, is categorical and provides as follows –

- (1) In case of the removal of the President from office or of his death or resignation, the Vice-President shall become President,
- (2) Whenever there is a vacancy in the office of the Vice-President, the President shall nominate a Vice-President who shall take office upon confirmation by a majority votes of both Houses of Congresses.

Under Constitutions that establish parliamentary systems of government, the death, removal or resignation of the President operates to dissolve Parliament, leading consequently to new elections. That is still the position in most English-speaking African jurisdictions. The third is the actual modalities for the transfer of instruments of power. This is rarely set out in detail in any constitution. Most Constitutions simply provide for –

- the commencement and termination of the term of office of the executive,
- formalities necessary before assumption of office, and
- procedure for the transfer of power otherwise than in consequence of a general election.

The Constitution of Uganda, however, is one of the few that is fairly explicit on this matter. According to Article 103,

- (7). The Electoral Commission shall ascertain, publish, and declare in writing under its seal, the results of the presidential election within forty-eight hours from the close of polling,
- (8). A person elected President during the term of a President shall assume office within twenty-four hours after the expiration of the term of the predecessor and in any other case, within twenty-four hours after being declared elected as President.

20.4.4 What the People Said

Transition issues were obviously in the minds of many of those who spoke to the Commission. Many people suggested, *inter alia*, that:

- (a) *As a general rule –*
- i) a clear line of succession should be established to avoid confusion in cases of death or resignation of the President;
 - ii) the Vice-President should take over Presidential powers for the remainder of the term;
 - iii) the new President taking over after an election should be sworn in on a specified date;
 - iv) the duration of service as President should remain restricted to two five-year terms.
- (b) *Specifically, the people:*
- i) want election results of the President to be announced by an Independent Electoral Commission;
 - ii) feel elections could be announced through the media. Kenyans want an open and transparent manner to ensure that there is no interference with the election results. There were suggestions that results should be announced at the polling stations and others say this should be done in the presence of the contestants and their representatives;
 - iii) want the next elections to be announced immediately after the results. The suggestions range from 24 hrs to 90 days after the elections with many Kenyans suggesting between 24hrs to 30 days;
 - iv) feel that the President should assume office immediately while others say that a specific date should be set for the President to take office;
 - v) want to leave no doubt as to whether the new President is properly elected and to ensure that there is opportunity to contest the results if the need arises. This makes majority of Kenyans want some space between the election results and the swearing in of the President;

- vi) want the Chief Justice to be vested with the responsibility of swearing in the incoming President, a few people want others such as the Speaker, church leaders, Court of Appeal, Parliament to do the job;
- vii) want the instruments of power transferred immediately. They think that this transfer of instruments of power should not be delayed while some say that they would like clearly defined procedures for the transfer of the instruments;
- vii) want a State function/ceremony to be held to transfer the instruments of power by the outgoing President;
- ix) suggest alternatively that there should be an official handing over presided over by a parliamentary commission and the Chief Justice, or that the Speaker should do it, while others suggested that an electoral college comprising of ECK, Judges and civil servants should oversee the transition;
- xi) proposes that definite dates for take over and swearing in be entrenched in the Constitution and that the Constitution should spells out the mode of transfer of power;
- x) need a mode of transfer of power and instruments of power that is definitive, predictable and smooth. They don't want to be taken by surprise by hearing that the president was sworn in the morning. They want a clearly well defined process;
- xi) want the incoming president to assume office 30 days after election. While others felt that this date should be specified in the Constitution, a few suggested that the incoming President should assume office immediately after the elections;
- xii) want the instrument of power transferred to an incoming President by the outgoing President after the swearing in ceremony;
- xiii) want clear constitutional provisions to ensure the security of the former presidents. Some indicate that the outgoing President should enjoy State security during transition;
- xiv) want no legal immunity for a former President but others think the Constitution should provide for it;
- xv) want the Constitution to provide for the welfare of former presidents. They want pensions and other retirement benefits for ex presidents.

20.4.5 Commentary

Questions relating to the transitional mechanisms required to bring a new Constitution into force have not been covered here for a good reason. They are dealt with in other chapters. In any event, some of the issues mentioned were purely technical and will be handled in the Draft Bill.

20.4.6 Recommendations

The recommendations made herein are therefore restricted to the issue of succession and transfer of power from one President to the next. The Commission recommended that:

- (a) *the order of succession should be -*
 - i) Vice-President,
 - ii) Minister designated by the President,
 - iii) Minister designated by the Cabinet,
 - iv) The Speaker of the National Assembly.
- (b) *When the President is absent from Kenya or unable to perform the functions of his office*, the Vice-President to perform the functions of the President's until the President returns or is able to perform them.
- (c) *The President-Elect will assume office* on swearing or affirming faithfulness and obedience to the Republic and the Constitution of Kenya at a public swearing-in ceremony to be held on the day the incumbent's term expires.

CHAPTER TWENTY-ONE

SUMMARY OF KEY RECOMMENDATIONS

The collection of the peoples views was a long, complex and arduous exercise. The Commission received a great deal of information from around the country and from people of all walks of life. A large percentage of that information was concerned with basic livelihood issues. That, however, is as it should be because it is these matters, which shape the spirit of any nation. The pattern in Table 3 emerges from a preliminary analysis of oral and written memoranda received by the Commission as at the time of completion of collection of views. The total memoranda received by the commission was 35,413 which was tabulated into 34,157 pages of text as follows:-

Table 3 : Memoranda received by CKRC by Issue/Areas of Concern

No.	Issue/Area of Concern:	From:	To:	Pages
1.	Preamble	1	464	464
2.	Principles of State Policy	465	778	314
3.	Supremacy	779	1438	660
4.	Citizenship	1439	2713	1275
5.	Defence & National Security	2714	3613	900
6.	Political Parties	3614	4717	1104
7.	Structure & Systems of Government	4718	6331	1614
8.	The Legislature	6332	10034	3703
9.	The Executive	10,035	12908	2874
10.	The Judiciary	12,909	14608	1700
11.	Local Government	14,609	16654	2046
12.	The Electoral Systems	16,655	19447	2793
13.	Basic Rights	19,448	22647	3200
14.	The Rights of Vulnerable Groups	22,648	23687	1040
15.	Land and Property Rights	23,688	25852	2165
16.	Cultural, Ethnic and Regional Diversity	25,853	26606	754
17.	Management and Use of National Resources	26,607	28011	1405
18.	Environment and Natural Resources	28,012	28632	621
19.	Participatory Governance	28,633	29021	389
20.	International Relations	29,021	29197	177
21.	Constitutional Commissions, Institutions and Offices	29,198	29939	742
22.	Succession and Transfer of Power	29,940	30529	590
23.	Women's Right	30,530	31046	517
24.	International Policy	31,047	31071	25
25.	Regional Policy	31,072	31082	11
26.	National/Sectoral Policies	31,083	33471	2389
27.	Customary, Statutory and Islamic Laws and Bills	33,475	33870	396
28.	General and Cross-Cutting Themes	33,870	34157	288

As shown in the Table, the Commission received abundant views which needed consideration in the drafting of a new Constitution. It was the responsibility of the

Commission to interpret and translate these issues into Constitutional principles. Not all recommendations made to or by the Commission did, in the event, find their way into the Draft Bill of 2002.

21.1 Summary of the Commission's Recommendations

The summary, which follows, is of the recommendations, which the Commission formulated and incorporated into the design of the Draft Bill of 2002. These are:-

Table 4: Issues and recommendations formulated and incorporated into the Draft Bill of 2002

Issue	Recommendations
<i>On Constitutional supremacy, the new Constitution should:-</i>	<ol style="list-style-type: none"> 1. have some entrenched provisions, which Parliament would have no power to amend without first seeking the views of the people at a referendum; 2. address the issue of the relationship among the various organs of state and must deal with checks and balances; 3. have a supremacy clause that should state that the Constitution is binding on all the people and all the organs of the state and at all levels; 4. except as provided in (1) above, only be amended by at least 75% of members of Parliament.
<i>On Constitutional interpretation, the new Constitution should:-</i>	<ol style="list-style-type: none"> 5. contain an interpretation clause worded in a manner that assists the interpreters to appreciate the fundamental values of the Constitution without taking away the judicial creativity that permits the Constitution to be a living document. 6. have a provision that sets out the principles governing interpretation which should include the promotion of values that underlie an open and democratic society based on human rights, equality and freedom. 7. establish a Supreme Court as the final arbiter on the interpretation of the Constitution.
<i>On sovereignty of the people, the new Constitution should:-</i>	<ol style="list-style-type: none"> 8. acknowledge the sovereignty of the people; 9. acknowledge that government derives its power from the people.
<i>On nationality and citizenship, the new Constitution should:-</i>	<ol style="list-style-type: none"> 10. treat women and men equally as regards conferment of Kenyan citizenship to spouses and children; 11. state that all citizens have a right to a national identity card and a passport; 12. provide for dual citizenship, naturalisation, registration and permanent residence status; 13. create and entrench an independent body to take responsibility for citizenship issues so as to prevent interference with citizenship rights; 14. provide for citizenship by adoption and legitimization; 15. provide that children under a certain age found within Kenya, and whose parents cannot be found, should be accorded citizenship; 16. firmly entrench the equality of all citizens regardless of race, ethnic origin, age, place of birth, gender or any other difference.
<i>On territoriality and defence, the new Constitution should:-</i>	<ol style="list-style-type: none"> 17. define Kenya's international boundaries, and proclaim Kenya's sovereignty over its territory; 18. create security and defence forces that are politically neutral, disciplined, patriotic and totally under civilian control; 19. specify the circumstances under which a declaration of war may be made or the defence forces of the Republic committed to operations outside the borders of the state.
<i>On State values, goals and ideology the new Constitution should:-</i>	<ol style="list-style-type: none"> 20. have a preamble which inter alia acknowledges the significance God to the Kenyan people; recognises the struggle for independence and the role of freedom fighters; recognises the sovereignty of the people in the establishment of the Constitution and setting the means of governance for themselves and the posterity; affirms the religious, cultural and ethnic diversity of Kenyans; re-affirms the indivisibility to heal post-independence wounds caused by political conflict; re-affirms commitment to social justice; and re-affirms commitment to democracy, Constitutionalism and the rule of law; 21. also contain directive principles of state policy requiring all persons and organs of state to respect the rule of law, protect democratic principles, protect fundamental rights and freedoms, exercise power justly and manage the country's resources sustainably;

	<p>22. entrench the republican principles of good governance, democracy and the rule of law;</p> <p>23. proclaim that Kenya is a sovereign Republic that derives all its powers from, and shares in the common interest of her people;</p> <p>24. proclaim that the Republic shall be a multiparty democratic state committed to promoting the full participation of the people in the management of public affairs either directly or indirectly;</p> <p>25. proclaim that all power derives from and is exercised on behalf of the people;</p> <p>26. clearly state and outline the country's basic national ideological principles and values, which direct the new social, political, cultural, economic and environmental dispensation.</p>
<i>On the character of the legal system, the new Constitution should:-</i>	<p>27. state clearly the sources of the laws of Kenya;</p> <p>28. acknowledge the viability and integrity of African customary law, Islamic law and Hindu law;</p> <p>29. declare the customary international law and treaties binding on Kenya are part of domestic law.</p>
<i>On the Bill of Rights, the new Constitution should:-</i>	<p>30. in addition to civil and political rights entrench social, cultural, economic and development (or solidarity) rights;</p> <p>31. state that the Bill of Rights has 'horizontal' effect i.e. applies not just to people in the government but between the people;</p> <p>32. restrict circumstances in which the state of emergency can be declared and the time and those who may declare it;</p> <p>33. ensure accessibility to courts and fair administration of justice;</p> <p>34. establish institutions other than courts for the supervision of the Bill of Rights;</p> <p>35. provide specifically for the rights and needs of women and of children;</p> <p>36. make provision recognizing the rights of persons with disabilities;</p> <p>37. make provision to recognise the rights of the elderly;</p> <p>38. recognise the rights of refugees;</p> <p>39. require government to take affirmative action in respect of groups marginalized on the basis of gender, numbers, disability, age or any other reason created by history, tradition or custom;</p> <p>40. provide that programmes of affirmative action be justified by full data, use appropriate means and goals be transparently operated and limited by time, and be adequately monitored;</p> <p>41. abolish the death penalty;</p> <p>42. give general protection to privacy of the home, person, correspondence and other form of communication;</p> <p>43. give general protection to the media, including protection from government interference;</p> <p>44. recognise the value of local languages and the right of people to use them, and the duty of the government to communicate in them, and to provide for their development where desirable and appropriate;</p> <p>45. guarantee access to government information, subject to reasonable exceptions for national security and to the information held by others that is necessary in order to enforce rights;</p> <p>46. protect the right to just administrative action;</p> <p>47. protect the rights of people in detention or custody.</p> <p>48. guarantee the rights of consumers to appropriate quality of goods from whatever source, fair advertising and consultation.</p>
<i>On cultural, religious and linguistic diversity, the new Constitution should:-</i>	<p>49. ensure that freedom of worship is not used to infringe onto other people's freedom of religion;</p> <p>50. state that no religious test will be required as a qualification to any office or public trust under Kenyan Government;</p> <p>51. declare that Kenya is a secular state and that the government will not do anything to help, encourage or promote any particular religion;</p> <p>52. put in place mechanisms that will ensure the removal of socio-cultural and religious obstacles that hinder or impede national integration and unity;</p> <p>53. provide that no person shall be compelled to participate in any activity or ritual or take any oath, bear any arms or work or study on any day, if doing of such acts violates the person's freedom of religion and conscience;</p> <p>54. provide for a clear language policy and effective implementation mechanism;</p> <p>55. recognise Kiswahili as the national language and accord its requisite status during national functions;</p>

	<p>56. recognise both Kiswahili and English as the official languages at the national level and provide that all national documents would be made available in the two languages;</p> <p>57. in the context of devolution of power, recognise Kiswahili, English, and language(s) of particular areas as official language at the District level, and sign language;</p> <p>58. provide for the enactment of legislation to establish institutions for the promotion of English, Kiswahili, sign language and Braille;</p> <p>59. place obligation on the government to set aside budgetary allocation for promotion of national languages, sign language and Braille;</p> <p>60. safeguard linguistic and cultural rights of all people.</p>
<i>On political parties, the new Constitution should:-</i>	<p>61. protect the right of all Kenyans to form political parties.</p> <p>62. provide that political parties, which intend to contest elections be required to register with the Electoral Commission.</p> <p>63. provide that the Electoral Commission be the registrar and supervisor of political parties.</p> <p>64. prohibit the founding of political parties purely on religious, linguistic, racial, ethnic, sex, corporatist or regional basis.</p> <p>65. prohibit political parties from engaging in activities that compromise public order or public peace.</p> <p>66. provide that political parties once registered, shall be obliged to subscribe to a legally binding Code of Conduct.</p> <p>67. define the circumstances under which political parties may be de-registered or re-instated.</p> <p>68. define the conditions under which and for what activities political parties may receive public.</p> <p>69. provide that everyone is free to join a political party ; no one can be compelled to join a party; and that only citizens can become members of a party.</p> <p>70. prohibit the delegation of state functions to, or the use of state resources by, political parties.</p> <p>71. require that election to offices and committees of political parties be conducted by or supervised by the Electoral Commission.</p> <p>72. provide for the regulation of expenditure by political parties during elections.</p> <p>73. require political parties to establish internal machinery for ensuring discipline that are consistent with the principles of democracy, justice and the rule of law.</p> <p>74. prohibit political parties from disciplining Members of Parliament on the basis of contributions made in Parliament including voting in a manner that may be contrary to the position of the sponsoring party.</p> <p>75. provide that the President and other senior government officials may not hold any official positions in their respective political parties.</p> <p>76. provide that political parties must publish their manifestoes before participation in elections.</p> <p>77. provide that Parliament shall enact a law on political parties.</p>
<i>On the state in the Global system:-</i>	<p>78. require Parliament to enact legislation to facilitate informed and strategic integration of Kenya's economy into the global and regional economy.</p> <p>79. provide that Kenya shall adopt the dualist treaty-making process that includes specific role of Parliament as part of its "in-put" to or supervision of the treaty-making powers of the Executive.</p>
<i>On participation and governance, the new Constitution should:-</i>	<p>80. affirm the importance of the people and their institutions in promoting democracy and republican principles, values and practice.</p> <p>81. provide that the people of Kenya have the right to participate in the affairs of government either directly or through freely elected representatives.</p> <p>82. provide that it is the duty of public authorities to promote individual and community participation in the activities of society and to influence decision-making affecting them.</p> <p>83. establish appropriate mechanisms to ensure the accountability of the government at all levels and to afford people the opportunity to participate effectively in the governance of the state.</p> <p>84. establish mechanisms to facilitate decision - making by the people on Constitutional issues whether through referenda or otherwise.</p> <p>85. require state institutions to conduct public enquiry before important decisions affecting the public welfare are made or implemented.</p> <p>86. guarantee the right of the people to individually or jointly petition or address complaints to public institutions and authorities including Parliament, and to insist that these be acted on.</p>

	<p>87. provide that Parliament enact a law defining the role of traditional leadership, customary law and the customs of communities.</p> <p>88. create mechanisms that would enable and empower people to monitor the performance of elected representatives and to recall them if their performance is not up to expectation.</p>
<i>On the electoral system, the new Constitution should:-</i>	<p>89. adopt the Mixed Member Proportional system for the elections of representatives to the National Assembly involving:-</p> <ul style="list-style-type: none"> • the retention of the current 210 constituencies through single member constituencies; • and the introduction of 90 proportional representation seats based on party lists distributed equally between men and women and also taking into account Kenya's other diversity; <p>90. require that at least one-third of all candidates presented for elections by political parties, and one-third of elective and appointive positions in public institutions be reserved for women.</p>
<i>On the electoral process, the new Constitution should:-</i>	<p>91. state that it is both a fundamental right and duty of every citizen to vote or otherwise participate fully in the electoral process.</p> <p>92. require the state to protect the right of every citizen to exercise his/her right duty to vote.</p> <p>93. provide that voting materials, polling stations and polling personnel be accessible to voters with disability, nomadic communities and other minorities.</p> <p>94. entrench the principle that elections shall be by secret ballot.</p> <p>95. guarantee the rights of the disciplined forces, persons in custody, bankrupts and those in hospital, to vote.</p> <p>96. provide that registration of voters be a continuous process, not confined to particular periods.</p> <p>97. provide that in a Presidential election a registered voter may vote anywhere in the Republic irrespective of the station where he/she is registered.</p> <p>98. provide that Parliamentary elections be held on a specific or predictable day every five years.</p> <p>99. empower electors to recall their representatives at Council and Parliamentary levels for specified acts of commission or omission during their tenure of office and in accordance with clearly defined procedures.</p> <p>100. require election candidates to possess minimum academic and other qualifications and to provide such other information as may be specified by electoral law at the time of nomination.</p> <p>101. allow independent candidates to stand for Presidential and Parliamentary elections.</p> <p>102. specify the circumstances under which a candidate for election may be disqualified from offering himself/herself for election.</p> <p>103. provide that except for the public servants barred by the Constitution, civil servants be allowed to take leave of absence in order to seek elective offices.</p> <p>104. provide for the enactment of a code of conduct governing elections and the conduct of election candidates and specifying penalties to be exacted for violation thereof.</p> <p>105. require state media to give balanced coverage to all persons and parties participating in elections.</p> <p>106. recognise and facilitate the right of civil society and other organizations both domestic and institutional to participate in election observation and monitoring, even with financial subsidies.</p>
<i>On management of elections, the new Constitution should:-</i>	<p>107. establish an independent and impartial Electoral Commission, comprised - of Commissioners of integrity appointed by the President with the approval of Parliament and funded directly from the Consolidated Fund.</p> <p>108. provide that Commissioners serve for a maximum of two five year terms but who otherwise have security of tenure.</p> <p>109. give the Electoral Commission the power to deal with certain electoral disputes or offences immediately.</p> <p>110. provide for the establishment of a special Electoral Boundaries Commission within two years of coming into force of the new Constitution to review constituency boundaries and where necessary create new constituencies on the basis of criteria specified in electoral laws.</p> <p>111. provide that the delimitations of constituency boundaries be done every ten years.</p>

<p><i>On the legislature, the new Constitution should:</i></p>	<ul style="list-style-type: none"> 112. provide for a bicameral legislature consisting of an Upper House called the National Council and a Lower House called the National Assembly both collectively referred to as Parliament. 113. provide that the National Council shall consist of 100 members of which 70 members shall be elected from the districts (including Nairobi) and 30 women elected from the provinces (4 from each province and 2 from Nairobi). 114. provide that the National Assembly be composed as indicated in recommendation number 89 above. 115. provide that the term of Parliament shall last five years from election to election. 116. provide, in detail, the functions of Parliament. 117. provide that the political party with a majority of members or a coalition of such parties would form the government. 118. provide that Parliament has unlimited powers over its own procedure and full control of its own calendar. 119. require that members of Parliament work full time. 120. stipulate clearly that Parliament has the power to dismiss the government through a vote of no confidence. 121. require that members of Parliament establish constituency offices. 122. stipulate that the office of Leader of the Minority party be established and recognised in Parliament. 123. enhance the capacity of Parliament to supervise the operations of the executive branch.
<p><i>On the executive, the new Constitution should:</i></p>	<ul style="list-style-type: none"> 124. provide for an executive branch consisting of a President and a cabinet headed by a Prime Minister. 125. stipulate that a Presidential candidate be nominated by a political party or be an independent candidate aged between 35 and 70 years, a graduate from a recognised university, and of high integrity and moral probity 126. stipulate that the President be elected directly by the people on the basis of universal suffrage. 127. provide that a Presidential candidate, who obtains 20% of votes cast in at least 5 provinces and an overall 50% of the total valid votes cast countrywide be declared elected and that where there is no outright winner, a run off shall be held between the two candidates with the highest number of votes, and the candidate with a simple majority in the run off be declared winner. 128. exclusively define the powers of the President and the circumstances under which he/she may be removed from office and procedure for impeachment. 129. provide that every Presidential candidate must nominate a person qualified to be President as his/her running mate who upon election shall become Vice President . 130. stipulate that in the event of death, impeachment, or resignation of the President, the Vice-President shall assume the office for the remainder of the term of the President. 131. provide that if the office of the Vice-President becomes vacant, the President shall appoint a Vice-President from among elected members of Parliament. 132. provide that in the event of death of both the President and the Vice President, the Speaker shall act as President. 133. provide for the appointment of a Prime Minister responsible to Parliament and head of the Cabinet in the Government of Kenya. 134. provide that the Prime Minister be appointed from the party or coalition of parties with the largest number of members in Parliament and be the head of the Cabinet. 135. provide that the term of office of the Prime Minister continues for the life of Parliament unless he/she resigns, dies or is dismissed by Parliament on a vote of no confidence. 136. provide for the appointment of two Deputy Prime Ministers to assist the Prime Minister in the performance of his/her functions. 137. limit the size of the cabinet to not more than fifteen ministers and that ministers be appointed from outside Parliament but approved by it. 138. provide for the appointment of a person qualified to be a High Court judge as Attorney-General as the chief legal advisor for the Government. 139. provide for a separate and independent office of Director of Public Prosecutions.

<i>On the judiciary, the new Constitution should:-</i>	<p>140. establish the office of Chief Justice the holder of which shall be the head and member of the Judiciary and President of the Supreme Court.</p> <p>141. establish an independent Judicial Service Commission and define its membership and functions.</p> <p>142. establish a new court structure consisting of:</p> <ul style="list-style-type: none"> Supreme Court Court of Appeal The High Court Kadhi's Courts Subordinate Courts Specialized Tribunals <p>143. provide that the Supreme Court be the Constitutional Court and the ultimate court of appeal in all matters.</p> <p>144. provide for the establishment of tribunals composed of village elders to adjudicate on land, and personal law matters at the local level.</p> <p>145. clearly define the qualifications necessary for appointing a judicial officer at any level.</p> <p>146. fix the retirement age for all judges, Kadhi's and magistrates at 65 years.</p> <p>147. accord the Chief Kadhi the status of a High Court Judge</p> <p>148. provide that upon coming into force all judges of the High Court, Court of Appeal and the Chief Kadhi comply with the terms and conditions set in its transitional provisions.</p>
<i>On the public service, the new Constitution should:-</i>	<p>149. establish an independent Public Service Commission and define its membership, functions and powers and mode of appointment.</p> <p>150. provide that all appointments to the public service be made by, and discipline of public servants be executed exclusively by the Public Service Commission.</p> <p>151. provide that all public servants shall retire at the age of 65 years.</p>
<i>On devolution of powers, the new Constitution should:-</i>	<p>152. provide for a four tier devolution structure based on the province, district, location and village.</p> <p>153. provide that Nairobi as the capital territory be governed in accordance with special legislation.</p> <p>154. provide that other municipalities be governed in accordance with legislation establishing units of devolution.</p> <p>155. entrench the structure of devolution</p> <p>156. provide that upon the new Constitution coming into effect the provincial administration will stand abolished.</p>
<i>On the management of natural resources, the new Constitution should:-</i>	<p>157. vest all natural resources including minerals, water, land, forests, fisheries and wetlands in and within the jurisdiction of Kenya in the people of Kenya except where ownership is expressly vested in other persons or people by this Constitution.</p> <p>158. provide that the state under the supervision of Parliament be under a public duty and trust to manage the country's resources on behalf of the people.</p> <p>159. provide that structures should exist through which communities can participate in the administration of natural resources</p>
<i>On the environment, the new Constitution should:-</i>	<p>160. create environmental rights and duties as well as standards for the conservation and sustainable utilization of the natural resources.</p> <p>161. contain provisions giving every person in Kenya a duty to have the environment protected for the benefit of present and future generations.</p> <p>162. establish a National Environmental Management Commission to take custody of environmental resources.</p>
<i>On the land question, the new Constitution should:-</i>	<p>163. declare that all land belongs not to the state but to the people of Kenya in their individual and collective capacity.</p> <p>164. prohibit non-Kenyans from holding land other than in terms of leases.</p> <p>165. provide that land be held as either public, community and individual property, and that all three categories be clearly defined.</p> <p>166. reserve in the state, the power of compulsory acquisition and authority to regulate the use of land.</p> <p>167. establish a National Land Commission to inter alia, hold title to and administer public land.</p> <p>168. require Parliament to establish mechanism for the investigation and recovery of all public land irregularly disposed of, and the investigation and regulation of land expropriated during colonialism or through other causes.</p> <p>169. require government to design and publish a national land policy.</p> <p>170. provide for security of land rights for all land owners irrespective of tenure</p> <p>171. require the government at all levels to establish an efficient, transparent and cost - effective land administration system.</p> <p>172. recognise customary land law as the regime governing the delimitation of right in community property and the transmission of those rights as part of the personal law of indigenous Kenyans.</p>

	173. recognise the right to matrimonial property and equitable access to such property by spouses during and after marriages.
<i>On intellectual property rights, the new Constitution should:</i>	174. protect indigenous knowledge and skills and promote their development and nurture. 175. require Parliament to enact legislation to promote cultural, industrial and scientific innovations and to enable inventors or authors to appropriate benefits derived from such innovations.
<i>On public finance and revenue management, the new Constitution should:</i>	176. establish an inter-disciplinary Economic and Financial Affairs Council comprised of such members and exercising such powers or performing such functions as may be defined in legislation. 177. provide for a Parliamentary Budgetary Committee that will work closely with the Treasury in the development of the Annual Financial Bill. 178. provide for a Parliamentary Budget Office in the form of a Secretariat that would render technical assistance to the Budget Committee on matters relating to financial control and audit. 179. establish a Central Bank of Kenya as an independent institution which shall be the supreme monetary authority of the Republic, headed by a Governor and Deputy Governor exercising such powers as may be specified in legislation. 180. prohibit the raising or levying of taxes without the authority of Parliament. 181. prohibit the incurring of the public debt of the Government of Kenya without the prior approval of Parliament. 182. provide for the creation of two separate Constitutional offices of Auditor-General, and Controller of the Budget and define their functions.
<i>On human resource management, the new Constitution should:</i>	183. require Parliament to enact legislation establishing an efficient, effective, accountable and motivated public service. 184. guarantee to every Kenyan free and compulsory basic (i.e. primary) education.
<i>On Social infrastructure, the new Constitution should:</i>	185. include, in the Bill of Rights, the basic right to health, shelter and efficient physical infrastructure. <i>On science and technology, the new Constitution should:</i> 186. require the state to design and implement a science and technology policy to improve the effectiveness of the national system of innovation and research.
<i>On Constitutional commissions and offices, the new Constitution should:</i>	187. create and define the powers and functions of special Constitutional Commissions and offices to supervise Constitutionality. 188. provide that the appointment of holders of Constitutional Commissions and offices be made with the approval of Parliament. 189. establish a Salaries and Remunerations commission to determine the remuneration and benefits of holders of Constitutional offices.
<i>On ethics and leadership, the new Constitution should:</i>	190. establish a leadership code to regulate the conduct of all public offices including those holding Constitutional offices. 191. establish an Ethics and Integrity Commission to administer the leadership code.
<i>On succession and transfer of power, the new Constitution should:</i>	192. provide detailed provisions relating to the management transitional issues consequential upon its commencement. 193. provide that any person who has ever held the office of President for more than two terms under the old Constitution be disqualified from holding office under it.

21.2 Compilation of the Draft Bill of 2002

Pursuant to the Review Act and on the basis of the views expressed by Kenyans, in addition to the analysis of the conceptual, comparative and situational issues, the Commission made specific recommendations organized around various topics, which formed the basis for drafting the Draft Bill to alter the Constitution of the Republic of Kenya of 2002. The compilation and drafting of the Draft Bill of 2002 was undertaken by the Commission at a retreat held in Leisure Lodge, Kwale District in Mombasa Province from 25th August 2002 to 20th September 2002, with the assistance of the Secretariat and the following legislative draftspersons.

(a)	Mr. Harrison Gicheru	-	Programme Officer, Legislative Drafting
(b)	Mr. Jeremiah Nyegenye	-	Programme Officer, Legislative Drafting
(c)	Prof. V.C.R.C. Crabbe	-	External Legislative Draftspersons
(d)	Margaret Nzioka	-	External Legislative Draftspersons
(e)	George Negota	-	External Legislative Draftspersons

The resultant Draft Bill to Alter the Constitution of the Republic Of Kenya of 2002 was issued in Nairobi at 11.00 a.m. Friday, the 27th day of September, 2002. The Draft Bill was divided into twenty chapters of 299 articles and eight schedules.

PART FOUR

THE NATIONAL CONSTITUTIONAL CONFERENCE

CHAPTER TWENTY-TWO

PRELUDE TO THE NATIONAL CONSTITUTIONAL CONFERENCE

22.1 The Mandate of the Commission

Under Section 26 (2) and (7) of the Review Act, the Commission was required to prepare and compile its Report including a summary of its recommendations, and on the basis thereof draft a Bill to alter the Constitution. Section 27(1) of the Act further required the Commission to publish its report and Draft Bill for a minimum period of thirty days, make the report and Draft Bill available to the public for civic education on the same, and thereafter to convene a National Constitutional Conference for discussion, debate, amendment and adoption of its Main Report and Draft Bill of 2002.

22.2. Compilation of the Commission's Reports

To effectively execute its mandate, the Commission organized the process of compiling its reports in various stages as follows.

22.2.1 Constituency Constitutional Forums Reports

The Commission compiled 210 Constituency Constitutional Forums Reports. The reports presented the summary of the views of the people during the constituency hearings including the socio-cultural, political and economic context within which people gave their views and expected change. The Research, Drafting and Technical Support Committee of the Commission developed a template, which was approved by the Commission, to guide the preparation of the Constituency Constitutional Forums' Reports. Each report consisted of a preface, overview of the Constituency as a Review Organ; Constituency Profile; the Constituency Public Hearings; and Appendices listing members of the Constituency Constitutional Committees, persons attending hearings, persons presenting memoranda, and persons making oral submissions. Each Constituency report was published individually.

22.2.2 The Report of Commission

The Commission's Main Report presented the key conceptual, comparative, situational and public hearing findings, conclusions and recommendations. The recommendations of the report formed the basis for the drafting of the Draft Bill of 2002. The Report of the Commission was published and presented to the National Constitutional Conference in five volumes as follows:

- Volume I: The Main Report,
- Volume II: The Draft Constitution

- Volume III: Commission's Method of Work
- Volume IV: The Constituency Constitutional Forum Reports,
- Volume V: The Technical Appendices presented in six parts,

The Main Report is reproduced in the Final report as Parts One, Two and Three and was prepared from materials assembled by nine taskforces between May and September 2002 at the Commission secretariat in Nairobi and Leisure Lodge in Mombasa, as follows:

1. *The Task Force on Constitutional Development in Kenya* worked on the exegesis of Kenya's Constitutional history to 1963; a detailed analysis of the Independence Constitution; a detailed analysis of Constitutional amendments to 2001; and the general assessment of the present Constitution. The members of the Task Force were as follows:

Professor Yash Pal Ghai	-	Co-Convenor
Professor H.W.O. Okoth-Ogendo	-	Co-Convenor
<i>Ms. Pauline Nyamwanya</i>	-	<i>Secretariat</i>

2. *The Task Force on the Constitutional Review Debate and Process* focused on the pressures for constitutional review in the global and African context; the legislative framework for the review; and the structure, organization and stages of the review process in Kenya. The members of the Task Force were as follows:

Professor Yash Pal Ghai	-	Co-Convenor
Professor H.W.O. Okoth-Ogendo	-	Co-Convenor
<i>Ms. Pauline Nyamwanya</i>	-	<i>Secretariat</i>

3. *The Task Force on the Political and Economic Context of the Constitutional Review Process* critically examined the contextual factors informing the review process at two levels. At the national level, the Task Force examined in great detail the political, social, economic and cultural context of the review. At the regional and international level the Task force examined the processes and implications of the global movement towards constitutional and democratic governance; economic globalization; and regional co-operation and integration in the review process. The members of the Task Force were as follows:

Professor H.W.O. Okoth-Ogendo	-	Co-Convenor
Dr. Andrenico O. Adede	-	Member
<i>Mr. Charles Oyaya</i>	-	<i>Secretariat</i>

4. *The Task Force on the Constitutive Process* considered, analyzed and made recommendations on the Preamble; National Values, Goals and Principles; Directive Principles of State Policy; Sovereignty of the People; Constitutional Supremacy; The Legal System; Nationhood and Citizenship; and National Territory, Defence and Security. The members of the Task Force were as follows:

Dr. Githu Muigai	-	Convenor
Ms. Kavetsa Adagala	-	Member

Mr. Abubakar Zein Abubakar	-	Member
Pastor Zablon Ayonga	-	Member
<i>Ms. Sylvia Nyaga</i>	-	<i>Secretariat</i>
<i>Mrs. Liz Kingi</i>	-	<i>Secretariat</i>

5. *The Task Force on the State and the Political System* considered, analyzed and made recommendations on Ideology of the State; State and Religion; Culture and Linguistic Diversity; Political Parties; Participatory Governance; The Electoral Process; Role of Civil society; and Kenya in the global and international system. The members of the Task Force were as follows:

Mr. Mutakha Kangu	-	Convenor
Prof. Ahmed I. Salim	-	Member
Mrs. Alice Yano	-	Member
Bishop Bernard Njoroge Kariuki	-	Member
Dr. Andronico O. Adede	-	Member
<i>Mr. Charles Oyaya</i>	-	<i>Secretariat</i>
<i>Mr. Nixon Ogira</i>	-	<i>Secretariat</i>

6. *The Task Force on Organs and Levels of Government* considered, analyzed and made recommendations on the issue on the Executive; the Judiciary; the Legislature; The Public Service; Separation of Powers; and Devolution of Powers (including Local Government). The members of the Task Force were as follows:

Dr. Mosonik arap Korir	-	Co-convenor
Dr. Charles Maranga Bagwasi	-	Co-convenor
Mr. Domiziano Ratanya	-	Member
Hon. Mrs. Phoebe Asiyo	-	Member
<i>Mr. Stephen Mukaindo</i>	-	<i>Secretariat</i>
<i>Mr. Wycliffe Owade</i>	-	<i>Secretariat</i>
<i>Mr. Maurice Kepoi Raria</i>	-	<i>Secretariat</i>
<i>Mr. Charles Oyaya</i>	-	<i>Secretariat</i>

7. *The Task Force on Fundamental Rights and Duties* considered, analyzed and made recommendations on Basic Needs; Basic Rights and Duties; Vulnerable Groups; Minorities; Culture and Languages; Individual and Community Rights and Duties; Women's Rights; and Children's Rights. The members of the Task Force were as follows:

Ms. Nancy Baraza	-	Convenor
Ms. Salome Wairimu Muigai	-	Member
Mr. Ibrahim Lethome Asmani	-	Member
Mr. Paul Musili Wambua	-	Member
<i>Ms. Achieng' Olende</i>	-	<i>Secretariat</i>
<i>Ms. Sheila Karani</i>	-	<i>Secretariat</i>
<i>Mrs. Liz Kingi</i>	-	<i>Secretariat</i>

8. *The Task Force on National Resources* considered, analyzed and made recommendations on Public Finances and Revenue; Human and Intellectual Resource

Management including Science, Technology and Education; Land and Property; and Environment and Natural Resources. The members of the Task Force were as follows:

Dr. Abdirizak Arale Nunow	-	Convenor
Mr. Isaac Lenaola	-	Member
Dr. Mohammed A. Swazuri	-	Member
Mrs. Abida Ali-Aroni	-	Member
<i>Ms. Catherine N. Mburu</i>	-	<i>Secretariat</i>
<i>Ms. Noor Awadh Ghalgan</i>	-	<i>Secretariat</i>
<i>Mr. Charles Oyaya</i>	-	<i>Secretariat</i>

9. *The Task Force on Management of Constitutionality* considered, analyzed and made recommendations on Independent Commissions; Constitutional Offices; Constitutional adjudication; the Public Service; Transitional Mechanisms; and Enforcement of Constitutional Rights. The members of the Task Force were as follows:

Prof. Wanjiku Kabira	-	Convenor
Mr. Riunga Raiji	-	Member
Mr. Ahmed Issack Hassan	-	Member
Mr. Keriako Tobiko	-	Member
<i>Ms. Eunice Gichangi</i>	-	<i>Secretariat</i>
<i>Ms. Jacqueline Obiero</i>	-	<i>Secretariat</i>

Prof. Yash Pal Ghai, the then Chairperson of the Commission, the Chairperson of Research, Drafting and Technical Support Committee of the Commission, Prof. H. W. O. Okoth-Ogendo, and Ms Pauline Nyamweya, the Deputy Secretary in charge of Research, Drafting and Technical Support Department, coordinated the work of these task forces.

Each of the Task Forces was given a set of terms of reference for guidance in its work. In its analysis, each Task Force was expected to:

- Provide a conceptual analysis of the key issues under its mandate;
- Highlight the provisions of the Independence and existing Constitution;
- Analyze the provisions of the Constitution of Kenya Review Act (Cap. 3A);
- Analyze the views and recommendations collected from Kenyans on the particular issues;
- Conduct a comparative analysis of constitutional systems of other countries of the world; and
- Distil and recommend for further debate by the Commission, broad principles, value systems, institutional mechanisms and processes that ought to be incorporated into the design of a new Constitution for Kenya.

The Task Forces, while observing these general guidelines worked principally through meetings in which vigorous debate, discussion, research and analysis of the views of Kenyans was conducted. The Task Forces finally presented their reports to the

Commission Plenary for further debate, approval and decision-making as follows:

- Taskforce on the Constitutive Process -30th August 2002;
- Taskforce on Fundamental Rights and Duties - 31st August 2002;
- Taskforce on the Management of Constitutionality - 2nd September 2002;
- Taskforce on the State and the Political System - 3rd September 2002;
- Taskforce on National Resources- 6th September 2002; and
- Taskforce on Organs and Levels of Government- 8th September 2002.

This Final Report builds on the Commission's Main Report by adding details on the preparation for, and proceedings during the National Constitutional Conference. In order to undertake the preparation of the Final Report, the Commission established Task Forces structured along the agreed content of the Final Report as follows:

1. *The Task Force Reviewing the Main Report* comprising the following members:

Dr. Githu Muigai	-	Convenor
Professor Ahmed Idha Salim	-	Member
Dr. K. Mosonik arap Korir	-	Member
Bishop Bernard Njoroge	-	Member
<i>Mr. Charles Oyaya</i>	-	<i>Secretariat</i>
<i>Ms. Leah Symekher</i>	-	<i>Secretariat</i>
<i>Mr. Geoffrey Mosoti</i>	-	<i>Secretariat</i>

2 *The Task Force on the Legal and Institutional Framework for the National Constitutional Conference* comprising the following members:

Ms. Nancy Baraza	-	Convenor
Dr. Charles Maranga	-	Member
<i>Mr. Jeremiah Nyegenye</i>	-	<i>Secretariat</i>

3. *The Task Force on the General Debate at the National Constitutional Conference* comprising the following members:

Mr. Mutakha Kangu	-	Convenor
Justice Mr. Isaac Lenaola	-	Member
Mr. Abubakar Zein Abubakar	-	Member
Ms. Salome Muigai	-	Member
Mr. Domiziano Ratanya	-	Member
Dr. Mohammed Swazuri	-	Member
<i>Mr. Walter Owuor</i>	-	<i>Secretariat</i>
<i>Mr. Fidelis Wangata</i>	-	<i>Secretariat</i>

4. *The Task Force on the Establishment and Work of Technical Working Committees and the Steering Committee* comprising the following members:

Professor Wanjiku Kabira	-	Convenor
Mr. Ibrahim Lethome	-	Member
Hon. Dr. Phoebe Asiyo	-	Member
Pastor Zablon Ayonga	-	Member
<i>Ms. Eunice Gichangi</i>	-	<i>Secretariat</i>

<i>Ms. Sylvia Nyaga</i>	-	<i>Secretariat</i>
<i>Mr. Evans Menach</i>	-	<i>Secretariat</i>
<i>Mr. Stephen Mukaindo</i>	-	<i>Secretariat</i>

5. *The Task Force on the Drafting Process at the National Constitutional Conference* comprising the following members:

<i>Professor H.W.O. Okoth-Ogendo</i>	-	Convenor
<i>Justice Mr. Isaac Lenaola</i>	-	Member
<i>Mr. Paul Wambua</i>	-	Member
<i>Mr. Riunga Raiji</i>	-	Member
<i>Mr. Keriako Tobiko</i>	-	Member
<i>Mr. Jeremiah Nyegenye</i>	-	<i>Secretariat</i>

6. *The Task Force on the Consideration and Adoption of the Draft Bill and Report at the National Constitutional Conference* comprising the following members:

<i>Dr. Andronico O. Adede</i>	-	Convenor
<i>Ms. Kavetsa Adagala</i>	-	Member
<i>Mrs. Abida Ali Aroni</i>	-	Member
<i>Dr. Abdirizak Nunow</i>	-	Member
<i>Mrs. Alice Yano</i>	-	Member
<i>Ms. Pauline Nyamwanya</i>	-	<i>Secretariat</i>
<i>Mr. Harrisson Gicheru</i>	-	<i>Secretariat</i>
<i>Mr. Peter Kanyi</i>	-	<i>Secretariat</i>
<i>Ms. Leah Symekher</i>	-	<i>Secretariat</i>
<i>Mr. Geoffrey Mosoti</i>	-	<i>Secretariat</i>
<i>Mr. Dan Juma</i>	-	<i>Secretariat</i>

The Task Forces prepared initial drafts, which were forwarded to the Research, Drafting and Technical Support Committee for review and finalization. The Chairperson of Research, Drafting and Technical Support Committee of the Commission, Prof. H. W. O. Okoth-Ogendo, and Ms. Pauline Nyamwanya, the Commission's Deputy Secretary in charge of Research, Drafting and Technical Support Department, compiled and edited the various reports of the Task Forces. This first draft of the Final Report became the working document for discussion by the Commission sitting in plenary.

Following the Commission's deliberations and consideration of the first draft of the Final Report, the Commission resolved that the finalization of the report be undertaken by a special Task Force constituted as follows:

<i>Dr. Mohammed Swazuri</i>	-	Co-convener
<i>Dr. Charles Maranga</i>	-	Co-convener
<i>Mrs. Abida Ali-Aroni</i>	-	<i>Ex officio Member</i>
<i>Prof. Ahmed Idha Salim</i>	-	<i>Ex officio Member</i>
<i>Prof. H.W.O. Okoth-Ogendo</i>	-	<i>Ex officio Member</i>
<i>Prof. Wanjiku Kabira</i>	-	<i>Ex officio Member</i>
<i>Ms. Kavetsa Adagala</i>	-	Member

Bishop Bernard Njoroge Kariuki	-	Member
Mr. John Mutakha Kangu	-	Member
<i>Ms. Pauline Nyamweya</i>	-	<i>Secretariat</i>
<i>Mr. Charles Oyaya</i>	-	<i>Secretariat</i>
<i>Ms. Roselyn Nyamato</i>	-	<i>Secretariat</i>
<i>Mr. Joash Aminga</i>	-	<i>Secretariat</i>
<i>Mr. Dan Juma</i>	-	<i>Secretariat</i>

This Task Force produced the Final Report, which was then transmitted for technical editing before approval by the Commission.

The Commission Chirperson, Mrs Abida Ali- Aroni, and the Research, Drafting and Technical Support Committee of the Commission maintained their management and technical advisory function in order to ensure internal consistency in the work of the Task Forces.

22.2.3 Additional Reports by the Commission

The Commission prepared, in the course of its activities, other reports and publications based on its broader statutory responsibilities of the Commission. These reports and publications included:

- The Curriculum for Civic Education for Constitutional Review (Nairobi, 2001).
- The Issues and Questions for Public Hearings (Nairobi, 2002).
- The Hansard Reports (Nairobi, From 2001 to date).
- Reviewing the Constitution: A Guide to the Kenyan Constitution by Professor Yash Pal Ghai (Nairobi, 2002).
- The People's Choice: The Report of the Constitution of Kenya Review Commission – A Short Version, (Nairobi, 2002).

22.3 Publication of the Commission's Main Report And Draft Bill of 2002

The Review Act under sections 22 and 27 required the Commission to publish its reports for the information of the Public. Section 27(1)(a) particularly, required the Commission's reports to be publicised for a period of thirty days for the information of the public. The publications were to be made available to the Documentation Centres, all libraries provided by the Kenya National Library Services Board, and through print and electronic media. Publication of the short version of the Commission's Report - The People's Choice, and the Draft Bill of 2002 in the print media in September 2002 served the purposes of availing the Draft Bill at reduced cost to members of the public and enabling members of the public to have first hand appreciations of the new Constitution.

22.4 Dissemination of the Commission's Main Report and Draft Bill of 2002

Section 27(1)(b) required the Commission to ensure that the report and the draft Bill

are made available to the persons or groups of persons conducting civic education. The initial provisions of this section of the Review Act had enjoined the Commission to conduct civic education for sixty days but this was reduced to thirty days by an amendment to the Act in August 2002, which also deleted requirements to have sessions at each province on the Commission's Main Report and Draft Bill of 2002 .

The amendment was intended to shorten the time frame for the constitutional review process, because of the then pending General Elections. The Commission therefore had to improvise and the main dissemination outlets and sources of feedback on the Main Report and Draft Bill were as follows:

- Print and electronic media including talk shows and features;
- Constituency Constitutional Forums – all the 210 constituencies were visited by Commissioners and Program Officers and face-to-face feedback received between 7th October and 18th October 2002;
- Direct submission of comments to the Commission by special interest groups;
- Peer Review of the Draft Bill of 2002 held at the Bomas of Kenya on 26th – 27th, October 2002;
- Public and Private Institutions;
- The Commission's website; and
- Community based civic education organizations.

The overall aim of the dissemination exercise was to enhance understanding and appreciation of Kenyans on the contents and implications of the Main Report and Draft Bill, to generate effective debate for and during the National Constitutional Conference and to build public consensus and support towards the final enactment of the Bill.

The Commission anticipated that through dissemination and interactive public debates, Kenyans would narrow their political gaps or even make compromises regarding certain contentious provisions contained in the draft Bill. Dissemination was, therefore, a continuous exercise during the entire period after the publication of the Report and Draft Bill. It was critical in stimulating public discussions and awareness of Constitutional matters, ownership, validation of views and accountability to the people. Attendance and shortage of time were major constraints arising from the time limits placed on the Commission.

22.4.1 Organization of Dissemination of the Main Report and Draft Bill 2002

The Commission's Mobilization and Outreach Department was charged with the responsibility of providing logistical arrangements for the dissemination process. The department selected suitable venues for the dissemination exercise. Choice of venues was done with the assistance of the 74 District Co-ordinators. The Mobilization and Outreach Department in conjunction with Civic Education, Public Information and Communication Department also ensured availability of necessary materials for the exercise such as copies of the Draft Bill, the short version of the Commission's report and the *Draft Bill at a Glance*. The Research, Drafting and Technical Support Department was responsible for the technical facilitation and management of the dissemination process. As a prelude to actual dissemination, a seminar was held at Kenya College of Communications and Technology, Mbagathi from 2nd to 4th October

2002 for Commission District Co-ordinators and secretariat, representatives of civil society, churches, NGOs, the private sector, and the media. The seminar familiarized participants with the contents of the Commission's Main Report and Draft Bill of 2002.

22.4.2 Print and Electronic Media

The Commission worked closely with various media houses, newspaper columnists, editors and international news agency reports. Print media such as the *Daily Nation*, *East African Standard*, *Taifa Leo*, *Kenya Times* and *The People* were most useful in the dissemination process. The Commission - caused pullouts of the draft Bill were published in the *Daily Nation* (English edition), *Taifa Leo* (Kiswahili edition) and the *East African Standard*. The Commission also published every fortnight, the *Katiba News*, an in-house newsletter dedicated to the review process.

The Commission put in place 20 Kenya Broadcasting Corporation radio programmes organized along the chapters of the Draft Bill of 2002. The broadcast sessions which began on September 29 2002, offered an in depth coverage of the draft Bill in preparation for the National Constitutional Conference which was initially planned to begin on 28th October 2002 but later rescheduled to 28th April 2003. These programmes were broadcast on National Service (in the Kiswahili language) and General Service (in the English language). The radio (especially Kenya Broadcasting Corporation state radio) was preferable because of its wide coverage throughout the Country. The Commission endeavoured to reach as many Kenyans as possible through radio stations such as IQRA FM, Family FM, Baraka FM, Pwani FM, Capital FM, Nation FM, KISS 100, CORO FM and Kameme FM. Baraka FM and Pwani FM targeted the Coastal Province audience while Capital FM , Nation FM and KISS 100 was appropriate for the young and professional middle classes. CORO FM and Kameme FM were the best medium to access the people who communicate in Kikuyu language in Nairobi and Central Provinces and their environs.

Commissioners appeared in various television programmes aired by the stations above, such as *Eyes on the People*, *Up Close and Candid*, and the *Third Opinion*. They also participated in various radio shows, examples being "Good Morning Kenya", "Madhari Ya Wiki" and in the British Broadcasting Corporation.

The Commission's website (<http://www.kenyaconstitution.org>) was accessed by over one million people who either downloaded the Main Report and Draft Bill of 2002 or browsed the documents. For Kenyans overseas, the website was the main source of information about the review process. On the first day upon the posting, over 100,000 hits worldwide downloaded the Draft Bill of 2002 from the Internet.

The Commission also organized press conferences, drama, advertisements, pamphlets, television segments, brochures, posters, banners among others as means of disseminating the Main Report and the Draft Bill of 2002. It is not farfetched to assert that through its multimedia strategy the Commission was one of the most publicized institutions ever established in Kenya.

22.4.3 Dissemination at Constituency Constitutional Forums

The Commission facilitated and organized a programme of dissemination of the Main Report and Draft Bill in all the 210 Constituencies of the Republic of Kenya between 7th and 18th October 2002. During the constituency dissemination visits, the Commissioners and Commission Secretariat discussed the contents of the Main Report and Draft Bill of 2002 with leaders and the people. It was evident that the people were proud of having participated in the process and their views having been fully reflected in the Report and Draft Bill by the Commission. The keenness of responses was heightened by the campaigns for the general elections, which, however, constrained the Commission due to the shortening of the dissemination process in the attempt to have a new Constitution before the December 2002 general elections.

As a result, in some constituencies attendance was affected by the short notice given in the print media, dissemination in some constituencies was for half a day due to logistical problems, and the short sessions curtailed detailed discussions on the Main Report and Draft Bill of 2002.

22.4.4 Direct Submissions

The publication of the Draft Bill of 2002 was one of the mechanisms adopted by the Review Act to ensure that the Draft Bill received consensus from a broad section of the public. The Draft elicited debate on its provisions from both individuals and civil society submitted their comments directly to the Commission. Notably, most of these special interest groups had closely followed the review debate. The direct submissions were compiled in the Compendium of Public Comments on the Draft Bill alongside other contributors.

22.4.5 Peer Review of the Draft Bill

The Commission organized a peer review of the Draft Bill of 2002 held on 26th and 27th October 2002 at the Bomas of Kenya. The purpose of the review was to provide opportunity for experts to audit the Draft Bill and provide insights on the revision of the Draft Bill ahead of the National Constitutional Conference. Delegates from all over the country who were participating in pre-conference activities attended the two-day meeting as observers. Different topical issues were discussed during the review meeting.

22.5 Consideration of the Public Feedback and Responses on the Draft Bill of 2002

Many Kenyans demonstrated great enthusiasm upon the publication of the Min Report and Draft Bill of 2002. They commended the Commission for designing a document that truly reflected the aspirations of Kenyans, notwithstanding the myriad hurdles on the way. In an opinion poll conducted by the International Republican Institute (IRI)

appearing on the *Daily Nation* of Tuesday 10th December 2002, it was reported that a large majority of Kenyans (82.8%) believed that the Constitution of Kenya Review Commission in its work was accountable to Kenyans and 74.2% felt that the draft Constitution represented the views of Kenyans.

In response to the public comments and recommendations, the Commission undertook, through the original Thematic Task Forces, to compile the public reactions to form the basis for the revision and annotation of the Draft Bill. Once the Thematic Task Forces completed their analysis and compilation of the public reactions and recommendations, these were forwarded to the Task Force on the Revision of the Draft Bill which produced *An Annotated Version of Draft Bill 2002 to Amend the Constitution*. The justification for this process found its expression in Section 5 (d) of the Review Act which provided that the review process shall “ensure that the final outcome of the review process faithfully reflects the wishes of the people of Kenya”.

The above activities were undertaken against the backdrop of two important circumstances. One was the increasing opposition from political leaders to the work of the Commission, whose recommendations were not popular with the government of the day. This generated fear that the constitution review process could be nipped in the bud. Second was the impending general elections, which were due to be held before the end of 2002. There were thus calls from some members of the public for the postponement of the elections, to enable the completion of the review process and elections under a new Constitution.

The Commission on its part proceeded with logistical arrangements for the National Constitutional Conference, which was the next major part of its work. Because of the extremely limited time that the Commission had to prepare for the Conference, the Commissioners and Commission Secretariat worked literally round the clock identifying and preparing the venue for the Conference; preparing and procuring the materials needed for the Conference; identifying and training the Conference staff, and preparing and publishing the necessary Conference regulations.

In addition, the Commission published a number of working documents in April 2003 intended to enhance the work of the National Constitutional Conference as follows:

1. An Annotated Version of the Draft Bill;
2. The Independence Constitution of the Republic of Kenya;
3. The Compendium of Public Comments on the Draft Bill;
4. The Compendium of Legislations that need to be enacted; and
5. A Summary of the Recommendations of the Commission.

CHAPTER TWENTY-THREE

THE LEGAL FRAMEWORK FOR THE NATIONAL CONSTITUTIONAL CONFERENCE

23.1 The Convening of the Conference

Under section 27(1) of the Review Act, the Commission was required after compiling its report and preparing a draft Bill, publishing the same and disseminating them, to convene a National Constitutional Conference for discussion, debate amendment and adoption of its report and draft Bill.

In exercise of these powers, the Commission first published the notice for the convention of the National Constitutional Conference to begin on 28th October 2002. Pre-conference activities duly commenced on 21st October 2002. These were aimed at availing the conference documents to the delegates, familiarizing them with the Commission's Main Report and Draft Bill of 2002, and training them on the Conference Regulations, all in preparation for the conference proceedings. On 25th October 2002, the then President, Daniel arap Moi, dissolved Parliament thus setting in motion the final stages to the country's general elections, which were expected to be held in late December 2002. The Chairman of the Electoral Commission of Kenya later announced the actual date of the general elections as 27th December 2002 .The Conference was therefore called off on 27th October 2002 to await the reconstitution of Parliament, since all members of Parliament were delegates of the National Constitutional Conference.

A second notice convening the National Constitutional Conference to commence on 28th April 2003 at the Bomas of Kenya in Nairobi was published on 10th April 2003, in the electronic and print media. Although the Commission originally planned to have one session of the Conference, the National Constitutional Conference was held in three sessions, popularly known as Bomas I, Bomas II and Bomas III because of intervening factors, and enthusiastic participation by delegates. After the Conference had been convened and had commenced, its life, including the number and duration of adjournments was, under the law, in the hands of the Conference itself. In exercise of its powers, the Conference adjourned as follows:

Table 5: Adjournments of the National Constitutional Conference

Date of Convening	Date of Adjournment	Reasons for Adjournment
28 th April 2003	6 th June 2003	Parliament to debate and pass the Finance Bill
17 th August 2003	25 th August 2003	Death of the Vice President
6 th September 2003	26 th September 2003	Parliament to transact pending parliamentary business
12 th January 2004	23 rd March 2004 (<i>Sine die</i>)	Adoption of the Draft Constitution

23.2 The Mandate of the National Constitutional Conference

The mandate of the Conference as set out in section 27(1)(b) was to convene a National Constitutional Conference for discussion, debate, amendment and adoption of its report and draft Bill". Under section 34 of the Act, the Commission was empowered to make Regulations to prescribe the procedure inter alia the constitution and conduct of the National Constitutional Conference.

In exercise of the powers conferred by sections 27 and 34 of the Act, the Commission made and published the following sets of Regulations on 5th August 2002.

- (1) The Constitution of Kenya Review (Constitution of the National Constitutional Conference) Regulations, 2002.
- (2) The Constitution of Kenya Review (National Constitutional Conference) (Nomination of Civil Society and Other Interest Groups Representatives) Regulations, 2002.
- (3) The Constitution of Kenya Review (National Constitutional Conference) (District Representatives Elections) Rules, 2002.

Prior to publishing these Regulations and Rules, the Commission held a series of consultative meetings with representative of women's organizations, religious bodies, professional bodies, trade unions and non-governmental organizations which were registered as at the commencement of the Review Act (in November 2000). This was in keeping with subparagraph (ii) of paragraph (e) of section 27(2) which required the Commission to –

"consult with and make Regulations governing the distribution of representation among the various categories of representatives set out in paragraph (e)".

The Commission also published the Constitution of Kenya Review (National Constitutional Conference)(Procedure) Regulations, 2003 on which borrowed heavily from parliamentary procedure in phraseology and method and content.

The text of these regulations is reproduced in Appendix III.

23.3 Composition of the National Constitutional Conference

The Act in section 27(2) provided for the composition of the Conference as follows – "The National Constitutional Conference shall consist of –

- (a) the Commissioners who shall be ex-officio members without the right to vote
- (b) all members of the National Assembly;
- (c) three representatives of each district, at least one of whom shall be a woman, and only one of whom may be a councillor elected by the respective County Council in accordance with such rules as may be prescribed by the Commission;
- (d) one representative from each political party registered at the commencement of this Act, not being a member of Parliament or a councillor;
- (e) such number of representatives of religious organizations, professional bodies, women's organizations, trade unions and non-governmental organizations

registered at the commencement of this Act and of such other interest groups as the Commission may determine:

Provided that –

- (i) the members under paragraph (e) shall not exceed twenty-five per cent of the membership of the National Constitutional Conference under paragraphs (a), (b), (c) and (d); and
- (ii) the Commission shall consult with and make regulations governing the distribution of representation among, the various categories of representatives set out in paragraph (e).

The complete list of the National Constitutional Conference delegates as at the end of the Conference is attached as Appendix IV.

23.4 Nomination and Election of Members

Of the categories of members of the National Constitutional Conference provided for under section 27(2), nominations and elections were required for representatives of religious organizations, professional bodies, women's organizations, trade unions, non-governmental organizations and other interest groups; district representatives; and representatives from political parties.

23.4.1 Civil Society Representatives

At the consultative meetings held with representative of women's organizations, religious bodies, professional bodies, trade unions and non-governmental organizations, the Commission notified the groups about the requirements of the Act and how the Commission proposed to arrive at the numbers of the representatives of the different categories or organizations. Each category of organizations was invited to consider the preliminary proposals of the Commission with regard to the distribution of seats to that category and to make a case for any changes.

Eventually the following distribution of representation was agreed upon by consensus:

Religious Organizations	35
Professional bodies	15
Women's organizations	24
Trade Unions	16
Non-Governmental organizations	23
Other interest groups	13
Total	126

In addition, it was agreed that each category of organizations would constitute a nominating panel to coordinate and facilitate the nomination of the representatives of that particular category of organizations and bodies before forwarding the names for gazettlement by the Commission.

The Regulations published by the Commission reflected the results of these consultations. The consultations minimised controversies, which might otherwise have encumbered the process of nomination and election of delegates. From the experience of the review process up to that stage, controversies relating to the numbers to represent each category and their mode of selection had been expected.

To be a civil society representative one had to be:

- (a) a member of one of the organizations and bodies provided for under section 27(2)(e) of the Act,
- (b) a citizen of Kenya,
- (c) a person of integrity and good character,
- (d) able to speak or otherwise communicate in English, Kiswahili or in sign language well enough to take an active part in the proceedings of the National Constitutional Conference, and
- (e) at least eighteen years of age.

In nominating persons for appointment as civil society representatives, a nominating panel was required to:

- (a) ensure that –
 - (i) all provinces are equally represented,
 - (ii) at least one third of its nominees are women, and
 - (iii) persons nominated are ordinarily resident in the province,
- (b) have regard to Kenya's ethnic, geographical, cultural, political, social and economic diversity, and
- (c) have regard to the need for the representation of persons with disabilities and the youth.

The nominating panel from women organizations was however not subjected to the one-third requirement in terms of women nominees.

Although the process of nomination of candidates was given to the nominating panels, the Commission retained oversight over these panels to ensure that they complied in their proceedings with the Regulations and observed the criteria set out for nomination of candidates. Each nominating panel consisted of not more than nine persons, at least one-third of whom were women, and reflected Kenya's ethnic, geographical, cultural, political, social and economic diversity. No member of a nominating panel was eligible for nomination as representative to the National Constitutional Conference.

Since the numbers were negotiated and agreed upon by consensus, the actual selection was by nominating panels elected by each category of organization. The process, save for minor complaints, which were eventually resolved, was considerably devoid of acrimony. Controversies were reported in the nomination of women's organizations, in respect of who was eligible for membership in the nominating panel, and the identifying of representatives from the participating organizations. This mainly arose from leadership disagreements and factions within these women's organizations. In some cases, the Commission, therefore, received double nominations from the same organization. These controversies were however resolved by the Commission's Accreditation Committee.

23.4.2 Political Party Representatives

In relation to the representatives of political parties, the Commission requested from the Registrar-General, a list of the political parties registered at the commencement of the Act (as at November 2000) and their registered officials and address. A total of 42 political parties were referred to the Commission as eligible to nominate representatives to the Conference. The Commission then wrote a letter to each political party (addressed to Secretary-General of each political party) inviting them to forward the name of their representative to the National Constitutional Conference. Many of these letters were returned as unknown at the given address. In other cases, the person whose name was shown as the Secretary-General of the party had long ceased to be a member of the party, and was in the leadership of another party. Many of the parties did not exist in any real sense and had private residences as their physical addresses. Some telephone calls were similarly traced to private residences. In other cases, the telephone numbers given were non-existent or perpetually out of order. In the end, communication with a number of political parties had to be pursued through a painstaking process of physical searches and informal networks.

Political parties had the largest number of complaints and controversies in the nomination of their representatives. Most of these revolved around factional differences within the parties, with some factions accusing others of nominating representatives who did not propagate the ideals and policies of their parties. In some cases, changes in office bearers resulted in nominations being done by the wrong person.

23.4.3 District Representatives

In relation to district representatives, the Regulations provided that a person was eligible for election as a delegate if the person was:

- a) a citizen of Kenya resident in one of the constituencies in the district the person sought to represent,
- b) a person of integrity and good character,
- c) of at least the age of eighteen years,
- d) able to speak or otherwise communicate in English, Kiswahili or in sign language, well enough to take an active part in the proceedings of the National Constitutional Conference, and
- e) nominated in accordance with the Rules.

The Commission commenced the election process by causing a notice to be published in the Gazette and in the print and electronic media, that elections for district representatives would be held pursuant to section 27(2)(c) of the Act. The notice specified:

- a) that three persons, one of whom must be a woman and only one of whom may be a councillor, were to be elected to represent each district;
- b) the date, time and venues of the elections; and
- c) the date, time and venues at which nomination papers were to be delivered to the returning officers.

The Commission appointed the district co-ordinator for each district as the returning officer for the purpose of the election. The Regulations provided all the details relating to the entire process of elections.

Prior to holding the elections, the Commission held workshops for councillors from county councils who constituted the electoral college for the election of district representatives, and took them through the regulations governing the elections. The qualifications and qualities of a suitable district representative were explained and simulation exercises of the election process conducted.

Most of the elections for district representatives were held on time and peaceably. However, in a number of cases elections had to be repeated. This was due to low attendance by councillors due to ignorance about the date and venue for the elections as advertised in the print media, and complaints about political interference by political parties and undue influence being exerted on councillors to manipulate the outcome of the elections. There was also general apathy by the district elite about the elections.

The appeal procedure for disputes arising out of or in connection with the elections were also explained to the district co-ordinators. All such disputes were to be determined by the Commission and such determination was final and conclusive.

Whenever vacancies arose, due to death or resignation of district delegates, the election and nomination procedure was applied.

23.5 The Decision-Making Process of the Conference

23.5.1 Organs of the Conference

The Constitution of Kenya Review (National Constitutional Conference)(Procedure) Regulations, 2003 established the following organs of the Conference to discharge the functions stated among others:

- Steering Committee
- Accreditation Committee
- Media Advisory Committee
- Privileges and Welfare Committee
- Technical Working Committees
- Committee of the Whole Conference

23.5.2 Determination of Quorum

Pursuant to section 27(4) of the Act, the quorum of the Conference was one half of the members of the Conference. This rule was also supposed to apply to all the Committees of the Conference, although in practice, it is only those delegates who were entitled to vote who formed the quorum in Committees. Regulation 16 of the Constitution of Kenya Review (National Constitutional Conference)(Procedure) Regulations, 2003 provided that any delegate could at any time after the proceedings of the Conference or the Committee had commenced, take objection that there was not a quorum present. Whenever such objection was taken, the chairperson of the Conference or the Committee

caused to be counted and if, on the first count, it seemed that there was no quorum, the chairperson ordered that the quorum bell be rung. If within five minutes after the quorum bell was sounded or within such further time as the chairperson allowed, no quorum was present, the chairperson would announce to the Conference or Committee that there was not a quorum present and would thereupon adjourn the Conference or Committee until the next sitting.

23.5.3 Voting procedure

The voting procedure for the Conference was provided for under sections 27(5) and (6) of the Act. The two subsections provided as follows:

“(5) All questions before the National Conference shall be determined by consensus, but in the absence of consensus, such decisions shall be determined by a simple majority of the members present and voting:

Provided that –

- (i) in the case of any question concerning a proposal for inclusion in the Constitution, the decision of the National Constitutional Conference shall be carried by at least two thirds of the members of the National Constitutional Conference present and voting; and
 - (ii) if on taking a vote for the purpose of subsection 5(i), the proposal is not supported by a two thirds vote, but is not opposed by one third or more of all the members of the National Constitutional Conference present and voting, then, subject to such limitations and conditions as may be prescribed by the Commission in the Regulations, a further vote may be taken; and
 - (iii) if on taking a further vote under paragraph (ii), any question on a proposal for inclusion in the Constitution is not determined, the National Constitutional Conference may, by a resolution supported by at least two-thirds of the members present determine that the question be submitted to the people for determination through a referendum.
- (6) The Commission shall record the decision taken by the National Constitutional Conference on the report and the draft Bill pursuant to its powers under subsection (1) (b) and shall submit the question or questions supported by a resolution under subsection 5(iii) to the people for determination through a referendum.”

In practice, most of the decisions at the Conference were reached by consensus which was signified by voice calls and acclamations, and voting was only resorted to in cases there was no consensus, and in the process of adoption of the “Revised Zero Draft” as shown in Chapter Twenty-three of this report.

The efficacy of a legislative framework cannot, unfortunately be determined beforehand. Care and circumspection can be applied but ultimately, it is only upon implementation of the legal provisions that success or failure was determined. By and large, the legal framework proved to be effective as shown in the succeeding chapters.

CHAPTER TWENTY-FOUR

STANDING COMMITTEES AND AD HOC COMMITTEES

OF THE CONFERENCE

24.1 The Mandate of the Conference

Pursuant to clause 44 of the Conference Regulations, the Conference was empowered to establish standing and *ad hoc* committees on any subject it considered appropriate for the carrying out of its functions. Subsequently, the Conference established various committees as follows.

24.2 The Steering Committee

24.2.1 The Mandate of the Committee

The Steering Committee was established pursuant to regulation 46(1) of the Constitution of Kenya Review (National Constitutional Conference) (Procedure) Regulations, 2003 as a standing committee of the Conference. The mandate of the Steering Committee was defined in clause 46(3) of the Regulations as follows:

- a) to consider and approve a work plan of the Conference as prepared by the Secretariat for the approval of the Conference;
- b) to revise, as necessary, the work plan of the Conference;
- c) to monitor the progress, and follow-up activities and resolutions of the Conference;
- d) to co-ordinate and guide the work of all other committees of the Conference;
- e) to deliberate and decide on the order in which reports of all other committees shall be considered by the Conference;
- f) to review the Conference Procedure Regulations from time to time and to make such recommendations for their amendment as the Committee considers necessary for the efficient functioning, and transaction of the business, of the Conference;
- g) to consider and, where appropriate, adopt such proposals for valid alteration of the Regulations as the Conference, the committees and the delegates may put forward; and
- h) to carry out such other functions as are conferred on it by the Regulations or as the Conference may assign to it.

24.2.2 The Constitution of the Steering Committee

Initially, the Steering Committee was to be constituted in accordance with clause 46(3) of the Regulations (as amended) as follows: -

- (a) the Chairperson;
- (b) the First Vice-Chairperson of the Commission;
- (c) the Vice-Chairpersons appointed under Regulation 13;

- (d) the Chairperson of the Parliamentary Select Committee established under section 10 of the Act;
- (e) the Speaker of the National Assembly;
- (f) the Minister for the time being responsible for matters relating to justice and constitutional Affairs;
- (g) the Rapporteur-General of the Conference;
- (h) not more than twenty-one other delegates;
- (I) the Convenors of all other committees as may exist from time to time;
- (j) the Rapporteurs (without the right to vote); and
- (k) the Secretary of the Commission.

As originally established, the Steering Committee of the Conference was to have had a core membership of twenty-six delegates, and all Commissioners of the Commission as Rapporteurs without the right to vote. Accordingly, on Friday the 2nd day of May 2003, the Conference Plenary elected the members of the Steering Committee. However, consequent to the need to accommodate the diversity of interests and “constituencies” represented at the Conference, Clause 46 of the Regulations was amended by a resolution of the Conference so as to: -

- create three positions of Vice-Chairpersons of the Conference (hence of the Steering Committee);
- substantially enlarge the core membership of the Committee; and
- strengthen the committee’s overall co-ordination of the conduct of Conference proceedings.

The membership of the Steering Committee was therefore expanded to include the following:

- Non-parliamentary political parties;
- The elderly;
- The youth; and
- Special interest groups.

The establishment of the Steering and other Standing Committees was preceded by delicate negotiations between the various constituencies represented at the Conference. The formula that was agreed on was that the district delegates sitting as provincial caucuses, and the other categories of delegates nominate members to the Steering Committee.

According to Regulation 13 of the Constitution of Kenya Review (National Constitutional Conference)(Procedure) Regulations, 2003, there were to be three Vice-Chairpersons of the Conference appointed as follows:

- (a) one, to be nominated by the Parliamentary Select Committee established under section 10 of the Act; and
- (b) two, one of whom shall be a woman, elected by the Conference.

There was intense lobbying and caucusing during the process of election of the Vice-Chairpersons, both inside and outside the Plenary proceedings. The Parliamentary Select Committee nominated Hon. Godana Adhi Bonaya, who was endorsed by the Conference. Hon. Bishop Philip Sulumeti, Hon. Dr. David Gitari, Hon. Kivutha Kibwana and Hon. Koitamet Ole Kina were proposed for one of the two positions,

although Hon Kivutha Kibwana later stepped down. The matter was put to a vote and the Conference elected Hon. Koitmet Ole Kina.

There was disagreement among the women's delegates on the appointment to Vice-Chairperson of what was perceived to be an elite as opposed to rural woman. The choice was between Hon. Sultana Fadhil, Hon Rose Waruhiu and Hon. Maria Nzomo. The women caucused among themselves and settled on Hon. Sultana Fadhil who was endorsed for the position by the Conference.

As finally established, the Steering Committee had a core membership of fifty-six delegates. *The final membership of the Steering Committee is presented in Appendix V.*

24.2.3 Meetings of the Steering Committee

The Steering Committee held ninety formal and two informal meetings during the currency of the Conference. The Committee held its first meeting on Friday 2nd May 2003 and its 90th and final meeting on Tuesday the 23rd March 2004. All meetings took place at the Steering Committee Tent, at the Bomas of Kenya, Nairobi. Normally, the meetings were presided over and managed by the Conference and Steering Committee Chairperson and the Secretary to the Steering Committee and the Conference. In the absence of the Conference Chairperson, the Conference Vice Chairpersons presided over the meetings. The decisions of the Committee were usually by consensus.

The meetings usually lasted for one hour at most. The Committee discussed issues arising from the Conference Plenary and the Technical Working Committees, as well as any conflicts arising from among and between delegates. The Steering Committee relied immensely on the invaluable advice of the Media Advisory Committee on management of the Media. Similarly, the Privileges, Welfare and Discipline Committee continuously played an advisory role on questions of privilege, discipline and welfare of delegates. These included issues of accommodation, food, security, and allowances for delegates, and observers at the Conference. The standing agenda of the Committee was as follows:

- (1) Prayers
- (2) Apologies
- (3) Adoption of the Agenda
- (4) Confirmation of Minutes
- (5) Matters Arising
- (6) Standing Committee Reports
- (7) Notices of Motions
- (8) Announcements
- (9) Any Other Business

The Steering Committee did however hold special meetings and the agenda would be changed to reflect the purpose of the meeting.

24.2.4 The Significant Issues Covered By The Steering Committee

During the first session of the National Constitutional Conference (Bomas I), the Steering Committee starting its business on Friday 2nd May 2003 to Friday 6th June 2003, deliberated on and addressed a wide range of issues including the following:

(i) *The Conference Work plan and Progress:* The mandate of the Steering Committee included the responsibility of approving the Conference work plan and programme. In this regard, the Steering Committee established an *ad hoc* committee on the Conference programme to advice it accordingly.

(ii) *Review of the Conference Procedure Regulations and the establishment of Technical Working Committee:* The Conference Procedure Regulations, when first applied at the beginning of the Conference, presented a number of problems to delegates who voiced concern on their application. Individual and conflicting attempts were made to modify the regulations, and to ensure efficient functioning and transaction of the business of the Conference.

The Steering Committee established a sub committee to examine the Conference Procedure Regulations and recommend necessary amendments thereto. Subsequently, the Conference Procedure Regulations were amended and published in the Kenya Gazette as Legal Notice Number 43 of 2003 on 2nd May 2003. The Committee was also mandated to consider an appropriate formula for constitution of the Technical Working Groups to ensure equitable representation while taking cognizance of expertise, interest and competence and to advise the Steering Committee accordingly. The Committee consisted of the following members:

- | | | | |
|----|--|---|-------------|
| 1. | Hon. Dr. Bonaya A. Godana (Parliament) | - | Chairperson |
| 2. | Prof. H. W.O. Okoth-Ogendo (CKRC) | - | Member |
| 3. | Ms. Sultana Fadhil (Women Org.) | - | Member |
| 4. | Rev. Mutava Musyimi (Religious Org.) | - | Member |
| 5. | Hon. Paul K. Muite (Parliament) | - | Member |
| 6. | Mr. Oduor Ong'wen, (NGOs) | - | Member |
| 7. | Ms. Nancy Lung'ahi,(District Rep.) | - | Member |

The Sub-Committee presented a report on “Amendments to the Conference Procedures and Regulations” and “Guidelines for the Constitution of Technical Committees.” The report on Amendments to the Conference Procedures and Regulations was adopted with amendments by the Steering Committee in the following terms:

- a) That there be an addition to Regulation 44 (1) (a) to read “subject to these regulations a Committee shall regulate its procedures”;
- b) That the Minister for Justice and Constitutional Affairs and the Speaker of the National Assembly be included in the Steering Committee as *ex officio* members. [Regulation 46 (1)];
- c) That the Secretariat of the Conference shall in the exercise of its functions be responsible to the Commission and the Steering Committee in relation to the work of the Conference [Regulation 50 (3)];
- d) That the membership of delegates on the Media Advisory Committee be enhanced from four to six. [Regulation 53 (1)];

- e) That the Steering Committee on the advice of the Media Advisory Committee be empowered to exclude any media house from proceedings of the Conference for any length of time, if in the opinion of the Steering Committee, that media house has been guilty of deliberate or negligent misreporting of the proceedings. [Regulation 53 (3)].
- f) That the Commission be required to consult the Steering Committee before inviting a person or a group of persons to attend the proceedings of the Conference as observers or guests for such period and in respect of such deliberations as it may deem fit. (Regulation 8).
- g) That the Steering Committee should give directions to the Media Advisory Committee to protect delegates from unfair reporting by media houses.
- h) That the Commission in consultation with the Steering Committee shall appoint the Drafting Team for the Conference.

The Sub-Committee made the following recommendations with respect to the appointment of Convenors for Technical Working Groups:

- a) That composition of the Technical Committees should reflect equitable representation from all the delegate categories.
- b) That delegate categories should be required to equitably distribute their members to all Technical Groups.
- c) That decision making in the Committees be, as far as possible, by consensus and where no consensus is reached, a vote should be taken and the Minority view minuted as part of the Committee's report to the Plenary.
- d) That if no consensus was reached, a vote should be taken and the Minority view minuted as part of the Committee's report to the Plenary.
- e) That the Steering Committee should approve the appointment of Convenors of Technical Committees.
- f) That delegates be requested to consider merit, experience and equitable representation when appointing Convenors.

(iii) *Guidelines for the National Constitutional Conference ad hoc and Technical Working Committees:* The Steering Committee considered and approved guidelines for the National Constitutional Conference ad hoc and Technical Working Committees, which had been prepared by the Research, Drafting and Technical Support Committee of the Commission and approved by the Commission. The guidelines provided for:

- The Establishment of Committees;
- Terms of Reference for the Committees;
- Membership of Committees;
- Organization and Management of the Committees;
- Conduct of Meetings in Committees;
- Reports of Committees; and
- Documentation of the Committee proceedings.

(iv) *Management of, and Participation in Plenary Proceedings:*

In order to ensure better and effective management of plenary proceedings and to assist session chairs in ensuring that delegates from all the categories were accorded a fair opportunity to make contributions at plenary sessions, the Steering committee resolved

that individual sessions of the Conference be co-chaired by a Conference Vice-Chair and a delegate nominated for that purpose. It was resolved that-

- the observers were free to attend all Conference proceedings;
- the observers may second nominees to the Technical Working Committees; and
- the Privileges, Discipline and Welfare Committee should write to the delegates who persistently absented themselves from Conference proceedings.

(v) *The appointment and approval of the Drafting Team and Panel of Experts to assist Technical Working Committees:* The Steering Committee considered and approved the Commission's report on the appointment and approval of the Drafting Team and Panel of Experts to assist the Conference in the execution of its statutory mandate under Section 27 of the Review Act.

(vi) *The establishment of a committee on Culture:* During the General Debate, the Conference was not satisfied with the manner in which Kenya's rich and diverse cultural heritage had been treated in the Draft Bill and proposed the establishment of a Technical Committee on Culture. Pursuant to the decision of the Conference, the Steering Committee established an Ad Hoc Committee on Culture to look into the question of Culture and make specific recommendations to the other Technical Committees.

(vii) *Election of Convenors and the management of the Technical Working Committees:* With regard to election of convenors for Technical Working Committees, the Steering Committee agreed that delegates sitting as provincial caucuses nominate convenors for specific committees. The nominations were to reflect equity, diversity, gender and expertise and be merit-based. Vacancies in the office of a convenor were filled on the basis of this formula. The list of members elected to convene the Technical Working Committees is presented in the following table:

Table 6: Convenors Of Technical Working Committees

Committee	Convenor(Delegate Number)	Province of Origin/Category	Province of Origin/Category
A	Preamble, Supremacy of the Constitution, the Republic and National Goals, Values and Principles	Nyang'au Billy Onuong'a (457),	Nyanza
B.	Citizenship and the Bill of Rights	1. Martha Koome (495), ¹ 2. Cecily Mbarire (217)	Eastern
C.	Representation of the People	Caroline Ng'ang'a (587)	Central
D.	The Executive	1. John Anyara Emukule (395), ² 2. Martin Shikuku (595)	Western
E.	The Judiciary	1. Kivutha Kibwana (057) , ³ 2. Bishop Philip Sulumeti (546)	Eastern*
F.	The Legislature	Samuel Arap Ng'enya (538)	Rift Valley
G.	The Devolution	1. Crispin Odhiambo Mbai (412) , ⁴ 2. Adhu Awiti (009)	Nyanza
H.	Public Finance, Public Service, Leadership and Integrity	Kerrow Billow Adams (015)	North Eastern
I.	Defence and National Security	Marsden Madoka (086)	Coast
J.	Land Rights and the Environment	Saleh Saad Yahya (483)	Coast
K.	Constitutional Commissions and Amendments to the Constitution	Kiriro Wa Ngugi (320)	Central
L.	Transitional and Consequential Arrangements	Joyce Majiwa (501)	Nyanza
M	Culture	Paul Eliud Nakitare (392)	Western

- (vii) *Conference Press Briefings:* The Steering Committee considered the role of the media in the management of the Conference and allocated time for the daily media briefings. The Conference Chairperson, accompanied by the Conference Vice-Chairpersons and members of the Media Advisory Committee, usually conducted the Press briefings.

24.3 Committee On Privileges, Discipline And Welfare.

Under clause 48 of the Conference Procedure Regulations, there was established a standing committee known as Committee on Privileges, Discipline and Welfare, whose functions were as follows:-

- (a) by order of the Conference, to inquire into any complaint of contempt or any matter of privilege referred to it and to recommend such action as the committee considered appropriate;

¹ Following Hon. Martha Koome appointment as Judge of the High Court of Kenya, Hon.Cecily Mbarire was elected to replaced her as Convenor.

² Following Hon. John Anyara Emukule appointment as Judge of the High Court of Kenya, Hon. Martin Shikuku was elected to replace him as Convenor.

³ Hon. Prof. Kivutha Kibwana was replaced by Hon. Bishop Philip Sulumeti following his resignation as Convenor.

*His replacement, Bishop Philip Sulumeti had been acting as Convenor in Hon. Kibwana's absence, and the Committee voted to elect him as substantive Convenor despite the fact that he did not originate from Eastern Province

⁴ Hon. Dr. Adhu Awiti was elected the Convenor following the death of Hon.Dr. Odhiambo Mbai

- (b) to consider any matter of discipline referred to it by the chair person or the Conference including matters relating to attendance of delegates at sittings of the Conference and sittings of the committee and report its findings to the Conference; and
- (c) to liaise with the Commission in order to facilitate proper attention to the welfare needs of the delegates.

The Committee was established on Friday 9th May 2003. The Committee worked very closely with the Commission's Resource Mobilization, Finance and Budgeting Committee especially with regard to the financial and administrative aspects of the Conference. The committee dealt with matters of increase in the delegates' allowances upon request from the delegates, and the treatment of delegates' spouses and children at the Hotels. The needs of observers, and delegates' bodyguards and drivers were also dealt with. While the allowances for delegates were increased from Kenya Shillings 1,500 to Kenya shillings 3,000 per day, it was agreed that issues of accommodation and food for delegates' spouses and children could not be accommodated by the Commission's budget for the Conference

The membership of the Standing Committee on Privileges, Discipline and Welfare is presented in Appendix VI.

24.4 Media Advisory Committee

Pursuant to clause 53 of the Conference Procedure Regulations, there was established a Media Advisory Committee, whose function was to accredit representatives of the media and accord them access to public sittings and records of the Conference and broadcasting facilities. The Committee was also charged with the responsibility of ensuring wide and balanced covering of the Conference proceedings. Further terms of the Committee included to:

- (a) act as a public relations arm for the National Constitutional Conference.
- (b) be the information link between the Conference, the Commission, the Public and the Media.
- (c) play civic education role on behalf of the Conference.
- (d) support the media and other agencies in informing Kenyans on the progress of the Review.

The Committee advised the Steering Committee and the Commission on the management of the media to ensure fair, balanced, accurate and timely reporting of the Conference proceedings. The Committee also arranged various consultations with media organizations and journalists covering the Conference to forge partnerships on the coverage of the Conference.

The Media Advisory Committee, in addition, corrected any misreporting of the Conference proceedings by delegates and officers of the Conference, responded to the concerns of delegates who had received negative and unfair coverage by the media, and investigated complaints against members of the media.

The Committee was established on Friday May 9th 2003. *The membership of the Media Advisory Committee is presented in Appendix VII.*

24.5 Ad Hoc Committees

24.5.1 Ad Hoc Committee On The Conference Programme

The Steering Committee resolved to appoint an *ad hoc* Committee on the Conference Programme. The mandate of the Committee was to review and periodically revise the Conference programme and timetable as prepared by the Constitution of Kenya Review Commission and adapting it to the realities of the Conference. The Committee would then table the same for scrutiny and approval of the Steering Committee.

The Committee also dealt with issues of time management to ensure that the programme was adhered to as much as was practicable and attempted to recoup the time lost owing to various adjournments and disruptions of the Conference programme.

The Membership of the ad hoc Committee on the Conference Programme is presented in Appendix VIII.

24.5.2 Ad Hoc Committee On Culture

Following concerns by delegates of the marginalization of Kenya's rich and diverse cultural heritage in the Draft Bill of 2002, a proposal was made for the establishment of a Technical Committee on Culture. The Steering Committee resolved that an *ad hoc* committee be constituted to look into the question of Culture and make specific recommendations to the other Technical Committees.

The mandate of the *ad hoc* Committee on Culture was to conduct a careful analysis of the Draft Bill with a view to determining whether, and the extent to which, the provisions of Sections 3 (e) and 17 (d) (x), of the Review Act had been fully provided therein, and in particular to:

- (i) explore ways of giving constitutional legitimacy to Kenya's rich cultural diversity and expression;
- (ii) explore constitutional options for
 - the promotion of the cultural expression and activities of the people of Kenya, and
 - the protection and promotion of the rights of communities to organize and participate in cultural activities locally or countrywide;
- (iii) explore whether or not certain aspects of culture, custom or tradition should be prohibited or otherwise qualified in specific provisions of the Draft Bill;
- (iv) propose, where necessary, amendments to any aspect of the Draft Bill, with the view to strengthening Kenya's cultural identity in the context of national integration and unity;
- (v) review the various aspects of the Draft Bill with a view to identifying any aspects of that may negate our cultural heritage;
- (vi) explore the possibility of establishing an institutional framework for the promotion and development of Kenya's diverse cultural values and heritage; and
- (vii) prepare a report for consideration to the Technical Working Committees of the Conference.

The *ad hoc* Committee on Culture was unable to proceed on any substantive issues for a number of reasons: firstly, the *ad hoc* Committee was established while Technical Working Committees had already commenced deliberations on the Draft Bill and Commission Report. It was therefore difficult to constitute the *ad hoc* Committee, as most delegates were unwilling to give up their membership of the Technical Working Committees. Secondly, the Conference adjourned soon after the formation of the *ad hoc* Committee. In the meantime, the Constitution of Kenya Review Commission established a task force to examine the question of Culture and its consideration in the Draft Bill. Finally, when the Conference reconvened for the second session, the Conference Plenary resolved to convert the *ad hoc* committee on Culture to the Technical Working Committee M on Culture.

The membership of the ad hoc Committee on Culture is presented in Appendix IX.

24.6 Consensus Building Processes and Initiatives

One of the principles underlying the Review Act was that of consensus building. Under section 5(b) of the Act (relating to the guiding principles for the review process), in the exercise of the powers or the performance of the functions conferred by the Act, the organs of the review process had to:

“ensure that the review process accommodates the diversity of the Kenyan people including socio-economic status, race, ethnicity, gender, religious faith, age, occupation, learning, persons with disabilities and the disadvantaged”.

Section 27(5) required that all questions before the National Constitutional Conference be determined by consensus and only in the absence of such consensus were decisions to be determined by the voting procedure set out in the previous chapter.

The Commission conducted extensive nationwide civic education. As a result, there was remarkable consensus on most of the issues in the Commission Report and Draft Bill. It should also be noted that the principles for a democratic and secure process for the review of the Constitution, provided for in the Third Schedule of the Act, required the Government of the Republic of Kenya, the organs of review of the Constitution, political parties, non-governmental organizations and all Kenyans to –

“recognise the importance of confidence-building, engendering trust and developing a national consensus for the review process”.

Arising from these provisions of law, it was always understood that consensus building processes and initiatives would be an invaluable and integral aspect of the National Constitutional Conference and had sound legal backing. In the context of the National Constitutional Conference, consensus-building initiatives, hitherto privately pursued but rarely publicly invoked, took centre stage just before the Third Session of the Conference (commonly referred to as Bomas III).

A major crisis arose when the Commission, after consultation with the Parliamentary Select Committee and the House Business Committee, put off the commencement date of Bomas III to 12th January, 2004, while the Conference itself at its last sitting had adjourned sittings up to 17th November 2004. A court case challenging the decision was pending and some quarters were asking for a further postponement of the Conference arguing that there was too much controversy to allow the Conference to proceed smoothly. Other quarters were claiming that there was a plot not to have the Conference re-convene at all. The controversy over the commencement date of Bomas III provided an impetus for the following consensus-building initiatives.

24.6.1 Coalition of National Unity (CNU) Consensus Building Initiative

In the above circumstances, an inter-parties group calling itself the Coalition of National Unity fronted largely by the political parties KANU and Ford People commenced consultations to bridge these differences. They held a high profile meeting at Safari Park Hotel between 10th and 11th January 2003 to which the Commission was invited and duly attended. The most significant outcome of that meeting was the affirmation that the Conference would reconvene on 12th January 2004 as planned. The initiative was however not supported at the National Constitutional Conference.

24.6.2 The Steering Committee Consensus Building Group

The Consensus Building Group (CBG) chaired by Bishop Philip Sulumeti, (Delegate No. 546 and also Chair of the Technical Working Committee on the Judiciary) and consisting of representatives of all constituencies of the Conference, was established by the Steering Committee on 2nd February 2004 to build consensus on contentious issues and report its decision to the Committee. The Steering Committee gave the CBG the mandate to –

“use all possible means to promote dialogue among all key stakeholders in the review process and to facilitate resolution of contentious issues”.

The group held numerous meetings between 3rd February and 19th February 2004, first at the Agricultural Finance Corporation Centre and later at the Kenya Commercial Bank Training Institute (both in Karen, Nairobi) and produced a report on a number of issues identified in advance by the Rapporteur-General of the Conference, as contentious.

The composition of this CBG is found in Appendix X.

It is important to note that the mandate of the Steering Committee Initiative was to hammer out a common basis for the resolution of issues submitted to it. It was understood that its recommendations would have to be processed through and be incorporated into the reports of relevant Technical Working Committees of the Conference. The initiative had no mandate, therefore, to make decisions binding on committees or the Conference. The report of the initiative was presented to the Steering Committee, which then transmitted specific recommendations to relevant Technical Committees. The issues discussed, and recommendations by the initiative are set out as follows-

a) Dual Citizenship

Many delegates pointed to the difficulties, and indeed humiliation, they have faced when their children or grandchildren have to travel on foreign passports and have to obtain Kenyan visa. These arguments for dual nationality were weighed against the dangers of the abuse of dual nationality and the acquisition of Kenyan citizenship for improper motives. However, it was pointed that with a few reasonable exceptions in the draft constitution, no citizen of another state had a right to become a citizen of Kenya. Kenya is free to prescribe conditions for the acquisition of Kenya's citizenship (such as residence in Kenya for a specified number of years, knowledge of our official languages, a crime free record, etc). These rules should be able to ensure that unsuitable persons do not become Kenyan citizens and benefit from dual nationality.

The Consensus initiative recommended as follows:

- Kenya should recognise dual nationality only for Kenyan citizens by birth.
- Parliament should provide rules and procedure for eligibility to dual nationality for the circumstances under which dual nationality shall be allowed.
- In addition to other persons that Parliament may decide, the following should be entitled to dual nationality:
 - A citizen of Kenya who is married to a citizen of another state; or
 - A citizen of Kenya who has acquired citizenship of another state.
- A former citizen of Kenya who renounced the citizenship of Kenya in order to acquire citizenship of another state is entitled, on application, to re-acquire the citizenship of Kenya.

The Technical Working Committee on Citizenship and Bill of Rights adopted some of these recommendations.

(b) The Right to Life

The principal point of contention was whether

'life' should be defined. Some delegates wanted to define life as 'beginning from conception' and to end with natural death. Others wanted the draft Constitution to simply protect the 'right to life' without any further qualification. Implied in this debate is the question of abortion. Delegates were informed of the difficulties of determining when 'life' begins. After a lengthy discussion, it was agreed that the matter of when abortion should be permitted be left to the Parliament to legislate on but should not be stipulated in the Constitution. The initiative affirmed that capital punishment should be abolished.

The Consensus initiative recommended as follows:

- The right to life is protected.
- Abortion is outlawed except under circumstances permitted by Parliament.
- There shall be no capital punishment.

The Technical Working Committee on Citizenship and Bill of Rights adopted these recommendations.

(c) *The Character of Marriage*

The Draft Constitution protects the right to marry and found a family. Some delegates feared that this provision may permit homosexual marriages since the draft Constitution did not specify that marriage can only take place between persons of the opposite sex. The Group endorsed the recommendation of the Technical Working Group ‘B’ on Citizenship and Bill of Rights that the draft should clarify the definition of marriage to prohibit same sex marriages.

The Consensus initiative accordingly recommended that marriage could take place only between persons of opposite sex.

The Technical Working Committee on Citizenship and Bill of Rights adopted this recommendation.

(d) *Recall of Members of Parliament and Councillors*

The Draft Bill of 2002 provided a procedure whereby voters could recall a Member of Parliament if they considered that the Member had failed to perform his/her responsibilities to their satisfaction. This provision reflected Kenyans views as expressed to the Constitution of Kenya Review Commission. However, most Members of Parliament opposed it and argued that there are no firm standards by which MPs performance could be assessed; the rule could be abused and there would be considerable uncertainty which should adversely affect the morale and MPs work. Moreover, they argued, that their record is scrutinised every five years in the general elections and non-performing Members of Parliament can be rejected then.

The consensus initiative adopted a compromise position that the recall provision be deleted, but high ethical and professional standards be established for the conduct of Members of Parliament in Standing Orders and other suitable instruments. The initiative noted that the draft constitution already provided for higher standards for public officials, including Members of Parliament, and had established the Integrity Commission to enforce these standards, which could lead to a pre-mature termination of a Member of Parliament’s term.

The Consensus initiative recommended as follows:

- There should be no recall provisions for MPs or Councillors.
- Standards of ethical and professional conduct for Members of Parliament shall be raised through standing orders and other relevant instruments including the Constitution.

The Technical Working Committee on the Legislature adopted this recommendation.

(e) *Terms of Office of Members of Parliament or Councillors*

The Technical Working Committee ‘B’ on Representation of the People had proposed that no person could serve for more than two terms as Member of Parliament or Councillor on the ground of ‘inter-generational’ equity. However, the consensus initiative considered that while a limit on the number of terms for the President and some other Executive or Constitutional Officers is justified, no such principle should apply to

Members of Parliament and Councillors. The draft constitution had proposed a stronger role in supervision over and accountability of government for elected bodies and for this to happen, it was critical that the elected bodies be composed of experienced legislators.

The Consensus initiative accordingly recommended that there should be no limit on the number of terms a person may serve as MP or councillor.

The Technical Working Committees on the Legislature and Devolution of Powers adopted this recommendation.

(f) *The Mixed Member Proportional Representation system*

The Draft Bill of 2002 provided for the Mixed Member Proportional Representation system of elections for the National Assembly to achieve two objectives: (a) to achieve greater proportionality between the votes for a political party and the number of seats in the National Assembly; and (b) fair representation of special interest groups, including women, minorities and the disabled. However, the Technical Working Committee on Representation of the People opposed this provision and considered that representation of special interests should be achieved through a reservation of seats for them.

The Consensus initiative accordingly recommended that the Mixed Member Proportional Representation method should not be adopted.

The Technical Working Committee on Representation of the People adopted this proposal.

(g) *The authority to register and supervise Political Parties*

The Draft Bill of 2002 provided that an independent Electoral Commission would register and supervise political parties that wish to contest elections. The Committee on the Representation of the People opposed this proposal on the grounds that the Electoral Commission should confine itself to the conduct of elections as registration and supervision of parties might compromise its integrity or impartiality. It recommended that the Registrar of Societies should continue to perform these tasks. Others argued that the Registrar of Societies, operating under the Office of the Attorney-General, had failed to act impartially in the past and it was critical to have an independent authority perform these tasks. There was also a reluctance to appoint yet another independent authority for this limited task.

The Consensus initiative accordingly recommended that the Electoral Commission should register and supervise political parties which intend to contest elections.

The Technical Working Committee on Representation of the People adopted this proposal.

(h) *Judicial Powers of the Electoral Commission*

The Draft Bill of 2002 gave the Electoral Commission minor powers to settle disputes as they arose during elections. This was based on the request of the Electoral Commission because it considered that the conduct of elections would be smoother

and its supervision more effective if it had these powers, which could be reviewed by courts if necessary.

The Consensus initiative accordingly recommended that the judicial powers of the Electoral Commission as stipulated in the Draft Constitution should be transferred to the Judiciary.

This recommendation was not considered by the Technical working Committee on the Judiciary.

(i) *Devolution*

While endorsing the concept of Devolution, the consensus initiative considered only two matters. The first was on the levels of government and the other on the boundaries of locations. The Group endorsed the proposal to have four levels of government. On the second point, it endorsed present boundaries subject to possible adjustments by an independent Boundaries Commission.

The Consensus initiative recommended as follows:

- There shall be four levels of government as follows:
 - The National Level;
 - The Regional Level;
 - The District Level;
 - The Location Level.
- The boundaries of devolved levels should be reviewed by an independent Boundaries Commission.

The Committee on Devolution of Power accepted these recommendations.

(j) *Constitutional Commissions and Constitutional Office Holders*

The consensus initiative discussed the question of how many Commissions there should be. There was concern that the Draft Bill of 2002 had created too many Commissions some of which could be dealt with under Acts of Parliament. The initiative recognised that a Commission should be put in the Constitution only if its responsibilities required that it be independent of political and other pressures. There were only very few such responsibilities. Having too many Commissions in the Constitution would not only add to the length of the document but also take away from future governments responsibilities and policies that are properly theirs. There was a danger of having the country run by independent commissions accountable to no one rather than by the Government and the Legislature in accordance with democratic principles.

The initiative identified, as listed below, the Commissions that should be put in the Constitution. In the same spirit, the Group agreed that the Gender Commission should be merged with the Commission on Human Rights and Administrative Justice. The initiative also recommended that no Commission should have more than 11 commissioners and where possible, they should be smaller, provided that the total number of commissioners should be an odd number. It endorsed the proposal that an independent Commission should be responsible for preparing the list of candidates for Constitutional Offices for consideration by the relevant appointing authority.

The Consensus initiative recommended as follows:

- The following Commissions should be established by the Constitution:
 - Commission on Human Rights, Gender and Administrative Justice;
 - Correctional Services Commission;
 - Electoral Commission;
 - Ethics, Integrity and Appointments Commission;
 - Fiscal and Finance Commission;
 - Judicial Service Commission;
 - Land Commission;
 - Parliamentary Service Commission;
 - Police Service Commission;
 - Public Service Commission.
- The following Commissions should be established for a limited time as part of the transitional mechanisms.
 - Boundaries Commission
 - Constitution Implementation Commission
- There should not be a separate Gender Commission but the functions of such a commission should be among the responsibilities of the Commission on Human Rights and Administrative Justice, with one Commissioner being designated as the Commissioner for Gender.
- Each Constitution Commission should have an odd number of Commissioners, and each should have no more than 11 Commissioners and wherever possible, the size should be smaller. It was also recognised that many Commissioners would be part time.
- The Police Service Commission should be responsible for recruiting all staff of police forces, including – if continued in separate existence – the Administration Police.
- Other Commissions already in existence and created under statutes such as the Teachers Service Commission (already established under an Act of Parliament); should continue but should not be required by the Constitution.

The various Technical Working Committees adopted most of the proposals on the Constitutional Commissions to be established. The Technical Working Committee on Constitutional Commissions and Amendments to the Constitution rejected the guideline of composition of the Commissions and observed that most issues raised by the Consensus Building Group had already been addressed and agreed to by consensus by the Technical Working Committee. In the Committee's opinion therefore, no issue regarding constitutional Commissions should have been referred to the Consensus Building Group.

(k) *Structure of the Executive*

After a preliminary discussion of the contentious issues on the Executive on 17th and 18th February 2004, the consensus initiative decided to set up a working group with representatives of all the parliamentary political groups, the Moderator and Chairperson of the National Constitutional Conference to make recommendations to the consensus initiative. The Working Group presented its recommendations on 19th February 2004 as follows:-

- a) That the Executive authority of the Republic of Kenya will repose in the President, the Prime Minister and the Cabinet.
The Technical Working Committee on The Executive rejected this recommendation.
- b) That the President shall be elected in accordance with the current rules which require the President to garner majority of votes countrywide and certain percentages in specified number of Regions.
The Technical Working Committee on The Executive accepted this recommendation.
- c) That the President is the Head of State, Head of Government, Commander-in-Chief of the Armed Forces and Chair of the National Security Council.
The Technical Working Committee on The Executive rejected this recommendation.
- d) That the President shall appoint the Prime Minister from the party or coalition of parties with the majority support in Parliament and submit the name of the appointed Prime Minister to the Parliament for approval by at least 50% vote of all Members of Parliament.
This recommendation was rejected by the Technical Working Committee on The Executive.
- e) If Parliament does not approve the nominated Prime Minister, the President shall nominate the leader of the second largest party or coalition of parties and if Parliament rejects the second nominee, then the President shall nominate the third nominee who shall be accepted by the Parliament.
This recommendation was rejected by the Technical Working Committee on The Executive.
- f) That the President in consultation with the Prime Minister shall appoint Cabinet Ministers.
The Technical Working Committee on The Executive accepted this recommendation.
- g) That Cabinet Ministers shall be Members of Parliament.
The Technical Working Committee on The Executive accepted this recommendation.
- h) That the number of Cabinet Ministers shall not exceed seventeen (17).
The Technical Working Committee on The Executive accepted this recommendation.
- i) That most of Government decisions shall be through the Cabinet.
The Technical Working Committee on The Executive accepted this recommendation.
- j) That the Prime Minister shall be the leader of Government Business in Parliament, shall coordinate work of ministries, shall prepare legislation and shall be responsible to the Cabinet and the Parliament.
The Technical Working Committee on The Executive accepted this recommendation.
- k) That the Prime Minister may be dismissed in one or two ways:
 - Through a motion introduced by the President and supported by fifty percent (50%) of Members of Parliament.
 - Through a vote of no confidence introduced by a Member of Parliament and supported by a third of Members of Parliament and voted for by at least fifty percent (50%) of Members of Parliament.

- This recommendation was accepted in part by the Technical Working Committee on The Executive.
- i) That the functions of the President, the Prime Minister and the Cabinet are largely as recommended by the Technical Working Committee on the Executive. *The Technical Working Committee on The Executive accepted this recommendation with the addition of the Deputy President in the list.*
- m) That the President shall serve a maximum of two-five-year-terms. This recommendation was accepted by the Technical Working Committee on The Executive.
- n) That the emphasis is on the President and the Prime Minister working in harmony. This recommendation was accepted by the Technical Working Committee on The Executive as a useful guide in the overall design of the chapter on the Executive.
- o) That the Cabinet should reflect the Kenyan cultural and ethnic diversity. The Technical Working Committee on The Executive rejected this recommendation.
- p) That the President shall appoint Permanent Secretaries and Public Service Commission in consultation with the Prime Minister. The Technical Working Committee on The Executive accepted this recommendation.

(l) Transitional and Consequential Arrangements

The Convenor of Technical Working Committee 'L' on Transitional and Consequential Arrangements addressed the Group on behalf of the Committee. The Convenor informed the meeting that there were no contentious issues emanating from her Technical Committee. After a brief discussion, the meeting resolved that there were no contentious issues emerging from Transitional and Consequential Arrangements.

24.6.3 The Conference Consensus Building Committee

The third Consensus Building initiative was constituted formally by the Conference Plenary on 9th March 2004 following an appeal by a section of delegates, to reconsider questions of the structure of the executive; power sharing between the President and the Prime Minister; devolution of powers; and transitional provisions and consequential arrangements. The Committee was also chaired by Bishop Philip Sulumeti. It commenced its deliberations on 10th March 2004 at Bomas of Kenya. This Committee had a much narrower mandate being limited to discussing and making recommendations on –

- the executive structure of the Government,
- devolution of powers, and
- transitional and consequential arrangements.

In constituting this Committee, the Steering Committee resolved that the major political protagonists would not be members of the Committee. Rather, in accordance with the Committee's mandate to "promote dialogue among key stakeholders", all the important political players would be invited to make submissions to the Committee. As matters turned out, it was really these political players that made all the decisions. To give

Committee the opportunity to present its report, consideration of the chapters on the Executive, Devolution and the Legislature were stood over by the Conference.

The Committee's report was presented to the Conference on Friday 12th March 2004 without debate. In considering the Consensus Committee's report, the Steering Committee resolved that the report be reduced into amendment proposals to alter the Zero Draft. Consequently, the Consensus Committee motions were tabled before the Committee of the Whole Conference on Monday 15th March 2004 for consideration. *The specific recommendations of the Consensus Committee are detailed out in Chapter Twenty-three of this report. The composition of the Consensus Building Committee is presented in Appendix XI.*

24.7 Challenges and Constraints Faced by the Committees

The work of the Committees was not without challenges and constraints. These included the following:

- Political differences among the political elite, which manifested themselves in the arguments over the Conference procedures, programme and actual provisions for inclusion in the draft bill.
- Persistent non-attendance of the Committee and Conference proceedings by some delegates.
- Apparent conflicts and mistrust between and among the various delegate categories.
- Various court cases instituted against the National Constitutional Conference and the Constitution of Kenya Review Commission. These cases included the *Timothy Njoya & Others v CKRC and the National Constitutional Conference*, High Court Misc. Application No. 82 of 2004 filed on 27th January 2004, and *Njuguna Michael Kung'u, Gacuru wa Karenge & Nichasius Mugo v the Republic, Attorney General and CKRC*, High Court Misc. Application No. 309 of 2004 filed on 22nd March 2004. These cases sought, *inter alia*, to declare various aspects of the Review Process and the National Constitutional Conference and its proceedings flawed and unconstitutional.
- Misconceptions and misunderstanding on the Commission's role and mandate to manage and provide technical support to the Conference.

Despite the challenges, the Standing and *ad hoc* Committees were committed to their mandate in the day-to-day management of the National Constitutional Conference, and proved to be an effective tool in moving the proceedings forward. The members of the Committees and the Secretariat diligently served the Conference on these key bodies to ensure the smooth running of the penultimate review stage.

CHAPTER TWENTY-FIVE

THE PLENARY DEBATE ON THE COMMISSION'S REPORT AND DRAFT BILL

25.1 Presentation of the Report and Draft Bill by the Commission

In accordance with Section 26 (7) of the Constitution of Kenya Review Act and Regulation 18 (1) and (2) of the Constitution of Kenya Review (National Constitutional Conference) (Procedure) Regulations, 2003, Prof. Yash Pal Ghai, the then Chairperson of the Conference, laid before the Conference on 6th May 2003, the Main Report and Draft Bill of 2002 prepared by the Commission. During that presentation, the Chairperson delivered a communication introducing the Main Report and Draft Bill. The substance of the Chairperson's communication was that the Commission faithfully followed the provisions of the Constitution of Kenya Review Act and the wishes of the people of Kenya.

The general debate was conducted on the assumption that a number of foundation principles regarding the constitutional review process had been agreed upon by the people of Kenya prior to the establishment of the Commission and the convening of the Conference. These foundation principles relate both to the conduct of, and the substantive outcome of the review process as stated in sections 3, 5 and 17 of the Review Act. Throughout the general debate, no delegate challenged these principles, nor attempted to re-open debate on the propriety of prior agreements thereon. Indeed the Conference accepted: -

- the Main Report of the Commission as a fair summary of the views of the people of Kenya; and
- the overall architecture and general content of the Draft Bill of 2002 as a fair reflection of what Kenyans were looking for in a new constitutional dispensation.

Based on this understanding, the Conference re-affirmed its mandate under section 27 (1)(c), which was to discuss, debate, amend and adopt the Main Report and Draft Bill of 2002 prepared by the Commission.

In accordance with Regulation 19 (1) of the Constitution of Kenya Review (National Constitutional Conference) (Procedure) Regulations, 2003, one of the delegates, Hon. Grace E. A. Ogot (Delegate No. 399), moved a motion and which was seconded, that the Conference debates the Main Report and Draft Bill of the Constitution of Kenya Review Commission. The Chairperson then put the question to the Conference, which was unanimously carried by acclamation. Subsequently, weekly programmes of debate were prepared, which were laid before and approved by the Steering Committee and the Conference. Any changes in the program were reflected in the subsequent Daily Order Papers prepared by the Conference Secretary and approved by the Steering Committee.

As has been explained before, although it was fully understood that the Chairperson of the Conference was ultimately responsible for the conduct of all proceedings, the proceedings during the first session of the Conference were co-chaired by Conference Vice-Chairpersons, provincial representatives, and in some instances, a delegate nominated for the purpose from among the “constituencies” represented at the Conference. This procedure was adopted to give delegates more ownership, participation and opportunity for making contributions to the Conference proceedings than would otherwise have been the case. In the second and third sessions, only the Chairperson and Vice-Chairpersons chaired the proceedings.

The general debate of the Commission’s Main Report and Draft Bill of 2002 was divided into daily sittings during which presentations organized around various themes were made by Commissioners. The corresponding chapters of the Main Report and provisions of the Draft Bill of 2002 were highlighted by the Commissioners and subsequently discussed by the Conference.

The Commission Main Report and the Draft Bill of 2002 were tabled, presented and debated between Wednesday the 6th of May 2003 and Friday the 6th of June 2003.

25.2 The General Debate on the Report and Draft Bill of 2002

Following the presentation of the Commission’s Main Report and Draft Bill of 2002, the Conference proceeded to debate and discuss the contents of the Main Report and Draft Bill. It is important to mention that the two documents were discussed concurrently since the Act treated both the Draft Bill and the Main Report distinctively. It is also noteworthy to state that during the presentation and debate, different people responded to issues differently. In accordance with Clause 19 (3) of the Conference Regulations, each delegate was to be allowed a maximum of ten minutes within which to make his/her speech. However, interruptions during debate, including those occasioned by points of order, led to time constraints during the general debate. Most of the points of order were on the delegates’ right to contribute to the debate, and eventually, delegates were accorded fewer minutes for debate, with time occasionally reduced to five, three or two minutes per delegate. It was however ensured that delegates from each category were given a chance to contribute to the debate.

It was evident that most delegates had studied the Commission’s Main Report and Draft Bill of 2002 and were widely informed on a number of its key provisions. In addition, Delegates were able to lobby or caucus both within and outside Bomas, in a variety of configurations ranging from religion, cultural nationalities, social and political classes, and gender and on issues of particular interest or concern to each category. These lobbies and caucuses were sustained throughout the Conference and, indeed, the general debate benefited immensely from these interactions.

At the conclusion of the general debate, 460 delegates had spoken at least once. The breakdown of delegates’ contributions by category is reflected in the following table.

Table 7: Substantive Contributions during General Debate by Category of Delegates

Category	Total No of Members	No. of Members from category who made Substantive contributions	Percentage of members who made substantive contributions out of total membership	No. of contributions made by category	Percentage of contributions by category out of total no. of contributions made
Members of Parliament	223	135	61%	225	27%
District Delegates	221	181	82%	281	34%
Trade Union Representatives	16	12	75%	25	3%
Non-Governmental Organization Representatives	23	21	91%	39	5%
Professional Organization Representatives	15	13	87%	25	3%
Women's Organization Representatives	24	17	71%	43	5%
Religious Organization Representatives	35	31	89%	50	6%
Political Party Representatives	40	30	75%	67	8%
Special Interests Groups Representatives	13	6	46%	12	2%
Commissioners	29	24	83%	56	7%
Total	629	460	73%	823	100%

The number of delegates contributing on chapters of the Main Report and Draft Bill of 2002 also varied significantly. Chapters on Devolution of Powers, the Executive and Land and Property Rights took longer time and had overwhelming number of delegates making their contributions. The chapters on Amendments to the Constitution, Transitional and Consequential Provisions and Interpretation respectively, had the least number of delegates making their contributions. This was largely because these chapters were discussed towards the end of the general debate, when there arose a time limit occasioned by the parliamentary calendar, leading to the adjournment of the conference. Hence, only few delegates were able to contribute.

Table 8 below provides details on the presentations and delegates' contributions on the thematic areas during the general debate.

Table 8: Presentations and Contributions on the Main Report and Draft Bill of 2002 by Thematic Area

Thematic Area	Date of Presentation	Presenters	Corresponding Chapters				No of Delegates' Contributions
			Main Report		Draft Bill		
The Constitutive Process	May 7, 2003	1. Dr. Githu Muigai 2. Ms. Kavetsa Adagala	7	The Constitutive Process	1 2 3 4	Sovereignty of the People and the Supremacy of the Constitution. The Republic National Goals, Values and Principles Citizenship	60
The Bill of Rights	May 8, 2003	1. Ms. Nancy Baraza 2. Mr. Ibrahim Lethome	8	The Bill of Rights	5	The Bill of Rights	52
Representative Governance	May 9, 2003	1. Mr. Mutakha Kangu 2. Hon. Phoebe Asiyo	9 10	The State and the Political System Participatory Governance	6	Representation of the People	54
Organs of Government	May 13, 2003	Dr. Andronico Adede Mr. Mutakha Kangu Dr. Charles Maranga Mr. Ahmed Issack Hassan Mr. Paul Wambua	11	Organs of Government	7 8 9	The Legislature The Executive Judicial and Legal System	97
Devolution of Powers	May 22, 2003	Prof. Yash Pal Ghai Prof. Wanjiku Kabira Dr. Mosonik arap Korir Mr. Mutakha Kangu	12	Devolution of Powers	10	Devolution of Powers	151
Land and Property Rights;	May 27, 2003	Prof. H.W.O. Okoth Ogendo Dr. Mohamed Swazuri	14	Land and Property Rights	11	Land and Property	84
Environment and Natural Resources	May 29, 2003	Mr. Zein Abubakar Zein Dr. Abdirizak Arale Nunow	13	Environment and Natural Resources	12	Environment and Natural Resources	
Public Resources and Capacity Building	June 3, 2003	Mrs Alice Yano Justice Isaac Lenaola	15	Public Resources and Capacity Building	13	Public Finance and Revenue Management	61
Managing Constitutionality	June 5, 2003	Mr. Riunga Raiji Mr. Keriako Tobiko Ms. Salome Muigai	16	Managing Constitutionality	17 18 19	Constitutional Commissions and Constitutional Offices Amendment of the Constitution Interpretation	50

The Public Service	June 6, 2003	Prof. Idha Salim Mr. Domiziano Ratanya Mrs. Abida Ali-Aroni Pastor Zablon Ayonga	11.6	The Public Service	14 15 16	Public Service Defence Forces and National Security Leadership and Integrity	25
Transitional and Consequential Provisions	June 6, 2003	Prof. H.W.O. Okoth Ogendo Dr. Githu Muigai	16.4	Succession and Transfer of Presidential Powers	20	Transitional and Consequential Provisions Fifth and Eight Schedules	14

By the time of presentation and debate on the chapters of the Main Report and Draft Bill of 2002 on *transitional and consequential provisions*, only slight debate took place because of the time constraints. It was also agreed that it was not the appropriate time to discuss the chapter, and that each of the Technical Working Committees would first discuss and debate the *transitional and consequential* import of their relevant chapters of the Draft Bill of 2002. In addition, some of the transitional provisions had been overtaken by events, as a result of the general elections, which had been held in December 2002. A decision was therefore taken that debate on the chapter was premature.

It is important to note that there existed a time constraint during the general debate. This reduced the number of delegates who contributed and the length of their contributions as it was necessary to comply with the deadlines set by the parliamentary calendar. There were numerous complaints in this regard by delegates, who were assured that they would be accorded adequate time for discussion during the Technical Working Committee stage as was provided for under Clause 20 (1) of the Constitution of Kenya Review (National Constitutional Conference) (Procedure) Regulations, 2003. Some delegates, therefore, raised issues at the Technical Working Committees, which would otherwise have been covered during the general debate.

Regulation 12 (1) of the Conference Procedure Regulations provided that the proceedings of the Conference could be conducted in either English or Kiswahili. In practice, the general debate was largely conducted in English, and those who preferred to speak in Kiswahili had the choice to do so.

25.3 Key Issues Raised During the Debate

The general debate during Bomas I in essence reflected the general opinion of the conference on the Draft Bill of 2002 and the Commission's Main Report. A wide range of issues were raised and discussed during the general debate, before the Conference adjourned on June 6, 2003. These issues are discussed below in two categories. The first category discusses aspects of the issues for which there was general support during the general debate, while the second category discusses those aspects of the issues for which there was no broad agreement and which even brought forth controversy in some cases.

25.3.1 Issues Receiving General Support

During the debate it began to emerge that there were several aspects, especially of the Draft Bill of 2002 that represented areas of broad support. It would appear later that most of these aspects of general support remained so at the consideration stage both at the Technical Working Committees and the Committee of the Whole House consideration stages.

Set out below, is a summary of these areas.

(a) The Sovereign Authority of the People

The proposition that all constitutional authority must derive from and can only be held and exercised on behalf of the people was upheld by the Conference. There was a broad understanding that the constituent power of the people must be reflected in the design of all aspects of the Constitution and, in particular in: -

- the provisions relating to future amendments to the Constitution;
- the system and process of representation both in political parties and in elective organs of state;
- appointments, control and dismissal of holders of public office;
- the regulation of the conduct and exercise of legislative, executive and judicial power at all levels of government;
- the control, utilization and management of national resources including finance, revenue and land; and
- the overall supervision of the entire constitutional structure.

Despite the Draft Bill of 2002 providing mechanisms through which the people would exercise effective control over the legislature and the executive, the Conference noted that this was not the case in respect of the Judiciary. This was particularly worrisome since the people do not elect members of the Judiciary. There was broad understanding that mechanisms that would open the Judiciary to public evaluation and scrutiny be established. The same was also necessary in respect of the supervision of the conduct of other holders of constitutional offices.

(b) The Supremacy of the Constitution

The Conference accepted the principle that while the people are sovereign, that sovereignty can only be expressed through a Constitution which is accepted and operates as the supreme law of the land. The proposition that the Constitution is supreme means, therefore, that: -

- all other laws are subordinate to the provisions of the Constitution and are void where inconsistent with it;
- the power to enact a new Constitution or replace the Constitution ultimately rests with the constituent authority i.e. the people;
- the tendency to treat Parliament as supreme must be discarded, and
- as far as possible, the Constitution should confine itself to the establishment of fundamental principles, institutions and processes; operational details being left to ordinary legislation.

The Conference noted that the doctrine of the supremacy of the constitution was central to the observance of the republican principles upon which the Draft Bill of 2002 was founded, namely, good governance, the rule of law, justice, democracy, and constitutionalism.

(c) *The Nature and Integrity of the Republic*

The Conference was in agreement that the essential characteristics of the state as defined in Chapters on the Republic and on National Goals, Values and Principles of the Draft Bill of 2002 were sound. There was need, however, to enhance the robustness of those characteristics by: -

- settling or providing a formula for the definition of the international boundaries of the Republic;
- ensuring that the internal boundaries which form the basis for devolution of power or local government are clearly defined;
- strengthening national identity by ensuring that Kenya's rich linguistic and cultural diversity is recognised and promoted in the Constitution; and
- ensuring that the goals; values and principles set out in the Draft Bill of 2002 are reflected in the design of all aspects of the Constitution.

(d) *The Basis of Nationality and Citizenship*

The provisions regarding nationality and citizenship contained in the Draft Bill of 2002 were fairly standard. However, the Conference noted and accepted a number of innovations intended to address inequities in the current constitution. Among these were provisions relating to -

- entitlement, as of right, to a passport, a birth certificate (if born in Kenya) and an identity card;
- gender parity in the conferment of Kenyan citizenship to spouses;
- conferment of Kenyan citizenship to children by either a Kenyan mother or father;
- presumption of citizenship in respect of children found in Kenyan seeming to be under the age of 8; and
- administration of matters of citizenship by an autonomous institution.

The Conference cautioned that a number of basic principles regarding nationality and citizenship should be enshrined in the new constitution. Among these were that –

- citizens must have true and substantial connection with the Republic of Kenya;
- citizenship implies absolute loyalty and adherence to the basic values, principles and goals on which the Republic is founded;
- the duties and obligations inherent in citizenship must be prescribed;
- the security of the state must be a paramount consideration when granting citizenship by registration or naturalization;
- Kenya should not make it too easy to acquire or lose citizenship;
- Conditions be put in place to moderate and regulate the processes involved in acquisition of citizenship;

(e) *The Bill of Rights*

The current Constitution has always had a chapter on the protection of fundamental rights and freedoms of the individual. The Conference was persuaded that there is need for an expanded and fully justiciable Bill of Rights which would protect not only civil and political rights, but also confer social, cultural, economic and development entitlements. Besides, the Conference noted that the rights and freedoms entrenched in the current Constitution are designed to protect only individuals and not communities, and even this only in respect of civil and political matters.

In this regard, therefore, there was broad agreement that while the state may not have the capacity or resources to confer or operationalise some of those entitlements, the new Constitution must create an obligation to strive towards the full attainment of those rights. There was broad agreement that public vigilance is the most effective way of promoting and enforcing the provisions of the Bill of rights.

(f) *Representative Governance*

The Conference accepted the proposition that governance at all levels should ideally, be based on free, competitive, and fair representation. It was also agreed that affirmative action for women was necessary in order to right historical and cultural wrongs based exclusively on gender. Specifically, the Conference agreed that the proportion of women in elective and appointive positions should not be less than one-third of the total establishment. The Conference noted that this general principle should apply not only to national and local governance but also to the internal (or domestic) organization of political parties and civic organizations. The need to promote and foster the culture of an open accountable and equitable society was thus underscored.

The Conference recognised, however, that a limited number of exceptions to this principle may be justified. Among these were: -

- elective or appointive processes that are wholly private or which do not compromise the public interest; and
- the need to respect fundamental rights and freedoms of individuals and communities.

(g) *The Principle of Separation of Powers*

The Conference accepted the need for clear separation of powers between and where necessary, within each of the state organs, namely the legislature, the executive and the judiciary. The Conference was fully aware of the dangers of perpetuating or not radically restructuring the position under the current Constitution whereby the executive has become the supreme organ of state, directly and indirectly controlling the operations of the legislature and the judiciary. The Conference noted, in particular, that the domination of the executive over other organs of government had led to a situation in which the Provincial Administration, an organ of the Office of the President, had become a government unto itself.

The Conference was in agreement, therefore, that the Constitution must state clearly:-

- the core functions of each organ of government;

- areas of authority exclusively reserved to each of those organs;
- the constitutional limits of such authority;
- the circumstance and manner in which such authority may be delegated or otherwise shared; and
- the conditions under which persons exercising powers entrusted to each organ may hold office or exercise such power.

(h) Checks and Balances

The Conference agreed on the need for checks and balances between organs of Government to ensure that authority, even where it is exclusively reserved, is not abused. The purpose of effective checks and balances is to enable those state organs to limit each other's power. The Conference, therefore, accepted provisions in the Draft Bill of 2002 relating to the controlled sharing of:

- law-making functions between the Legislature, the Executive and the Judiciary over a limited number, but significant range, of issues;
- appointments to constitutional offices (including the Judiciary) between the Executive and the Legislature;
- legislative and supervisory functions within a bicameral legislature; and
- executive power between the Presidency and the Cabinet.

(i) The Structure and Functions of Organs of Government

In terms of the legislature, there was general agreement that a bicameral system be re-introduced. The Executive was extensively debated by the Conference which accepted the proposal that the functions be shared by the President, assisted by the Vice-President, and a Cabinet headed by a Prime Minister and Deputy Prime-Ministers. The Conference further accepted the proposition that the Prime Minister be nominated by the President from among members of the first (lower) chamber and approved by simple majority vote of members of that chamber, and that the rest of the Cabinet be appointed by the President on the recommendation of the Prime Minister and approval by simple majority vote of members of the first chamber. Regarding the Judiciary, there was general agreement that the hierarchy of courts as set out in the Draft Bill of 2002 was acceptable.

(j) The Principle of Devolution of Power

A fundamental feature of the Draft Bill which the Conference accepted, was that power and authority should not only be shared, they must also be dispersed both vertically and horizontally among and between agencies and levels of government. The Conference accepted the propositions that devolution: -

- would ensure the sharing of power and national resources;
- would promote self and participatory governance;
- ensure effective coordination if governmental functions vertically between the centre and the grass-roots, and horizontally between various units of devolution;
- ensure effective and efficient delivery of services; and
- if properly designed and efficiently operated, is inconsistent with the present system of provincial administration.

The Conference was however unanimous that further work needed to be done on the structure of devolution to reflect the general agreement of the Conference. The

Conference thereby mandated the Commission to reconsider the chapter on devolution and in particular, to examine questions on viability of structures, equitable resource allocation, accountability of the governance system, effective and efficient delivery of services and empowerment of the people.

(k) *Control and Management of Natural Resources*

The Conference appreciated the fact that unlike the current Constitution, the Draft Bill made elaborate provisions on the control and management of land, environment and natural resources. The Conference however felt that more direct methods of control should be built into the Draft Bill and the Report. These should include:

- decentralised resource administration structures,
- imposition of specific public trust obligations on agencies with responsibility over the management of resources,
- conferment of a public right of censure coupled with unimpeded access to the courts for purposes of preventing abuse of national resources and
- efficient mechanisms for the monitoring of the ethics and integrity provisions of the Constitution.

(l) *Public Finance*

Whereas the Conference appreciated the in depth analysis and consideration given to the chapter in the Draft Bill, it was unanimously felt that the following issues be examined further and given serious consideration:

- equitable sharing of national and local resources taking into account the principle of devolution of power,
- empowerment of the office of the Auditor General to enable him/her audit expeditiously the expenditures and revenues of all government departments and state corporations and providing timely reports to parliament,
- proper management of taxes and revenue collection,
- strengthening of other financial institutions to ensure financial stability, effective planning and monitoring of resources,
- Transparency and accountability in the management of public finance.

(m) *The Public Service*

Despite the fact that the principle and structure of the public service as presented in the chapter on the Public Service in the Draft Bill of 2002 was generally endorsed by the Conference, delegates were of the view that the following issues be discussed further and strengthened:

- improved terms and conditions of service as a motivation to performance and service delivery,
- appointments and promotions based on merit,
- autonomy and independence of the public service commission,
- career progression, continuous capacity building and succession development
- strengthening and stabilising pension rights and retirement benefits through effective mechanisms.

(n) The Police Service

The Conference endorsed the broad provisions in the Draft Bill of 2002 and were unanimous that the relevant chapter of the Bill should be more elaborate on the following key issues:

- motivation and morale development,
- a more responsive and people friendly institution, and
- image building, integrity and professionalism.

(o) Leadership and Integrity

The Conference appreciated the direct provisions on leadership and integrity, and was in agreement that relevant Chapter and the Fifth Schedule of the Draft Bill of 2002 although clear, needed to be expanded and strengthened. In particular, the Conference agreed that those provisions should:

- be integrated into the mandate of the Ethics and Integrity Commission,
- be extended to the private sector,
- apply to official conduct at all levels of governance, and
- provide for more severe penalties for violations thereof.

(p) The National Security and Defence System

There was broad understanding that the new constitution must provide for the establishment of security, defence, intelligence and police forces that are disciplined, loyal and responsible to the civilian authority.

(q) Management of Constitutionality

The Conference was in general support of the proposals in the Draft Bill of 2002 that the exercise of constitutional functions and the enjoyment of constitutional rights generally, be monitored so as to ensure that the powers delegated by the people are efficiently and responsibly discharged, and their rights protected. There was general agreement at the Conference for the need for oversight as long as the institutions and offices charged with that responsibility have functional and financial autonomy and independence from other organs of Government, and that those appointed to positions in those institutions and offices must be men and women of integrity enjoying security of tenure.

(r) Culture

Issues of culture were raised and supported as crosscutting during the general debate. The Conference accordingly gave instructions to the Commission to include a chapter on Culture in the Draft Bill

25.3.2 Issues Eliciting Controversy

There were a number of aspects of the issues discussed in the foregoing that generated considerable debate and controversy during the general debate of the Conference. Some of the concerns raised were fundamental, while others were issues of detail. The aspects that remained controversial are set out below.

(a) The Preamble

Many delegates felt that the proposal contained in the Draft Bill of 2002 was not satisfactory. Issues which required further thought, were –

- the significance of God in the enactment of a secular constitution;

- an appropriate formula for recognising Kenya's freedom struggles; and
- whether the concept "people" should be disaggregated in terms of gender, demographic characteristics, socio-economic status; or ethnic identity.

It was appreciated, however, that the preamble eventually agreed upon, must be concise, enduring and must address the past, present and the future.

(b) The Sovereignty of the People and Supremacy of the Constitution

While the delegates accepted the principle of supremacy of the constitution, there was still concern on a number of issues in the chapter of the Draft Bill of 2002 on the Sovereignty of the People and Supremacy of the Constitution including: -

- whether people's sovereignty is exercised only through elected representatives;
- whether provisions relating to amendments enhance the doctrine of supremacy of the Constitution;
- whether there should be a clear duty to defend the Constitution;
- the identification and hierarchy of the sources of laws in Kenya;
- the status of East African Community law, customary international law, and treaties to which Kenya is a party *vis-à-vis* other bodies of domestic law; and
- the place of laws enacted by devolved units of government.

Consequently, many delegates wanted that provision on the supremacy of the Constitution revisited in order to remove any doubts as to the nature and content of Kenyan laws and legal system.

(c) Nationality and Citizenship

The delegates were uneasy about two critical aspects of the provisions on citizenship. The first was the provision relating to dual citizenship. Although the justification for introducing this category of citizenship appeared reasonable, there was concern that it might create security problems for the country. The second was the provision relating to acquisition of citizenship by marriage. Many delegates thought that three years was not enough time for a person, married to a Kenyan citizen to demonstrate true and substantial commitment to Kenya. The fact that no other citizenship conditions were prescribed in the Draft Bill of 2002 was of great concern to delegates. Many were of the view, therefore, that this easy manner of acquiring citizenship could be used to sabotage the security of the state, increase the influx of foreigners holding themselves out as Kenyans and would water down the value of Kenyan citizenship.

(d) The Bill of Rights

The issues of controversy on the Bill of Rights were whether all the provisions in the Bill of Rights should apply to all persons without exception, and the exact circumstances under which any of these rights may be qualified.

In addition, a number of delegates were concerned that the Draft Bill of 2002 contained no clear definition of a number of concepts including –

- when life begins, in the context of scientific, religious pro-life and pro-choice approaches to the issue of abortion;

- the right to life;
- family and marriage;
- same sex marriages as opposed to “woman to woman” marriages under customary practices;
- youth;
- older members of society; and
- persons with disability.

It was felt that these definitions should take into account the African culture and context, and further clarity on these and similar concepts could eliminate controversy on an otherwise acceptable Bill of Rights.

(e) Management of Political Parties

While the Conference appreciated the crucial role played by political parties in the articulation and nurturing of democratic ideals, there was concern that if not properly managed, political parties could sabotage those ideals. Many delegates were therefore of the view that proper mechanisms should be established for –

- enforcing democratic governance within political parties,
- ensuring gender equity in political party representation,
- controlling the conduct of “political turn-coats” or defectors especially at or in between elections,
- ensuring absolute neutrality of the public service from activities of political parties, and
- ensuring strong and effective political party organization rather than a proliferation of “brief-case” parties.

It is important however, to state that the Draft Bill of 2002 had adequately addressed nearly all of the issues raised above.

(f) The Structure and Composition of the Legislature

Despite the feeling amongst majority of the delegates that the bicameral structure proposed in the Draft Bill of 2002 was acceptable, others wanted a number of outstanding details resolved. These included: –

- the size of the second (Upper) Chamber,
- the linkage between the second Chamber and units of devolution,
- the manner in which legislative authority is shared between the two Chambers,
- the role of the President in the legislative process,
- the nature and consequences of the parliamentary motion of no-confidence in the Prime Minister, and
- clarity in the roles and responsibilities of those Chambers.
- the Mixed Member Proportional (MMP) representation system
- the infusion of affirmative action principles in the composition of both chambers, and
- recall of Members of Parliament

Other delegates thought that a bicameral system was not only unnecessary and expensive, it was a significant departure from systems in operation in East Africa. Consequently they wanted further discussion on this issue.

(g) The Nature of Executive Authority

Even though there was clear agreement that executive authority should be shared between the President (assisted by a Vice-President) and the Cabinet (headed by a Prime Minister) the exact distribution of power between those two slots was an issue of controversy at the Conference. Delegates were divided between those who preferred–

- a strong Prime Minister as would be the case in a pure Parliamentary system, or
- a strong President as would be the case in a pure Presidential system, or
- a mixed Parliamentary and Presidential system as recommended in the Draft Bill of 2002.

Attention of delegates was drawn to the fact that the first of these options was in operation in this country for a brief period under the independence Constitution. Discussion in respect of the third option however, ranged between the French model of relative parity of power between the Presidency and the Cabinet, and the model in the Tanzanian constitution in which the Prime Minister's primary responsibility is to execute policies determined by a Cabinet chaired by the President.

The primary concern of the Conference was that any power-sharing model must ensure that –

- unnecessary conflicts or deadlock in the execution of governmental functions were avoided,
- procedures for appointment and dismissal of the Prime Minister are clearly established, and
- powers and functions conferred upon the President or the Prime Minister in other parts of the Constitution are consistent with those in the chapter on the Executive in the Draft Bill of 2002.

Other issues concerning the Executive which were raised included: -

- the upper age limit for candidates vying for the Presidency,
- the procedure (not desirability) of providing for impeachment of the President and, in particular the exact roles of the two Chambers in the investigation of impeachable offences, the framing of articles of impeachment, and the determination of guilt or innocence, and
- whether members of the Cabinet other than the Prime Minister and Deputies should be appointed from outside Parliament as proposed in the Draft Bill.

These issues emerged as some of the most contentious leading to extreme polarization amongst delegates.

(h) The Judicial and Legal System

Whereas the structure and jurisdiction of courts as set out in the Draft Bill of 2002 were generally accepted, a number of issues remained controversial. The most important of these were:-

- the entrenchment of Kadhi's courts in the Constitution,
- the scope of jurisdiction of Kadhi's Courts,
- the reference to religious courts in the Constitution, and
- the conflict between the provisions on the Kadhi's Courts and other provisions in the Draft Bill that all religions are equal.

Other issues concerning the judicial and legal systems which were controversial included qualifications for appointment of judges to the High Court, Court of Appeal and the Supreme Court and whether provision should be made for the removal of all or some of the current judges of the High Court and Court of Appeal.

(i) The Structure of Devolution

Despite the fact that the principle of devolution was widely embraced by the Conference, its structure and levels as presented in the chapter on Devolution of Powers of the Draft Bill of 2002 were subject of intense debate and disagreement. The key issues of contention related to:

- The extent of devolution.
- Whether the principal unit of devolution should be at the district or provincial level;
- Viability of majority of the districts as the principal unit of devolution taking into account the "political" districts;
- The cost effectiveness of five levels of devolution/government;
- Administration of urban areas currently under city, municipal, town and area councils and rural county councils;
- Revenue management; and
- Functions of different levels of government.

On the question of levels of devolution and the principal level of devolution, the delegates were considerably in support of the district as the principal centre of devolution of powers. However, it was suggested that they would be too many while others were economically challenged. Moreover, it was noted that the proposed structure lacked a clear linkage with the national government. The subject of the legality of existing districts as the basis of the proposed devolution structure was passionately debated. With respect to local government, the transformation of towns and municipalities to district status was opposed. Support was expressed for a three-tier devolution structure (location, district and province), however, some other view favoured a two-tier devolution structure (location and the district). There was also a view that proposed the constituency as a distinct level of government. It was generally proposed that there ought to be comparable social and economic resources in the proposed units of devolution.

Critical issues were raised on the cost of running the devolved system of government and whether it would be prudent to just restructure and strengthen the current system i.e. provincial administration and local authorities without fundamentally changing the system. Because of the nature of the questions raised, the Conference agreed that the Chapter on devolution needed to be reconsidered.

(j) Access to and Control of Land and Property

A number of specific issues were raised with regard to the ownership, control and use of land and natural resources. Regarding the issue of ownership of subterranean deposits, delegates noted that the Draft Bill of 2002 proposed that these be owned and utilised by those who have title to the surface. This would mean that mineral deposits and water bodies on or below private, public or community land as defined in the Draft Bill, would vest in those holding title to such land. Many delegates thought that given the history of land grabbing in Kenya, that could be dangerous. A minority of delegates thought however, that the proposal in the Draft Bill of 2002 was not only sound, but would also strengthen the negotiating stand of owners of private and community land against the state or multinationals seeking to exploit those resources or deposits.

The concern of delegates in respect of the structure and functions of the proposed National Land Commission was that –

- its jurisdiction appeared limited to the control and administration of public land,
- similar structures had not been proposed for the administration of land by devolved units of government,
- other land administration functions such as registration, land market regulation and transactional processes were not included in its mandate, and
- the relationship between the proposed Commission and existing structures of land administration was not clarified.

As regards land belonging to communities, delegates wanted further clarity on a number of operational issues. Among these were –

- whether pastoral land would remain community property,
- how communities as juridical persons would be identified,
- the exact mechanisms for the protection of community land before such persons are identified,
- how individual claims to community resources would be resolved, and
- whether and under what circumstances, community land could be converted to public or private land and vice-versa.

The issue of the resolution of historical land claims was extensively debated by the Conference. Whereas it was recognised that many of those claims were justified and should be resolved, no clear agreement was reached on the exact modalities for achieving this. Among issues yet to be resolved are –

- whether resolution should be on the basis of restitution, restoration, compensation, or resettlement on government land,
- the cut-off date with reference to which resolution should be made, and
- the need for a clear policy on and mechanisms for resolution of the problem of spontaneous (i.e. squatter) settlements especially in the Rift Valley Province and the Ten-Mile Coastal strip.

Delegates briefly mooted the desirability of establishing a land fund that would facilitate land banking by the state and units of devolution as well as facilitating access to land

by Kenyans. The exact nature of such a fund, where its resources would come from, and how it would be managed was, however, not explored.

Delegates also briefly mooted the issue of matrimonial property. Whereas many of them wanted this matter dealt with in the constitution, no clear guidelines were developed on –

- what would constitute matrimonial property,
- how such property would be controlled or used,
- the modalities of transfer and transmission of such property, and
- how such property can be partitioned.

(k) The National Security and Defence System

The only issues of contention with National Security and Defense related to the distinction between issues of “national security” and those concerning “defence” and need for appropriate structures and offices for steer national security and defense functions. The relationship between the Kenya Police and Administration Police and whether they should be merged into one police force later turned out to be quite contentious.

(l) Supervision of Constitutional Functions

The only issue of contention with regard to the supervision of constitutional functions and the protection of constitutional rights was on the absolute or optimal number of Commissions to be created. Other delegates also wanted clarification on the powers and functions of these Commissions in relation to the powers and functions of organs of the state.

25.4 Recommendations on Emergent and Crosscutting Issues

Although the Technical Working Committees could address majority of issues raised during the general debate on the Main Report and Draft Bill of 2002 at the consideration stage, a number of issues needed further action. The Conference therefore made the following key recommendations for further work:

1. While affirmative action for women was understood and accepted, affirmative action for other groups was not fully explored due to uncertainty as to the range and the mechanisms required to implement that principle. Many delegates, therefore, wanted an expert presentation on affirmative action before the commencement of consideration by the Technical Working Committees.
2. The Conference felt that the issue of culture had not received serious attention in the Draft Bill of 2002. Indeed many delegates thought that the Draft was totally devoid of cultural content, hence it was fundamentally alien to Kenya. An *ad hoc* committee was established to work on the culture question.
3. The Conference recommended a redrafting of the Devolution chapter to take into consideration issues such as levels of devolution, costs of devolution, the number of units and regional composition. The Constitution of Kenya Review Commission was tasked to redraft the chapter on Devolution.

4. The Conference recommended the need to reassess the heavy program for consequential legislation and especially whether the three-year outer limit for the enactment of new legislation was realistic.
5. While the principles underlying the transitional arrangements proposed in the Eighth Schedule of the Draft Bill of 2002 were fully explained to the delegates, the Conference was of the view that detailed consideration of the Eighth Schedule before the final text of the new Constitution was necessary. Besides, many of the circumstances in existence at the time when that Schedule was drafted had dramatically changed thus suggesting the need of new ideas on the transitional arrangements.
6. Although the Conference agreed that the process of constitutional amendment must not be left entirely to Parliament, different options needed further thought particularly with regard to the exact modalities of engaging the constituent power of the people in the process of constitutional amendments; the dangers of making amendment procedures either too rigid or too flexible; and whether the categorization of constitutional provisions as entrenched or non-entrenched for purposes of amendments was sound.

The Commission embarked on addressing the above issues during the period of adjournment. The Commission subsequently generated new reports and provisions on affirmative action, culture and devolution, as is detailed out in Chapter Twenty-one of this report. When the Conference reconvened for the second session, the reports on Affirmative Action, Devolution and Culture were tabled and presented by the Commission. After general debate on the reports, they were subsequently adopted by the Conference and forwarded to the relevant Technical Working Committees for further discussions during the consideration stage.

CHAPTER TWENTY-SIX

EMERGENT AND CROSS-CUTTING ISSUES

26.1 The Mandate of the Commission

Section 26 (1) (b) required the Commission to present its Main Report and Draft Bill of 2002 to the National Constitutional Conference for discussion, debate, amendment and adoption. Pursuant to the general discussion and debate of the Main Report and Draft Bill of 2002 by the Conference during its first session (Bomas I), a number of issues were raised and recommended for further consideration by the Commission. These were the questions of culture, affirmative action and devolution of power. Culture and affirmative action had been noted during the general debate as cross-cutting issues which had not been effectively mainstreamed in the Draft Bill, while the provisions on devolution had been found to be unsatisfactory in some respects. The Commission consequently established task forces to address the three areas when the Conference adjourned, which task forces' reports were approved and adopted by the Commission. *The membership of these task forces is contained in Appendix XII.*

26.2 Culture

The Review Act required the Draft Bill of 2002 to include provisions that would respect ethnic and regional diversity and communal rights, including the rights of communities to organize and participate in cultural activities and the expression of their identities. It was observed during the general debate of the Conference that this had not been done, and the Commission was instructed to pursue the matter further.

26.2.1 Views of Delegates on Culture

During the general debate at the Conference, delegates reiterated that Kenya's cultural heritage had not been given its due significance in the Draft Bill of 2002, and required specific attention and inclusion in a separate chapter. The views expressed by the delegates were as follows:-

- The Preamble should be committed to nurturing and protecting the well being of members of community as well as capturing the struggle for freedom;
- Concerning family and marriage, the family as an institution should be respected and given its place in the society, and recognition given to the concept of extended family under African traditions;
- Marriage should expressly be a union between a male and female and that all marriages, including marriages under African traditions should be legally recognised;
- As regards when life begins, the Constitution should state that life begins from the time of conception;
- With regards to welfare, basic needs and social security, the state should make provisions for the maintenance and welfare of the aged, and the African cultural ways of taking care of the aged should be taken into account;
- On the question of language, it was proposed for inclusion that all Kenyan languages should be national languages;

- As far as the Kenyan communities are concerned, the Constitution should state clearly who the Kenyan communities are and protect these indigenous communities. The Constitution should guarantee community rights;
- The Constitution should recognise traditional village courts and just as well, the council of elders should be recognised by the Constitution; and
- Communal land policy schemes should be entrenched in the Constitution. Customary land rights and especially those relating to inheritance and alienation of land should be recognised in the Constitution.

26.2.2 Establishment of the Commission's Task Force on Culture

Due to limited time because of the adjournment of the Conference on Friday 6th June 2003, the Conference referred the tasks of the *ad hoc* Committee on Culture to the Commission for further action during the recess. Pursuant to Section 19 (1) of the Review Act, the Commission established a Task Force on Culture with mandate to:

- prepare a background paper on the '*Constitutional Promotion and Protection of Kenya's Cultural Diversity and Activities*';
- conduct an audit of the Draft Bill to determine the extent to which Kenya's cultural heritage had been provided for in the Draft Bill;
- explore and propose for other ways of giving constitutional legitimacy and protection to that heritage; and
- prepare a report for consideration by the National Constitutional Conference.

The Task Force on Culture fully executed its mandate and prepared a special working document and draft provisions on Culture which were presented to, debated and approved by the Commission.

26.2.3 The Commission's Recommendations on Culture

In its report, the Commission recognised that all Kenyan peoples cultural, linguistic and religious communities are equal and that all peoples have a right to manifest, practice, revitalise and benefit from their cultural heritage. This includes the right to maintain, protect, develop and transmit the past and present manifestations to future generation, such aspects of culture as archaeological and historical sites, sacred places, languages, oral traditions, philosophies, material culture, design, ceremonies, knowledge technologies, visual performing arts, and literature, as well as the right of restitution of cultural, intellectual, religious and spiritual property taken without their free will and consent or in violation of their laws, traditions and customs. Recognizing the equality among diverse cultural, linguistic and religious heritage of Kenya, the report provided that no aspect of Kenyan cultural community may be addressed by pejorative and offensive terms and may be stereotyped or negatively profiled.

In general, the Commission Report made recommendations on the following aspects:

- the principle of multiculturalism;
- recognition and respect of all Kenyan communities;
- right to manifest and practise culture;
- right of transmission of history and heritage to future generations;

- recognition, respect, preservation, protection and promotion of historical and religious sites;
- protection of the intellectual property of the people of Kenya;
- education, science, and technology;
- right to be involved in national life;
- promotion of national culture, identity, values and symbols;
- recognition and protection of family and marriage;
- recognition and strengthening of cultural institutions;
- establishment of the National Council for the Promotion and Protection of Cultural Heritage;
- conflict management and resolution;
- media; and
- legislative measures to promote cultural development.

To place them on the same footing with the Main Report and Draft Bill of 2002, the Report and draft articles on culture from the Commission was presented by Commissioner Kavetsa Adagala to the Conference for debate on September 16, 2003. The Conference among other things, resolved that Culture be given its own chapter and that a full-fledged Technical Working Committee be formed to consider the issues of culture in the Constitution. The *Ad Hoc* Committee on culture was transformed to the Technical Working Committee M on Culture.

The work of the Technical Working Group M is presented in Chapter Twenty-two of this Report

26.3 Affirmative Action

The Commission further considered the affirmative action question pursuant to section 3 of the Review Act in which the review process must address issues relating to gender equity and equality; equal citizenship; redress of the historical wrongs and discrimination; respect of human rights and fundamental freedoms; equitable access to national resources; full and inclusive participation in public affairs; and the provision of basic needs to all Kenyans through the establishment of an equitable framework for economic growth.

26.3.1 Views of Delegates on Affirmative Action

The general debate stage of the Conference elicited many strong views from the delegates pertaining to the question of affirmative action. In particular, the delegates expressed the following:

- Proper representation of women, the youth, people with disabilities, the aged and minority and marginalized communities,
- Due recognition of the rights of pastoralist communities,
- The principle of Affirmative Action should not only be applied to women, but to the youth, people with disabilities, the aged and minority and marginalized communities as well,
- A comprehensive definition of marginalized communities should be established,
- Historical land injustices should be addressed by the Constitution, and
- Equal and equitable access to land should be affirmed.

26.3.2 Establishment of Task Force on Affirmative Action

The Commission established a task force to consider how affirmative action could be mainstreamed in the Draft Bill of 2002. The task force had the following mandate:

- To critically examine the entire Draft Bill, with a view to determining whether and the extent to which provisions of section 3(b) and (f) of the review Act had been adequately addressed with particular regard to groups that have hitherto been discriminated against on the basis of gender, disability, age, geographical situation and other forms of affliction;
- To propose ways of mainstreaming inter-generational equity as a principle in the entire Draft Bill so as to make a constitution for all ages and generations; and
- To propose, where necessary, amendments to any aspect of the Draft Bill with a view to entrenching the principle of intergenerational and social equity.

26.3.3 The Commission's Recommendations on Affirmative Action

In its report, the Commission considered affirmative action as a direct response to historical concerns of gross inequalities that characterize Kenya's social and economic environment including the following concerns:

- Exclusion of whole regions and communities from enjoying the benefits of national development;
- Unequal development;
- Unequal distribution of national resources; and
- Unequal participation in decision-making and management of public affairs especially by women, people with disabilities, the youth, pastoralists and minority communities.

The Commission therefore recommended that:

- a. The Constitution should include a clear statement of obligation to take positive action to strengthen equality, or affirmative action, and of meeting the basic needs. This statement should be included in the Bill of Rights chapter of the Draft Bill, thus making it a duty to undertake affirmative action measures in specified circumstances.
- b. The Constitution should propose criteria for the objectives, methodology and process of affirmative action measures, with emphasis on transparency, participation, genuine need, monitoring, and should provide for time limits.
- c. The Constitution should:
 - (i) state that the diversity of the nation should apply in the executive, public service and judiciary;
 - (ii) state clearly that the ethnic diversity of the nation should be reflected in the police and correctional services;
 - (iii) state clearly that the principle of ethnic diversity applies to all constitutional commissions and offices;
 - (iv) ensure balanced development, including compensating for past neglect of certain areas;
 - (v) ensure obligation on part of the state to foster Kenyan languages, including the obligation, where feasible, to make public information available in local languages;
 - (vi) recognise and promote the principles applicable to constitutional commissions to have regard to the interests of disadvantaged sections;

- (vii) emphasize affirmative action for the historically marginalized and disadvantaged groups and areas including women, people with disability; the youth, pastoralists; older people, and minority communities, in representation, management of public affairs and sharing benefits of development;
- (viii) provide for the principle of inter-generational equity;
- (ix) make it clear that regard for future generations extends to resources as well as to the environment generally;
- (x) provide and define criteria for allocating resources to marginalized areas in order to ensure equalization of opportunities and access to development;
- (xi) make provisions on institutional, legislative and policy arrangements for the implementation of affirmative action for the marginalized, disadvantaged and minority groups and areas; and
- (xii) make provisions on redress, reparation and compensation for historical injustices committed on the people of Kenya.

Commissioners Prof. Yash Pal Ghai and Isaac Lenaola made the Commission's presentation the Conference on September 16, 2003. In their presentation, they recommended to the Conference the entrenchment of affirmative action in the Constitution. They requested the Conference to come to a decision whether the principle should be a temporary measure or should be through transitional provisions.

The Conference in its debate and discussions on the Commission's report considered the recommendations as cross cutting and therefore directed all the Technical Working Committees to consider them in their deliberations with a view to mainstreaming the recommendations in each relevant Chapter of the Draft Bill.

26.4 Devolution of Powers

Section 3 of the Constitution of Kenya Review Act stipulates that the object and purpose of the review of the Constitution is to secure provisions therein *inter alia*:

- promoting people's participation in national governance by devolving power;
- respecting ethnic and regional diversity and communal rights, including the communities' rights to enjoy their cultures and express their identities;
- establishing a free and democratic system based on good governance and the separation of powers and checks and balances; and
- promoting the accountability of public authorities.

In addition to examining and making recommendations on organs of government, the Review Act required the Commission to examine and make recommendations on:

- structures and systems of government, including the federal and unitary systems;
- the place of local government in the constitutional organization of the Republic; and
- the extent of devolution of power to local authorities.

26.4.1 Views of the Delegates on Devolution

The National Constitutional Conference, in its debate and discussion on the chapter on Devolution of Powers supported the principle of devolution, but felt that the Chapter

was not well developed and needed further substantive work. The main concerns raised by the Conference were:

- The general principles guiding devolution of power;
- The levels of devolution;
- The functions of devolved government;
- Administration of devolved units;
- Number of devolution units; and
- Financial arrangements;

The Conference therefore asked the Commission to reconsider the Chapter on devolution by addressing the above issues and to pay particular attention to the questions on viability of structures, equitable resource allocation; accountability of the governance system, effective and efficient delivery of services and empowerment of the people.

26.4.2 Establishment of the Task Force on Devolution

To effectively respond to the tasks given by the Conference, the Commission during the recess established a task force on Devolution. The task force's terms of reference were:

- to identify and examine the issues, comments and recommendations made on the Devolution chapter of the Draft Bill of 2002 during the general debate at the National Constitutional Conference;
- to make proposals for revision of the Devolution chapter based on the above-cited findings;
- to identify other provisions of the Draft Bill of 2002 that will need revision as a result of such proposed changes to the Devolution chapter;
- to revise the Seventh Schedule of the Draft Bill of 2002 in the light of the above cited changes; and
- to prepare a report for consideration by the National Constitutional Conference.

The task force prepared a report, which was discussed and approved by the Commission at a retreat held in Mombasa between August 6 – 15, 2003. That report made comprehensive recommendations on the need for and principles, which should guide the process of devolution of powers, the structure of devolution, and the functions and powers of units of devolution. The Commission also generated a new draft replacing the original Chapter on Devolution of Powers of the Draft Bill of 2002 and setting out the technical parameters of devolution, including provisions that would ensure that this issue is effectively mainstreamed in the entire Bill.

26.4.3 The Commission's Recommendations on Devolution

In its report, the Commission made the recommendations on the general principles of devolution and emphasized the need to promote peace, internal harmony, indivisibility of the nation, coherence and national unity as part of the overall design of the devolution system. In particular, the Commission recommended the need to:

- promote observance of the rule of law at all levels;
- ensure equitable representation of all Kenyans in the national institutions and processes;

- protect and promote cultural, communal, religious, ethnic and linguistic minorities;
- rationalize the relationship between national government and the lower levels of devolved government;
- ensure loyalty of government units to the constitution and the national goals, values and principles of the Republic;
- ensure clarity of functions of different levels of government;
- entrench levels and units of devolution in the constitution;
- consider the principles of viability, sustainability, efficiency and effectiveness of devolved units of the government; and
- make provisions on the Devolution Act.

The Commission further recommended specific principles on taxation and revenue management focusing on the need to establish a bearable taxation regime and an enabling institutional arrangement for tax administration. The Commission recommended that each devolved unit should have a consolidated fund into which the revenue collected may be paid and that money may only be withdrawn from a consolidated fund on the basis of legislation. It was also recommended that every devolved level of government should be entitled to an equitable share of revenue raised nationally and that any additional revenue raised by the devolved levels of government may not be deducted from their national share of revenue. At the same time there would be no obligation on the national government to compensate the devolved levels of government that do not raise revenue commensurate with their fiscal capacity and tax base.

In response to issues of unequal development, the Commission recommended that the principles of universality and equal tax treatment according to economic capacity be applied and that the national government should promote financial equalization among the regions and should make equalization grants to marginalized areas while taking into their financial capacity and special situation.

Both the report and new devolution provisions were presented as Commission documents to and debated by the Conference between August 21 – 22 2003 and on September 16, 2003, thus placing the report and draft provisions on the same footing as the Main Report and Draft Bill of 2002. Commissioners Prof. Wanjiku Kabira, Mutakha Kangu and Mosonik arap Korir made the presentations and indicated that they had consulted experts on Devolution, the Lancaster Conference veterans and other Constitutions including those of Ghana, Ethiopia, Nigeria, Canada, Switzerland, Germany, South Africa and Namibia. Following debate and discussions, the report and provisions on devolution were adopted and forwarded to the Technical Working Committee on Devolution of Powers for further discussions during the consideration stage.

Besides the recommendations to establish the Technical Working Committee M on Culture; the redrafting of the Devolution chapter and recommendations on Affirmative Action, the Conference also made various recommendations of sections of the Draft Bill of 2002 to be moved between various chapters. These recommendations were mainly effected during the Technical Working Committee sessions as reflected in subsequent chapters of this report.

CHAPTER TWENTY-SEVEN

CONSIDERATION OF THE COMMISSION'S REPORT AND THE DRAFT BILL BY TECHNICAL WORKING COMMITTEES

27.1 Introduction

Regulation 20(1) of the Constitution of Kenya Review (National Constitutional Conference) (Procedure) Regulations, 2003 required that upon the conclusion of the general debate, the Commission's Report and Draft Bill would stand committed to consideration by the Technical Working Committees established under Regulation 49. At this consideration stage, Regulation 20 (3) specified that the debate would be confined to the Commission's Report and Draft Bill and that the delegates were entitled to discuss, debate and move amendments to any aspect of the Report and Draft Bill.

The Revised Guidelines for the National Constitutional Conference *Ad Hoc* and Technical Working Committees issued by the Steering Committee further provided that the delegates in each Technical Working Committee would-

- i. examine all issues raised during the general debate and any other issues touching on matters provided for in the Report and Draft Bill prepared by the Commission and to consider how best these may be used to strengthen or enrich the recommendations and/or proposals presented therein in respect of their thematic mandate;
- ii. propose amendments or changes to the contents of the Report and/or Draft Bill in relation to matters under their specific thematic mandate;
- iii. report on their proposed amendments to the Report and/or Draft Bill to the Steering Committee or the Conference;
- iv. consider and report on any other matter referred to it by the Steering Committee or the Conference.

A copy of these guidelines is annexed to this report as Appendix XIII.

27.2 Establishment of Technical Working Committees

Under Regulation 49(1) of the Conference Regulations, the Conference was required to appoint Technical Working Committees to consider any issue or theme arising from the Draft Bill as it may consider appropriate. Regulation 49 (4) established thirteen such Committees with the mandate to deal with the themes specified-

- | | |
|---------------------------------|---|
| Technical Working Committee A – | Preamble, Supremacy of the Constitution, the Republic and National Goals, Values and Principles |
| Technical Working Committee B – | Citizenship and the Bill of Rights |
| Technical Working Committee C – | Representation of the People |
| Technical Working Committee D – | The Executive |
| Technical Working Committee E – | The Judiciary |
| Technical Working Committee F – | The Legislature |
| Technical Working Committee G – | Devolution |

Technical Working Committee H	— Public Finance, Public Service, Leadership and Integrity
Technical Working Committee I	— Defence and National Security
Technical Working Committee J	— Land Rights and Environment
Technical Working Committee K	— Constitutional Commissions and Amendments to the Constitution
Technical Working Committee L	— Transitional and Consequential Arrangements
Technical Working Committee M	— Culture

27.3

Constitution of the Technical Working Committees

Regulation 49(3) of the Constitution of Kenya Review (National Constitutional Conference) (Procedure) Regulations 2003 provided for the constitution of the Technical Working Committees and limited each Committee, in its membership to a maximum of sixty delegates. Nonetheless, delegates were free to attend the sittings of any Committee they chose but had no voting rights in such Committees. This Regulation did not in any way deal with the question of the actual allocation of delegates to the various Technical Working Committees and this was done by resolution of the Steering Committee.

In constituting the Technical Working Committees, regard had to be paid to the different categories of members to the National Constitutional Conference outlined under section 27(2) of the Review Act to ensure that the members were spread out as equitably and evenly as possible. The Steering Committee had contemplated a situation where the delegates would meet within their categories of representation for purposes of allocation to the different Committees. The dynamics of the Conference however dictated otherwise. At the time, the delegates preferred that there be equitable representation in each Committee along ethnic and political party lines, rather than along the different categories of delegates. Provincial groupings therefore became the focal point for representation.

The categories of representation envisaged by the Act were quickly assimilated into these provincial groupings. As a result, the Steering Committee directed that the delegates be organized on the basis of the provinces and that provincial coordinators be identified to oversee the process of allocation of the delegates to the Technical Working Committees in each group. However, delegates from the categories of political parties, religious organizations, women's organizations and other civil society categories as well as special interest groups preferred and were allowed to meet within their respective categories to ensure that they were well represented in all the Technical Working Committees.

The result of this process was the preliminary list of Technical Working Committee membership compiled and circulated by the Rapporteur-General towards the close of Bomas I. There were a number of problems with the list. Over-subscription in some Committees was the greatest problem, while other Committees suffered from under-subscription. This arose from the requirements in the Conference regulations limiting membership in any one Committee to sixty. The Committees that were over-subscribed were Devolution, the Executive, the Bill of Rights, Land Rights and Environment and Transitional and Consequential Arrangements Committees. The Committees that were under-subscribed included those on the Preamble, Supremacy of the Constitution, the Republic, National Goals, Values and Principles; Defence and National Security,

Constitutional Commissions and Amendments to the Constitution; and Culture. It was interesting to note the disparity between the interests of Kenyans during the process of collection of views, which centred on mainly on the land question, which did not spur as much interest in the process of constituting the Technical Working Committees.

One issue with the Committee membership was that various categories of delegates had different preferences. It was evident that most Members of Parliament were attracted to the Committees on the Executive, the Legislature and Devolution; delegates from religious organizations preferred the committees on the Bill of Rights and the Judiciary. Most delegates representing women organizations preferred the committees on Citizenship and Bill of Rights; Cabinet Ministers, the Committee on Transitional and Consequential Arrangements; district delegates, the Devolution Committee while the delegates from pastoralists areas preferred the Committee on Land and Environment. Most delegates who had retired from the civil service preferred the Committee on Public Finance, Public Service, Leadership and Integrity.

There were also cases of double subscription in some committees. Despite several revisions, the list of members was not concluded during Bomas I. At the commencement of Bomas II, further attempts at rationalization within the provincial groupings were made. Eventually, the Rapporteur-General was mandated by the Steering Committee to rationalize the list of membership, by which time the Committees had commenced their sittings. In actual fact, the process of rationalization by the Rapporteur-General continued all through the duration of the Conference. This situation was regularized after a lot of negotiation and persuasion.

The final list of committee members is presented in Appendix XIV.

27.4 Training on Technical Working Committee Rules and Procedures

The general procedure of the Technical Working Committee was governed by the Conference Regulations, which, according to regulation 45 would apply, with any necessary modifications, to the Committees of the Conference. In their deliberations, the Technical Working Committee's were required to comply, to the extent possible, with the provisions of the Second Schedule to the Conference Procedure Regulations. This Schedule spells out the detailed rules and procedure for consideration of provisions of the Draft Bill of 2002 and the Main Report.

For some delegates, this procedure appeared rigorous, complex and totally incomprehensible. These delegates felt that the rules of procedure were inflexible and quite restraining for use in the Committees. However, the delegates, who were or had been Members of the National Assembly, and who were familiar with the procedure were instrumental in assisting fellow delegates. Nonetheless, it was generally agreed that the rules of procedure were vital for purposes of ensuring that the work of the Committees was conducted in an orderly and systematic manner. In practice, these rules were modified whenever it was deemed necessary within the Committees. It was therefore essential to train the Convenors, Rapporteurs and the Secretariat as well as the delegates themselves on the rules of procedure. Several forums were organized for the conduct of the trainings as follows.

27.4.1 Training for Technical Working Committees Personnel (10th – 13th August, 2003 Leisure Lodge Hotels and Golf Resort, Mombasa)

This training workshop was organized by the Commission for Committee personnel. The workshop was held prior to the commencement of Bomas II, before the commencement of the sittings of the Technical Working Committees. In attendance were the Rapporteurs, the Programme Staff and the Clerks attached to the Technical Working Committees. The main objective of this workshop was to equip the participants with the knowledge and skills required to effectively conduct the meetings of the Technical Working Committees.

The workshop was facilitated by a team of training consultants. The consultants addressed the following topics relating to the management of committees:

- Convening meetings;
- conducting meetings;
- problems that build deadlocks;
- use of sub-committees for deadlock breaking;
- committee documentation; and
- the committee report.

On matters of procedure, senior staff from Parliament including the Clerk of the National Assembly, with wide experience in parliamentary procedures inducted the participants on the use and application of the rules of procedure in managing the conduct of the Technical Working Committees. The participants also had the opportunity to practice the skills learnt in a role-play sessions.

27.4.2 Induction Workshop for Technical Working Committee Convenors and Rapportuers (21st – 22nd August 2003, Lenana Mount Hotel, Nairobi)

On the eve of the commencement of the work of the Technical Working Committees, it was felt that the Convenors, who had not attended the first training, also required to be inducted on the rules of procedure and the general skills required for the management of the Committees. A short training session was then held at Lenana Mount Hotel in Nairobi. The Convenors, Rapportuers and other newly engaged members of the Secretariat attended this induction.

27.4.3 Further Training for Convenors, Rapportuers and Staff of Technical Working Committees (19th – 22nd November, 2003, Mount Kenya Safari Club, Nanyuki)

Another in-depth training for Technical Working Committee personnel was held at Mount Kenya Safari Club, Nanyuki between 19th and 22nd November 2003. This training was held before the commencement of the third phase of the National Constitutional Conference. The Technical Working Committee personnel had the opportunity to report on their experiences with matters of procedure in the Technical Working Committees and to seek clarification on areas of particular difficulty.

This training also dealt with the issue of the preparation and presentation of the Technical Working Committee Reports. Once again, the participants were taken through the rules of procedure, particularly those dealing with reporting to the Conference and the consideration and adoption stages at the Conference.

27.4.4 Training of Delegates (6th May 2003, Bomas of Kenya, Nairobi)

The delegates underwent a training session on 6th May 2003 on the rules and regulations governing not just the Conference as a whole but the Technical Working Committees as well. This was in preparation for the General Debate stage of the Conference which commenced shortly thereafter.

27.4.5 Further Training of Delegates (4th – 13th February 2004, Bomas of Kenya, Nairobi)

Between 4th and 13th February 2004, the delegates had another opportunity to be inducted and trained on the following:

- Principles guiding the constitution review process;
- Consensus building and negotiation skills; and
- The rules and procedures for the consideration and adoption stage of the Conference.

The training which included role modelling, was conducted by facilitators and senior parliamentary staff, and was to prepare the delegates for the Committee of the Whole Conference and Plenary stages of the National Constitutional Conference.

27.5 Management of Technical Working Committees

The revised guidelines for the National Constitutional Conference were devoted to management and co-ordination of the Technical Working Committees. All Technical Working Committees operated under the management of a Convenor and two Rapportuers, who were Commissioners appointed by the Commission.

For effective management, the Regulations and the Guidelines placed the control and management of committees primarily on the Convenors with the technical input from the Rapportuers. The programme staff of the Research, Drafting and Technical Support Department of the Commission provided backstopping assistance to the Rapportuers and Convenors by way of research and logistical support. Each Committee was under the technical direction of at least two Rapportuers supported by two Assistant Programme Officers, a Clerk, a Verbatim Recorder and a Draftsperson and support staff. Two Program Officers in charge of Research under the guidance of the Commission's Deputy Secretary in charge of Research, Drafting and Technical Support, were responsible for the overall operational co-ordination of all the Technical Working Committees. In addition each Committee had access to expert advisors on any matter for which clarification was required.

Even though the Committees initially encountered operational problems, the Committee personnel did become an effective bureau for managing the agenda and deliberations of Committees. The Conference Secretariat also provided facilities for use by delegates in negotiations, mediation, review of daily proceedings and conflict resolution outside formal proceedings through the provision of offices for Convenors and Rapportuers.

27.5.1 Role of Convenors and Rapportuers

Regulation 45 of the National Constitutional Conference (Procedure) Regulations, 2003 and the Revised Guidelines for the National Constitutional Conference *Ad Hoc* and Technical Working Committees issued by the Steering Committee defined the roles of convenors and Rapportuers as follows:

(a) *Role of Convenors*

The duties of Convenors were to:-

- call committee meetings, subject to authorization of the committee;
- preside over the meetings of and to put all questions for discussion by the committee;
- ensure that quorum is maintained and decide all questions of order;
- rule on all procedural matters;
- direct the administration of the committee;
- consult on a regular basis with convenors of other committees; and
- present the report of the committee to the Steering Committee and to the Conference.

(b) *Role of Rapportuers*

The duties of Rapportuers were to-

- ◆ prepare and issue the daily agenda of committees in consultation with their respective Convenors;
- ◆ maintain an accurate record of membership of committees;
- ◆ ensure that observers do not participate in the deliberations of Committees;
- ◆ ensure that delegates who are not members of particular committees and observers thereof do not vote;
- ◆ follow carefully, all discussions in the committee and, in particular to:
- ◆ note the trends of the debate, for the purposes of assisting the Convenor, where necessary, with the summary of the debate;
- ◆ record the main issues, constituting general agreement among the delegates as well as those which remain contentious during the discussion;
- ◆ record the decisions or conclusions reached by the committee during its deliberations, including minority opinions, if any;
- ◆ prepare and issue the minutes of the daily proceedings of committees; and
- ◆ perform the role of resource persons for committees by:
 - providing clarifications on the provisions of the draft bill as may be requested during the discussions, or at her/his own initiative;
 - providing, upon request, or at her/his own initiative, pertinent information on any issue relating to the draft bill, as may be necessary in the course of discussions; and
 - assisting the Convenor in facilitating the work of the committee by ensuring the availability of efficient logistical support.

27.5.2 Co-ordination of Technical Working Committees

At the end of each day of Committee deliberations, or at such, other time as the Steering Committee determined, all Convenors and Rapportuers of Committees met with the Chairperson and the Rapporteur-General to:

- review the progress of the work of Technical Working Committees and in particular the issues covered during the day's deliberations;
- identify crosscutting issues and those that one committee should pass on to other committee(s) for consideration ;
- clarify Committee mandates and resolve any conflicts arising thereof;
- provide guidance on how cross-cutting issues should be dealt with;
- rationalise the consideration of overlapping issues; and
- monitor and forecast progress in the Committees.

These meetings, supplemented by the daily returns from the Clerks and Assistant Programme Officers attached to each committee, provided the basic information for the compilation of the Rapporteur-General's daily journal.

Later however, the coordination meetings in the evening between Convenors, Rapportuers, the Rapporteur-General and the Chairperson of the Conference ended up being more of reporting rather than co-ordination fora. A number of factors contributed to this. First, was the timing of the meeting which was late in the afternoon and participants were fatigued after the day's work in the Technical Working Committees. Secondly, due to fatigue and the time factor, most members left as soon as they presented his/her Committee's day's report. Other members could not attend the meetings either because their Committees were still in session or due to other engagements. As a result no serious discussions were possible on those reports. It was also the case that crosscutting issues requiring harmonization or negotiation across committees were not often discussed.

To address some of these issues more time was created on Friday afternoons for the coordination meetings and in addition, crosscutting issues were thrashed out in bilateral meetings of the Rapportuers and Convenors from the concerned Committees. The Rapporteur-General's Daily Journal highlighted the crosscutting issues that needed to be addressed in the working sessions held by the Convenors and Rapportuers. In general, the coordination mechanisms established helped significantly in ensuring effective management of the Committees.

27.6 Instruments for Daily Management of Committee Business

27.6.1 Agenda

The order of business for the Committee meetings involved a sequence of items on the agenda. Most Committees used the following standard items;

- call to order;
- prayers;
- general comments (the first hour);
- reading and approval of the minutes of the previous meeting;
- outstanding Issues;
- committee business;
- announcements; and
- adjournment.

However, any Committee could set its order of business in any manner considered appropriate to ensure convenient, efficient and effective consideration of the business before it.

27.6.2 Minutes

Most committee minutes included the following standard items;

- the type of meeting;
- the name of the Committee;
- the date, hour and place of the meeting;
- the name of the Convenor;
- the names of the Rapporteurs;
- the names of the technical support staff;
- the number and names of members present and the absentees;
- all motions, the names of the persons moving and seconding it, and the action taken;
- points of order and appeals, including minority positions;
- any information that in the future may be helpful in explaining what was done at the meeting; and
- the time of adjournment.

It was the responsibility of Rapporteurs to prepare agenda, record minutes and circulate the same, assisted by the Parliamentary Clerks attached to each Committee. The Assistant Program Officers performed these tasks in the absence of the Clerks. The Committee minutes were approved and signed by the respective Convenors.

27.6.3 The Daily Journal

Regulation 49(3) provided that delegates who had particular interest in the work of committees, other than which they were members, could attend meetings of such committees and make oral or written presentations thereat but without the right to vote. To facilitate this provision, the Rapporteur-General published a Daily Journal with assistance of a Program Officer and an Assistant Program Officer. The Daily Journal was circulated to each committee, the Press and publicized in Conference notice boards.

27.6.4 Daily Summaries

To ensure that major concerns and issues raised by the members were captured on a regular basis and that the final report was an accurate and true reflection of the deliberations of the Committees, daily summary reports of the deliberations of each Technical Working Committee were compiled and distributed to the Committee members on a daily basis. These summaries helped the members to confirm the issues raised and addressed by the Committee on the previous day. The Assistant Program Officers attached to each Committee compiled the daily reports, which were approved by the respective Rapportuers and Convenors before circulation.

27.7 Deliberations and Decisions of Committees

In the conduct of their business, the Committees were guided by the procedures and regulations of the Constitution of Kenya Review (National Constitutional Conference) Procedures Regulations 2003 which were applied with necessary modifications in their application. Additionally, the Rapporteur General's Guidelines for the National Constitutional Conference *Ad Hoc* and Technical Working Committees released on 6th June 2003 by the Steering Committee also guided the Committee discourse. Convenors summoned and presided over the meetings of the Technical Working Committees. The sittings of the Committee were open and any delegate who wished to could participate in its proceedings, although only members of the Committee could

vote on decisions. The proceedings which were also monitored by local and international observers.

The first hour of each of the sessions of the Committees was devoted to general comments on all the articles, which were due for consideration, as indicated in the Daily Journal. It was during this hour of general comments on the articles that the members of a Committee had the opportunity to raise and discuss any issue relating to the report of the Commission concerning any of the draft articles under consideration at the session. The members of the Committee had another opportunity to discuss the relevant parts of the report of the Commission in the context of the specific draft articles, as they were taken up for consideration individually. This session also provided an opportunity for a delegate to follow debate on any issue in any other Committee where he or she was not a member.

The reading and confirmation of the minutes was done next. Thereafter the articles of the Draft Bill of 2002 having been called by the Clerk of the Committee would be taken up for consideration on the basis of motions for amendments (if any). Amendments were tabled by the Convenor by *proposing* the question of a motion for such amendment or further amendment, as the case may be, thus opening the way for the debate on each of the motions, taking the further amendment first.

When, in the opinion of the Convenor the debate on any of the motions was exhausted, he or she would *put the question* of the motion for a decision. Depending upon the result, the text of the article of the Draft Bill, either as amended, or in its original version was put by the Convenor for the decision of the Committee. If adopted, the article was recorded as having been accepted to form part of the Draft Bill. The articles for which there were no amendments were proposed for discussion and put for decision. If adopted the Articles were recorded as having been accepted to form part of the Draft Bill. Where a member was not satisfied with the decision taken by the Committee, he or she was allowed to record a minority opinion on the particular article of the Draft Bill. For a minority view to be recorded, a member was supposed to put it in writing and get the approval of the Convenor and the Committee.

The Rapportuers explained, upon request, or on their own initiatives where necessary, the rationale behind a particular article of the Draft Bill under consideration, to assist the members towards reaching an appropriate decision on the article. Where, in the course of consideration of an article, the members felt they needed expert advice external to the Committee and Conference, the services of such experts were formally requested by the Committee, which suspended its consideration and decision on the article in question until the requested expert advice was given.

Where the subject-matter of a particular article being considered was also being dealt with by another Technical Committee, the Convenor reported the same to the Convenor's meetings so as to initiate inter-Committees consultations on the issue. Committees considered the recommendations made to them by other Technical Working Committees in the process of harmonization and incorporated them where appropriate. The issues of drafting nature were referred to the legislative drafts-person assigned to each of the Committees for advice. The Committees themselves were not expected to engage in the actual drafting as such.

Only official Conference materials and documents were used in the Committee. This is not to say that other documents would not be invoked in the course of debate as there were reference materials in the Conference Documentation Centre and the Library which provided a wealth of information for the delegates. Indeed, unofficial documents were first shown to the Secretariat before being placed on a separate table at the tent, thus making them accessible to the delegates. Some of the notable documents included the draft constitutions by Law Society of Kenya, the Ufungamano Initiative, and *Katiba Tuitakayo* by Citizens Coalition for Constitutional Change (4Cs). Delegates also made extensive use of the Commission's registry to retrieve the data on the views collected by the Commission during public hearings.

As a general rule, Technical Working Committees were required to work their way *seriatim* through articles of the Draft Bill assigned to them. As permitted under the rules, a number of Committees found it necessary to defer the consideration of certain issues comprised in whole articles or specific clauses thereof, until subsequent ones were resolved. Among the reasons for this were the needs to-

- obtain expert intervention on certain matters before delegates could make informed decisions on them,
- await consensus on the same issue,
- await decision-making on other article(s) that impinge on a given article(s),
- consult other Committees in respect of matters in which there were potential or actual overlaps, or which were cross-cutting,
- accord delegates time to review or rethink their positions on particular issues, concepts and principles,
- provide a “cooling off” period within which to ease tensions between the competing positions, or
- to draft and/or reorganize articles or clauses therein in a more rational or logical sequence.

There were also occasions where deferrals were inevitable due to inadequate time allocated to deal with the matters set for the day.

After the Technical Working Committees completed consideration of their Articles, time was set aside for the compilation and harmonization of the provisions from the different Committees. The resulting “Zero Draft” was circulated to all the Committees for verification and discussion. It was after this process that the “Revised Zero Draft” was prepared and which formed the basis of consideration in the Committee of the Whole Conference. It is at this point in time that the Technical Working Committee completed their mandate as indicated in table 9 hereunder;

Table 9: Date of Completion of Technical Working Committees Business

Technical Working Committee	Thematic Area Covered by Committee	Date of completion*
A	Preamble, Supremacy of the Constitution, the Republic and National Goals,	24 th February, 2004
B	Citizenship and the Bill of Rights	26 th February, 2004
D	The Executive	26 th February, 2004
C	Representation of the People	26 th February, 2004
E	The Judiciary	26 th February 2004
F	The Legislature	24 th February, 2004
G	Devolution	25 th February, 2004
H	Public Finance, Public Service, Leadership and Integrity	18 th February, 2004

I	Defence and National Security	27 th February, 2004
J	Land Rights and Environment	26 th February, 2004
K	Constitutional Commission and Amendments to the Constitution	26 th February, 2004
L	Transitional and Consequential Arrangements	26 th February, 2004
M	Culture	26 th February, 2004

*Includes the dates when each Technical Working Committee's recommendations were finally included in the "Revised Zero Draft" dated 27th February 2004.

27.8 Use of Expert Advisory Services

Regulation 45(5) of the Conference Regulations empowered the Technical Working Committees to invite any person (including delegates) to give expert opinion on an issue. Regulation 47(2) went further to provide for an inter-disciplinary Panel of Experts for the Conference consisting of such persons as may be appointed by the Commission. The functions of the Panel of Experts were identified as being-

- (a) to render advice to delegates, Committees and Technical Working Groups as to—
 - (i) the phrasing that will best achieve their objectives;
 - (ii) consequential amendments arising out of their proposed amendments that should be made to other parts of the Draft Bill;
 - (iii) any transitional or other issues necessary to be dealt with; and
 - (iv) other matters arising in legislative drafting.
- (b) to assist delegates and Committees of the Conference prepare amendments proposed by them to the Draft Bill;
- (c) to assist the Conference to put together the Draft Bill for adoption after all amendments have been considered and the Conference has taken decisions on them; and
- (d) to assist the Conference in any other manner that the Chairperson or the Conference may request.

On the strength of these Regulations, as need arose, the Committees invited experts to address them on matters that were before them on which they required technical input or further explanation. The input of the experts was intended to assist the Committees to make informed and rational decisions.

A list of the experts invited by the Committees and the issues addressed is attached to this Report as Appendix XV.

27.9 Observers

Regulation 8 of the Constitution of Kenya Review (National Constitutional Conference) Procedures Regulations 2003 provided that the Conference would be open to the public and that any person or groups of persons may be invited by the Commission to attend the proceedings of the Conference as observers or guests in respect of such deliberations as it deemed fit. Observers were however under Regulation 52, prohibited from participating in, and contributing to, the deliberations, debates and decision-making processes of the committees and the Conference as a whole.

Due to increased interest in the review process, the Commission's Accreditation Committee received thousands of applications, which it considered and awarded

observer status in accordance with set criteria. The aim of admitting the observers was to ensure that the Conference process remained open and transparent and that various stakeholders in the review process had the opportunity to monitor the proceedings of the Committee and Conference business. While all the accredited observers sat at the Plenary, at the Committee stage, they were allocated Committees to observe according to their individual or organizational preference. Some of the observers wrote reports on the Conference proceedings which they presented to the Commission.

Most of the observers were from civil society organizations, the private sector and the diplomatic corps, and their attendance varied depending on their areas or topics of interest. *The list of categories of observers as accredited to the Conference from Bomas I to Bomas III is found in Appendix XVI*

27.10 Lobbying and Advocacy

Apart from the experts who were formally invited to address the Committees, several groups sought the indulgence of the Committees to lobby for certain positions. The lobbying took different forms. While some organizations set up tents within Bomas and distributed materials in the form of pamphlets and magazines to the delegates with prior clearance from the Commission, others engaged the delegates on face-to-face advocacy. In addition, groups and individuals were given audience before the Committees upon request , and in this way sought to advance their cases.

Throughout the Conference the above groups consulted and met to review issues pertaining to their interests. The consultations entailed lobbying, advocacy and information sharing. Women organizations and delegates for example, held almost daily consultations to address and review women issues and to ensure that women's gains were retained and safeguarded to the very end of the Conference. Most of the women's consultations were held at lunchtime and at given occasions, experts would be invited to share appropriate information necessary for their making of informed decisions. These consultations were facilitated by various women's organizations including the Kenya Women Political Alliance, The Kenya Women's Political Caucus and Federation of Women Lawyers in Kenya among others.

The lobby and advocacy groups and organizations indeed played a crucial role in building consensus and influencing committee and Conference decisions. In certain instances however, certain political lobby groups contributed to stalemates especially on decisions concerning power relations and political structure of the government.

The categories of lobby groups accredited to the Conference from Bomas I to Bomas III is found in Appendix XVII.

27.11 Coordination and Harmonization of the Work and Decisions of Technical Working Committees

The Committees did not consider the report and the draft bill in isolation. By the very nature of the Main Report and the Draft Bill of 2002 many issues were inter-related and required consultations, harmonization and rationalization. By and large harmonization of crosscutting and conflicting provisions was largely handled through

the daily or periodic Convenors and Rapportuers meetings and inter-committee consultations.

27.11.1 Joint Sittings

On the question of the financial aspects of the devolution structure, the Committees on Devolution and Public Finance and Revenue Management held joint sittings on 22nd January 2004 at which the experts addressed them. The Committees considered issues on Commission on Government Finance, now Commission on Revenue Allocation; taxation powers, government finance with reference to consolidated funds, borrowing, administration of revenue, treasury control and procurement.

27.11.2 Inter-Committee Consultations

The Technical Working Committees did not work in isolation and several consultations were held through joint meetings of Convenors and Rapporteurs. Inter- Committee consultations were also held to address issues of mutual concern, possible conflict or areas of convergence throughout the Committee consideration stage. Generally, various committees consulted as follows:

Table 10: Inter-Committee Consultations

Subject of Consultation	Issues to be resolved	Committee involved	Outcome
Theory and system of government.	Mixed or Parliamentary System of government.	Preamble, Supremacy of the Constitution, the Republic and National Goals, Values and Principles & The Executive.	Committee on Executive was left to determine the matter and they settled on a mixed system of government.
The zoning of the country into units.	The terminology of the units to be created.	Preamble, Supremacy of the Constitution, the Republic and National Goals, Values and Principles & Devolution	It was resolved that the words "districts and provinces" be deleted to be replaced with a term that would be in harmony with the recommendation of the Devolution Committee.
Mode of recruitment of the members of the Senate.	District based or otherwise Recruitment on non-political considerations	Legislature, Devolution & Culture	<p>It was agreed that:</p> <ul style="list-style-type: none"> - One member elected indirectly from each district - Two women elected from each region - Ten members to represent marginalized groups and communities - Recruitment should not be based on political parties.
Electoral and Administrative boundaries	When and who should determine the boundaries On what basis the boundaries would be determined	Devolution, Representation & Culture.	It was resolved that they be determined by the Committee on Devolution and an Electoral and Boundaries Commission be created for future reviews
Membership of Constitutional Commissions (the number of commissioners each constitutional Commission should have).	Whether all Constitutional Commissions established in the Draft Bill should be bound by the ceiling of between three and ten commissioners set by the Committee dealing with the chapter on Constitutional Commissions.	Devolution; Public Finance and Public Service ; Representation; Judiciary and Legal System; Legislature; Land, Culture; Defence and National Security. (All Committees having Constitutional Commissions and Councils established under their respective chapters).	The principles provided for in the chapter on Constitutional Commissions, apply to all Constitutional Commissions and Councils established in the Draft Bill, except where specific provision is made to the contrary. To this extent, all Constitutional Commissions should have between three and ten Commissioners
Appointment of members of Constitutional Commissions.	Whether all Constitutional Commissions established in the Draft should be bound by the criteria for appointment set by the Committee on Constitutional Commissions.	Devolution; Public Finance and Public Service; Representation; Judiciary and Legal System; Legislature; Land, Culture; Defence National Security	The decision of the Committee on Constitutional Commissions, on the criteria for appointment of

Subject of Consultation		Committees involved	Agreement/Result
		(All Committees having Constitutional Commissions and Councils established under their respective chapters).	members of Commissions, prevailed where it was in conflict with the decisions of other Committees on the same.
Whether the article dealing with composition of commissions should embrace the principle that at least one third of appointees to Constitutional Commissions should be women in addition to the principle of Affirmative Action.	The Committee on Constitutional Commissions had resolved that appointments to Constitutional Commissions should only be in accordance with the principle of Affirmative Action. The Committee in reaching its decision had been informed with the reasoning that the Principle of Affirmative Action was wider and more encompassing than the principle of 'at least one third should be women'.	Preamble, Supremacy of the Constitution, the Republic and National Goals, Values and Principles & Committee on Constitutional Commissions and Amendments to the Constitution.	Appointments to the Constitutional Commissions should be subject to both the Principle of Affirmative Action and the principle that at least one third of the appointees should be women
Ethics and Integrity Commission	Whether the article on Ethics and Integrity Commission, was properly within the Chapter on Constitutional Commissions, or whether it should be taken to the Chapter on Leadership and Integrity Commission	Preamble, Supremacy of the Constitution, the Republic and National Goals, Values and Principles & Committee on Constitutional Commissions and Amendments to the Constitution	The Ethics and Integrity Commission was transferred to the Chapter on Leadership and Integrity.
Whether Article 290 (2) (b) (as it were), should provide that the Salaries and Remuneration Commission, should also regulate the Salaries and Remunerations of officers of devolved governments.	Whether the term 'Public Officers' as resolved by the Committee on Constitutional Commissions, included officers of the devolved governments.	Committee on Constitutional Commissions and Amendments to the Constitution & Devolution	It was resolved that the Salaries and Remuneration Commission, should also regulate the Salaries and Remunerations of officers of devolved government
Terminology of devolved governments	Whether it was proper for the Committee 'K' on Constitutional Commissions to refer to devolved government units as "spheres"	Committee on Constitutional Commissions and Amendments to the Constitution & Devolution	The TWC 'K', to Continue using the terminology 'spheres' until the Committee on Devolution gives the proper name, which was agreed to be "levels".
Heroes and Heroines Commission.	Whether the article on Heroes and Heroines Commission should be taken care of by the National Commission on Culture.	Committee on Constitutional Commissions and Amendments to the Constitution and Committee on Culture.	The article was transferred to the Committee/Chapter on Culture and taken care of by the National Commission on Culture, as established under the Committee/Chapter on Culture.

The article on Ethics and Integrity Commission, which provided that the Commission shall make the register of the assets declared be available for inspection by any citizen in a manner prescribed by an Act of Parliament.	Whether the provision was in contradiction with Article 43, Chapter on the Bill of Rights, on individuals' right privacy.	Committee on Constitutional Commissions and Amendments to the Constitution and the Committee on Citizenship and Bill of Rights	The provision was upheld since its application shall be subject to an Act of Parliament and the fact that public interest overrides individual interests
Bankruptcy and removal from office.	Whether the Committee on Constitutional Commissions should include a provision providing bankruptcy as a ground for removal from a Constitutional Office.	Preamble, Supremacy of the Constitution, the Republic and National Goals, Values and Principles & Committee on Constitutional Commissions and Amendments to the Constitution	The latter Committee adopted the proposal.
Amendment of the Constitution by the People	Whether the article on 'Amendment by the People' was properly within the Chapter on Constitutional Amendments or should be transferred to the Chapter on Sovereignty of the people.	Committee on Constitutional Commissions and Amendments to the Constitution & Committee on Preamble, Supremacy of the Constitution, the Republic and National Goals, Values and Principles	It was resolved that the provision was properly within the Committee on Constitutional Commissions and Amendments to the Constitution
Reference to the Senate vs. National Council	Whether the National Council should be referred to as "Senate" and the modalities involving the National Executive	The Executive, Legislature & Culture	Agreement was reached that reference should be to the "Senate" instead of National Council.
Provisions on the Legislative Functions of the President and General Jurisdiction of the Supreme Court as regards advisory jurisdiction of the Supreme Court on a Bill enacted by Parliament	That it shall conflict with the doctrine of separation of powers	The Executive and Judiciary	The sub-articles were deleted
Removal of President on grounds of incapacity with reference to the Chief Justice	Whether the Chief Justice should be involved in the process	The Executive and Judiciary	The provisions transferred to Parliament and the Speaker
Impeachment and removal of	Whether this is a purely parliamentary process and	The Executive and Judiciary	It was resolved that this is a purely a

Subject of Consultation	Issue to be resolved	Committees involved	Agreement/Result
the President	whether the Chief Justice should be involved in the process		parliamentary process and that a provision be made to the Supreme Court jurisdiction to cater for disputes arising from the process of the impeachment of the president
Principles of executive authority regarding the powers of the executive, and that it should include the communities of Kenya	Need to recognise that the executive authority shall be exercised not only for the benefit of the people but also for all communities of Kenya	The Executive and Culture	It was agreed that the word 'communities' be added
Composition of the National Executive Authority	Whether the composition of the National Executive should be reflective of all regions and ethnic diversity of the people of Kenya to ensure equity and balanced distribution of national positions.	The Executive and Culture	It was resolved that this be provided for in the Chapter on Executive
The Period for implementation of the provisions relating to number of constituencies, Regional Councils, District Councils, Locational Councils and any other local authority, manner of voting at elections, registration of citizens as voters, conduct and supervision of public elections and registration and voting by citizens who are outside Kenya	The Committee on Transition had proposed 2 years while the Committee on Representation was of the view that this could be accomplished within one year	Transitional and Consequential Arrangements and Representation	Implementation of these provisions be implemented within two years
Judges on suspension for misconduct ought to receive half pay	The Committee on transition was of the view that as a matter of substantive principle, if there is speculation that a judge has engaged in misconducts, he/her should receive half pay pending investigations like other public servants. The Committee on the judiciary was	Transitional and Transitional Arrangements and Judiciary.	No agreement although the position of the Transitional and Consequential Arrangements Committee was retained.

Subject of discussion	Proposed by	Committees involved	Outcome
	of the view that this was tantamount to eroding the independence of the judiciary		
The re-naming of the Constitutional Commission to Constitutional Implementation Commission	Re-naming the Constitutional Commission as Constitutional Implementation Commission would restrict its mandate	Transition and Consequential Arrangements and Constitutional Commissions	The Transitional and Consequential Arrangements Committee retained the name Constitutional Implementation Commission
All land wrongfully expropriated from communities whether by citizens or non citizens should revert back to communities after the expiration of the maximum 99 year lease	That in addition to foreigners, Kenyan citizens had colluded with the Government to buy or get allocated pieces of land that had been taken away forcibly by the colonial administration. Such people should also return this land Whether we should seek reparation for the plunder committed on our land and property by foreigners	Land Rights and Environment, Transitional and Consequential Arrangements and Culture	This would be addressed as part of historical land claims according to an act of Parliament
The Kenya Police Service.	Whether the Kenya Police Service be established under the Public Service or under the Defence and National Security Forces and the involvement/recognition of communities in security issues.	Committees on Public Finance, Public Service Leadership and Integrity, Defence and National Security and Culture	That the establishment of the Kenya Police Service be under the Chapter on Defence and National Security.
Commission on Government Finance	Name and membership of the proposed Commission	Devolution and Public Finance, Public Service, Leadership and Integrity & Devolution	It was however resolved that the formulation and name be as proposed by the former Committee, while membership should be as proposed by the latter Committee. It was renamed by Drafting Team
Funds for devolved governments	Terminology of the fund; Revenue Funds or Other Consolidated Funds	Devolution and Public Finance, Public Service, Leadership and Integrity & Devolution	It was resolved that Revenue Fund be adopted
Taxation powers	Whether the draft should be specific on them or be outlined in general terms	Devolution and Public Finance, Public Service, Leadership and Integrity & Devolution	It was resolved that the specific taxation powers of the various governments be itemised in a schedule

Subject or Content	Proposed by Committee	Committee in Charge	Agreement/Result
On composition of Land and Environment Commission	Whether it should be covered in chapters on Environment and National Resources or chapter on Land and Property or in chapter on Constitutional Commissions	Land Rights and Environment and Constitutional Commissions and Amendments to the Constitution	Provisions on the composition of all commissions to be covered in chapter on Constitutional Commissions
Environmental Rights	Whether to be covered in chapter on Environment or Bill of Rights The rights of communities to benefit from resources found within their locality.	Land Rights and Environment, Citizenship and Bill of Rights and Culture	Environmental rights were left to the chapter on the Bill of Rights
Protection of rights in land and property	Whether to be included in the chapter on Land and Property or Bill of rights. Community rights in community land	Land Rights and Environment, Citizenship and Bill of Rights and Culture	To be covered in the Bill of Rights. However proposal to enhance the Bill of Rights to include community rights was not adopted.
Establishment of Environmental and Land Courts	Whether to be established as separate courts or under the subordinate courts Establishment of the African traditional courts systems and use of the traditional methods of dispute resolution and reconciliation	Land Rights and Environment and Judiciary and the Legal System	It was agreed that Parliament shall establish by legislation a court or a division of the High Court to hear and determine disputes relating to environment and the occupation and use of, and title to land Issue of traditional courts partially addressed.
Review and assessment of unjust expropriation of land	Committee on Land Rights and Environment had proposed a time limit of two years for Parliament to enact validation and verification law for the review while committee on Transitional and Consequential Arrangements had proposed a limit of six months for the commission on Human Rights And Administrative Justice to investigate the causes of civil strife, including massacres, ethnic clashes, political assassinations, land clashes and claims and identify those responsible.	Land Rights and Environment & Transitional and Consequential Arrangements	The review and assessment of unjust expropriation of land was provided for as one of the functions of the Land Commission
Mainstreaming of culture and affirmative action provisions in all Chapters as cross cutting provisions.	The Culture Committee had prepared a document on mainstreaming and cross cutting provisions that it required to be taken into account by all Committees while considering their own provisions.	Technical Working Committee on Culture and all other Committees	Provisions proposed by Culture Committee considered and mainstreamed to the extent possible.

Subject of Consultation	Issue to be resolved	Committees involved	Agreement/Result
The official languages	The order of priority in official languages	Preamble, Supremacy of the Constitution, the Republic and National Goals, Values and Principles and Culture	That the official languages should be Kiswahili and English – in that order
The family	That the values of the extended family should be included in the Bill of Rights	Bill of Rights and Culture	Not resolved
The right to education	That the Constitution should encompass the values of an education system that enhances our cultural values, such as transformative education.	Bill of Rights and Culture	Not resolved

27.12 Harmonization of the Decisions of Technical Working Committees

Harmonization of the decisions of the committees was done at three levels:-

- (a) at the outset this was done during the consideration of the Draft by the Technical Working Committees. The key areas that attracted synchronization at this level were those relating to culture, affirmative action and devolution, which had not been properly mainstreamed in the Commission's first Draft.
- (b) at the second level, harmonisation was done during the Mombasa harmonisation retreat held between 3rd and 11th February 2004 attended by Convenors, Rapporteurs and the Technical Working Committees' Secretariat. Convenors of all the Technical Working Committees presented the decisions of their Committees, which were considered by the participants and suggestions made for reconsideration by the Committees. Crosscutting issues on affirmative action and culture were also incorporated in all the chapters.
- (c) the third level of harmonisation was done by the Technical Working Committees following the Mombasa harmonisation retreat. Technical Working Committees re-convened and considered the issues that arose at the Mombasa retreat, incorporating those that they considered agreeable. All cross-cutting issues were re-considered and committees revised their "Zero Drafts" and forwarded them to the drafts people for technical editing.

Following the third level of harmonization, two meetings were held at Serena Hotel, Nairobi, on 25th and 29th February 2003, where Rapportuers and Convenors of all Technical Working Committees were updated on the progress in the drafting of the "Revised Zero Draft" that had been refined by the Drafting Team. The Technical Working Committees also reported on the efforts made in relation to the harmonization of crosscutting issues and consideration of the recommendations made from the Consensus Building Group.

To ensure that the decision-making stage at the Conference plenary was a collective exercise, Convenors were required to assist delegates by explaining the philosophical tenets behind the formulation of the Articles by the drafters. It was agreed that delegates who nonetheless maintained their minority opinions would be free to move their motions during the decision-making stage at the plenary.

Subsequent to the checking by Technical Working Committees of the "Revised Zero Draft" against the Committees' decisions, corrigenda were prepared where necessary, and circulated to all delegates as replacement of the relevant articles or clauses in the "Revised Zero Draft".

27.13 The Technical Working Committee Reports

Pursuant to Regulation 45(13) (15) of the Constitution of Kenya (National Constitutional Conference) Regulations, 2003, the Committees prepared and produced a number of reports as follows.

27.13.1 Interim Report of the Committees

This was prepared by each Technical Working Committee at the end of Bomas II and covered the period between 26th May 2003 and 26th September 2003. During Bomas III each committee updated its Interim report to become the final Committee report.

27.13.2 Convenor's Reports

These were prepared for purposes of reporting to the Committee of the Whole House. The Convenors' reports were presented in two parts:

- (a) one containing the committees' method of work and a template that not only gave the draft articles as amended by the committee but that also gave the explanation to the amendments made by the Technical Working Committee as well as any minority opinions, and
- (b) one containing the method of work and a template that reflected the draft articles as amended by the Technical Working Committee and as reflected by the drafting team.

Both sets of the reports of each Committee were given to delegates at the close of Committee work. The Convenors to each Committee reported to the committee of the Whole House on the articles as amended by the drafting team.

27.13.3 Verbatim Report

The Committee proceedings were recorded verbatim and reports compiled on a weekly basis by the Commission's Hansard team. A verbatim recorder was attached to each Committee for this function.

27.13.4 The Final Report of the Committees

This report captures in detail the work of the Committee. The first part of the report gives a synopsis of the Committee's mandate and method of work including the number of meetings held and the process of debate and adoption of the report and draft Bill. The second part of the report gives details on the committee debate and captures the general issues raised about the committee work, issues relating to the report and issues relating to specific articles and sub-articles of the Draft.

Under this part, all issues as raised by the committee are addressed whether or not they influenced the amendment made to the Draft. The third part of the report deals with the technical recommendations and decisions on the report and draft bill as agreed by the committee. This captures the general comments on the report and general recommendations of the draft Bill and specific recommendations on the amendments of the Draft Bill, where all changes made to the articles are noted. In order to ensure uniformity in style and presentation, committees were requested to record all technical

decisions presented in accordance with template consisting of the following aspects presented in a logical format:

- Chapter;
- Article as printed in the Commission's Draft Bill of 2002;
- Article as adopted by the Technical Working Committee;
- Article as formulated by the minority (if any); and
- Explanatory Notes.

The last part consisted of a bundle of technical appendices containing the minority report(s), list of formal motions for amendment of the report and Draft Bill of 2002, the minutes of the committee's proceedings, the drafters report and a list of the committee members.

Regulation 45(15) required that every Committee tables before Conference its report with the direction of the Steering Committee and that the report would be accompanied by the minutes of the Committee.

27.14 Key Decisions by Technical Working Committees

As noted in section 22.12, each Technical Working Committee documented its decisions and proceedings and prepared a Committee Report. A summary of the key decisions of the Committees are rendered hereunder as follows:

27.14.1 TWC 'A' - Preamble, Sovereignty of the People, Supremacy of the Constitution, the Republic and National Values, Goals and Principles

- That the preamble should recognise the supremacy of God.
- The preamble should make reference to the environment.
- That constitutive provisions should provide for the theory of government and it is recommended that Kenya be a parliamentary system.
- That the defence of the constitution should not rest with just individuals but should extend to groups of people.
- That reference to Islamic, Hindu and African customary personal laws should be simply generalized as 'personal laws of the peoples of Kenya' instead of specifically enumerating the personal laws.
- That it would be wrong for the constitution to provide for the boundary in Kenya as provided for in the draft, as that would legitimize it, yet the boundary especially that with Uganda is in dispute.
- That 20th October should be recognised as a national day and the same should be named "*Mashujaa Day*".
- That the duty to pay taxes should be incorporated among the duties of the citizen.

27.14.2 TWC 'B' - Citizenship and Bill Of Rights

- Citizenship by registration should be permitted for those people residing in Kenya for at least seven years continuously.
- Dual Citizenship should be permitted and legislation should be enacted to provide for the conditions under which it will be permitted.
- The right to life should be protected and relevant legislation should be enacted to protect the sanctity of life of the unborn child as well as the mother.
- Capital punishment should be abolished.

- One should not be discriminated against on the basis of health status and dress.
- A council should be established to define and advise on policies and programs for the care and protection of older members of society.
- A new Article should be inserted to cater for the youth, taking into account their unique needs.
- Same sex marriage and homosexuality should be prohibited.
- There should be an Article recognizing the principles of affirmative action and prohibiting historical, cultural or traditional injustices in terms of gender, disability, age or for any other reason..
- There should be provisions and measures to ensure equitable allocation of airtime to political parties, generally or during election campaigns by state-owned and other specified categories of broadcasting media.
- An independent body should be established to regulate and monitor compliance with the media standards set by legislation.
- Acquisition and ownership of property, either individually or in association with others, should be permitted in any part of the Republic.
- Housing should be adequate as well as accessible.
- Courts and other tribunals should be accessible and affordable.

27.14.3 TWC 'C' - Representation of the People

- Only indigenous Kenyan citizens should stand for elections to legislative and executive bodies created under the Constitution.
- Elections should ensure fair representation of women, persons with disabilities, workers through the workers' organizations and marginalized communities, and for that purpose, the State shall take the necessary affirmative action measures.
- All persons in elective offices should be eligible to serve two consecutive terms but may seek re-election every five years.
- Parliament should enact a law to provide for the number and delimitation of electoral units for the election of members of the Senate, National Assembly, Regional Councils, District Councils and Locational Councils;
- A person wishing to stand as a candidate for election to the Senate should apply directly to the Electoral and Boundaries Commission for nomination to stand in the relevant electoral unit.
- In the interest of affirmative action, five percent of the seats in the National Assembly and devolved governments and eight decimal five percent in the Senate should be reserved for special interest groups.
- The principle of maintaining at least one-third affirmative action for the marginalized gender should apply to all levels of government and shall ensure that at no time should one gender have more than two-thirds representation.
- Special arrangements are made to accord members of the Armed Forces, the Police, staff of Diplomatic Missions, citizens living or working abroad, prisoners, election officials and patients admitted in hospitals, the opportunity to vote.
- The clearing of all presidential, parliamentary and devolved governments' candidates should be in consultation with the Ethics and Integrity Commission.
- The Electoral and Boundaries Commission should by Statutory Order determine the names and boundaries of the electoral units and also make recommendations concerning the fixing, review and variation of boundaries of regions, districts and locations.

- The Commission should every after ten years or before the end of that period, review and where necessary, make alterations of names and boundaries of electoral units.
- There should be established the Office of the Registrar of Political Parties.
- Thirty percent of the moneys allocated by Parliament to the Political Parties' Fund should be distributed equally among the registered Political Parties annually; and the remaining seventy percent should be paid proportionately by reference to the number of votes secured by each political party in the previous National Assembly elections and the number of women candidates and special interest groups elected or nominated at that election.
- A political party that has not for each of the two previous general elections secured at least one seat in the National Assembly or a council of devolved government should not qualify for funding.
- The President, Vice-President, Prime Minister, Deputy Prime Minister, a Minister, Deputy Minister or any Public Officer should not hold any elective office in a Political Party.

27.14.4 TWC 'D' – Executive

- The National Executive consists of the President, the Deputy President, the Prime Minister and Ministers.
- The President should be Head of State, Commander-in-Chief of the Defence Forces, Chairperson of the National Security Council and Chair of Cabinet.
- The President should not hold any other public or political party office.
- The President should also have legislative functions.
- Decisions of the President should be in writing and should bear the seal and signature of the President.
- Presidential elections should be held on the second Tuesday in August of the material year. Such elections should be conducted by direct adult suffrage through a secret ballot.
- Any Presidential election petitions are to be filed in the Supreme Court.
- The President is to hold office for a maximum of two five-year terms.
- The President should receive protection from any legal proceedings that may be instituted during his tenure of office.
- The President may be removed from office on grounds of physical or mental incapacity, following laid down procedures.
- The President may be impeached on grounds of violation of a provision of the constitution or gross misconduct, following laid down procedures.
- In the event that the office of the President falls vacant, the Deputy President should assume the office.
- In the event of a vacancy in both the President's and Deputy President's office, the Speaker of the National Assembly should assume the office of the President and elections should be held within sixty days.
- The President may exercise the powers of clemency in accordance with laid down procedures.
- The Deputy President, who should chiefly be Principal Assistant to the President, shall be a running mate of the President's.
- In the event that the office of the Deputy President falls vacant, the President

should nominate a candidate to fill the said post who shall be approved by the National Assembly.

- The Prime Minister should be the Head of Government.
- The Prime Minister should be appointed by the President in accordance with laid down procedures.
- The Prime Minister may resign or be dismissed from office.
- In the absence of the Prime Minister, one of the Deputy Prime Ministers should perform the functions of the Prime Minister.
- Cabinet Ministers should be nominated by the Prime Minister from among members of the National Assembly, for appointment by the President, and their appointment should be subject to the approval of the Senate.
- Cabinet Ministers can be removed from office by a vote of no confidence passed by the National Assembly. The Prime Minister may also recommend to the President the dismissal of Cabinet Ministers.
- Cabinet should meet at least monthly, and decisions thereof should be made collectively.
- There should be a Secretary to the Cabinet, in charge of the Cabinet Office and appointed by the President on the recommendation of the Prime Minister. The Secretary to the Cabinet may resign or be dismissed by the President on the recommendation of the Prime Minister.
- There should be Principal Secretaries who shall be supervisors of government ministries. They should be nominated by the Prime Minister for appointment by the President and may resign or be dismissed by the President on the recommendation of the Prime Minister.

27.14.5 TWC ‘E’ – Judiciary

(a) *On the Judicial System-*

- Judicial authority should vest exclusively in the courts and tribunals established in accordance with this Constitution.
- The Structure of the courts should consist of the Supreme Court, the Court of Appeal and the High Court as superior courts of record and Magistrates courts, Kadhis courts and specialised tribunals to be established by Acts of Parliament as subordinate courts.
- The independence of the Judiciary should be guaranteed and certain principles that enhance the institutional and decisional independence of the judicial officers should be enshrined.
- There is established the offices of the Chief Justice, the Deputy Chief Justice and the Chief Registrar of the Judiciary as substantive constitutional offices.
- There should be a Supreme Court that shall be the highest court in the land with exclusive original jurisdiction in respect of presidential election petitions and disputes arising from the process of the impeachment of the President.
- Due to the spatial spread of the High Court, it should be the Constitutional Court with jurisdiction to determine questions relating to the interpretation and enforcement of the Constitution.
- The qualifications for the appointment of the Chief Justice, the Judges of the Supreme Court, Court of Appeal and High Court have been clearly specified. By the same token, the Constitution should enshrine the grounds for removal of Judges and the procedure thereof.

- The Constitution should empower Parliament to establish subordinate courts through Acts of Parliament as the need arises. These may include special tribunals, African traditional courts, village courts and small claims courts.
- The Kadhi's court should be a subordinate court with jurisdiction to determine questions of Islamic law relating to personal status, divorce and matters consequential thereto, marriage, inheritance and succession in proceedings in which all the parties profess the Islamic faith.
- There should be an independent Judicial Service Commission with functions to enhance the impartiality, efficiency and accountability of the Judiciary.

(b) On the Legal System-

- There should be an office of the Attorney General, which shall be an office in the public service.
- The Attorney General should be appointed by the President on the recommendation of the Public Service Commission and with the approval of the National Assembly.
- The Attorney General should be the chief principal legal advisor to the government whereas the Director of Public Prosecutions shall exercise state powers of prosecution.
- There should be an office of Public Defender who shall be responsible for providing legal advice and representation to persons who cannot afford legal services.

27.14.6 TWC 'F' - Legislature

- That the upper house be referred to as 'Senate' instead of 'National Council'.
- That there be affirmative action for historically disadvantaged groups to ensure their representation in the Senate and National Assembly
- That there should be no age limit for members of parliament.
- That all religious groups and days should be taken into account when deciding on the day of holding elections. Tuesday was agreed upon as an appropriate day for holding elections.
- The provision on the recall of members of Parliament should be deleted.
- The provision of referring a bill to the Supreme Court by the President should be deleted.
- That the term of the Senate and that of the National Assembly be harmonized to five years.
- The provision for dissolution of Parliament upon a vote of no confidence being passed in the Prime Minister be deleted and instead Parliament should have a role in deciding who would be the next Prime Minister by submitting three names to the President.
- The membership of the Parliamentary Service Commission should be reduced to nine which would include two members from outside Parliament but experienced in public affairs.
- The nomination of candidates for election to the Senate should not be based on political parties.
- The Senate should consist of –
 - one member elected from each district by the district council of that district acting as an electoral college, to represent the region of which

- the district forms part;
- two women elected from each region, to represent the region, by an electoral college consisting of all the elected members of district councils within the region;
- ten members to represent marginalized groups and communities a third of whom should be women; and
- the Speaker.
- And that eight and one-half per cent (8.5%) of the seats in the Senate should be reserved for persons with disabilities, older members of the society, workers and marginalized groups and communities, so that at least one-third of these seats go to women.
- In the Senate, except where the Constitution provides otherwise –
 - each region, and the marginalized groups and communities, shall have one vote, to be cast on behalf of the region or marginalized group or community by the head of its delegation or, in the absence of the head of the delegation, by another member of the delegation acting on behalf of the head of the delegation; and
 - all questions shall be determined by a two-thirds majority of those delegations.

27.14.7 TWC ‘G’ – Devolution

- (a) *Principles and Objects of Devolution*
- To enhance the capacity of local people to exercise self-governance.
 - To enhance transparency, accountability and participation of the citizens in the governance process.
 - To ensure equitable development and distribution of national resources.
 - To provide for separation of powers between the centre and the local units.
 - To check incidences of lack of control over national and local resources, poor service delivery and lack of transparency and accountability.
 - To accommodate and reconcile cultural values and diversity.
 - To ensure protection of rights of communities on the basis of participation, accountability and social justice.
 - To promote better use of State power.
 - To promote access to basic needs.
 - To promote equality and Human Rights.
 - To check abuse of power by central government and devolved governments.
 - To protect all citizens and minorities including marginalized and indigenous communities.
 - To provide for affirmative action.
 - To promote peace, internal harmony, indivisibility of the nation, coherence and National unity.
 - To promote observance of the rule of law at all levels.
 - Ensure equitable representation of all Kenyans in the government and national institutions and processes.
 - Protection and promotion of cultural, communal, ethnic and linguistic minorities.
 - Ensure that, in appropriate cases, the higher levels of government exercise restraint in favour of the lower levels of devolved government.
 - The national government and the government at each level to which power is

- devolved shall be loyal to the constitution and uphold the national goals, values and principles of the Republic.
- To ensure that the national government and the devolved governments shall exercise such power and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of the other governments and shall respect the constitutional status, institutions, powers and functions of governments in the other levels
- Entrenchment of the level(s) of devolution and the sub-national units in the constitution.
- Viability, sustainability, efficiency and effectiveness of devolved units of the government- based on population geographic size, historical and cultural ties, economic and natural resources shall be considered in the establishment of units and levels of devolution and review of boundaries between the established units.
- The promotion of a safe and healthy environment for the community.

(b) Structure of the Devolved Governments

(i) Levels of Government

1. the national level;
2. the regional level ;
3. the district level; and
4. the locational level.

(1) Regional government

- That there should be fourteen (14) regions.
- That the primary role of Regional governments should be the co-ordination and supervision of the districts in the course of their implementation of national and regional policies and standards and projects that span across districts.
- That the regional government should not have taxation powers.
- That the County Councils should constitute the electoral colleges for the purpose of electing representatives to the Regional Legislative Assembly including the Regional Premier and the Deputy Premier.
- That there should be established Regional Civil Service.
- That the Regional Premier should be elected by a two-thirds majority of the Electoral College.

A map showing the 14 regions is attached as Appendix XVIII.

(2) District government

- District government should be the principal unit of devolution of power.
- The district government should have taxation powers.
- The existing districts should remain the same until reviewed otherwise.
- The District Chief Executive should be called a District Governor and should have a deputy.
- The District Governor and deputy shall be directly elected by registered voters in the district.

(3) Location government

- A location government consisting of a locational council and location

administrator is established for each location.

- A locational council shall consist of representatives elected by registered voters who meet the requirements for residence in the location as shall be prescribed by Act of Parliament.
- Election to the location council shall be conducted in such manner as shall be prescribed by Act of Parliament, being a manner that ensures that an equal number of men and women are elected.
- A location administrator is the executive authority of the location and is to be elected, in the manner prescribed by district legislation, by voters resident in the location.
- The term of office of a location administrator is five years and shall be eligible for re-election for a further and final term of five years.
- The functions of the location government shall be to co-ordinate location matters and should initiate, plan and implement projects at the community level.
- The administrator shall be accountable to the locational council in the exercise of the powers and the performance of functions of the office.
- The locational council shall elect/appoint a chairperson, secretary and treasurer of the council.

(ii) *Participation in national decision-making*

- Governance and administration at the national level should be a shared function between the national, regional and district governments.
- The regions and districts should participate through the Senate in the national legislative decision-making process and national administration.
- Upon election, the Senators elected from each region should collectively constitute a single delegation and should, in consultation with the regional legislative assembly for that region, or the caucus of identified groups, elect one of their number as the head of the delegation.

(c) *Public Finance Management*

(i) *Principles of Taxation*

- The general principles of taxation, particularly the coverage of taxpayers, and the object of tax and its calculations shall be established by law.
- To the extent that the nature of the tax allows it, the principles of universality and equality of tax treatment and of taxation according to economic capacity shall be respected.
- Inter-regional and inter-district double taxation shall not be allowed. National legislation shall provide for the necessary measures.
- The taxation and other revenue-raising powers of a devolved government shall not be exercised in a way that materially and unreasonably prejudices national economic policies; economic activities across regional, district or locational boundaries; or the national mobility of goods, services, capital or labour.
- When two or more governments have taxation or other revenue-raising powers and functions with regard to the same subject-matter, Act of Parliament shall make an appropriate division of those powers and functions.

(ii) Sharing of Revenue

- The establishment of an independent Commission on Revenue Allocation which will ensure that the sharing of revenue from national resources is equitable as between governments at all four levels and as between the different units at that level. The Commission to also have the following functions:
 - report to the four levels of government its recommendations concerning the apportionment of national revenues to the four levels;
 - frequently review such recommendations to ensure they conform with changing circumstances;
 - mediate in and determine disputes relating to inter-governmental financial arrangements.
- Legislation regulating the taxation and other revenue raising powers of devolved governments and the sharing of revenue and making of grants to devolved governments shall take into account;
 - the national interest;
 - any provision that must be made in respect of the national debt and other national obligations;
 - the needs and interests of the Government;
 - the need to ensure that the devolved governments are able to perform the functions allocated to them;
 - the fiscal capacity and efficiency of the devolved governments;
 - developmental and other needs of devolved governments;
 - economic disparities within and among the devolved governments, including the needs of marginalized areas;
 - obligations of the devolved governments in terms of national legislation;
 - the desirability of stable and predictable allocations of revenue shares; and
 - emergencies or other temporary needs.
- Each level of government shall prepare and pass its own budget and appropriation Bills on the basis of legislation passed by Parliament,
- The Government shall promote financial equalization among all levels of government. Each devolved government –
 - is entitled to an equitable share of revenue raised nationally; and
 - may receive equalization grants or other allocations from Government revenue, either conditionally or unconditionally.
- Additional revenue raised by a devolved government may not be deducted from its share of revenue raised nationally, or from other allocations made to it out of Government revenue.
- There should be no obligation on the Government to compensate a devolved government that does not raise revenue commensurate with its fiscal capacity and tax base.
- A devolved government's share of revenue raised nationally shall be transferred to that government promptly and without deduction, except as otherwise provided for in the Constitution or statute.

Figure 5: The Devolved Structure Agreed on at the Conference

NATIONAL LEVEL

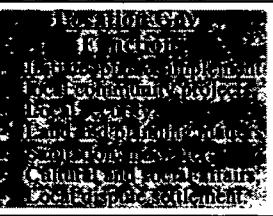
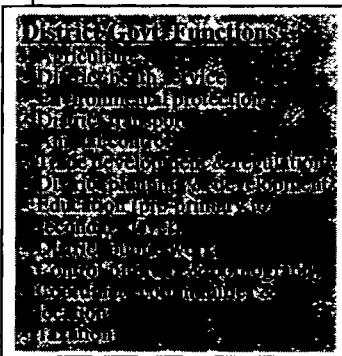
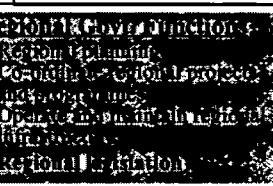
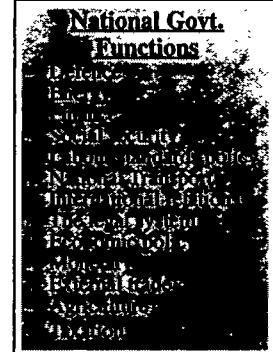
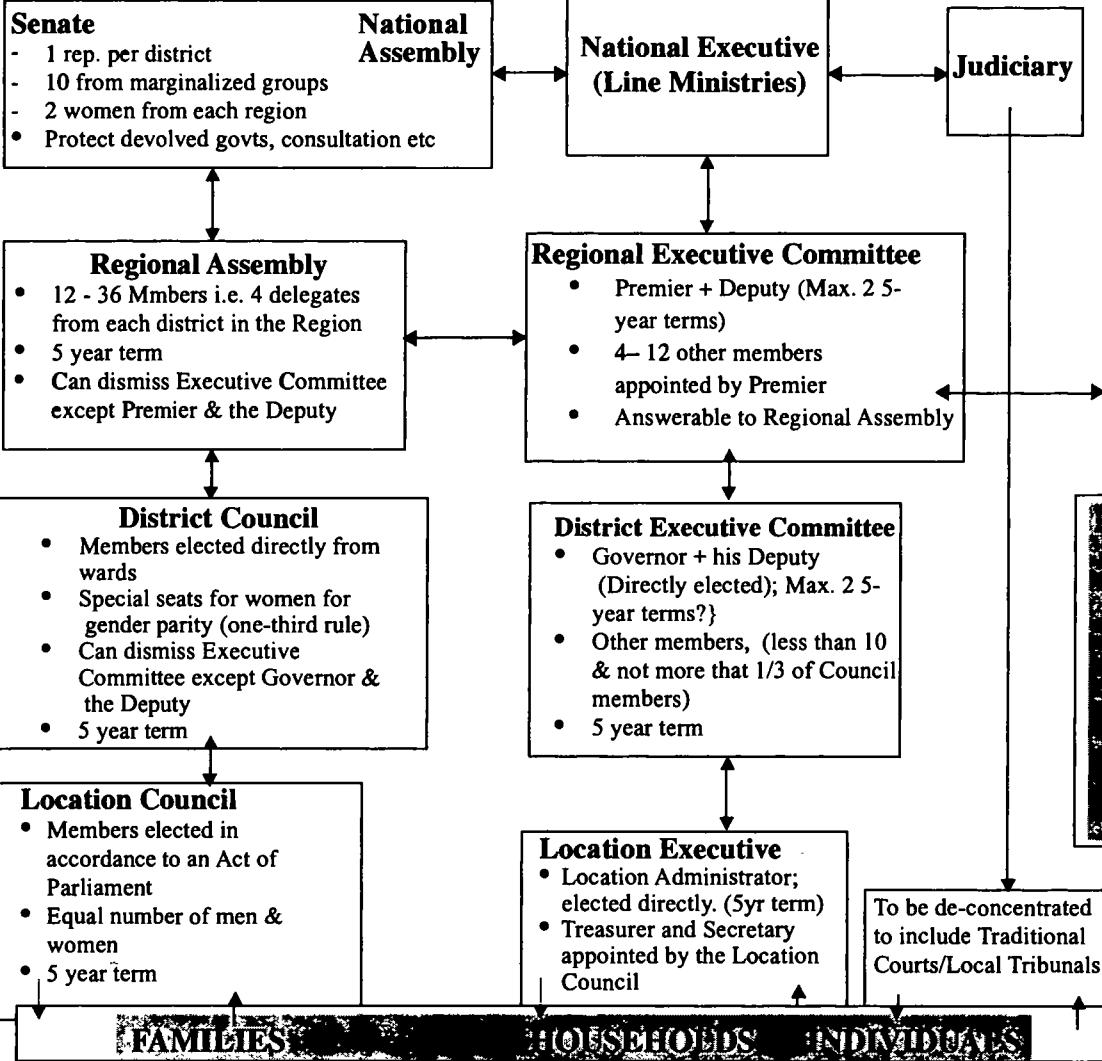
REGIONAL LEVEL

CH

DISTRICT LEVEL

LOCATION LEVEL

* = Concurrent functions



27.14.8 TWC ‘H’ - Public Finance, Public Service, Leadership And Integrity

(a) *Public Finance*

- Parliament’s authority to withdraw from the Consolidated Fund be limited to only 50% of the current year’s estimates.
- Government’s borrowing be limited to 50% of the Gross Domestic Product of the financial year immediately preceding the year for which the budget proposals have been made, provided that the current debt level are reduced to this or a lower limit within a ten-year transition period.
- The Governor of Central Bank to be the Chairman of the Board of the Central Bank.
- Portraits on currency be only that of the First President and other images that symbolize nationhood.
- The term of office of the Controller of Budget and Auditor-General be five years renewable once, so as to provide security of tenure.
- The membership of the Economic and Social Council be reduced from twenty-one to nine members.
- New provisions be included to cater for the proposed structure on devolution of power, and in particular on:
 - Management of national and devolved government finances;
 - Financial equalization, taking into account the principle of equity;
 - Principles of taxation;
 - The devolved governments’ taxation powers;
 - Establishment of the National Revenue Authority;
 - Criteria for collection of revenue due to the National Government;
 - Establishment of the Commission on Government Finance whose function would be to make recommendations on revenue allocation to the various levels of government in an equitable and fair manner;
 - Establishment of Revenue Funds for devolved governments into which all revenues received by the devolved government would be paid.
 - The sources of funds due to the devolved governments from the National Government;
 - Establishment of the National Treasury Control and their powers and functions;
 - Procurement of public goods and services;
 - Power of the devolved governments to borrow;
 - Governments’ debt guarantees; and
 - The devolved governments’ Plans and Budgets.
- The Tenth Schedule of the Draft Bill of 2002 on Taxation Powers of the Devolved Governments be amended by redefining the powers under each of the levels of government. The regional government should only have facilitation powers of such taxes and no powers to collect any taxes.
- Audit of and reports on publicly funded organizations.

(b) *Public Service, the Police and Correctional Services*

- Establishment of the office of the Secretary of the Public Service Commission who shall be the Chief Executive of the Commission.

- The powers and functions of the Public Service Commission, be expanded to provide for review of the terms and conditions of service, code of regulations, qualifications of public officers and matters relating to human resource development in the public service.
 - A limit be put on the appointment of personal staff for Presidents and retired Presidents.
 - The definition of “public service”, be widened to include any service whether temporary or permanent, paid or unpaid.
 - The office of the Director General of Kenya Correctional Service be removed from the list of Constitutional Offices.
 - The principles for the Kenya Correctional Service be restructured to provide for the humane treatment of prisoners and supervision of those serving non-custodial sentences and the rehabilitation of prisoners.
- (c) *Leadership and Integrity*
- The Chapter on leadership and integrity be amended to include an introduction with guiding principles on leadership and integrity. These principles were distilled from the Fifth Schedule, and the Leadership and Integrity Code of Ethics which was consequently omitted from the Schedules and incorporated in the Chapter.
 - The Ethics and Integrity Commission be moved to the chapter on Constitutional Commissions to attain uniformity.
 - The office of the Vice-President and offices of Permanent Secretaries be included among offices to which the chapter applies.

27.14.9 TWC ‘I’ - Defence and National Security

- The national security of Kenya should be promoted and guaranteed under the Constitution
- The recruitment process should reflect the diversity of the Kenyan people.
- National Security Organs should comprise the Kenya Defence Forces, National Intelligence Service, the Kenya Police and the Administration Police.
- That while in the performance of their functions, national security organs should not act in a partisan manner or further any political interest.
- There should be a National Security Council chaired by the President.
- The Kenya Defence Forces should consist of the Kenya Navy, Kenya Army and The Kenya Air Force.
- There should be a National Intelligence Service responsible for security intelligence and counter intelligence of the country
- There should be Director-General of Intelligence of the National Intelligence Service to serve for one term of five years renewable only once.
- There should be established the Kenya Police Service
- There should be the Inspector General of the Kenya Police Service to serve for one term of five years only.
- There should be a Police Service Commission.
- There should be a service known as the Administration Police Service separate from the Kenya Police Service.
- There should be the Commandant General of the Administration Police Service to serve for one term of five years only.

27.14.10 TWC ‘J’ - Land Rights And Environment

(a) Land Rights

- All land should be collectively vested in the people of Kenya and held in trust for people.
- There should be a national land policy
- Land should be classified as public, community or private.
- Non-citizens may hold land only on leasehold for a period not exceeding ninety-nine (99) years and there should be legislation to effectively translate all leaseholds greater than ninety-nine years to at most ninety-nine years,
- Surviving spouses should have a right to the matrimonial home.
- The State should have the power to ensure proper use of land to ensure public safety, public order, health, morality and use and utilization of property,
- The state should provide the conducive political, social and economic atmosphere for the development and management of land,
- There should be established a National Land Commission, with offices throughout the country.

(b) Environment and Natural Resources

- The state should respect and promote the principles sustainable development and the integrity of natural process and ecological communities, and the intrinsic value of all forms of life including conservation of habitats and species.
- The State should ensure that social and cultural values traditionally applied by communities in Kenya for the sustainable management of the environment and natural resources are observed.
- The State has the obligation to ensure that natural resources are sustainably developed and utilized for the benefit of Kenya as a whole and for the benefit of inhabitants of the areas where these resources occur.
- The planning and utilization of the environment should take into account the needs of marginalized areas and disadvantaged minority persons including people with disabilities.
- The State should legislate for the protection and promotion of the environmental rights, the duties of persons towards the environment and sustainable development, management and utilization of natural resources.
- There is established the National Environment Commission whose functions be decentralized to the lowest level of Government.

27.14.11 TWC ‘K’ - Constitutional Commissions and Constitutional Offices and Amendment to the Constitution

- That all Constitutional Commissions established should be subject to the Constitution.
- All Constitutional Commissions should have limited membership of not more than 10 members (except the Commission on Revenue Allocation).
- That all Constitutional Commissions are under obligation to establish branches using their own staff at all devolved spheres of government and to offer their services to the public free of charge.
- That membership to Constitutional Commissions should be subject to the

principles of Affirmative Action.

- A member of a constitutional Commission should not, save for an ex-officio member, hold any other office of profit or emolument or any other employment whether public or private, directly or indirectly.
- Any person who has locus standi to lodge a complaint against a Constitutional Commission reserves the interest to refer a part or all the reports of a commission to High Court.
- That there should be a Health Service Commission.
- That the Commission on Human Rights and Administrative Justice should include a Minorities Rights Commissioner and at least one person having knowledge and experience in matters of the rights of the aged.
- That there should be a Gender Commission to deal with gender issues afflicting both women and men.
- That the Ethics and Integrity Commission should put in place measures aimed at the prevention of corruption including issuing guidelines to public bodies formed under an Act of Parliament, should be the custodian of the Leadership and Integrity Code of Conduct and of the register of assets and liabilities of all public offices and make the register of their assets and liabilities available for inspection by any citizen in a manner prescribed by an Act of Parliament.
- That the Teachers Service Commission should consist of ten members.
- The functions the Constitution Implementation Commission should be to monitor, facilitate and oversee the development of legislation required under the 4th Schedule and administrative procedures as required to fully implementing the Constitution.
- The Constitution Implementation Commission should stand dissolved at the full implementation of the Constitution.
- The amendments to the Constitution relating to the supremacy of the constitution, territory of Kenya; sovereignty of the people,; principles, values and goals of the Republic; the Bill of Rights, term of office of the President; the independence of the Judiciary and Constitutional Commissions and Offices; functions of Parliament, values and principles of devolution; and the chapter on Amendments to the Constitution should be approved by the people in a Referendum.
- That citizen and the civil society may initiate Constitutional amendments through a process called “popular initiative”.
- That Parliament should enact a ‘Referendum Act to govern the conduct of referenda in the country.

27.14.12 TWC ‘L’ - Transitional And Consequential Arrangements

- That the Constitution should come into force on enactment and that the enactment should act to repeal the existing Constitution.
- That the Constitution should come into force in its entirety on enactment: those parts of the Constitution that could not be implemented immediately should be phased in accordance with the stipulated time table up to a maximum of three years.
- That where Parliament fails to perform the functions within the stipulated time, a petition should lie to the High Court which should then have power to stipulate

- a time table for Parliament: in default, the CJ shall advise the President to dissolve Parliament.
- That all rights duties and obligations of the state should subsist under the new constitution.
 - That all laws should continue to operate under the new Constitution to the extent of their conformity with the new Constitution.
 - That the general elections of 2002 should be deemed to have been conducted under the new Constitution; and that the National Assembly constituted then should be deemed to be the national Assembly under the new Constitution.
 - That the Senate should be constituted in the first Parliamentary Elections under the new Constituted.
 - That all elections, including by-elections held after the effective date should be conducted under the new Constitution.
 - All local authorities shall continue to exist until the implementation of the devolution structure under the new Constitution and should stand dissolved on election of the office holders under the new Constitution; Parliament should within two years put in place a devolution legislation to implement the provisions of the Constitution.
 - That all administrative Boundaries of Districts and local authorities should continue as such until reviewed as provided for under the new Constitution.
 - Political parties should comply with the requirement of the new Constitution within twelve months of the appointment of the Electoral Commission.
 - The President, Vice President and Cabinet should continue to hold their corresponding responsibilities under the new Constitution.
 - The Provincial Administration should stand dissolved on the holding of elections for the Devolved Government.
 - That all Constitutional Office holders should continue to hold such offices as if appointed to those offices under the new Constitution and shall within 30 days from the appointment of the Ethics Commission, comply with the provisions relating to leadership and integrity.
 - All assets, liabilities, and responsibilities of existing institutions or offices should be succeeded by the corresponding institutions as established under the new Constitution.
 - That all pensions and gratuities should be protected under the new constitution.
 - All Judges including acting Judges may continue to hold such offices as if appointed under the new Constitution and shall comply with the requirements of the new Constitution within thirty days of the constitution of the Ethics Commission: or should exercise the option to retire.
 - That the Judicial Service Commission should investigate and deal with complaints against judges and those against whom a *prima facie* case is established should proceed on forced leave with half pay.
 - That all Judicial proceedings should continue before the corresponding courts.
 - That the death penalty should be commuted to life imprisonment.
 - The Corporal sentence should be remitted.
 - The Ethics Commission and the Constitution Implementation Commission should be constituted within ninety days of the effective date while the rest of the Constitutional Commissions should be implemented within nine months of the effective date.

- The establishment and appointment of judges of the Supreme Court shall be conducted within 90 days of the appointment of the Judicial Service Commission.
- That Parliament should within 6 months put in place a legislation to facilitate the redress of past human rights abuses, and investigate causes of civil strife, massacres, ethnic clashes, political assassinations, land claims, and land clashes and identify those responsible and make recommendations for appropriate action.
- That all leasehold interests larger than 99 years held by non-citizens should be commuted to periods not more than 99 years.
- That all official documents should be in both English and Kiswahili by the year 2007.
- That the Government should facilitate civic education on the new Constitution on a continuous basis and in local languages.
- For the first five years, the provisions relating to public finance should only be amended by referendum.

27.14.13 TWC ‘M’ – Culture

- That the Constitution recognises culture as the foundation of our Nation, the cumulative civilization of the Kenyan people and communities, and the bedrock on which all spheres of our individual and collective lives are based.
- The values and principles of the unwritten constitutions of all the communities of Kenya, their past traditions, present struggles and future aspirations should be affirmed.
- The fundamental goals and values of our culture as the basis for nurturing our national pride and identity should be recognised and protected
- All organs of the state in the performance of their functions should be guided by the principle of multiculturalism.
- The state should take steps to develop, preserve, promote, enrich and transmit the languages of the people of Kenya.
- The organs of the state should promote and expand acceptable cultural reciprocation and exchange programmes and cooperation within and outside Kenya in order to enhance and publicize the cultural heritage of Kenya.
- The state should involve the people of Kenya in the formation and implementation of cultural and development plans to ensure cultural sustainability.
- The state should ensure that the indigenous communities enjoy and benefit from their historical, religious, sacred and archeological sites as well as other cultural heritages.
- The state should develop and maintain an education policy that enhances culture and cultural values.
- The state should recognise and register marriages under traditional systems, religion, personal or family law and through legislation prohibit incest.
- The state should support, protect, promote patent and preserve artistic, technological, intellectual innovations, inventions, cultural medicine and their application to the development of the people of Kenya.
- The state should ensure that imported scientific, artistic and technological

- developments and inventions are consistent with this constitution
- The state should encourage the people of Kenya to rediscover and apply the values of traditional farming systems, diet and traditional drinks
- The state should ensure that the designers adopt and adapt traditional architectural styles, materials and functions that take into consideration the extended family values.
- The state should develop enabling policies and legislation for policy research and development, which support and protect indigenous seed and characteristics and ensure equitable sharing of benefits accrued from the indigenous deed/plant/animal material.
- The state should encourage and ensure the establishment of museums, including live ethnic cultural museums, archives and libraries for conservation of material culture, historical documents and literature in each distinctive cultural group.
- The state should develop local and foreign tourism so long as such tourism shall not violate Kenya's culture as prescribed in the constitution.
- The state should encourage every community to adopt, adapt, develop, own and use their cultural dress, costumes, and ornaments to signify our originality and pride in rich culture.
- The state should promote and enhance traditional systems of governance, discipline, respect and integrity through age sets, age groups, traditional associations, family hood and clans.
- There should be established a National Commission for the promotion and protection of culture.
- There should be a formally established the African traditional court system whose functions, composition and structure shall be prescribed by an Act of parliament.
- The state should encourage, promote and facilitate African traditional methods of resolving conflicts and disputes, which are consistent with this constitution.
- The state should recognise our traditional oathing systems in the judicial system and other offices
- The Senate should be a representative body of the diverse communities and peoples of Kenya and the election of the representatives to the Senate should be on the basis of the principles of devolution as set out in the Constitution.
- A Cultural Day should be observed on 26th December of every year.

27.15 Constraints in Committees

27.15.1 Procedural Problems

The Guidelines on *Ad Hoc* and Technical Working Committee issued to Technical Committees indicated clearly that their deliberations should conform to the provisions of Regulation 20 and 45 of the Conference Procedure Regulations. These provisions required the Committees to:

- consider, and where necessary, make amendments to the contents of the Report and/or the Draft Bill of 2002,
- confine themselves to the subject matter referred to them by the Conference,
- seek consensus before a vote is called on any matter, and
- as far as possible, conduct business in accordance with the Second Schedule of the Regulations.

In practice, there were significant variations in the interpretation and operation of the above Regulations from Committee to Committee. Some Committees went directly to an article-by-article consideration of the Draft Bill of 2002; others chose to first debate or discuss all the provisions of the Draft Bill of 2002 falling within their mandate before making decisions on an article-by-article basis while others decided to first debate the Report before considering the relevant provisions of the Draft Bill of 2002. There were also those who used the period devoted to general comment on the draft articles scheduled for discussion each day for comments also on the Report, which was also discussed, where appropriate, in the context of specific draft articles. A number of reasons account for this variability in procedure. These include:

- lack of clear guidelines on how to deal with the Main Report of the Commission in relation to the Draft Bill of 2002,
- difficulties in applying the provisions of the Second Schedule to the Regulations,
- when and for what purposes input from experts should be requisitioned, and
- differing management styles by Convenors.

As mentioned earlier, the rules of procedure handicapped most delegates. Whereas this may have worked well with members of Parliament, other delegates found them complex, repetitive and boring. However, the training accorded to Convenors, Rapporteurs, Clerks and Program staff on the application of these procedures before the commencement of Bomas II went a long way in helping solve some of these problems. What was innovative is that delegates took the view that whereas debate must be guided by the Regulations, there was need to adjust them to serve specific prevailing circumstances.

27.15.2 Operational Problems

In addition to the procedural problems set out above, all Committees at one stage or another were beset by a number of operational problems. Among these were:

- delays in commencing proceedings,
- protracted stalemates in some committees,
- unavoidable delays,
- artificial (or engineered) stalemates, and
- ineffective use of available documents,
- over-attendance in some Committees,
- tensions between Convenors and Rapportuers in some Committees on their respective roles,
- introduction of unauthorised Draft Bills by the Chairperson of the Conference;
- differing leadership styles;
- lack of quorum; and
- close proximity of tents to each other, hence noise and electromagnetic interference of the sound systems.

The decision of the Steering Committee to permit delegates to visit other Committees within the first hour of commencement of proceedings of Committees' business affected some Committees. The Committees on Devolution and Executive attracted most delegates from other Committees during this first hour. Consequently, the

majority of Committees were only able to commence substantive work after 9.30 a.m. each day. This would however be confined to antecedent proceedings other than the core business. In order to protect the integrity of decisions made by Committees, Convenors were advised to ensure, at the very minimum, that decisions on any aspect of the Main Report or Draft Bill of 2002 were taken only when Committees were quorate. To ensure this, a number of measures were employed including bell ringing, use of whips and regular announcements for quorum.

Proceedings of some Committees were often disrupted by stalemates engineered by some delegates through a number of tactics including: -

- protracted debates over very minor issues,
- adverse “press effect”, where some delegates tried to make an impression for the cameras. In some committees, time was spent discussing what appeared in the press attributed to some members,
- diversionary discourses and sideshows,
- mistrust and suspicion between certain delegate categories or individuals, and
- deliberate attempts, in some cases, to derail Committee proceedings.

Despite these constraints, the standing and *ad hoc* committees were crucial in not only ensuring orderly and effective proceedings at the Conference, but also in management of conflicts and in building consensus on key issues at the Conference. It is at these committees that most technical issues were discussed and agreed upon, setting the stage for the adoption stage during the Committee and Plenary of the Whole Conference.

CHAPTER TWENTY-EIGHT

THE COMMITTEE AND PLENARY OF THE WHOLE CONFERENCE

28.1 The Mandate of the Committee and Plenary of the Whole Conference

The mandate of the Committee and Plenary of the Whole Conference was to consider, amend, and adopt the provisions of the Draft Bill of 2002 and Commission's Main Report based on the recommendations and decisions of the Technical Working Committees. The Constitution of Kenya Review (National Constitutional Conference)(Procedure) Regulations 2003 spelt out the specific workings and operations of the Technical Working Committees and Plenary of the Whole Conference.

Regulation 20 and the Second Schedule of the Regulations required that the Committee of the Whole Conference consider and make decisions on specific provisions of the Draft Bill of 2002 as recommended by the Technical Working Committees, subject to amendment motions brought by delegates, and on the report of the Consensus Building Committee tabled before it. Once the Committee of the Whole House had made its decisions, such decisions were then committed for adoption by the Plenary of the Conference to be part of the Draft Bill to Alter the Constitution.

28.2 The Consideration Stage

The consideration of the Draft Bill in the National Constitutional Conference was in two phases as shown in Figure 6 below. The first was the consideration by Technical Working Committees and the second was the consideration by the Committee of the Whole Conference. This course of action was provided for under Regulation 20 (1) of the Constitution of Kenya Review (National Constitutional Conference) (Procedure) Regulations, 2003, which stated that:

“Upon the conclusion of the general debate, the Commission’s Report and Draft Bill shall stand committed to the Consideration Stage, which shall comprise consideration by the technical working groups established under Regulation 50 and subsequent consideration by the committee of the whole Conference as provided in these Regulations”.

Regulation 20 (3), stated that:

“At the consideration stage, the debate at the Conference shall be confined to the Commission’s Report and Draft Bill only.”

Pursuant to these Regulations, each Technical Working Committee was expected to scrutinise the Articles of the Draft Bill of 2002 and compare it with the contents of the Main Report to verify whether provisions contained in the Draft Bill were consistent with the views of Kenyans. The Revised Guidelines for the National Constitutional Conference *Ad Hoc* and Technical Working Committees issued by

the Steering Committee, Delegates further enjoined each Technical Working Committee to:

- (i) “examine all issues raised during the general debate and any other issues touching on matters provided for in the Report and Draft Bill prepared by the Commission and to consider how best these may be used to strengthen or enrich the recommendations and/or proposals presented therein in respect of their thematic mandate;
- (ii) propose amendments or changes to the contents of the Report and/or Draft Bill in relation to matters under their specific thematic mandate;
- (iii) report on their proposed amendments to the Report and/or Draft Bill to the Steering Committee or the Conference; and
- (iv) consider and report on any other matter referred to it by the Steering Committee or the Conference”.

These Reports, popularly known as the “Convenor’s Reports”, contained Articles that had been agreed upon at the Technical Committee level, and had taken into consideration cross-cutting issues emanating from deliberations in other Technical Working Committees and, where required, had been enriched by input from expert opinion.

Pursuant to Regulation 21, the Steering Committee made a decision that a retreat be organized for all Convenors, Rapporteurs and programme staff at Leisure Lodge in Kwale District, Mombasa between 3rd and 11th February 2003, as part of the preparation for consideration and adoption of the Technical Working Committee Reports by the Conference. The mandate of the team going for the retreat was to:

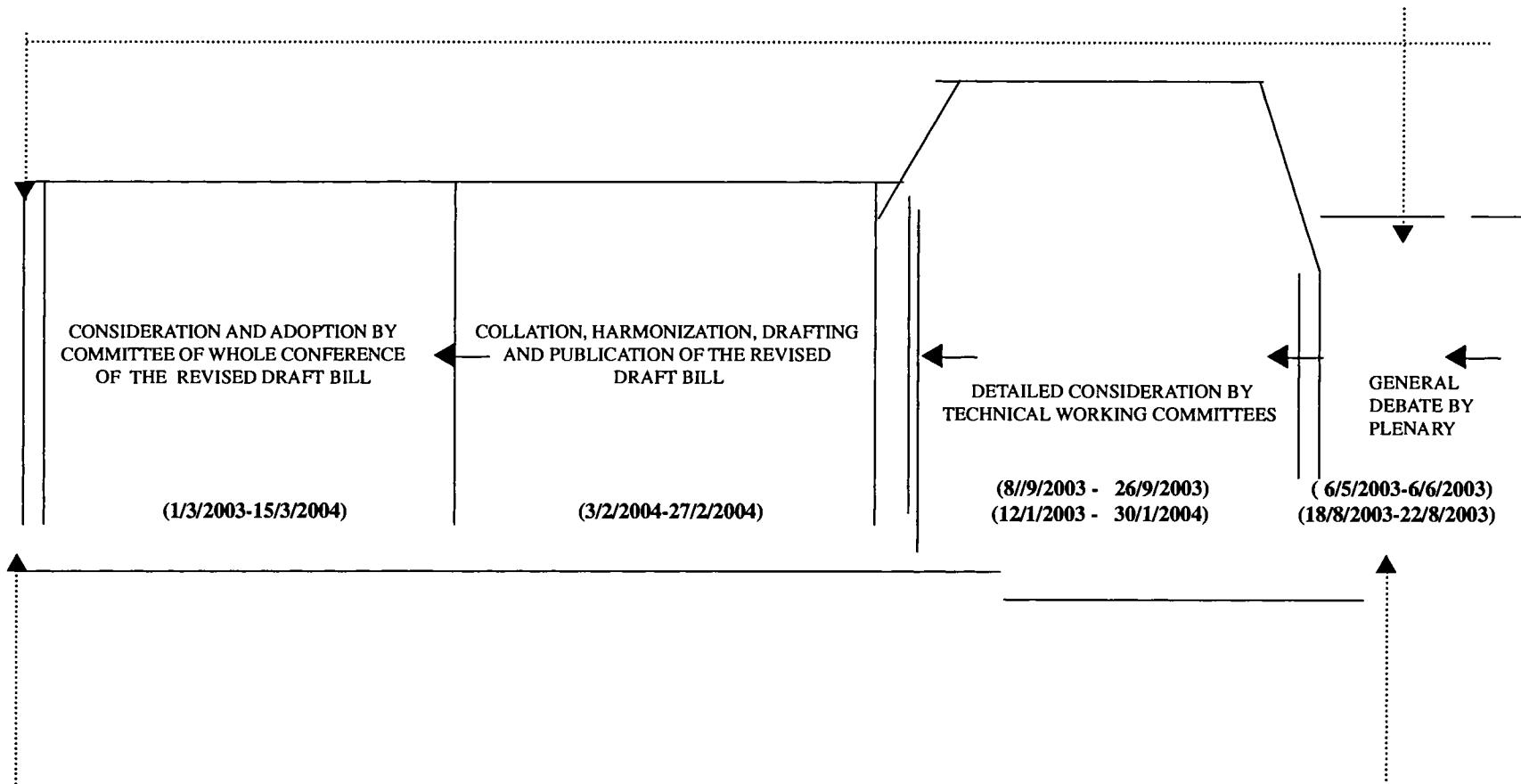
- complete and verify the Committee Reports to ensure consistency, coherence and accuracy;
- rationalize and mainstream the crosscutting issues,
- identify issues requiring reconsideration or harmonization;
- facilitate consultations among Convenors and Rapporteurs of Committees;
- consider overlaps and inconsistencies across committees; and
- consolidate and compile a Zero Draft Bill for consideration by the Committee of the Whole Conference.

As a result, a Zero Draft containing all decisions made by committees was released on February 11, 2004. Between February 11, 2004 and February 26, 2004, the Technical Working Committees had the opportunity to consider provisions of the Zero Draft and the revised Committee reports at the Bomas of Kenya. Some of the proposals emanating from the retreat were indeed accepted after debate in the Technical Working Committees, further consultations and inter-Committee negotiations.

Decisions made by the Technical Committees based on the recommendations of the Mombasa retreat were then passed on to the Drafting Team with instructions to incorporate them into a “Revised Zero Draft”. The draft was then prepared and released to all delegates on 27th February 2003 in readiness for the commencement of the Committee of the Whole Conference on Monday, March 1, 2004.

Figure 6: Debate and Consideration Stages at the National Constitutional Conference

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CONSIDERATION STAGE

The Committee of the Whole Conference sequentially considered provisions contained in the “Revised Zero Draft”, Article-by-Article pursuant to Regulation 20 (1) above, and Regulations 45 (16) and (17) which prescribe that:

“45 (16) Subject to these Regulations, every Committee shall report to the Conference at such time as the Steering Committee may direct, and the Report shall be accompanied by Minutes of the Committee and shall be tabled before the Conference.

(17) The Conference shall consider the Report from a Committee upon a motion “That the Report of the (here mention the name of the Committee) to be approved.”

During the debate at the Technical Working Committee level, the treatment of minority positions was raised. It was subsequently decided by the Steering Committee at its 79th meeting held on 3rd March 2003 that such positions either be resolved or be transformed into alternative committee amendments or motions to be moved during Consideration in the Committee of the Whole Conference. Some delegates, therefore, sought clarification as to whether such amendments or motions had been taken care of. After consultations, the Chairperson ruled that the Convenors of each of the 13 Technical Working Committees present, for consideration, only the recommendations of their Committees, in the spirit of Regulation 20 (2), which states that:

“subject to these Regulations, at the consideration stage, delegates are entitled to move amendments to the Commission’s Report and Draft Bill in accordance with these Regulations”.

This was also in accordance with Regulation 20 (4), which states that:

“The rules set forth in the Second Schedule to these Regulations shall apply with respect to the consideration of provisions of the Draft Bill”.

In accordance with the “Revised Guidelines for the National Constitutional Conference *Ad Hoc* and Technical Working Committees” issued by the Steering Committee, each Committee was required to report on its proposed amendments to the Report and/or Draft Bill to the Conference. Regulations 45 (16) prescribed that every Committee would report to the Conference at such time as the Steering Committee may direct. Regulation 45 (17) provided that the Conference would consider the Report from a Committee upon a motion “that the Report of the Committee be approved by the Conference.”

Convenors presented their reports by reading them out and, where necessary, explaining their respective reports by citing the corresponding provisions of the “Revised Zero Draft”. After the Convenors had completed their presentations, the Committee of the Whole Conference began consideration of the “Revised Zero Draft” pursuant to Rule 2 of the Second Schedule to the Regulations, which states that:

“The Secretary to the Conference shall call the number of each article in succession and shall read the article heading above each article, and if no amendment is offered,

the Chairperson shall, after a convenient number of articles has been called, put the question. “That articles...to...stand part of the Draft Bill”.

The following table illustrates the sequence of the presentation of Technical Working Committee reports.

Table 11: Sequence of Presentation of Technical Working Committee Reports at the Committee of the Whole Conference

Day & Date	Technical Working Group	Chapter of Revised Zero Draft		Presenter
Monday, 1/3/2004	A	1 2 3	Sovereignty of the People & Supremacy of the Constitution The Republic National Goals, Values & Principles	Hon. Delegate Billy Onwing'a
Monday, 1/3/2004	B	4 5	Citizenship Bill of Rights	Hon. Delegate Cecily Mbarire
Monday, 1/3/2004	M	5	Culture	Hon. Delegate Paul Nakatire
Monday, 1/3/2004	J	11 12	Land Environment	Hon. Delegate Daniel Ichang'i*
Tuesday, 2/3/2004	C	6	Representation of the People	Hon. Delegate Caroline Ng'ang'a
Tuesday, 2/3/2004	F	7	The Legislature	Hon. Delegate Samuel Arap Ng'eny
Tuesday, 2/3/2004	D:	8	The Executive	Hon. Delegate Martin Shikuku
Tuesday, 2/3/2004	E	9	Judicial & Legal System	Hon. Delegate Bishop Philip Sulumeti
Tuesday, 2/3/2004	K	17 18 19	Constitutional Commissions Amendment of the Constitution Interpretation	Hon. Delegate Kiriro Wa Ngugi
Wednesday, 3/3/2004	G	10	Devolution	Hon. Delegate Dr. Adhu Awiti
Wednesday, 3/3/2004	H	13 14 16	Public Finance & Revenue Management Public Service Leadership & Integrity	Hon. Delegate Dr. Chris Okemo*
Wednesday, 3/3/2004	I	15	Defence & National Security	Hon. Delegate Marsden Madoka
Tuesday, 4/3/2004	L	20	Transitional & Consequential Provisions Schedules	Hon. Delegate Zakayo Kirimi*

* These delegates were presenting on behalf of the Convenors of the Technical Working Committee

Initially, provisions of the “Revised Zero Draft” were read out in full and considered article by article in accordance with the Regulations. However, at one point, only the number

of articles were mentioned without reading out the full text of the provisions, but delegates insisted on the reading out of the provisions of the “Revised Zero Draft” and adopting them article-by-article.

The Steering Committee, being of the opinion that delegates had adequate opportunity to discuss, debate and consider issues at the Technical Working Committees, directed that consideration at the Committee of the Whole Conference be restricted to specific amendments initiated through written motions. The delegates accordingly submitted amendment motions in accordance with Regulation 24 (1) to (4), which required that notices of motion be given in writing, and in advance and be signed by the delegate or delegate giving the notice. The notices of motion were handed either to the Secretary of the Conference or the Secretariat, and where necessary, delegates were offered technical support and advice in the drafting of the motions thereof.

The Conference registered 415 motions, which were then consolidated and circulated in advance to all delegates and observers. The idea was to enable delegates scrutinise beforehand the proposals contained therein to fully understand their implications before consideration by the Committee of the Whole Conference. However, in accordance with Regulation 32 (1) which provided for motions that needed not to be preceded by notice of motion, a total of eighty-three (83) amendment motions were raised on the floor.

The List of Notices of Motions is presented in Appendix XIX of this report.

Of the 415 amendments, 13 were moved and carried while 38 were moved and rejected. The procedure was that a Delegate was allowed to move an amendment and a second speaker, selected from the floor, spoke in support of the amendment. Two other speakers were allowed to speak in opposition to the amendment. In accordance with Rule 8 which states that:

“Where two or more proposed amendments to any article seek to attain the same objective but in different ways, or the wording of the amendments differs, sponsors of the amendments may be required by the Chairperson to discuss their amendments and consolidate them or agree on compromise amendments that will be acceptable to the sponsors”;

Four amendments were consolidated, and eight were withdrawn in accordance with Rule 10, which states that:

“An amendment or a new article may be withdrawn at the request of the mover by leave of the Conference before the question is put on it if there is no objection”,

Five amendments were not considered pursuant to Regulation 29, which stipulates that:

“No delegate shall be competent, without the leave of the Chairperson, to move a motion raising a question substantially identical with a question raised in a motion which has already been disposed of”.

The fate of the remaining 347 motions of amendment remains unclear.

Amendments to motions were made in accordance with Regulation 30 (1), which states that:

“After a motion has been proposed as a question by the Chairperson, an amendment may be moved which seeks to alter the question”-

- (a) “by leaving out certain words”;
- (b) “by leaving out certain words and inserting other words in their place;” or
- (c) “by inserting certain words in a specified place”.

After all the motions for amendments had been considered, questions on the amendments were put in accordance with Regulation 20 (2), and either agreed upon or rejected, according to the voting process set out in Regulations 41, 42 and 43 which state that:

- “41 (1) Where voting is to be taken, being a vote which, in accordance with section 27 (5) of the Act, requires only a simple majority to pass, the Chairperson shall take a voice vote of the Conference, and announce the results of the vote accordingly.
- (2) The Chairperson shall direct a division to be taken if a delegate claims a division and-
 - (a) the Chairperson considers that there is reasonable doubt as to the outcome of the vote in question; or
 - (b) if thirty or more further delegates rise in their places to support the delegate claiming the division.
- 42 Where a vote is to be taken, being a vote which, in accordance with section 27 (5) of the Act, requires a two-thirds majority to pass it, the Conference shall not proceed to a division unless and until a number of delegates equivalent to that majority is present at the time for directing the division.
- 43 (1) If any division is required under these Regulations, the Chairperson shall order for a division and the lobbies shall be cleared for the purpose.
- (2) The Chairperson shall direct the “AYES” into the lobby on his right and the “NAYS” into the one on his left and appoint two tellers for each lobby to count the votes.
- (3) After the lapse of a reasonable time from his original direction, the Chairperson shall direct that the doors or any other barrier or thing giving access to the Plenary Hall be closed.
- (4) When all delegates have left the lobbies, the tellers shall return to the Plenary Hall and shall report the number of those who have voted in their respective lobbies to the Chairperson, who shall then declare the numbers to the Conference and announce the result of the division.
- (5) Any door or other barrier giving access to the Plenary Hall shall then be unlocked or removed, as the case may be.
- (6) A delegate may abstain from voting and any delegate wishing to abstain shall not enter a lobby while a division is in progress and the names of delegates abstaining shall be recorded.
- (7) In the case of confusion or error occurring in the course of a division concerning the numbers recorded which cannot otherwise be corrected, the Chairperson shall direct the Conference to proceed to another division.”

The commencement of the approval of the Articles was marked by differences in opinion on the preferred system of voting. Some delegates suggested that the Conference should adopt an open voting system; others suggested that secret ballot would have been the most appropriate while the rest wanted voting by acclamation or show of hands. The argument advanced against the open voting system was that some Delegates would be intimidated into voting in a particular manner, that some would raise the numbers of absent delegates, and that there would be difficulties in ascertaining genuine voters. Others were fearful that double voting would occur.⁵

Eventually, the system of voting adopted was of raising placards, which were then recorded and reported by tellers allocated to various sections of the plenary hall. The tellers then reported the number of delegates who had voted in their respective sections to the Secretary and the Chairperson of the Conference then declared the results of the division to the Conference in accordance with Regulation 20, above.

28.2.1 Consensus Building at the Committee of the Whole Conference

The third Consensus Building initiative was constituted and approved by the Conference Plenary following an appeal by a section of delegates, to reconsider questions of the structure of the Executive and, especially, the sharing of powers between the President and the Prime Minister; Devolution of Powers; and Transitional and Consequential Arrangements. With respect to the Executive, there was contention regarding the sharing of powers between the President and the Prime Minister, with some delegates opting for an executive Prime Minister while others opted for an executive President.

With regard to Devolution of Powers, the borne of contention was with respect to Levels of Government, with some delegates opting for four levels while others opted for two levels. The provision requiring that Ministers be appointed from outside Parliament coupled with the one introducing the recall of non-performing Members of Parliament had become a source of contention amongst delegates in the Technical Working Committee on the Legislature. In Transitional Arrangements, the issue of contention was when the Draft Constitution would become operationalized.

The Conference formed the Consensus Building Committee on 9th March 2004 with Bishop Philip Sulumeti as Chief Moderator. It commenced its deliberations on 10th March 2004 at the Bomas of Kenya. In constituting the Committee, the Steering Committee resolved that all the major political players should make submissions to the Committee. To give the Committee the opportunity to present its report, consideration of the chapters on the Executive, Devolution and the Legislature were stood over by the Conference.

The Committee's report was presented to the Conference on Friday 12th March 2004 without debate. During the morning session of the Conference on 12th March 2004,

the Vice President of Kenya and delegate number 2, Honourable Moody Awori, addressed the Conference as follows:

⁵ This method was used in the entire consideration process although the Chair at one point ruled that the secret ballot system should be adopted (See Verbatim Report of 15th March 2004, pp. 29).

"Delegates, it is my pleasure to join you this morning with just a very brief statement to emphasize the fact that there should be no doubt in anybody's mind of the determination of the Kenyan Government, that Bomas has to give Kenyans a new constitution by June of this year (applause). Also to make an appeal to everybody, whether a Parliamentarian or whether an aspiring Parliamentarian or whether a former Parliamentarian, that we have to work together because we either succeed or we sink together. That the Constitution that we want is not a Constitution designed for any single person, present or future. This should be a Constitution that will serve (clapping) this country to the very end of the world. So, I just want to wish you success and I want to wish you well that we move smoothly. I know that somebody said that "democracy is the worst form of government" but nobody has brought in a better one. Let us use democracy, which means that we must be tolerant to each other and give Kenyans a Constitution by June this year.

Thank you. Thank you very much (*clapping*)."

In the afternoon session of the same day, the Vice President again addressed the Conference and made reference to the Sulumeti Report:

"Distinguished Delegates, I will add only little of what I mentioned or said this morning to confine myself to the Report from Bishop Sulumeti. As we know in every society there are structures and in this society of Kenya, one of the structures at the moment is Bomas and within Bomas, there are also structures. You have had Committees and you have had the Plenary. Within those structures, you have exchanged a lot of views. It is always important that in every structure when a decision is taken, it should not be rescinded unless it is by consensus.

I do understand that this Plenary mandated a Committee on Consensus and since it is this Plenary that mandated it, it cannot rescind that decision. Ladies and gentlemen, it is important that we should always respect one another and accept to be convinced or not. I think this is the most important thing. Ladies and gentlemen, I am not going to deal with the merits or demerits of the consensus. I am only following the point that once you have a decision, it is always better-- We have always been led in decisions by majority, it has never been defined the amount of majority. All of us know, those who submit ourselves every five years to the electorate.

Many people go back to the Council or they go to Parliament with only one majority. Others go with the majority of a thousand to ten thousand but when they sit either in the Council or in the Assembly, they are equal, whether you had a majority of one or whether you had a majority of one thousand. What we need distinguished Delegates, is to have a respect for the structures. I listened very carefully to Mzee Gitu Kahengeri. *Alizungumza na hekima na ujasili na ninafikiri sisi sote tungeweza kusikiliza yale Mzee amesema kwamba tunataka nchi ambayo itakuwa na umoja, kwamba tunataka tuwe na chombo ambacho*

*kitatusaidia sisi kuendelea kuunda sheria katika nchi hii, tutakuwa tumefaulu. Tunasema kwamba, heshima si utumwa, Kukubali sio kuogopa.*⁶ We need to listen seriously to what Bishop Sulume's Consensus Committee has reported to us.

I just want to end by asking all of us, all the Delegates, together with our families out there and together with our friends out there that this weekend, let us offer special prayers so that we will be led properly, so that we will have a good Constitution, so that we will always be friends, so that we will always accept to differ but without making enemies. Let us always be adversaries but never enemies. Please, let us have those special prayers this weekend for the success of the new Constitution of Kenya. I thank you all (*Clapping*)".

Meanwhile, the proceedings of the Committee of the Whole Conference continued as the Report of the Consensus Building Committee was being awaited. The recommendations of the Consensus Building Committee were distributed to delegates and tabled for consideration by the Committee of the Whole Conference on Monday, March 15, 2004 as follows:

(a) *Structure of the Executive*

The Committee agreed, unanimously, that the structure of the Executive should be based on the following: -

- (i) That the Executive authority of the Republic of Kenya will repose in the President, the Prime Minister and the Cabinet;
- (ii) That the President shall be elected in accordance with the rules which require the President to garner majority of votes countrywide and certain percentages in specified number of Regions;
- (iii) That the President is the Head of State, Head of Government, Commander-in-Chief of the Armed Forces and Chair of the National Security Council;
- (iv) That the President shall appoint the Prime Minister from the party or coalition of parties with the majority support in Parliament and shall submit the name of the appointed Prime Minister to Parliament for approval by at least 50% vote of all Members of Parliament;
- (v) If the Parliament does not approve the nominated Prime Minister, the President shall nominate the leader of the second largest party or coalition of parties and if the Parliament rejects the second nominee, then the President shall nominate the third nominee who shall be accepted by the Parliament;
- (vi) That Cabinet Ministers shall be Members of Parliament;
- (vii) That the number of Cabinet Ministers shall be between 17 and 20;
- (viii) That most of Government decisions shall be through the Cabinet;
- (ix) That the Prime Minister shall be the leader of Government Business in Parliament, shall coordinate work of ministries, shall prepare legislation and shall be responsible to the Cabinet and the Parliament;
- (x) That the Prime Minister may be dismissed in one of two ways:
 - Through a motion introduced by the President and supported by fifty percent (50%) of Members of Parliament; and,

⁶ "He spoke with wisdom and bravery, and I think that if we would all listen to what the old man has said, that we want a country that will be united, we want to have an instrument that will help us to continue to formulate the laws in this country, we shall succeed. We say that respect is not servitude and to concede is not cowardice".

- Through a vote of no confidence introduced by a Member of Parliament and supported by a third of Members of Parliament and voted for atleast fifty percen (50%) of Members of Parliament.
- (xi) That the functions of the President, the Prime Minister and the Cabinet are largely as stated in the Zero Draft;
- (xii) That the President shall serve a maximum of two-five-year-terms;
- (xiii) That the emphasis is on the President and the Prime Minister working in harmony;
- (xiv) That the Cabinet should reflect the Kenyan regional and ethnic diversity;
- (xv) That the President shall appoint Permanent Secretaries and Public Service Commission in consultation with the Prime Minister;
- (xvi)
 - The President shall appoint Ministers of the Cabinet; and,
 - The President shall consult the Prime Minister and take into account the advice of the Prime Minister before appointing Ministers of Cabinet under (i) above; and,
- (xvii) It was agreed that a review of the system of the Executive will be undertaken before the general elections of 2012.

(b) Levels of Government

- (i) There shall be three levels of government as follows:
 - National;
 - District (as listed in the First Schedule of the revised zero draft, subject to review by a boundaries commission); and,
 - Location.
- (ii) Districts may cooperate with other districts for purposes of joint ventures and may set up joint committees for that purpose;
- (iii) There shall be a Regional Forum meeting at least twice a year for co-operation and co-ordination of activities of districts within the region. The regions shall be those which are listed in the First Schedule of the revised zero draft, subject to review by a Boundaries Commission.
- (iv) The Principal Unit of Devolution
 - The district shall be the principal unit of devolution.
- (v) Powers and functions of different levels of government
 - National Level
 - Legislative;
 - Taxation;
 - Resource allocation and utilization; and,
 - Administration.
 - District Level
 - Legislative;
 - Taxation:
 - Resource allocation and utilization;
 - Administration.
 - Location Level

- Resource allocation and utilization; and,
 - Administration.
- (vi) The Capital City and Urban Areas
 - There shall be special legislation for the governance of Capital City;
 - Legislation shall provide for the governance of other cities.
- (vii) Equitable Distribution of Resources
 - The National Government will be responsible for ensuring equitable distribution of resources to all districts;
 - The District Governments will ensure the equitable distribution of resources to all locations.
- (viii) Representation at the various levels shall be as follows:-
 - National level
 - National Assembly – one representative elected from each parliamentary constituency and one woman representative elected from each district.
 - Senate – 3 representatives elected from each region, one of who must be a woman.
 - District level
 - one councillor elected from each location in the district; and,
 - special seats for women to ensure one third representation.
 - Regional Forum
 - Two representatives, - one woman and one man from each district government within the Region.
- (ix) Style of drafting

Provisions on devolution should, wherever possible, be simplified and matters of detail should be removed and included in legislation.

Subsequently, debate on the recommendations of the Consensus Building Committee was marred by disagreements on procedural technicalities regarding the format in which they should be presented to the Conference. The Chairperson presented the Committee of the Whole Conference with two options. Firstly, it could debate and approve, with or without amendments, the principles in the Consensus Report after which legislative Draftspersons would revise the relevant chapters in the “Revised Zero Draft”. Secondly, the Secretary could introduce amendments to the relevant Articles of the “Revised Zero Draft” that would then be approved by the Committee of the Whole Conference. Delegates were divided between the two options. Subsequently, a vote was taken and the second procedure was carried. Regulations 41, 42 and 43, presented above, prescribe the voting procedure.

Consideration of the recommendations on the Executive in the Sulumeti Report then proceeded with debate on specific amendments to the “Revised Zero Draft”. As consideration amendment proposals continued, it became apparent that a section of the delegates were not happy with the outcomes and complained about the voting procedure, leading to a session beset with acrimony and controversy. These delegates claimed that the proceedings were not following the law, were open to abuse and not free and fair and feared that the same voting procedure would be applied until the contentious chapters were done away with. They, therefore, advocated for the adoption of secret ballot. A protracted debate ensued and the Chairperson, after consultations, ruled as follows:

“that there be a division that our tellers maintain a register which contains the names of all Delegates, that at the appropriate voting moment in an orderly row by row fashion the Delegates move to our tellers and signify their vote by signing against theirs names.”

A vote on this voting procedure was called by way of acclamation and was lost, and delegates continued with the open voting system. In the end, a variation of division in respect to each article and chapter was adopted, allowing delegates to physically signify their preferences against their names to tellers designated for the purposes.

When some delegates raised questions on the validity of the amendments that raised issues similar to those contained in the Consensus Building Committee Report, the Chairperson, after consultations, ruled that amendments relating to the proposals of the Consensus Building Committee were to be dealt with first. This implied that, ideally, all other amendments relating to the same Articles had to wait until the provisions proposed by the Consensus Building Committee had been disposed of.

Upon resumption of consideration of the Consensus Building Committee's amendments on the Executive, the first two proposals outlined in the foregoing were passed, but when the third and fourth amendments on Articles 173 and 174 (3) of the "Revised Zero Draft" were not approved, further acrimony and confusion ensued. This led to an eventual rejection of all of the Consensus Building Committee's proposed amendments and the Conference was polarized.

The upshot of the consideration of the proposals from the Consensus Building Committee on a priority basis had the effect of rendering most motions filed on the Executive, *inter alia*, redundant and rejected without debate. These included the 40 motions filed/registered by Honourable George Omari Nyamweya (Delegate No. 615), which could not be moved because the Conference had earlier made decisions on similar motions. Hon. Nyamweya, on his part stated thus vis-à-vis his intended amendments:

"Mr. Chairman, I want then this to be on record for historical purposes. That you are asking me now to move motions when you have removed the foundations of any of those motions' existence, that is really the point. If you have already ruled that you are not going to have a presidential system, how can you now ask me to move motions, when you have already ruled that you are not having that! ... that is water beneath the bridge...I will withdraw them but it is because the very foundation of my motions has been taken by you"!⁷

There was, as a result, confusion as to the best way to proceed. Consequently, a section of the delegates who supported the Consensus Building Committee's Report withdrew from the Conference and went out to consult and did not return to the Conference. These delegates were led by the Minister for Justice and Constitutional Affairs, Hon. Kiraitu Murungi (delegate No. 124). The Chairperson thereafter ruled that since the withdrawal did not occasion lack of quorum, proceedings of the Conference would continue and deliberations and adoption of Articles of the "Revised Zero Draft" accordingly continued.⁸ This adoption procedure detailed in the following section thereafter proceeded rapidly. The withdrawal by some of the delegates took place at 4.00 p.m on 15th March 2004 when Article 174 of the "Revised Zero Draft" was being debated upon. Debate and adoption of the remaining Articles (Articles 174 to 352, and the Preamble) took place between 4.00 p.m and 7.10 p.m of the same day, and the Chairperson shortly thereafter declared the Draft Constitution adopted. The Table below illustrates the sequence of debate on and adoption of the "Revised Zero Draft".

⁷ See *The Constitution of Kenya Review Commission's Verbatim Report of 15th March 2004*, pps. 61-75, where Hon. Delegate George Nyamweya, number 615 and Hon. Delegate Prof. Wangari Maathai, number 084 sought clarification as to the fate of their motions.

⁸ The total number of delegates was 629, of whom 600 had voting power. Quorum was determined by the presence of 315 delegates.

Table 12 :

**Sequence of Debate on, and Adoption of the “Revised Zero Draft”
by the Committee of the Whole Conference**

Date	Chapters and Articles Adopted
Monday 8/3/2004	Chapter 1 : Sovereignty of the People & Supremacy of the Constitution Articles : 1, 2 , 3 & 4 Chapter 2 : The Republic Articles : 5 , 6 , 8(1) , 9 , 10 , 11 & 12
Tuesday, 9/3/2004	Chapter 2 : The Republic Articles : 7 & 8 (2) Chapter 3 : National Goals, Values & Principles Articles : 13 Chapter 4 : Citizenship Articles : 14 to 25 Chapter 5 : Culture Articles : 26 to 33
Wednesday, 10/3/2004	Chapter 6 : The Bill of Rights Articles : 34 to 83 Chapter 7 : Land & Property Articles : 84 to 91 Chapter 8 : Environment Articles : 92 to 100 Chapter 9 : Leadership & Integrity Articles : 101 to 108
Thursday 11/3/2004	Chapter 13 : Judicial & Legal System Articles : 207 to 230 Chapter 16 : The Public Service Articles : 302 to 312 Chapter 17 : National Security Articles : 313 to 328
Friday, 12/3/2004	Chapter 18 : Constitutional Commissions Articles : 329 to 343 Chapter 19 : Amendment of the Constitution Articles : 344 to 346 Chapter 10 : Representation of the People Articles : 109 to 131
Monday, 15/3/2004	Chapter 11 : The Legislature Articles : 132 to 170 Chapter 12 : The Executive Articles : 171 to 206 Chapter 14 : Devolution Articles : 231 to 272 Chapter 15 : Public Finance Articles : 273 to 301 Chapter 20 : General Provisions Articles : 347 to 348 Chapter 21 : Transitional & Consequential Provisions Articles : 349 to 352 Preamble Schedules

Adoption of the Main Report and “Revised Zero Draft”

Section 27(5) of the Constitution of Kenya Review Act states that:

“All questions before the National Conference shall be determined by consensus, but in the absence of consensus, such decisions shall be determined by a simple majority of the members present and voting:

Provided that-

- (i) in the case of any question concerning a proposal for inclusion in the Constitution, the decision of the National Constitutional Conference shall be carried by at least two thirds of the members of the National Constitutional Conference present and voting; and
- (ii) if on taking a vote for the purpose of subsection 5(i), the proposal is not supported by a two thirds vote, but is not opposed by one third or more of all the members of the National Constitutional Conference present and voting then, subject to such limitations and conditions as may be prescribed by the Commission in the Regulations, a further vote may be taken; and
- (iii) if on taking a further vote under paragraph (ii) any question on a proposal for inclusion in the Constitution is not determined, the National Constitutional Conference may, by resolution supported by at least two thirds of the members present determine that the question be submitted to the people for determination through a referendum.”

The basic structure and sequence of Conference proceedings as set forth in Part IV of the Conference Procedure Regulations envisages an adoption stage, wherein the Commission Report and Draft Bill are adopted by the Conference sitting in Plenary, once consideration of the two documents is completed. Regulation 21 of the Constitution of Kenya Review (National Constitutional Conference) (Procedure) Regulations 2003, stipulates that:

- “(1) Upon the completion of the consideration stage the Conference shall, with the assistance of the Drafting Team appointed under regulation 48, cause to be incorporated in the Draft Bill the amendments (if any) approved during the consideration stage.
- (2) The Drafting Team shall ensure-
 - (a) that all provisions of the Draft Bill are consistent with one another; and
 - (b) that the language used in the Draft Bill is uniform and consistent and conforms with the best drafting standards and for this purpose shall be allowed sufficient time to do its work.
- (3) After the amendments, if any, have been incorporated in the Report and Draft Bill, the Chairperson shall cause the Report and Draft Bill to be printed and a copy to be provided to each delegate.
- (4) After copies of the Report and Draft Bill have been distributed to delegates, the Chairperson shall, in consultation with the Steering Committee, appoint a time for the Conference to sit and adopt the Report and Draft Bill.
- (5) At the time appointed, the Chairperson shall invite a delegate to move the

- motion “That the National Constitutional Conference adopts the Constitution of Kenya Report and Draft Bill 2004.
- (6) If such motion, having been duly seconded, is carried by the Conference, the Secretary shall then read aloud the Title of the Report and Draft Bill together with the adopting formula, which shall be “Adopted by the National Constitutional Conference” or, as the case may require, “Adopted by the National Constitutional Conference, subject to submission of the following provision(s) to a national referendum in accordance with subsections (6) and (7) of section 27 of the Constitution of Kenya Review Act.
- (7) The Report and Draft Bill shall then be deemed to have been adopted by the Conference, (subject to sub regulation (6) if applicable) and the Chairperson shall so declare and, if he so wishes, make valedictory remarks”.

Regulation 21 envisaged that the Consideration Stage would be separate from the Adoption Stage. It was deemed that upon the conclusion of consideration of the provisions of the “Revised Zero Draft”, the Committee of the Whole Conference would transit itself into Plenary to receive and adopt the recommendations from the Committee of the Whole Conference. This transit however, did not happen because the Steering Committee of the Conference had resolved that the consideration and adoption stages be merged, and all Articles be voted on in terms of section 27 (5) of the Review Act.⁹ The following table illustrates the overall voting pattern on the chapters of the “Revised Zero Draft”.

Table 13: The Voting Pattern on Provision of the Draft Bill*

Chapter in Revised Zero Draft*	Article:	Affirmative Votes:		Negative Votes:		Abstentions	Total Votes Cast
Chapter One (Sovereignty of the People & Supremacy of the Constitution)		Valid	Spoilt**	Valid	Spoilt**		
Articles 1-4 adopted by acclamation							
Chapter Two (The Republic)	Articles 6, 7, 8 (2)	324	none	2		2	328
	Articles 5, (1), 9, 10, 11, 12	320	none	2	none	0	322
Chapter Three (National Goals, Values & Principles)	Article 13	365	22	3	none	0	368
Chapter Four (Citizenship)	Articles 14 – 25	311	21	0	none	0	311
Chapter Five (Culture)	Articles 26 – 33	323	9	0	none	0	323
Chapter Six (The Bill of Rights)	Articles 34 – 83 <i>As amended</i>	313	14	0	none	0	313
	41(2) (Amendment motion)	204	1	116	none	3	323
Chapter Seven (Land & Property)	Articles 84 – 91	306	12	8	1	4	318
Chapter Eight (Environment)	Articles 92 – 100	339	11	0	none	0	339
Chapter Nine (Leadership & Integrity)	Articles 101 – 108	348	10	0	none	0	348

⁹ The Minutes of the 83rd Steering Committee Meeting, Min. NCC SC83/07/04: Procedure In The Adoption Stage.

Chapter Nine (Leadership & Integrity)	Articles 101 – 108	348	10	0	none	0	348
Chapter Ten (Representation of the People)	Articles 109 – 131	343	17	1	none	0	344
Chapter Eleven (The Legislature)	Articles 132 – 170	332	none	0	none	0	332
Chapter Twelve (The Executive)	Articles 171 – 206 <i>As amended</i>	321	none	5	none	1	327
	173	307	7	144	3	0	451
	174 (3) (<i>Amendment Motion</i>)	57	none	324	none	0	381
Chapter Thirteen (Judicial & Legal System)	Articles 207 – 230	308	11	8	none	2	318
Chapter Fourteen (Devolution)	Articles 231 – 272	329		2		0	331
Chapter Fifteen (The Public Service)	Articles 273 – 301	333	none	0	none	1	334
Chapter Sixteen (National Security)	Articles 302 – 312	326	14	0	none	0	326
Chapter Seventeen (National Security)	Articles 313 – 328	313	14	15	none	0	328
Chapter Eighteen (Constitutional Commissions)	Articles 329 – 343	321	15	0	none	0	321
Chapter Nineteen (Amendment of the Constitution)	Articles 344 – 346	319	13	0	none	0	319
Chapter Twenty (General Provisions)	Articles 347 – 348	335	10	1	none	1	337
Chapter Twenty One (Transitional & Consequential Provisions) and the Schedules	Articles 349 – 352 and Schedules 1 - 7	332	none	0	none	0	332
Preamble	Preamble	332			0	0	332
Title	Title	287	16	0	none	0	287

* Chapter numbers as contained in the Revised Zero Draft dated February 27, 2004

**Spoilt votes consist of votes arising from double voting

On 15th March 2004, the Committee of the Whole Conference completed its adoption of the various provisions of the Draft Bill after which the Chairperson announced that “with these votes and the adoption of the Title, the Constitution of the Republic of Kenya formally stands adopted by the National Constitutional Conference”. The Chairperson also announced that “your decisions now will be put into the final text by the Drafting Team and we shall meet later in the week to adopt it formally and hand it to the Attorney General”. The Drafting Team took longer than expected in the harmonization of the full text of the Draft Bill, and the Conference was not able to convene in plenary until the 23rd day of March 2004.

On this day the Chairperson made the following statement:

“Now, following the Act, I am going to give the Attorney General an advance copy of

the (draft) Constitution. The final version will be given to him in the next few days. I have assured you that there will not be any change to the document that he receives in terms of the decisions that we have made. However, we also have to give the Attorney General a report of the Conference which is nearly complete and when the two documents are ready, they'll be given to him. But I want to symbolize the passing of the responsibility to Parliament by handing him a copy now in front of you all."

On his part, the Attorney General remarked as follows:

"...when the Draft Constitution Bill as was adopted by the National Constitutional Conference on Monday, 15th March, 2004 is handed over to the Constitution of Kenya Review Commission.... As you have rightly stated, this is to confirm that I have received this as an advance copy, but I have also received it as a member of the Constitution of Kenya Review Commission and as delegate number 575 to the National Constitutional Conference. Indeed, all delegates will be receiving, if they have not already received, a copy of the Draft Bill and I can assure delegates that there is nothing in the order that was obtained in the Court yesterday to stop delegate number 575 from receiving this advance copy"

The Attorney General could not receive the Draft Constitution from the Conference in his official capacity because under sections 28(1) and (2) of the Review Act, the Constitution of Kenya Review Commission is required to prepare and submit the Draft Constitution and its Final Report to the Attorney General, after confirming that the Draft Constitution faithfully reflects the decisions made in the National Constitutional Conference.

28.4 Adjournment of the Conference

Section 4(2) of the Constitution of Kenya Review Act stipulates that:

"The organs specified in subsection (1) (a), (b) and (c) shall not be dissolved except in accordance with section 33".

Section 33 in turn states that:

"Upon the enactment of the Bill to alter the Constitution tabled before the National Assembly pursuant to section 28, the Commission shall stand dissolved and the terms of office of the Commissioners shall thereupon expire, save the Secretary and such number of staff as shall be necessary, shall remain in office for a period of three months to conclude the financial and administrative affairs of the Commission".

Pursuant to the above sections, Hon. Martin Shikuku, delegate number 595, moved a motion of adjournment on 23rd March 2004, which was successfully carried, that the Conference adjourns *sine die*.

CHAPTER TWENTY-NINE

THE DRAFTING PROCESS AT THE CONFERENCE

29.1 The Drafting Team and Management Protocol

29.1.1 The Drafting Team

Regulation 47(1) of the Constitution of Kenya Review (National Constitutional Conference)(Procedure) Regulations, 2003 provided for the establishment of a Drafting Team for the National Constitutional Conference consisting of experts appointed by the Commission.

The Regulations provided that the functions of Drafting Team would be to:

- a. render advice to delegates, committees and technical working groups as to :–
 - (i) the phrasing that will best achieve their objectives;
 - (ii) consequential amendments, arising out of their proposed amendments, that should be made to other parts of the Draft Bill;
 - (iii) any transitional or other issues necessary to be dealt with; and
 - (iv) other matters arising in legislative drafting;
- b. assist delegates and committees of the Conference to prepare amendments proposed by them to the Draft Bill of 2002;
- c. assist the Conference to put together the Draft Bill for adoption after all amendments have been considered and the Conference has taken decisions on them; and
- d. assist the Conference in any other manner that the Chairperson or the Conference may request.

Pursuant to Regulation 47(1), the Commission appointed the following persons and assigned them to the various Technical Working Committees –

Table 14 : Draftspersons Attached to Technical Working Committees

Technical Working Committees	Draftsperson	Nationality of Draftsperson
A: Preamble, Supremacy of the Constitution, The Republic and National Goals, Values and Principles	1. Prof. J. B. Ojwang' 2. Mr. Jeremy Wainwright	1. Kenyan 2. Australian Kenyan
B: Citizenship and the Bill of Rights	Mr. Jeremiah Nyegenye	
C: Representation of the People	Mrs. Margaret Ndawula	Ugandan
D: The Executive	Prof. V. C. R. A. C Crabbe	Ghanaian
E : The Judiciary	Mr. Clive Grenyer	English
F : The Legislature	Mr. Harrison Ndoria Gicheru	Kenyan
G: Devolution	Mr. Peter Barrett Mr. Jeremy Wainwright	1. Australian 2. Australian
H: Public Finance, Public Service, Leadership and Integrity	1. Mrs. Margaret Nzioka 2. Mr. Mark Spakowski 3. Mr. Gad Awuonda	1. Kenyan 2. Canadian 3. Kenyan
I: Defence and National Security	Ms. Linda Murila	Kenyan

J: Land Rights and Environment	Mrs. Lucy Masua	Kenyan
K: Constitutional Commissions and Amendments to the Constitution	Mr. Lawrence Kamugisha	Ugandan
L: Transitional and Consequential arrangements	1. Prof. Phil Knight 2. Mrs. Eva Jhala	1. Canadian 2. Zambian
M: Culture	1. Mr. Tom Mboya 2. Prof. V. C. R. A. C Crabbe	1. Kenyan 2. Ghanaian

Initially it was Prof J. B. Ojwang who was appointed as the Convenor of the Drafting Team. He was later appointed as a Judge of the High Court of Kenya, and Prof. V. C. R. A. C. Crabbe and Prof. Phil Knight were then subsequently appointed as joint Convenors of the Drafting Team.

The Team in their individual and collective capacities, were, in addition to their mandate expected to –

- (a) listen carefully and make accurate notes on discussion in plenary and Technical Working Committees;
- (b) harmonize their notes with those of Rapporteurs and clerks assigned to each Technical Working Committee;
- (c) prepare technical drafts accurately reflecting decisions taken by Technical Working Committees on the basis of reports submitted by the various Rapporteurs;
- (d) submit drafts as approved by the Committee of the whole Conference to the Commission through the Rapporteur-General.

29.1.2 Management Protocol

Since statutory responsibility for the preparation of the Draft Bill was vested in the Commission, the Team was to report to it. Operationally, the Steering Committee of the Conference was responsible for laying the recommendations of the Technical Working Committees before the plenary.

Consequently, the Team was to be supervised as follows –

1. As regards drafts from the Technical Working Committees, the Team reported to an organ established jointly by the Commission and the Steering Committee. This organ consisted of –
 - the Chairperson of the Conference;
 - the three Vice-Chairpersons of the Conference; and
 - the three Vice-Chairpersons of the Commission.

The responsibilities of this established organ were to :

- receive drafts as approved by the Technical Working Committees and the Conference;
 - create a programme of work for the Drafting Team;
 - allocate draftspeople on needs basis;
 - resolve all problems arising out of the drafting process; and
 - perform such other functions as the Commission and Steering Committee would assign to it.
2. As regards drafts emanating from the Conference meeting as the Committee of the Whole Conference, the Team reported primarily to the Steering Committee of the Conference.

It should be noted that the laid down procedures relating to the management protocol were not observed. The Drafting team did not report to the Commission, and was instead personally supervised by the Chairperson of the Conference and the Rapporteur-General. The Rapporteurs were also rarely consulted on the work of the Drafting team, and in actual fact did not have an opportunity to comment on the Draft Constitution until the 23rd March 2004 when it was presented to the Conference.

29.2

Drafting in Technical Working Committees

As earlier indicated, one draftsperson from the Drafting Team was attached to each Technical Working Committee of the Conference and was present at all sessions of the Committee.

A draftsperson attached to the Committee was responsible for –

- (a) advising delegates on all legislative aspects and ramifications of their work;
- (b) explaining legal terms and concepts;
- (c) assisting delegates to prepare proposed amendments to the Draft Bill of 2002;
- (d) re-drafting the Draft Bill of 2002 to incorporate amendments passed by the Committee; and
- (e) preparing the final version of the Chapter dealt with by the Committee for presentation to the Committee of the Whole Conference.

29.3

Preparation of the “Zero Draft”

Each of the Technical Working Committees of the Conference was dealing with a specific Chapter or Chapters of the Draft Bill of 2002 in isolation from the rest of the Bill and independent of the work of other Committees. The consequence was that it was possible for conflicts and duplications between Technical Working Committees to occur. Conflicts arose where one Committee made decisions, which were directly or by implication inconsistent with decisions made by another Committee. Duplications arose where more than one Committee took the same decisions but in respect of different Chapters in the Draft Bill of 2002. Duplications and conflicts were easy to detect because the Rapporteur-General of the Conference kept a daily journal in which was entered an account of each Committee's daily deliberations and the decisions the Committee took. Similarly, there were regular meetings of all Convenors and Rapporteurs of all Technical Working Committees for the purpose of discussing the goings-on in their respective Committees and charting the way forward.

In order to harmonize the recommendations of the different committees and produce a single coherent Draft Bill, Steering Committee decided that a working retreat be organized between 3rd February 2004 and 11th February 2004 bringing together Convenors, Rapporteurs, Draftspersons and the Programme staff.

It was at this meeting that the contradictions and duplications were discussed and on the basis of the decisions arrived at a draft phrased the “Zero Draft” was produced by the Drafting Team.

29.4

Revision of the “Zero Draft”

The “Revised Zero Draft” comprised the “Zero Draft” as produced after the working retreat as revised by the respective Committees and the Drafting Team. Revision by the Drafting Team was undertaken so as to -

- remove duplications and inconsistencies,
- standardize language,
- present material in a logical order, and
- supply necessary provisions to bridge gaps.

This was done without departing from the principles on which the “Zero Draft” was based. At this level of harmonisation, the draftspersons technically edited the “Zero Draft” and ensured consistency. They ensured that there was flow in the document and that there were no internal incongruities. Where for example, the Technical Working Committee on Preamble, Supremacy of the Constitution, the Republic and National Goals, Values and Principles had provided that the system of government shall be parliamentary while the Technical Working Committee on the Executive had in its provisions envisaged a hybrid system, the technical drafts people, in an attempt to harmonize the two provisions, and upon consideration of the draft in its entirety, edited out the proviso by the former Committee.

29.4.1

Highlights of the “Revised Zero Draft”

The highlights of the “Revised Zero Draft” in respect of the various Chapters were as follows –

Preamble

The Preamble basically remained as was in the “Zero Draft” but with the addition of a paragraph relating to the environment.

Chapter One - Sovereignty of the People and Supremacy of the Constitution

The Chapter basically remained as it was in the “Zero Draft”. Changes were however effected by the Drafting Team so as to-

- a) recast Article 2 on the supremacy of the Constitution, in order to make the theme of “supremacy” to feature more prominently in the Article;
- b) transfer clauses (4) and (5) of Article 2 to Chapter 20 (dealing with general principles of construction and interpretation)

Chapter Two - The Republic

The Chapter remained as it was in the “Zero Draft”

Chapter Three - National Goals Values and Principles

The Chapter remained as it was in the “Zero Draft”

Chapter Four - Citizenship

The Article was re-drafted by-

- a) moving the Article on the duties of a citizen from the Chapter on National Goals, Values and Principles to this Chapter;
- b) providing for dual citizenship (as of right) for Kenyans but subject to conditions to be set out in legislation in the case of non-Kenyans.

Chapter Five - Culture

It was apparent from the “Zero Draft” that a number of Articles were either repetitive or were not arranged in a logical manner. In order to achieve a logical

flow of Articles in the Chapter and remove inconsistencies and redundancies in the Chapter, a number of Articles were merged or transferred to other more relevant Chapters.

Chapter Six - Bill of Rights

The Chapter was split into two parts, the first dealing with general provisions relating to the Bill of Rights and the second dealing with specific provisions relating to substantive fundamental rights and freedoms. It was felt that this was a neater and more coherent way to proceed.

Chapter Seven - Land

The Chapter was retained largely as it was in the “Zero Draft”. Changes were however effected by the Committee to-

- a) give power to the State to revoke certain interests in land held by non-citizens
- b) provide that community land vests in devolved governments to hold in trust for the community

Chapter Eight - Environment

Except for environmental rights and duties, which were retained in this Chapter, the Chapter remained as in the “Zero Draft”.

Chapter Nine - Leadership and Integrity

The Chapter was originally Chapter Sixteen and some of its provisions were originally in the Fifth Schedule. To reduce duplication, the Chapter and the Schedule were consolidated into a single longer Chapter. The length of the Articles was reduced without derogating from the substance of the provisions.

Chapter Ten - Representation of the People

The Chapter was re-drafted to exclude provisions in affirmative action as these were covered under the Chapter on National Goals, Values and Principles.

Chapter Eleven – The Legislature

The following revisions were made to the “Zero Draft” –

- (a) deletion of detailed provisions which could properly form the content of the Standing Orders of Parliament,
- (b) sequential re-arrangement of provisions,
- (c) removal of repetition and re-arrangement of provisions to achieve thematic coherence, and
- (d) closing of lacunae.

Chapter Twelve – The Executive

Changes to the “Zero Draft” in the Chapter on the Executive were as a result of a meeting of the Technical Working Committee on the Executive and the Consensus Building Committee of the Conference and related to -

- (a) the role of the National Assembly in the appointment of the Prime Minister,
- (b) the functions of the Prime Minister,
- (c) the demarcation of responsibility of Head of State to vest in the President and Head of Government to vest in the Prime Minister, and
- (d) the removal from office of the President and the Prime Minister.

Chapter Thirteen – Judicial and Legal System

Changes were made to provisions relating to the Judicial Service Commission to reflect the general requirements on the Chapter on Constitutional Commissions. The Chapter was overhauled to reflect the phraseology and the principles of construction and interpretation that had been applied throughout the Draft Bill.

Chapter Fourteen – Devolved Government

This was formerly Chapter Ten. A considerable part of the provisions that were formerly in this Chapter was moved to Chapters Two (the Republic), Eleven (The Legislature), Fifteen (Public Finance), Sixteen (Public Service) and Nineteen (Amendment of the Constitution). In addition, the list of functions of various levels of government were moved from the main text of the draft to the new Fifth Schedule.

Chapter Fifteen – Public Finance

The Chapter remained as it was in the “Zero Draft”.

Chapter Sixteen – Public Service

Two new Commissions, namely, Teachers Service Commission and the Health Service Commission were transferred to this Chapter from the Chapter on Constitution.

Chapter Seventeen – National Security

The Chapter remained as it was in the “Zero Draft”, except for technical drafting changes to ensure clarity, consistency and harmony within the Draft Bill.

Chapter Eighteen – Constitutional Commissions

The Chapter remained as it was in the “Zero Draft”.

Chapter Nineteen – Amendment of the Constitution

The Article on Amendment of the Constitution by Parliament was recast to read more clearly, while the Article on Amendment of the Constitution by the people had too many gaps and questions, which the Drafting Team attempted to fill by expanding the Article.

Chapter Twenty – General Provisions

The Chapter was expanded including more principles of interpretation and construction not originally included in the Chapter.

Chapter Twenty-One and the Sixth Schedule – Transitional Provisions

These remained basically as in the “Zero Draft”, except for technical changes to ensure consistency and harmony.

It was the “Revised Zero Draft” incorporating the foregoing changes that was presented to the Committee of the Whole Conference.

29.5

Preparation of the Draft Bill of 2004

When the “Revised Zero Draft” was committed to the Committee of the Whole Conference, it became open for any member to bring a motion seeking to amend any of its provisions. As motions were being moved and passed or rejected, the Drafting Team, in accordance with its mandate and Terms of Reference was working the changes into an evolving Draft Bill of 2004, which was presented to the Conference on 23rd March 2004. The Team spent considerable time between the time of adoption of the “Revised Zero Draft” in March 15 2004 and March 23 2004 fine-tuning the Draft Bill by:

- harmonizing and standardizing drafting style;
- ensuring proper technical editing and cross-referencing;

29.6

Verification of the Draft Bill of 2004

Pursuant to section 28 of the Act, the Commission undertook from the 16th August 2004 to 16th September 2004, a verification exercise to ensure that the provisions of the Draft Bill of 2004 as circulated on 23rd March 2004 faithfully reflected the decisions of the Conference. The Draft Bill of 2004 was verified against the following documents:

- “Revised Zero Draft” dated 26th February 2004 (together with the accompanying corrigenda);
- the Summary of decisions made by the Conference from 8th to 15th March 2004

In addition, reference was occasionally made to the verbatim and video records of the Conference proceedings of 8th to 15th March 2004.

The Commission verified each provision of the Draft Bill thoroughly against the aforesited reference sources to ascertain whether-

- (a) A provision had been omitted from, relocated within, or added to the Draft Bill of 2004, or merely recast;
- (b) The omission, relocation, addition or recasting in (a) above added value to or denigrated the Draft Bill of 2004, to the end that the substance of the provisions were lost.

The Rapporteurs of the various Technical Working Committees, who are also Commissioners, led the verification of their various thematic chapters of the Draft Bill of 2004. The Commissions legislative draftspersons provided explanations, on behalf of the Drafting Team, for any variances between the reference sources and the Draft Bill of 2004.

At the end of the verification exercise, the Draft Bill of 2004 was annotated to reflect the decisions reached, and it this Final Draft Bill of 2004 that the Commission is honoured to present as a separate volume with this Final Report.

29.7

Challenges and Lessons

The drafting work of the Commission was by and large a demanding undertaking. However, many important lessons were learned. Some of the challenges encountered included:

29.7.1

Corporate Drafting Instructions

Drafting instructions were given in a collegiate manner from Technical Working Committees or the Conference and the decision taken was usually that of the majority. The Drafting Team were sometimes lobbied by the losing minority or those with divergent views to accommodate their views, and when this did not happen they raised some of their arguments again subsequently to contest the

draftspersons rendition of what was agreed when what was really being contested was the decision itself.

29.7.2 Insufficient or Vague Instructions

When there was lengthy debate or when an issue was controversial, the Draftspersons were not able to get clear instructions from the Technical Working Committees or the Conference The Committees or Conference tended in such circumstances to ask the draftspersons to provide a working draft based on the deliberations. Essentially, this shifted the onus of formulating the decision reached to the draftsperson and put the draftsperson in the awkward position of presenting a draft based primarily only on the draftspersons own interpretation of the matter.

29.7.3 Size of the Drafting Team

The number of the Technical Working Committees into which the conference was divided determined the size of the Drafting Team. There were thirteen such Committees with the consequence that the Drafting Team was quite large. This was beneficial in so far as the Team constituted a diverse gathering of some of the most renowned drafters in the world. In practice, it also proved to be quite a challenge because of the multiplicity of drafting styles, different cultural experiences and co-ordinating problems that surfaced.

29.7.4 Local and Foreign Drafters

A mixture was achieved by constituting a Drafting Team with both local and foreign drafters. The former brought their expertise and comparative experience, while the latter brought expertise and knowledge of local conditions and circumstances. Considering all the circumstances, there should have been more local drafters on the Drafting Team.

29.7.5 Involvement at all Stages.

Since the draftspersons needed to be aware of the issues in the constitution review process, the Commission appointed its own in-house drafters to be part of the Drafting Team, who were part of the process from the very beginning and throughout it, and who thus understood all aspects of the process well. The rest of the Drafting Team was, however, new to the Kenyan constitutional review process. They were engaged during the National Constitutional Conference and faced various problems in understanding some of the issues and concepts at the Conference.

29.7.6 Convenors of the Drafting Team

The very concept of co-Convening resulted in attendant differing leadership styles and disagreements over method between the two co-Convenors of the Drafting Team. Both co-Convenors were non-Kenyans and though both were vastly experienced drafters, they had not been part of the constitutional review process and could not entirely understand the fears and aspirations of Kenyans. The

Commission had been unable to procure the services of senior experienced Kenyan draftspersons, a resource in which Kenya suffers from an acute shortage. Considering the importance attached to the *travaux préparatoires* in constitutional interpretation, and the fact that in appropriate circumstances the constitution makers and even the drafters could be called in evidence, it would have been better if the institutional memory of the review process was home-based.

29.7.7 Constraints of time

It was the view of the Drafting Team that the time allowed before presentation of a final draft was entirely inadequate. Members of the Drafting Team were unanimous that in their professional judgment, they did not present to the Conference, a Draft Bill with which they themselves were entirely satisfied. Pleas by the Drafting Team for more time were not accommodated.

PART FIVE

POST-BOMAS EVENTS

CHAPTER THIRTY

THE POST BOMAS EVENTS

The review process leading to the adoption of the Draft Constitution of Kenya 2004 on 15th March 2004 and the adjournment of the National Constitutional Conference *sine die* on 23rd March 2004 was faced with several political challenges that eventually generated new political dimensions hitherto unanticipated. Under section 28 of the Review Act, the final enactment of the Bill to Amend the constitution was to be performed by Parliament, defined Section 4 of the Act as one of the organs of review process. This was however not to be as serious dispute and stalemate arose concerning, the method of final adoption and enactment of the Draft Constitution of Kenya 2004 adopted by the National Constitutional Conference. Different groups and stakeholders sought to address the dispute in different ways.

30.1 Post-Bomas Legal Obstacles

On 15th March, 2004, the National Constitutional Conference adopted the Draft Constitution of Kenya Bill, 2004 in accordance with section 27 (1)(b) of the Constitution of Kenya Review Act, setting the stage for the conclusion of the Conference on 23rd March 2004.

Pursuant to section 28(1) and (2), of the Review Act the Commission was required to prepare and submit the final report and the Draft Bill to the Attorney-General for presentation to the National Assembly. The Attorney General was required, under section 28(3) within seven days of the receipt of the Draft Bill to publish the same in the form of a Bill to alter the Constitution.

At the expiry of a further period of seven days after the publication of the Bill to alter the Constitution, section 28(4) required the Attorney General to table the same together with the final report of the Commission before the National Assembly for enactment within seven days.

These steps towards the conclusion of the review process were however thrown into disarray because of a series of court cases, including-

- *Timothy Njoya & Others v CKRC and the National Constitutional Conference*, High Court Misc. Application No. 82 of 2004;
- *Njuguna Michael Kung'u, Gacuru wa Karenge & Nicholas Mugo v the Republic, Attorney General and CKRC*, High Court Misc. Application No. 309 of 2004;
- *The Martin Shikuku Case; and*
- *Peter Mwalimu Miwa v the Attorney General and CKRC HCCC No. 1 of 2004*

In the Njoya Case, orders were sought, among other things, that section 28(4) of the Review Act which provides for the procedure for the tabling by the Attorney General of the Draft Bill and its enactment by Parliament was unconstitutional.

Parliament could not usurp the people's sovereign right to replace their Constitution, and orders were also sought that every person in Kenya had a right to review the Constitution and that this right included the right to ratify the Constitution in a referendum.

The Constitutional Court held, among other things, that section 28(4) of the Review Act requiring the Attorney General to table the draft Bill before the National Assembly for enactment was unconstitutional. It further ruled that the people of Kenya have a right to ratify the Draft Bill in a mandatory referendum or plebiscite, and that Parliament had no jurisdiction under section 47 of the Constitution to abrogate the existing Constitution and enact a new one in its place. It is noteworthy, however, that the Court did not provide for the procedure for the holding of the referendum.

In the Wa Karenge Case, the applicants argued that the National Constitutional Conference had on 15th March, 2004 purported to adopt the chapters of the draft Bill in relation to the Legislature, the Executive, Devolution, Public Finance and Revenue Management, and Transitional and Consequential Provisions and eventually the Bill itself in violation of the Review Act. The argument further stated that they would be prejudiced if the Draft Bill so adopted was presented to the Attorney-General in terms of the Act. In particular, the applicants argued that debate on the particular chapters of the Draft Bill was conducted *ultra vires* the provisions of the Review Act and was characterized by confusion, intimidation and threats and that debate on the Draft Bill was done without the requisite quorum.

The High Court, in its ruling, prohibited the Commission from preparing its Final Report and the Draft Bill in relation to the chapters on the Legislature, the Executive, Devolution, Public Finance and Revenue Management, and Transitional and Consequential Provisions until the matter was heard and determined. The Attorney General was similarly also prohibited from receiving the final report and the draft Bill from the Commission until the final determination of the matter. At the time of writing, this report, the interim orders remain in force.

In the Martin Shikuku Case, following on the decision in the Njoya case, the applicants sought orders, among other things, that the constitutional amendments since 1963 are unconstitutional and that Kenya should revert to the 1963 Independence Constitution. They also sought a declaration that the Bomas draft be submitted as it is to the people of Kenya for ratification in a referendum and that in the interim all debate, discussion and action on the Bomas draft be prohibited. At the time of preparing this Report, the case is pending determination; but in the meantime the court granted the prayers that all debate, discussion and action on the Bomas draft be prohibited.

The Peter Mwalimu Miwa Case was a constitutional reference seeking a declaration that the Review Act was null and void on the ground that it was inconsistent with section 47 of the Constitution. This case was later withdrawn.

Commission Work After the Conclusion of the National Constitutional Conference

After the conclusion of the National Constitutional Conference, the Commission continued to undertake its work through the following standing Committees, namely-

- (a) Steering Committee;
- (b) Research, Drafting and Technical Support Committee;
- (c) Civic Education, Publicity, Information and Communication Committee;
- (d) Mobilization and Outreach Committee; and
- (e) Finance and Resource Mobilization Committee.

In addition, the Commission continued to function through Task Forces and Ad Hoc Committees established from time to time and charged with specific responsibilities. These have included the Legal Task Force, the Task Force on the Referendum, Committee on Staff Rationalization, Task Force on the Final Report of the Commission, and the Consensus Committee.

The Review Act pursuant to sections 17, 24 and 26 of the Act charged the Commission with, among others, the following tasks:-

- Conducting and facilitating civic education in order to stimulate public discussion and awareness of constitutional issues;
- Collecting and collating the views of the people of Kenya on proposals to alter the Constitution and, on the basis thereof, drafting a Bill to alter the Constitution;
- Carrying out or causing to be carried out studies, researches and evaluations concerning the Constitution and other Constitutions and constitutional systems as, in the Commission's opinion, may inform the Commission and the people of Kenya on the state of the Constitution of Kenya;
- Convening and recording the decision of the National Constitutional Conference; and
- Conducting the referendum (if any) and recording its decisions and, on the basis thereof, preparing the final draft Bill for presentation to the National Assembly.

The Commission had successfully discharged its statutory mandate up to and including the convening of the National Constitutional Conference before the advent of the legal impediments outlined above, which, as noted, had the effect of preventing the Commission - as indeed all other organs of the review- from proceeding in the manner envisaged in the Review Act.

After the conclusion of the National Constitutional Conference, the Commission was engaged in the following tasks: -

- (a) *Preparation of Commission reports, including –*
 - The Final Report of the Commission;
 - Technical Appendices – Volume on Referendum and Devolution;
 - Volume III – on Method of Work; and
 - Volume VI – People’s Participation in the Constitutional Review Process.
- (b) *Compilation and Finalization of National Constitutional Conference Documentation as follows -*
 - Editing and publication of the Reports of the Technical Working Committees of the Conference;
 - Compiling and consolidating the proceedings of the National Constitutional Conference (Bomas I, II, III);
 - Compiling and consolidating the daily summaries for the Conference Plenary and the Technical Working Committees;
 - Compiling and consolidating the Plenary Votes and Proceedings; and
 - Compiling and consolidating Minutes of the meetings of the Technical Working Committees.
- (c) *Finalization of the database.*
 - Library & Archives
 - Identifying material for archiving
 - Creating Committee meeting file database
 - Identifying books to be transferred to various and relevant institutions
 - Putting measures in place to have an institutional memory upon winding up
- (d) *Drafting*
 - Verifying of the Draft Bill;
 - Preparing the Kiswahili Draft Bill; and
 - Drafting of routine subsidiary legislation relating to the Commission’s work.
- (e) *Hansard*
 - Finalizing of Conference verbatim reports (editing and availing reports);
 - Dubbing and printing for archiving; and
 - Preparing and transferring of audio, audio-visual and other data to suitable formats for archiving.
- (f) *Civic Education*
 - Preparing a Braille version of the Draft Bill;
 - Preparing guidelines for conduct of Civic Education on the Draft Bill;
 - Preparing materials for civic education for the referendum;
 - Publishing and distributing of the Draft Constitution;
 - Preparing delegates’ biographies;
 - Preparing guidelines for archiving/registry of materials;
 - Preparing the Civic Education Report.
- (g) *Mobilization and Logistics*
 - Preparing the Report on the Participation of the People in the Constitutional Review Process;

- Preparing Conference Mobilization Reports (Bomas III);
 - Planning for reactivation of the Constituency Constitutional Forums and District Coordination Offices; and
 - Strategic planning for the Referendum, including:
 - Preparing for training personnel to carry out and monitor Civic Education; and
 - Preparing for monitoring of the referendum.
- (h) *Finance and Administration*
- Settlement of outstanding bills and claims arising from the National Constitutional Conference;
 - Developing budgetary projections for Financial Year 2004/5;
 - Updating of Commission inventories;
 - Consolidation of NCC assets for accounting and subsequent disposal/transfer to other Government Ministries;
 - Disposal/Transfer of Commission equipment and stores;
 - Administrative management of Commission's affairs; and
 - Handling of litigation concerning the Commission.

30.3 Deadlock-breaking Initiatives

While the review impasse remained, a series of initiatives aimed at finding common ground or a way forward on the obstacles to the successful conclusion of the review process were mooted. One of these initiatives was the formation by a number of back-bench members of Parliament of an informal Consensus-Building Group. The group was to try to narrow the differences on the issues perceived to be contentious in the Draft Bill as adopted by the National Constitutional Conference. It organized a workshop for members of Parliament in Mombasa and also met with the Commission and different other groups in pursuit of their objectives

At the same time, a lobby group consisting of some delegates of the concluded National Constitutional Conference, and calling itself Katiba Watch, was opposing the work of the parliamentarians and organizing a series of events and protest meetings. It was calling for the adoption, by 30th June 2004, of the Draft Bill as adopted by the National Constitutional Conference on March 15th without any amendments to it.

30.4 The Constitution of Kenya Review (Amendment) Bill, 2004

The efforts of the Consensus Building Group of members of Parliament supported by the Commission resulted in the publication on 28th June 2004 of the Constitution of Kenya Review (Amendment) Bill, 2004, commonly referred to as the Consensus Bill. The object was to amend the Constitution of Kenya Review Act to provide for the making of a new Constitution in accordance with the decision of the High Court with respect to how that could be done.

The Bill provided for additional functions relating to facilitation and monitoring of civic education to be invested on the Commission; and for the process leading to a referendum and the replacement of the Constitution.

The Bill was passed by the National Assembly on August 5, 2004. It did not however receive the assent of the President. In his Memorandum to Parliament the President recommended that certain sections of the Bill be amended on the ground that they were inconsistent with the Constitution. The Memorandum was debated and agreed to by the National Assembly on December 2, 2004. The Bill was subsequently assented to by the President and is awaiting publication in the Kenya Gazette.

30.5

Intervention by Parliamentary Select Committee

Arising from the difficulties into which the Consensus Bill had run when the President withheld his assent and while the matter was pending, the Parliamentary Select Committee on Constitutional Review appointed a sub-committee with the dual mandate of:

- a) considering the contentious issues in the Draft Bill and making recommendations thereon;
- b) proposing appropriate amendments to the Constitution in order to overcome the legal obstacles facing the constitutional review process and bring the review process to an early and successful completion.

The latter mandate was necessitated by claims that the Consensus Act would not by and of itself be adequate legal basis for the successful completion of the constitutional review process. The Parliamentary Select Committee completed its mandate and submitted its report to the National Assembly on December 7, 2004, primarily recommending amendments to the Constitution and making recommendations for the resolution of contentious issues. The National Assembly however adjourned *sine die* and was subsequently prorogued before discussing the Select Committee's report.

At the time of writing this Report, the National Assembly is expected to debate the Parliamentary Select Committee's report when the new session is convened.

APPENDIX I

THE CONSTITUTION OF KENYA REVIEW ACT

(CHAPTER 3A OF THE LAWS OF KENYA)

ARRANGEMENT OF SECTIONS

PART I — PRELIMINARY

Section

- 1— Short title.
- 2— Interpretation.
- 3— Object and purpose of constitutional review.
- 4— Organs of review.
- 5— Guiding principles.

PART II — ESTABLISHMENT AND COMPOSITION OF COMMISSION

- 6—Establishment and membership of the Commission.
- 7—Procedure for appointing commissioners.
- 8—Qualifications and disqualifications for appointment as commissioners
- 9—Chairperson and vice-chairpersons.
- 10—Establishment of Parliamentary Select Committee.
- 11—The Secretariat.
- 12—Staff of the Commission, experts and consultants.
- 13—Oaths of office and affirmations.
- 14—Code of conduct.
- 15—Tenure of office of commissioners and secretary.
- 16—Disqualification of commissioners for election.

PART III — FUNCTIONS, POWERS AND PRIVILEGES OF THE COMMISSION AND COMMISSIONERS

- 17—Functions of the Commission.
- 18—Powers of the Commission.
- 19—Committees of the Commission.
- 20—Constituency Constitutional Forums.
- 21—Procedure.
- 22—Publication of Commission's records.
- 23—Documentation centres.
- 24—Civic Education.
- 25—Privileges of commissioners and secretary during office and other immunities.

PART IV — REPORT OF COMMISSION AND ACTION THEREON

- 26—Completion of work, report and action thereon.
- 27—National Discussion of Commission’s Report
- 28—Introduction of Commission’s Report to National Assembly.

PART V — EXPENSES OF THE REVIEW PROCESS

- 29—Funds for expenses of the review process.
- 30—Constitution of Kenya Review Fund.
- 31—Remuneration and allowances of commissioners.
- 32—Accounts and audit.

PART VI — DISSOLUTION OF ORGANS OF REVIEW AND FINAL PROVISIONS

- 33—Dissolution of Commission and repeal of this Act.
- 34—Regulations.
- 35—Act to bind the Government.

FIRST SCHEDULE	- Oaths and affirmations.
SECOND SCHEDULE	- Code of Conduct for the members and staff of the Commission.
THIRD SCHEDULE	- Principles for a democratic and secure process for the review of the Constitution.

THE CONSTITUTION OF KENYA REVIEW ACT

6 of 1998

5 of 2000

2 of 2001

An Act of Parliament to facilitate the comprehensive review of the Constitution by the people of Kenya, and for connected purposes

ENACTED by the Parliament of Kenya as follows:-

PART I — PRELIMINARY

Short title.

1. This Act may be cited as the Constitution of Kenya Review Act.

Interpretation.

6 of 1998. s.4

5 of 2000. s.3

2 of 2001. s.3

2. In this Act, unless the context otherwise requires –

“chairperson” and “vice-chairpersons” means the chairperson and vice-chairpersons appointed under section 9 of this Act;

“Commission” means the Constitution of Kenya Review Commission established under section 6;

“Commissioner” means a Commissioner appointed under this Act;

Cap. 7

“constituency” has the meaning assigned to it in section 2 of the National Assembly and Presidential Elections Act;

“Constituency Constitutional Forum” means a forum established in accordance with section 20;

“the Constitution” means the Constitution of Kenya;

Cap. 265

“County Council” has the meaning assigned to it in section 2 of the Local Government Act, and for the purposes of this Act, includes the City Council of Nairobi;

Cap. 221

“Kenya Broadcasting Corporation” means the Kenya Broadcasting Corporation established under the Kenya Broadcasting Corporation Act;

Cap. 225

“Kenya National Library Services Board” means the Board established under the Kenya Library Services Board Act;

“National Constitutional Conference” means the National Constitutional Conference referred to in section 27(1)(c);

“Non-Governmental Organization” mean a Non-Governmental Organization registered under the Non-Governmental Organizations Co-ordination Act, 1990;

“secretary” means the secretary appointed under section 11.

Object and purpose of constitutional review.

6 of 1998. s.5

2 of 2001. s.4

3. The object and purpose of the review of the Constitution is to secure provisions therein –
- (a) guaranteeing peace, national unity and integrity of the Republic of Kenya in order to safeguard the well-being of the people of Kenya;
 - (b) establishing a free and democratic system of Government that enshrines good governance, constitutionalism, the rule of law, human rights and gender equity;
 - (c) recognising and demarcating divisions of responsibility among the various state organs including the executive, the legislature and the judiciary so as to create checks and balances between them and to ensure accountability of the Government and its officers to the people of Kenya;
 - (d) promoting the peoples’ participation in the governance of the country through democratic, free and fair elections and the devolution and exercise of power;
 - (e) respecting ethnic and regional diversity and communal rights including the right of communities to organize and participate in cultural activities and the expression of their identities;
 - (f) ensuring the provision of basic needs of all Kenyans through the establishment of an equitable frame-work for economic growth and equitable access to national resources;
 - (g) promoting and facilitating regional and international co-operation to ensure economic development, peace and stability and to support democracy and human rights;
 - (h) strengthening national integration and unity;
 - (i) creating conditions conducive to a free exchange of ideas;
 - (j) ensuring the full participation of people in the management of public affairs; and
 - (k) enabling Kenyans to resolve national issues on the basis of consensus.

Organs of review.
6 of 1998. s.5
2 of 2001. s.5

- 4.(1) The organs through which the review process shall be conducted shall be -
- (a) the Commission;
 - (b) the Constituency Constitutional Forum;
 - (c) the National Constitutional Conference;
 - (d) the referendum; and
 - (e) the National Assembly.
- (2) The organs specified in subsection (1) (a), (b) and (c) shall not be dissolved except in accordance with section 32.
5. In the exercise of the powers or the performance of the functions conferred by this Act, the organs specified in section 4 (a), (b), (c) and (e) shall -
- (a) be accountable to the people of Kenya;
 - (b) ensure that the review process accommodates the diversity of the Kenyan people including socio-economic status, race, ethnicity, gender, religious faith, age, occupation, learning, persons with disabilities and the disadvantaged;
 - (c) ensure, particularly through the observance of the principles in the Third Schedule that the review process -
 - (i) provides the people of Kenya with an opportunity to actively, freely and meaningfully participate in generating and debating proposals to alter the Constitution;
 - (ii) is, subject to this Act, conducted in an open manner; and
 - (iii) is guided by respect for the universal principles of human rights, gender equity and democracy;
 - (d) ensure that the final outcome of the review process faithfully reflects the wishes of the people of Kenya.

PART II – ESTABLISHMENT AND COMPOSITION OF COMMISSION

Establishment and membership of the Commission.
6 of 1998. s.6
5 of 2000. s.5

6. (1) There is established a Commission to be known as the Constitution of Kenya Review Commission.
- (2) The Commission shall be a body corporate with perpetual succession and a common seal and shall, in its corporate name, be capable of -

2 of 2001 s.7

- (a) suing and being sued;
- (b) taking, purchasing or otherwise acquiring, holding, charging, or disposing of movable and immovable property; and
- (c) doing or performing all such other acts necessary for the proper performance of its functions under this Act which may lawfully be done or performed by a body corporate.

Cap. 446

- (3) The provisions of the State Corporations Act shall not apply to the Commission.
- (4) The Commission shall consist of
 - (a) the chairperson appointed from amongst the commissioners in accordance with section 9;
 - (b) twenty-seven commissioners nominated by the National Assembly and appointed by the President in accordance with section 7;
 - (c) the Attorney-General or his representative and the secretary who shall be ex officio commissioners without the right to vote.
- (5) In nominating persons for appointment as commissioners, the National Assembly shall have regard to -
 - (a) Kenya's ethnic, geographical, cultural, political, social and economic diversity; and
 - (b) the principle of gender equity.

Procedure for appointing commissioners.
6 of 1998. s.7
5 of 2000. s.6
2 of 2001. s.8

- 7.(1) The National Assembly shall, within seven days of the commencement of this Act, by advertisement in the Gazette and in at least three daily newspapers of national circulation, invite applications from persons qualified under this Act for nomination as commissioners.
- (2) An application under subsection (1) shall be forwarded to the National Assembly within fourteen days of the advertisement and may be made
 - (a) by any qualified person; or
 - (b) by any person, organization or group of persons proposing the nomination of any qualified person.

- (3) The National Assembly shall, within fourteen days of the expiry of the period prescribed in subsection (2), consider the applications received pursuant to that subsection and shall nominate twenty-seven persons for appointment as commissioners.
- (4) In considering the applications under this section, the National Assembly shall consult widely.
- (5) The National Assembly shall submit the list of nominees under subsection (3) to the Attorney-General for onward transmission to the President.
- (6) The Attorney-General shall forthwith submit the list of the nominees received under sub-section (5) to the President.
- (7) The President shall, upon receipt of the names forwarded under subsection (6), notify the appointment of the twenty-seven persons nominated under subsection (3) as commissioners.

Qualifications and disqualifications for appointment as commissioners.
 6 of 1998. s.8
 5 of 2000. s.7
 2 of 2001. s.9

- 8.(1)** Subject to subsection (3), of the twenty-seven commissioners referred to in section 6 -
 - (a) eleven shall have knowledge of and at least five years' experience in matters relating to law; and
 - (b) sixteen shall have knowledge of and experience in public affairs:

Provided that –

- (i) the persons qualified in terms of paragraph (b) shall comprise two persons from each province;
 - (ii) the total membership of the Commission shall not comprise more than four persons from any one province; and
 - (iii) at least six members of the Commission shall be women.
- (2)** Notwithstanding the provisions of subsection (1), no person shall be qualified for appointment as a commissioner –
 - (a) unless such person –
 - (i) is of sound mind; and
 - (ii) is of good character and integrity; or

- (b) if such person is an undischarged bankrupt.
- (3) All Commissioners once appointed shall cease active participation in political parties or any other organization, whether registered or otherwise, propagating partisan views with respect to the review process.
- | | |
|---|--|
| Chairperson and vice-chairpersons.
6 of 1998. s.9
5 of 2000. S.8
2 of 2001.s.10 | <p>9.(1) There shall be a chairperson of the Commission who shall be appointed by the President from amongst the commissioners appointed under section 8(1) (a).</p> <p>(2) There shall be three vice-chairpersons of the Commission, one of whom shall be a woman, elected by the commissioners from amongst their number.</p> <p>(3) The chairperson shall, within fifteen days of the appointment of the commissioners, convene the first meeting of the Commission at which the commissioners shall elect three vice-chairpersons of the Commission as specified in subsection (2), one of whom shall be designated as the first vice-chairperson.</p> |
| Establishment of Parliamentary Select Committee.
5 of 2000. S.9
2 of 2001. S.11 | <p>10. The National Assembly shall, in accordance with its Standing Orders, establish a Select Committee consisting of not less than five, and not more than twenty-seven members to assist it in the performance of its functions under the Act.</p> |
| The Secretariat.
5 of 2000 .s.10
2 of 2001. s.12 | <p>11.(1) There shall be a secretary to the Commission who shall be appointed by the President from two persons nominated by the National Assembly.</p> <p>(2) The secretary shall serve on a full-time basis.</p> <p>(3) Where a vacancy occurs in the office of the secretary the Commission shall within fourteen days of the occurrence, submit to the Parliamentary Select Committee three names of persons qualified under this Act to fill the vacancy.</p> <p>(4) The Select Committee shall within seven days of receipt of the names from the Commission, submit to the National Assembly names of two persons from whom the President shall appoint a secretary.</p> <p>(5) The President shall, within seven days of receipt of the names submitted under subsection (4) appoint a secretary.</p> |

- (6) There shall be at least three deputy secretaries appointed by the Commission to assist the secretary in administration, research and drafting and other duties or functions of the Commission.
- Staff of the Commission, experts and consultants.**
6 of 1998. s.10
5 of 2000. s.11
- 12.(1)** The staff of the Commission shall comprise –
- (a) such officers and other staff as the Commission may appoint to assist it in the discharge of its functions under this Act; and
 - (b) such public officers as may be necessary for the purposes of the Commission as may, upon the request of the Commission, be seconded thereto by the Public Service Commission, the Parliamentary Service Commission, the Judicial Service Commission or the Teachers' Service Commission, as the case may be and such public officers shall, during their secondment, be deemed to be officers of the Commission and subject to the direction and control of the Commission.
- (2) The Commission may employ experts or consultants to assist the Commission as appropriate and necessary under this Act.
- Oaths of office**
6 of 1998. s.11
- 13.(1)** A commissioner, the secretary and the deputy secretaries appointed and under this Act shall, according to their religious or other beliefs –affirmations.
- (a) make and subscribe to the oath prescribed in the First Schedule; or
 - (b) make the solemn affirmation in the form prescribed in the First Schedule before the Chief Justice, prior to embarking on the duties of the Commission.
- (2) Every oath and affirmation made and subscribed to under this section shall be deposited with the secretary and with the Chief Justice.
- Code of conduct.**
6 of 1998. s.12
5 of 2000. s.13
- 14.(1)** For the better discharge of the functions of the Commission and the Secretariat of the Commission under this Act, the code of conduct prescribed in the Second Schedule shall apply.
- (2) A person who breaches the provisions of the code of conduct shall -

- (a) in the case of a commissioner or the secretary, subject to the provisions of section 15(4), be disqualified from holding office as such; and
- (b) in the case of a member of staff of the Commission, be liable to such disciplinary action as the Commission may prescribe.

Tenure of office
of commissioners
and secretary.
5 of 2000. s.22
2 of 2001.s.14

- 15.**(1)The term of office of a commissioner (other than the *ex officio* commissioner under section 6(2) (c)) or the secretary shall be from the date of appointment under section 7 or 11 respectively and shall, unless the commissioner or the secretary resigns under subsection (2) or the office falls vacant earlier owing to any reason specified in subsection (4), terminate on the date of enactment of the Constitution as stipulated in section 33, subject to the provisions of that section as to the winding up of the financial and administrative affairs of the Commission.
- (2) A commissioner or the secretary may, at any time after appointment, resign, by notice in writing to the President through the chairperson of the Commission and the resignation shall take effect within seven days of the date of that notice.
- (3) The President shall notify every resignation in the Gazette within fifteen days thereof.
- (4) The office of a commissioner or the secretary shall fall vacant if the person -
- (a) dies; or
 - (b) resigns from office; or
 - (c) is adjudged bankrupt; or
 - (d) is convicted of an offence and sentenced to imprisonment for a term of six months or more without the option of a fine; or
 - (e) is in breach of the code of conduct prescribed under section 14; or
 - (f) without reasonable excuse, fails to attend three consecutive meetings of the Commission; or
 - (g) is by reason of physical or mental infirmity, unable to discharge his duties as a commissioner or as the secretary; or
 - (h) is for any other reason, unable or unwilling to act as a commissioner or as the secretary,

and in any case to which paragraphs (e), (f), (g) and (h) apply, the breach, failure, inability or unwillingness is noted by the Commission in its records and supported by a resolution of two-thirds majority of the members and the person is informed of the termination of the appointment in writing through the secretary, or where the affected person is the secretary, through the chairperson.

- (5) Where any vacancy occurs in the Commission, the Commission shall within fourteen days of the occurrence, submit to the Parliamentary Select Committee a list of three names of persons qualified under this Act to fill the vacancy.
- (6) The Select Committee shall, within seven days of the receipt of the names submitted under subsection (5), submit to the National Assembly names of two persons from whom the President shall appoint a Commissioner.
- (7) The President shall, within seven days of receipt of the names submitted under subsection (6) appoint a commissioner or commissioners holding the same qualifications and from the same province as the commissioner in respect of whom the vacancy has arisen.
- (8) No act of the Commission shall be called to question on the ground merely of the existence of any vacancy in, or defect in, the constitution of the Commission.

Disqualification
of commissioners
for election.
6 of 1998. s.14

16. The office of a commissioner shall be deemed to be an office for the purposes of subsection (1) (f) of section 35 of the Constitution.

PART III – FUNCTIONS, POWERS AND PRIVILEGES OF THE COMMISSION AND COMMISSIONERS

Functions of
the Commission.
6 of 1998. s.15
5 of 2000. s.26
2 of 2001. s.15

17. The functions of the Commission shall be-
 - (a) to conduct and facilitate civic education in order to stimulate public discussion and awareness of constitutional issues;
 - (b) to collect and collate the views of the people of Kenya on proposals to alter the Constitution and on the basis thereof, to draft a Bill to alter the Constitution for presentation to the National Assembly;

- (c) to carry out or cause to be carried out such studies, researches and evaluations concerning the Constitution and other constitutions and constitutional systems as, in the Commission's opinion, may inform the Commission and the people of Kenya on the state of the Constitution of Kenya; and
- (d) without prejudice to paragraphs (b) and (c), to ensure that in reviewing the Constitution, the people of Kenya -
- (i) examine and recommend the composition and functions of the organs of state including the executive, the legislature and the judiciary and their operations aiming to maximise their mutual checks and balances and secure their independence;
 - (ii) examine the various structures and systems of government including the federal and unitary systems and recommend an appropriate system for Kenya;
 - (iii) examine and recommend improvements to the existing constitutional commissions, institutions and offices and the establishment of additional ones to facilitate constitutional governance and the respect for human rights and gender equity in Kenya as an indispensable and integral part of the enabling environment for economic, social, religious, political and cultural development;
 - (iv) examine and recommend improvements to the electoral system of Kenya;
 - (v) without prejudice to subparagraph (i), examine and make recommendations on the judiciary generally and in particular, the establishment and jurisdiction of the courts, aiming at measures necessary to ensure the competence, accountability, efficiency, discipline and independence of the judiciary;
 - (vi) examine and review the place of local government in the constitutional organization of the Republic of Kenya and the degree of the devolution of powers to local authorities;
 - (vii) examine and review the place of property and land rights, including private, Government and Trust land in the constitutional frame-work and the law of

Powers of the
Commission.

- Kenya and recommend improvements that will secure the fullest enjoyment of land and other property rights;
- (viii) examine and review the management and use of public finances and recommend improvements thereto;
 - (ix) examine and review the right to citizenship and recommend improvements that will, in particular, ensure gender parity in the conferment of the right;
 - (x) examine and review the socio-cultural obstacles that promote various forms of discrimination and recommend improvements to secure equal rights for all;
 - (xi) examine and review the rights of the child and recommend mechanisms that will guarantee protection thereof;
 - (xii) examine and review succession to office and recommend a suitable system for the smooth and dignified transfer of power after an election or otherwise;
 - (xiii) examine and recommend on the treaty-making and treaty-implementation powers of the Republic and any other relevant matter to strengthen good governance and the observance of Kenya's obligations under international law;
 - (xiv) examine and make recommendations on the necessity of directive principles of state policy;
 - (xv) establish and uphold the principle of public accountability by holders of public or political offices;
 - (xvi) examine and make recommendations on any other matter which is connected with or incidental to the foregoing and achieves the overall objective of the constitutional review process.

18.(1)The Commission shall have all powers necessary for the execution of its functions under this Act, and, without prejudice to the generality of the foregoing, the Commission –

5 of 2000. s.28
2 of 2001.s.16

- (a) shall visit every constituency in Kenya to receive the views of the people on the Constitution;
- (b) shall, without let or hindrance, receive memoranda, hold public or private hearings throughout Kenya and in any other manner collect and collate the views and opinions of Kenyans, whether resident in or outside Kenya, and for that purpose the Commission may summon public meetings of the inhabitants of any area for the discussion of any matter relevant to the functions of the Commission;
- (c) may summon any public officer to appear in person before it or before a committee or to produce any document or thing or information that may be considered relevant to the functions of the Commission.
- (2) Any public officer who, without lawful cause, fails to appear before the Commission pursuant to any summons by the Commission under subsection (1) (c) commits an offence and shall be liable on conviction to a fine not exceeding ten thousand shillings, or to imprisonment for a term not exceeding three months, or to both.
- 19.** (1) The Commission may establish such committees of the Commission as it may deem necessary for the better carrying out of its functions under this Act.
- (2) For the purposes of subsection (1) a meeting of any committee established for purposes of collecting the views of the public during the review process shall be deemed to be a meeting of the Commission.
- 20.** The Commission shall, in the performance of its functions under this Act facilitate the establishment of Constituency Constitutional Forums for the debate, discussion, collection and collation of the views of the members of the public on proposals to alter the Constitution.
- 21.** (1) Subject to this section, the Commission shall regulate its own procedure and that of its committees.
- (2) Subject to subsection (3), the Commission shall hold such number of meetings in such places, at such times and in such

manner as the Commission shall consider necessary for the discharge of its functions under this Act.

- (3) All meetings of the Commission for the collection of the views of the public shall be held in public:

Provided that nothing in this section shall preclude the Commission from receiving evidence in private if circumstances so warrant.

- (4) The chairperson shall -

(a) preside over all meetings of the Commission, and in the absence of the chairperson, the first chairperson shall preside and in the absence of both the chairperson and the first vice chairperson any one of the other vice-chairpersons may preside as the Commission may determine;

(b) be the spokesperson for the Commission and in the absence of the chairperson, the first vice-chairperson shall be the spokesperson and in the absence of both the chairperson and the first vice-chairperson any of the other vice chairpersons may be the spokesperson as the Commission may determine;

(c) supervise and direct the work of the Commission:

Provided that in the absence of both the chairperson and all the vice-chairpersons, the commissioners present shall elect one of their number to perform the functions under this subsection during such absence.

- (5) The quorum of the Commission and of any of its committees shall be one half of the members.

- (6) All questions before the Commission or a committee thereof shall be determined by consensus, but in the absence of consensus, decisions of the Commission shall be determined by a simple majority of the members present and voting

- (7) The secretary shall be responsible for -

(a) the day to day administration of the affairs of the Commission;

(b) the co-ordination of the Commission's studies, research and evaluations;

(c) the recording of the proceedings; and

- Publication of Commission's records.
6 of 1998. s.20
2 of 2001.s.20
- (d) custody of all records and documents of the Commission.
- 22.(1)** Save as may be provided for in the Regulations, the Commission shall avail the record of the proceedings of every meeting of the Commission through-
- (a) the documentation centres established under section 23;
- (b) the libraries provided by the Kenya National Library Services Board throughout the country; and
- (c) through the print and the electronic media.
- (2) The Commission shall, for the purposes of subsection (1)(c), consult with the Kenya Broadcasting Corporation and other broadcasting stations licensed under the Kenya Communications Act, 1998 in order to secure suitable arrangements for the –
- (a) allocation of air-time and space for purposes of disseminating the report of the Commission through the electronic and print media; and
- (b) provision of a sign language inset or subtitles in all television programmes aired for purposes of paragraph (a), all newscasts, civic educational programmes and in all other programmes covering the constitutional review process.
- (3) Where a broadcasting station is consulted by the Commission under subsection (2), such station shall make suitable arrangements to air such programmes whose broadcast is specified by the Commission.
- Documentation centres.
6 of 1998. s.20
- 23.(1)** Notwithstanding the provisions of any other written law, the county council of every district shall facilitate the establishment by the Commission of a documentation centre in the district for the preservation and dissemination to the public of the records of the deliberations and proceedings of the Commission and such other information as the Commission may direct.
- (2) Any person may, during working hours, inspect at the documentation centre, any of the records preserved therein and may obtain copies thereof upon payment of such fee as the Commission may prescribe.

Civic Education. 24. The Commission shall, during the entire period of its work, facilitate and promote civic education in order to stimulate public discussions and awareness of constitutional issues.

2 of 2001. s.21

Privileges of Commissioners or and secretary during office and other immunities.

25.(1) A commissioner or the secretary shall not be liable to any civil action suit for or in respect of any matter or thing done or omitted to be done in good faith as a commissioner or as the secretary.

(2) No commissioner or secretary shall be liable to arrest under civil process while proceeding to, participating in, or returning from any meeting of the Commission or of any committee thereof.

(3) No person who appears before the Commission shall, whether such appearance is in pursuance of any summons by the Commission under this Act or not, be liable to any criminal or civil proceedings, or to any penalty or forfeiture whatsoever in respect of any evidence or information given to the Commission by such person.

PART IV – REPORT OF THE COMMISSION AND ACTION THEREON

Completion of work, report and action thereon.

6 of 1998. s.21

2 of 2001. s.22

26.(1) The Commission shall complete its work within a period of twenty-four months of the commencement of this Act.

(2) For purposes of subsection (1), the work of the commission shall consist of visiting all the constituencies in Kenya, compiling reports of the Constituency Constitutional Forums, the National Constitutional Conference, conducting and recording the decision of the referendum referred to in section 27(6), and on the basis thereof drafting a Bill for presentation to Parliament for enactment.

(3) Where the Commission considers this period inadequate, it may, at least twelve months after the commencement of its work, request an extension of the period by the National Assembly.

(4) Notwithstanding any extension of time under subsection the Commission may, where circumstances demand, recommend such minimum amendments to the Constitution or any other law as may be necessary towards fulfilment of any of the

National discussion of Commission's report.
2 of 2001. s.23

objects of the review process, which shall be considered by the National Assembly in accordance with its Standing Orders.

- (5) The National Assembly may, upon a request under subsection (3), by resolution, extend the period prescribed under the Act by such period as it may deem appropriate.
- (6) Where an extension of time is granted to the Commission under this section, the Commission shall proceed expeditiously with its work in accordance with the provisions of this Act.
- (7) The Commission shall, compile its report together with a summary of its recommendations and on the basis thereof, draft a Bill to alter the Constitution.

27.(1) The Commission shall -

- (a) upon compilation of its report and preparation of the draft bill referred to in section 26-
 - (i) publish the same for the information of the public in the manner specified in section 22, for a period of thirty days; and
 - (ii) ensure that the report and the draft Bill are made available to the persons or groups of persons conducting civic education;
- (b) upon the expiry of the period provided for in paragraph (a)(i), convene a National Constitutional Conference for discussion, debate, amendment and adoption of its report and draft Bill.

(2) The National Constitutional Conference shall consist of –

- (a) the commissioners who shall be *ex-officio* members without the right to vote;
- (b) all members of the National Assembly;
- (c) three representatives of each district, at least one of whom shall be a woman, and only one of whom may be a councillor all of who shall be elected by the respective county council in accordance with such rules as may be prescribed by the Commission;
- (d) one representative from each political party registered at the commencement of this Act, not being a member of Parliament or a councillor;

(e) such number of representatives of religious organizations, professional bodies, women's organizations, trade unions and non-governmental organizations registered at the commencement of this Act and of such other interest groups as the Commission may determine:

Provided that –

- (i) the members under paragraph (e) shall not exceed twenty-five per cent of the membership of the National Constitutional Conference under paragraphs (a), (b), (c) and (d); and
 - (ii) the Commission shall consult with and make regulations governing the distribution of representation among, the various categories of representatives set out in paragraph (e).
- (3) The chairperson of the Commission shall be the chairperson of the National Constitutional Conference.
- (4) The quorum of the National Conference shall be one half of the members.
- (5) All questions before the National Conference shall be determined by consensus, but in the absence of consensus, such decisions shall be determined by a simple majority of the members present and voting:

Provided that –

- (i) in the case of any question concerning a proposal for inclusion in the Constitution, the decision of the National Constitutional Conference shall be carried by at least two thirds of the members of the National Constitutional Conference present and voting; and
- (ii) if on taking a vote for the purpose of subsection 5(i), the proposal is not supported by a two thirds vote, but is not opposed by one third or more of all the members of the National Constitutional Conference present and voting, then, subject to such limitations and conditions as may be prescribed by the Commission in the Regulations, a further vote may be taken; and
- (iii) if on taking a further vote under paragraph (ii), any question on a proposal for inclusion in the Constitution is not determined, the National Constitutional Conference may, by a resolution supported by at least two-thirds of the

voting members present, determine that the question be submitted to the people for determination through a referendum

- (6) The Commission shall record the decision taken by the National Constitutional Conference on the report and the draft Bill pursuant to its powers under subsection (1) (c) and shall, submit the question or questions supported by a resolution under subsection 5 (iii) to the people for determination through a referendum.
- (7) A national referendum under subsection (6) shall be held within one month of the National Constitutional Conference.

Introduction of 28. (1) The Commission shall, on the basis of the Commission's Report to the

Assembly.
2 of 2001. s.24

- (1) The Commission shall, on the basis of the decision of the people at the referendum and the draft Bill as adopted by the National Constitutional Conference, National prepare the final report and draft Bill.
- (2) The Commission shall submit the final report and the draft Bill to the Attorney-General for presentation to the National Assembly.
- (3) The Attorney-General shall, within seven days of the receipt of the draft Bill, publish the same in the form of a Bill to alter the Constitution.
- (4) At the expiry of a further period of seven days of the publication of the Bill to alter the Constitution, the Attorney-General shall table the same together with the final report of the Commission before the National Assembly for enactment within seven days.

PART V – EXPENSES OF THE REVIEW PROCESS

Funds for expenses of the review process.
6 of 1998. s.23
2 of 2001. s.25

- (1) The expenses of the constitutional review process incurred by the Commission, the Constituency Constitutional Forums, the National Constitutional Conference and the referendum in accordance with this Act shall be charged on and issued out of the Consolidated Fund without further appropriation than this Act.
- (2) Without prejudice to subsection (1), there may be made to the Commission grants, gifts, donations or bequests towards the achievement of the objects of the review process specified in section 3:

Provided that no grant, gift, donation or bequest shall be made on any condition that the Commission perform any function or discharge any duty or obligation other than duties under this Act aimed at achieving the objects of the constitutional review process.

Constitution of
Kenya Review
Fund.
6 of 1998. s.23
2 of 2001. s.26

Cap.412

Remuneration
and allowances
of commissioners.
2 of 2001. s.27

Accounts and
Audit.
6 of 1998. s.23
Cap.412

- 30.(1)** There is established a Fund to be known as the Constitution of Kenya Review Fund which shall be administered, on behalf of the Commission, by the secretary.
- (2) There shall be paid into the Fund –
- (a) such monies as may be appropriated out of the Consolidated Fund for the constitutional review process pursuant to this Act; and
- (b) any grants, gifts, donations or bequests received under section 29(2).
- (3) There shall be paid out of the Fund all payments in respect of any expenses incurred in pursuance of the provisions of this Act.
- (4) The secretary shall, in administering the Fund, consult with the Permanent Secretary to the Treasury and, subject to provisions of the Exchequer and Audit Act, manage the Fund in such manner as promotes the object and purpose of the review process.
- (5) Upon the dissolution of the Commission under section 33, any assets standing to the credit of the Constitution of Kenya Review Fund shall, subject to any condition attached to a gift, donation or bequest, be credited to the Consolidated Fund.
- 31.** The Minister in charge of finance in consultation with the Parliamentary Select Committee, shall determine commissioners and the remuneration and allowances of the shall scrutinise and approve the budget of the Commission.
- 32.** The accounts of the Constitution of Kenya Review Fund shall be kept, audited and reported upon to the National Assembly in accordance with section 18 and 19 of the Exchequer and Audit Act.

PART VI - DISSOLUTION OF ORGANS OF REVIEW AND FINAL PROVISIONS

Dissolution of **33.(1)** Upon the enactment of the Bill to alter the

Commission
6 of 1998. s.24
2 of 2001. s.28

Constitution tabled before the National Assembly pursuant to section 28, the Commission shall stand dissolved and the terms of office of the Commissioners shall thereupon expire, save that the secretary and such number of staff as shall be necessary, shall remain in office for a period of three months to conclude the financial and administrative affairs of the Commission.

Regulations.
2 of 2001. s.29

34.(1) The Commission shall make Regulations generally for the better carrying out of its functions under this Act.

(2) Without prejudice to the generality of subsection (1), regulations under this section may -

(a) prescribe anything required by this Act to be prescribed;

(b) subject to this Act, prescribe the procedure for-

(i) electing the vice-chairpersons and filling any vacancies arising in respect thereof;

(ii) facilitating and promoting the provision of civic education;

(iii) the establishment of Constituency constitutional forums;

(iv) the Constitution and conduct of the National Constitutional Conference;

(v) resolution of any disputes arising in the course of the review process.

(c) prescribe the disciplinary procedures applicable to the staff of the Commission; or

(d) prescribe the procedure for the holding of a referendum under section 27:

Provided that regulations under this paragraph shall be made in consultation with the Electoral Commission of Kenya.

Act to bind the
Government.
2 of 2001. s.30

35. This Act shall bind the Government.

FIRST SCHEDULE (s.13)

6 of 1998.

5 of 2000.

OATH OFFICE OF A COMMISSIONER

I being appointed a commissioner under the Constitution of Kenya Review Commission Act do solemnly swear that I will faithfully and fully, impartially and to the best of my ability discharge the trust and perform the functions and exercise the powers devolving upon me by virtue of this appointment without fear, favour, bias, affection, ill-will or prejudice and to the end that in the exercise of the functions and powers as such commissioner I shall not be influenced by any political party, religious society or other organization or person which may have nominated me for appointment. So help me God.

.....
COMMISSIONER

.....
CHIEF JUSTICE

SOLEMN AFFIRMATION OF A COMMISSIONER

I being appointed a commissioner under the Constitution of Kenya Review Commission Act do solemnly declare and affirm that I will faithfully and fully, impartially and to the best of my ability discharge the trust and perform the functions and exercise the powers devolving upon me by virtue of this appointment without fear, favour, bias, affection, ill-will or prejudice and to the end that in the exercise of the functions and powers as such commissioner I shall not be influenced by any political party, religious society or other organization or person which may have nominated me for appointment.

.....
COMMISSIONER

.....
CHIEF JUSTICE

OATH OF OFFICE OF THE SECRETARY OR A DEPUTY SECRETARY

I being appointed the secretary/a deputy secretary under the Constitution of Kenya Review Commission Act do solemnly swear that I will faithfully and fully, impartially and to the best of my ability discharge the trust and perform the functions and exercise the powers devolving upon me by virtue of this appointment without fear, favour, bias, affection, ill-will or prejudice and to the end that in the exercise of the functions and powers as such secretary/deputy secretary I shall not be influenced by any political, religious or other interest, or by any person. So help me God.

.....
SECRETARY/DEPUTY SECRETARY

.....
CHIEF JUSTICE

SOLEMN AFFIRMATION OF THE SECRETARY AND A DEPUTY SECRETARY

I being appointed the secretary/a deputy secretary under the Constitution of Kenya Review Commission Act do solemnly and sincerely declare and affirm that I will faithfully and fully, impartially and to the best of my ability discharge the trust and perform the functions and exercise the powers devolving upon me by virtue of this appointment without fear, favour, bias, affection, ill-will or prejudice and to the end that in the exercise of the functions and powers as such secretary/deputy secretary I shall not be influenced by any political, religious or other interest, or by any person.

.....
SECRETARY/DEPUTY SECRETARY

.....
CHIEF JUSTICE

SECOND SCHEDULE

6 of 1998.

5 of 2000.

CODE OF CONDUCT FOR MEMBERS AND STAFF OF THE COMMISSION

Impartiality and Independence of Members

1. (1) Every member of the Commission shall serve impartially and independently and perform the functions of his office in good faith and without fear, favour or prejudice.
2. (1) No member of the Commission shall, during tenure of office, be eligible for appointment or nomination to any political office.
- (2) No member of the Commission may -
 - (a) by his or her membership, association, statement, conduct or in any other manner jeopardize the perceived independence of the member, or in any other manner prejudice the credibility, impartiality, independence or integrity of the Commission;
 - (b) make private use of or profit from any confidential information gained as a result of being a member of the Commission.

Disclosure of Conflicting Interests

3. If a member of the Commission is directly or indirectly interested in any contract, proposed contract or other matter before the Commission, such member shall disclose the fact and shall not take part in the consideration or discussion of, or vote on, any question with respect to the contract or other matter, or be counted in the quorum of the meeting during consideration of the matter.
4. This Code shall apply with necessary modifications to the staff of the Commission.

THIRD SCHEDULE

No.2 of 2001

PRINCIPLES FOR A DEMOCRATIC AND SECURE PROCESS FOR THE REVIEW OF THE CONSTITUTION

The Government of the Republic of Kenya, the organs of review of the constitution, political parties, non-governmental organizations, and all Kenyans shall –

- (i) recognise the importance of confidence building, engendering trust and developing a national consensus for the review process;
- (ii) agree to avoid violence or threats of violence or other acts of provocation during the review process;
- (iii) undertake not to deny or interfere with any one's right to hold or attend public meetings or assemblies, the right to personal liberty, and the freedoms of expression and conscience during the review process, save in accordance with the law;
- (iv) ensure that the police shall protect the safety of all persons who attend meetings or exercise their other rights from violence from whatever source;
- (v) ensure that the meetings of all organs of review are held in peace;
- (vi) respect the independence of the Commission and its members; and
- (viii) desist from any political or administrative action that will adversely affect the operation or success of the review process.

APPENDIX II

THE CONSTITUTION OF KENYA REVIEW (GENERAL) REGULATIONS, 2001

LEGAL NOTICE NO 121 OF 2001

IN EXERCISE of the powers conferred by section 33 of the Constitution of Kenya Review Act, the Constitution of Kenya Review Commission makes the following Regulations:-

PART 1 – PRELIMINARY

Citation 1. These Regulations may be cited as the Constitution of Kenya Review (General) Regulations, 2001

Interpretation 2. In these Regulations unless the context otherwise requires –

“committee” means the Steering Committee, a working committee, a panel or any committee of whatever nature established for purposes of these Regulations;

“documentation centre” means a documentation centre established pursuant to section 23 of the Act;

“meeting of the Commission” means and includes all meetings of the Commission or of its committees whether in ordinary, extra ordinary or special session and includes public hearings, expert consultations, panel discussions and workshops for which notice has been given;

“office of the Commission” means the office of chairperson the vice-chairpersons and the chairpersons of the committee of the Commission;

“secretariat” means the Secretary, the Deputy Secretaries and staff of the Secretariat;

“select committee” means the Parliamentary Select Committee established by the National Assembly in accordance with section 10 of the Act;

“staff of the Secretariat” means all persons appointed or seconded to the Secretariat of the Commission other than persons to whom regulation 7 applies;

“staff of the Commission” means all staff whether permanent or temporary, employed or engaged by the Commission to perform any function for which the Commission is established and includes staff to whom regulation 7 applies.

4.

PART II – THE SECRETARIAT

In the furtherance of the performance of his functions and duties under the Act, the Secretary shall –

- (a) supervise the day-to-day operations and functions of the Secretariat;
- (b) send timely notices of all meetings of the Commission and ensure that minutes of such meetings are accurately recorded;
- (c) ensure that Commissioners have access to the minutes of the Commission;
- (d) facilitate the deposit of such records of the Commission as are required to be deposited with documentation centres;
- (e) ensure that the decisions of the Commission are followed up and implemented;
- (f) provide adequate services for all committees of the Commission;
- (g) keep custody of all records and property of the Commission;
- (h) perform such other functions as the Commission may assign to him,

The Deputy

Secretary 5.

- (1) The Deputy Secretaries shall be recruited by the Commission from among persons with knowledge and expertise in fields relevant to the work of the Commission
- (2) The mode of recruitment of the Deputy Secretaries shall be through open advertisement and competitive interviews.
- (3) The Deputy Secretaries shall assist the Secretary in the day-to-day performance of his functions under the Act and these Regulations.
- (4) Notwithstanding the generality of sub-regulation (3) the Secretary may assign a Deputy Secretary to each of the committees of the Commission but such assignment shall not in any way prevent the Secretary from himself performing the functions that are the subject of such assignment.

The staff of the

Secretariat 6.

- (1) The Commission may recruit such number of staff, as it shall by resolution determine.
- (2) Positions on the staff of the Secretariat shall be advertised in the press and recruitment shall be by way of competitive interviews.

- (3) Nothing in sub-regulation (2) shall prevent the Commission from recruiting any member of the staff of the Secretariat through secondment from Government departments or other public agencies.
- (4) All staff of the Secretariat shall be subject to the general direction and supervision of the Commission.

Recruitment of temporary staff.

7. (1)

The Secretary may, on the instructions of the Commission, recruit such number of temporary staff as may be required for the effective performance of specific functions of the Commission.

- (2) Except as the Commission may otherwise determine, staff recruited on a temporary basis shall not be retained in the service of the Commission for a continuous period exceeding three months and no such staff shall be so retained for a cumulative period exceeding six months.

Welfare of staff

8. (1)

Under the general direction of the Commission the Secretary shall take all necessary measures to ensure that the welfare of the staff of the Secretariat and other staff of the Commission is taken care of.

- (2) Notwithstanding the generality of sub-regulation (1) the Secretary shall ensure that –

- (a) adequate medical cover for staff is arranged; and
(b) staff on Commission business out of station are properly insured.

Discipline of staff

9. (1)

Disciplinary action shall be taken against a member of staff of the Commission who fails to adhere to lawful instructions issued by the Commission or violates the provisions of the Act or these Regulations or otherwise compromises the functions or the integrity of the Commission.

- (2) The Commission shall by resolution, establish disciplinary procedures governing the conduct of all staff of the Commission whether or not such staff are seconded to the Commission from other organizations.

PART III – THE STATUS OF COMMISSIONERS

Remuneration of Commissioners

10. (1)

The Commissioners shall receive such remuneration and allowances, as maybe determined under the Act.

- (2) Where calculated in cash such remuneration and allowances shall be paid monthly in arrears.
- (3) The Commission shall arrange for full medical cover and adequate insurance for all Commissioners.
- Security of Commissioners**
11. (1) All Commissioners shall, throughout their tenure of office be provided with adequate security.(2) The Commission shall by resolution determine the nature and extent of the security to be provided under this regulation.
- Removal of a Commissioner or Secretary**
12. (1) Where the Commission has reason to believe that a Commissioner or the Secretary is in breach of section 15 (4) (e), (f), (g) and (h) of the Act, any Commissioner or group of Commissioners with information to that effect may –
- (a) where the allegation relates to paragraph (e) thereof, prepare a detailed statement specifying the various acts constituting the alleged breach of the Code of Conduct by the Commissioner or the Secretary; or
 - (b) where the allegation relates to paragraph (f) thereof, require the Secretary to produce the record of attendance at meetings of the Commission not being meetings of the committees of the Commission by such Commissioner; or
 - (c) where the allegation relates to paragraph (g) thereof obtain such certified copies of the medical records of the Commissioner or Secretary as indicate that he is unable to discharge his duties by reason of physical or mental infirmity; or
 - (d) where the allegation relates to paragraph (h) thereof, prepare a brief that indicates unequivocally, that the Commissioner or the Secretary is unwilling or unable to act as a Commissioner or the Secretary.
- (2) Any statement, record, certificate or brief prepared in support of any allegation made under sub-regulation (1) shall be –
- (a) furnished in advance to the Commissioner or the Secretary by the Chairperson at least seven days

- before the Commission meeting at which the matter is to be tabled;
- (b) presented before a meeting of the Commission convened specifically for that purpose, and if after a full and exhaustive deliberation during which the Commissioner in question or the Secretary, as the case may be, shall be given an opportunity of being heard, the Commission resolves by a two-thirds majority that the tenure of office of the Commissioner in question or the Secretary shall be determined, the President shall be informed accordingly.

Replacement of Commissioners or Secretary

13. (1) Whenever a vacancy occurs in the office of Commissioner or Secretary, the Commission shall advertise such vacancy in the press requiring any person qualified to be a Commissioner or Secretary under the Act to submit an application within seven days of the occurrence of such vacancy.
- (2) Applications received in accordance with the sub-regulation (1) shall be considered by a full meeting of the Commission convened specifically for that purpose and a decision shall be taken thereon in accordance with the provisions of section 15 of the Act.

PART IV – THE COMMITTEES OF THE COMMISSION

Committees of the Commission

14. (1) The Commission shall exercise its functions and the duties through advisory committees as follows –
- (a) the Steering Committee;
- (b) Working Committees;
- (c) Panels;
- (2) The Secretary shall be the Secretary to all committees of the Commission

Membership of committees of the Commission

15. The Steering Committee shall consist of the chairperson of the Commission, the Vice chairpersons of the Commission, the chairperson of committees of the Commission and two other Commissioners elected by the Commission in ordinary session.
- (2) Subject to sub-regulation (1) the committees of the Commission shall comprise –
- (a) the chairperson of the Commission and the vice chairpersons of the Commission, as ex officio members; and
- (b) at least five Commissioners elected by the Commission in ordinary session.

Composition and functions of committees	16	The Commission shall by resolution determine the number, composition, organization and functions of committees established in accordance with regulation 15.
Meetings of committees of the Commission	17	<p>(1) Except as the Commission may otherwise determine, committees of the Commission shall –</p> <ul style="list-style-type: none"> (a) be convened by the Secretary on the instructions of the chairperson; (b) meet as often as may be necessary to discharge their functions under these Regulations; (c) ensure that proper records of their proceedings are prepared and lodged with the Secretariat; and (d) submit any decision made in the course of their deliberations to the Commission for approval. <p>(2) The quorum for the transaction of the business of any committee of the Commission shall be one half of its members.</p>

PART V – THE PROCEDURE AND POWERS OF THE COMMISSION

Decisions of the Commission	18	The decisions of the Commission shall determine by consensus, but in the absence of consensus, such decisions shall be determined by a simple majority of the members of the Commission present and voting.
Election to offices of the Commission	19	<p>(1) The vice-chairpersons of the Commission shall be elected at a meeting specifically convened for that purpose from among members of the Commission but nothing in this regulation shall prevent the Commission from transacting any other business at such meeting.</p> <p>(2) Elections to all offices of the Commission other than those specified under sub-regulation (1) shall be conducted at an ordinary meeting of the Commission.</p>
Meetings of the Commission	20.	<p>(1) Except as it may otherwise decide, the Commission shall meet –</p> <ul style="list-style-type: none"> (a) in ordinary session at least twice in every month to transact its business; (b) in extra-ordinary session at any time upon the

		<p>requisition in writing by the chairperson or at least one half of its members, to transact the business specified by the chairperson or the members requisitioning such a meeting; and</p> <ul style="list-style-type: none"> (c) as often as may be necessary to transact any business for which the Commission has been established.
	(2)	<p>Except as may otherwise be provided in these Regulations, all meetings of the Commission shall be convened by the Secretary on the instructions of the chairperson.</p>
	(3)	<p>The quorum for the transaction of the business of the Commission shall be one-half of its members.</p>
The conduct of business of the Commission	21.	<p>(1) All meetings of the Commission other than those to which regulation 20(1) (a) and (b) apply shall be –</p> <ul style="list-style-type: none"> (a) held in public at a venue or venues determined by the Commission; (b) advertised as widely as possible in the print and electronic media; (c) conducted in such manner and in such language or languages as the participants find acceptable; and (d) deemed to be properly constituted if presided over or convened by a Commissioner <p>Provided that upon the written request of any person appearing before it the Commission shall, if circumstances so warrant, meet in private for the whole or part of the meeting question.</p> <ul style="list-style-type: none"> (2) The Commission may, for the better conduct of meetings held in public or private, divide itself into two or more panels and shall, at its discretion, determine the programme and itinerary of any such panels. (3) The Commission may, in addition to such other meetings as it may conduct, hold such hearings and expert consultations as it may, in the course of its work consider necessary.
Additional means of information gathering	22	<p>(1) The provisions of regulation 21 notwithstanding the Commission shall solicit views and obtain such information or data as it may require through such methods and instruments not requiring the convening of formal meetings or hearings as it may determine.</p>

- Engagement of experts and consultants**
- 23 (1) For the more effective fulfillment of the objectives and purposes for which it is established, the Commission may authorize the Secretary to engage such number of experts and consultants as it may require.
- (2) Experts and consultants engaged in accordance with this regulation shall –
- (a) not by reason of such engagement become members of the Secretariat;
 - (b) be engaged in their individual capacities and in recognition of their personal expertise in specific areas; and
 - (c) be engaged on such terms and conditions as the Commission may determine.
- Issuance of summons**
- 24 (1) The Commission may issue summons requiring any public officer to appear before it and testify in respect of any matter to which that person is privy.
- (2) All summons issued by the Commission shall –
- (a) be in the name of the Secretary;
 - (b) be transmitted in such form as the Commission may by resolution determine;
 - (c) contain a notice of the penal consequences attendant upon non-compliance therewith.
- Analysis of information and data,**
- 25 All information and other data whether oral or documentary, obtained by or surrendered to the Commission shall be deposited with the Secretariat and upon receipt of such information and data, the Secretariat shall forthwith cause them to be compiled and analyzed and the results of such analysis transmitted to the Commission for consideration.
- Establishment of documentation centres**
- 26 (1) The Commission shall, in consultation with county councils establish documentation centres at all district headquarters in the country.
- (2) The documentation centres shall be managed in such a manner and by such staff not being members of the staff of the Secretariat as the Commission may, in consultation with the county council assign.
- (3) The Commission shall pay such allowances to staff

assigned to documentation centres as it may determine.

- (4) All documents and materials deposited at documentation centres shall be open for perusal by the public but such documents and materials shall remain the property of the Commission.

Establishment of

constituency fora

27. (1) The Commission shall, in consultation with elected leaders and active civil society groups facilitate the establishment of a forum or several fora for the articulation of views at constituency level throughout the country.
- (2) Subject to such guidelines as the Commission may issue, constituency fora shall be managed by persons freely chosen by the stakeholders at that level and the Commission shall not impose any particular pattern of organization upon such fora.
- (3) Views expressed through constituency fora shall be transmitted to the Commission in any form of language
- (4) Nothing in this regulation shall prevent any person or groups of persons from transmitting their views to the Commission otherwise than through a constituency forum.

**The conduct
of civic education
activities**

28. (1) The Commission shall facilitate the institutionalization and active articulation of civic education activities specifically directed at the fulfillment of the objects and purposes for which the Commission is established, in all constituencies.
- (2) Notwithstanding the generality of sub-regulation (1) the Commission shall –
- (a) harmonize the content of the curricula used by civic educators in furtherance of civic education;
- (b) provide such facilitation as the process of civic education may require.

**Convening of the
National
Constitutional
Conference**

29. (1) The Commission shall, in compliance with section 27(1) of the Act, convene a National Constitutional Conference to deliberate on the report and draft bill prepared and discussed in accordance with that subsection.
- (2) The National Constitutional Conference shall meet a such venue in Kenya as the Commission shall determine.

PART VI – THE FINANCES OF THE COMMISSION

- The Constitution
of Kenya Review
Fund 30 (1) All funds, monies, or other finances appropriated to or otherwise intended for the use of the Commission shall be held in the Constitution of Kenya Review Fund established under the Act.
- (2) The Fund shall not be managed, administered, or disbursed for any purpose or purposes except in accordance with the Act and these Regulations.
- Accounts of the
Fund 31. (1) The Fund shall be held in two principal bank accounts as follows –
 (a) a Public Fund Account to be opened in such bank as the Commission may, with the approval of the Treasury appoint;
 (b) a Private Fund Account to be opened in such bank as the Commission may appoint:
(2) Notwithstanding the generality of sub-regulation (1), before establishing any bank account, the Commission shall record a formal resolution authorising the opening of such account.
(3) There shall be deposited into the Public Fund Account such monies as have been appropriated out of the Consolidated Fund.
(4) There shall be deposited into the Private Fund Account all monies received by the Commission in the form of grants, gifts, donations and bequests other than those specifically required to be deposited into the Public Fund Account.
- Interest accruing into
the Accounts 32. Any interest earned from any of the Fund Accounts shall unless otherwise specified by the contributor to the Account, be rolled over into the principal sum held in the relevant Fund Account.
- Auditing of
the Fund 33. In addition to the requirements of the Act regarding the procedure for the audit of the Fund, the Commission may, at any time and shall, if so requested by the Treasury or any other person or agency which may have made a contribution to any of the accounts of the Fund, order an examination or independent enquiry into the accounts of the Fund.
- Rules of the
management 34. The rules governing the management, administration and disbursement of the Fund shall be as set out in the Schedule.
- Code of
conduct 35. All staff of the Commission shall be bound by the Code of Conduct set out in the Second Schedule to the Act.

PART VII – MISCELLANEOUS

SCHEDULE RULES FOR THE MANAGEMENT OF THE FUND

The fund shall be managed and administered in accordance with the following rules –

1. The Secretary shall be responsible for the day-to-day management of the Fund and under the supervision of the Commission shall ensure that –
 - (a) a proper income and expenditure account is prepared and presented to the Commission at intervals of every three months.
 - (b) books of account and all relevant documents are available for inspection at the offices of the Commission by any Commissioner or other parties entitled to inspect them; and
 - (c) the provisions of rule 6 are complied with.
2. The Commission shall prepare and approve a comprehensive estimate of its expenditure on an annual basis and such estimate shall specify –
 - (a) the line items of expenditure which the Commission expects to incur during that year;
 - (b) the specific Fund Account or Accounts out of which each line item is to be funded;
 - (c) the source or sources from which the monies drawn from a Fund Account supporting that line item are derived; and
 - (d) the projected cash flow for that year.
3. All expenditure of the Commission other than that required to be met from any particular Fund Account shall be charged to the Public Fund Account.
4. The signatories to all Fund Accounts shall be the Chairperson, the secretary, the vice-chairpersons and one commissioner nominated by the Commission.
5. all withdrawals of monies from the Fund Account shall carry the signature of the Secretary and that of any two of the signatories designated in rule 4.
6. subject to the provisions of rules 4 and 5, the following procedure shall be followed in respect of any expenditure to be incurred out of any of the Fund Accounts -

- (a) only the Secretary shall have power to commit or incur expenditure out of any Fund Account;
 - (b) payments shall be made by way of vouchers prepared by a member of staff of the Secretariat other than the Secretary or a Deputy Secretary and certified by the Secretary, or a Deputy Secretary designated specifically for that purpose;
 - (c) no purchase orders shall be committed or issued without prior confirmation of funding in respect of that particular expenditure;
 - (d) all cash books shall be written up and balanced daily;
 - (e) bank reconciliation shall be prepared and received monthly; and
 - (f) any impress issued to any Commissioner or member of staff of the Secretariat shall be surrendered fully before any subsequent imprest is issued to the same imprest holder.
7. All procurements to be made by or on behalf of the Commission shall be made in accordance with the provisions of the Exchequer and Audit (Public Procurement) Regulations, 2001, made pursuant to section 5A of the Exchequer and Audit Act (Cap. 412)

Dated the 23rd July, 2001.

Y. P. GHAI,
Chairman, Constitutional Review Commission of Kenya

APPENDIX IIIA
THE CONSTITUTION OF KENYA REVIEW
(CONSTITUTION OF NATIONAL CONSTITUTIONAL
CONFERENCE) REGULATIONS, 2002

LEGAL NOTICE NO

THE CONSTITUTION OF KENYA REVIEW ACT
(Cap. 3A)

IN EXERCISE of the powers conferred by sections 27 and 34 of the Constitution of Kenya Review Act, the Constitution of Kenya Review Commission makes the following Regulations—

THE CONSTITUTION OF KENYA REVIEW (CONSTITUTION OF NATIONAL CONSTITUTIONAL CONFERENCE) REGULATIONS, 2002

- | | | |
|---|----|--|
| Citation | 1. | These Regulations may be cited as the Constitution of Kenya Review (Constitution of National Constitutional Conference) Regulations, 2002. |
| Convening of the Constitutional Conference | 2. | The Commission shall by notice in the Gazette and in at National least three daily newspapers of national circulation and by such other means as the Commission may determine, convene the National Constitutional Conference on the date or dates and at the venue or venues to be specified in the notice. |
| District representatives. | 3. | The district representatives to the National Constitutional Conference provided for under subsection 2 (c) of section 27 of the Act shall be elected in accordance with the Constitution of Kenya Review (District Representatives Elections) Rules set out in the First Schedule hereto. |
| Political parties the chairperson of the representatives. | 4. | The Commission shall by letter under the hand of Commission, addressed to the person registered with the Registrar-General as the Secretary-General of each political party provided for under subsection 2 (d) of section 27 of the Act, require each political party to submit within the time stated in the letter, the name of its representative to the National Constitutional Conference. |

- Civil society bodies
5. The representatives of religious organizations, professional women's organizations, trade unions, non-governmental representatives organizations and other interest groups determined by the Commission as provided for under subsection 2 (e) of section 27 of the Act shall be appointed in accordance with the Constitution of Kenya Review (Nomination of Civil Society and Other Interest Groups Representatives) Rules set out in the Second Schedule.

FIRST SCHEDULE

(regulation 3)

THE CONSTITUTION OF KENYA REVIEW (DISTRICT REPRESENTATIVES ELECTIONS) RULES, 2002

PART I – PRELIMINARY

- Citation. 1. These Rules may be cited as the Constitution of Kenya Review (District Representatives Elections) Rules, 2002.
- Interpretation. 2. In these Rules, unless the context otherwise requires-
- “candidate”, in respect of the elections, means a person seeking nomination or duly nominated as a candidate for election thereat;
- “close of nominations” means four o’clock in the afternoon of the last nomination day;
- Cap 265
- “councillor” means an elected or nominated councillor of any council, established under the Local Government Act, within the district;
- “county council” includes the Mombasa Municipal Council and the Nairobi City Council;
- “district” means one of the geographical areas specified in Form 1 in the Appendix;
- “District Co-ordinator” means a person duly appointed by the Commission to co-ordinate the affairs of the Commission in a district;
- “election” means an election in accordance with the provisions of these Regulations in a district for the purpose of electing district representatives to the National Constitutional Conference pursuant to section 27 of the Act;

“elector” means a councillor of the county council of the district in which an election is held;

“Form” means a form, which is substantially the same as the appropriately numbered form in the Appendix;

“nomination days” in respect of the election, means the days fixed by a notice under rule 3 as the days for the nomination of candidates for the election;

“nomination paper” means a nomination paper delivered to a returning officer by a person wishing to stand as a candidate at the election;

“returning officer” means a person appointed as such under rule 4;

“subscriber”, in relation to a nomination paper, means a proposer, seconder and any supporter whose name appears on such paper;

PART II - NOTIFICATION OF ELECTIONS AND APPOINTMENT OF OFFICERS

Notification of
the Appendix
election

3. The Commission shall issue a notice in Form 2 in the Gazette and in at least two newspapers of national circulation and at least two radio broadcasting stations with national listenership or by such other means as the Commission may determine, stating that elections for district representatives to the National Constitutional Conference are to be held pursuant to the provisions of section 27 (2) (c) of the Act, and specifying –
 - (a) that three persons, one of whom must be a woman and only one of whom may be a councillor are to be elected to represent each district;
 - (b) the dates, times and venues of the elections, and
 - (c) the dates on and the times and venues at which nomination papers are to be delivered to the returning officer.

Returning
officers.

4. (1) The Commission shall appoint as the returning officer for each district, the District Co-ordinator for that district, or such other person as it may determine.
 - (2) Every appointment under this rule shall be published in the Gazette and in such other manner as the Commission may deem necessary in order to bring it to the attention of persons who may be affected thereby.

PART III-NOMINATION OF CANDIDATES FOR ELECTIONS

Qualification unless

of candidates. 5. No person shall be eligible as a candidate at an election such person –

- (a) is a citizen of Kenya ordinarily resident in one of the constituencies in the district he or she seeks to represent;
- (b) is a person of integrity and good character;
- (c) has attained the age of eighteen years;
- (d) is able to speak or otherwise communicate in English, Kiswahili or in sign language, well enough to take an active part in the proceedings of the National Constitutional Conference; and
- (e) has been nominated in accordance with these Rules;

Nomination of

candidates. 6. (1) For the purposes of nomination for candidature at the election, every candidate shall –

- (a) be proposed or seconded by an elector in the district;
 - (b) be supported by not less than five and not more than ten persons, who are registered as voters in elections to the National Assembly and drawn from the constituencies into which the district is divided other than the proposer, seconder or elector;
 - (c) deliver or cause to be delivered to the returning officer for the district, between the hours of eight o'clock in the morning and four o'clock in the afternoon on the nomination days for the election, of a nomination paper in Form 3.
- (2) There shall be delivered to the returning officer with a nomination paper a declaration, in Form 4, by the candidate to the effect that he or she consents to his or her nomination.
- (3) The subscribers to a nomination paper shall all be persons who are Kenyan citizens ordinarily resident in one of the constituencies in the district in which the election it to be held.
- (4) If a person stands nominated as a candidate for election in more than one district, all such nominations of that person shall be declared void and he or she shall not again be nominated as a candidate.

**Nomination
papers.**

7. (1) A nomination paper shall—

- (a) contain such description of the candidate as is, in the opinion of the returning officer, sufficient to identify the candidate;
 - (b) show the place of residence and the national identity card number of each of the subscribers thereto;
 - (c) contain a declaration by the subscriber that he or she has not subscribed to the nomination of any other candidate.
- (2) No person shall be a subscriber to more than one nomination paper in respect of the same election, and if any person subscribes to more than one such paper his or her subscription shall be inoperative in respect of all such papers:

Provided that where a person has subscribed to more than one nomination paper such subscription shall not prevent a candidate from being supported by another subscriber.

- (3) A returning officer shall, on request made at such place and during such times as are notified under rule 3, supply to any person a form of nomination paper, and shall, at the request of any person, prepare a nomination paper for signature, but it shall not be necessary for a nomination paper to be on a form so supplied so long as it otherwise complies with the requirements of these Rules.

Attendance at
delivery of
nomination
papers.

8. (1) Except for the purpose of assisting the returning officer, and at his request, no person shall be entitled to attend the proceedings taking place during the time fixed for the delivery of nomination papers unless he is a candidate or the, proposer or seconder of a candidate:

Provided that only two such persons shall be entitled so to attend at any one time in respect of any one candidate, whether one of those two is the candidate himself or not.

- (2) A person entitled to attend proceedings under this rule shall also be entitled to inspect, and to object to the validity of, any nomination paper delivered in his presence.

Validity of
declaration

9. (1) Where a nomination paper, together with the

nomination
returning
papers.

referred to in sub-rule (2) of rule 6, has been delivered to the officer, the nomination paper shall be deemed to be valid, and the candidate named therein to stand validly nominated for the election unless and until the returning officer decides otherwise or until proof is given, to the satisfaction of the returning officer, of the death of the candidate, or the candidate withdraws his candidature.

- (2) A returning officer shall be entitled to hold a nomination paper invalid on any of the following grounds, but not otherwise, that is to say:
- (a) that the particulars of the candidate or subscribers contained in the paper are not as required by these Rules;
 - (b) that the paper is not subscribed as required by these Rules;
 - (c) that the candidate is not qualified in accordance with these Rules from being nominated or from being elected as a district representative;
 - (d) that the proposer or seconder, or so many of the supporters as would reduce the number of qualified supporters to less than five, are not qualified to be subscribers.
- (3) A returning officer shall give his decision on an objection to a nomination paper as soon as practicable after such objection is made.
- (4) Where a returning officer decides that a nomination paper is invalid he shall record that decision and the reasons therefor on the paper and append his signature thereto.

Withdrawal of
nomination
candidates.

10.

At any time before the election, a candidate whose paper has been delivered to the returning officer may, by notice in writing signed by him or her and delivered to the returning officer, withdraw his or her candidature.

Procedure after
close of
nomination

11.

(1) If, after the close of nominations for the elections, the nominated candidates equal the number and distribution of district representatives to be elected, and at least one of the nominated candidates is a woman, the Commission shall declare those candidates to be elected and shall publish a certificate in Form 5 giving the result and countermanding the holding of the election.

- (2) If, after the close of nominations for an election, no candidate is nominated, or the number of candidates nominated is less than the number of district representatives to be elected, or where none of the nominated candidates is a woman, the Commission shall publish a notice in the Gazette to that effect and invite new nominations within such time as it shall specify.
- (3) If, after the close of nomination for an election, the number of persons standing validly nominated exceeds the number of district representatives to be elected, the returning officer shall prepare a notice in Form 6 stating:
- (a) the number of candidates to be elected;
 - (b) the names of the candidates in alphabetical order of surnames, or, if there are two or more candidates with the same surname, of their names, their addresses and occupations as given in their nomination papers;
 - (c) the names of the subscribers to the nomination papers;
 - (d) the location, division, and constituency in which each candidate resides;
 - (e) the category or categories under which the candidate is vying to be elected; and
- shall deliver to the offices of the county council addressed to each councillor a copy of such notice.
- (4) The notice referred to in subrule 3 shall be delivered to the clerk of the county council not less than three clear days before the election day.

PART IV-PROVISIONS RELATING TO ELECTIONS

Election procedure.

12. (1) Every election shall be held at the place, whose name shall be published in the Gazette, where the county council ordinarily meets to transact its business.
- (2) Every election shall be by secret ballot wherein the votes of the electors shall consist of ballot papers, and shall be held in accordance with the provisions of these Rules.
- (3) No person shall vote in any election other than that in respect of the district in which he or she is an elector.

- (4) The chairperson of a county council or, if he or she is a candidate, the vice-chairperson of the county council in each district shall be the chairperson for the purposes of the election.
- (5) Where the chairperson and the vice-chairperson of the county council are candidates, the council shall elect one of their number who is not a candidate as the chairperson.
- (6) The Chairperson shall liaise with the returning officer for the proper conduct of the election.
- (7) The returning officer shall have general oversight of the election and shall at the request of the chairperson or any other elector, or may of his or her own motion, tender advice regarding the conduct of the election.
- Admission to election venue.**
13. (1) The returning officer shall exclude from the election venue all other persons except--
- (a) the candidates;
 - (b) Commission staff on duty;
 - (c) persons necessarily assisting electors with disabilities with the consent of such electors; and
 - (d) observers approved or accredited by the Commission.
- Postponement of election.**
14. (1) The returning officer may postpone or adjourn the proceedings at the election venue where they are interrupted, or are in his opinion likely to be interrupted, by riot, open violence or other cause.
- (2) Any election postponed or adjourned under subrule (1) shall be held within seven days of the postponement or adjournment.
- Application of Cap. 66.**
15. (1) The Election Offences Act shall, with any necessary, modifications apply to the election as it applies to the National Assembly and Presidential elections.
- (2) A person who commits an offence under subrule (1) is liable to fine not exceeding six thousand shillings or to imprisonment for term not exceeding six months or both.
- Sealing of ballot boxes.**
16. (1) Immediately before the commencement of voting, the Presiding officer shall show the ballot box or ballot boxes to such persons as are lawfully present in the election venue, and shall

- allow such of the candidates as may wish to do so to ascertain that the box or boxes are empty and shall thereupon close the box or boxes.
- (2) After a ballot box is closed under the provisions of subrule (1) it shall be placed ready for the receipt of ballot papers and throughout the voting shall be kept in the view of the returning officer.
- Election procedure.**
17. (1) The persons validly nominated under rule 11, and whose names appear in the notice issued pursuant to that rule and no others, shall have their names inserted in the ballot papers for the election.
- (2) Every ballot paper for use at an election shall be in Form 7.
- (3) Each elector shall be issued with –
- (a) a category “A” ballot paper for the women’s seat having the names of all validly nominated female candidates; and
- (b) a category “B” ballot paper for the open seats having the names of male candidates as well as the names of all the female candidates listed on the category ‘A’ ballot paper and shall be required to cast a vote in respect of each category.
- (4) For the avoidance of doubt , the election of category “A” candidates shall precede that of category “B” candidates and before the commencement of the category ‘B’ election, the returning officer shall announce to the electors the name of the person elected under category “A” and shall delete from all the category “B” ballot papers the name of that candidate.
- Hours of election.**
18. Unless the Commission otherwise directs, the election shall be held between eleven O’clock and four O’clock on the day of the election, which day may fall on any day of the week but preferably on a Monday, Tuesday, Wednesday or Thursday.
- Count of votes.**
19. At the counting of votes at the election, any ballot paper -
- (a) which does not bear the official mark; or

- (b) which is unmarked or which is so marked as to be uncertain for whom the vote has been cast,
shall be void and shall not be counted.

- Recount. 20. (1) A candidate, if present when the counting or recount of votes is completed, may require the returning officer to have the votes recounted or again recounted, or the returning officer, on his or her own initiative, may have the votes recounted or again recounted.
(2) No steps shall be taken on the completion of a count or recount of votes until the candidates present at such completion have been given a reasonable opportunity to exercise the rights given by this rule.

PART V – COMPLETION OF ELECTIONS

- Result of election 21. (1) When the count, including any recount, of votes at an election is completed the returning officer shall announce the result to the persons then present.
(2) Where an election results in a tie for any seat or seats a fresh round of voting shall be held in respect of the seat or seats.
(3) If there is a tie after the round of voting under subrule (2), the presiding officer shall have and exercise a casting vote.
(4) The returning officer shall declare a person to be duly elected as a district representative if such person –
(a) being a candidate for the women's seat, obtains the highest number of votes cast for that seat;
(b) being a candidate for the open seats and not being a councillor obtains the highest or second highest number of votes cast for the open seats;
(c) being a candidate for the open seats and being a councillor-
(i) obtains the highest number of votes cast for the open seats if the person elected for the women's seat under paragraph (a) is not a councillor;
(ii) obtains the second highest number of votes cast for the open seats and both the person elected for the

- women's seat under paragraph (a) and the person who obtains the highest number of votes for the open seats are not councillors;
- (d) being a candidate for the open seats and not being a councillor, becomes the candidate with the highest or the second highest number of votes cast for the open seats on account of the operation of paragraph (c).
- (5) The returning officer shall forward the results to the Commission for gazettlement of the persons elected as district representatives to the National Constitutional Conference.
- Notification of results**
22. Upon the election of district representatives to the National Constitutional Conference, the Commission shall as soon as reasonably practicable cause the names of the representatives for each district to be published in the Gazette and in at least two daily newspapers of national circulation.
- Retention and public inspection of documents.**
23. (1) All documents relating to the election shall be retained in safe custody by the returning officer for a period of one month after the results of such election have been declared and shall then, be handed over to the Commission by the returning officer.
- (2) Documents retained under this rule shall during the one month period be made available for inspection by any member of the public, upon request being made by him or her, at such time and subject to such conditions as may be decided by the returning officer.
- Disputes.**
24. (1) Any dispute arising out of or in connection with the calling or conduct of the elections under these Rules shall be determined by the Commission and such determination shall be final and conclusive.
- (2) The Commission shall not entertain any dispute referred to it under sub-rule (1) after the expiry of fourteen days from the date the last election under these Rules is held.

APPENDIX

FORM 1

(rule 3)

DISTRICTS

- | | |
|----------------------|-------------------------|
| 1. Baringo | 45. Mwingi |
| 2. Bomet | 46. Nairobi |
| 3. Bondo | 47. Nakuru |
| 4. Bungoma | 48. Nandi |
| 5. Bureti | 49. Narok |
| 6. Busia | 50. Nyambene |
| 7. Butere/Mumias | 51. Nyamira/North Kisii |
| 8. Embu | 52. Nyandurua |
| 9. Garissa | 53. Nyando |
| 10. Gucha | 54. Nyeri |
| 11. Homa Bay | 55. Rachuonyo |
| 12. Ijara | 56. Samburu |
| 13. Isiolo | 57. Siaya |
| 14. Kajiado | 58. Suba |
| 15. Kakamega | 59. Taita Taveta |
| 16. Keiyo | 60. Tana River |
| 17. Kericho | 61. Teso |
| 18. Kiambu | 62. Tharaka/Marimanti |
| 19. Kilifi | 63. Thika |
| 20. Kirinyaga | 64. Trans Mara |
| 21. Kisii Central | 65. Trans Nzoia |
| 22. Kisumu | 66. Turkana |
| 23. Kitui | 67. Uasin Gishu |
| 24. Koibatek | 68. Vihiga |
| 25. Kuria | 69. Wajir |
| 26. Kwale | 70. West Pokot |
| 27. Laikipia | |
| 28. Lamu | |
| 29. Lugari | |
| 30. Machakos | |
| 31. Makueni | |
| 32. Malindi | |
| 33. Mandera | |
| 34. Maragua | |
| 35. Marakwet | |
| 36. Marsabit | |
| 37. Mbeere | |
| 38. Meru Central | |
| 39. Meru South/Nithi | |
| 40. Migori | |
| 41. Mombasa | |
| 42. Moyale | |
| 43. Mt. Elgon | |
| 44. Muranga | |

NOTICE OF DISTRICT REPRESENTATIVES ELECTION

Elections are to be held of district representatives to serve in the National Constitutional Conference pursuant to the provisions of section 27 (2) (c) of the Constitution of Kenya Review Act in respect of the following districts at the respective venues indicated:

District	Venue
.....

Pursuant to section 27 (2) (c) of the Act, each district shall have three representatives, at least one of whom shall be a woman and only one of whom may be a councillor.

The elections will be held on the 2002.

Nomination papers for the election may be delivered by candidates to the returning officer at the respective District Documentation Centre for each district between the hours of eight o'clock in the morning and four o'clock in the afternoon on, 2002 and, 2002.

Forms of nomination for the election may be obtained at the respective District Documentation Centre for each district on any day between the hours of nine o'clock in the morning and noon.

Dated the, 2002.

.....
Secretary,
Constitution of Kenya Review Commission

NOMINATION PAPER

Election for District.

We, the undersigned, being Kenyan citizens ordinarily resident

inDistrict nominate the undermentioned person as a candidate at the election and solemnly and sincerely declare that we are not subscribers to any other nomination at the election.

Candidate's Names in Full	Place of Residence	Occupation or Designation
	_____ Location	
	_____ Division	
	_____ Constituency	
Signatures		Place of Residence (Location, Division and Constituency) and National Identity Card number/passport number/ birth certificate number

Proposer _____

Seconder _____

We, the undersigned being Kenyan citizens ordinarily resident in District support the foregoing nomination and solemnly and sincerely declare that we are not subscribers to any other nomination at the election.

2

3

4

5

6

7

NOTES

1. The attention of candidates and persons subscribing to this paper is drawn to the provisions of the Constitution of Kenya Review Act (Cap 3A) and to the Constitution of Kenya Review (District Representatives Elections) Rules.
 2. No person may subscribe to more than one nomination paper for the election.
-

**DECLARATION FOR PURPOSES OF NOMINATION
AT A ELECTION**

I,
of do solemnly and sincerely declare
as follows: -

1. I do hereby consent to my nomination as a candidate at an election to be held in the District.
2. I am duly qualified for the election in accordance with the Act and the Constitution of Kenya Review (District Representatives Elections) Rules.

And I make this declaration conscientiously believing the same to be true
and according to the Oaths and Statutory Declarations Act.

Declared at
this day
of , 2002

Signature of Declarant

Before me,

.....
**A Magistrate/Commissioner
For Oaths/Clergyman**

- The declarant's names must be written in the order in which he wishes them to appear on the nomination statement and the surname must be underlined.

**CERTIFICATE THAT NUMBER OF PERSONS NOMINATED
FOR ELECTION DOES NOT EXCEED THE NUMBER
OF VACANCIES**

I, , the returning officer
for District, certify
that—

- (a) the following person(s) has/have been duly nominated as a candidate candidates for the election for the above district;
- (b) the number of duly nominated candidates does not exceed the number of representatives to be elected;
- (c) the following person(s) is/are therefore elected as district representatives for District and no election shall be held.

Category under which candidate is vying (state whether candidate is vying under the "open seat" category or under "both" categories)	Name of Candidate	Place of Residence (specify location, division and constituency)	Sex	Date of Nomination

Dated the

.....
Returning Officer

.....
Secretary,
Constitution of Kenya Review Commission.

STATEMENT OF PERSONS NOMINATED

The following persons have been and now stand nominated for the election forDistrict.

CATEGORY A (CANDIDATES FOR WOMEN'S SEAT)

1. Name of candidate.....

Address (including location, division and constituency)

.....
.....

Occupation and description

Names of subscribers to nomination paper –

2.

3.

4.

CATEGORY B (CANDIDATES FOR OPEN SEATS)

1. Name of candidate

Address (including, location, division and constituency)

.....
.....

Occupation and description

Names of subscribers to nomination paper –

2.

3.

The election shall be held at _____ on _____ 2002

Dated this day of, 2002.

.....
Returning Officer

CATEGORY "A" BALLOT PAPER (WOMEN'S SEAT)**ELECTION TO NATIONAL CONSTITUTIONAL CONFERENCE**..... **DISTRICT.**

	Candidate's Name	Elector's Mark

INSTRUCTIONS TO ELECTOR

1. Mark the paper by placing the mark \checkmark opposite the name of the candidate you wish to be elected.
2. DO NOT place a mark opposite the names of more than one candidate.
3. Make no other mark whatsoever on the paper.
4. Fold the paper through the centre, from right to left, so as to conceal your vote.

CATEGORY "B" BALLOT PAPER (OPEN SEATS)**ELECTION TO NATIONAL CONSTITUTIONAL CONFERENCE**..... **DISTRICT.**

	Candidate's Name	Elector's Mark

INSTRUCTIONS TO ELECTOR

1. Mark the paper by placing the mark \checkmark opposite the name of the candidate you wish to be elected.
2. DO NOT place a mark opposite the names of more than one candidate.
3. Make no other mark whatsoever on the paper.
4. Fold the paper through the centre, from right to left, so as to conceal your vote.

SECOND SCHEDULE

THE CONSTITUTION OF KENYA REVIEW (NOMINATION OF CIVIL SOCIETY AND OTHER INTEREST GROUPS' REPRESENTATIVES) RULES, 2002

- Citation 1. These Rules may be cited as the Constitution of Kenya Review (National Constitutional Conference) (Nomination of Civil Society and Other Interest Groups Representatives) Rules, 2002.
- Number of civil society representatives. 2. (1) The number and distribution of representatives of religious organizations, professional bodies, women's organizations, trade unions, non-governmental organizations ("hereinafter referred to as civil society representatives") and the representatives of other interest groups to attend the National Constitutional Conference under sub-section (2) (e) of section 27 and the distribution of representation among the various categories provided for under that sub-section shall be as set out in the Appendix.
(2) The Commission shall, in such form as it may deem fit specify the interest groups other than religious organizations, professional bodies, women's organizations, trade unions and non-governmental organizations which shall be represented at the National Constitutional Conference.
- Notification of nomination process. 3. The Commission shall –
(a) publish a notice in the Gazette and in at least two newspapers of national circulation; and
(b) issue an announcement through at least two radio broadcasting stations with national listenership,
informing the public generally of the commencement of the process of nomination of civil society representatives to the National Constitutional Conference and inviting any interested person to apply for nomination in accordance with these Rules.
- Nominating panels. 4. (1) The Commission shall, after consultation with such representatives of the categories of the organizations and bodies

		provided for under subsection (2) (e) of section 27 of the Act as it shall determine, constitute a panel or panels consisting of not more than nine persons, (hereinafter referred to as the “nominating panel”) to nominate the civil society representatives in respect of each of those categories of organizations and bodies.
	(2)	In constituting a nominating panel under subrule (1), the Commission shall have regard to Kenya’s ethnic, geographical, cultural, political, social and economic diversity and shall ensure that at least one third of the members of the nominating panel are women.
	(3)	The Commission may, if it is satisfied that some special circumstances so require, waive some or all of the requirements of subrules (1) and (2) in respect of any particular category of organizations and bodies and may in respect of that particular category of organizations and bodies, adopt other appropriate criteria for the constitution of a nominating panel.
	(4)	The consultations referred to in subrule (1) shall be held within seven days of the publication of the notice provided for under rule 3.
Functions of facilitate the nominating panels.	5. (1)	Each nominating panel shall co-ordinate and nomination of the representatives of its particular category of organizations and bodies and shall ensure compliance of the nominations with the requirements of the Act and these Rules.
Procedure.	(2)	Pursuant to its functions under sub rule (1), a nominating Panel shall convene such number of meetings of the representatives of its particular category of organizations and bodies as it may consider necessary.
Disqualification from nomination.	6.	Subject to such guidelines as the Commission may issue, each nominating panel shall regulate its own procedure.
Expenses of the panels.	7.	No member of a nominating panel shall be eligible for Nomination as a civil society representative as a civil society representative.
Application for nomination.	8.	All expenses properly incurred with prior approval of the Commission by a nominating panel in the discharge of its functions under these Rules shall be met by the Commission.
	9.	A person who desires to be nominated as a civil society representative shall apply through one of the organizations and bodies

provided for under subsection 2 (e) of section 27 of the Act to the appropriate nominating panel.

Qualifications of civil society

- 10.** A person shall not be qualified for nomination as a civil representatives. society representative unless such person –
- (a) is a member of one of the organizations and bodies provided for under subsection 2 (e) of section 27 of the Act;
 - (b) is a citizen of Kenya;
 - (c) is a person of integrity and good character;
 - (d) is able to speak or otherwise communicate in English, Kiswahili or in sign language well enough to take an active part in the proceedings of the National Constitutional Conference; and
 - (e) has attained the age of eighteen years.

Diversity of nominees.

- 11.** In nominating persons for appointment as civil society representatives, a nominating panel shall –
- (a) ensure as far as possible, that all provinces are equal represented;
 - (b) have regard to Kenya's ethnic, geographical, cultural, political, social and economic diversity;
 - (c) have regard to the need to the need for the representation of persons with disabilities and the youth and shall ensure that at least one third of its nominations are women.

Forwarding of names of nominees.

- 12.** (1) Not later than twenty-eight days from the date of the Notice under rule 3, each nominating panel shall forward to the Commission for gazettlement, the names of nominees agreed upon by that panel.
- (2) The Commission may, if it is not satisfied that the requirements of regulation 12 have been observed require a nominating panel to reconsider the names of the nominees submitted by that panel within such time as the Commission may direct and thereafter to re-submit the names of the nominees agreed upon to the Commission for gazettlement within seven days.
- (3) Where a nominating panel fails to submit to the Commission the names of nominees agreed upon within the periods specified in subrules (1) and (2), the Commission may itself carry out the nomination.

- Nomination by Commission.
- 13.** Notwithstanding the other provisions of these Rules, the Commission may, if it deems fit, nominate by name or title or designation any or all of the representatives of such interest groups as it shall have specified under sub rule (2) of rule 2.
- Disputes
- 14.** (1) Any dispute arising out of or in connection with the nomination process provided for under these Rules shall be determined by the Commission and such determination shall be final and conclusive.
- (2) The Commission shall not entertain any dispute referred to it under subrule (1) after the expiry of fourteen days from the date the last panel to submit the names of its nominees shall have submitted its list of nominees.

APPENDIX

(rule 3)

NUMBER AND DISTRIBUTION OF REPRESENTATION AMONG THE VARIOUS REPRESENTATIVES SET OUT IN SUBSECTION (2) (e) OF SECTION 27

Total number of representatives 126

Distribution of representation

Organizations	Number of representatives
Religious Organizations	35
Professional bodies	15
Women's organizations	24
Trade Unions	16
Non-governmental organizations	23
Other interest groups	13

Dated the _____, 2002

**Y. P. GHAI,
Chairperson,
Constitution of Kenya Review Commission**

(rule 4)

APPENDIX IIIB

THE CONSTITUTION OF KENYA REVIEW (NATIONAL CONSTITUTIONAL CONFERENCE)(PROCEDURE) REGULATIONS, 2003

LEGAL NOTICE No. 42 of 2003

THE CONSTITUTION OF KENYA REVIEW ACT (Cap.3A)

THE CONSTITUTION OF KENYA REVIEW (NATIONAL CONSTITUTIONAL CONFERENCE)(PROCEDURE) REGULATIONS, 2003

IN EXERCISE of the powers conferred by section 34 of the Constitution of Kenya Review Act, the Constitution of Kenya Review Commission makes the following Regulations: -

PART I – PRELIMINARY

Citation.

1. These Regulations may be cited as the Constitution of Kenya Review (National Constitutional Conference)(Procedure) Regulations, 2003

Interpretation.

2. (1) In these Regulations, unless the context otherwise requires -

“Chairperson” means the Chairperson of the Conference designated by section 27(3) of the Act;

“Commission Report” means the report compiled by the Commission under section 26(7) of the Act;

“Committee” means any committee established by or under these Regulations;

“Conference” means the National Constitutional Conference convened under section 27(1)(b) of the Act;

“consideration stage” means that part of the proceedings of the Conference in which, as referred to in Regulation 20, the Draft Bill is considered by the Committee of the whole Conference and its working groups;

“Convenor” means any person elected under Regulation 44(2) to preside over any committee;

“delegate” means a person designated, appointed or elected by or under section 27(2) of the Act as a delegate to the Conference;

“Draft Bill” means the Bill to alter the Constitution, drafted pursuant to section 26(7) of the Act;

“lobby” means any place within the Plenary Hall which makes it possible to separate the delegates voting for any motion from the delegates voting against the motion;

“officer of the Conference” means any officer or member of staff of the Conference, any person acting within the precincts of the Conference under the direction of the Chairperson and any security officer on duty within the precincts of the Conference

“precincts of the Conference” includes the Plenary hall, the offices of the Conference and the galleries and places provided for the use of the Conference;

“Secretariat” means the Secretariat of the Conference established under Regulation 50;

“Steering Committee” means the steering committee established under Regulation 46;

“unauthorised person” in relation to the Conference means any person other than a delegate, observer or officer of the Conference.

- (2) References in these Regulations to an article or chapter, or to the preamble or title, are references to an article or chapter or to the preamble or title of the proposed new Constitution contained in the Draft Bill.

PART II - DELEGATES AND OTHERS IN ATTENDANCE

Credentials committee.

3. (1) There shall be an Accreditation Committee consisting of seven Commissioners appointed by the Commission.
- (2) The committee shall have power -
(a) to verify and determine the validity of the credentials of all persons purporting to be delegates to the Conference; and
(b) to issue identification badges to all accredited delegates.
- (3) A person purporting to be a delegate and who is aggrieved by a decision of the committee in the exercise of its functions under this Regulation may appeal to the Commission, whose decision shall be final.

Participation by improper delegate.

4. Participation in any proceedings of the Conference by a person purporting to be a delegate but who is in fact not a delegate shall not affect the validity of those proceedings, unless it appears that his participation in a decision of the Conference, alone or together with any participation in such a decision by other persons who are not delegates, rendered the decision contrary to section 27(5) of the Act.

Vacancy in office.

5. (1) The office of a delegate shall fall vacant –
- (a) if he dies
 - (b) if, being a delegate by virtue of being a Commissioner, he ceases to be a Commissioner; or
 - (c) if, being a delegate by virtue of being a member of the National Assembly, he ceases to be a member of the National Assembly.
- (2) Where a vacancy occurs in the office of a delegate referred to in section 27(2)(c)-(e) of the Act, another delegate shall be appointed or elected, in such manner as the Commission may prescribe, to represent the organization or body who was represented by the delegate who vacated office.
- (3) Proceedings of the Conference are not be invalid by reason of the fact that they took place while a vacancy was not filled under subregulation (2).

Oaths and affirmations.

6. (1) Before taking part in the proceedings of the Conference, every delegate shall take and subscribe an oath or make and subscribe a solemn affirmation in the form prescribed in the First Schedule to these Regulations.
- (2) The oath or affirmation shall be administered by the Chairperson before the assembled Conference during its first sitting or as soon thereafter as the delegate may attend.
- (3) Before administering oaths and affirmations to the other delegates, the Chairperson shall take and subscribe an oath or make and subscribe an affirmation which shall be administered by the Secretary of the Conference.
- (4) During the first sitting of the Conference, the oaths and affirmations may be administered collectively or severally in such manner as the Chairperson may determine.

Behaviour of delegates

7. Delegates shall -

- Observers and other invitees.**
- (a) conduct themselves with the civility, decorum and dignity befitting a member of the Conference;
 - (b) act at all times in the national interest.
- 8. (1) The proceedings of the Conference shall be open to the public.
 - (2) The Commission may invite any person or group of persons to attend the proceedings of the Conference as observers or guests for such period and in respect of such deliberations as it may deem fit.
 - (3) Entry into the Plenary Hall of the Conference and committee rooms shall be for delegates and persons invited under subregulation (2).
 - (4) The Conference may by resolution decide that a particular sitting or session is not open to the public and in such event the Chairperson shall direct that unauthorised persons should not enter the meeting place or, if present, should withdraw.

PART III – SITTINGS OF THE CONFERENCE

- Notice of first sitting**
- 9. The Chairperson shall cause notice to be given, in such manner as he thinks fit, of the first sitting of the Conference.
- Venue and sitting times**
- 10. (1) The Conference shall sit on such days and at such time or times as may be determined by the Steering Committee and notified in the Order Paper.
 - (2) A sitting day of the Conference may be divided into two or more sessions
 - (3) Unless otherwise determined by the Steering Committee, the sittings of the Conference shall be held in Nairobi at the Bomas of Kenya.
 - (4) Any session of the Conference or of any of the committees of the Conference shall be held at such places as the Steering Committee may appoint, taking into consideration the nature of the meeting, the facilities available at the venue, the convenience of the delegates and the cost involved.
- Seating arrangements**
- 11. (1) Delegates shall be seated in such manner as the Steering Committee shall determine and all delegates shall be obliged to observe the seating arrangements.
 - (2) Failure to observe the seating arrangements shall constitute a contravention of these Regulations and may be dealt with under Regulation 41.

- | | |
|---|---|
| Language of conference. | 12. (1) Debates and proceedings of the Conference may be conducted in English or Kiswahili, at the option of the person speaking.

(2) The proceedings of the Conference shall be recorded in both English and Kiswahili.

(3) Sign language interpreters shall be provided by the Commission during all sessions of the Conference and a braille copy of the proceedings shall be part of the final Conference report. |
| Vice-Chairpersons. | 13 (1) There shall be three Vice-chairpersons of the Conference appointed in accordance with sub-regulation (2).

(2) Of the three Vice-chairpersons appointed under sub-regulation (1)-
(a) one shall be nominated by the Parliamentary Select Committee established under section 10 of the Act; and

(b) two, one of whom shall be a woman, shall be elected by the Conference. |
| Presiding at meetings and Chairing of sessions. | 14. (1) On any sitting day of the Conference -

(a) the Chairperson; or
(b) in the absence of the Chairperson, any of the three Vice-chairpersons; or
(c) in the absence of the Chairperson and all the Vice-chairpersons, a member of the Steering Committee elected by them, shall preside;
(d) the Steering Committee may appoint a delegate to chair a session of the Conference, but a delegate so elected to chair a session shall be subject to the direction and overall authority of the Chairperson of the Conference, pursuant to sub-regulations (a), (b) and (c) of this regulation.

(2) A person other than the Chairperson who is presiding on a sitting day of the Conference shall have and may exercise the powers and perform functions of the Chairperson under these Regulations. |
| Other functions of Chairperson. | 15. The Chairperson shall -
(a) be the spokesperson for the Conference; and
(b) exercise overall authority for the preservation of order in the Conference and the enforcement of these Regulations. |

- Quorum.
- 16.** (1) Any delegate may at any time after the proceedings of the Conference have commenced take objection that there is not a quorum present.
- (2) Whenever such an objection is taken, the Chairperson shall cause the Conference to be counted and if, on the first count, a quorum does not seem to be present, shall cause the division bell to be rung, as on a division.
- (3) If, within five minutes after the bell has sounded, or within such further time as the Chairperson may allow, no quorum is present, the Chairperson shall announce to the Conference that there is not a quorum present and shall thereupon adjourn the Conference until the next sitting.
- Adjournment.
- 17.** The Chairperson may, on a motion by a delegate or of his own volition, adjourn any sitting of the Conference, but the duration of such an adjournment may not exceed one day unless ratified by the Steering Committee, and if the adjournment exceeds three days, unless approved by the Conference.

PART IV – STRUCTURE OF BUSINESS

- Introduction of Commission's Report and Draft Bill.
- 18.** (1) The Commission shall lay before the Conference the following documents -
- (a) the Report and Draft Bill prepared in accordance with Section 26(7) of the Act
 - (b) such other working documents as would assist the conference in its deliberations on the Report and Draft Bill.
- (2) As soon as practicable after the commencement of the proceedings of the Conference, the Chairperson shall present to the Conference the Commission's Report and Draft Bill.
- (3) The Chairperson may, upon presentation of the Commission's Report and Draft Bill, deliver a Communication from the Chair introducing the Report and Draft Bill.
- General debate on Commission's report and Draft Bill.
- 19.** (1) After concluding his communication, the Chairperson shall invite a delegate to move the motion "That this Conference debates the Report and Draft Bill of the Constitution of Kenya Review Commission."
- (2) After the mover has moved the motion, with or without a speech, and the motion has been duly seconded, the Chairperson shall propose the question, so as to open the debate on the merits and principles contained in the Commission's Report and Draft Bill.

- Consideration stage.
- (3) Each delegate shall be allowed a maximum of ten minutes within which to make his speech, but the Chairperson shall take into account time unduly lost through points of order taken by other delegates, but shall not take into account time taken by points of explanation.
- (4) Where the Chairperson is satisfied that each delegate wishing to speak has had an opportunity to speak, he shall declare the general debate closed without question put.
- 20.** (1) Upon the conclusion of the general debate, the Commission's Report and Draft Bill shall stand committed to the consideration stage, which shall comprise consideration by the technical working groups established under Regulation 50 and subsequent consideration by the committee of the whole Conference as provided in these Regulations.
- (2) Subject to these Regulations, at the consideration stage, delegates are entitled to move amendments to the Commission's Report and Draft Bill in accordance with these Regulations.
- (3) At the consideration stage, the debate at the Conference shall be confined to the Commission's Report and Draft Bill only.
- (4) The rules set forth in the Second Schedule to these Regulations shall apply with respect to the consideration of provisions of the Draft Bill.
- (5) After the consideration of the Draft Bill is completed, the Conference shall proceed to consider the Report.
- (6) The procedures prescribed by these regulations with respect to consideration of the Draft Bill shall apply, with any necessary modifications, to the consideration of the Commission's Report.
- (7) The Report and Draft Bill having been dealt with in the manner described above, the Chairperson shall cause final drafts containing all the alterations to be prepared as the final Commission's Report and Draft Bill for adoption by the Conference.
- (8) Nothing in this Regulations or in the rules contained in the Second Schedule to these Regulations shall affect the discretion of the Chairperson to alter the Order Paper as he may deem necessary or to authorise debate on the Report and Draft Bill in a manner appearing to him most expedient.
- Adoption of Report and Draft Bill.
- 21.** (1) Upon the completion of the consideration stage the

Conference shall, with the assistance of the Drafting Team appointed under regulation 48, cause to be incorporated in the Draft Bill the amendments (if any) approved during the consideration stage.

- (2) The Drafting Team shall ensure -
- (a) that all provisions of the Draft Bill are consistent with one another; and
 - (b) that the language used in the Draft Bill is uniform and consistent and conforms with the best drafting standards
- and for this purpose shall be allowed sufficient time to do its work.
- (3) After the amendments, if any, have been incorporated in the Report and Draft Bill, the Chairperson shall cause the Report and Draft Bill to be printed and a copy to be provided to each delegate.
- (4) After copies of the Report and Draft Bill have been distributed to delegates, the Chairperson shall, in consultation with the Steering Committee, appoint a time for the Conference to sit and adopt the Report and Draft Bill.
- (5) At the time appointed, the Chairperson shall invite a delegate to move the motion "That the National Constitutional Conference adopts the Constitution of Kenya Report and Draft Bill 2002".
- (6) If such a motion, having been duly seconded, is carried by the Conference, the Secretary shall then read aloud the title of the Report and draft Bill together with the adopting formula, which shall be "Adopted by the National Constitutional Conference" or, as the case may require, "Adopted by the National Constitutional Conference, subject to submission of the following provision(s) to a national referendum in accordance with subsections (6) and (7) of section 27 of the Constitution of Kenya Review Act, namely (here read out the numbers and article headings of the provision(s))
- (7) The Report and Draft Bill shall then be deemed to have been adopted by the Conference (subject to subregulation (6), if applicable) and the Chairperson shall so declare and, if he so wishes, make valedictory remarks.

PART V – CONDUCT OF BUSINESS

General conduct and order of business. 22.

- (1) All procedural matters not expressly provided for in these Regulations shall be decided by the Chairperson and his decision shall be final.
- (2) All other matters not expressly provided for in these Regulations shall be resolved by the Commission.

- Statements and personal explanation**
- (3) The Chairperson of the Conference and the Convenor of each committee shall cause an Order Paper to be published on each of the days of the Conference setting out the full agenda for the day.
- (4) So far as may be practicable, a copy of the Order Paper for each sitting of the Conference shall be provided to each delegate prior to the commencement of the sitting.
- (5) The Steering Committee shall prepare for provision to each delegate a timetable of the work of the Conference, and shall revise it from time to time as necessary.
- Notices of motion.**
23. (1) With the leave of the Chairperson, a delegate may make a statement on any matter of urgent public importance relating to the functions of the Conference or explain a matter of a personal nature at the time appointed, but no debate may arise upon a personal explanation.
- (2) Other delegates may comment upon any statement other than a personal explanation for a period not exceeding ten minutes.
- (3) Any proposed statement referred to in subregulation (1) shall first be submitted to the Chairperson in writing.
24. (1) Notices of motion shall be given in writing and signed by the delegate giving the notice.
- (2) A notice of motion may be handed to the Secretary of the Conference, or an officer designated by him, at any time when the Conference is sitting or may be sent to or left at the Secretariat office within the time prescribed for the purpose.
- (3) A motion of which notice has been received at least one day before a sitting shall, unless the Chairperson rules the motion out of order, be placed upon the Order Paper.
- (4) A delegate who desires to vary the terms of a motion standing in his name may do so by giving an amended notice of motion, provided that such amendment does not, in the opinion of the Chairperson, materially alter any principle embodied in the original motion or in its scope.
- Other motions requirements**
25. (1) Subject to these Regulations, no motion is valid unless it has been seconded by another delegate.
- (2) The Chairperson may disallow a notice of motion which, in his opinion, contains unbecoming expressions, infringes the rules of debate or is otherwise irregular, but any such notice may be amended by the Chairperson, with the consent of the delegate who

- gave the notice, and may thereupon appear on the Order Paper.
- Lapse of motions.** **26.** (1) A motion of which notice has been given shall lapse if not moved at the proper time, unless the Chairperson directs that it may be moved at some other time.
- (2) Any motion brought otherwise than during the consideration stage and which is not seconded shall lapse.
- (3) A delegate who has a motion standing in his name may in writing authorise some other delegate to move that motion on his behalf.
- Order of taking motions.** **27.** The order in which motions shall be moved shall be determined by the Steering Committee.
- Withdrawal of motions.** **28.** (1) A delegate who has made a motion may withdraw it by leave of the Conference, there being no dissentient voice. But if the question has been proposed on an amendment to a motion the original motion may not be withdrawn until the amendment has been disposed of.
- (2) A motion which has been withdrawn by leave of the Conference may be made again on notice given, but its order of priority shall again be subject to ballot.
- Motions raising questions already decided.** **29.** No delegate shall be competent, without the leave of the Chairperson, to move a motion raising a question substantially identical with a question raised in a motion which has already been disposed of.
- Amendments to motions.** **30.** (1) After a motion has been proposed as a question by the Chairperson, an amendment may be moved which seeks to alter the question -
- (a) by leaving out certain words;
 - (b) by leaving out certain words and inserting other words in their place; or
 - (c) by inserting certain words in a specified place.
- (2) An amendment shall be relevant to the question to which it is proposed.
- (3) An amendment shall not raise any question which may only be raised by a substantive motion after notice.
- (4) An amendment shall not be moved if substantially identical with an amendment already disposed of.
- (5) An amendment shall not be moved if substantially a direct

negative of the original proposition or of the words which it is proposed to

- (6) If two or more amendments are offered at the same place, the Chairperson shall determine the order in which they shall be moved.
- (7) Unless otherwise permitted by the Chairperson, any proposed amendment of which notice has not been given shall be handed to him in writing before it is moved.
- (8) Before proposing an amendment, the Chairperson may call upon the delegate who offers it to give such explanation of its objects as may enable him to form a judgment upon it.

Withdrawal of amendments.

31. A delegate who has proposed an amendment may withdraw it any time before the question has been proposed on the amendment.

Motions without notice.

32. (1) The following motions do not require to be preceded by a notice of motion -
- (a) a motion relating to a matter of privilege;
 - (b) a motion made in the consideration stage;
 - (c) a motion to amend any motion upon which the question has already been proposed from the Chair;
 - (d) a motion for the suspension of these Regulations put with the permission of the Chairperson;
 - (e) a motion for the adjournment of the Conference or a debate;
 - (f) a motion for the withdrawal of strangers;
 - (g) a motion for the suspension of a delegate.
- (2) Unless otherwise provided by these Regulations, notice must be given of all motions other than those set out in subregulation (1).
- (3) A motion directly concerning the privileges of the Conference shall be taken at the time appointed in the Order Paper, but proceedings of the Conference may be interrupted at any moment, save during the progress of a division, by a motion based on a matter of privilege when a matter has recently arisen which directly concerns the privileges of the Conference.

Order and manner of speaking.

33. (1) A delegate wishing to contribute to the debate shall indicate so by putting up his hand so as to get the attention of the Chairperson.
- (2) A delegate shall address his observations to the Chairperson and shall refer to any other delegate as "the honourable delegate".
- (3) When a delegate has finished his observations he shall resume his seat and the Chairperson shall call the next delegate on the list of speakers to address the Conference.

Contents of
speeches.

34. (1) Except during the debate on the general merits and principles of the Commission's Report and Draft Bill, every member shall restrict his observations to the paragraph of the Report or article of the Draft Bill under discussion.

- (2) It shall be out of order to use offensive or insulting language in reference to any other delegate or official of the Conference.
- (3) It shall be out of order to use in the Conference derogatory language regarding any person or persons not present at the Conference.
- (4) No delegate shall impute any improper motive to any other delegate.

Scope of debate. 35. (1) The Chairperson shall ensure that all contributions by delegates regarding any article or proposed amendment to an article shall be relevant to the matter being debated.

- (2) When an amendment to an article proposes to leave out words and to insert or add other words instead of them, debate upon the question to leave out words may include both the words to be left out and those proposed to be inserted or added.
- (3) On an amendment proposing only to leave out words or to insert or add words, debate shall be confined to the subject matter of the proposed amendment.
- (4) In debate on any amendment to an article, the Chairperson may, at his discretion, direct that the debate on the amendment may include debate on the matter of the article where, in his opinion, the matter of the amendment is not conveniently separable from the matter of the article.
- (5) When the Chairperson gives a directive under subregulation (4), a delegate who has already spoken to an article may, in speaking to the amendment, speak only to a new matter raised by the amendment.

When a delegate
may speak more
than once.

36. (1) A delegate may not speak more than once on any proposition except-

- (a) in a committee;
- (b) in explanation as provided in subregulation (2); or
- (c) during the consideration stage.

- (2) A delegate who has spoken to a question proposed to the Conference may again be heard, if the Chairperson so permits, to

explain any matter considered relevant, provided that he shall not introduce any new matter.

Closure of debate. **37.** (1) Where a motion on an article has been moved and debated, a delegate may move that the question be now put, and unless it appears to the Chairperson that the motion is an abuse of these Regulations or an infringement of the right of any delegate, the question that the question be now put shall be put forthwith and decided without amendment or debate.

(2) If the question for closing a debate under subregulation (1) is agreed to, the question of the motion which was being discussed when the motion for closure was moved shall be put forthwith without further discussion.

Interruptions. **38.** A delegate shall not interrupt another delegate except -

- (a) by raising a point of order, point of information or point of procedure, in which case the delegate speaking shall remain silent and the delegate interrupting shall direct attention to the point which he or she desires to bring to notice and submit it to the Chairperson for decision; or
- (b) to elucidate some matter raised by another delegate in the course of his speech if the delegate speaking is willing to give way, unless it appears to the Chairperson that this may be an abuse of these Regulations.

General conduct of delegates.

39. During a sitting of the Conference -

- (a) all delegates shall dress in a dignified manner;
- (b) all delegates shall enter or leave the Conference with decorum;
- (c) no delegate shall bring into the Conference anything not directly connected with the business of the Conference except with the consent of the Chairperson;
- (d) delegates shall not read newspapers, books, letters or other documents except matters in them directly connected with the business of the Conference;
- (e) while a delegate is speaking, all other delegates shall be silent and shall not make unseemly interruptions;;
- (f) applause is permitted if done with dignity; and
- (g) no delegate may leave his mobile telephone on.

Enforcement of order.

- 40.** (1) The Chairperson shall be responsible for the observance of order, and his decision on any point of order shall not be open to appeal.
- (2) The Chairperson, after having called the attention of the

Conference to the conduct of a delegate who persists in irrelevance, or tedious repetition either of his own arguments or of arguments made by other delegates in the debate, may direct him to discontinue his speech.

- (3) The Chairperson shall order any delegate whose conduct is grossly disorderly to withdraw from the Conference for the remainder of that day's sitting, and the officers of the Conference shall cause the orders of the Chairperson to be carried out to ensure compliance with this Regulation.
- (4) Where a delegate has been guilty of persistent contravention of these Regulations, the Chairperson shall refer the matter to the Committee on Privileges, Discipline and Welfare to be dealt with as that Committee shall consider appropriate.

Voting where simple majority required. 41.

- (1) Where a vote is to be taken, being a vote which, in accordance with section 26(5) of the Act, requires only a simple majority to pass it, the Chairperson shall take a voice vote of the Conference, and announce the results of the vote accordingly.
- (2) The Chairperson shall direct a division to be taken if a delegate claims a division and -
 - (a) the Chairperson considers that there is reasonable doubt as to the outcome of the vote in question; or
 - (b) if thirty or more further delegates rise in their places to support the delegate claiming the division.

Voting where fixed majority required 42.

- Where a vote is to be taken, being a vote which, in accordance with section 26(5) of the Act, requires a two-thirds majority to pass it, the Conference shall not proceed to a division unless and until a number of delegates equivalent to that majority is present at the time for directing the division.

Division.

- (43.)
 - (1) If any division is required under these Regulations, the Chairperson shall order for a division and the lobbies shall be cleared for the purpose.
 - (2) The Chairperson shall direct the "AYES" into the lobby on his right and the "NOES" into the lobby on his left and appoint two tellers for each lobby to count the votes.
 - (3) After the lapse of a reasonable time from his original direction, the Chairperson shall direct that the doors or any other barrier or thing giving access to the Plenary Hall be closed.
 - (4) When all delegates have left the lobbies, the tellers shall return to the Plenary Hall and shall report the number of those who have voted in their respective lobbies to the Chairperson, who shall then

declare the numbers to the Conference and announce the result of the division.

- (5) Any door or other barrier giving access to the Plenary Hall shall then be unlocked or removed, as the case may be.
- (6) A delegate may abstain from voting and any delegate wishing to abstain shall not enter a lobby while a division is in progress and the names of delegates abstaining shall be recorded.
- (7) In the case of confusion or error occurring in the course of a division concerning the numbers recorded which cannot otherwise be corrected, the Chairperson shall direct the Conference to proceed to another division.

PART VI – COMMITTEES AND WORKING GROUPS

Establishment of committees.

- 44.** (1) Subject to these Regulations, the Conference may establish ad hoc committees and standing committees on any subject it considers appropriate for the carrying out of its functions.
- (2) Each committee -
- (a) shall consist of not more than fifteen persons at least one of whom, but not more than two of whom, shall be Commissioners appointed-
 - (i) in the case of a Commissioner or Commissioners, by the Commission; and
 - (ii) in the case of the other members, by the Steering Committee;
 - (b) shall have a Convenor elected by the Conference on the advice of the Steering Committee; and
 - (c) shall have a quorum of one half of the members of the committee who are entitled to vote;
 - (d) shall have power to appoint a subcommittee from among its members to undertake any part of the work of the committee, and any such subcommittee shall submit its report to the committee which established it.
- (3) The Secretariat shall afford to each committee the services of such staff as may be necessary for the committee to do its work.
- (4) Any vacancy occurring in any committee shall be filled in the same manner as provided in these Regulations for appointment to the office.

Procedure in
committees
generally.

- (5) Subject to these Regulations, a delegate may not be a member of more than one committee.
- (6) A committee may co-opt not more than two delegates.
- (7) In fixing the size and composition of a committee the Conference shall, subject to these Regulations, have regard to -
 - (a) the imperatives of expeditious transactions of the business of the Conference;
 - (b) the cost and expense;
 - (c) the qualifications and experience of delegates and
 - (d) the diversity of the persons represented at the conference.
- (8) Except as the Conference may otherwise determine, a committee shall stand dissolved after its report has been presented to and received by the Conference.

- 45.** (1) The provisions of these Regulations shall, with any necessary modifications, apply to all committees of the Conference in the same way as to the Conference itself.
- (2) Without prejudice to the generality of subregulation (1), and except and to the extent to which the Convenor may in his discretion otherwise direct for the purpose of facilitating full consideration and discussion of the matter referred to a committee, the procedure in the committee shall be as nearly as possible the same as that in the consideration stage.
- (3) Every committee shall commence its sittings as soon as possible after it is established and shall meet -
 - (a) at such time as the Convenor of the committee may determine or as requested by notice in writing signed by not less than one-third of the members of the committee; and
 - (b) at such places as the Convenor of the committee may determine or as requested by notice in writing signed by not less than half of the members of the committee.
- (4) Sittings of a committee shall be presided over by the Convenor of the committee or in his absence by a temporary Convenor elected by the delegates present.
- (5) A committee may invite, to assist it in its work, any person who appears to the committee to be likely to give information necessary

for the carrying out of the functions of the committee.

- (6) The Secretariat shall designate a clerk for each committee and the Commission shall designate not more than two commissioners to be rapporteurs to each committee.
- (7) The clerk shall assist the Convenor in matters of procedure and shall take minutes of the proceedings of the Committee.
- (8) The rapporteurs shall, in consultation with the clerk, prepare the report of the committee.
- (9) The deliberations of each committee shall be confined to the subject matter referred to it by the Conference.
- (10) Any delegate is entitled to attend and make oral or written statements to any committee but is not entitled to vote in the proceedings of the committee unless he is a member of the committee and has a right to vote.
- (11) A committee may propose amendments to the contents of the Report and Draft Bill relevant to the subject being considered by the committee.
- (12) The Commission shall appoint a Commissioner to be the Rapporteur-General of the Conference.
- (13) The Rapporteur – General shall -
 - (a) co-ordinate the work of the rapporteurs of Committees and
 - (b) in consultation with the rapporteurs of Committees prepare a consolidated report for presentation to the Steering Committee.
- (14) Amendments to the contents of the Report and Draft Bill recommended in the report of a committee may be moved at the appropriate time by the Convenor, the rapporteurs or by a member of the committee.
- (15) Every decision of a committee shall, as far as possible, be by consensus; but if there is no consensus, the decision shall be by the vote of the majority of members of the committee:

Provided that a minority of members of the committee may submit a minority report which shall accompany the main report.
- (16) Subject to these Regulations, every committee shall report to the conference at such time as the Steering Committee may direct,

and the report shall be accompanied by the minutes of the committee and shall be placed before the Conference.

- (17) The Conference shall consider the report from a committee upon a motion “That the report of the [here mention the name of the committee] be approved”.
- (18) The Secretariat of the conference shall have custody of the minutes of each committee.
- (19) Any committee established by the Conference may be dissolved by the Conference.

Steering Committee. 46. (1) There shall be a standing committee to be known as the Steering Committee comprising the following -

- (a) the Chairperson;
- (b) the First Vice-chairperson of the Commission;
- (c) the Vice-chairpersons appointed under regulation 13;
- (d) the Chairperson of the Parliamentary Select Committee established under section 10 of the Act;
- (e) the Speaker of the National Assembly;
- (f) the Minister for the time being responsible for matters relating to justice and constitutional Affairs;
- (g) the Rapporteur-General of the Conference;
- (h) not more than twenty-one other delegates;
- (I) the Convenors of all other committees as may exist from time to time;
- (j) the rapporteurs (who shall not have the right to vote); and
- (k) the Secretary of the Commission.

- (2) The Chairperson shall preside over sittings of the Steering Committee.
- (3) The functions of the Steering committee shall be -

- (a) to consider and approve a work plan of the Conference as prepared by the Secretariat for the approval of the Conference;

- (b) to revise, as necessary, the work plan of the Conference;
 - (c) to monitor the progress, and follow-up activities and resolutions of the Conference;
 - (d) to co-ordinate and guide the work of all other committees of the Conference;
 - (e) to deliberate and decide on the order in which reports of all other committees shall be considered by the Conference; and
 - (f) to review these Regulations from time to time and to make such recommendations for their amendment as the Committee considers necessary for the efficient functioning, and transaction of the business, of the Conference;
 - (g) to consider and, where appropriate, adopt such proposals for valid alteration of these Regulations as the Conference, the committees and the delegates may put forward; and
 - (h) to carry out such other functions as are Conferred on it by these Regulations or as the conference may assign to it.
- (4) Sittings of the Steering Committee shall be convened by the Chairperson on his own initiative or at the request of not less than five members appointed under subregulations (1) (b).

- Drafting Team and Panel of Experts. 47. (1) There shall be a Drafting Team for the Conference, consisting of such experts as may be appointed by the Commission whose functions shall be to -
- (a) render advice to delegates, committees and technical working groups as to -
 - (i) the phrasing that will best achieve their objectives
 - (ii) consequential amendments, arising out of their proposed amendments, that should be made to other parts of the Draft Bill;
 - (iii) any transitional or other issues necessary to be dealt with; and
 - (iv) other matters arising in legislative drafting;
 - (b) assist delegates and committees of the Conference to prepare amendments proposed by them to the Draft Bill;
 - (c) assist the Conference to put together the Draft Bill for adoption after all amendments have been considered and the Conference has taken decisions on them; and

- (d) assist the Conference in any other manner that the Chairperson or the Conference may request.
- (2) There shall be an interdisciplinary Panel of Experts for the Conference consisting of such persons as may be appointed by the Commission whose functions shall be to-
- (a) render advice on such specific issues pertaining to the work of the Conference and its committees as may be required;
 - (b) assist delegates and committees of the Conference in the preparation of such briefs or position papers other than amendments to the draft Bill as may be required; and
 - (c) assist the Conference in any other manner that the Chairperson or the Conference may request.
- Committee on privileges, discipline and welfare.** **48.**
- (1) There shall be a standing committee to be known as the Committee on Privileges, Discipline and Welfare, which shall consist of three Commissioners designated by the Commission and eight delegates elected by the Conference.
 - (2) The functions of the committee on Privileges Discipline and Welfare shall be -
 - (a) by order of the Conference, to inquire into any complaint of contempt or any matter of privilege which may be referred to it and to recommend such action as the Committee considers appropriate;
 - (b) to consider any matter of discipline referred to it by the Chairperson or the Conference, including matters relating to attendance of delegates at sittings of the Conference and sittings of committees, and to report its findings to the Conference.
 - (c) to liaise with the Commission in order to facilitate proper attention to the welfare needs of the delegates; and
 - (d) to carry out such other functions as are conferred on it by these Regulations or as the Conference may assign to it.
- Technical working groups.** **49.**
- (1) In order to facilitate expeditious disposal of matters before the Conference the Conference shall, on the recommendation of the Steering committee, appoint technical working groups to consider any issue or theme arising from the Draft Bill as it may consider appropriate.
 - (2) The Chairperson shall have the right to adjourn any motion which in his opinion would be better dealt with by the relevant

technical working group, and may commit any such motion to that technical working group to consider and report back to the Conference within a time specified.

(3) The technical working groups shall consist of not more than sixty delegates but other delegates, who shall have no right to vote, may attend their sittings.

(4) Unless the Conference otherwise determines, the following technical working groups shall be established and each group shall consider the subject matter of the Draft Bill indicated opposite its designation -

Technical Working Group A	Preamble, Supremacy of the Constitution, the Republic and National goals, Values and Principles
Technical Working Group B	Citizenship and the Bill of Rights
Technical Working Group C	Representation of the People
Technical Working Group D	The Executive
Technical Working Group E	The Judiciary
Technical Working Group F	The Legislature
Technical Working Group G	Devolution
Technical Working Group H	Public Finance, Public Service, Leadership and Integrity
Technical Working Group I	Defence and National Security
Technical Working Group J	Land Rights and Environment

Technical Working Group K	Constitutional Commissions and Amendments to the Constitution
Technical Working Group L	Transitional and Consequential Arrangements
(5)	For the purposes of these Regulations, each technical working group shall be deemed to be a committee of the Conference.

PART VII - MISCELLANEOUS

(1) There is hereby established a Secretariat of the Conference, consisting of -

- (a) the Secretary of the Commission as Secretary to the Conference and head of the Secretariat; and
- (b) such other staff of the Commission as the Commission may assign.

(2) The Conference shall in addition have the services of such other staff provided by the Commission as the Conference may need for the effective performance of its functions and those of the committees.

(3) The Secretariat of the Conference shall, in the exercise of its functions, be responsible to the Commission and the Steering Committee in relation to the work of the Conference.

(4) The Secretariat shall -

- (a) facilitate the deliberations of the Conference;
- (b) notify delegates of the sittings of the Conference;
- (c) before the commencement of each sitting, dispatch to each delegate a copy of a paper to be called the "Order Paper" stating the business of the sitting;
- (d) receive and put in the "Order Paper" notices of motions and amendments;
- (e) keep a book to be called the "Order Book" in which he or she shall enter and number in succession all matters intended for discussion at each sitting;

- (f) keep the minutes of the sitting to be called "Votes and Proceedings" of the Conference which shall record all decisions and all things done by the Conference at each sitting;
- (g) keep a list of attendance of delegates at each sitting and annex the list to the Votes and Proceedings;
- (h) be responsible for making entries and records of things done and approved in the Conference and keep secret all such matters as are required by the Conference to be treated as secret and not discuss them before they are officially published;
- (i) have the custody of all records and other documents belonging or presented to the Conference which shall, subject to paragraph (h), be open to inspection by delegates under such arrangements as may be made by the Conference;
- (j) make all necessary logistical arrangements;
- (k) without prejudice to the foregoing paragraphs, be responsible for day to day administration of the affairs of the Conference; and
- (l) perform such other functions in relation to the work of the Conference as the Commission or the Steering Committee may determine or as may be conferred on the Secretariat by these Regulations.

Privileges and immunities of delegates.

- 51.** (1) A delegate shall not be liable to any civil action or suit for or in respect of any matter or thing done or omitted to be done in good faith as a delegate.
- (2) No delegate shall be liable to arrest under civil process while proceeding to, participating in, or returning from any meeting of the Conference or of any committee thereof.
- (3) No person who appears before the Conference shall be liable to any criminal or civil proceedings or to any penalty or forfeiture whatsoever in respect of any statement made or information given to the Conference by such person.

Unqualified persons sitting or voting.

- 52.** (1) No person who is not a delegate shall sit or vote in the Conference.

- Media
- (2) Any person who, not being a delegate, sits or votes in the Conference, knowing or having reasonable grounds to believe that he is not so entitled to do so, shall be guilty of an offence and shall be liable on conviction to a fine not exceeding five thousand shillings or to imprisonment for a term not exceeding one month.
- 53.**
- (1) There shall be a standing committee of the Conference to be known as the Media Advisory Committee consisting of three Commissioners and six delegates.
 - (2) Subject to these Regulations, the Media Advisory Committee shall accredit representatives of the media and accord them-
 - (a) access to public sittings and records of the Conference; and
 - (b) broadcasting facilities.
 - (3) The Steering Committee on the advice of the Media Advisory Committee may exclude any media house from proceedings of the Conference for any length of time if in the opinion of the Steering Committee that media house has been guilty of deliberate or negligent misreporting of the proceedings.
- Recommendations
for amendment of
these Regulations. **54.**
- Without prejudice to the Commission's power to amend these Regulations, the Conference may, by a resolution supported by two-thirds of the delegates present and voting, recommend to the Commission an amendment to these Regulations.

FIRST SCHEDULE (R.6)

OATHS AND AFFIRMATIONS

Oath of Office of a Delegate

I,....., being appointed a delegate to the National Constitutional Conference under the Constitution of Kenya Review Commission Act, do solemnly swear that I will faithfully and fully, impartially and to the best of my ability discharge the trust and perform the functions and exercise the powers devolving upon me by virtue of this appointment without fear, favour, bias, affection, ill-will or prejudice and to the end that in the exercise of the functions and powers as such delegate I shall at all times be guided by the national interest. So help me God.

Solemn Affirmation of a Delegate

I,....., being appointed a delegate to the National Constitutional Conference under the Constitution of Kenya Review Commission Act, do solemnly declare and affirm that I will faithfully and fully, impartially and to the best of my ability discharge the trust and perform the functions and exercise the powers devolving upon me by virtue of this appointment without fear, favour, bias, affection, ill-will or prejudice and to the end that in the exercise of the functions and powers as such delegate I shall at all times be guided by the national interest.

SECOND SCHEDULE (R.20)

RULES FOR CONSIDERATION OF PROVISIONS OF THE DRAFT BILL

- 1.** The following order shall be observed in considering the Draft Bill -
 - (a) articles as printed and new articles, in their numerical order;
 - (b) postponed articles;
 - (c) Schedules as printed and new Schedules, in their numerical order;
 - (d) the preamble;
 - (e) the title.
- 2.** The Secretary to the Conference shall call the number of each article in succession and shall read the article heading above each article, and if no amendment is offered, the Chairperson shall, after a convenient number of articles has been called, put the question. "That articles ...to...stand part of the Draft Bill".
- 3.** If any delegate announces, while the articles are being called, that he wishes to move an amendment to, or make some comment on, an article, the Chairperson shall forthwith put the question with regard to all the articles that have been called but not yet agreed to, excluding the article indicated by the delegate, which shall then be considered.
- 4.** After the article has been considered, and after any proposed amendment thereto has been agreed to or negatived, the Chairperson shall put the question "That the article (or, as the case may require, the article as amended) stand part of the draft Bill".

5. Any amendment to an article which a delegate wishes to propose may be moved and seconded at any time after the question has been proposed by the Chairperson and before it has been put by the Chairperson at the conclusion of the debate upon the article.
6. When two or more amendments are proposed on the same article, the Chairperson shall call upon the movers in the order in which their amendments relate to the text of the article.
7. The amendment which, in the opinion of the Chairperson, departs furthest from the text under discussion shall be debated and disposed of first.
8. Where two or more proposed amendments to any article seek to attain the same objective but in different ways, or the wording of the amendments differs, sponsors of the amendments may be required by the Chairperson to discuss their amendments and consolidate them or agree on compromise amendments that will be acceptable to the sponsors.
9. When every amendment to an amendment has been disposed of, the Chairperson shall either again propose the question upon the original amendment, or shall propose the question upon the original amendment as amended.
10. An amendment or a new article may be withdrawn at the request of the mover by leave of the Conference before the question is put on it if there is no objection.
11. If the question has been proposed on an amendment to an amendment or to a new article, the original amendment or the new article, as the case may be, may not be withdrawn until the amendment to it has been disposed of.
12. The consideration of the Schedules (or Schedule), including new Schedules, if any, the preamble, and the title shall follow the consideration of the articles, including proposed new articles.
13. An article in the Draft Bill as printed may be postponed, unless upon an amendment thereto a question shall have been fully put from the Chair
14. Consideration of any article may be postponed unless upon an amendment moved to it a question has been fully put from the Chair.
15. Postponed articles shall be considered after the remaining articles of the Draft Bill and before the new articles which may have been deferred

for consideration have been brought up.

16. New articles may be considered at their appropriate places in the Draft Bill, or they may be deferred for consideration until after the articles in the Draft Bill as printed have been disposed of.
17. On the suggested number and article heading note of any new article being read out, the Chairperson shall propose the question “That the new article be considered” and if, after putting the question, it is agreed to, amendments may then be proposed to the new article and the final question to be proposed shall be “That the article (or the article as amended) be added to the Draft Bill”.
18. New Schedules shall be considered and treated in the same way as new articles.
19. Any amendment to the Draft Bill shall be within the scope of the subject matter of the Bill.
20. No amendment shall be made which is inconsistent with any article already agreed upon by the Conference or any decision already arrived at by the Conference, and the Chairperson may, at any time during the discussion of a proposed amendment, withdraw it from the consideration of the Conference if in his opinion the discussion has shown that the amendment contravenes the provisions of this rule.
21. The Conference may at any time refer a proposed amendment to the Drafting Team.
22. A delegate may speak more than once to any question proposed, but in any even shall not speak for more than five minutes on any occasion.

A. I. SALIM
1st Vice-Chairperson,
Constitution of Kenya Review Commission

APPENDIX IV

LIST OF DELEGATES AT THE NATIONAL CONSTITUTIONAL CONFERENCE

MEMBERS OF PARLIAMENT

DEL. NO.	NAME	CONSTITUENCY
001	KIBAKI H.E. Mwai	OTHAYA
002	AWORI Arthur Moody	FUNYULA
003	ABDIRAHMAN Ali Hassan	WAJIR SOUTH
004	ACHUKA Francis Igwaton	TURKANA SOUTH
005	AKARANGA Moses Epainitous	SABATIA
006	ALI Abdullahi Ibrahim	WAJIR NORTH
007	ANGWENYI Jimmy Nuru Ondieki	KITUTU CHACHE
008	ARUNGAH Julius Odenyo	KHWISERO
009	AWITI Adhu	KARACHUONYO
010	NAKITARE Davies	SABOTI
011	AYACKO George Mbogo Ochilo	RONGO
012	BAHARI Abdul Ali	ISIOLO SOUTH
013	BALALA Najib Mohamed	MVITA
014	BIFWOLI Sylvester Wakoli	BUMULA
015	BILLOW Adan Kerow	MANDERA CENTRAL
016	BIWOTT Nicholas Kiprono Kipyator	KEIYO SOUTH
017	BOIT William Kiplumbei	BARINGO NORTH
018	CHEBOI Moses Kipkemboi	KURESOI
019	CHELAITE Alicen Jemaria Ronoh	RONGAI
020	CHEPKITONY Lucas Kipkosgei	KEIYO NORTH
021	CHOGE Jim	ALDAI
022	DAHIR Abdullahi Sheikh	LAGDERA
023	DZORO Morris Mwachondo	KALOLENI
024	ETHURO David Ekwee	TURKANA CENTRAL
025	GACHAGUA James Nderi	MATHIRA
026	GALGALLO Gurrach Boru	MOYALE

027	GITAU William Kabogo	JUJA
028	GITHAE Robinson Njeru	NDIA
029	GODANA Bonaya Adhi	NORTH HORN
030	GUMO Frederick Omulo	WESTLANDS
031	HAJI Yussuf Mohamed	IJARA
032	IVUTI Patrice Ezekiel Mwangu	KITUI SOUTH
033	KAGWE Mutahi	MUKURWEINI
034	KAGWIMA Francis Nyamu	THARAKA
035	KAINDI Peter Kyalo	KATHIANI
036	KAJEMBE Seif Ramadhan	CHANGAMWE
037	KAJW'ANG Gerald Otieno	MBITA
038	KAMAMA Asiman Abongotum	BARINGO EAST
039	KAMANDA Maina	STAREHE
040	KAMOTHO John Joseph	MATHIOYA
041	KARABA Daniel Dickson	KERUGOYA/KUTUS
042	KARIUKI Godfrey Gitahi	LAIKIPIA WEST
043	KARIUKI Mirugi	NAKURU TOWN
044	KARUA Martha Wangari	GICHUGU
045	KARUME James Njenga	KIAMBAA
046	KATUKU John Mutua	MWALA
047	KEMBI Gitura	KIHARU
048	KENNETH Peter	GATANGA
049	KENYATTA Uhuru Muigai	GATUNDU SOUTH
050	KETER Charles Cheruiyot	BELGUT
051	MOHAMED Ahmed Khalif	WAJIR WEST
052	KHALWALE Bonny Basiye	IKOLOMANI
053	KHAMASI Daniel Lyula	SHINYALU
054	KHAMISI Joseph Matano	BAHARI
055	KHANIRI George Munyasa	HAMISI
056	KIBUNGUCHY Enoch Wamalwa	LUGARI
057	KIBWANA Kivutha	MAKUENI
058	KIHARA Njeri Jayne	NAIVASHA
059	KILIMO Linah Jebii	MARAKWET EAST
060	KILONZO Julius Kiema	MUTITO

061	KIMATHI James Viscount	LARI
062	KIMETO Anthony Kipkosge	SOTIK
063	KIMUNYA Amos Muhinga	KIPIPIRI
064	KINGI Joseph Kahindi	GANZE
065	KIPCHUMBA Joseph Lagat	ELDORET EAST
066	KIRWA Kipruto Rono	CHERANGANY
067	KITUYI Mukhisa	KIMILILI
068	KIUNJURI Mwangi	LAIKIPIA EAST
069	KOECH John Kipsang Arap	CHEPALUNGU
070	KOECH Sammy Cheruiyot	KONOIN
071	KOFA Mugava Tola	GALOLE
072	KOMBE Harrison Garama	MAGARINI
073	KOMBO Musikari Nazi	WEBUYE
074	KONCHELLA Gideon Sitelu	KILGORIS
075	KORIR Joseph Kipkasto	MOGOTIO
076	KOROS David Kiptanui	ELDORET SOUTH
077	KOSGEY Henry Kiprono	TINDERET
078	KULUNDU Newton Wanjala	LURAMBI
079	KURIA Simon Kanyangi	LIMURU
080	KUTI Mohamed Abdi	ISIOLO NORTH
081	LESHORE Prisa Sammy	SAMBURU EAST
082	LESIRMA Simeon Saimanga	SAMBURU WEST
083	LIGALE Andrew Ndooli	VIHIGA
084	MAATHAI Wangari Muta	TETU
085	MACHAGE Wilfred Gisuka	KURIA
086	MADOKA Marsden Herman	MWATATE
087	MAGARA James Omingo	SOUTH MUGIRANGO
088	MAGUGU Arthur Kinyanjui	GITHUNGURI
089	MAITHA Emmanuel Karisa	KISAUNI
090	MAITHA Moffat Muia	KANGUNDO
091	MAITHA Lucas Baya Mweni	MALINDI
092	MANDUKU Hezron	NYARIBARI MASABA
093	MANGO Christine Abungu	BUTULA
094	MANOTI Stephen Kengere	BOBASI

095	MAOKA Richard Maore	NTONYIRI
096	MARENDE Kenneth Otiato	EMUHAYA
097	MASANYA Godfrey Okeri	NORTH MUGIRANGO / BORABU
098	MBAI Benson Itwiku	MASINGA
099	MBAU Elias Peter	MARAGWA
100	MGANGA Boniface	VOI
101	MICHUKI John Njoroge	KANGEMA
102	MIDIWO Washington Jakoyo	GEM
103	M'MUKINDIA Kirugi Laiboni	CENTRAL IMENTI
104	M'NKIRIA Petkay Shell Miriti	NITHI
105	MOHAMED Hussein Maalim	DUJIS
106	MOHAMED Abdi Mahamud	WAJIR EAST
107	MOHAMED Abdi Haji Mohamed	MANDERA WEST
108	MOHAMED Abu Chiaba	LAMU EAST
109	MOI Gideon	BARINGO CENTRAL
110	MOROTO Samuel Chumel	KAPENGURIA
111	MUCHIRI Geoffrey Gachara	NDARAGWA
112	MUGO Beth Wambui	DAGORETTI
113	MUIRURI Patrick Kariuki	GATUNDU NORTH
114	MUITE Paul Kibugi	KABETE
115	MUKIRI Macharia	MOLO
116	MUNGATANA Danson Buya	GARSEN
117	MUNYA Peter Gatirau	TIGANIA EAST
118	MUNYAO Joseph Konzollo	MBOONI
119	MUNYES John Kiyonga	TURKANA NORTH
120	MURIITHI Peter Gichohi	NYERI TOWN
121	MURIUKI Karue	OL' KALAU
122	MURIUNGI Raphael	IGEMBE
123	MURUNGARU Christopher Ndarathi	KIENI
124	MURUNGI Kiraitu	SOUTH IMENTI
125	MUSILA David	MWINGI SOUTH
126	MUSYOKA Stephen Kalonzo	MWINGI NORTH
127	KILONZO Charles Mutavi	YATTA

128	MUTISO John Mutinda	KILOME
129	MUTURI Justin Bedan Njoka	SIAKAGO
130	MAKWERE Chirau Ali	MATUGA
131	MWANDAWIRO Mganga	WUNDANYI
132	MWANGI Onesmus Kihara	KIGUMO
133	MWANZIA Fredrick Daudi	MACHAKOS TOWN
134	MWENDWA Winfred Nyiva	KITUI WEST
135	MWENJE David Kamau	EMBAKASI
136	MWIRARIA Daudi	NORTH IMENTI
137	MWIRIA Valerian Kilemi	TIGANIA WEST
138	NDAMBUKI Gideon Musyoka	KAITI
139	NDERITU Alfred Mwangi	MWEA
140	NDILE Richard Kalembe	KIBWEZI
141	NDOLLO Reuben Owino Nyanginja	MAKADARA
142	NDWIGA Peter Njeru	MANYATTA
143	NGILU Charity Kaluki	KITUI CENTRAL
144	NGOYONI Titus Lemusei	LAISAMIS
145	NGOZI Abdallah Jumaa	MSAMBWENI
146	NKAISSEERRY Kasaine Joseph	KAJIADO CENTRAL
147	NTIMAMA William Rongora ole	NAROK NORTH
148	NTUTU Stephen Kanyinke	NAROK SOUTH
149	NYACHAE Simeon	NYARIBARI CHACHE
150	NYAGAH Norman Gathakari King'ang'i	KAMUKUNJI
151	NYAGAH Joseph William Nthiga	GACHOKA
152	NYAMUNGA Eric Opon	NYANDO
153	NYONG'O Peter Anyang'	KISUMU RURAL
154	OBWOCHA Henry Onyancha	WEST MUGIRANGO
155	ODINGA Raila Amolo	LANGATA
156	ODOYO Peter Ochieng'	NYAKACH
157	OGINGA Oburu	BONDOKO
158	OGUR Tobias Orao Ochola	NYATIKE
159	OJAAMONGSON Sospeter Odeke	AMAGORO
160	OJODE Joshua Orwa	NDHIWA
161	OKEMO Chrysanthus	NAMBALE

162	OKIOMA Samson Nyang'au	KITUTU MASABA
163	OKUNDI Philip Okoth	RANGWE
164	OLWENY Patrick Ayiecho	MUHORONI
165	OMAMBA Herman Odhiambo	URIRI
166	OMINO Joab Henry Onyango (since deceased) (Vacant by the time the Conference concluded its proceedings)	KISUMU TOWN WEST
167	OMONDI William Opendo	KASARANI
168	ONDIEK Stephen Alloys Oluoch	UGENYA
169	ONYANCHA Joel Omagwa	BOMACHOGO
170	OPARANYA Wycliffe Ambetsa	BUTERE
171	OPORE John Zebedeo	BONCHARI
172	OSUNDWA Wycliffe	MUMIAS
173	OWIDI Peter Otieno	KASIPUL-KABONDO
174	OWINO Charles Oyugi	MIGORI
175	METITO Katoo Ole	KAJIADO SOUTH
176	POGHISIO Samuel Losuron	KACHELIBA
177	RAI Samuel Gonzi	KINANGO
178	ROTINO Philip Ruto	SIGOR
179	RUTO William Samoei	ELDORET NORTH
180	RUTTO Sammy Kipkemtoi	KIPKELION
181	SAITOTI George	KAJIADO NORTH
182	SALAT Nicholas Kiptoo Korir	BOMET
183	SAMBU John Kipkorir	MOSOP
184	SANG Kipkorir Marisin	BURET
185	SASURA Abdi Tari	SAKU
186	SERUT John Bomet	MT. ELGON
187	SHAABAN Ali Isaack	MANDERA EAST
188	SHABAN Naomi Namsi	TAVETA
189	SHAKOMBO Suleiman Rashid	LIKONI
190	SIRMA Musa Cherutich	ELDAMA RAVINE
191	SOITA Peter Shitanda	MALAVA
192	SUDI David Kiprono Sutter	MARAKWET WEST
193	SUGOW Aden Ahmed	FAFI
194	SUNGU Eric Gor	KISUMU TOWN EAST

195	SYONGOH Zaddock Madiri	GWASI
196	TARUS Stephen Kipkiyeny	EMGWEN
197	TOO Nondin Noah Arap	AINAMOI
198	TORO Joshua Ngugi	KANDARA
199	TUJU Raphael	RARIEDA
200	TWAHA Fahim Yasin	LAMU WEST
201	WAITHAKA Mwangi	KINANGOP
202	WAMBORA Martin Nyaga	RUNYENJES
203	WAMUNYINYI Athanas Misiko Wafula	KANDUYI
204	WAMWERE Koigi	SUBUKIA
205	WANJALA Raphael Bita Sauti	BUDALANGI
206	WARIO Ali	BURA
207	WEKESA Noah Mahalang'ang'a	KWANZA
208	WERE David Aoko	MATUNGU
209	WETANGULA Moses Masika	SIRISIA
210	WEYA Samuel Arthur	ALEGO/USONGA
211	ABDALLA Amina Ali	Nominated
212	ARINGO Peter Oloo	Nominated
213	BETT Franklin K.	Nominated
214	KEINO Esther C.	Nominated
215	KILONZO Mutula	Nominated
216	KONES Kipkalya	Nominated
217	MBARIRE Cecily M.	Nominated
218	MWAU Adelina Ndeto	Nominated
219	NDUNGU Njoki S.	Nominated
220	OJIAMBO Julia A.	Nominated
221	ONIANG'O Ruth K.	Nominated
222	TETT Betty N.	Nominated
223	KAPARO F. O.	Speaker of the National Assembly

DISTRICT DELEGATES

Nairobi Province

224	Nancy Kabeyeka Lung'ahi	NAIROBI
225	Salim Ibrahim	NAIROBI

226	Samuel Macharia Muchuga	NAIROBI
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Coast Province

227	Amina Zuberi Rajab	MOMBASA
228	Livu K. Raphael	MOMBASA
229	Mdahoma Farouk Said	MOMBASA
230	Boi Fatuma Bakari	KWALE
231	Kitambi Mwalimu Digore	KWALE
232	Ndeme Raphael Bombo	KWALE
233	Mwaringa Beatrice Mwaka	KILIFI
234	Haji Mwijaa Mwinyi	KILIFI
235	Tsumah Reuben R.	KILIFI
236	Zuhura Zukira Wanje	MALINDI
237	Onotto Joshua Jilo	MALINDI
238	Badawy Abdulrahman Ahmed	MALINDI
239	Halako Fatuma Galogalo	TANA RIVER
240	Abuti Mohammed Juma	TANA RIVER
241	Golich Juma Wario	TANA RIVER
242	Ahmed Amina Muhudhar	LAMU
243	Aboud Sheikh Abdalla	LAMU
244	Omar Twalib Mzee	LAMU
245	Mwanyota S. Mariam	TAITA TAVETA
246	Mwailengo Haji Joel	TAITA TAVETA
247	Mnene J. Othiniel	TAITA TAVETA

North Eastern Province

248	Asli Ibrahim Ali	GARISSA
249	Abdirahaman Ali Abass	GARISSA
250	Abdullahi Haji Mohammed	GARISSA
251	Hubbie Hussein Al-Haji	IJARA
252	Dubat Ali Amey	IJARA
253	Salah Arte Ahmed	IJARA
254	Fatuma Sheikh Muhammed	WAJIR
255	Ahmed Maalim Omar	WAJIR
256	Nur Ibrahim Abdi	WAJIR

257	Sahara Ahmed Hillow	MANDERA
258	Isaack Derow Ibrahim	MANDERA
259	Salah Maalim Alio	MANDERA

Eastern Province

261	Khadija Fugicha Dabassa	MOYALE
262	Abdikadir Guyo	MOYALE
263	Kaaru Abdulkadir Guleid	MOYALE
264	Esintele Kureya	MARSABIT
265	Guracha Denge Wario	MARSABIT
266	Galgalo Adano Tuye	MARSABIT
267	Fatuma Boru Jaldesa	ISILO
268	Godana Doyo Adhi	ISILO
269	Yusuf Wako Dogo	ISILO
270	Bariu Beatrice	NYAMBENE
271	Kiumo Amos	NYAMBENE
272	Thimangu Jim Muketha	NYAMBENE
273	Muriuki Joyce Kagendo	MERU CENTRAL
274	Gituma Paul Victor	MERU CENTRAL
275	M'Rinyiru Julius M'Mworia	MERU CENTRAL
276	Ndeke Leah Ciamwari	MERU SOUTH
277	M'Thigaa Godfrey Mbuba	MERU SOUTH
278	Nkoroi Peter Kang'ethe	MERU SOUTH
279	Nduyo Grace Ntembi	THARAKA
280	Kaimba Bruno Kibaara	THARAKA
281	Mungania Julius Mugao	THARAKA
282	Kimani Lydia Wanjiru	EMBU
283	Njeru Abel Mwaniki	EMBU
284	Munyi John Gitari	EMBU
285	Naleah Gatiti Kithumbu	MBEERE
286	Isa Ireri Ngunia	MBEERE
287	Nichasius Mugo Njoka	MBEERE
288	Mutunga Jane Mwikali	MWINGI
289	Maluki Robert M	MWINGI
290	Mutua Eric Kyalo	MWINGI

291	Jane Mwende Pius	KITUI
292	Francis Nzuki Kaloki	KITUI
293	Justus Musyoki Mutweti	KITUI
294	Victoria Mutheu Musyoka	MACHAKOS
295	Saipstone Ngalaatu Musau	MACHAKOS
296	Stanislous Wambua Kasoka	MACHAKOS
297	Wambua Praxedes Nzisa	MAKUENI
298	Maende Rhoda Ndumi	MAKUENI
299	William Nduse Matheka	MAKUENI

Central Province

300	Lydia Wambui Muriuki	NYANDARUA
301	George Ndatho Muchiri	NYANDARUA
302	Frederick Rukwaro Nderitu	NYANDARUA
303	Margaret Nyathogora	NYERI
304	Hezekiah Waithanje Minjire	NYERI
305	Dominic Muraguri Nderi	NYERI
306	Ngari Christine Nyawira	KIRINYAGA
307	Waruri John Nyaga	KIRINYAGA
308	Mathenge James Stanley	KIRINYAGA
309	Kirangari Jane Kamwaga	MURANGA
310	Mwangi James Waweru	MURANGA
311	Fr. Gitonga Joachim	MURANGA
312	Mburu Muthoni Mary	MARAGUA
313	Simon Gathii Gachomo Gichuru	MARAGUA
314	Gacuru Wa Karenge	MARAGUA
315	Beatrice Wairimu Kamamia	THIKA
316	Gitu wa Kahengeri	THIKA
317	John Kinuthia Waitiki	THIKA
318	Hannah Nyambura Kimani	KIAMBU
319	James Kinuthia Mwangi	KIAMBU
320	Kiriro Wa Ngugi	KIAMBU

Rift Valley Province

321	Loyer Rhoda Arupe	TURKANA
322	Lomorukai L. Emmanuel	TURKANA
323	Emaase Peter Derick Ejore	TURKANA
324	Koringura Hellen	WEST POKOT
325	Lopetakou William	WEST POKOT
326	Alew Simon	WEST POKOT
327	Lepuchirit Sophia	SAMBURU
328	Lobuk Pius Leyaro	SAMBURU
329	Julius Lalampaa	SAMBURU
330	Nancy Iyadi	TRANS NZOIA
331	Bungei Isaac Kipkosgei	TRANS NZOIA
332	Nathaniel K. Tum	TRANS NZOIA
333	Emmy Jerono Kipsoi	UASIN GISHU
334	Moses Kiplagat Keter	UASIN GISHU
335	Julius Kipkurgat Sitienei	UASIN GISHU
336	Mkawerweren B. Chebii	MARAKWET
337	Sengech Michael Kipkemtoi	MARAKWET
338	Kiptum Jane Jebiwott	MARAKWET
339	Caroline Chemursoi	KEIYO
340	David K. Kuto	KEIYO
341	Kaitany Ernest Kiprotich	KEIYO
342	Magut Felicity Irine	NANDI
343	Saina Augustine Kibet	NANDI
344	Kimaiyo Keroney Arap Sego	NANDI
345	Lekisemon Mariamu Ntausian	BARINGO
346	Cheruiyot Isaiah Kiplabat	BARINGO
347	Chelagat Naftali Kemboi	BARINGO
348	Chepkoech Sally	KOIBATEK
349	Kigen David Kimaiywa	KOIBATEK
350	Kiptingos Saul Kipkoech	KOIBATEK
351	Pascalina Riwandi Lebarleiya	LAIKIPIA

352	John Muchai Kiniti	LAIKIPIA
353	Shuel Joseph Njalis	LAIKIPIA
354	Lizah Chepkorir Chelule	NAKURU
355	Mwangi Michael Githu	NAKURU
356	Kesendany Ezekiel Kosgey	NAKURU
357	Teclah Nairesiai Munkushi	TRANSMARA
358	Moses L. Naimadu	TRANS MARA
359	David Mpilei Oloisa	TRANS MARA
360	Lorna Timanoi Tetu	NAROK
361	William Salaon Ole Yiaile	NAROK
362	Wilfred Koitamet Ole Kina Nchoshoi	NAROK
363	Keko Somoina Margaret	KAJIADO
364	Osoi Kamwende Daniel	KAJIADO
365	Ole Sisika Lengete Moses	KAJIADO
366	Caroline Cherotich Ruto	BOMET
367	Alexander Kipngetich Chepkwony	BOMET
368	Joel Kipyegon Sang	BOMET
369	Christina Cherono Ngeno	KERICHO
370	Joseph Maritim Soo	KERICHO
371	James Kibii Koske	KERICHO
372	Bornice Chelangat Soi	BURET
373	Kiplangat Arap Koech	BURET
374	Joseph Kipngeno Soi	BURET

Western Province

375	Nandako Jane Kauka	LUGARI
376	Mafunga Chesmei Wambulwa	LUGARI
377	Nakalo David Okiya	LUGARI
378	Dorcus N. Mbelesia	KAKAMEGA
379	Levi Wangula Ahindukha	KAKAMEGA
380	Charles Lwanga Lwole	KAKAMEGA
381	Katamu Rita Ombito	BUTERE - MUMIAS
382	Aswani Sammy Amunga	BUTERE - MUMIAS
383	Tsalwa Warrens Apollo	BUTERE - MUMIAS

384	Jandeka Rebecca Evelia	VIHIGA
385	Caleb Kisato Jumba	VIHIGA
386	Ohare Charles Edward	VIHIGA
387	Ngeywa Cherotich Nancy	MT. ELGON
388	Chemwey Naibei Sammy	MT. ELGON
389	Kisiero Arap Wilberforce	MT. ELGON
390	Kellan Khaoma Wavomba	BUNGOMA
391	Oscar Zakayo Makokha	BUNGOMA
392	Eliud Paul Nakitare	BUNGOMA
393	Ashepete Barasa Roseline	TESO
394	Mark Asitaluko Osilli Adungo	TESO
395	Ajaa Olubai	TESO
396	Akhayalu Happy Gloria Wabwire	BUSIA
397	Awillie David Lidbury Erulu	BUSIA
398	Wesonga George Ojwang	BUSIA

Nyanza Province

399	Ogot Grace Emily Akinyi	SIAYA
400	Owino Rose Marie	SIAYA
401	Awora Daniel Obare	SIAYA
402	Eve Akinyi Obara	KARACHUONYO
403	Benta Auma Saoke	KARACHUONYO
404	Fares Ogada Aguo	KARACHUONYO
405	Ochola Fibie Atieno	KISUMU
406	Shakeel Shabbir Ahmed	KISUMU
407	Kayila James Omolo	KISUMU
408	Nam Judith Achieng' Oyalo	NYANDO
409	Attyang Joseph David	NYANDO
410	Ombura Elphas Odhiambo	NYANDO
411	Ogutu Teresa Usunga	HOMABAY
412	Odhiambo Ollunga Mark	HOMABAY
413	Ogingo Otieno Kevin Mathew	HOMABAY
414	Okelo Elizabeth Nyangetha	MIGORI
415	Dache John Pesa	MIGORI
416	Oyao David Adundo	MIGORI

417	Atonga Gaudentia Agoko	SUBA
418	Orwa George Ochieng	SUBA
419	Onyango Philip Romanus	SUBA
420	Susan Wambura Jackson	KURIA
421	Thomas Mosabi Merengo	KURIA
422	Maasai Maroa	KURIA
423	Clare Kwamboka Omanga	KISII
424	Thomas Nyabote Aburi	KISII
425	Sylvanus Onyambu Ogari	KISII
426	Orwenyo Mary Obonyo	NYAMIRA
427	Ogero Benson Kegoro	NYAMIRA
428	Kibagendi Richard Ngoge	NYAMIRA
429	Judith Magundho	BONDO
430	Mitere Albert Onyango	BONDO
431	Otieno Rose Adiana	BONDO
432	Rodah Gesare Kamanda	GUCHA
433	David Marcos Rakamba	GUCHA
434	Peter G. Nyanducha	GUCHA

TRADE UNION REPRESENTATIVES

DEL. NO.	NAME	ORGANIZATION
435	John Katumanga	KNUT
436	Francis Ng'ang'a	KNUT
437	Zeruiya Otwani	KNUT
438	John Cheruiyot	Union of Kenya Civil Servants
439	George Muchai	COTU
440	Rajab Mwondi	COTU
441	Joel Chebii	COTU
442	Francis Waweru	COTU
443	Roselinda Simiyu	COTU
444	Maero Tindi	COTU
445	Esther Lelei	COTU
446	Francis Wangara	COTU
447	Kennedy Kiliku	COTU
448	Isaiah Kubai	COTU

449	Benson Okwaro	COTU
450	Francis Atwoli	COTU

NON GOVERNMENTAL ORGANIZATIONS REPRESENTATIVES

DEL.NO.	NAME
451	Millie G. A. Odhiambo
452	Maurice Odhiambo Makoloo
453	Elkanah Odembo
454	Kathurima M'Inoti
455	Lawrence Murugu Mute
456	Mohamed J. Nyaoga
457	Onwonga Nyangau Billy
458	Odenda Lumumba
459	Oduor Ongwen
460	Gichira Kibara
461	Philip Ole Sironka
462	Samuel Tororei
463	Suba Churchill Meshack
464	Singoei Korir Abraham
465	Beatrice Nduta Kiarie
466	Joyce Umbima
467	Mary Wambui Kanyi
468	Hellen Jepkerich Too - Yego
469	Grace N. Githaiga
470	Sophia Abdi
471	Rose Kasiala Lukalo - Owino
472	Miriam Muto
473	Pamela Arwa Mboya

PROFESSIONAL ORGANIZATIONS REPRESENTATIVES

DEL. NO.	NAME	ORGANIZATION
474	Okoth Anne Ochien'g	NNAK
475	Anne Wairimu Njogu	ICPSK
476	Mohammed Jamila	CIAK

477	Beryl Anyango Ouma	LSK
478	Sabenzia N. Wekesa	KVA
479	Kavoo Kilonzo	KMA
480	John Karimi Njiraini	ICPAK
481	Daniel W. Ichang'i	GSK
482	Isaac Ongumba Kibwage	PSK
483	Saleh Saad Yahya	ISK
484	Sylvester C.M. Wafula	AAK
485	Raphael G. Mwai	APSEA
486	Daniel Njagi	ACEK
487	Baldip Singh Rihal	APSEA
488	James F.T. Foster	ICPSK

WOMEN ORGANIZATIONS REPRESENTATIVES

DEL. NO.	NAME
489	Jane Mumbi Kiano
490	Rose Waruhiu
491	Lillian Wanjira
492	Mercy Mwamburi
493	Aisha Chiku Wanje
494	Kauchi A. Chivumba
495	Asenath Kaimuri Nyamu
496	Ann Mululu
497	Jillo Mumina Konso
498	Kathini Maloba Caines
499	Margaret Hutchinson
500	Kamla Sikand
501	Joyce M. Majiwa
502	Rose A. Olende
503	Elizabeth Mayieka
504	Rukia A. Subow
505	Fatuma Ali Saman
506	Fatuma Ibrahim Ali
507	Margaret Kamar
508	Mareso Agina
509	Martha Rop

510	Atsango Chesoni
511	Ruth N. Kibiti
512	Florence Machayo

RELIGIOUS ORGANIZATIONS REPRESENTATIVES

DEL. NO.	NAME	ORGANIZATION
513	Abuom, Agnes	NCCK
514	Ajuoga, Milcah Aoko	OAIC
515	Ali, Shee Mohammed	SUPKEM
516	Bwana, Peter Ondari	SDA
517	El-Busaidy, Abdulghafur H.S.	SUPKEM
518	Fadhil, Sultana	MCC
519	Gacambi, Marie Therese	Kenya Episcopal Conference
520	Gatiti, James Nthiga	Kenya Episcopal Conference
521	Wahu Kaara.	PCEA
522	Gitari, David M.	NCCK
523	Wanjiru, Margaret Muchai	Evangelical Fellowship of Kenya
524	Kapila, Neera Kent	Hindu Council of Kenya
525	Ibrahim Ahmed Yussuf	MCC
526	Kinyanjui, Rosemary, M.	Anglican Church of Kenya
527	Njeru Wambugu	OAIC
528	Mageria, James John	PCEA
529	Maina, Patrick Musungu	Church of God in East Africa
530	Mburugu, Florence W. Ruhiu	Kenya Episcopal Conference
531	Ali Mustafa Yussuf	SUPKEM
532	Muchai, Rogers Lumetete Walubengo	Kenya Episcopal Conference
533	Mung'athia, Hellen	Methodist Church of Kenya
534	Musyimi, Mutava	NCCK
535	Ojiambo Fred O. O. N'cruba	Evangelical Fellowship of Kenya
536	Mwaniki, Tabitha Mumbi	SDA
537	Mwanzi, Asiya Mahmood	SUPKEM
538	Ng'eny, Samuel K. Arap	Anglican Church of Kenya
539	Njue, John	Kenya Episcopal Conference
540	Nthamburi, Zablon	Methodist Church of Kenya

541	Okoth, Zacchaeus	Kenya Episcopal Conference
542	Omondi, Ibrahim	Evangelical Fellowship of Kenya
543	Rashmin P. Chitnis	Hindu Council of Kenya
544	Sehmi, Rupinder Singh	Hindu Council of Kenya
545	Shitemi, Simeon	Joint Religious Leaders
546	Sulumeti, Philip	Kenya Episcopal Conference
547	Wandati, Abdulrahaman Mirimo	MCC

COMMISSIONERS OF THE CONSTITUTION OF KENYA REVIEW COMMISSION

DEL. NO.	NAME
548	Yash Pal Ghai
549	Ahmed Idha Salim
550	Abida Ali-Aroni
551	H. W. O. Okoth-Ogendo
552	Phoebe Asiyo
553	M. A. Swazuri
554	Charles Maranga Bagwasi
555	Salome Wairimu Muigai
556	Alice Yano
557	Wanjiku Kabira
558	Abdirizak Arale Nunow
559	Bishop Bernard Njoroge Kariuki
560	Pastor Zablon Ayonga
561	Nancy Makokha Baraza
562	Mutakha Kangu
563	Kavetsa Adagala
564	Paul Musili Wambua

565	Abubakar Zein Abubakar
566	Ahmed Issack Hassan
567	Riunga Raiji
568	Ibrahim Lethome
569	Keriako Tobiko
570	Githu Muigai
571	Isaac Lenaola
572	K. Mosonik arap Korir
573	Domiziano Ratanya
574	Andronico O. Adede
575	Amos Wako
260	PLO- Lumumba

POLITICAL PARTY REPRESENTATIVES

DEL. NO.	NOMINEE	PARTY
576	Simon Mwai Gakuya	Chama Cha Uma Party (CCU)
577	George Kinyua	United Agri Party
578	Jacob Ochino Ogundo	Reform Party of Kenya
579	Daniel Mokaya Rasugu	National Party (Labour)
580	Francis Carey Onyango	Social Party for Advancement and Reforms - Kenya
581	Yusuf Mahmoud Aboubakar	Shirikisho Party of Kenya
582	Njuguna M. Kung'u	United Patriotic Party of Kenya
583	Appolo Njonjo	Social Democratic Party of Kenya (SDP)
584	Makau Mutua	Safina Party
585	Dennis Kodhe	Liberal Democratic Party
586	George Mwaura Mburu	Peoples Party of Kenya
587	Caroline Ng'ang'a	Labour Party of Kenya
588	Francis Wabayale	New People's Democratic Party
589	Daniel Gachihi Njoroge	Kenya Nationalist People Democratic Party

590	Patrick O. Onyango	Kenya National Democratic Alliance
591	Ogembo Masese	Kenya National Congress
592	Francis Kilemi	Green African Party
593	Gervase A. Akhwabi	Forum for Restoration of Democracy (FORD Kenya)
594	Orie Rogo Manduli	Forum for Restoration of Democracy (FORD People)
595	Joseph Martin Shikuku	Forum for Restoration of Democracy (FORD Asili)
596	Hezron K. N. Manonda	Democratic Assistant Party
597	Moses M. Wekesa	Kenya Socialist Party
598	Kimani M. Ng'ang'a	United Kenya Citizen
599	Leslie Betawa Mwachiro	Chama Cha Majimbo na Mwangaza
600	Zakayo M. Karimi	Sisi Kwa Sisi Party of Kenya
601	Lus'eno H. Liyai Indembukhani	Peoples Solidarity Union
602	Benjamin Gitoi	National Conservative Party of Kenya
603	Winston Ogola Adhiambo	Federal Party of Kenya
604	Samuel M. Mwaura	Mass Party of Kenya
605	Ngorongo Makanga	Liberal Greens Party of Kenya
606	Phoebe Sikoya Kituyi	Reform of Political Kenya Union
607	Nginyo L. Kariuki	National Alliance Party of Kenya
608	Lihanda Kemen Savai	Kenya Republican Reformation Party
609	Kenneth N. Njiru	United Democratic Peace Integrity Kenya
610	Justus M. Wekala	People's Democratic Union of Kenya
611	John P. Nyakundi	Kenya Social Congress
612	David Wakahu	UMMA Patriotic Party
613	Mike Oliewo	Party of Independent Candidates of Kenya (PICK)
614	Dalmas Anyango Otieno	Kenya African National Union (KANU)
615	George Omari Nyamweya	Democratic Party of Kenya
616	Were W. K. Domtila	Economic Independence Party

SPECIAL INTERESTS GROUPS

DEL NO.	NAME	
617	Manu Chandaria	Industry / Business Community
618	VACANT	Judiciary
619	Wilfred Kiboro	Media
620	R. S. C. Omolo	Judiciary
621	Robert Rukunga	Cultural Arts
622	Bernadette Quadros	Hindu
623	Murtaza Jaffer	Hindu
624	King'ori Mwangi	Police
625	Gilbert M. Omondi	Prisons
626	Mamo Abudo Qonchoro	Students/Youth
627	Danny Irungu Mwangi	Youths
628	James O. Bwatuti	Informal Sector / Jua Kali
629	T. K. Githiora	Armed Forces

APPENDIX V

MEMBERS OF THE STEERING COMMITTEE OF THE NATIONAL CONSTITUTIONAL CONFERENCE

	NAME	DEL. NO.
1.	Yash Pal Ghai	548
2.	Bonaya A. Godana	029
3.	Sultana Fadhil	518
4.	Koitamet Ole Kina	362
5.	Bishop Phillip Sulumeti	546
6.	Rev. Mutava Musyimi	534
7.	Kimaiyo K. Arap Sego	344
8.	Uhuru Kenyatta	049
9.	Thomas Nyabote Aburi	424
10.	S. K. Tororei	462
11.	Saul K. Kiptingos	350
12.	Rhoda N. Maende	298
13.	Mariam S. Mwanyota	245
14.	Sammy Naibei Chemwey	388
15.	Oduor Ong'wen	459
16.	Somoina Keko	363
17.	Rev. Macharia Muchuga	226
18.	Gacuru Wa Karenge	314
19.	Roselinda Simiyu	443
20.	Ahmed Maalim Omar	255
21.	Ruth N. Kibiti	511
22.	Nancy Lung'ahi	224
23.	Sheikh Ali Shee	515
24.	Sophia Abdi Noor	470
25.	Yusuf Wako Dogo	269
26.	Joyce Umbima	466
27.	Ruth K. Oniang'o	221
28.	Simeon Nyachae	149
29.	Mwalimu Digore Kitambi	231
30.	Grace Ogot	399
31.	Wangari Maathai	083
32.	Martha Karua	044
33.	Kiraitu Murungi	124
34.	Amos Wako	575
35.	H. W. O. Okoth-Ogendo	551
36.	Ahmed Idha Salim	549
37.	Wanjiku Kabira	557
38.	Abdirizak Arale Nunow	558
39.	Mohammed A. Swazuri	553
40.	Musikari Kombo	073
41.	Paul Kibugi Muite	114
42.	Raila Odinga	155

	NAME	DEL. NO.
43.	Charles Maranga Bagwasi	554
44.	Isaac Lenaola	571
45.	Bishop Bernard N. Kariuki	559
46.	Raphael G. Mwai	485
47.	Kenneth Njiru	609
48.	Orie Rogo-Manduli	594
49.	Pamela Mboya	473
50.	Martin Shikuku	595
51.	Suba Churchill	463
52.	Njuguna Kung'u	582
53.	Abida Ali-Aroni	550
54.	Githu Muigai	570
55.	Ahmed Issack Hassan	566
56.	Nancy Makokha Baraza	561
57.	Kavetsa Adagala	563
58.	Mutakha Kangu	562
59.	Paul Musili Wambua	564
60.	Salome Wairimu Muigai	555
61.	Phoebe M. Asiyo	552
62.	Alice Yano	556
63.	Pastor Zablon Ayonga	560
64.	Abubakar Zein Abubakar	565
65.	Riunga Raiji	567
66.	Ibrahim Lethome	568
67.	Keriako Tobiko	569
68.	K. Mosonik arap Korir	572
69.	Domiziano Ratanya	573
70.	Baldip S. Rihal	487
71.	Francis X. Ole Kaparo	223
72.	Rose Lukalo-Owino	471
73.	Andronico O. Adede	574
74.	M. J. A. Emukule	395
75.	Adhu Awiti	009
76.	Cecily Mbarire	217
77.	Samuel Arap Ng'eny	538
78.	Kiriro wa Ngugi	320
79.	Joyce M. Majiwa	501
80.	Kerrow Billow Adan	015
81.	Marsden Madoka	085
82.	Saleh Saad Yahya	483
83.	Kivutha Kibwana	057
84.	Caroline W. Ng'ang'a	587
85.	Nyangau Onwong'a Billy	457
86.	Wilfred Kiboro	619
87.	Eliud Paul Nakitare	392
88.	Dr. PLO – Lumumba	260

APPENDIX VI

MEMBERS OF THE STANDING COMMITTEE ON PRIVILEGES, DISCIPLINE AND WELFARE

1.	Baldip S. Rihal	-	Chairperson
2.	Salim Ibrahim	-	Member
3.	Hezekiah Wathanje	-	Member
4.	Abdullahi Haji	-	Member
5.	Francis Wangara	-	Member
6.	Miriam Muto Malogo	-	Member
7.	Joel Kipyegon Sang	-	Member
8.	Kamta Sikand	-	Member
9.	Francis Kaparo	-	Member
10.	Shakeel Shabir	-	Member
10.	Bishop B. N. Kariuki		<i>ex-officio</i> Member
11.	Mrs. Abida Ali-Aroni		<i>ex-officio</i> Member
12.	Dr. P.L.O. Lumuba		<i>ex-officio</i> Member

APPENDIX VII

MEMBERS OF THE MEDIA ADVISORY COMMITTEE

	NAME	DEL. NO	
1	Ms Rose Lukalo-Owino	471	Chairperson
2	Mustafa Ali	531	Member
3	Peter Kangethe Nkoroi	278	"
4	Sylvestor C.M. Wafula	484	"
5	Awillie David Erulu	397	"
6	Mike Oliewo	613	"
7	David Marcos Rakamba	433	"
8	Mutahi Kagwe	033	"
9	Kavetsa Adagala	563	<i>ex-officio</i>
10	Salome Muigai	555	"
11	Abubakar Zein Abubakar	565	"

APPENDIX VIII

MEMBERSHIP OF THE AD HOC COMMITTEE ON THE CONFERENCE PROGRAMME

1.	Prof. Wangari Maathai	-	Chairperson
2.	Gachuru wa Karenge	-	Member
3.	Eliud Paul Nabitare	-	Member
4.	J.P. Nyakundi	-	Member
5.	Maasai Maroa	-	Member
6.	Jamila Mohammed	-	Member
7.	Atsango Chesonni	-	Member
8.	Rajab Mwondi	-	Member
9.	Dubat A. Arney	-	Member
10.	James Koske	-	Member
11.	Arch. Bishop David Gitari	-	Member
12.	Rev. Macharia Muchuga	-	Member
13.	Mwandawiro Mghanga	-	Member
14.	Kureya Esintele	-	Member
15.	Nyang'au Onwonga	-	Member
16.	Thimangu G. Muketha	-	Member
17.	Kavetsa Adagala	-	Member
18.	Abubakar Zein Abubakar	-	Member
19.	Bishop Benard Njoroge	-	Member

APPENDIX IX

MEMBERS OF THE AD HOC COMMITTEE ON CULTURE

1.	Prof. Wangari Maathai	-	Convenor
2.	Gachuru wa Karenge	-	Member
3.	Eliud Paul Nakitare	-	Member
4.	J.P. Nyakundi	-	Member
5.	Maasai Maroa	-	Member
6.	Jamila Mohammed	-	Member
7.	Atsango Chesonni	-	Member
8.	Rajab Mwondi	-	Member
9.	Dubat A. Amey	-	Member
10.	James Koske	-	Member
11.	Arch. Bishop David Gitari	-	Member
12.	Rev. Macharia Muchuga	-	Member
13.	Mwandawiro Mghanga	-	Member
14.	Kureya Esintele	-	Member
15.	Nyang'au Onwonga	-	Member
16.	Thimangu G. Muketha	-	Member
17.	Kavetsa Adagala	-	Rapporteur
18.	Abubakar Zein Abubakar	-	Rapporteur
19.	Bishop Benard Njoroge	-	Rapporteur

APPENDIX X

MEMBERS OF THE CONSENSUS BUILDING GROUP – BOMAS I

1.	Bishop Philip Sulumeti	-	Chief Moderator
2.	Nancy Lung’ahi	-	Assisting Moderator
3.	Sammy Naibei Chemwey	-	Member
4.	Njuguna Kung’u	-	“
5.	Nichasius Mugo	-	“
6.	Yusuf Abubakar	-	“
7.	Gacuru wa Karenge	-	“
8.	Ahmed Maalim Omar	-	“
9.	Ruth Kibiti	-	“
10.	Wahu Kaara	-	“
11.	Daniel Ole Osoi	-	“
12.	Oduor Ong’wen	-	“
13.	Sheikh Ali Shee	-	“
14.	Neera Kent Kapila	-	“
15.	Otieo Ogingo	-	“
16.	Kenneth Marende	-	“
17.	Joe Khamisi	-	“
18.	Bonaya Godana	-	“
19.	Sophia Abdi Noor	-	“
20.	Rhoda Maende	-	“
21.	David Musila	-	“
22.	Henry Obwocha	-	“
23.	Oburu Oginga	-	“
24.	Sultana Fadhil	-	“
25.	Wilfred Kiboro	-	“
26.	Grace Ogot	-	“
27.	Raphael Mwai	-	“
28.	Roselinda Simiyu	-	“
29.	Charles Lwanga Lwole	-	“
30.	Irene Magut	-	“
31.	Kenneth Njiru	-	“
32.	Ogembo Masese	-	“
33.	Margaret Muchai	-	“

34.	Otieno Kajwang'	-	"
35.	Uhuru Kenyatta	-	"
36.	William Ruto	-	"
37.	Naomi Shaaban	-	"
38.	Soita Shitanda	-	"
39.	Danson Mungatana	-	"
40.	Moses Wetangula	-	"
41.	Mirugi Kariuki	-	"
42.	Bonny Khalwale	-	"
43.	Amos Kimunya	-	"
44.	H. W. O. Okoth-Ogendo	-	<i>Ex- officio</i>
45.	Koitamet Ole Kina	-	<i>Ex- officio</i>
46.	Amos Wako	-	<i>Ex- officio</i>
47.	Prof. Yash Pal Ghai	-	<i>Ex- officio</i>
48.	Dr. PLO Lumumba	-	<i>Ex- officio</i>

APPENDIX XI

MEMBERS OF THE CONSENSUS BUILDING COMMITTEE – BOMAS II

1.	Bishop Philip Sulumeti	-	Chief Moderator
2.	Ruth Kibiti	-	Member
3.	Sheikh Ali Shee	-	"
4.	Sophia Abdi Noor	-	"
5.	Grace Ogot	-	"
6.	Kimaiyo arap Sego	-	"
7.	Gitu wa Kahengeri	-	"
8.	Marsden Madoka	-	"
9.	Wangari Maathai	-	"
10.	Prof. Yash Pal Ghai	-	<i>Ex- officio</i>
11.	Prof. H. W. O. Okoth-Ogendo	-	<i>Ex- officio</i>
12.	Dr. PLO- Lumumba	-	<i>Ex- officio</i>

APPENDIX XIIA

MEMBERS OF THE TASK FORCE ON CULTURE

Commissioners:

1.	Ms. Kavetsa Adagala	-	Co-Convenor
2.	Ms. Salome Muigai	-	Co-Convenor
3.	Bishop Benard Njoroge	-	Member
4.	Mr. Zein Abubakar Zein	-	Member
5.	Pastor Zablon Ayonga	-	Member
6.	Mr. Domiziano Ratanya	-	Member
7.	Ms. Nancy Baraza	-	Mmber
8.	Dr. Phoebe Asiyo	-	Member
9.	Prof. Wanjiku Kabira	-	Member
10.	Prof. Yash Pal Ghai	-	<i>Ex- officio</i>
11.	Prof. H.W.O. Okoth-Ogendo	-	<i>Ex- officio</i>
12.	Dr. PLO Lumumba	-	<i>Ex- officio</i>

Secretariat

1.	Ms Pauline Nyamweya	-	Deputy Secretary, RD&TS
2.	Mr. Charles Oyaya	-	Programme Officer
3.	Mr. Peter Kanyi	-	Programme Officer
4.	Mr. J oash Aminga	-	Assistant Programme Officer
5.	Mrs. Liz Kingi	-	Assistant Programme Officer
6.	Ms. Sylvia Nyaga	-	Assistant Programme Officer
7.	Ms. Noor Awadh Ghalgan	-	Assistant Programme Officer
8.	Mr. Maurice Kepoi	-	Assistant Programme Officer
9.	Mr. Wycliffe Owade	-	Assistant Programme Officer
10.	Ms. Leah Symekher	-	Assistant Programme Officer
11.	Mr. Noor Mohammed Abdi	-	Assistant Programme Officer
12.	Mr. Geoffrey Mosoti	-	Assistant Programme Officer

APPENDIX XII B

MEMBERS OF THE TASK FORCE ON AFFIRMATIVE ACTION

Commissioners:

1.	Prof. Yash Pal Ghai	-	Convenor
2.	Ms. Nancy Baraza	-	Member
3.	Dr. Abdirizak Nunow	-	Member
4.	Prof. Wanjiku Kabira	-	Member
5.	Justice Mr. Isaac Lenaola	-	Member

Secretariat

1.	Ms Pauline Nyamweya	-	Deputy Secretary, RD&TS
2.	Ms. Leah Symekher	-	Assistant Programme Officer
3.	Ms. Rahma Jillo	-	Assistant Programme Officer

APPENDIX XII C

MEMBERS OF THE TASK FORCE ON DEVOLUTION

Commissioners:

Prof. Wanjiku Kabira	-	Co-convenor
Mr. Mutakha Kangu	-	Co-convenor
Dr. Githu Muigai	-	Member
Ms. Kavetsa Adagala	-	Member
Mrs. Alice Yano	-	Member
Bishop Bernard Njoroge Kariuki	-	Member
Dr. Andronico O. Adede	-	Member
Dr. Mosonik arap Korir	-	Member
Dr. Charles Maranga Bagwasi	-	Member
Hon. Dr. Phoebe Asiyo	-	Member
Mr. Isaac Lenaola	-	Member
Dr. Mohammed A. Swazuri	-	Member
Mr. Riunga Raiji	-	Member
Mr. Ahmed Issack Hassan	-	Member
Prof. Yash Pal Ghai	-	Ex Officio
Prof. H. W. O. Okoth-Ogendo	-	Ex Officio
Dr. PLO Lumumba	-	Ex Officio

Secretariat

Ms. Pauline Nyamweya	-	Deputy Secretary, RD&TS
Ms. Eunice Gichangi	-	Programme Officer
Mr. Jeremiah Nyegenye	-	Programme Officer
Mr. Fidelis W. Wangata	-	Assistant Programme Officer
Mr. Dan Juma	-	Assistant Programme Officer
Mrs. Jacqueline Obiero	-	Assistant Programme Officer
Mr. Stephen Mukaindo	-	Assistant Programme Officer
Ms. Jonuba Bekah	-	Assistant Programme Officer
Ms. Rukia Abdikadir	-	Assistant Programme Officer

APPENDIX XIII

REVISED GUIDELINES FOR THE NATIONAL CONSTITUTIONAL CONFERENCE *AD HOC* AND TECHNICAL WORKING COMMITTEES

1. Establishment of Committees

1.1 Ad Hoc Committees

Regulation 44(1) of the Constitution of Kenya Review (National Constitutional Conference) (Procedure) Regulations empower the Conference to establish “ad hoc....” Committees on any subject it considers appropriate to carry out its functions. Pursuant to this mandate, the Conference has established an Ad Hoc Committee on Culture with the following terms of reference:-

- to conduct a careful analysis of the Draft Constitution with a view to determining whether, and the extent to which the provisions of section 3 (e) of the Review Act have been reflected therein and, in particular to :
 - (i) explore ways of giving constitutional legitimacy of Kenya’s rich cultural diversity and expression promoting the cultural expression and cultural activities of the people of Kenya;
 - (ii) explore constitutional options for the protection and promotion of the rights of communities to organize and participate in cultural activities locally or countrywide;
 - (iii) explore whether or not certain aspects of culture, custom or tradition should be prohibited or otherwise qualified in specific provisions of the draft Constitution;
 - (iv) propose, where necessary, amendments to any aspect of the draft, with the view to strengthening Kenya’s cultural identity in the context of national integration and unity;
 - (v) prepare a report for consideration to the Technical Working Groups of the Conference;
 - (vi) review the various aspects of the Draft Bill with a view to identifying any aspects that may negate our cultural heritage; and

- (vii) explore the possibility of establishing an institutional framework for the promotion and development of Kenya's diverse cultural values and heritage.

1.2 Technical Working Committees

Under Regulation 49(1) the Conference is required to appoint Technical Working Committees to consider any issue or theme arising from the Draft Bill, as it may consider appropriate. Clause (4) of that Regulation establishes twelve such committees as follows:-

Technical Working Committee A	- Preamble, Supremacy of the Constitution, the Republic and National Goals, Values and Principles.
Technical Working Committee B	- Citizenship and the Bill of Rights
Technical Working Committee C	- Representation of the People
Technical Working Committee D	- The Executive
Technical Working Committee E	- The Judiciary
Technical Working Committee F	- The Legislature
Technical Working Committee G	- Devolution
Technical Working Committee H	- Public Finance, Public Service, Leadership and Integrity
Technical Working Committee I	- Defence and National Security
Technical Working Committee J	- Land Rights and the Environment
Technical Working Committee K	- Constitutional Commissions and Amendments to the Constitution
Technical Working Committee L	- Transitional and Consequential Arrangements.

Under Regulation 20(1), upon the conclusion of the general debate the Commission's Report and Draft Bill shall stand committed to consideration by Technical Working Committees established under Regulation 49 above. Clause (3) specifies that at this stage, the debate in committees shall be confined to the Commission's Report and Draft Bill. Specifically delegates are entitled to move amendments to the Report and Draft Bill and, in particular to -

- (i) examine all issues raised during the general debate on and any other issues touching on matters provided for in the Report and Draft Bill prepared by the Commission and to consider how best these may be used to strengthen or enrich the recommendations and/or proposals presented therein in respect of their specific thematic mandate;
- (ii) propose amendments or changes to the contents of the Report and/or Draft Bill in relation to matters under their specific thematic mandate;
- (iii) report on their proposed amendments to the Report and/or Draft Bill to the Steering Committee for presentation to and debate by the Conference, and
- (iv) consider and report on any other matter referred to it by the Steering Committee or the Conference;

In their deliberations, Technical Working Committees are required to comply, to the extent possible, with the provisions of the Second Schedule to the Conference Regulations.

1.3 Authority to call for Information

Under Regulation 45(5), Committees may invite any person (including a delegate) to make specialised presentation before them or to provide such other information as they may require.

2. Membership of Committees

2.1 Ad Hoc Committees

As a general rule, the size of Ad Hoc Committees may not exceed fifteen persons “at least one but not more than two, of whom shall be Commissioners”. Committees are, however, empowered under Regulation 44(6) to co-opt “not more than two delegates”. The maximum size of an ad hoc committee is therefore SEVENTEEN.

2.2 Technical Working Committees

Under Regulation 49(3) Technical Working Committees “shall consist of not more than sixty delegates”. The regulation further provide that -

- no delegate can be a member of more than one committee;
- delegates who have a particular interest in the work of the committee of which she/he is not a member may attend meetings of such

meetings, and make oral or written presentations thereat but without the right to vote.

3. Organization and Management of Committees

3.1 Convenors of Committees

Each Committee shall have a Convenor elected by the Conference on advice of the Steering Committee. The functions of convenors are to -

- (i) call committee meetings, subject to authorization of the committee;
- (ii) preside over the meetings of and to put all questions for discussion by the committee;
- (iii) maintain order and quorum and to decide all questions of order;
- (iv) rule on all procedural matters;
- (v) direct the administration of the committee;
- (vi) consult on a regular basis with convenors of other committees; and
- (vii) present the report of the committee to the Steering Committee and to the Conference;

Regulation 45(4) provides that in the absence of the Convenor, delegates present may elect a temporary Convenor to chair that particular session of the committee.

3.2 Rapporteurs of Committees

Each committee shall have not more than two rapporteurs, who shall be Commissioners appointed by the Commission. The functions of the rapporteurs are to:-

- (i) maintain an accurate record of membership of committees.
- (ii) follow carefully, all discussions in the Committee and, in particular to:
 - (a) note the trends of the debate, for the purposes of assisting the Convenor, where necessary, with the summary of the debate;

- (b) record the main issues, constituting general agreement among the delegates as well as those which remain contentious during the discussion;
 - (c) record the decisions or conclusions reached by the Committee during its deliberations, including minority opinions, if any;
- (iii) assume the role of a resource person for the Committee by:
- (a) providing clarifications on the provisions of the draft bill as may be requested during the discussions, or at her/his own initiative;
 - (b) providing upon request, or at her/his own initiative, pertinent information on any issue relating to the draft bill, as may be necessary in the course of discussions; and
- (v) assist the Convenor in facilitating the work of the Committee by ensuring the availability of efficient logistical support.

3.3 Programme Officers

Each Committee shall be assigned such programme officers as may be required for the completion of their work. The functions of the programme staff are to:-

- (i) ensure that documentation required by the Committee is available;
- (ii) provide research back-stopping for the Committee and;
- (iii) assist the Rapporteurs in the preparation of the report of the Committee.

3.4 Committee Clerks

Each Committee shall be assigned a Clerk who shall assist the Convenors and Rapporteurs in the preparations of the agenda and records of the Committee.

The list of Clerks assigned to each Committee is in Appendix D to these Guidelines.

3.5 Legal Drafting

Each Committee shall be assigned one or more draftspeople to assist the Convenors and Rapporteurs in the preparation of its report to the Steering Committee and to the Conference, and, in particular, in –

- (i) the technical formulation of proposed amendments to those aspects of the Draft Bill falling within the Committee's specific mandate;

- (ii) the harmonization of the proposed amendments with other parts of the Draft Bill; and
- (iii) the resolution of issues of a technical drafting nature arising from the deliberations of the Committee.

3.6 Expert Advisors:

At its request, an expert may be availed to a Committee to advise it on any issue for which further information; theory, experience or precedent may be required. The advisor may not participate on the work of the Committee beyond the specific matter in respect of which his/her intervention is requisitioned.

4. Conducts of Meetings in Committees:

4.1 In General -

- (a) meetings of the Committee shall be called by the Convenor of the Committee by written notice or by a request in writing by not less than one-third of the members of the Committee, and shall be presided over by the Convenor, or in his or her absence, a temporary Convenor elected by the delegates present;
- (b) the time and place of the meeting of the committee shall be determined by the Convenor or delegates calling the meeting;
- (c) notice of meetings of the committee shall contain an agenda of business to be considered or state the purpose of the meeting. Reasonable efforts shall be made to give prior notice of all subjects to be acted upon;
- (d) the quorum necessary for the committee to transact business shall be one half of the members of the committee who are entitled to vote;
- (e) decisions shall be as far as possible by way of consensus, but if there is no consensus, then decisions shall be by way of vote of majority of members present and voting in the committee;
- (f) the votes and proceedings of any meeting of the Committee shall be approved and signed by the Rapporteurs before distribution to and approval by the members of the committee;
- (g) the rules of procedure of the Conference shall with the necessary modifications apply to the committees in the same way as to the Conference itself.

4.2 Order of Business

- (a) the order to be observed in the deliberations before the committee shall in so far as possible, and subject to the Convenor's discretion, be that provided for in the Second Schedule of the Constitution of Kenya Review (National Constitutional Conference) (Procedure) Regulations, for consideration of provisions of the Draft Bill and envisages an Article-by-Article consideration of the subject matter referred to the Committee by the Conference;
- (b) the Committee may hold special consultations with persons it considers will give information necessary to the carrying out of its functions.

4.3 Decorum

- (a) All debate and questions should be addressed to the Convenor;
- (b) The Convenor is primarily responsible for maintaining order at the committee meetings. Order can normally be maintained by calling for the attention of those present or by ruling inappropriate decisions out of order;
- (c) In the unlikely event of a disruptive person ignoring the directions of the Convenor, it might become necessary to temporarily recess the meeting and ask for security personnel to be contacted.

4.4 Subcommittees

- (a) Committees have the power to appoint subcommittees from among its members to undertake any part of the work of the committee and any such subcommittee shall submit its report to the committee which established it;
- (b) Rules and guidelines relating to the committee shall be followed by the subcommittee.

4.5 Coordination of the Work of Committees

At the end of each day of Committee deliberations, all Convenors and Rapporteurs of Committees shall meet with the Chairperson and the Rapporteur-General of the Conference to -

- (i) review issues covered during the days deliberations;
- (ii) provide guidance on how cross-cutting issues emerging from committee deliberations should be handled in subsequent sessions; and

- (iii) identify issues that one committee should pass on to other committees for deliberation and;
- (iv) resolve any conflict arising from the mandate of committees.

4.6 Dissolution of Committees

Regulations 44(8) and 44(19) provide that a Committee stands dissolved once its report has been received by the Conference or may be dissolved at any time by the Conference.

5. Reports of Committees

5.1 The Report

The report of a committee shall consist of the following documents:-

- (i) the Agenda and Minutes of all meetings of the Committee and of its sub-committees (if established);
- (ii) an audio and verbatim transcript of all meetings of the committees and of its sub-committees (if established);
- (iii) a synopsis of the deliberations of the committee containing -
 - a narrative statement of the Committee's work;
 - a succinct analysis of all the issues presented to and addressed by the Committee;
 - the technical recommendations agreed to by the Committee;
 - any minority positions taken by members on any of the technical recommendations of the committee;
 - the list of formal motions for amendment of the Report and Draft Bill agreed to by the committee and any minority reservations recorded in respect thereof; and
 - any other matter which the committee would want the Conference to address or resolve.

Unless specifically demanded, only item (iii) of committee reports shall be laid before the Steering Committee and the Conference.

5.2 Preparation of Reports

It is the responsibility of the Rapporteur with the assistance of the Clerk and Draftspeople, and under the direction of the Convenor, to prepare the report of the Committee. The report once prepared must first be reviewed by the Convenor before presentation to the Committee for formal approval before it is transmitted to the Steering Committee and to the Conference. The Rapporteur-General of the Conference shall receive reports prepared by all committees.

6. Documentation

6.1 Conference Documentation

The rapportuer shall ensure that the following documents are available to the committee to which she/he is assigned:-

- (i) The Main Report of the Commission (Green and Orange versions);
- (ii) The Draft Bill to Alter the Constitution (Green and Orange versions);
- (iii) The Interim Report of the Rapporteur-General of the Conference (available at the end of the general debate);
- (iv) The Verbatim transcripts of the Conference proceedings;
- (v) The following working documents of the Conference:-
 - (a) The Constitution of Kenya Review Act (Cap. 3A);
 - (b) The Constitution of Kenya;
 - (c) The 1963 Independence Constitution;
 - (d) Annotated version of the Draft Bill (Red Version);
 - (e) Outline of Consequential Legislation (Red Version);
 - (f) Compendium of Delegate views on the Draft Bill (available at the end of the general debate).

6.2 The Library

The Commission has established a library containing many documents relevant to the work of committees. Among these are the Constitutions of all countries of the world. Delegates are encouraged to consult this collection.

7. **Meeting Venues**

Regulation 45(3)(b) provides that Committees may meet at such place or places “as the Convenor may determine” or as may be requested by at least one half of its members. Subject to that requirement.

APPENDIX XIV

MEMBERSHIP OF TECHNICAL WORKING COMMITTEES (FINAL LIST)

SERIAL NUMBER	DELEGATE NUMBER	NAME	TECHNICAL WORKING COMMITTEE
1	2	Moody Awori	K
2	3	Abdirahman Ali Hassan	A
3	4	A. Egwaton	K
4	5	Moses Akaranga	I
5	6	Abdullahi Ibrahim Ali	F
6	7	Jimmy Angwenyi	D
7	8	Julius Arunga	A
8	9	Adhu Awiti	G
9	10	Davis Nakitare	J
10	11	Ayacko G. M. Ochilo	F
11	12	Abdu Bahari Ali	H
12	13	Najib Balala	L
13	14	Sylvester Wakoli	F
14	15	Billow Adan Kerrow	H
15	16	Nicholas Biwott	G
16	17	William Boit	I
17	18	Moses Cheboi	L
18	19	Alicen Chelaite Jematio	A
19	20	Lucas K. Chepkitony	B
20	21	Choge Jim	B
21	22	Abdullahi Sheikh Dahir	F
22	23	Dzoro Morris Mwachondo	I
23	24	Ekwee Ethuro	I
24	25	Gachagua Nderi James	L
25	26	G. B. Galgallo	G
26	27	W. Kabogo	D
27	28	Robinson Githae	L
28	29	Bonaya Godana Adhi	G
29	30	Fred Gumo	D
30	31	Mohamed Yusuf Haji	G
31	32	Patrice M. Ivuti	G

32	33	Mutahi Kagwe	L
33	34	Francis Kagwima	C
34	35	Peter Kyalo Kaindi	J
35	36	Kajembe Seif Ramadhan	E
36	37	Otieno Kajwang	D
37	38	Kamama Asman	K
38	39	Maina Kamanda	D
39	40	J. J. Kamotho	G
40	41	D. Karaba	F
41	42	G. G. Kariuki	G
42	43	Mirugi Kariuki	E
43	44	Martha Karua	L
44	45	Njenga Karume	J
45	46	John Katuku	G
46	47	Kembi Gitura	E
47	48	Peter Kenneth	L
48	49	Uhuru Kenyatta	L
49	50	Charles Keter	F
50	51	Mohammed Ahmed Khalif	C
51	52	Bonny Khalwale	D
52	53	Daniel Khamasi	G
53	54	Joe Khamisi	J
54	55	George Khaniri	A
55	56	Enock Kibunguchy	D
56	57	Kivutha Kibwana	E
57	58	Kihara Njeri Jane	I
58	59	Lina Kilimo Jebii	J
59	60	Kiema Kilonzo	F
60	61	Viscount Kimathi	E
61	62	Anthony Kimetto	F
62	63	Amos Kimunya	J
63	64	Kingi Kahindi Joseph	I
64	65	Joseph K. Lagat	D
65	66	Kipruto arap Kirwa	F
66	67	Mukhisa Kituyi	C
67	68	Mwangi Kiunjuri	D
68	69	John arap Koech	D
69	70	Koech Sammy Cheruiyot	L
70	71	Tolla Koffa	I
71	72	Harrison Kombe	F

72	73	Musikari Kombo	L
73	74	Ole Konchellah G. S	H
74	75	Joseph Korir Kipkaptro	A
75	76	David Koros	I
76	77	Henry Kosgey	G
77	78	Newton Kulundu	K
78	79	Kuria Simon Kanyingi	A
79	80	Mohamed Kuti	J
80	81	Leshore Prisa Sammy	D
81	82	Simeon Lesrima	B
82	83	Ligale Andrew N.	J
83	84	Maathai Wangari	M
84	85	Machage W. Gisuka	G
85	86	Marsden Madoka	I
86	87	Magara James Omingo	L
87	88	Magugu Arthur	B
88	89	Emmanuel K. Maitha	F
89	90	Moffat Maitha	A
90	91	Lucas Maitha	D
91	92	Hezron Manduku	G
92	93	Christine Mango	L
93	94	Manoti Stephen	A
94	95	Maoka Maore	F
95	96	Kenneth Marende	G
96	97	Masanya Godfrey Okeri	B
97	98	Benson Mbai	K
98	99	E. Mbau	H
99	100	Boniface Mghanga	D
100	101	J. Michuki	D
101	102	Midiwo Washington J.	K
102	103	Kirugi M'Mukindia	K
103	104	Petkay Shen Miriti	I
104	105	Hussein Maalim M.	D
105	106	Mohamed Abdi Mohamed	J
106	107	Abdullahi Haji Mohammed	H
107	108	Mohamed Abu Chiaba	E
108	109	Gideon Moi	D
109	110	Samuel Moroto	I
110	111	Gachara Muchiri	J
111	112	Beth Mugo	H

112	113	P. Muiruri	K
113	114	P. Kibugi Muite	D
114	115	Macharia Mukiri	L
115	116	Mungatana Danson	K
116	117	Peter Munya	E
117	118	Joseph Munyao	L
118	119	John Munyes	A
119	120	P. K. G. Muriithi	D
120	121	Muriuki Karue	F
121	122	Raphael Muriungi	D
122	123	C. Murungaru	C
123	124	Kiraitu Murungi	L
124	125	David Musila	D
125	126	Stephen Kalonzo Musyoka	F
126	127	Kilionzo Charles Mutavi	B
127	128	John M. Mutiso	K
128	129	J. B. Muturi	K
129	130	Ali Mwakwere	J
130	131	Mwandawiro Mganga	M
131	132	Onesmus K. Mwangi	E
132	133	F. Mwanzia	J
133	134	Nyiva Mwendwa	D
134	135	David Mwenje	I
135	136	David Mwiraria	H
136	137	Kilemi Mwiria	H
137	138	Gideon Ndambuki	D
138	139	Nderitu, Alfred Mwangi	F
139	140	Kalembe Ndile	J
140	141	Reuben Ndolo	D
141	142	Peter Njeru Ndwiga	L
142	143	Charity Ngilu	A
143	144	Titus Ngomyoni	I
144	145	Abdalla Ngozi	E
145	146	Maj. General (Rtd) Nkaiserry	I
146	147	W. R. Ole Ntimama	A
147	148	Ole Ntutu Stephen K.	M
148	149	Simeon Nyachae	G
149	150	Norman M. G. K.Nyagah	F
150	151	J. W. Nyaga	B
151	152	Nyamunga Eric Opon	H

152	153	Peter Anyang Nyong'o	H
153	154	Henry Obwocha Onyancha	H
154	155	Raila Odinga	L
155	156	Peter Odoyo	H
156	157	Oburu Oginga	D
157	158	Ogur Tobias O. Ochola	I
158	159	Sospeter Ojaamong	G
159	160	Orwa Ojode	C
160	161	Chris Okemo	H
161	162	Okioma Samson	F
162	163	Phillip Okundi	L
163	164	Olweny P. Ayiecho	J
164	165	Odhiambo Omamba	I
165	166	Omino Jacob H. O.	E
166	167	William Omondi Opondo	J
167	168	Bishop Stephen Ondiek	B
168	169	Onyancha Joel Omagwa	C
169	170	Wycliffe Oparanya	H
170	171	Opore Zebedeo	J
171	172	Wyclife Osundwa	I
172	173	Owidi Peter Otieno	A
173	174	Owino Charles Oyugi	E
174	175	Kato ole Metito	F
175	176	S. Poghisia	L
176	177	Gonzi Rai	D
177	178	Phillip Rotino	J
178	179	William arap Ruto	D
179	180	Sammy K. Ruto	F
180	181	Saitoti George	D
181	182	Nick K. Salat	D
182	183	John Sambu Kipkorir	F
183	184	Sang Kipkorir Marisin	A
184	185	Abdi Tari Sasura	E
185	186	John Serut	J
186	187	Shaaban Issack	G
187	188	Naomi Shaaban	L
188	189	Suleiman Shakombo	G
189	190	Musa Sirma	H
190	191	Soita Shitanda	L
191	192	Sudi David Kiprono Sutter	B

192	193	Adan A. Sugow	G
193	194	Gor Sungu	L
194	195	Syongoh Zaddock Madiri	G
195	196	Stephen Tarus	C
196	197	Noah N. arap Too	H
197	198	Eng. Toro	C
198	199	Raphael Tuju	J
199	200	Fahim Twaha	B
200	201	Waithaka Mwangi	E
201	202	M. N. Wambora	H
202	203	Wafula Wamunyinyi	B
203	204	Koigi wa Wamwere	J
204	205	Raphael Wanjala	J
205	206	Ali Wario	B
206	207	Noah Wekesa	J
207	208	David Were	F
208	209	Moses Wetangula	D
209	210	Weya Samuel Arthur	F
210	211	Amina Abdalla	E
211	212	Peter Oloo Aringo	A
212	213	Franklin K. Bett	H
213	214	Esther Keino	B
214	215	Mutula Kilonzo	L
215	216	Kipkalya arap Kones	D
216	217	Cecily Mbarire	B
217	218	Mwau Adelina Ndeto	J
218	219	Njoki S. Ndungu	C
219	220	Ojiambo, Julia	M
220	221	Ruth Oniang'o	L
221	222	Betty Njeri Tett	G
222	223	Kaparo F. O	L
223	224	Nancy Lung'ahi	F
224	225	Salim Ibrahim	E
225	226	Rev Muchuga	G
226	227	Amina Zuberi	B
227	228	Raphael Livu	G
228	229	Farouk Said	H
229	230	Fatuma Boy Bakari	E
230	231	Mwalimu Digore K.	D
231	232	Raphael Ndeme	C

232	233	Beatrice Mwaringa	J
233	234	Mwinyi Haji Mwijaa	G
234	235	Reuben Tsuma	D
235	236	Zuhura Zukira Wanje	A
236	237	Jillo Onotto	B
237	238	Abdurhman Baawy	E
238	239	Fatuma Halako Galgalo	J
239	240	Mohammed Juma Abuti	C
240	241	Juma Wario	G
241	242	Amina Ahmed	E
242	243	Sheikh Abdalla	B
243	244	Omar Twalib Mzee	M
244	245	Mariam Mwanyota	L
245	246	Mwalengo Haji Joel	J
246	247	Munene O. J.	J
247	248	Asli Ibrahim	E
248	249	Abdirahaman Ali Abbas	E
249	250	Mohammed Abdi Haji	E
250	251	Hubbie Hussein Al Haji	E
251	252	Dubat Ali Amey	D
252	253	Saleh Maalim Arte	L
253	254	Fatuma Sheikh Mohamed	G
254	255	Ahmed Maalim Omar	G
255	256	Noor Ibrahim Abdi	K
256	257	Sahara Ahmed Hillo	B
257	258	Issack Derrow Ibrahim	E
258	259	Salah Maalim Alio	B
259	261	Khadija Fugicha	E
260	262	Abdikadir Guyo	I
261	263	Kaaru Abdukadirl Guleid	J
262	264	Einsintele Kureya	M
263	265	Guracha Denge Wario	G
264	266	Galgallo Tuye Adano	I
265	267	Fatuma B. Jaldesa	C
266	268	Godana Adhi Doyo	E
267	269	Yusuf Wako	B
268	270	Beatrice Bariu	L
269	271	Amos Kiumo	G
270	272	Thimangu Jim Muketha	D
271	273	Muriuki Joyce Kagendo	M

272	274	Victor P. Gituma	E
273	275	M' Mworia Julius	M
274	276	Leah Ndeke	K
275	277	M' thigaa Godfrey Mbuba	C
276	278	Peter Kangethe Nkoroi	K
277	279	Grace Ntembi Nduyo	H
278	280	Bruno Kaimba	I
279	281	Julius M. Muungania	F
280	282	Lydia W. Kimani	L
281	283	Abel Mwaniki Njeru	G
282	284	John Gitari Munyi	D
283	285	Nalea G. Kithumbu	A
284	286	Isa Ireri Ngunia	G
285	287	Nichasius Mugo	B
286	288	Jane Mutunga	K
287	289	Robert Maithya Maluki	I
288	290	Eric Kyalo Mutua	L
289	291	Jane Mwende	B
290	292	Francis N. Kaloki	B
291	293	Justus Musyoki Mutweti	C
292	294	Victoria Mutheu M.	E
293	295	Ngalaatu Musau	C
294	296	Stamislion W. Kasoka	D
295	297	Praxedas N. Wambua	J
296	298	Rhonda Maende	A
297	299	William N. Matheka	H
298	300	L. Wambui Muriuki	L
299	301	G. Ndatho Muchiri	G
300	302	Frederick Nderitu	H
301	303	M. Nyathogora	G
302	304	Waithanje Minjire	E
303	305	D. Muraguri Nderi	I
304	306	C. Nyawira Ngari	J
305	307	J. Nyaga Waruri	L
306	308	J. S. Mathenge	G
307	309	J. Kirangari Kamwanga	C
308	310	J. Mwangi Waweru	G
309	311	Father Gitonga	M
310	312	M. Muthoni Mburu	J
311	313	G. G. Gichuru	K

312	314	Gacuru wa Karenge	D
313	315	Beatrice Wairimu	D
314	316	Gitu Wa Kahengeri	A
315	317	John Kinuthia Waitiki	I
316	318	H. Nyambura Kimani	D
317	319	J. Kinuthia Mwangi	G
318	320	Kiriro Ngugi	K
319	321	Laylor Rhoda	M
320	322	Emmanuel Lomorukai	I
321	323	Peter E. Ejore	J
322	324	Hellen Koring'ura	G
323	325	William Lopetakou	J
324	326	Simon L. Alew	I
325	327	Sophia Lepuchirit	C
326	328	Pius Lobuk	G
327	329	Julius Lalampaa	J
328	330	Iyadi Nancy	L
329	331	Isaac K. Bungei	L
330	332	Nathaniel Tum	E
331	333	Emmy Kipsoi	C
332	334	Moses Keter	L
333	335	Julius Sitienei	K
334	336	Mkawerweren Chebii	I
335	337	Michael Sengech	D
336	338	Jane J. Kiptum	E
337	339	Caroline Chemursoi	F
338	340	David Kuto	H
339	341	Ernest Kaittany	D
340	342	Felicity Irene Magut	L
341	343	Augustine Saina	J
342	344	Kimayo Arap Sego	K
343	345	Mariam Ntansian L.	H
344	346	Isaiah Cheruiyot	G
345	347	Naftali K. Chelagat	C
346	348	Sally Chepkoech	D
347	349	David Kigen	L
348	350	Kipkoech Kiptongos	L
349	351	Pascalina R. Lebarleiya	A
350	352	John Muchai Kiniti	K
351	353	Joseph Njalis Shuel	H

352	354	Liza Chelule	F
353	355	Michael Githu	G
354	356	Ezekiel Kesendany	J
355	357	Teclah Nairesiai	G
356	358	Moses Naimodu	J
357	359	David O. Mpilei	C
358	360	Lorna Timanoi	B
359	361	William S. Ole Yiaile	J
360	362	Koitamet Ole Kina	L
361	363	Keko Margaret	M
362	364	Daniel Ole Osoi	G
363	365	Moses Lengete Ole Sisika	B
364	366	Carolyne Ruto	C
365	367	Alex Chepkwony	G
366	368	Joel Sang'	L
367	369	Christina C. Ng'eno	L
368	370	Joseph Maritim Soo	L
369	371	James Koskei	J
370	372	Bornice S. Chelang'at	J
371	373	Kiplangat arap Koech	I
372	374	Joseph K. Soi	H
373	375	Jane Kauka	A
374	376	Mafunga Wambulwa	J
375	377	David Okiya	L
376	378	Dorcas Mbelersia	B
377	379	Levi Ahindukha	J
378	380	Charles Lwanga Lwole	I
379	381	Ombito Rita Katamu	M
380	382	Sammy Aswani A.	D
381	383	Apollo Warrens Tsalwa	C
382	384	Evelia Rebecca	B
383	385	Caleb Jumba	G
384	386	Edward C. Ohare	D
385	387	Nancy C. Ngeywa	C
386	388	Sammy Naibei Chemwei	F
387	389	Wilberforce Kisiero	G
388	390	Kellan Wavomba	D
389	391	Oscar Makokha	F
390	392	Nakitare Paul E.	M
391	393	Ashepete Baraza	M

392	394	Asili Adungo	H
393	395	Ajaa Olubayi	D
394	396	Gloria Wabwire	G
395	397	David L. A. Erulu	A
396	398	George Wesonga	B
397	399	Grace Akinyi Ogot	G
398	400	Marie Rose Owino	A
399	401	Daniel Obare Awora	F
400	402	Eve Akinyi Obara	L
401	403	Benta Auma	E
402	404	Fares Ogada	C
403	405	Fibie Atieno Ochola	J
404	406	Shakeel Shabir	E
405	407	James Omolo Kayila	H
406	408	Judith A. Nam	H
407	409	Joseph Attyang	L
408	410	Elphas Ombura	H
409	411	Teresa Osunga	B
410	412	Prof. Odhiambo M. O.	G
411	413	Otieno Ogingo	G
412	414	Elizabeth Okelo	D
413	415	Dache John Pesa	H
414	416	David Oyao	D
415	417	Gaudentia Atonga	B
416	418	Orwa Ochieng	C
417	419	Onyango R. P.	M
418	420	Susan Wambura	F
419	421	Thomas Merengo	J
420	422	Maasai Maroa	D
421	423	Omanga Claire	M
422	424	Thomas Nyabote Aburi	K
423	425	Silvanus Ogari	B
424	426	Orwenyo Mary Obonyo	A
425	427	Benson Kegoro	F
426	428	Richard Kibagendi	C
427	429	Judith Magundho	L
428	430	Albert Onyango Mitere	L
429	431	Rose Otieno	C
430	432	Kamanda Rhoda	M
431	433	David M. Rakamba	I

432	434	Peter Nyanducha	C
433	435	John Katumanga	B
434	436	Francis Ng'ang'a	K
435	437	Zeruiya Otwani	K
436	438	John Cheruiyot	F
437	439	George Muchai	C
438	440	Rajab Mwondi	J
439	441	Joel Chebii	D
440	442	Francis Waweru	E
441	443	Roselinder Simiyu	F
442	444	Maero Tindi	G
443	445	Esther Lelei	I
444	446	Francis Wangara	H
445	447	Kiliku Kennedy	F
446	448	Isaiah Kubai	E
447	449	Benson Okwaro	A
448	450	James Ngusi	C
449	451	Milly Odhiambo	B
450	452	Maurice Odhiambo Makoloo	L
451	453	Elkanah Odembo	G
452	454	Kathurima M'inoti	E
453	455	Lawrence Mute	B
454	456	Mohammed Nyaoga	E
455	457	Nyang'au Onwonga	A
456	458	Lumumba Odenda	J
457	459	Oduor Og'wen	F
458	460	Gichura Kibara	K
459	461	Phillip Ole Sironka	J
460	462	Samuel Tororei	F
461	463	Suba Churchill Meshack	B
462	464	Sing'oei Korir	B
463	465	Nduta Beatrice Kiarie	J
464	466	Joyce Umbima	B
465	467	Mary Wambui Kanyi	C
466	468	Hellen Yego	D
467	469	Grace Githaiga	L
468	470	Sophia Abdi Noor	F
469	471	Rose K. Lukalo-Owino	H
470	472	Mariam Muto	C
471	473	Pamela Mboya	B

472	474	Anne A. Okoth	B
473	475	Anne Njogu	B
474	476	Jamila Mohamed	E
475	477	Beryl Ouma	F
476	478	Sabenzia N. Wekesa	B
477	479	Kavoo Kilonzo	A
478	480	John K. Njiraini	H
479	481	Daniel G. Ichangi	J
480	482	Isaac O. Kibwage	C
481	483	Yahya Saad Swaleh	J
482	484	Wafula Sylvester	J
483	485	Raphael G. Mwai	I
484	486	Daniel Njagi	I
485	487	Rihal Singh	D
486	488	James F. T. Foster	G
487	489	Jane Mumbi Kiano	L
488	490	Rose Waruhiu	H
489	491	Lilian Wanjera	E
490	492	Mercy Mwamburi	G
491	493	Asha Chiku Wanje	M
492	494	Kauchi Chivumba	G
493	495	Asenath Nyamu	C
494	496	Ann Mululu	H
495	497	Jillo Mumina Konso	F
496	498	Kathini Maloba-Caines	C
497	499	Margaret Hutchingson	B
498	500	Kamla Sikand	H
499	501	Joyce Majiwa	L
500	502	Rose Olende	B
501	503	Elizabeth Mayieka	I
502	504	Rukia Subow	I
503	505	Fatuma Ali Saman	B
504	506	Fatma Ibrahim Ali	J
505	507	Margaret Kamar	L
506	508	Mereso Agina	G
507	509	Martha Rop	J
508	510	Atsango Chesoni	F
509	511	Ruth Kibiti	K
510	512	Florence Machayo	B
511	513	Agnes Abuom	E

512	514	Ajuoga Milka Aoko	K
513	515	Ali Shee Mohammed	E
514	516	Peter O. Bwana	B
515	517	El-Busaidy Abdulghafur.	E
516	518	Fadhil Sultana	E
517	519	Marie Therese Gachambi	B
518	520	James Nthiga Gatiti	A
519	521	Wahu Kaara	D
520	522	Archbishop David Gitari	F
521	523	Margaret Muchai	E
522	524	Neera Kent Kapila	B
523	525	Ibrahim Ahmed Yusuf	A
524	526	Rosemary Kinyanjui	B
525	527	Archbishop Njeru Wambugu	J
526	528	James John Mageria	I
527	529	Rev. Patrick M. Musungu	E
528	530	Mburugu Florence Ruhiu	A
529	531	Sheikh Mustafa Ali	E
530	532	Walubengo Lumatete	E
531	533	Helen Mung'athia	C
532	534	Pastor David Oginde	D
533	535	Fred Ojiambo	E
534	536	Tabitha Mwaniki	F
535	537	Asiya Mwanzi	C
536	538	Samuel K. arap Ng'eny	F
537	539	John Njue	B
538	540	Zablon Nthamburi	E
539	541	Zacheus Okoth Arch.	E
540	542	Ibrahim Omondi	A
541	543	Rasmin P. Chitris	C
542	544	Sehmi Rupinda Singh	H
543	545	Simon Shitemi	G
544	546	Bishop Phillip Sulumeti	E
545	547	Wandati Abudlrahman M.	E
546	576	Mwai Gakuya S.	M
547	577	George Kinyua	G
548	578	Jacob Odino	C
549	579	Daniel Rasugu	E
550	580	Francis Carey Onyango	F
551	581	Yusuf Moh. Aboubakar	E

552	582	Njuguna Kung'u	L
553	583	Apollo Njonjo	L
554	584	Makau Mutua	K
555	585	Dennis Kodhe	F
556	586	George Mburu Mwaura	G
557	587	Caroline Ng'ang'a	C
558	588	Francis Wabayale	A
559	589	Daniel Njoroge	H
560	590	Patrick O. Onyango	G
561	591	Ogembo Masese	D
562	592	Francis Kilemi	I
563	593	Gerves A. Akhwabi	E
564	594	Orie Rogo-Manduli	D
565	595	Joseph M. Shikuku	D
566	596	K. N. Mamonda	I
567	597	Moses M. Wekesa	H
568	598	Kimani M. Ng'ang'a	J
569	599	Leslie Mwachiro	G
570	600	Zakayo M. Karimi	L
571	601	Luseno Liyai	C
572	602	Benjamin Gitoi	J
573	603	Winston A. Adhiambo	C
574	604	Samuel Mwaura	J
575	605	Ngorongo Makanga	M
576	606	Phoebe Sikoya	H
577	607	Nginyo Kariuki	A
578	608	Lihanda K. Savai	B
579	609	Kenneth Njiru	C
580	610	Justus Wekala	H
581	611	Nyakundi Peter	L
582	612	David Wakahu	C
583	613	Mike Oliewo	D
584	614	Dalmas Otieno	D
585	615	George Nyamweya	D
586	616	Domtilla Were	H
587	617	Manu Chandaria	H
588	618	R. O. Kwach	E
589	619	Wilfred Kiboro	B
590	620	R. S. C. Omolo	L
591	621	Robert Rukungah	J

592	622	Bermadette Quadros	B
593	623	Murtaza Jaffer	A
594	624	King'ori Mwangi	I
595	625	Gilbert Omondi	H
596	626	Abudo Q. Mamo	F
597	627	Danny Irungu	C
598	628	James Bwatuti	H
599	629	T. K. Githiora	I

APPENDIX XV

LIST OF EXPERTS INVITED BY TECHNICAL WORKING COMMITTEES AND ISSUES ADDRESSED

NAME	DATE	TWC	SUBJECT COVERED
Prof. Walter Oyugi	22.9.03	A	The Theory of Government
Dr. Andronico O. Adede	23.1.04	B	Dual Citizenship
Mr. Gabriel Mukele	17.9.03	C	The Electoral Commission of Kenya
Mr. Mutakha Kangu	22.9.03	C	Mixed-Member Proportional Representation
Mr. Francis Atwoli	23.9.03	C	Representation of the Labour Movement in Parliament
Ms. Koki Muli	24.9.03	C	Mixed-Member Proportional Representation
Dr. Andronico O. Adede	28.1.04 30.1.04	C	- Kenya's Representation in International Bodies - The Senate
Prof. Walter Oyugi	12.9.03	D	The System of Government
Mr. Orao Obura	25.9.03	E	Constitutionalisation of the Industrial Court
Mr. Gerishom Konditi	25.9.03	E	„
Mr. Abisai O. Ombege	25.9.03	E	„
Mr. Gilbert Omondi	22.01.04	E	Prerogative of Mercy
Mr. Francis Angila	17.9.03	F	Mixed-Member Proportional Representation
Mr. Mutakha Kangu	20.1.04	F	Devolution and the Senate
Mr. Julius Kipng'entich	26.1.04	G	Costing the Proposed Devolution Structure
Mr. Willie Samute (Permanent Secretary, Department of Local Government Office, Office of the President, Republic of Malawi)	26.1.04	G	The Malawian Experience with Devolution
Mr. Gilbert Wangalwa	26.1.04	G	Cost of the Proposed Devolution Structure
Prof. Peter Wanyande	28.1.04	G	Distribution of Functions in a Devolved System
Mr. N.T.T. Simiyu	22.1.04	G & H (Joint sitting)	Cost and Revenue Implications of Devolution
Mr. Joseph H.M. Oyula	22.1.04	G & H (Joint sitting)	Public Finance Management and Governance in Kenya

Mrs. S. Boboti	22.1.04 (Joint sitting)	G & H	„
Mr. S.G. Siambi	22.9.93	H	Public Service
Ms. Betty Maina	23.9.03	H	Critique of the Chapters on Public Finance, Public Service and Leadership and Integrity
Mr. Dennis Kabaara	23.9.03	H	Financial Implications of Devolution
Mr. Andrew Okelo	19.1.04	H	Revenue Collection and Tax
Mr. Ayiro	28.1.04	H	Implications A Response to the Presentation by Mr. N.T.T. Simiyu from the Ministry of Education
Lt. General (Rtd.) John arap Sawe	25.9.03	I	Defence Forces
Mr. G.N. Macgoye		I	The Administration Police
Mr. Ibrahim N. Mwathane	10.9.03	J	Critique of the Chapters on Land and Property and Environment and Natural Resources
Mr. Joel Yego	10.9.03	J	„
Mr. Maurice McOloo	23.9.03	J	„
Dr. Albert Mumma	23.9.03	J	„
Prof. Charles Okidi	23.9.03	J	„
Mr. Gabriel Mukale	17.9.03	K	Electoral Commission of Kenya
Prof. Yash Pal Ghai	18.9.03	K	- Entrenchement of the Presidential Term of Office - Establishment of a Commission to make Recommendations on Appointment of Constitutional Office Holders
Eng. Abdullahi Sharawe	25.9.03	K	Salaries and Remuneration
			Commission
Mr. Joab Okaka Manyala	25.9.03	K	Salaries and Remuneration Commission
Dr. James Nyikal	22.1.04	K	Health Service Commission
Prof. H.W.O. Okoth-Ogendo	23.9.03	L	Ttransitional Provisions
Prof. Yash Pal Ghai	23.9.03	L	„
Mrs. Margaret Ndawula	25.9.03	L	„
Prof. Macharia Munene	25.9.03	L	„
Mr. Njeru Kirira	26.9.03	L	Financial Implications of the Transition Process
Mr. Dennis Kibaara	26.9.03	L	„
Dr. Isaac Were		M	Technical Input to the Committee on Culture
Mr. Dennis Akumu		M	„
Ms. Monica Opole		M	„

APPENDIX XVI

CATEGORIES OF OBSERVERS ACCREDITED TO THE NATIONAL CONSTITUTIONAL CONFERENCE

OBSERVER CATEGORY	BOMAS I April 28 – June 6, 2003	BOMAS II August 18 – September 26 2003	BOMAS III January 12 - March 23, 2003
General Observers (including Religious Organizations, Universities and Colleges, Professional Bodies, Children Organizations, NGOs, Trade Unions, Political organizations, Individuals etc.)	229	208	244
Members of the East African Legislative Assembly	8	8	8
Lancaster House Veterans	12	12	12
International Organizations representatives	6	6	6
Representatives of Diplomatic missions	30	35	41
Persons manning the Lobby Tents	12	13	13
Total	297	282	324

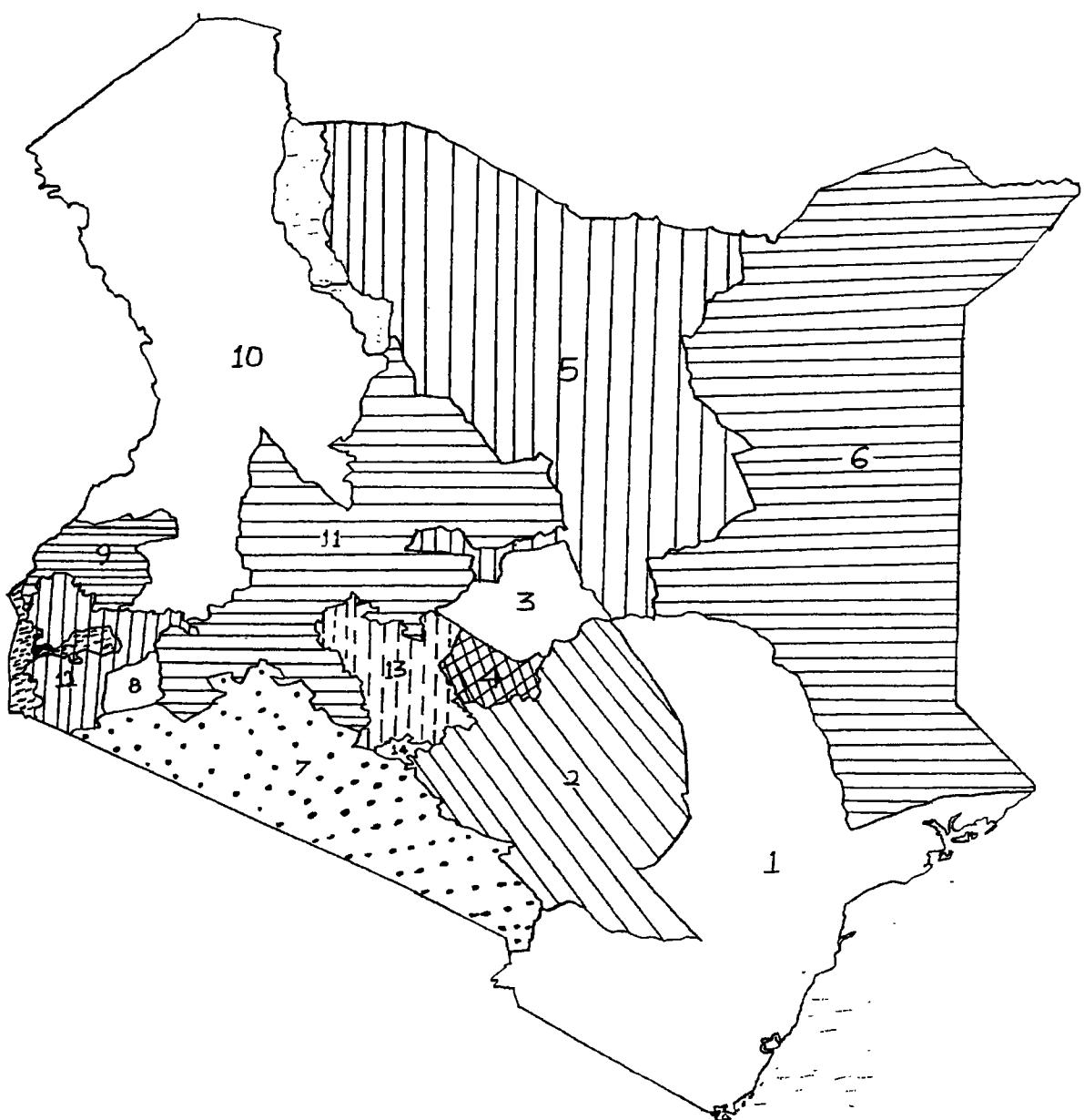
APPENDIX XVII

CATEGORIES OF LOBBY GROUPS AND ORGANIZATIONS ACCREDITED TO THE NATIONAL CONSTITUTIONAL CONFERENCE

LOBBY ORG	ORGANIZATION	NAME OF TENT MANAGER
RT. 01	KWPC 1	Anymba Perez
RT. 02	KWPC 2	Husna Hassan
RT. 03	IED 1	Eric Okelo
RT. 04	FIDA 1	<i>Card on Rotation</i>
RT. 05	CRECO 1	Wambua Kituku
RT. 06	CRECO 2	Antony Mwangi
RT. 07	KHUC 1	<i>Card on Rotation</i>
RT. 08	KHUC 2	<i>Card on Rotation</i>
RT. 09	NGO Council 1	Eusebio Wanyama
RT. 10	NGO Council 2	George Gathuru
RT. 11	ALGAK 1	Mark Osiche
RT. 12	ALGAK 2	A. M. K. Odipo
RT. 13	NCEC 1	Ndungu Wainaina
RT. 14	NCEC 2	Cyprian Nyamwamu
RT. 15	Cradle 2	Milly Odongo
RT. 16	Cradle 2	Justus Kivindyo
RT. 17	NARC 1	Phyllis Mramko
RT. 18	NARC 2	Evelyne Makori
RT. 19	NCEC	<i>Card on Rotation</i>
RT. 20	NCEC	<i>Card on Rotation</i>
RT. 21	SUPKEM	A. A. Nassaeer
RT. 22	SUPKEM	Al-Amin Kimathi
RT. 23		F. Abdalla
RT. 24	IED 1	Mary Ndinda
	NGO Council	Luke Odoyo Akech
RT. 24	CRECO 2	Boniface Kilonzo
RT. 25	Kenya Alliance for Advancement Children (KAACR)	Anthony Muchiri
RT. 26	NGO Council	Mary Ndinda
RT. 27	National Youth Movement	Benson Nganga
RT. 28	Kenya Alliance for Advancement Children (KAACR)	<i>Card on Rotation</i>

APPENDIX XVIII

MAP SHOWING THE 14 REGIONS OF THE DEVOLVED GOVERNMENT



KEY: DISTRICTS SITUATED IN EACH REGION

REGION 1

1. Kwale
2. Mombasa
3. Taita Taveta
4. Kilifi
5. Lamu
6. Tana River
7. Malindi

REGION 2

1. Makueni
2. Machakos
3. Kitui
4. Mwingi

REGION 3

1. Meru Central
2. Meru South
3. Meru North
4. Tharaka

REGION 4

1. Mbeere
2. Embu
3. Kirinyaga

REGION 5

1. Isiolo
2. Marsabit
3. Moyale

REGION 6

1. Garissa
2. Ijara
3. Mandera
4. Wajir

REGION 7

1. Kajiado
2. Narok
3. Trans Mara
4. Kuria

REGION 8

1. Kisii Central
2. Gucha
3. Nyamira

REGION 9

1. Teso
2. Bungoma
3. Busia
4. Lugari
5. Kakamega
6. Vihiga
7. Butere/Mumias

REGION 10

1. Turkana
2. West Pokot
3. Trans Nzoia
4. Marakwet
5. Mt. Elgon
6. Keiyo
7. Uasin Ngishu
8. Nandi North
9. Nandi South

REGION 11

1. Kericho
2. Bureti
3. Bomet
4. Baringo
5. Koibatek
6. Nakuru
7. Samburu
8. Laikipia

REGION 12

1. Kisumu
2. Bondo
3. Nyando
4. Siaya
5. Suba
6. Rachuonyo
7. Homa Bay
8. Migori

REGION 13

1. Kiambu
2. Thika
3. Murang'a
4. Maragua
5. Nyandarua
6. Nyeri

REGION 14

1. Westlands
2. Kasarani
3. Lang'ata
4. Embakasi

APPENDIX XIX

LIST OF NOTICES OF MOTIONS PRESENTED TO THE NATIONAL CONSTITUTIONAL CONFERENCE MOTIONS FOR THE CONSIDERATION STAGE OF THE CONFERENCE MARCH, 2004

DELEGATE NAME & NO	ARTICLE NO.	MOTION	REMARKS
1. Hon. Gitu wa Kahengeri Del. No. 316 AMM/003/04	Preamble	Insert the words ' <i>heroically</i> ' between the words ' <i>who</i> ' and ' <i>struggled</i> ' in the second line of the Preamble	
2. Hon. James Koske Del. No. 371 AMM/087/04	Preamble	Editorial amendments as per the motion	
3. Hon. Julia Ojiambo Del. No. 220 AMM/093/04	Preamble	Insert the following words immediately after the word 'creation' in the first line: <i>PROUD to be the cradle of humankind;</i> <i>EXPRESSING our pride in our common Kenyan culture and enduring common philosophy of 'utu' which has been nurtured for many centuries and survived throughout our shared history and struggle against foreign domination;</i>	
4. Hon. Wangari Maathai Del. No. 084 AMM/171/04	Preamble	Insert the words ' <i>conserve and</i> ' between the words ' <i>to</i> ' and ' <i>sustain</i> ' and further insert the words ' <i>present and</i> ' between the words ' <i>of</i> ' and ' <i>future</i> '	
5. Hon. James Koske Del. No. 371 AMM/088/04	1(1) and (2)	Delete the word ' <i>may</i> ' appearing in both clauses and substitute therefor the word ' <i>shall</i> '.	

DELEGATE NAME & NO	ARTICLE NO.	MOTION	REMARKS
6. Hon. Christina Cherono Ng'eno Del. No. 369 AMM/095/04	1(1) and (2)	Delete the word ' <i>may</i> ' appearing in both clauses and substitute therefor the word ' <i>shall</i> '	
7. Hon. Luseno Liyai Del. No. 601 AMM/073/04	NEW (Immediately after Article (2))	<p>Insert a new clause as follows:</p> <p><i>(2A)</i></p> <p><i>The people shall have the right to intervene directly in decision-making on legislative and constitutional provisions to enable them:</i></p> <p><i>(a) to propose a complete or partial revision of the Constitution or any other law</i> <i>(b) to propose and implement a referendum</i> <i>(c) the referendum shall be supervised by the Electoral Commission of Kenya at all levels of government</i></p>	
8. Hon. Sophiah Abdi Noor Del. No. 470 AMM/106/04	5	<p>Insert a new clause immediately after clause (2) as follows:</p> <p><i>(I) Where fundamental freedoms, respect for human rights and the rule of law is abused and violated by some organs of the government, any region or community shall have a right to self-determination.</i></p>	
9. Hon. Sammy Ruto Del. No. 180	5 (2)	Insert the words ' <i>and good</i> ' immediately before the word ' <i>participatory</i> '	Motion yet to be signed
10. Hon. Kiriro wa Ngugi Del. No. 320 AMM/113/04	7 (1) 7 (2)	<p>Delete the clause in its entirety and substitute therefor as follows:</p> <p><i>(I) The sovereign authority of the people is exercised at different levels and forums:-</i></p> <p><i>(a) the national level;</i> <i>(b) the district level as the principal unit of devolution;</i> <i>(c) such other forums as prescribed by law which may include regional, constituency, locational or village forums</i></p> <p>Delete the clause in its entirety and substitute therefor as follows:</p> <p><i>(2) the principal role of a regional forum is to co-ordinate the implementation within the districts forming the region of programmes and projects that extend across two or more districts of the region.</i></p>	

DELEGATE NAME & NO	ARTICLE NO.	MOTION	REMARKS
	7 (3)	Delete the clause in its entirety and substitute therefor as follows: (3) <i>the principal role of the locational forum is to enhance self governance and involvement in the implementation of local programmes and projects.</i>	
11. Hon. Sammy K. Ruto Del. No. 180	8(1)	Insert the word "city" immediately after the word "capital" and delete the words "is Kenya" and substitute therefor the words "shall be determined by legislation."	Motion yet to be signed
12. Hon. Christina Cherono Ng'eno Del. No. 369 AMM/096/04	8 (2)	Delete the word 'regions' and substitute therefor the words 'levels of devolution'	
13. Hon. James Koske Del. No. 371 AMM/089/04	8(2)	Delete the word 'region' and substitute therefor the words 'levels of government'	
14. Hon. Onesmus Kihara Mwangi Del. No. 132 AMM/012/04	10	Delete the Article in its entirety and substitute with: (1) <i>Kenya shall be a multi-religious state.</i> (2) <i>Christianity shall be the state religion.</i> (3) <i>The State shall treat all other religions equally.</i>	
15. Hon. Wangari Maathai Del. No. 084 AMM/178/04	10 (3)	Insert the word 'registered' immediately after the words 'treat all'	
16. Hon. John M. Kiniti Del. No. 352	10(3)	Insert the word "lawful" between the words "all" and "religions".	Motion yet to be signed
17. Hon. William ole Yiaile Del. No. 361 AMM/058/04	11 (1)	Insert a new clause immediately after Article 11 (1) (d) as follows: (e) <i>there is composed a battle hymn of the Republic</i>	

DELEGATE NAME & NO	ARTICLE NO.	MOTION	REMARKS
18. Hon. Winston O. Adhiambo Del. No. 603 AMM/064/04	12	Insert a new paragraph immediately after paragraph (c): (d) <i>Culture Day (Utamaduni)</i>	
19. Hon. David Erulu Del. No. 397 AMM/113/04	12 (b)	Delete the words ' <i>Heroes and Heroines Day</i> ' and substitute therefor the words ' <i>Mashujaa Day</i> '	
20. Hon. David Wakahu Del. No. 612 AMM/222/04	12 (b)	Delete the words ' <i>Heroes and Heroines Day</i> ' and substitute therefor the words ' <i>Mashujaa Day</i> '	
21. Hon. Sammy K. Ruto Del. No. 180	12(d)	Insert a new paragraph immediately before paragraph (a) thus (aa) 1st May – Labour Day	Motion yet to be signed
22. Hon. Abdullahi Haji Del. No. 250 AMM/045/04	13 (1)	Insert a new paragraph immediately after paragraph (o) as follows: (p) <i>cooperate or federate with any nation or regional organization as long as Parliament has assented to the arrangement.</i>	
23. Hon. Wangari Maathai Del. No. 084 AMM/189/04	13 (1)	Insert the words ' <i>and men</i> ' immediately after the words ' <i>participation of women</i> ' Insert new paragraphs immediately after paragraph (o) as follows:	
24. Hon. Lawrence Mute Del. No. 455 AMM/018/04	13 (2)	(p) <i>progressively implement the principle that 5% of the members elective and appointive bodies be persons with disabilities.</i> (q) <i>recognise and practise affirmative action as a temporary measure to eradicate discrimination practised on distinct groups or communities and as a way of substantive equalization of the opportunities of groups or communities disadvantaged by reason of such discrimination including women, persons with disabilities, youth and older persons.</i>	
25. Hon. Winston O. Adhiambo Del. No. 603 AMM/063/04	13 (2)	Insert a new clause after paragraph (o) as follows: (p) <i>recognise and promote farism.</i>	

DELEGATE NAME & NO	ARTICLE NO.	MOTION	REMARKS
26. Hon. Sammy K. Ruto Del. No. 180	13(2)	Insert two new paragraphs immediately after paragraph (o) as follows: (p) <i>promote the practice of fundamental principles of democracy, good governance and the rule of law;</i> (q) <i>promote the practice of the basic principles and attitudes of care in all respects of private and public life and in the management of community and natural resources.</i>	Motion yet to be signed
27. Hon. Sammy K. Ruto Del. No. 180	13(2)(g)	Delete the word "facilitate".	Motion yet to be signed
28. Hon. John Kiniti Del. No. 352	13 (2) (i)	Insert the words "and men" immediately after the word "women"	Motion yet to be signed
29. Hon. Wangari Maathai Del. No. 084 AMM/190/04	13 (2) (j)	Delete the word 'women' and substitute therefor the words' either gender'	
30. Hon. John Kiniti Del. No. 352	13 (2) (j)	Delete the words "women" and substitute therefor the words "either gender".	
31. Hon. Dr. Sammy K. Ruto Del. No. 180	13(2)(k)	Delete the word "the" between the words "recognise" and "special" and substitute therefor the word "its" and further insert the words "and those" immediately after the words "responsibilities" and "that".	
32. Hon. Sammy K. Ruto Del. No. 180	13(2) (m)	Delete Article 13 (2)(m) in its entirety.	Motion yet to be signed
33. Hon. Wangari Maathai Del. No. 084 AMM/196/04	18 (1)	Delete the words 'at least' and substitute therefor the word 'ten'	
34. Hon. William ole Yiaile Del. No. 361 AMM/028/04	18 (2)	Delete the word 'not' after the word 'is'. Further delete the words 'through marriage or' and substitute therefor the word 'at'	

DELEGATE NAME & NO	ARTICLE NO.	MOTION	REMARKS
35. Hon. John M. Kiniti Del. No. 352	18(1)	Delete the word "seven" and substitute therefor the word " <i>ten</i> ".	Motion yet to be signed
36. Hon. Wangari Maathai Del. No. 084 AMM/181/04	19	Delete the words 'naturalized as a citizen' and substitute therefor the words ' <i>made a permanent resident</i> ' Further insert a new clause as follows: <i>A permanent resident who has been lawfully resident in Kenya for a continuous period of at least five years and who satisfies the conditions prescribed by an Act of Parliament may apply to be naturalized as a citizen of Kenya.</i>	Sic!
37. Hon. Sammy K. Ruto Del. No. 180	20(1)	Delete the words " <i>who appears to be less than eight years of age and</i> ".	Motion-yet to be signed
38. Hon. Hezron Manonda Del. No. 596 AMM/065/04	21	Delete the Article in its entirety and replace with the following clause: <i>'Dual citizenship is not permitted in Kenya calls and only it can be enacted for an Act of Parliament of Kenya, which shall regulate it with conditions'</i>	Sic!
39. Hon. William ole Yiaile Del. No. 361 AMM/029/04	21 (1)	Delete the words ' <i>does not lose</i> ' and substitute therefor the word ' <i>loses</i> '	
40. Hon. John Kiniti Del. No 352	21 (3)	Delete in its entirety	Motion yet to be signed
41. Hon. John Kiniti Del. 352	23 (2)	Delete the clause in its entirety	Motion yet to be signed
42. Hon. John Kiniti Del. No. 352	25	Delete the Article in its entirety	Motion yet to be signed
43. Hon. John P. Nyakundi Del. No. 611 AMM/225/04	Chapter 5	Insert the words " <i>Education, Science and Technology</i> " immediately before the word " <i>Culture</i> " in the Title to the Chapter.	

DELEGATE NAME & NO	ARTICLE NO.	MOTION	REMARKS
44. Hon. Julia Ojiambo Del. No. 220 AMM/047/04	NEW (immediately after Article 27)	<p>Insert a new Article thus:</p> <p>27A: Family Institution</p> <p><i>The state shall –</i></p> <ul style="list-style-type: none"> (a) <i>recognise and register marriages under the traditional systems, religion, personal or family law, which recognise the marriages of individuals of opposite sex but outlaws the marriages of the same sex, in conformity with this Constitution;</i> (b) <i>recognise, appreciate and support cultural aspects of traditional childbirth, naming, upbringing and intergenerational parenting.</i> (c) <i>through legislation prohibit incest.</i> 	
45. Hon. David Rakamba Del. No. 433 AMM/049/04	NEW (After Article 28)	<p>Insert new Article thus:</p> <p>28A: Representation of the Communities and Peoples of Kenya</p> <ul style="list-style-type: none"> (1) <i>The Upper House of Parliament shall be a representative body of the diverse communities and peoples of Kenya.</i> (2) <i>The election of representatives to the Upper House of Parliament shall be conducted on the basis of the 1st Schedule of the Constitution taking into account the principles of Devolution set out in Chapter Fourteen and principles of affirmative action.</i> 	
46. Hon. Mganga Mwandawiro Del. No. 131 AMM/040/04	NEW (after Article 28)	<p>Insert a new Article thus:</p> <p>28A:</p> <ul style="list-style-type: none"> (1) <i>There is established the African court system whose functions, the composition and structure shall be prescribed by an Act of Parliament.</i> (2) <i>The State shall encourage, promote and facilitate African traditional methods of resolving conflicts and disputes which are consistent with this Constitution.</i> (3) <i>The State shall recognise our traditional oathing system in the judicial system and other officer.</i> 	

DELEGATE NAME & NO	ARTICLE NO.	MOTION	REMARKS
47. Hon. David Erulu Del. No. 397 AMM/113/04	30 (2)]	Delete paragraphs (b) (d) (e) and (f) in their entirety	
48. Hon. Martha C. Rop AMM/113/04	30 (2) (c)	Insert the words ' <i>only during ceremonies</i> ' immediately after the word ' <i>drinks</i> '	
49. Hon. S.G.G. Gichuru Del. No. 313	30(2)(e) and (f)	Delete the word " <i>seed</i> " appearing in both paragraphs and substitute therefor the word " <i>germplasm</i> ".	Motion yet to be signed
50. Hon. Mwangi Kihara Del. No. 132	30 (2) (f)	Delete the word ' <i>seed</i> ' and substitute therefor the word ' <i>germplasm</i> '	Motion yet to be signed
51. Hon. Gacuru wa Karenge Del. No. 394 AMM/220/04	31(e)	Insert the following words immediately after the word " <i>Culture</i> " in the last line of the paragraph: <i>"and encourage the people to design, develop and popularize the use of a national dress code and costumes which are culturally acceptable".</i>	
52. Hon. John Kiniti Del. No. 352	32(1)	Delete the words " <i>on culture</i> ".	Motion yet to be signed
53. Hon. Rita Katamu Del. 381 AMM/165/04	32 (3) (k)	Insert the words ' <i>and legally protected</i> ' immediately after the word ' <i>supported</i> '	
54. Hon. James Koske Del. No. 371 AMM/090/04	32 (3) (m)	Delete the words ' <i>electronic and print</i> ' and substitute therefor the word ' <i>appropriate</i> '	
55. Hon. Gacuru wa Karenge Del. No. 314 AMM/221/04	New (Immediately after Article 33)	Insert a new Article immediately after Article 33 as follows: <i>(33A) Upon the coming into force of this Constitution, Parliament shall enact legislation to give effect to the provisions of this Chapter.</i>	
56. Hon. Dr. Sammy Ruto Del. No. 180	35 (5)	Delete the words ' <i>and facilitate</i> '	Motion yet to be signed

DELEGATE NAME & NO	ARTICLE NO.	MOTION	REMARKS
57. Hon. Wangari Maathai Del. No. 084 AMM/188/04	38 (2)	Delete the clause in its entirety	
58. Hon. John Kiniti Del. No. 352	38(2)	Delete in its entirety.	Motion yet to be signed
59. Hon. Victoria Mutheu Musyoka Del. No. 294 AMM/128/04	40 (4)	Clause to be deleted in its entirety.	
60. Hon. Joachim Gitonga Del. No. 311 AMM/011/04	41	Insert the following clauses immediately after Article 41 (2): (3) <i>The life of a person starts at conception.</i> (4) <i>Abortion is not allowed unless on medical advice when the life of the mother is in danger.</i>	
61. Hon. Daniel Njoroge Del. No. 589 AMM/036/04	41	Insert new clauses immediately after Article 41 (2) as follows: (a) <i>Adequate compensation shall be given to victims of criminal violence or their families.</i> (b) <i>The law shall prescribe the amounts, procedure and modalities of payment of the compensation.</i>	
62. Hon. Dr. Sammy K. Ruto Del. No. 180	41	Insert a new clause immediately after Article 41(2) as follows: (3) <i>For purposes of this Article, life shall be assumed to begin from conception to natural death.</i>	Motion yet to be signed
63. Hon. Godfrey Mbuba M'Thigaa Del. No. 277 AMM/124/04	41 (1)	Insert the words ' <i>from conception</i> ' immediately after the word 'life'	
64. Hon. Marie Therese Gaambi Del. No. 519	41 (1)	Delete the sub-article in its entirety and substitute therefor as follows:	

DELEGATE NAME & NO	ARTICLE NO.	MOTION	REMARKS
AMM/127/04	41 (2)	<p>(a) <i>All human life from conception shall have protection of the law.</i></p> <p>New clause (2) to be inserted immediately after clause (1) as follows:</p> <p>(b) <i>Abortion is outlawed.</i></p> <p>Original clause (2) to be renumbered as clause (3)</p>	
65. Hon. Ruth Oniang'o Del. No. 221 AMM/057/04	41 (2)	Delete the sub-article in its entirety	
66. Hon. Isa Ireri Ngunia Del. No. 286 AMM/122/04	41 (2)	Insert the words ' <i>except in the case of murder</i> ' immediately after the words ' <i>death penalty</i> '	
67. Hon. David Erule Del. No. 397 AMM/164/04	41 (2)	Delete the clause in its entirety	
68. Hon. David Awillie Del. No. AMM/174/04	41 (2)	Delete the clause in its entirety	Motion recorded twice
69. Hon. Ibrahim Salim Del. No. 225	41 (2)	Delete clause in its entirety	
70. Hon. John Kiniti Del. No. 352	44	Delete the word 'Women' in the title and substitute therefor the word 'Gender'	Motion yet to be signed
71. Hon. Ezekiel Kesendany Del. No. 356 AMM/243/04	44	Delete the word "Women" in the title to the Article and substitute therefor the word "Gender".	Motion yet to be signed

DELEGATE NAME & NO	ARTICLE NO.	MOTION	REMARKS
72. Hon. Sammy K. Ruto Del. No. 180	44(1)	Delete the word "and" immediately after the word "cultural" and substitute therefor a "comma" and further insert the words " and other similar " immediately after the word "social"	Motion yet to be signed
73. Hon. Sammy K. Ruto Del. No. 180	44(4)(b)	Insert the words " Welfare for both women and men to enable them " immediately before the first word in the paragraph.	Motion yet to be signed
74. Hon. James Koske Del. No. 371 AMM/091/04	46 (3) (b)	Insert the word ' good ' between the words 'in' and 'governance'	
75. Hon. Luseno Liyai Del. No. 601 AMM/078/04	47	Insert a new clause immediately after clause (6) 6A: <i>Parents and guardians have the right to be assisted in light household and farm chores by children under their care during the latter's free time.</i>	
76. Hon. Sophiah Abdi Noor Del. No. 470 AMM/105/04	50 (3) (e) and (f)	Delete the word 'reasonable' and substitute therefor the word ' adequate '	
77. Hon. Sammy K. Ruto Del. No. 180	51(1) & (2)	Delete the words "[E]very person" appearing in the clauses and substitute therefor the words " [A]ll persons "	Motion yet to be signed
78. Hon. Mary Teresa Osunga Del. No. 411 AMM/152/04	51 (2) (b)	Delete the paragraph in its entirety	
79. Hon. Sammy K. Ruto Del. No. 180	53(1)	Delete the word "may" and substitute therefor the word " shall ".	Motion yet to be signed
80. Hon. Sammy K. Ruto Del. No. 180	53(2)	Delete the word "may" and substitute therefor the word " shall ". Further insert the words " except in the execution of a lawful order as may be consistent with the provisions of this Constitution " immediately after the word "labour"	Motion yet to be signed

DELEGATE NAME & NO	ARTICLE NO.	MOTION	REMARKS
81. Hon. Beatrice Bariu Del. No. 270 AMM/126/04	55	Delete clauses (2) (3) (4) (5) and (6) in their entirety.	
82. Hon. Mary Teresa Osunga Del. No. 411 AMM/151/04	56 (d)	Insert the words ' <i>which do not become destructive</i> ' immediately after the word ' <i>research</i> '	
83. Hon. Rose Lukalo-Owino Del. No. 471 AMM/131/04	57 (6) (c) 57 (6) (d)	Delete paragraph in its entirety Delete the words 'and to' and substitute therefor the words ' <i>which will set media standards</i> '. Further delete the words ' <i>the media</i> ' and substitute therefor the word ' <i>these</i> '. Further delete the words ' <i>referred to under paragraph (c)</i> '	
84. Hon. John P. Nyakundi Del. No. 611 AMM/245/04	59(5)(b)	Delete the word " <i>in the hands of a body that is independent of Government or political control</i> " and substitute therefor the words " <i>by the Registrar of Societies under the Societies Act</i> ".	
85. Hon. Mary Teresa Osunga Del. No. 411 AMM/154/04	61 (3) (a)	Delete the words ' <i>by secret ballot</i> '	
86. Hon. Winston O Adhiambo Del. No. 603 AMM/074/04	68 (1)	Insert the word ' <i>care</i> ' immediately after the word ' <i>health</i> ' in the first line of the clause and the words ' <i>at all State institutions of medical treatment</i> ' immediately after the last word in the clause.	
87. Hon. Ibrahim Omondi Del. No. 542 AMM/125/04	68 (1)	Delete the words ' <i>including reproductive health care</i> '	

DELEGATE NAME & NO	ARTICLE NO.	MOTION	REMARKS
88. Hon. Winston O. Adhimbo Del. No. 603 AMM/062/04	68 (2)	Delete the sub-article in its entirety.	
89. Hon. Luseno Liyai Del. No. 601 AMM/079/04	69	Insert a new clause immediately after Article 69 (4) as follows: <i>(4) parents and guardians have the right to discipline, guide and counsel children under their care.</i>	
90. Hon. Luseno Liyai Del. No. 601 AMM/080/04	69	Insert a new clause immediately after Article 69 (4) as follows: <i>(6) parents and guardians have the right to discipline, guide and counsel children under their care.</i>	Motion same as preceding one
91. Hon. Winston O. Adhiambo Del. No. 603 AMM/075/04	69 (1)	Delete the word 'person' and substitute therefor the word 'Kenyans' and further insert the word 'free' immediately before the word 'education' and the following words 'at all State institutions of learning' immediately after the word 'education'	
92. Hon. Winston O. Adhiambo Del. No. 603 AMM/077/04	69 (2)	Delete the words 'institute a programme to implement the right of every child to' and substitute therefor the word 'provide' and further delete the words 'pre-primary and primary' and insert the words 'to Kenyans from pre-primary upto Form Four in all State schools' immediately after the word 'education'	
93. Hon. Winston O. Adhiambo Del. No. 603 AMM/076/04	69 (3)	Delete in its entirety	
94. Hon. Samuel Tororei Del. No. 462 AMM/020/04	70 (1)	Delete the words 'access to' and substitute therefor the words ' <i>accessible and</i> '	
95. Hon. Mwai Gakuya Del. No. 576 AMM/241/04	70 (7)	Insert a new clause immediately after (6) as follows: <i>The state shall not demolish property owned by poor urban people living in ghettos, shanties and slums without following the laid down rules and regulations under the UN.</i>	

DELEGATE NAME & NO	ARTICLE NO.	MOTION	REMARKS
96. Hon. Wangari Maathai Del. No. 084 AMM/179/04	75 (1)	Delete the word ' <i>the</i> ' appearing before the word ' <i>language</i> ' and substitute therefor the word ' <i>their</i> '	
97. Hon. Mary Teresa Osunga Del. No. 411 AMM/153/04	82 (3)	Delete the word ' <i>prison</i> ' and substitute therefor the words ' <i>Correctional Institution</i> '	
98. Hon. Sahara Ahmed Hillow Del. No. 257 AMM/231/04	83	<p>Insert a new clause immediately after clause (7) as follows:</p> <p><i>Every community has a right to self determination if they find life unbearable due to:</i></p> <ul style="list-style-type: none"> (a) <i>unjust declaration of state of emergency</i> (b) <i>enactment of discriminatory laws</i> (c) <i>neglected as a result of marginalization and historical injustices</i> (d) <i>suppression of religious conscience and freedom</i> (e) <i>lack of financial legalization for marginalized areas and communities</i> 	
99. Hon. Mafunga Chesmei Wambulwa Del. No. 376 AMM/158/04	84	<p>Insert new clause immediately after clause (2) as follows:</p> <p><i>(c) the state shall establish a National Agricultural Produce Marketing Board and a National Agricultural Produce Marketing Board Fund to enhance the efficiency of services provided to the land and property users and thereby reduce poverty.</i></p>	
100. Hon. Winston Ogola Adhiambo Del. No. 603 AMM/059/04	84 (1)	Transfer the provisions of Article 84 (1) (e) and (f) to Article 89 (1) as clauses (e) and (f)	
101. Hon. Joseph Njalis Shuel Del. No. 353 AMM/104/04	85 (3)	Insert the words ' <i>and shall not be renewed until adequate consultations with the local community have been held</i> ' immediately after the word ' <i>years</i> '	
102. Hon. Joseph Njalis Shuel Del. No. 353	85(3)	Insert the words " <i>and shall not be renewed until adequate consultations with the local community have been held</i> " immediately after the words " <i>ninety-nine years</i> ".	Motion yet to be signed

DELEGATE NAME & NO	ARTICLE NO.	MOTION	REMARKS
103. Hon. Mark Adungo Del. No. 394 AMM/113/04	86 (2) (a) 86 (2) (f) 86 (2) (g) 86 (3) (a) and (b) 86 (5) (a) and (b)	Delete all references to specific Acts of Parliament since the Draft Bill envisages the consolidation of the existing land laws.	
104. Hon. Philip ole Sironka Del. No. 461 AMM/068/04	87 (4)	Insert the words ' <i>through community land ownership association</i> ' immediately after the word ' <i>collectively</i> '	
105. Hon. Wangari Maathai Del. No. 084 AMM/176/04	87 (6) (xv)	Delete the words ' <i>the Coast, North Eastern and Rift valley provinces or whether</i> ' and substitute therefor the word ' Kenya '	
106. Hon. Mwai Gakuya Del. No. 576 AMM/242/04	87	Insert a new clause immediately after clause (60) as follows: <i>The State shall encourage the ownership of city/town Council Rental Houses where tenants have stayed or occupied for more than twenty or more years.</i>	
107. Hon. John Nyakundi Del. No. 611	88 (2) (c)	Insert a new paragraph immediately after paragraph (ii) as follows: <i>(iii) A compensation or royalties of 15% shall be paid annually to persons whose land has been acquired for development purposes.</i>	Motion yet to be signed
108. Hon. Jane Kihara Del. No. 058	91	Insert a new clause immediately after Article 91(2) as follows: <u><i>“Community” means a group of Kenyan citizens living in a specific geographical area irrespective of their ethnicity or culture.</i></u>	Motion yet to be signed
109. Hon. Wangari Maathai Del. No. 084 AMM/186/04	91 (3)	Insert new clause immediately after clause (3) as follows: <i>‘Community’ means a group of Kenyan citizens living in a specific geographical area irrespective of their ethnicity and culture.</i>	
110. Hon. John M. Kiniti Del. No. 352	91(1) and (2)	Expunge the provisions of the Article and transfer to Chapter 20 on General Provisions.	Motion yet to be signed

DELEGATE NAME & NO	ARTICLE NO.	MOTION	REMARKS
111. Hon. Nduta Kiarie Del. No. 465 AMM/055/04	92	Insert a new clause immediately after Article 92 (4) as follows: <i>Environmental considerations and all aspects of natural resource management such as protection, conservation and sustainable use shall be incorporated in the ownership and title of land in all ecosystems.</i>	
112. Hon. Rita Katamu Del. No. 381 AMM/042/04	92 (1)	Insert a new paragraph immediately after paragraph (c) as follows: <i>(d) ensure that tobacco growing is banned and replaced by a non-hazardous crop for the purpose of protecting the youth and future generations from the hazardous effect of tobacco.</i>	
113. Hon. Nduta Kiarie Del. No. 465 AMM/055/04	93 (g)	Insert the word ' <i>natural</i> ' before the word ' <i>disasters</i> '	
114. Hon. Mark Adungo Del. No. 394 AMM/113/04	95 (2)	Delete the words ' <i>local communities, devolved authorities and the central governments</i> ' and substitute therefor the words ' <i>national government and devolved governments</i> '	
115. Hon. J. P. Nyakundi Del. No. 611	95 (2)	Insert a new paragraph immediately after paragraph (b) as follows: <i>Provide for a 15 % compensation of the profits accruing from the exploitation of natural resources to the communities where such resources are located.</i>	Motion yet to be signed
116. Hon. Nduta Kiarie Del. No. 465 AMM/055/04	95 (2) (a)	Insert the words ' <i>access to</i> ' immediately before the word ' <i>genetic</i> '	
117. Hon. Nduta Kiarie Del. No. 465 AMM/055/04	97 (c)	Delete the word ' <i>external</i> '	
118. Hon. John M. Kiniti Del. No. 352	100(1) and (2)	Expunge the provisions of the article and transfer to Chapter 20 on General Provisions.	Motion yet to be signed

DELEGATE NAME & NO	ARTICLE NO.	MOTION	REMARKS
119. Hon. (Dr.) Ruth Kibiti Del. No. 511 AMM/ O83/ 04	109	Insert a new clause immediately after Article 109 (4) thus: 4A: <i>Every district and borough shall be an electoral unit for the election of women representatives.</i>	
120. Hon. Sheikh Ali Shee Del. No. 515 AMM/102/04	109	Insert two new clauses immediately after Article 109 (7) as follows: (8) <i>All persons in elective offices shall ensure adequate consultation with their electors on all matters that have consequences and impacts on the livelihood of electors in question.</i> (9) <i>Parliament shall within one year of the coming into force of this Constitution, put in place legislation to give effect to the above principles.</i>	
121. Hon. Godfrey Thipaa Del. No. 277 AMM/041/04	109 (1)	Insert the words ' <i>only indigenous citizens</i> ' immediately after the word 'and' and 'to'	
122. Hon. Ruth Oniang'o Del. No. 221 AMM/056/04	109 (7)	Delete the clause in its entirety and substitute therefor the following: (7) <i>There is no limit on the number of terms that a person may serve in an elective office.</i>	
123. Hon. Joel Haji Del. No. 246 AMM/098/04	109 (7)	Insert the words ' <i>with pension or retirement benefits as per an Act of Parliament</i> ' between the words 'term' and 'but'	
124. Hon. David Rakamba Del. No. 433 AMM/111/04	109 (7)	Delete the clause in its entirety	
125. Hon. James Mathenge Del. No. 308	109 (7)	Delete the clause in its entirety	Motion yet to be signed

DELEGATE NAME & NO	ARTICLE NO.	MOTION	REMARKS
126. Hon. Mohammed Juma Abdi Del. No. 240	109(7)	Delete the clause in its entirety.	Motion yet to be signed
127. Hon. Hubbie Hussein Al Haji Del. No. 251 AMM/292/04	110 (1) (f)	Delete the words appearing after the word ' <i>referenda</i> '	
128. Hon. Atsango Chesonni Del. No. 510 AMM/135/04	110 (2)	Delete clause in its entirety	
129. Hon. Mary Wambui Del. No. 467 AMM/113/04	110 (2)	Insert a new clause immediately after clause (2) as follows: <i>(2A) A political party shall adhere to the Affirmative Action principles in its nomination of candidates for direct elections.</i>	
130. Hon. Nancy Lung'ahi Del. No. 244	110(2)	Delete in its entirety.	Motion yet to be signed
131. Hon. Ngoromo Makanga Del. No. 605 AMM/101/04	110 (3)	Delete in its entirety	
132. Hon. Sammy Naibei Chemwey Del. No. 388 AMM/108/04	110 (3)	Delete the words ' <i>Affirmative action, five per cent of the seats in the National Assembly</i> ' and the words ' <i>eight decimal five per cent in the Senate</i> ' and insert the words ' <i>ensuring the representation of all categories of Kenyan citizens not more than ten percent of the seats in Parliament</i> ' between the words 'of' and 'or' Further, delete the words ' <i>so that at least one third of the seats go to women</i> ' Insert two new clause immediately after clause (3) as follows: <i>Provided that all time at least one third of the seats in Parliament and devolved government shall be held by women.</i> <i>Parliament shall enact legislation that enforces clauses (3) and (4).</i>	

DELEGATE NAME & NO	ARTICLE NO.	MOTION	REMARKS
133. Hon. Sammy K. Ruto Del. No. 180	110(3)	Delete the words " <i>eight decimal five percent</i> " and substitute therefor the words " <i>ten percent</i> "	Motion yet to be signed
134. Hon. (Dr.) Simeon Shitemi Del. No. 545 AMM/ O84/ 04	NEW (immediately after Article 110)	Insert new Article immediately after Article 110 thus: 110A: Election Campaign Expenditure <i>An Act of Parliament shall limit the amount of money to be expended by candidates in elections campaigns.</i>	
135. Hon. Gilbert Omondi Dele. No. 625 AMM/069/04	113 (e)	Insert the words ' Kenya Correctional Service ' immediately before the word 'staff' in the second line.	
136. Hon. Kavoo Kilonzo Del. No. 479 AMM/293/04	113 (e)	Insert the words ' prison warden ' immediately after the word ' prisoners '. Further, insert the words ' health workers ' immediately after the word ' officials '	
137. Hon. John P. Nyakundi Del. No. 611	114	Delete the Article in its entirety	Motion yet to be signed
138. Hon. John P. Nyakundi Del. No. 611	116	Delete paragraphs (2) (e) and (f)	Motion yet to be signed
139. Hon. Hubbie Hussein Al Hajj Del. No. 251 AMM302/04	117 (2)	Insert a new paragraph immediately after paragraph (viii) as follows: <i>Level of economic development</i>	
140. Hon. Hubbie Hussein Al Hajj Del. No. 251 AMM/299/04	117 (2) (b) (ix)	Delete the words ' <i>and the proportional representation</i> '	
141. Hon. Hubbie Hussein Al Hajj Del. No. 251 AMM/303/04	117 (2) (b) (ix)	Delete the paragraph in its entirety	

DELEGATE NAME & NO	ARTICLE NO.	MOTION	REMARKS
142. Hon. John P. Nyakundi Del. No. 611	NEW (immediately after Article 119)	Insert new Article immediately after Article 119 as follows: 119A <i>There is established the office of the Registrar of Political Parties whose functions will be the supervision of political parties and management of the Political Parties Fund.</i>	Motion yet to be signed
143. Hon. Mark Osili Adungo Del. No. 394 AMM/009/04	119	Insert a new clause immediately after Article 119 (3) as follows" 119 (4): <i>'Political Parties may form coalitions the running of which shall be regulated by an Act of Parliament'.</i>	Motion yet to be signed
144. Hon. John P. Nyakundi Del. No. 611	119	Insert a new clause immediately after clause (3) as follows: <i>Political parties shall be registered by the Registrar of Political Parties under the Political Parties Act.</i>	
145. Hon. Winston O. Adhiambo Del. No. 603 AMM/060/04	NEW (immediately after Article 121)	Insert a new Article immediately after Article 121 as follows: 121 A: (2) <i>There is established an independent office of the Registrar of Political Parties consisting of:</i> (a) <i>Registrar of political parties</i> (b) <i>One Deputy Registrar of Political parties</i> (c) <i>Three Assistant Registrars of political parties</i> (d) <i>The Registrar of political parties, Deputy Registrar and Assistant Registrars of Political parties shall be appointed by the President with the approval of the National Assembly.</i> (e) <i>The staff of the Registrar of Political parties will be appointed by the Judicial Service Commission in consultation with the Registrar of Political Parties.</i> (3) <i>The functions of the Registrar of political parties shall be:</i> (a) <i>to register, keep and maintain the register of political parties</i> (b) <i>to arbitrate in intra and inter party disputes;</i> (c) <i>to maintain a political parties library and archives</i> (d) <i>to supervise the elections of the officials of the registered political parties</i>	

DELEGATE NAME & NO	ARTICLE NO.	MOTION	REMARKS
		(e) <i>supervision of political parties</i> (f) <i>supervision of political parties Fund</i>	
146. Hon. John P. Nyakundi Del. No. 611	122 (2)	Delete the words ' <i>Electoral and Boundaries Commission</i> ' throughout the Article and substitute therefor the words ' <i>Registrar of Political Parties</i> '	Motion yet to be signed
147. Hon. Sammy K. Ruto Del. No. 180	123(1)(b)	Insert the words " <i>ethically and morally acceptable</i> " immediately after the word "any"	Motion yet to be signed
148. Hon. Rashmin P. Chitnis Del. No. 543 AMM/236/04	124 123 & 125	Article to be re-organized to appear immediately before Article 122 Articles to be combined	Articles address the same issue
149. Hon. Sammy K. Ruto Del. No. 180	124(4)	Delete the words " <i>Thirty percent</i> " and substitute therefor the words " <i>Fifty percent distributed proportionally</i> "	Motion yet to be signed
150. Hon. Daniel Njoroge Del. No. 589 AMM/034/04	126 (2)	Delete the words ' <i>the Auditor-General</i> ' and substitute therefor the words ' <i>an approved certified auditor</i> '	
151. Hon. Daniel Njoroge Del. No. 589 AMM/035/04	126 (3)	Delete the words ' <i>the Auditor-General</i> ' appearing in the clause and substitute therefor the words ' <i>an approved certified auditor</i> '	
152. Hon. Sammy K. Ruto Del. No. 180	127	Insert a new clause immediately after Article 127(4): (5) <i>Any political party which does not satisfy the minimum standards specified by this Constitution shall be recommended for deregistration.</i>	Motion yet to be signed
153. Hon. Sammy Naibei Chemwey Del. No. 388 AMM/107/04	133 (2) (d)	Delete the clause in its entirety and substitute therefor with the following: (d) <i>approving the sharing of funds among the four levels of Government and appropriating funds for expenditure by the departments of the national level of Government.</i>	
154. Hon. Raphael Livu Del. No. 228 AMM/137/04	136 (1)	Delete the clause in its entirety	

DELEGATE NAME & NO	ARTICLE NO.	MOTION	REMARKS
155. Hon. Samuel M. Muchuga Del. No. 226 AMM/159/04	136 (1)	Delete clause in its entirety and substitute therefor as follows: (a) <i>forty-two members elected, three each from all the fourteen regions, one from each region being of the opposite gender;</i> (b) <i>three members elected from the marginalized groups through an electoral college of all marginalized groups as provided for in Article 139 (at least one of whom shall be of opposite gender); and</i> (c) <i>the Speaker to be elected through an electoral college</i>	
156. Hon. Wangari Maathai Del. No. 084 AMM/185/04	136 (1)	Delete the words 'seventy-four, twenty-eight' and 'ten'	
157. Hon. Wangari Maathai Del. No. 084 AMM/193/04	136 (1)	Delete the words 'seventy four'	
158. Hon. Wangari Maathai Del. No. ,084 AMM/197/04	136 (1)	Delete the words 'seventy four', 'twenty eight' and 'ten'	Motion recorded twice
159. Hon. James Waweru Del. No. 310	136 (1) (a)	Delete the words 'seventy-four'	
160. Hon. Wangari Maathai Del. No. 084 AMM/191/04	136 (1) (b)	Delete the words 'twenty eight'	
161. Hon. James Waweru Del. No. 310	136 (1) (b)	Delete the words 'twenty-eight'	Motion yet to be signed
162. Hon. Lawrence Mute Del. No. 455 AMM/015/04	136 (1) (c)	Delete the words 'one each' and insert the words ' <i>provided that at least three shall be persons with disabilities</i> ' immediately after the figures 139	

DELEGATE NAME & NO	ARTICLE NO.	MOTION	REMARKS
163. Hon. Wangari Maathai Del. No. 084 AMM/192/04	136 (1) (c)	Delete the word 'ten'	
164. Hon. James Waweru Del. No. 310	136 (1) (c)	Delete the word 'ten'	Motion yet to be signed
165. Hon. Moses Cheboi Del. No. 018 AMM/300/04	136 (1)	Insert a new paragraph immediately after paragraph (1) (d) as follows: <i>(e) members who are 45 years of age and above</i>	
166. Hon. Ngorongo Makanga Del. No. 605	136(2)	Delete in its entirety and substitute therefor the following clause: <i>(2) Minorities under paragraph (c) shall be elected on the basis of proportional representation.</i>	Motion yet to be signed
167. Hon. Wangari Maathai Del. No. 084 AMM/182/04	137 (1)	Delete the words 'two hundred and ten', 'seventy-four' and 'fourteen'.	
168. Hon. Wangari Maathai Del. No. 084 AMM/199/04	137 (1) (a)	Delete the words 'two hundred and ten'	Motion recorded twice
169. Hon. James Waweru Del. No. 310	137 (1) (a)	Delete the words 'two hundred and ten'	Motion yet to be signed
170. Hon. James Waweru Del. No. 310	137 (1) (b)	Delete the words 'seventy four'	Motion yet to be signed
171. Hon. Ngorongo Makanga Del. No. 605 AMM/097/04	137 (1) (b)	Delete and replace with the following paragraphs: <i>(b) Every district shall have at least one woman representative in the National Assembly.</i> <i>(b) For purposes of representation under clause (1) (b), the woman representative shall be elected by the political party with the majority of aggregate votes cast in all the constituencies in the district.</i>	

DELEGATE NAME & NO	ARTICLE NO.	MOTION	REMARKS
	137 (1) (c)	<p>Delete and insert the following paragraphs:</p> <p><i>(c.a) the principle of proportional representation shall be applied to elect such number of representatives to the National Assembly as provided for in Article 139 (2) by political parties that shall have not got seats in the National Assembly in terms of Article 137 (1) (a) (b)</i></p> <p><i>(c.b) Parliament shall enact a legislation to give effect to the provisions of this Article.</i></p>	
	137 (2)	<p>Delete the clause in its entirety and substitute therefor the following:</p> <p><i>The provisions of this Article are subject to any boundary alterations as prescribed or anticipated under Article 117.</i></p>	
172. Hon. Ngorongo Makanga Del. No. 605	137(1)(b)	<p>Delete in its entirety and substitute therefor a new paragraph as follows:</p> <p>(b) Every District shall have at least one woman member of Parliament.</p>	Motion yet to be signed
173. Hon. Wangari Maathai Del. No. 084 AMM/201/04	137 (1) (b)	Delete the word 'seventy four'	Motion recorded twice
174. Hon. Lawrence Mute Del. No. 455 AMM/016/04	137 (1) (c)	Insert the words ' <i>provided that at least five shall be persons with disabilities</i> ' after the figures 139	
175. Hon. Wangari Maathai Del. No. 084 AMM/200/04	137 (1) (c)	Delete the word 'fourteen'	Motion recorded twice
176. Hon. Makanga Ngorongo Del. No. 605	137 (1) (c)	<p>Delete the clause in its entirety and substitute therefor as follows:</p> <p><i>Subject to Article 139 members shall be elected through proportional representation.</i></p>	Motion yet to be signed

DELEGATE NAME & NO	ARTICLE NO.	MOTION	REMARKS
177. Hon. Sammy Ruto Del. No. 180	137 (1) (c)	Delete the words ' <i>fourteen</i> ' and substitute therefor the words ' <i>ten percent</i> '	Motion yet to be signed
178. Hon. John P. Nyakundi Del. No. 611 AMM/246/04	138 (1)	Delete the clause in its entirety	
179. Hon. Daniel Njoroge Del. No. 589 AMM/168/04	138 (2)	Insert a new paragraph immediately after paragraph (f) as follows: <i>(i) has been implicated by the Public Accounts Committee, the Anti-Corruption Authority for misuse or abuse of Public or any other office or in any way had contravened the principles of the Ethics and Integrity Commission.</i>	
180. Hon. Atsango Chesonni Del. No. 510 AMM/103/04	139	Insert a new clause immediately after clause (2) as follows: <i>(2A) Any representative of a marginalized group shall be eligible for re-election to Parliament as such representative once.</i>	
181. Hon. Atsango Chesonni Del. No. 510	139	Insert a new clause immediately after Article 139 (2): <i>(3) any representative of a marginalized group shall be eligible for election to Parliament as such representatives once.</i>	Motion yet to be signed
182. Hon. Naftali Chelagat Del. No. 347 AMM/175/04	139 (2) (a)	Delete the clause in its entirety	
183. Hon. Luseno Liyai Del. No. 601 AMM/295/04	139 (2)	Insert a paragraph immediately after paragraph (g) that reads: <i>(h) Kenyan Community abroad Or (h) Kenyan citizens in the diaspora</i>	
184. Hon. Mark Osili Adungo Del. No. 394 AMM/033/04	142 (1)	Insert a new clause immediately before paragraph (a) as follows: <i>(aa). if the member dies;</i>	

DELEGATE NAME & NO	ARTICLE NO.	MOTION	REMARKS
185. Hon. Atsango Chesoni Del. No. 510 AMM/134/04	145	Insert a new clause immediately after clause (e) as follows: <i>(f) if that person becomes President</i>	
186. Hon. Nancy Lung'ahi Del. No. 224	145(2)	Insert a new paragraph immediately after paragraph (e) as follows: <i>(f) if that person becomes President.</i>	Motion yet to be signed
187. Hon. Leslie Betawa Mwachiro Del. No. 599 AMM/207/04	159 (1) (a)	Delete the word ' <i>Enactments</i> ' and substitute therefor the word ' <i>laws</i> '. Further, delete the words ' <i>Speaker of the National Assembly</i> ' and substitute therefor the words ' <i>Registrar of the Supreme Court</i> '.	
188. Hon. David Erule Del. No. 397 AMM/166/04	167 (6)	Delete the words ' <i>thirty five per cent</i> ' and substitute therefor the words ' <i>sixty five percent</i> ' and further insert the words ' <i>only where there is an emergency or a national disaster</i> ' immediately after the word ' <i>request</i> '	
189. Hon. Samuel Tororei Del. No. 462 AMM/019/04	170 (1) (c)	Insert the words ' <i>provided that at least one member shall be a person with disability</i> ' immediately after the word ' <i>affairs</i> '	
190. Hon. David Erule Del. No. 397 AMM/163/04	170 (3) (e)	Insert a new paragraph immediately after clause (ii) as follows: <i>All the above functions must be first ratified by the Senate.</i>	
191. Hon. David K. Awillie Del. No. 221	170 (3)(e)	Insert a sub paragraph immediately after sub paragraph (ii) as follows: (iii) All the above functions must be first ratified by the Senate.	
192. Hon. John M. Kiniti Del. No. 352	170(1)	Insert the words " <i>in accordance with Chapter 18</i> " immediately after the word " <i>Commission</i> ".	Motion yet to be signed
193. Hon. Bishop Philip Sulumeti Del. No. 546	171	Insert a new clause immediately after clause (2) as follows: <i>(3) The composition of the National Executive shall reflect the regional and ethnic diversity of the people of Kenya.</i>	

DELEGATE NAME & NO	ARTICLE NO.	MOTION	REMARKS
194. Hon. Daniel Njoroge Del. No. 589 AMM/169/04	172	Insert new clause (2) as follows: <i>the President, the Deputy President, the Prime Minister, Deputy Prime Ministers and the Cabinet Ministers will not be members of the Legislature or any of the other segments of the government.</i>	
195. Hon. George Omari Nyamweya Del. No. 615 AMM/247/04	172	Delete the words 'Prime Minister, the two Deputy Prime Ministers'	
196. Hon. Bishop Philip Sulumeti Del. No. 546	172	Delete the Article in its entirety and therefor substitute with a new Article as follows: <i>The Executive authority of the Republic at the national level of government is vested in the President, the Deputy President, the Prime Minister, and the Cabinet, all of whom, in the performance of their respective functions, shall work in harmony for the good governance of Kenya and the progress of the people of Kenya.</i>	
197. Hon. Luseno Liyai Del. No. 601 AMM/296/04	172 (a)	Insert a new clause as follows: <i>(a) at no one time shall any two holders of the offices contemplated in Article 172 (i.e the President, the Deputy President, the Prime Minister and the two Deputy Prime Ministers) come or originate from the same geographical region or ethnic community.</i>	
198. Hon. George Omari Nyamweya Del. No. 615 AMM/014/04	172, 174, 179, 180, 181, 182, 186, 187, 190, 193, 194, 195, 206	To be amended in terms of the motion presented	Motions have been separated and redrafted.
199. Hon. Bishop Philip Sulumeti Del. No. 546	173 (2) (a)	Delete the sub-clause in its entirety and substitute therefor as follows: <i>(a) is the Head of State, the Head of Government, the Commander -in-Chief of the Kenya Defence Forces, the Chairperson of the Cabinet, and the Chairperson of the National Security Council.</i>	

DELEGATE NAME & NO	ARTICLE NO.	MOTION	REMARKS
200. Hon. John Gitari Munyi Del. No. 284 AMM/226/04	173(2)(a)	Insert the word " <i>Government</i> " immediately after the word " <i>and</i> " in the first line of the paragraph and a comma thereafter, and further insert the words " <i>and the chair to the Cabinet</i> " immediately after the word " <i>Council</i> ".	
201. Hon. Wangari Maathai Del. No. 084	173(2)(a)	Insert the words " <i>Head of Government</i> " immediately before the word " <i>and</i> " in the first line of the paragraph and further insert the words " <i>and the chair to the Cabinet</i> " immediately after the word " <i>Council</i> ".	
202. Hon. Bishop Philip Sulumeti Del. No. 546	174 (1)	Delete the clause in its entirety.	
203. Hon. Isa Ireri Ngunia Del. No. 286 AMM/118/04	174 (1) (a)	Delete the paragraph in its entirety	
204. Hon. George Omari Nyamweya Del. No. 615 AMM/248/04	174 (2) (a)	Insert the words ' <i>in accordance with Article 14I</i> ' immediately after the word ' <i>Parliament</i> '	
205. Hon. George Omari Nyamweya Del. No. 615 AMM/249/04	174 (2) (b)	Insert the words ' <i>as is provided for in Article 14I</i> '	
206. Hon. George Omari Nyamweya Del. No. 615 AMM/250/04	174 (2) (c)	Insert the word ' <i>and</i> ' immediately after the semi-colon	
207. Hon. George Omari Nyamweya Del. No. 615 AMM/251/04	174 (2) (d)	Delete the paragraph in its entirety and substitute therefor a new paragraph as follows: <i>'may dissolve Parliament only in the circumstances contemplated in Article 168'</i>	
208. Hon. Romanus Onyango Del. No. 4 19 AMM/005/04	174 (3)	Insert the words ' <i>and in consultation with the leader of the majority political party or coalition of parties in Parliament</i> ' immediately after the word ' <i>Constitution</i> '	

DELEGATE NAME & NO	ARTICLE NO.	MOTION	REMARKS
		Insert a new clause: ‘In making the above appointments under Article 174 (3), the President shall take into account the ethnic diversity of the country’.	
209. Hon. Bishop Philip Sulumeti Del. No. 546	174 (3)	Delete the clause and substitute therefor as follows: (3)The President, in accordance with this Constitution, shall appoint and may dismiss– (a) the Prime Minister (b) Deputy Prime Minister (c) Cabinet Ministers and Deputy Ministers (d) The judges of the superior courts of record; (e) any other public officer whom this Constitution requires the President to appoint.	
210. Hon. George Omari Nyamweya Del. No. 615 AMM/252/04	174 (3) (a) (i)	Insert the words ‘ <i>as provided for in Article 171</i> ’ immediately after the word ‘Minister’	
211. Hon. Wangari Maathai Del. No. 084	174 (3) (a) (ii)	Delete the words ‘ <i>nominated by the Prime Minister</i> ’	Motion yet to be signed
212. Hon. George Omari Nyamweya Del. No. 615 AMM/253/04	174 (3) (a) (ii)	Insert the words ‘ <i>in consultation with the President</i> ’ between the words ‘ <i>Ministers</i> ’ and ‘ <i>nominated</i> ’ where they first appear. Further, insert the words ‘ <i>as provided for in Article 198</i> ’ immediately after the words ‘ <i>Prime Minister</i> ’ where it last appears.	
213. Hon. Wangari Maathai Del. No. 084	174 (3) (a) (iii)	Delete the words ‘ <i>nominated by the Prime Minister</i> ’.	Motion yet to be signed
214. Hon. George Omari Nyamweya Del. No. 615 AMM/254/04	174 (3) (a) (iii)	Insert the words ‘ <i>in consultation with the President</i> ’ between the words ‘ <i>Ministers</i> ’ and ‘ <i>nominated</i> ’. Further, insert the words ‘ <i>as provided for in Article 198</i> ’ immediately after the words ‘ <i>Prime Minister</i> ’ where they last appear.	

DELEGATE NAME & NO	ARTICLE NO.	MOTION	REMARKS
215. Hon. George Omari Nyamweya Del. No. 615 AMM/255/04	174 (3) (b)	Delete the word ' <i>twenty</i> ' and substitute therefor the words ' <i>twenty five</i> '. Further, insert the words ' <i>in consultation with the President</i> ' between the words ' <i>Deputy Ministers</i> ' and ' <i>nominated</i> '	
216. Hon. Wangari Maathai Del. No. 084	174 (3) (b)	Delete the words ' <i>nominated by the Prime Minister</i> '	Motion yet to be signed
217. Hon. David Mwenje Del. No. 135	174(3)(a)(ii) & (iii) and (b)	Delete all the words " <i>nominated by the Prime Minister</i> " appearing in the (sub) paragraphs.	Motion yet to be signed
218. Hon. John Gitari Munyi Del. No. 284 AMM/227/04	174 (3) (a) (ii) 174(3)(a)(iii)	Delete the words " <i>nominated by</i> " and substitute therefore the words " <i>in consultation with</i> " Delete the words ' <i>nominated by</i> ' and substitute therefor the words ' <i>in consultation with</i> '	
219. Hon. George Omari Nyakundi Del. No. 615 AMM/256/04	174 (3) (c)	Delete the entire paragraph and substitute therefor the words ' <i>Judicial Officers as provided for in Article 205</i> '	
220. Hon. Bishop Philip Sulumeti Del. No. 546	174 (4)	Delete the clause in its entirety and substitute therefor as follows: <i>(1) With the prior approval of the National Assembly, the President may sign instruments of consent by the Republic to be bound by international agreements in accordance with Article 133.</i>	
221. Hon. Bishop Philip Sulumeti Del. No. 546	174 (5)	Delete the clause in its entirety.	
222. Hon. George Omari Nyamweya Del. No. 615 AMM/257/04	174 (7)	Delete the word ' <i>may</i> ' and substitute therefor the word ' <i>shall</i> '	
223. Hon. George Omari Nyamweya Del. No. 615 AMM/258/04	174 (7) (a)	Editorial amendments as presented in the motion	

DELEGATE NAME & NO	ARTICLE NO.	MOTION	REMARKS
224. Hon. George Omari Nyamweya Del. No. 615 AMM/259/04	174 (7) (c)	Delete the paragraph in its entirety and substitute therefor as follows: <i>Seek an advisory opinion from the Supreme Court of Kenya on any matter concerning the interpretation, protection or enforcement of the Constitution; as and when such need arises;</i>	
225. Hon. George Omari Nyamweya Del. No. 615 AMM/260/04	174 (7) (d)	Insert the words ' <i>pardons or reprieve offenders and remit fines, penalties or forfeitures in accordance with Article 211.</i> '	
226. Hon. George Omari Nyamweya Del. No. 615 AMM/261/04	174 (7) (e)	Delete the words ' <i>acting in accordance with the advice of the Ethics and Integrity Commission</i> ' and substitute therefor the words ' <i>in consultation with the Prime Minister</i> '	
227. Hon. John P. Nyakundi Del. No. 611 AMM/223/04	177	Amendments as presented in the motion.	
228. Hon. David Rakamba Del. No. 433 AMM/113/04	178	Delete the entire Article and substitute therefor as follows: <i>The election of the President shall be by the combined sitting of the two Houses of Parliament during their first sitting for that purpose.</i>	
229. Hon. William arap Ruto Del. No. 179 AMM/294/04	178 (1)	Delete the clause in its entirety and substitute therefor as follows: <i>(1) The election of the President shall be by college of the National Assembly, the Senate and Chairpersons of all regions and districts in a joint sitting.</i>	
230. Hon. Paul Nkitare Del. No. 392 AMM/048/04	178 (2) (a)	Delete the word ' <i>second</i> ' wherever it appears in the paragraph and substitute therefor the word ' <i>fourth</i> '	
231. Hon. George Omari Nyamweya Del. No. 615 AMM/263/04	179 (1) (a)	Renumber the paragraph as paragraph (g)	

DELEGATE NAME & NO	ARTICLE NO.	MOTION	REMARKS
232. Hon. George Omari Nyamweya Del. No. 615 AMM/262/04	179 (1)	Delete the words ' <i>qualifies</i> ' and substitute therefor the words ' <i>is qualified</i> '	
233. Hon. George Omari Nyamweya Del. No. 615 AMM/265/04	179 (1)	Insert a new clause immediately after clause (c) as follows: <i>Is a citizen of Kenya by birth, and of sound mind</i>	
234. Hon. George Omari Nyamweya Del. No. 615 AMM/266/04	179 (1)	Insert a new paragraph as follows: <i>Is not an undischarged bankrupt</i>	
235. Hon. George Omari Nyamweya Del. No. 615 AMM/267/04	179 (1)	Insert a new paragraph as follows: <i>Is not serving a sentence of imprisonment for the commission of a crime</i>	
236. Hon. George Omari Nyamweya Del. No. 615 AMM/268/04	179 (1)	Insert a new paragraph as follows: <i>Has not been removed from the public office on the ground of gross misconduct</i>	
237. Hon. George Omari Nyamweya Del. No. 615 AMM/ 264/04	179 (1) (b) (ii)	Delete the word ' <i>one</i> ' between the words ' <i>least</i> ' and ' <i>thousand</i> '. Further delete the words ' <i>who shall include not less than one hundred registered voters from each region</i> ' and substitute therefor the words ' <i>each from at least fifty per cent of the Republic's districts</i> '	
238. Hon. Mark Osili Adungo Del. No. 394 AMM/010/04	179 (2)	Clause (b): Delete the word ' <i>defense</i> ' and substitute therefor the word ' <i>defence</i> ' Further, substitute the words ' <i>local government authority</i> ' with the words ' <i>devolved governments</i> '.	
239. Hon. George Omari Nyamweya Del. No. 615 AMM/269/04	179 (2)	Insert the words ' <i>or an office to which Article 103 applies</i> ' immediately after the words ' <i>judicial office</i> '	

DELEGATE NAME & NO	ARTICLE NO.	MOTION	REMARKS
240. Hon. George Omari Nyamweya Del. No. 615 AMM/270/04	179 (2)	Insert a new paragraph as follows: <i>A person elected as President or Deputy President and also as a member of Parliament shall immediately vacate his seat as a member of Parliament</i>	
241. Hon. George Omari Nyamweya Del. No. 615 AMM/271/04	179 (2)	Insert a new paragraph as follows: <i>Is qualified from holding the office of President under this Article</i>	
242. Hon. David Rakamba Del. No. 433 AMM/112/04	180	Delete the Article in its entirety	
243. Hon. Winston O. Adhiambo Del. No. 603 AMM/156/04	180	Delete the Article in its entirety and substitute therefor as follows: (i) <i>Each ethnic group elects their own President</i> (ii) <i>Kenyans end up with 42 ethnic Presidents</i> (iii) <i>The Presidents for the Federal Presidential Council</i> (iv) <i>The Federal Presidential Council nominates one among themselves in rotation from each ethnic group for one-year term.</i> (v) <i>The President takes Chair at Federal Presidential Council meetings but otherwise has no powers or privileges over the council members, and continues as head of his districts, state or region. At the end of it, all tribes will have been President including the Ogiek and El Molo.</i> (vi) <i>Federal Presidential Council is the executive body of the nation.</i> (vii) <i>Each unit to which power is devolved vertically will control 70 % of tax and foreign exchange resources for their well being while transmitting 30 % to Federal Government for administering Foreign Affairs, Parliament, Supreme Court, currency minting, defence, etc</i>	
244. Hon. George Omari Nyamweya Del. No. 615 AMM/272/04	180 (4)	Delete the word 'region' and substitute thereof the word 'Districts'	
245. Hon. George Omari Nyamweya Del. No. 615 AMM/273/04	181 (1)	Delete the clause in its entirety and substitute therefor as follows: <i>The High Court shall have original jurisdiction to determine any question arising as to whether any provision of the Constitution or other law relating to presidential</i>	

DELEGATE NAME & NO	ARTICLE NO.	MOTION	REMARKS
		<i>elections has been complied with; or whether any person has been elected President under Article 180 and an appeal shall lie at the Supreme Court on points of law</i>	
246. Hon. George Omari Nyamweya Del. No. 615 AMM/274/04	181 (2)	Delete the clause in it entirety	
247. Hon. George Omari Nyamweya Del. No. 615 AMM/275/04	181 (3)	Delete the clause in its entirety	
248. Hon. George Omari Nyamweya Del. No. 615 AMM/276/04	182	Delete the Article in its entirety and substitute as follows: <i>The person elected as President assumes office by taking and subscribing to the oath or affirmation of allegiance and the oath or affirmation for the due execution of the functions of the office prescribed in the Fourth Schedule, before the Chief Justice or a judge of the Supreme Court on the date when the term of office of the incumbent President ends.</i>	
249. Hon. David Rakamba Del. No. 433 AMM/114/04	182 (a)	Delete the paragraph in its entirety	
250. Hon. Isa Ireri Ngunia Del. No. 286 AMM/117/04	182 (a)	Delete the clause in its entirety	
251. Hon. John Kiniti Del. No. 352	182 (a) (i)	Delete the words 'of September'	Motion yet to be signed
252. Hon. Kivutha Kibwana Del. No. 057	182(a)(i)	Delete in its entirety and substitute therefor a new paragraph as follows: <i>(i) within twenty four hours of the announcement of the results of the presidential elections by the Electoral Commission.</i>	Motion yet to be signed

DELEGATE NAME & NO	ARTICLE NO.	MOTION	REMARKS
253. Hon. Winston O. Adhiambo Del. No. 603 AMM/061/04	184	Delete the Article in its entirety	
254. Hon. George Omari Nyamweya Del. No. 615 AMM/277/04	186 (1)	Delete the clause in its entirety	
255. Hon. George Omari Nyamweya Del. No. 615 AMM/615/04	186 (2)	Insert the word ' Deputy ' immediately before the word ' Speaker '	
256. Hon. George Omari Nyamweya Del. No. 615 AMM/279/04	186 (3)	Insert the word ' Deputy ' immediately before the word ' Speaker '	
257. Hon. George Omari Nyamweya Del. No. 615 AMM/280/04	186 (4)	<p>Delete the clause in its entirety and substitute therefor as follows:</p> <p><i>If a motion is passed under clause (2), the Deputy Speaker of the National Assembly shall constitute a special committee comprising:</i></p> <p class="list-item-l1">(a) <i>the Chief Justice, who shall be the Chairperson; and</i></p> <p class="list-item-l1">(b) <i>thirteen members appointed by the Senate in accordance with the Standing Orders of the Council, taking into account the proportional representation of the political parties represented in the Council, to investigate the matter.</i></p>	
258. Hon. Leslie Betawa Mwachiro Del. No. 599 AMM/206/04	186 (4)	<p>Delete the words '<i>thirteen of its members in accordance with the Standing Orders of the Senate</i>' and substitute therefor the words '<i>a number of its members, one per region in accordance with the Standing Orders of the Senate</i>'.</p> <p>Further, delete the words '<i>taking into account the proportional representation of its political parties represented in the Senate</i>'</p>	
259. Hon. George Omari Nyamweya Del. No. 615 AMM/281/04	187	Insert the word ' Deputy ' immediately before the words ' Speaker of the Senate '	

DELEGATE NAME & NO	ARTICLE NO.	MOTION	REMARKS
260. Hon. Isa Ireri Ngunia Del. No. 286 AMM/121/04	187 (5)	Delete the clause in its entirety	
261. Hon. David Rakamba Del. No. 433 AMM/115/04	188 (3)	Delete the words ' <i>The Electoral Commission</i> ' and substitute therefor the words ' <i>The sitting of the two Houses of Parliament</i> '.	
262. Hon. George Omari Nyamweya Del. No. 615 AMM/282/04	190	Insert a new clause immediately after clause (1) as follows: <i>The Deputy President shall be the Speaker of the Senate.</i>	
263. Hon. George Omari Nyamweya Del. No. 615 AMM/285/04	NEW (immediately after Article 190)	<p>Insert a new Article immediately after Article 190 as follows:</p> <p><i>190A:</i></p> <p class="list-item-l1">(0) <i>If it is resolved by one half of all the members of the National Assembly that the question of the physical or mental capacity of the Deputy President to perform the functions of the office ought to be investigated, the Speaker shall inform the Chief Justice who shall, within seven days of the resolution, appoint a tribunal of five persons qualified as medical practitioners under the laws of Kenya;</i></p> <p class="list-item-l1">(c) <i>four of whom shall be nominated by the Medical Practitioners and Dentists Board; and</i></p> <p class="list-item-l1">(d) <i>the other one nominated by the Deputy President</i></p> <p class="list-item-l1">(1) <i>Where the National Assembly resolves that the question of the physical or mental capacity of the Deputy President to perform the functions of the office be investigated, the Deputy President shall, until another person assumes the office of Deputy President or the tribunal appointed under clause (1) reports that the Deputy President is incapable of performing the functions of the office, whichever is earlier, cease to perform the functions of the office.</i></p> <p class="list-item-l1">(2) <i>If the Chief Justice does not appoint a tribunal within the period specified in clause (1), the Speaker of the National Assembly shall appoint a tribunal within seven days.</i></p>	

DELEGATE NAME & NO	ARTICLE NO.	MOTION	REMARKS
		<p>(3) <i>The tribunal shall inquire into the matter and report -</i></p> <p>(a) <i>to the Chief Justice within fourteen days of the appointment and send a copy direct to the Speaker, or</i></p> <p>(b) <i>to the Speaker within fourteen days of the appointment of the tribunal by the Speaker</i></p> <p>(4) <i>The Chief Justice or the Speaker of the National Assembly shall certify in writing accordingly and take the certificate together with the report of the tribunal before the National Assembly.</i></p> <p>(5) <i>Where the tribunal reports that the Deputy President is capable of performing the functions of the office, the Speaker of the National Assembly shall so announce in the National Assembly.</i></p> <p>(6) <i>If the tribunal reports that the Deputy President is incapable of performing the functions of the office, the National Assembly shall, supported by the votes of one-half of all the members ratify the decision of the tribunal, and on the ratification, the Deputy President shall cease to hold office.</i></p> <p>(7) <i>A motion for the purposes of clause (I) may be proposed by any member of the National Assembly at any time during the meeting of the National Assembly</i></p>	
264. Hon. George Omari Nyamweya Del. No. 615 AMM/286/04	NEW (immediately after Article 190)	<p>Insert a new Article immediately before Article 190 as follows:</p> <p>190B:</p> <p>(1) <i>If two thirds of the members of the National Assembly approve a motion for the impeachment of the Deputy President for violation of the Constitution or gross misconduct, the Deputy Speaker of the Senate shall convenor a meeting of the Senate to hear charges against the Deputy President</i></p> <p>(2) <i>The Deputy Speaker of the Senate shall:</i></p> <p>(a) <i>if the Senate is then sitting or has been summoned to meet, bring the motion to the notice of the Senate for its consideration within seven days; or</i></p> <p>(b) <i>if the Senate is not then sitting, summon it to meet within twenty-one days of the notice to consider the motion.</i></p>	

DELEGATE NAME & NO	ARTICLE NO.	MOTION	REMARKS
		<p>(3) <i>If a motion is passed under clause (2), the Deputy Speaker of the National Assembly shall constitute a special committee comprising:</i></p> <p>(a) <i>the Chief Justice, who shall be the Chairperson; and</i> (b) <i>thirteen members appointed by the Senate in accordance with the Standing Orders of the Council, taking into account the proportional representation of the political parties represented in the Council, to investigate the matter.</i></p> <p>(4) <i>The special committee shall investigate the matter and shall, within ten days, report to the Senate whether it finds the particulars of the allegations against the Deputy President to have been substantiated.</i></p> <p>(5) <i>The Deputy President shall have the right to appear and to be represented before the special committee during its investigations.</i></p> <p>(6) <i>If the special committee reports that the particulars of any allegation against the Deputy President have not been substantiated, no further proceedings shall not be taken under this Article in respect of that allegation.</i></p> <p>(7) <i>If the special committee reports that the particulars of any allegation against the Deputy President have been substantiated, the Senate shall vote on impeachment charges and the President shall be removed if two-thirds of the members vote to uphold the impeachment charges.</i></p>	
265. Hon. Isa Ireri Ngunia Del. No. 286 AMM/120/04	191	Delete the Article in its entirety	
266. Hon. John Gitari Munyi Del. No. 284 AMM/229/04	193(1)	Delete the words "who shall be the head of Government".	
267. Hon. Geoffrey Muchiri Gachara Del. No. 111	193(1)	Delete all the words appearing after the word "Kenya".	Motion yet to be signed

DELEGATE NAME & NO	ARTICLE NO.	MOTION	REMARKS
268. Hon. Bishop Philip Sulumeti Del. No. 546	193 (1)	Delete the words ' <i>Head of Government</i> ' and substitute therefor the words ' <i>Leader of Government business in Parliament</i> '	
269. Hon. George Omari Nyamweya Del. No. 615 AMM/283/04	193 (2)	Delete the words ' <i>co-ordinate the work of the Ministries, shall prepare legislation, and is responsible to the Cabinet and Parliament</i> ' and substitute therefor the words ' <i>chair inter-ministerial committee set up by the President and the Cabinet</i> '.	
270. Hon. Wangari Maathai Del. No. 084 AMM/170/04	193 (2)	Delete the word ' <i>Cabinet</i> ' and substitute therefor the word ' <i>President</i> '.	
271. Hon. George Omari Nyamweya Del. No. 615 AMM/284/04	193 (3)	Delete the words ' <i>The Prime Minister and other members of the Cabinet exercise authority within the Republic by</i> ' and substitute therefor the words ' <i>The Prime Minister shall co-ordinate the implementation of Cabinet decisions and shall be responsible for</i> '	
272. Hon. David Rakamba Del. No. 433 AMM/110/04	193 (4)	Delete the words ' <i>in the absence of the President and the Deputy President</i> '	
273. Hon. Bishop Philip Sulumeti Del. No. 546	193 (5)	Insert the words ' <i>nominated by the Prime Minister</i> ' immediately after the words ' <i>Deputy Prime Ministers</i> '	
274. Hon. Winston O. Adhiambo Del. No. 603 AMM/155/04	193, 194, 195, 196, 197	Delete the Articles in their entirety and adopt the Swiss style.	Sic!
275. Hon. Isaiah Cheruiyot Del. No. 346 AMM/030/04	194 (1)	Insert the words ' <i>with a two-thirds majority</i> ' immediately after the word ' <i>Assembly</i> '	
276. Hon. Isaiah K. Cheruiyot Del. No. 346	194(1)(a)	Delete the word " <i>majority</i> " and substitute therefor the word " <i>ruling</i> ".	Motion yet to be signed

DELEGATE NAME & NO	ARTICLE NO.	MOTION	REMARKS
277. Hon. Bishop Philip Sulumeti Del. No. 546	194 (1) (a) and (b)	Delete the word ' <i>majority</i> ' and substitute therefor the word ' <i>largest</i> '. Further, delete the word ' <i>minority</i> ' and substitute therefor the words ' <i>second largest</i> '.	
278. Hon. George Omari Nyamweya Del. No. 615 AMM/287/04	194 (7)	Insert the words ' <i>President shall dissolve the</i> ' between the words ' <i>the</i> ' and ' <i>National Assembly</i> '. Further, delete the words ' <i>shall stand dissolved</i> '. Insert the word ' <i>require</i> ' between the words ' <i>and</i> ' and ' <i>the Electoral Commission</i> ' in the fourth line	
279. Hon. Loyor Roda Arupe Del. No. 321 AMM/167/04	195 (1) 195 (2) (b)	Delete the clause in its entirety Delete the word ' <i>appointed</i> ' and substitute therefor the word ' <i>elected</i> '.	
280. Hon. Wangari Maathai Del. No. 084 AMM/203/04	195 (1)	Insert the word ' <i>President</i> ' between the words ' <i>the</i> ' and ' <i>people</i> '	
281. Hon. Joshua Toro Del. No. 198	195 (1)	Insert the word ' <i>President</i> ' and a comma thereafter immediately after the word ' <i>the</i> ' appearing in the third line	Motion yet to be signed
282. Hon. Joshua Toro Del. No. 198	195(1)	Insert the word " <i>President</i> " immediately after the word " <i>people</i> " in the fourth line.	Motion recorded twice
283. Hon. George Omari Nyamweya Del. No. 615 AMM/288/04	195 (1)	Insert the words ' <i>the President</i> ' immediately after the word ' <i>the Speaker</i> '	
284. Hon. George Omari Nyamweya Del. No. 615 AMM/289/04	195 (2)	Insert a new clause as follows: <i>A person shall not hold office as the Prime Minister for more than two terms of five years each.</i>	

DELEGATE NAME & NO	ARTICLE NO.	MOTION	REMARKS
<p>285. Hon. George Omari Nyamweya Del. No. 615</p> <p>AMM/290/04</p>	<p>NEW (immediately after Article 196)</p>	<p>Insert a new Article immediately after Article 196 as follows:</p> <p>196A: <i>Removal of Prime Minister on grounds of incapacity</i></p> <p>(1) <i>If it is resolved by one half of all the members of the National Assembly that the question of the physical or mental capacity of the Prime Minister to perform the functions of the office ought to be investigated, the Speaker shall inform the Chief Justice who shall, within seven days of the resolution, appoint a tribunal of five persons qualified as medical practitioners under the laws of Kenya,</i></p> <p>a. <i>four of whom shall be nominated by the Medical Practitioners and Dentists Board; and</i> b. <i>the other one nominated by the Prime Minister</i></p> <p>(2) <i>Where the National Assembly resolves that the question of the physical or mental capacity of the Prime Minister to perform the functions of the office be investigated the office to be investigated, the Prime Minister shall, until another person assumes the office of Prime Minister or the tribunal appointed under clause (1) reports that the Prime Minister is incapable of performing the functions of the office, whichever is earlier, cease to perform the functions of the office.</i></p> <p>(3) <i>If the Chief Justice does not appoint a tribunal within the period specified in clause (1), the Speaker of the National Assembly shall appoint a tribunal within seven days.</i></p> <p>(4) <i>The tribunal shall inquire into the matter and report -</i></p> <p>(a) <i>to the Chief Justice within fourteen days of the appointment and send a copy direct to the Speaker' or</i> (b) <i>to the Speaker within fourteen days of the appointment of the tribunal by the Speaker</i></p> <p>(5) <i>The Chief Justice or the Speaker of the National Assembly shall certify in writing accordingly and take the certificate together with the report of the tribunal before the National Assembly.</i></p>	

DELEGATE NAME & NO	ARTICLE NO.	MOTION	REMARKS
		<p>(6) <i>Where the tribunal reports that the Prime Minister is capable of performing the functions of the office, the Speaker of the National Assembly shall so announce in the National Assembly.</i></p> <p>(7) <i>If the tribunal reports that the Prime Minister is incapable of performing the functions of the office, the National Assembly shall, supported by the votes of one-half of all the members ratify the decision of the tribunal, and on the ratification, the Prime Minister shall cease to hold office.</i></p> <p>(8) <i>A motion for the purposes of clause (1) may be proposed by any member of the National Assembly at any time during the meeting of the National Assembly.</i></p>	
286. Hon. Loyor Roda Arupe Del. No. 321 AMM/167/04	197	<p>Delete the word 'Appointment' in the title of the Article and substitute therefor the word 'Election'.</p> <p>Delete clauses (1) to (7) and substitute therefor the provisions of Articles 178, 179, 180 and 181, with the necessary modifications to refer to the Prime Minister.</p>	
287. Hon. Wangari Maathai Del. No. 084 AMM/198/04	197 (1) 197 (4) 197 (6)	<p>Delete the word 'may' and substitute therefor the word 'shall'</p> <p>Delete the words '<i>and that of the two Deputy Prime Ministers, the Cabinet Ministers and the Deputy Ministers</i>'</p> <p>Delete the words '<i>the two Deputy Prime Ministers, the Cabinet Ministers and the Deputy Ministers and the relevant provisions of Article 169 shall apply regarding the appointment of a new Prime Minister</i>'</p>	
288. Hon. Joshua Toro Del. No. 198	197(1) 197(4) 197(6)	<p>Delete the word "may" and substitute therefor the word "shall".</p> <p>Delete all the words appearing after the word "resignation" in the fifth line.</p> <p>Delete all the words appearing after the words "Prime Minister" in the fourth line.</p>	Motion yet to be signed
289. Hon. Joshua Toro Del. No. 198	197(7)	<p>Delete the word "not" and further delete the word "any" immediately before the word "circumstances" and the words "other than those".</p> <p>Further, insert the words "<i>and in consultation with Parliament</i>" immediately after the figure 174.</p>	Motion yet to be signed

DELEGATE NAME & NO	ARTICLE NO.	MOTION	REMARKS
290. Hon. Wangari Maathai Del. No. 084 AMM/187/04	197 (7)	Delete the entire clause and substitute therefor as follows: <i>The President shall dismiss the Prime Minister, the two Deputy Prime Ministers, the Cabinet Ministers and the Deputy Ministers in circumstances contemplated in this Article 174 and in consultation with Parliament.</i>	
291. Hon. Abdulrahman Ali Hassan Del. No. 003 AMM/067/04	198 (1)	Delete the word 'Senate' and substitute therefor with the words ' <i>National Assembly</i> '	
292. Hon. Kihara Mwangi Del. No. 132	198 (1)	Insert the word ' <i>Cabinet</i> ' immediately after the word ' <i>members</i> ' in the first line	Sic!
293. Hon. James Foster Del. No. 488 AMM/ O85/ 04	198 (1)	Delete the words ' <i>from among members of the National Assembly, and subject to the approval of the Senate</i> ' and insert therein the words ' <i>from amongst professionals who are not members of any elected body and subject to the approval of the National Assembly</i> '	
294. Hon. Wangari Maathai Del. No. 084 AMM/202/04	198 (1)	Delete the word 'remaining' and substitute therefor the word ' <i>Cabinet</i> '	
295. Hon. John Gitari Munyi Del. No. 284 AMM/228/04	198(1)	Delete the words " <i>nominated by the Prime Minister</i> " and further delete the words " <i>and subject to the approval of the Senate</i> ".	
296. Hon. John M. Kiniti Del. No. 352	198(1)	Delete the words " <i>the remaining</i> " in the first line.	Motion yet to be signed
297. Hon. Bishop Philip Sulumeti Del. No. 546	198 (1)	Delete the clause in its entirety and substitute therefor as follows: <i>(1) The President shall appoint from among the members of the National Assembly-</i> <i>(a) the members of the Cabinet comprising of the two Deputy Prime Ministers and not less than seventeen and not more than twenty Cabinet Ministers; and</i> <i>(b) not less than seventeen and not less than twenty Deputy Ministers.</i>	

DELEGATE NAME & NO	ARTICLE NO.	MOTION	REMARKS
298. Hon. Wangari Maathai Del. No. 084 AMM/194/04	198 (2)	Delete the words 'other than the Prime Minister'	
299. Hon. Bishop Philip Sulumeti Del. No. 546	198	Insert a new clause immediately after clause (1) as follows: <i>In making the appointments under clause (1) the President –</i> <i>(a) shall take account of the regional and ethnic diversity of the people of Kenya; and</i> <i>(b) shall consult, and take account of the advice of, the Prime Minister.</i>	
300. Hon. John Gitari Munyi Del. No. 284 AMM/230/04	199(2)	Delete the words "on the recommendation of the Prime Minister" and substitute therefor the words "after an approval of the National Assembly".	
301. Hon. Kihara Mwangi Del. No. 142	199(2)	Delete the word "on the recommendation of" and substitute therefor the words "in consultation with".	Motion yet to be signed
302. Hon. Bishop Philip Sulumeti Del. No. 546	200 (4)	Delete the clause in its entirety.	
303. Hon. Bishop Philip Sulumeti Del. No. 546	200 (5)	Delete the clause in its entirety.	
304. Hon. Wangari Maathai Del. No. 084 AMM/195/04	200 (7)	Insert the word 'President' immediately after the words 'accountable to the'	
305. Hon. Bishop Philip Sulumeti Del. No. 546	202 (3)	Delete the words 'during the respective terms of office' and substitute therefor the words 'or engage in any other remunerated activity'.	
306. Hon. Isa Ireri Ngunia Del. No. 286 AMM/119/04	203 (1) (a)	Delete the words 'the President'	

DELEGATE NAME & NO	ARTICLE NO.	MOTION	REMARKS
307. Hon. Bishop Philip Sulumeti Del. No. 546	New Article inserted (immediately after Article 206)	Insert a new Article 206A immediately after Article 206 as follows: <i>Notwithstanding the provisions of Article 344 of this Constitution, a review of the structure of the Executive shall be held before the general elections of 2012 and a referendum may be held to determine the structure of the Executive.</i>	
308. Hon. John Gitari Munyi Del. No. 284 AMM/099/04	206 (3)	Delete the words ' <i>nominated by the Prime Minister in consultation with the Public Service Commission for appointment by the President</i> ' appearing after the word ' <i>be</i> ' and substitute therefor the words ' <i>appointed by the President in consultation with the Prime Minister and Public Service Commission</i> '	
309. Hon. Bishop Philip Sulumeti Del. No. 546	206 (3)	Delete the clause in its entirety and substitute therefor as follows: <i>(3) A Principal Secretary shall be appointed by the President in consultation with the Prime Minister on the recommendation of the Public Service Commission.</i>	
310. Hon. George Omari Nyamweya Del. No. 615 AMM/291/04	206 (4)	Insert a new paragraph immediately after paragraph (b) as follows: <i>On assumption of a new government, a principal secretary shall cease to hold THAT office</i>	
311. Hon. David Oginde Del. No. 534 AMM/130/04	209 (3) (a)	Delete the words ' <i>the Kadhis court</i> ' and substitute therefor the words ' <i>Religious courts</i> '	
312. Hon. John P. Nyakundi Del. No. 611 AMM/297/04	209 (3) (c)	Delete the words ' <i>any traditional courts</i> ' and substitute therefor the words ' <i>the African traditional court system</i> '	
313. Hon. Leslie Betawa Mwachiro Del. No. 599 AMM/205/04	210 (7)	Insert the words ' <i>and to rotate its sitting to the regional headquarters</i> ' immediately after the word ' <i>Nairobi</i> '	
314. Hon. Leslie Betawa Mwachiro Del. No. 599 AMM/208/04	218 (1)	Delete the word ' <i>persons</i> ' and substitute therefor the word ' <i>Kenya citizens</i> ' Insert a new paragraph immediately after paragraph (ii) as follows:	

DELEGATE NAME & NO	ARTICLE NO.	MOTION	REMARKS
	218 (1) (a)	' <i>Scholar and teacher of law in a recognised university</i> '	
	218 (2) (a)	Insert a new paragraph immediately after paragraph (ii) as follows: ' <i>scholar and teacher of law in a recognised university</i> '	
315. Hon. Kipyegon Sang Del. No. 368 AMM/053/04	220 (6)	Insert the words ' <i>one-half</i> ' immediately after the word ' <i>retain</i> '	
316. Hon. David Oginde Del. No. 534 AMM/130/04	221 (2)	Delete the words ' <i>or kadhi</i> '	
317. Hon. David Oginde Del. No. 534 AMM/130/04	222	Delete the title and substitute therefor as follows: <i>The Religious Courts</i>	
	222 (1)	Delete the entire clause and substitute therefor the words ' <i>There are established the Religious Courts</i> '.	
	222 (2)	Delete the clause in its entirety and substitute therefore as follows: <i>The Religious Courts shall be organized and administered as may be prescribed by an Act of Parliament.</i>	
318. Hon. David Oginde Del. No. 534 AMM/130/04	223	Delete the title and substitute therefor as follows: <i>Jurisdiction of the Religious Courts</i>	
		Further, delete the Article in its entirety and substitute therefor as follows: <i>The religious courts shall be subordinate courts with limited jurisdiction to determine questions of religious laws relating to personal status, marriage, divorce and matters consequential to divorce, inheritance, and succession on proceedings in which parties profess the same religious faith or persuasion.</i>	

DELEGATE NAME & NO	ARTICLE NO.	MOTION	REMARKS
319. Hon. Victoria Mutheu Musyoka Del. No. 294 AMM/129/04	224 (1) (f)	Delete the words ' <i>the Chief Kadhi</i> ' and substitute therefor the words ' <i>Religious representatives as Parliament shall legislate</i> '	
320. Hon. Leslie Betawa Mwachiro Del. No. 599 AMM/209/04	224 (1)	Insert a new clause immediately after clause (h) as follows: <i>Two deans of law schools in the faculties of Law nominated by the local Kenyan universities.</i>	
321. Hon. Leslie Betawa Mwachiro Del. No. 599 AMM/210/04	232 (5)	Delete the clause in its entirety and substitute therefor as follows: <i>Governments at level 3, that is districts governments within one region can amalgamate some functions and have them performed at the regional for greater efficiency and delivery of services within its regions</i>	
322. Hon. James Koske Del. No. 371 AMM/092/04	233 (1)	Insert the word ' <i>structure</i> ' between the words ' <i>policy</i> ' and ' <i>standards</i> '.	
323. Hon. Wilberforce Kisieru Del. No. 389 AMM/007/04	233 (2)	Clause (a): Delete the words ' <i>and supervision</i> '. Clause (e): Delete the word ' <i>and</i> ' and substitute with the word ' <i>regional projects</i> ' after the word ' <i>implementation</i> '.	
324. Hon. Isa Ireri Ngunia Del. No. 286 AMM/123/04	234 (2)	Insert the words ' <i>giving special consideration to indigenous minorities and marginalized communities like the Nubians, Isakhia and the Swahili in the city of Nairobi</i> ' immediately after the word ' <i>Parliament</i> '.	
325. Hon. Lawrence Mute Dele. No. 455 AMM/017/04	236 (2)	Insert the words ' <i>including disability</i> ' immediately after the word ' <i>diversities</i> '	

DELEGATE NAME & NO	ARTICLE NO.	MOTION	REMARKS
326. Hon. Stanslous Wambua Kasoka Del. No. 296 AMM/237/04	237	Delete in its entirety.	
327. Hon. Kipyegon Sang Del. No. 368 AMM/052/04	238 (1) (a) (ii)	Insert the word ' <i>metropolitan</i> ' immediately before the words ' <i>Mayor</i> ' and ' <i>Deputy Mayor</i> ' appearing in the paragraph.	
328. Hon. Stanslous Wambua Kasoka Del. No. 296 AMM/238/04	241	Insert a new clause immediately after Article 241(3) as follows: (4) <i>At any sitting of a Regional Legislative Assembly</i> (a) <i>the Premier presides or</i> (b) <i>in the absence of the Premier the Deputy Premier presides or</i> (c) <i>in the absence of both, one of the members elected by the members present presides</i>	
329. Hon. Samuel Tororei Del. No. 462 AMM/021/04	245 (1)	Insert a new clause immediately after Article 245 (1) (b) as follows: (c) <i>marginalized groups including persons with disabilities, older persons and youth provided that at least two shall be persons with disabilities.</i>	
330. Hon. Stanslous Wambua Kasoka Del. No. 296 AMM/239/04	246	Delete in its entirety and clause (5) be transferred to Article 248	
331. Hon. Stanslous Wambua Kasoka Del. No. 296 AMM/240/04	248	Insert a new clause immediately after Article 248(4) as follows: (5) (a) <i>The District Governor shall preside over the meetings of the Council</i> (b) <i>In the absence of the Governor, the Deputy Governor shall preside</i> (c) <i>In the absence of both, one of the members elected by the members present presides.</i>	
332. Hon. Samuel Tororei Del. No. 462 AMM/022/04	252 (2)	Insert the words ' <i>and that at least one member shall be a person with disability</i> ' immediately after the word ' <i>elected</i> '.	

DELEGATE NAME & NO	ARTICLE NO.	MOTION	REMARKS
333. Hon. Wilberforce Kisiero Del. No. 389 AMM/008/04	268 (5)	Delete the sub-article in its entirety	
334. Hon. Ahmed Maalim Omar Del. No. 255 AMM/054/04	268 (5)	Delete the Article in its entirety and substitute therefor a new clause as follows: <i>District legislation prevails over regional legislation if Article 235 (c) does not apply.</i>	
335. Hon. James Waweru Del. No. 310	269	Delete the Article in its entirety and substitute therefor as follows: <i>(2) National legislation shall provide for the governance and management of urban areas.</i> <i>(3) That legislation shall:</i> <i>establish criteria for distinguishing between</i> <i>(i) metropolitan city</i> <i>(i) city</i> <i>(ii) municipality</i> <i>provide for participation by citizens of urban areas in governance functions of the areas</i> <i>town councils as presently constituted shall be managed by the District governments.</i>	Motion yet to be signed
336. Hon. James Waweru Del. No. 310 AMM/298/04	269	Insert the words ' <i>metropolitan city, cities and municipalities</i> '	
337. Hon. David Rakamba Del. No. 433 AMM/116/04	272 (1) (f)	Delete the paragraph in its entirety	
338. Hon. Michael Githu Del. No. 355 AMM/233/04	272 (1) (f)	Delete the words ' <i>raised directly by the devolved governments</i> ' and substitute therefor the words ' <i>charged directly on the consolidated fund.</i> '	

DELEGATE NAME & NO	ARTICLE NO.	MOTION	REMARKS
339. Hon. Samuel M. Mwaura Del. No. 604 AMM/004/04	300 (3)	Delete the words ' <i>may</i> ' and substitute therefor the word ' <i>shall</i> '.	
340. Hon. Isaiah Chepkwony Del. No. 346 AMM/006/04	300 (3)	Insert ' <i>and the second President of Kenya</i> ' after the words ' <i>the first President of Kenya</i> '.	
341. Hon. Paul Nabitare Del. No. 392 AMM/050/04	301 301 (1) 301 (2) (a) 301 (3) (a) 301 (3) (b) 301 (3) (c)	Insert the words ' <i>and Cultural</i> ' after the word ' <i>Economic</i> ' in the title to the Article Insert the words ' <i>and Cultural</i> ' after the word ' <i>Economic</i> ' Insert the words ' <i>cultural</i> ' between the words ' <i>social</i> ' and ' <i>development</i> ' Delete the words ' <i>and</i> ' between the words ' <i>economic</i> ' and ' <i>social</i> ' and insert the words ' <i>and cultural</i> ' between the words ' <i>social</i> ' and ' <i>concern</i> '. Delete the word ' <i>and</i> ' between the words ' <i>economic</i> ' and ' <i>social</i> ' and insert the words ' <i>and cultural</i> ' between the words ' <i>social</i> ' and ' <i>policies</i> '. Delete the word ' <i>and</i> ' between the words ' <i>economic</i> ' and ' <i>social</i> ' and insert the word ' <i>and cultural</i> ' between the words ' <i>social</i> ' and ' <i>implications</i> '	
342. Hon. Michael Githu Del. No. 355 AMM/173/04	305 (2)	Insert the words ' <i>and district governments</i> ' immediately after the word ' <i>regional</i> '	
343. Hon. Leslie Betawa Mwachiro Del. No. 599 AMM/211/04	309 (2) (b)	Delete the paragraph in its entirety	
344. Hon. Peter Kang'ethe Nkoroi Del. No. 278 AMM/113/04	310	Title to be amended to read ' <i>Health Services Commission</i> '	

DELEGATE NAME & NO	ARTICLE NO.	MOTION	REMARKS
345. Hon. Peter Kangethe Nkoroi Del. No. 274	310 310(2)(d) 310(2)	Delete the word "Service" in the title and substitute therefor the word "Services" Insert the words " <i>and delivery of efficient healthcare services</i> " immediately after the word " <i>professionals</i> ." Insert a new paragraph immediately after paragraph (h) <u>(i) to manage epidemics and health related disasters,</u>	
346. Hon. Peter Kang'ethe Nkoroi Del. No. 278 AMM/113/04	310 (2)	Insert a new paragraph immediately after paragraph (h) as follows: (i) <i>to manage epidemics and health related disasters</i>	
347. Hon. Leslie Betawa Mwachiro Del. No. 599 AMM/212/04	310 (2) (b)	Delete the entire paragraph	
348. Hon. Nancy Ngeiywa Del. No. 387 AMM/160/04	311	Delete clauses (2), (3) and (4)	
349. Hon. Nancy Ngeiywa Del. No. 387 AMM/162/04	311 (1)	Insert the words ' <i>consisting of the Prison Department, Probation Department and the Children's Department which shall be autonomous</i> ' immediately after the word 'service'	
350. Hon. Patrick Maina Musungu Del. No. 529	311 (1)	Insert the words ' <i>comprising of the Prisons Department, the Probation Department and Children's Department, which shall run autonomously</i> ' immediately after the word 'Services'	Motion yet to be signed Motion similar to the previous one
351. Hon. Nancy Ngeiywa Del. No. 387 AMM/161/04	312	Delete the Article from the Revised Zero Draft and transfer the same to legislation	

DELEGATE NAME & NO	ARTICLE NO.	MOTION	REMARKS
352. Hon. James Foster Del. No. 488 AMM/002/04	314 (1) (d)	Delete the clause in its entirety.	
353. Hon. William ole Yiaile Del. No. 361 AMM/026/04	320	<p>Insert new clauses immediately after Article 320 (2) as follows:</p> <p>(a) <i>The Director General of the National Intelligence Service should hold office for a term of ten years and shall not be eligible for re-appointment.</i></p> <p>(b) <i>The Director General may be removed from office by the President in accordance with the provisions of Article 325 (5) and (6) of this Constitution.</i></p>	
354. Hon. Abdullahi Haji Del. No. 250 AMM/043/04	320 (2)	Delete the words 'with the approval of Parliament' and substitute therefor the word ' <i>in consultation with the National Security Council</i> '.	
355. Hon. Muraguri Nderi Del. No. 305 AMM/032/04	323 (1)	<p>Insert a new paragraph immediately after paragraph (g) as follows:</p> <p>(h) <i>co-ordinate, supervise and control all private and quasi-government security organizations to ensure safety and security in the Republic of Kenya.</i></p>	
356. Hon. Martin Wambora Del. No. 202	324	<p>Insert a new clause immediately after Article 324 (4) thus:</p> <p>(4 A):</p> <p><i>The Inspector-General shall in the exercise of his functions be accountable to the people of Kenya through the relevant arms of government in accordance with the relevant Act of Parliament.</i></p>	
357. Hon. Abdullahi Haji Del. No. 250 AMM/039/04	324 (4)	Delete all the words after the word 'shall' and substitute therefor the words ' <i>exercise his function without bias or favor</i> '	

DELEGATE NAME & NO	ARTICLE NO.	MOTION	REMARKS
358. Hon. Muraguri Nderi Del. No. 305 AMM/031/04	325 (5)	Insert a new paragraph immediately after paragraph (f) as follows: (g) the Commission shall have a civilian oversight body to investigate complaints against police officers and take appropriate correctional measures.	
359. Hon. John Waitiki Del. No. 317 AMM/001/04	326 (2)	Delete the words ' <i>be a separate service from</i> ' and substitute therefor the words ' <i>operate in support of</i> '.	
360. Hon. Shakeel Shabir Del. No. 406 AMM/133/04	326 (2)	Delete the clause in its entirety and substitute therefor as follows: <i>The Administration Police Service shall be an integral part of the Kenya Police Service but administered as a separate branch of the Police Service</i> .	
361. Hon. Ezekiel Kesendany Del. No. 356 AMM/244/04	328	Insert the word " General " immediately after the word " Commandant " in the title and accordingly in clauses (1) and (2).	
362. Hon. Abdullahi Haji Del. No. 250 AMM/044/04	328 (1)	Delete the words ' <i>with the approval of Parliament</i> ' and substitute therefor the words ' <i>in consultation with the Police Services Commission</i> '	
363. Hon. Shakeel Shabir Del. No. 406 AMM/132/04	328 (1)	Delete the words ' <i>who shall be appointed by the President with the approval of Parliament for one term of five years</i> ' and substitute therefor the words ' <i>branch, who shall report to the Inspector-General of the Kenya Police Service</i> '.	
364. Hon. Ahmed Maalim Omar Del. No. 255 AMM/070/04	332 (1)	Delete the word ' <i>ten</i> ' and substitute therefor the word ' <i>fourteen</i> '	
365. Hon. Leslie Betawa Mwachiro Del. No. 599 AMM/213/04	332 (1)	Delete the words ' <i>at least three and not more than ten members</i> ' and substitute the words ' <i>of one nominee from each regional assembly and as in Article 296 (2) (c) and Article 296 (2) (d)</i> '	

DELEGATE NAME & NO	ARTICLE NO.	MOTION	REMARKS
366. Hon. Nur Ibrahim Del. No. 256 AMM/086/04	332 (2) (a)	Insert the words ' <i>regional diversities and</i> ' between the words ' <i>consideration</i> ' and ' <i>the principles</i> '	
367. Hon. Mary Wambui Del. No. 467 AMM/113/04	332 (7)	Insert the words ' <i>taking into account gender balance the</i> ' immediately before the word ' <i>Members</i> ' and further insert the words ' <i>and a vice-chairperson</i> ' between the words ' <i>chairperson</i> ' and ' <i>from</i> '	
368. Hon. Leslie Betawa Mwachiro Del. No. 599 AMM/214/04	333	Delete the title to the Article and substitute therefor as follows: <i>'Secretary of the Commissions'</i> Further, insert the words ' <i>under the Secretary of the Commission as in Article 303 (3) and (4)</i> ' immediately after the word ' <i>function</i> '	
369. Hon. Winston O. Adhiambo Del. No. 603 AMM/ O82/ 04	339	That an additional paragraph be inserted immediately after paragraph (d) thus: (e) <i>The Kenya Fisheries Commission</i>	
370. Hon. Leslie Betawa Mwachiro Del. No. 599 AMM/215/04	340 (1) (e) 340 (2)	Delete the paragraph in its entirety and substitute therefor the words ' <i>other members consisting of one nominee from each regional assembly and also as in Article 296 (2) (c) and (d)</i> ' Delete the word ' <i>six</i> '	
371. Hon. Leslie Betawa Mwachiro Del. No. 599 AMM/216/04	341	Delete the Article in its entirety	
372. Hon. Ngorongo Makanga Del. No. 605 AMM/113/04	343 (2)	Insert a new clause immediately after clause (b) as follows (a) <i>the difference between the highest and the lowest salary and remuneration of public officers shall not be more than one hundred times</i>	

DELEGATE NAME & NO	ARTICLE NO.	MOTION	REMARKS
373. Hon. Michael Githu Del. No. 355 AMM/172/04	343 (2) (a)	Insert the word ' <i>offices</i> ' immediately after the words ' <i>all Constitutional</i> '	
374. Hon. Alexander Chepkwony Del. No. 367 AMM/024/04	346 (1)	Delete the words ' <i>citizens registered to vote</i> ' immediately after the word ' <i>million</i> ' and insert therein the words ' <i>voters drawn proportionally from all districts of the Republic</i> '	
375. Hon. Kaaru Abdulkadir Guleid Del. No. 263 AMM/100/04	346 (1)	Insert the words ' <i>and drawn from all the regions of Kenya on pro rata basis</i> ' after the word ' <i>vote</i> '	
376. Hon. Jillo Onotto Joshua Del. No. 237 AMM/023/04	348 (1) (c)	Insert the word ' <i>fishing</i> ' immediately after the word ' <i>gatherer</i> '.	
377. Hon. Sammy K. Ruto Del. No. 180	348(1)	Delete the word " <i>eighteen</i> " under the definition of " <i>youth</i> " and substitute therefor the word " <i>nineteen</i> " and further delete the words " <i>has not attained</i> " in the definition of " <i>youth</i> " and substitute therefor the words " <i>is assumed to be within</i> "	
378. Hon. Sammy K. Ruto Del. No. 180	348(1)(d)(ii)	Insert a new paragraph immediately after the definition of the word " <i>natural resources</i> " as follows: <u><i>older members of the society shall be assumed to be sixty five years and above</i></u>	Motion yet to be signed
379. Hon. Leslie Betawa Mwachiro Del. No. 599 AMM/217/04	NEW (to be inserted as Article 350)	Insert a new Article immediately after Article 348 as follows: <i>350: Commission on the Implementation of the Constitution</i> Further, insert the provisions of Article 341 into the new Article.	
380. Hon. Ashephete Barasa Del. No. 393 AMM/046/04	First Schedule	Insert new Part immediately after Part I that schedules the communities of Republic of Kenya as appended in the motion.	

DELEGATE NAME & NO	ARTICLE NO.	MOTION	REMARKS
381. Hon. Winston O. Adhiambo Del. No. 603 AMM/157/04	First Schedule Part I	Motion to subdivide region 12	
382. Hon. John P. Nyakundi Del. No. 611	First Schedule, Part I	Region 8 to be renamed as ' <i>Gusii Highlands Region</i> ' with its headquarters as Kisii Town	Motion yet to be signed
383. Hon. Simeon Shitemi Del. No. 545 AMM/025/04	First Schedule, Part I	Delete ' <i>Trans Nzoia</i> ' and ' <i>Mt. Elgon</i> ' from Region 10 and transfer to Region 9.	
384. Hon. Sophia Lepuchirit Del. No. 327 AMM/232/04	First Schedule, Part I	Delete <i>Samburu District</i> from Region 11. Further, establish a new region for the MAA speakers consisting of <i>Narok</i> , <i>Kajiado</i> , <i>Trans Mara</i> , <i>Samburu</i> , <i>Laikipia</i> , <i>Marsabit</i> (partially) and <i>Isiolo</i> (partially) and delete these districts from their respective regions.	Withdrawn
385. Hon. Sophia Lepuchirit Del. No. 327 AMM/304/04	First Schedule, Part I	Delete <i>Samburu</i> and <i>Laikipia</i> districts from Region 11	
386. Hon. Sophia Lepuchirit Del. No. 327 AMM/305/04	First Schedule, Part I	Amend by establishing a special region comprising of Samburu and Laikipia Districts	
387. Hon. Saul Kiptingos Del. No. 350 AMM/071/04	Second Schedule	Insert the following under (c): (i) <i>Coat of Arms shall be made up of the images of the shield, two lions on each side holding one spear each.</i> (ii) <i>the shield is coloured black, green and red, starting from top respectively and the base bearing the word KENYA substituting the word HARAMBEE existing presently.</i> (iii) <i>the usage and protection of the Coat of Arms shall be determined by legislation.</i>	

DELEGATE NAME & NO	ARTICLE NO.	MOTION	REMARKS
388. Hon. Saul Kiptingos Del. No. 350 AMM/037/04	Second Schedule (a)	<p>Insert the following:</p> <p>(4) The National flag is rectangular, it is one and a half longer than its width.</p> <p>(5) It is coloured black, green, red and composed of fourteen stars of the colour white in two rows on the centre coloured green.</p> <p>(6) The green band is twice bigger than the black and red bands.</p> <p>(7) The law shall prescribe the dimensions, the meaning of the colours, the stars and the other details of the flag.</p>	
389. Hon. Saul Kiptingos Del. No. 350 AMM/038/04	Second Schedule, (b)	<p>Insert the following:</p> <p><i>O God of all creation, Bless this our land and nation' Justice be our shield and defender' May we dwell in unity, peace and liberty, Plenty be found within our borders.</i></p> <p><i>Let one and all arise, With hearts both strong and true, Service be our earnest endeavor, And our homeland of Kenya, Heritage of splendor Firm may we stand to defend.</i></p> <p><i>Let all with one accord, In common bond united, Build this our nation together, And the glory of Kenya, The fruit of our labor, Fill every heart with thanksgiving.</i></p>	
390. Hon. Saul Kiptingos Del. No. 350 AMM/072/04	Second Schedule	<p>Insert the following under (d):</p> <p>(i) <i>That the public seal shall be made up of the images of the shield, two lions on each side holding on two spears.</i></p> <p>(ii) <i>The shield should be coloured black, green and red on the centre on the base printed 'KENYA' and printed 'REPUBLIC OF KENYA' in black against a white background.</i></p>	

DELEGATE NAME & NO	ARTICLE NO.	MOTION	REMARKS
		(iii) <i>The characteristics, significance, usage and protection of the Public Seal shall be determined by legislation.</i>	
391. Hon. Kavoo Kilonzo Dell. No. 479 AMM/113/04	Fifth Schedule Part I Section 23	Delete the section in its entirety and substitute thereof the words ' <i>Health policy, intergovernmental and inter-ministerial co-ordination and licensing'</i>	
392. Hon. S.G.G. Gichuru Del. No. 313	Fifth Schedule Part I	Insert two new paragraphs immediately after section 26 as follows: (27) <i>Management and control of epidemics, epizootics and zoonoses;</i> (28) <i>Regulation of the veterinary profession.</i>	Motion yet to be signed
393. Hon. S.G.G. Gichuru Del. No. 313	Fifth Schedule Part II Section 6(b)	Delete the word "burial" and substitute therefor the word " <i>disposal</i> ".	Motion yet to be signed
394. Hon. Wangari Maathai Del. No. 084 AMM/177/04	Fifth Schedule, Section 22	Delete the entire section and substitute therefor as follows: <i>Rehabilitation, conservation and protection of the environment and biodiversity with a view to promoting sustainable development in Kenya.</i>	
395. Hon. Wangari Maathai Del. No. 084 AMM/184/04	Fifth Schedule, Part IV	Insert new clauses immediately after clause (e) as follows: (g) <i>implement policies which promote sustainable land use, conservation of the environment, natural resources and local bio-diversity;</i> (h) <i>promote cultural practises, indigenous knowledge and heritage which promote the sustainable management of the environment, natural resources and bio-diversity.</i>	
396. Hon. Ruth Otiang'o Del. No. 221 AMM/066/04	Sixth Schedule, NEW (immediately after section 4)	Insert a new clause immediately after section 4 thus: <i>Within six months after the effective date, the National Assembly shall revise its standing orders and the Senate shall adopt standing orders so as to enable Parliament to perform efficiently its duties under this Constitution.</i>	

DELEGATE NAME & NO	ARTICLE NO.	MOTION	REMARKS
397. Hon. Michael Githu Del. No. 355 AMM/235/04	Sixth Schedule, Section 3	Insert the words ' <i>and councils</i> ' between the words ' <i>Parliament</i> ' and ' <i>elected in those elections</i> '	
398. Hon. Wangari Maathai Del. No. 084 AMM/183/04	Sixth Schedule, Section 3	Insert the words ' <i>not</i> ' immediately after the word ' <i>shall</i> '	
399. Hon. S. K. arap Ng'eny Del. No.538 AMM/013/04	Sixth Schedule Section 5	Delete paragraph (1) and (2) and substitute with new clause: 'The first elections to the Senate shall be held within twelve months of the effective date.'	
400. Hon. David Rakamba Del. No. 433 AMM/109/04	Sixth Schedule, Section 9 (1)	Delete the section in its entirety and substitute therefor as follows: <i>(I) The person occupying the office of President immediately before the effective date shall continue to serve both as President and Prime Minister in accordance with this Constitution until the first elections held under this Constitution.</i>	
401. Hon. Leslie Betawa Mwachiro Del. No. 599 AMM/218/04	Sixth Schedule, Section 7	Delete the words ' <i>as prescribed by an Act of Parliament</i> '	
402. Hon. Michael Githu Del. No. 355 AMM/234/04	Sixth Schedule Section 7(3)	Delete all the words appearing after and including the word " <i>called</i> " and substitute therefor the words " <i>held under this Constitution</i> ".	
403. Hon. Leslie Betawa Mwachiro Del. No. 599 AMM/219/04	Sixth Schedule, Section 10 (3)	Insert a new paragraph immediately after paragraph (3) as follows: <i>3A: Electoral Colleges on the Implementation of the Constitution</i> <i>(I) All Councillors of all Local Authorities in a district comprising of urban, townships, municipalities and counties councils shall constitute themselves into collective district council electoral colleges and elect</i>	

DELEGATE NAME & NO	ARTICLE NO.	MOTION	REMARKS
		<p>(a) one senator (b) one district governor (c) the four members from the district to their regional assembly</p> <p>(2) The District Councils formed under (1) above in a region, shall form themselves into an electoral college of their region and elect</p> <p>a. two women senators b. a member to the respective commissions established in this Constitution c. regional premier and deputy regional premier d. regional speaker and deputy regional speaker</p> <p>as required by the devolution Chapter Fourteen in this Constitution.</p>	
404. Hon. James Waweru Del. No. 310	Sixth Schedule, Section 10	<p>Delete the section in its entirety and substitute therefor as follows:</p> <p>i. Upon the enactment of this Constitution, the Provincial Administration presently comprising Assistant Chiefs, Chiefs, District Officers, District Commissioners and Provincial Commissioners shall stand dissolved. There shall be established Provincial and District transitional Boards, comprising of the following:</p> <p>e. representatives of the Members of Parliament f. representatives from local authorities within the area of jurisdiction g. nominees recommended by the CKRC (with knowledge of the Constitution) h. the Provincial Commissioner and District Commissioners shall act as Secretaries to the Boards and provide the Secretariat.</p> <p>i. The Transitional Boards shall ensure safety custody of all assets held by the national government situated in the Provinces, Districts, divisions and locations. ii. Until the regional and district governments are constituted, all the assets held by local authorities shall not be transferred or otherwise disposed. iii. Upon holding of elections for the devolved governments, the transitional Boards shall hand over to the respective regional and district governments.</p>	Motion yet to be signed

DELEGATE NAME & NO	ARTICLE NO.	MOTION	REMARKS
		iv. <i>The Public Service Commission shall in consultation with the Provincial and District transitional Boards reorganize the staffing requirements to suit the devolved governments structure. The Commission shall re-deploy the staff currently working under the Provincial Administration, the Provincial Commissioner, the District Commissioner, the District Officer, Chiefs and Assistant Chiefs.</i>	
405. Hon. Ibrahim Salim Del. No. 225	Sixth Schedule Section 14	Insert a new section thus: <i>All judges of the High Court and Court of Appeal currently holding office shall automatically vacate office upon the enactment of this Constitution.</i>	Motion yet to be signed
406. Hon. Ibrahim Salim Del. No. 225	Sixth Schedule, Article 14	Insert new clause as follows: <i>Any judge desiring reconsideration to office should apply to the Judicial Service Commission seeking the position if she/he under the terms laid out in this Constitution.</i>	Motion yet to be signed
407. Hon. Kipyegon Sang Del. No. 368 AMM/051/04	Sixth Schedule Section 10 (3)	Insert the words ' <i>and the approval of Parliament</i> ' after the word ' <i>Government</i> '	
408. Hon. Ibrahim Salim Del. No. 225	Sixth Schedule, Section 14 (1)	Delete the paragraph in its entirety	Motion yet to be signed
409. Hon. Ibrahim Salim Del. No. 225	Sixth Schedule, Article 14 (3)	Delete the paragraph in its entirety	Motion recorded twice
410. Hon. Ibrahim Salim Del. No. 225	Sixth Schedule, Section 14 (4)	Delete the paragraph in its entirety	Motion yet to be signed
411. Hon. Ibrahim Salim Del. No. 225	Sixth Schedule, Section 14 (5)	Delete the paragraph in its entirety.	Motion yet to be signed
412. Hon. Ibrahim Salim Del. No. 225	Sixth Schedule, Section 14 (6)	Delete the paragraph in its entirety	Motion yet to be signed

DELEGATE NAME & NO	ARTICLE NO.	MOTION	REMARKS
413. Hon. Ibrahim Salim Del. No. 225	Sixth Schedule, Section 14 (7)	Delete the paragraph in its entirety	Motion yet to be signed
414. Hon. William ole Yiaile Del. No. 361 AMM/027/04	Sixth Schedule, Section 21 (2)	Delete the words ' <i>National Land Commission</i> ' and substitute therefor the words ' <i>Devolved District Governments</i> '	
415. Hon. Victor Paul Gituma Del. No. 274 AMM/301/04	Sixth Schedule, Section 23	Delete the words ' <i>its relevant organs</i> ' and substitute therefor the words ' <i>the National Constitutional Conference delegates</i> '	Withdrawn

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