

**CONSTITUTION OF KENYA REVIEW COMMISSION**

**(CKRC)**

**NATIONAL CONSTITUTIONAL CONFERENCE**

**(NCC)**

**Verbatim Report of**

**MEETING BETWEEN CKRC COMMISSIONERS AND MEMBERS OF**

**THE PARLIAMENTARY SELECT COMMITTEE (PSC) HELD IN COUNTY  
HALL, NAIROBI**

**ON**

**16.07.04**

## Commissioners:

1. Mrs. Abida Ali Aroni	-	Chairperson
2. Prof. Ahmed I. Salim	-	First Vice-Chair
3. Prof. Okoth Ogendo	-	Vice Chair
4. Prof. Wanjiku Kabira	-	“
5. Ms. Nancy Baraza	-	“
6. Dr. Charles Maranga	-	“
7. Ms. Salome Wairimu Muigai	-	“
8. Mr. Domiziano Ratanya	-	“
9. Bishop Bernard Kariuki Njoroge	-	“
10. Mr. Riunga Raiji	-	“
11. Mr. Githu Muigai	-	“
12. Mr. Ibrahim Lethome Asman	-	“
13. Dr. Abdirizak Alarle Nunow	-	“
14. Mr. Ahmed I. Hassan	-	“
15. Dr. M.A. Swazuri	-	”
16. Dr. Mosonik arap Korir	-	“
17. Mr. Keriako Tobiko	-	“
18. Dr. John Mutakha Kangu	-	“
19. Dr. Andronico Adede	-	“
20. Mr. Ibrahim Lethome	-	“
21. Mrs. Alice Yano	-	“
22. Mr. Abubakar Zein Abubakar	-	“

## Members of Parliament:

### Parliamentary Select Committee Members

1. Hon. William Ruto	-	Chairman
2. Hon. Kiraitu Murungi		
3. Hon. Raila Odinga		
4. Hon. Joe Khamisi		
5. Hon. Marsden Madoka		
6. Hon. Bonaya Godana		
7. Hon. Joseph Kamotho		
8. Hon. Kenneth Marende		
9. Hon. Kipkalya Kones		
10. Hon. Njoki Ndung'u		
11. Hon. Henry Kosgey		
12. Hon. Moses Wetangula		
13. Hon. Chris Murungaru		
14. Hon. Moses Cheboi		
15. Hon. John Munyes		
16. Hon. Gonzi Rai		
17. Hon. Andrew Ligale		
18. Mr. Samuel Ndindiri		

## **CKRC Staff in Attendance:**

Patricia Mwangi - Verbatim recording

Meeting was called to order at 9.50 a.m. with Hon. William Ruto in the Chair.

**Hon. William Ruto:** Ladies and Gentlemen, I want to call this meeting to order. I want to take this opportunity to welcome members of CKRC to this joint meeting of CKRC and Select Committee. I want to take this opportunity also to congratulate the new Chairperson on behalf of my Committee. Madam Chair, we want to wish you well in your new responsibility as Chair to CKRC, a very important body to the review of the Constitution and on behalf of my Committee we want to assure you that we will cooperate with you and your Commission and work together towards realizing this noble duty that has been given to us by the people of Kenya.

Having said that, the Select Committee did decide in its meeting last week to ask the Commission to come so that we can have a joint meeting basically to do two things. One, so that you as the Commission can brief the Select Committee on behalf of Parliament on what we called the status of the Review Process. There are so many issues that have happened since the 15<sup>th</sup> of March this year when we concluded Bomas and secondly, to give us your own assessment of whatever is left of what the Commission is charged to do by law and which has not been done. Maybe you could also suggest how much time you think you need to be able to conclude whatever is pending. With that we can be able to make a decision as a Committee and be able to communicate that decision to Parliament on end of extension of time. We have received a letter from the Commission requesting for extension of your mandate, of course in conformity with the law and before we take that decision we thought of having this meeting. I can therefore say, over to you, Madam Chair.

**Com. Abida Ali-Aroni:** Thank you, Chairman, and Honourable Members of Parliament. I wish to thank the Chairman and all the Members for that welcome speech by the Chair and assure you that the Commission is ready to work with you and we hope that we will have a cordial, meaningful and useful relationship that will see us towards the end of this Process that has taken quite a bit of time. And, Chair, I want to assure you despite the description I read on Saturday of you being combative and articulate and me being soft spoken, I want to say that I think those are complimentary so we have a long way to go and I want to assure Members here that we have worked together before and we will work together. So it is not a cause for alarm, those two characteristics as put by the Media are not too bad.

Mr. Chairman, we did send you a letter requesting for extension of time on the 28<sup>th</sup> of June this year and yesterday we sent you a Status Report as adopted unanimously at the Plenary of the Commission two days ago. Mr. Chairman, I will be making

reference to both the documents. The Memorandum, which I am sure you looked at before requesting for the Status Report, has analysed the role of the Commission in accordance with Chapter 3 (a) of Laws of Kenya. We did enumerate that document, the functions of the Commission throughout the Review Process, we did also in that document indicate to you the impediments that the Commission has faced. We did enumerate a number of cases that have been in place since March this year and we did also enumerate the different interpretations by different stakeholders in the Process emanating from the various Court decisions that we have.

Mr. Chairman, you will realize that on the 15<sup>th</sup> of March this year at the National Conference we did adopt the Draft Bill and the Conference was concluded on the 23<sup>rd</sup> of March. Under Section 28 (i) and (ii), the Commission ought to have given a Draft Bill and the Report of the Commission to the Attorney General upon finalisation of our Report and the Attorney General, under Section 28 Subsection (v) ought to have table the document. As detailed in our memorandum, that has not happened due to various reasons.

Briefly what I would say is that there are various cases that have been filed and three of them stand out which have made it impossible for the Commission to conclude the task of compiling the Report and handing the Report over to the Attorney General together with the Draft Bill as at 15<sup>th</sup> of March this year. Mr. Chairman, the cases, in our opinion, and the political atmosphere currently have not made our work easier. In a way one would say that we have reached a place where the Commission wants to move forward but we are unable to move forward.

The case of Njoya, Mr. Chairman, gave a new twist to the process. The court judgement indicates that the tabling of the Bill before the National Assembly is unconstitutional; it also gives the citizens of this country a right to ratify the Draft in a mandatory referendum.

Then we have the case of Wa Kareng'e – if I may call it that – this the case that was filed by about three of the former Delegates of the National Conference and in that case the court prohibited the Commission from preparing a final report specifically on four Chapters that they deemed in their application in court, as contentious. You are aware of the four Chapters namely, the Chapter on Legislature, Executive, Devolution, Public Finance and Management and the last Chapter on Transition and Consequential Provision. This particular case also barred the Attorney General from receiving the Report from the Commission. The case, Mr. Chairman, you are aware, is yet to be fully determined, so that injunction is still on against the Commission and the Attorney General.

Mr. Chairman, there is also the case filed by Honourable – if I may call him that – Martin Shikuku and Others where the court gave an injunction against debate, discussion and any action on the Draft Bill.

Mr. Chairman, having in brief indicated the issue at hand as far as the court cases are concerned, what we will be requesting

you, Hon. Members, is to view the work we have done so far and the projection of the remaining work in light of those three cases. Taking into account the fact that the Review Commission is an institution that is working on the principal law of this country and the loud cry by the Chief Justice over time and as late as yesterday, of the need to uphold the rule of law, the Commission has not been able to conclude the Final Report that we ought to have given to the Attorney General.

That notwithstanding the Commission has undertaken various other tasks leading towards the finalisation of the Process. In this regard, Mr. Chairman, we have been able to work as usual through the various Committees of the Commission and for the sake of the new Members we worked through five different Committees in the Commission, namely, the Steering Committee that guides the working of the Commission, then we have Research Drafting and Technical Support Committee, Civic Education Publicity Information and Communication Committee, Mobilisation and Outreach Committee, Finance and Resource Mobilisation Committee. We also time and again work through Ad Hoc Committees and Task Force Committees. Some of the Committees that have been working since conclusion of Bomas are the Legal Task Force Committee, Task Force on Referendum, a Committee on Staff Rationalisation, a Task Force on the Finalisation of the Commission Reports and the Consensus Committee.

On page 5 of our Status Report, Mr. Chairman, we will wish to draw your attention to Sections 17, 24 and 26 of Chapter 3 (a) of the Laws of Kenya that gives us various functions. Mr. Chairman, Section 17 gives us four broad functions. There are some that we have been able to achieve to date. Mr. Chairman, the first function is conducting and facilitating civic education and this particular Section has to be read together with Section 24 that requires the Commission to facilitate and undertake civic education throughout the Review Process. Mr. Chairman, Section 26, more specifically 26 (i) gives us particular mandate and I will read out the same: “the work envisaged under Section 26 of the Act includes visiting constituencies...”, that we have done, Mr. Chairman, “...compiling reports of the constituencies...”, that has been done as well, “...conducting the National Conference...”, we have done that “...conducting and recording of the discussions of the referendum...”, that is yet to be accomplished, Mr. Chairman “...and drafting a Bill for presentation to Parliament.”. Mr. Chairman, this Bill needs verification. That is an ongoing process at the Commission at the moment. Should we have a referendum further drafting will be required. So, having that in mind, Mr. Chairman, I would suggest that the two items, the referendum and drafting of the final Bill, are yet to be done.

Mr. Chairman, having stated that I would invite you to look at the bottom of page 5 of our Status Report that will lead you up to page 9 which details tasks that the Commission has undertaken from March to date and I will highlight items probably that are significant. On page 5, Mr. Chairman, we are in the process of finalizing the reports but as I indicated there is nothing much the Commission can do bearing in mind the court injunctions on the five items, but between the four walls here, I want to tell you that the Commission has looked at those five Chapters but I am afraid that is the best that the Commission can do.

Mr. Chairman, I also want to draw your attention to page 6 under compilation and finalisation of the Conference material. We

have edited and are in the process of publishing reports of the different working Committees of the Conference, we are also compiling and consolidating proceedings of the National Conference in all the different sections of Bomas, Bomas I, II and III. Mr. Chairman, we are also in the process, like I said, of verifying the Draft Bill. You may ask why we want to verify the Draft Bill after the adoption on the 15<sup>th</sup>. Mr. Chairman, we gave our word to the Delegates at Bomas that no word will be changed in the Draft as adopted on the 15<sup>th</sup>. We are looking at the different decisions of the Conference to ensure that the Draft Bill remains intact. We are also in the process of preparing the Kiswahili Draft Bill. We have had difficulties as we have been informed that in this country we do not have an expert in Kiswahili legal drafting so we are engaging experts from Tanzania and that will require a bit of time and the Commission, as a matter of necessity, will have to verify the contents of the Kiswahili version of the Draft Bill. We are also engaging in drafting of routine subsidiary legislation related to the Commission's work. We cannot complete that until the legal framework on the referendum has been worked upon by you, Hon. Members.

Next, Mr. Chairman, you will wish to know that we are also finalizing our Hansard Reports of the verbatim recording at Bomas of Kenya and taking cognizance of those of us who cannot read, we are also in the final stages of preparing a Braille version of the Draft Bill. Mr. Chairman, in regard to civic education which is a key function of the Commission, we are in the process of preparing guidelines for civic education necessary for purposes of the referendum. We are also preparing civic education reports so that people can look back and understand what the Commission did as far as civic education is concerned. We are also in the process of preparing a document that will give details of the participation of the Kenyan people in the Review Process, we are also laying strategy for the referendum, e.g. preparing for training of the personnel who will carry out the civic education and monitor civic education.

As far as finances are concerned, Mr. Chairman, we are trying to sort out amongst other things the assets of the Commission. We are also in the process of disposing and transferring some of our equipments to the relevant Ministries in conjunction with the Ministry of Finance. We are also handling the various litigations that concern the Commission and the Review Process.

Mr. Chairman, on page 8, having given you the tasks that we have undertaken as a Commission from end of March to date, we strongly feel that the Commission, and, Mr. Chairman, this is a fact, that we have not been able to conclude our mandate. Mr. Chairman, having discussed the impediments earlier on we have projected our Work Plan with certain assumptions in mind.

Number one, that we will be able to overcome the legal impediments and this, Mr. Chairman, we are hoping that with a conducive environment, the litigants will be encouraged to withdraw their cases in court; if that does not happen, Mr. Chairman, that the cases will be determined at the earliest opportunity. Secondly, Mr. Chairman, that the necessary legal framework relating to the referendum will be in place latest August this year and that you will see the need of the Commission to play its statutory mandate and with that, that you will extend our mandate to enable us undertake the tasks.

Mr. Chairman, on the issue of our mandate, I wish to draw the attention of Hon. Members to Section 33 of The Review Act

that states that the time of the Commission will expire upon the enactment of the Constitution. Mr. Chairman, when we talk about the extension of the mandate under Section 26 (ii), I would kindly ask you to read it together with that Section that indicates we still have work to complete.

Having said that, Mr. Chairman, and with the assumption as indicated, the Commission has still the following tasks to accomplish: verification of the Draft Bill which is ongoing, finalisation of all Commission reports, preparing legislation and subsidiary legislation and more specifically, rules and regulations on the conduct of referendum that will be based on a legal framework that we are waiting to receive from you, Hon. Members, giving technical assistance and consultation with the Electoral Commission of Kenya. We have held consultations with them but we are unable to conclude pending a legal framework. We will also have to engage them as far as logistic coordination is concerned. We will have to revitalize and train members of the Constituency Fora and the District Coordinators that had worked with us earlier. There is the issue of phrasing of the referendum question which will be key in the next phase of referendum. We also have to conclude preparation of civic education guidelines and materials. We have to distribute civic education materials, we have to induct and train personnel who will carry out civic education and the actual referendum in conjunction with the Electoral Commission. The Commission also hopes to monitor the conduct of the referendum and thereafter prepare the final report on the referendum for onward transmission to the Attorney General.

Mr. Chairman, there are other duties set out on page 9, and I will not go into details of those other duties that we intend to undertake as a Commission. Mr. Chairman, we also require adequate time to be able to wind up our affairs.

Mr. Chairman, having said all that I wish to respond to information that is floating around that probably the Commission is not the right institution to carry the Process to its logical conclusion. Mr. Chairman, our humble view as a Commission—

**Hon. William Ruto:** Maybe I should-- I do not think we should respond to rumours, really. I think let us stick to the facts.

**Com. Abida Ali-Aroni:** Thank you, Mr. Chairman. Mr. Chairman, what I would wish to state in conclusion is that the Commission is working tirelessly despite the impediments to ensure that we deliver a Constitution to the people of Kenya at the earliest opportunity. Mr. Chairman, what I would also want to stress is that despite the difference of opinion within the Commission, we all are agreed as a unit that we need to conclude this task as soon as possible. Mr. Chairman, I wish to remind that our differences in the Commission is really the strength that this country has.

Mr. Chairman, the other thing I would wish to state although again without listening to the rumours or things that are going round the country is that our commitment to the Process remains and we are hoping that you will give us adequate, reasonable time pegging on Section 33 so that we can be able to discharge the remainder of the work. Mr. Chairman, I have been reminded by my colleagues that there is a chart at the end of our documents that will give you a projection of what we will do, beginning



the month of July to April 2005. Mr. Chairman, what we have done is to look at the different tasks that each Committee of the Commission, and indeed the whole Commission, has to undertake and you will see that up to Item No. 17 the Commission has work to undertake up to January 2005. Item No. 18 takes into account the three months that the Commission has to wind up its affairs. Mr. Chairman, under Section 33 of the Act, the winding up of the affairs of the Commission relates to the financial and administrative affairs of the Commission. So, Mr. Chairman, from Item 1 to 17, these will not doubt, under the Act, require the input of the Commissioners.

And with that, Mr. Chairman, I would request my colleagues, the Vice Chairs who head different Committees of the Commission to add, if there is anything that I have left out of the presentation. Thank you.

Prof. Okoth Ogendo, Prof. Salim and Prof. Kabira. Mr. Chairman, you can see I am surrounded by able Professors in the discharge of my duty. Thank you. *(Laughter)*.

**Com. Okoth Ogendo:** Chairman, I just want to confirm that the Chair of the Commission has covered my Committee well and I have nothing to add to it. Thank you.

**Hon. William Ruto:** *(Inaudible) (Laughter)*.

**Com. Idha Salim:** Mr. Chairman, I want to do the same thing namely that our Chairperson has very, very ably covered the ground that we wanted her to cover.

As the Chairperson of CEPIC, the Committee in charge of Civic Education, I merely need to emphasize the point made about the need for any Referendum to be preceded by Civic Education because without Civic Education, to tell the people what a Referendum is all about, it will be very difficult for them to really vote with information. Not only that, Mr. Chairman, probably the whole new Draft Bill itself may require also sufficient coverage, if not by the Commissioners, certainly by people the Commission itself can appoint for that particular purpose. We have said in the past that the Draft Bill has been prepared very much in accordance with the views of the people and it is also a representative of the people at Bomas who contributed to that Draft Bill and also gave their views and changed it to a large extent and, therefore, now it really ought to go to the people again, countrywide, for it to be explained to them and for them to be satisfied that indeed, this is in accordance with our wishes.

Other than that, Mr. Chairman, I want to commend our Chairperson for her presentation and may I, Mr. Chairman, also congratulate you on your appointment as the PSC Chairperson, on behalf of the Commission.

**Com. Wanjiku Kabira:** Thank you, very much, Mr. Chairman. I also want to confirm that what the Chair has presented is a true record of what the Department intends to do and has been doing and like Prof. Salim, add that we need to make a

distinction between Civic Education for the Referendum and Voter Education for a Referendum and I think that has been creating some confusion.

In our consultation with ECK, we have clarified and they have also clarified that the basic role of the Commission would be to-- Not just Civic Education, Civic Education now seems to mean anything, but this particular Civic Education means taking the Constituency Forums and other leaders all over the country and as many people as possible through the Draft Bill or the Bill that is going to be sent to the Referendum, in order to ensure that they are voting for something they have fully understood. Basically, that is what we are talking about when we say, Civic Education.

Similarly, it is like the kind of exercise we carried out before, which was mainly coordinated by the District Coordinators and the Constituency Forums which are still in existence. As you note from the Act, the Constituency Forums remain organs of the Review up to the end and it is through these Forums coordinated by the Constituency Committees, which are still in existence, that we will actually coordinate Civic Education exercises, or at least will help coordinate the Civic Education exercises in every Constituency.

In terms of voter education from ECK, they see their job as educating the people on how to vote for the Referendum and to also put in place the structures that will facilitate the actual voting of the Referendum and in this respect, the proposal is that we should be able, which is reflected in our programme, to have joint activities with ECK, where they can train on voter education, while the Commission continues to elaborate and educate the Kenyans on the Draft itself so that they can make decisions from an informed position. I think basically that is the only thing I wanted to add.

One more thing in terms of District Coordinators, we have institutional frameworks in every District where we have what you call the Resource Centres and the District Coordinators are still in place although they have been out of the pay roll since I think we started Bomas III. Other than that, I think we have enough information.

I am being reminded also that we take the National Constitutional Delegates as also a group of people who are fully informed in this Process, having spent almost a year debating the same document, that they are also in a position to help and work with the Commission in terms of ensuring that the Kenyans understand the document that they will vote for. Therefore, for us the sooner the decisions are made, so that we can complete this exercise, the better. Thank you. I also congratulate Hon. Ruto for the appointment to this important position. Thank you.

**Hon. William Ruto:** Thank you very much, Madam Chair, and your Vice Chairpersons, for that presentation. My Committee had the privilege of having this report beforehand and we had perused it through as individual members and I think you have given us a presentation that highlights some of the issues that you have already stated in your report.

I will take this opportunity to ask Hon. Members to maybe seek clarification or ask some questions so that we can fully comprehend your presentation and let me have the privilege of being the first one.

Madam Chair, I heard you well when you said we should consider the provision of Section 33 of the Act. Therefore, I want to ask, were you drafting this timetable with the provisions of Section 33 in mind or were you looking at what the Commission can practically do? I mean, the balance of work that is there? Because on the side of my Committee and Parliament, being custodians of public interest, the people of Kenya want value for every shilling they spend. I think many questions have been asked as to why you have to seek extension of mandate from Parliament and I think the wisdom in that was that Kenyans wanted to know that as they pay for your Commission, they get value for their money and I want to know, what was the guiding principle? The work balance, or the fact that the provision of Section 33, anyway, says you can be there until there is a new Constitution?

Lastly, have you considered the size of the Commission as an option that you can present to us? Since we have looked at most of the items and most of the work has been done, maybe we can reduce the size of the Commission or something like.

Lastly, on the issue of Civic Education, have you considered that-- I think somebody mentioned, I think Prof. Kabira, or is it Prof. Salim, there could be people who can provide Civic Education in a better way or something like that, so that you can contract that service and get the job done properly. Maybe you can take down the issues and maybe we can take them from three people then you can respond.

**Hon. Njoki Ndung'u:** I would just like to take this opportunity to congratulate the new Chair. I think it is very important when we recognize that women have the ability to do these kinds of jobs. I wish you congratulate you, the Chair and your team.

Thank you for this report, it is very clear, it has been done in a very simple way, we are able to understand the legal and technical issues. However, Chair, you may want to be able to talk a little bit more to Members of Parliament and particularly those on the Committee, in terms of understanding the kind of work you do. Fortunately for me, I was involved at the time when you were doing the Civic Education, before you collected and collated the views and I did read the report that you did on the difficulties that you had.

In fact, most of the work is not yet done and I think that this is a misunderstanding that we have. We have the Draft, but the bulk of the work before the Referendum is going to be the Civic Education. I wish it was actually possible that we could expand your number because I know that during the Civic Education before the Conference, you didn't actually reach everyone and in terms of the Referendum, you must reach everyone.

I would be curious to know how we, as Members of Parliament will be able to participate in the development of the curriculum

for Civic Education. I am one person who was not particularly pleased or particularly satisfied with the curriculum that went out before the views of the people were taken. So, I just want to say, thank you, for the programme and I think we really need to engage ourselves in terms of Civic Education and Voter Education and please, help us to be informed as to the extent and the bulk of the work that you have ahead of you, thank you.

**Hon. William Ruto:** Hon. Kamotho.

**Hon. Joseph Kamotho:** Thank you, Mr. Chairman. I would also like to take this opportunity to congratulate the Lady Chairperson of the Commission and also congratulate her and the Vice Chairmen for their presentations.

My two questions are, I think currently we are in a real legal mess as far as the Process is concerned and I know that in the report-- The Chair did mention about the cases which are pending in Court and cases which have already been determined. While we can understand that the cases that are pending in Court could be discussed and be withdrawn, what do you do with the cases which have already been determined like the Ringera case? I am sure the answer can come from either side. Because unless these legal matters are sorted out, I don't think we are getting anywhere. So, I think we need to be told very clearly what is going to be done in order to remove these road blocks before we can decide on the way forward.

**Hon. Kiraitu Murungi:** Thank you, Chair. Let me also take this opportunity to congratulate the Chairperson of the CKRC on her appointment to this very important position, also the Vice Chair, for election. I think the presentation made before the Committee today is an excellent presentation, it was well prepared and it captures the issues and the status. I want to follow up a bit on what the Permanent Secretary General, JJ Kamotho, (*laughter*), said, regarding the legal issues.

Although you talked about four cases, there are only two cases which are relevant because regarding the Njoya case, that has been disposed off by the Constitutional Court and as law abiding Kenyans, we have no option but to comply with that decision.

The last case, Peter Mwalimu Miwa case has been withdrawn, therefore it is of no consequence to these proceedings. So, we are left with the Wa Kareng'e and Martin Shikuku Case. The Wa Kareng'e case prohibits the Commission from completing its report with regard to the Chapters which are mentioned there but my understanding of this is that, it does not prevent you from doing the report minus these Chapters.

Secondly, the Wa Kareng'e case prohibits the Attorney General from receiving a report from the Commission but it does not prevent any other body from receiving such a report. So, Madam Chair, would there be any problem with you preparing a report to such an extent as it does not contravene these orders, that is a report minus these Chapters and presenting that report to this Committee because the orders are against the Attorney General? There is no order preventing this Committee from

receiving such a report. So, would there be any problem with you presenting such a report to our Committee, just to be able to see what you have been doing?

**Hon. Bonaya Godana:** A partial report?

**Hon. Kiraitu Murungi:** Pardon?

**Hon. Bonaya Godana:** A partial report.

**Hon. Kiraitu Murungi:** Yeah, call it a partial report, but you can call it an interim report or whatever. I do not know the impact of the Martin Shikuku case, which prohibits all debates, discussion and action on the Bomas Draft. Does that prevent this Committee from debating and discussing the Bomas Report? I would like to know, since you have got so many Professors, whether you can enlighten us on those issues, thank you.

**Hon. William Ruto:** Marsden and then you will respond.

**Hon. Marsden Madoka:** Thank you, Mr. Chairman. Again, I join the others in congratulating the Chair on the appointment. the two Chairs. Just to make a comment, to get a report without those Chapters and they are the crucial Chapters, it will be no report.

**Hon. William Ruto:** Madam Chair.

**Com. Abida Ali-Aroni:** Thank you, Mr. Chairman. I will begin from your questions. Mr. Chairman, I appreciate the questions. What the Commission feels is that Section 33 will save Parliament the onerous task of extensions although we do not hope that we will be coming back for extensions, but I think that is beyond the Commission and your Committee as well.

Mr. Chairman, the timetable that we made is based on the projection that I took you through, but again, on the three assumptions that I enumerated. But, Mr. Chairman, you realize that we have these Court Cases, in fact, I think they are more because the Christian Churches went to Court yesterday. We are yet to know the outcome of that Application before the Court but there is a Constitutional matter on the issue of the Kadhis Court. So, Mr. Chairman, what we are saying is that if the impediments are done away with, then our projection is most likely. But we bear in mind the fact that these factors are beyond our reach as a Commission, we also realize that you may have very little to do with this as Honourable Members of Parliament, although we hope that you will be talking to your Constituents to do away with the Court Cases.

Mr. Chairman, we looked at that and thought that with the assistance of your Committee, the Parliamentary Select Committee,

you will be able to engage us and work very closely with us, to monitor our work, to ensure that the Commission is on course and the commitment is there so that if there is a delay in having the legal framework, which we are waiting for, a delay in conclusion of the cases, we do not have to come before the Select Committee to ask for another extension.

Mr. Chairman, on downsizing the Commissioners, my personal view is this and I hope I am speaking for all the Commissioners.

The faces that you see here are faces of people who represent different interests in this country. Mr. Chairman, I want to remind you and I know I engaged you on this way back in 1998, when we had a stalemate for over 14 months because we could not agree on the Commissioners. Downsizing this Commission will draw us further into a stalemate. I think it will not be acceptable to a wide range of Kenyans and like I said before, our differences, Mr. Chairman, are the strength of the Review Process. So, on behalf of my colleagues, if I may be speaking for most of them, I think that will be a wrong move towards the Review Process.

Having said that, Mr. Chairman, on the issue of Civic Education, as I did emphasize, this is a key function of the Commission. Yes, we may engage and indeed we did engage Civic Education Providers on the onset of the Review Process, but it is a mandatory function of the Commission to monitor and supervise and to some extent, to engage Kenyans in Civic Education. So, Mr. Chairman, we will have, due to the massive task of Civic Education, engage other providers in this Process to work in conjunction with the Commission and I appreciate the comment by Hon. Njoki that we did not reach all Kenyans. I think this is really a fact and for purposes of the Referendum, we will need to work harder and put in more man-hours to be able to reach more Kenyans than we did before because right now, we will be asking Kenyans to ratify a document that will govern this country for many years to come.

Mr. Chairman, on the comment by Hon. Njoki, I would wish to state that we are ready at any time to engage you, at your convenience, so that we can be able to discuss the intended curriculum for the Referendum and on any other aspect where you think the Commission can make meaningful contribution.

Hon. Kamotho wanted to find out what we can do about the Court Cases. *Mheshimiwa*, I think like you put it, this is really a real mess for all of us. We cannot do much, in my opinion, as far as the Njoya case is concerned, no Appeal has been preferred by anybody. So, as a Lawyer, my interpretation is that the ruling stands as it is.

On the other issues of the pending cases, *Mheshimiwa*, I think the way forward is to engage the litigants to see how best we can convince them to withdraw the cases because if the cases are left for the Courts, it is very difficult for one to project when these cases are likely to be concluded. So we are hoping that Honourable Members will help us engage the litigants, we intend to engage them as well, to listen to their problems and see whether the problems can amicably be sorted outside the Court and at the earliest opportunity.

*Mheshimiwa Kiraitu*, I agree with Hon. Madoka that really a report without the five Chapters, which are crucial, and I think the ones that have landed us in the stalemate, will not be a report. I think we will need to give you a complete report for the same to be meaningful. That notwithstanding, *Mheshimiwa*, the law, Section 28 (1) and (2) are very clear, that we need to give the report to the Attorney General for onward transmission to the National Assembly. I think we need to comply with the Law, unless the Law is changed, for us to be able to give the document in any other way.

*Mheshimiwa*, the case of Martin Shikuku, I was wondering whether all persons include Parliament and if it does, then I think you are also barred from discussing. Although, one wonders because Hon. Shikuku himself is busy debating and discussing the Draft Bill, so I don't know what interpretation to give to that, but strictly speaking, if we are to heed the cries of the CJ, then it will be very difficult for you as legislators to engage in debating and discussing that Bill, unless Hon. Martin Shikuku withdraws or the Court decides otherwise, thank you.

**Hon. William Ruto:** I will give the Professor, then Githu will follow.

**Com. Prof. Okoth Ogendero:** Chairman, I just want to make a very quick comment on the question of the report of the Commission. The Act must be read as a whole. The Commission produced a report which was tabled before the Conference. What we are talking about here is the final report of the Commission.

When Wa Kareng'e and the others went to Court, they had their own concept of what they thought was going to be the Commission's report. The Commission has defined what that report is and it is not a report on Chapters. Therefore, to respond to the Minister's question, it is not a question of preparing a report that includes all the Chapters, the report is a report which accompanies and explains the Draft Bill from Bomas not a report on Chapters. And as far as I am concerned, we can prepare a report, and we have prepared a report, which can be given to this Commission. What we cannot do is to hand over that report to the Attorney General because if we do that, the Wa Kareng'e case says we don't and the Attorney General also is not supposed to receive it.

So, the conception in Court that we can prepare a report of Chapters is wrong in the first instance because that is not also the way the Commission has conceived of it. The Commission sees the final report as a report that completes the entire Process and up to this and then explains how we ended up with the Bomas Draft. So that is basically what it is.

**Hon. William Ruto:** Well, Githu.

**Com. Githu Muigai:** Mr. Chairman, I wanted to suggest, with respect, that we should be more proactive about these pending cases. I think that the Process can hemorrhage for a very long time as these cases make their way through the Court system and it may very well be useful to ask the Attorney General, appearing as a friend of the Court, to request the Chief Justice to



consolidate all these matters so that they may be disposed off.

**Hon. William Ruto:** Hon. Raila.

**Hon. Raila Odinga:** *(Inaudible).*

**Hon. William Ruto:** Okay, Mr. Kangu.

**Com. Mutakha Kangu:** Mr. Chairman, I would like to go back to what Hon. Kamotho raised and to me that is the most important and difficult task which yourselves and ourselves have to address. This Process must move forward and be concluded. Can we address the mess that we have been put in by the cases in Court?

When the Njoya case was decided, I personally said that case has thrown the country into a constitutional crisis, some people thought I was talking politics but now it has dawned on most that in fact that case is a big problem. My suggestion is that we need a day or two to retreat into a quiet place, yourselves and ourselves, to have well structured, programmed sessions to discuss the different interpretations of the law as it is today, even these cases and perhaps be able to come up with a common position on how we can move forward, given these cases. I am sure that this meeting is not the best forum to provide an opportunity for exhaustive discussion of the different views that people hold on those cases.

**Hon. William Ruto:** All right, good suggestion and I want to take this opportunity on behalf of my Committee--

**Hon. Raila Odinga:** *(Inaudible).*

**Hon. William Ruto:** Okay, Hon. Raila wants to say something.

**Hon. Raila Odinga:** Mr. Chairman, I know you want to conclude here but we all know that of course the Courts are there to interpret the Law but the Courts are also themselves a product of the Constitution, just like Parliament is and the Executive. Busy bodies can be going to Court until the cows come home. Of course, there are other issues that we are going to discuss as a Committee.

But what I want, before the Commission leaves here, what I want to know is, where is the Commission in regard to preparation of the report? Prof. Ogendo mentioned something but I want to have a clear definite position because according to the former Chairman of the Commission, the report was already prepared, it is only that the Commission was not able to present it to the Attorney General because of the Court ruling. Now, is it true that the Commission has prepared a report which is ready? Because looking at what we have been given by the Chair, the current Chair, there is still some work to be done with regard to



that report. We want to know whether the report is being prepared and is ready and cannot be presented to the Attorney General because of the Njoya Court ruling or not. I want this information from Prof. Ogendo.

**Com. Okoth Ogendo:** Mr. Chairman--

**Hon. William Ruto:** One moment, Professor, so that you can answer both questions.

**Hon. Kenneth Marende:** Yeah, thank you, Chairman. There is one issue that I am concerned about and I wish to raise so that it is also dealt with possibly conductively. I am worried about the request for extension particularly bearing in mind the Provisions of Section 26 of the Review Act. Although the Chairman in her presentation says that if we invoke the Provisions of Section 33, then we need not worry about Section 26, I am still not persuaded that that is the best way to get round Section 26 because we have previously complied with the Provisions of Section 26 by asking for one extension and in my interpretation, Section 26 allows for just one extension and no more. So, I am not quite persuaded that we can go round 26 by invoking 33 because by practice, we have complied with 26 in the past and to me, talking as a Lawyer, it will appear like there is a conflict between 26 and 33. Given that both of them are Sections of the same Act, I don't know which supersedes the other. It is a matter of interpretation but I think it is important that we have a clear pathway round 26.

**Hon. William Ruto:** Well, I think, Hon. Marende, let me say I think that is an issue that we can discuss as Select Committee. That is our opinion or opinion of our members but I think they have given us the background on which they did their letter of request for extension of mandate. Maybe, Madam Chair, you can answer the issues raised by Hon. Raila and your Commission.

**Com. Abida Ali-Aroni:** Mr. Chairman, I think the question was directed to Prof. Okoth Ogendo--

**Hon. William Ruto:** The question was directed to the Commission.

**Com. Abida Ali-Aroni:** To the Commission, thank you. Mr. Chair, although I will be asking Prof. Okoth Ogendo to address it as well, Hon. Raila talked about the Court interpreting the Law, *Mheshimiwa*, the Courts also make Laws. They have that function of making Law as well.

On the issue of the report, *Mheshimiwa*, the Commission has a raw draft of the report that was concluded Friday last week. So, to answer you--

**Com. Abida Ali-Aroni:** I would request you answer the Chair.

**Hon. William Ruto:** The Chair, thank you, I am sorry about it. Chair, I think it is difficult to really place the comment of our first Chair, but the draft that the Commission has prepared was concluded last Friday and I call it raw draft because it has not gone through the normal Process of the Commission. Prof. Okoth Ogendo's Committee has prepared a document that will then be tabled before the Plenary of the Commission to be adopted and/or fine tuned, but I would ask Prof. Ogendo to comment more on that.

**Com. Okoth Ogendo:** Chairman, the procedure of the Commission is that Committees prepare documents and the documents go to Plenary for formal endorsement and if you look at all our documents, they say, approved by the Commission at such and such a date, then they become Commission documents.

This report has now been concluded at the Committee level, it should go to Plenary for formal endorsement then it becomes a report of the Commission, that is where we are.

**Hon. William Ruto:** Okay, I don't know whether we have any other comments from our side. I want to take this opportunity to very, very sincerely thank the Commission for finding time to come and have this meeting with us. Madam Chair of the Commission has given us as Members of Parliament a challenge that we talk to our Constituents to get the cases out of Court. I believe she does not mean in any way that we sponsored those cases (*laughter*) and she also pledged that the Commission will engage the litigants, maybe to try and find an easy way out of this, so that we can remove the biggest hurdle that seems to be bogging down all of us and the country.

I am sure we are at liberty to call you in at any time to consult further on the issues that we have discussed. My Committee will take a decision on the basis of the discussion we have had and the discussions we will have as a Committee. Once again I want to say we wish you, as a Commission and you specifically as Chair of that Commission, the very best as you steer the Commission in concluding the Constitutional Review Process.

I will request you to be seated for two, three minutes, there is tea that this Committee has prepared for you and please have the tea. The members of the Press want to have a shot of our sitting, I don't know, for some reason. I think it will help in removing some of the stories that are being perpetuated in the Press to say there could be this or that.

**Meeting ended at 11.00 a.m. to pave way for the Press Briefing.**

*(Members of the Press entered the Hall).*

## PRESS BRIEFING

**Hon. William Ruto:** May I call this meeting once again to order. I will be very brief because we do intend to continue with the meeting of the Select Committee.

I want to welcome the members of the media. I want to say that on behalf of my Committee, we have had a joint meeting of the Select Committee and the Commission, we have explored, we have listened to the Committee, they have presented a Status Report on the Review Process and we have engaged in discussions on the possible way forward. My Committee will now consider the request of extension of mandate by the Commission on the basis of the report they have made and the programme they have tabled before us for the items pending for conclusion by the Commission.

We did take time to commend and congratulate the new Chair of the Commission and we confirmed to the Commission that we will assist them in the best way possible to conclude this Process. Maybe the Chairperson of the Commission will make some comments and then we can conclude this.

**Com. Abida Ali-Aroni:** Thank you, Mr. Chairman. I wish to confirm to you that this morning, the Commission has presented its Status Report of the work that the Commission was engaged in from 23<sup>rd</sup> of March to date. We have also given to the Select Committee a projection of the remaining work of the Commission that will enable the Commission to conclude this Process.

Our meeting was very cordial and I want to believe that in the meeting we were able to come up with useful and meaningful proposals. We are hoping that after today we will be able to take the Process forward. We did discuss the impediments, more specifically the outstanding Court cases and the orders emanating from those cases. It is our hope that the Select Committee will sit, deliberate and be able to assist the country to move forward in terms of the Review Process. Thank you.

**Hon. William Ruto:** Okay, so that--

**Question:** I need to find out what remains to be done?

**Com. Abida Ali-Aroni:** I think in terms of the timeframe, we have given a projection to the Select Committee and it is very difficult to project, having in mind that neither the Commission nor the Select Committee really can determine the outcome of the Court cases. I think that is the biggest problem that we have and one can begin to count days, as soon as the Court cases are either fully determined or are withdrawn. Otherwise, we have tabulated the tasks ahead of us and are hoping that we will be able to engage as soon as the injunction has been removed.

On the issue of the highlight of work pending, the Commission cannot conclude its final report for as long as the injunction is

there. We are working on the report but can only conclude once the Court determines the matter that injuncted us.

Secondly, there is the issue of Referendum, I think that is the biggest task ahead of the Review Process at the moment and the Commission in terms of the Review Act has got quite a bit to do to enable the citizens of this country be able to engage in a meaningful Referendum.

**Hon. William Ruto:** Okay, we will request you again, Ladies and Gentlemen, to give us a bit of time, we want to continue with the meeting of the Select Committee. Welcome for a cup of tea.

Meeting ended at 12.20 p.m.

