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CONSTITUTION OF KENYA REVIEW COMMISSION

(CKRC)

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**CKRC/ECK JOINT CONSULTATIVE WORKSHOP ON THE
REFERENDUM PROGRAMME,**

HELD AT LEISURE LODGE, MOMBASA

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4.06.05

CONSTITUTION OF KENYA REVIEW COMMISSION,

**CKRC/ECK Joint Consultative Workshop on Referendum Programme, Leisure Lodge, Mombasa,
held on 14th June, 2005.**

Present:

- | | | |
|--|---|----------------------------|
| 1. Mrs. Abida Ali-Aroni | - | Chairperson |
| 2. Prof. Ahmed Idha Salim | - | 1 st Vice-Chair |
| 3. Prof. H.W.O. Okoth Ogendero | - | Vice-Chair |
| 4. Prof. Wanjiku Kabira | - | Vice-Chair |
| 5. Dr. Charles Maranga Bagwasi | - | Commissioner |
| 6. Mrs. Alice Yano | - | “ |
| 7. Ms. Nancy Makokha Baraza | - | “ |
| 8. Mr. John Mutakha Kangu | - | “ |
| 9. Mr. Ahmed Issack Hassan | - | “ |
| 10. Mr. Riunga Raiji | - | “ |
| 11. Dr. Andronico O. Adede | - | “ |
| 12. Mr. Paul Musili Wambua | - | “ |
| 13. Mr. Domiziano M’ tuchokera Ratanya | - | “ |
| 14. Pastor Zablon Ayonga | - | “ |
| 15. Ms. Kavetsa Adagala | - | “ |
| 16. Mr. Ibrahim Lethome Asman | - | “ |

17. Dr. Mohamed Swazuri	-	“
18. Dr. Abdirizak Arale Nunow	-	“
19. Hon. Mrs. Phoebe Asiyu	-	“
20. Mr. Abubakar Zein Abubakar	-	“
21. Dr. Mosonik arap Korir	-	“
22. Hon. Amos Wako	-	Commissioner <i>ex officio</i>

CKRC Secretariat in Attendance:

1. Irene Masit	-	DS/CEPIC
2. Col. J.P. Gichuhi	-	DS/Mobilization
3. Pauline Nyamweya	-	DS/R&D
4. John Watibini	-	PO/Mobilization
5. Daniel Karao	-	
6. Teresa Apondi	-	PO/CEPIC
7. Kibisu Kabatesi	-	PO/CEPIC
8. Samuel Wanjohi	-	PO/CEPIC
9. Hassan Mohammed	-	PO/Mobilization
10. Fatuma Jama	-	PO/Mobilization
10. Jermiah Nyegenye	-	PO/R&D
11. Charles Oyaya	-	PO/R&D
12. Stephen Mukaindo	-	PO/Personal Assistant
13. Evans Menach	-	APO
14. Noor Awadh	-	APO
15. Leah Symekher	-	APO
16. Helen Makone	-	Human Resource
17. Patricia Mwangi	-	PO/Hansard
18. Beatrice Mwangi	-	
19. Lilian Udoto		
20. Lawrence Kasungi		
21. Richard Maranga	-	IT
22. Brian Anguba		
23. Mohamed Abdi Korio	-	
24. Samuel Bobby Anditi		
25. Joseph Mitoka	-	
26. James Nganga	-	
27. Gerald Ndwiga	-	
28. Evans Ondwari	-	
29. Shiundu Wafishino		

ECK Commissioners present:

1. E.C. Cheronu	-	Commissioner
2. J.B. Tumwa	-	“
3. S.M. Mageto	-	“
4. Sammy Manyunza	-	“
5. Frank Kwinga	-	“
6. Jeremiah Matagaro	-	“
7. Nathaniel Chebelyon	-	“
8. Edward Lopokoiyit	-	“

9. Kihara Muttu	-	“
10. Habel Nyamu	-	“
11. Rachel Mzera	-	“
12. S.B. Tunu	-	“
13. Henry Jura	-	“
14. G.K. Mukele	-	“
15. W.M. Karanja	-	“
16. Anne Wambaa	-	“
17. S.M. Kivuitu	-	“
18. Pastor M’Thambu	-	“
19. Abuya Abuya	-	“
20. Bashir Sheikh Ali	-	“

ECK Secretariat in attendance:

1. J.H. Tola
2. S. Chege
3. D. Kiiru
4. M. Lemaiyan
5. J. Keli

Observers

Jacqueline Olweya - Assistant Resident Representative, UNDP Kenya.

The Meeting was called to order at 9.15 a.m. with Commissioner Idha Salim in the Chair.

Com. Idha Salim: I think we can start this historic get-together of ECK and CKRC and I would like us to begin with short prayers and if I may ask one of us to lead us in the short prayer. Maybe Commissioner Bishop from ECK. Is he here? Could you kindly lead us in a short prayer, please? Thank you.

Com. Pastor M’Thambu, ECK: Let us pray. We thank you Heavenly Father, we give you praise, we give you glory for giving us an opportunity today, dear Lord, that we can assemble in this place, the two important organizations in this Republic of Kenya, that you bring peace, equality and stability to this country, Almighty God. There are a number of things that we need to discuss, Almighty God, we need to iron out issues, dear Lord, that will enable us to have a peaceful Nation and every one of us, my Father, to enjoy the freedom. That we need in our capacity as individuals created by You in your image to live in this world in peace. We are grateful for the peaceful travel, that every one of us is here, whole in body and mind and we commit what we are going to do today, my Father, before you that you may invigorate our minds to be able to come out with the solutions of every issue that is risen. Father, we pray for brotherliness, sisterliness and harmony in everything that we are going to do, that, Lord, we shall not sit here and come out regretting why we sat here and when we go out there, O’ God, since this responsibility

is bestowed upon us, as it is written in Matthew 5:9, “That blessed are the peacemakers for they shall be called the children of God”. We want, after all, My Father, to glorify your name because you love Kenya and you love us. Surround us with your love as we deliberate in everything. In Jesus name I pray. Amen.

Com. Idha Salim: Thank you very much. Those were very relevant, very apt prayers and we do hope, each and every one of us, that God will answer them. We are at a stage of the Review Process when we need prayers most. Thank you very much, Bishop.

Now we take the second step of getting to know one another and I think most of us know most of us, but even then, for the record and for posterity, let us please introduce oneself to the rest. Let me start with the table up here, if I could ask my colleague on my left to please tell us who he is.

Com. Okoth Ogendo: My name is Okoth Ogendo, Commissioner of CKRC and Vice Chairman.

Com. Idha Salim: Mine is Ahmed Idha Salim, Vice Chairman, CKRC.

Com. Abida Ali-Aroni: Good morning, I am Abida Ali-Aroni, Chair, CKRC.

Com. Samuel Kivuitu, ECK: I am Samuel Kivuitu, Chairman, Electoral Commission.

Jacqueline Olweya: Good morning, my names are Jacqueline Olweya, I am an Assistant Resident Representative with UNDP-Kenya.

Com. Gabriel Mukele, ECK: I am Gabriel Kwava Mukele, Vice Chairman, ECK.

Com. Idha Salim: Next, the inner circle.

Com. Samuel Manyunza, ECK: My name is Samuel Manyunza, ECK.

Com. Anne Wambaa, ECK: I am Anne Wambaa, ECK.

Com. Habel Nyamu, ECK: I am Habel Nyamu, ECK.

Com. Kihara Muttu, ECK: I am Kihara Muttu, Electoral Commission.

Com. Samson Mageto, ECK: I am Samson Mageto, ECK.

Com. Nathaniel arap Chebelyon, ECK: I am Nathaniel arap Chebelyon, ECK.

Com. Rachel Mzera, ECK: I am Rachel Mzera, ECK.

Com. Jeremiah Matagaro, ECK: I am Jeremiah Matagaro, ECK.

Com. Wangui Karanja, ECK: I am Wangui Karanja, ECK.

Com. Frank Kwinga, ECK: I am Frank Kwinga, ECK.

Com. Riunga Raiji: I am Riunga Raiji, CKRC.

Com. Ibrahim Lethome: I am Ibrahim Lethome, CKRC.

Com. Charles Maranga: I am Charles Maranga, CKRC.

Com. Ahmed Hassan: Ahmed Issack Hassan, CKRC.

Com. Abdirizak Nunow: I am Abdirizak Arale Nunow, CKRC.

Com. Edward Lopokoiyit, ECK: I am Edward Lopokoiyit, Electoral Commission of Kenya.

Com. Zablon Ayonga: I am Pastor Ayonga, CKRC.

Com. Domiziano Ratanya: I am Domiziano Mtuchekera Ratanya, CKRC.

Com. Wanjiku Kabira: I am Wanjiku Kabira, CKRC.

Com. Musili Wambua: I am Musili Wambua, CKRC.

Com. Mutakha Kangu: I am Mutakha Kangu, CKRC.

Com. J.B. Tumwa, ECK: I am Ambassador Tumwa, ECK.

Com. Abuya Abuya, ECK: I am Abuya Abuya, ECK.

Com. Kavetsa Adagala: I am Kavetsa Adagala, CKRC

Com. Henry Jura (ECK): I am Henry Jura, Electoral Commission.

Com. Bashir Sheikh Ali, (ECK): I am Bashir Sheikh Ali, ECK.

Com. Edward Cheronno (ECK): I am Edward Cheronno, ECK.

Com. Silus Tunu (ECK): I am Silus Tunu, ECK.

Com. Andronico Adede: I am Andronico Adede, CKRC.

Com. Nancy Baraza: I am Nancy Baraza, CKRC.

Com. Zein Abubakar: I am Abubakar Zein, CKRC.

Helen Makone: I am Helen Makone, CKRC.

Samuel Wanjohi: I am Samuel Wanjohi, CKRC.

M Lemaiyan: I am (?) Lemaiyan, ECK.

David Kiiru: I am David Kiiru, ECK.

Daniel Karao: I am Daniel Karao, CKRC.

Col. Gichuhi: I am Colonel Gichuhi, CKRC.

Irene Masit: I am Irene Masit, CKRC.

Hassan Mohamed: I am Hassan Mohamed, CKRC.

Fatuma Jama: I am Fatuma Jama, CKRC.

Suleiman Chege: I am Suleiman Chege, ECK.

Jemimah Keli: Jemimah Keli, ECK.

Com. Pastor M'Thambu (ECK): I am Pastor M'Thambu, ECK.

Joel Tola: I am Joel Tola, ECK.

Pauline Nyamweya: I am Pauline Nyamweya, CKRC.

Patricia Mwangi: I am Patricia Mwangi, CKRC.

Noor Awadh: I am Noor Awadh, CKRC.

Leah Symekher: I am Leah Symekher, CKRC.

Steve Mukaindo: I am Steve Mukaindo, CKRC.

Menach Evans: I am Menach Evans, CKRC.

Jeremiah Nyegenye: I am Jeremiah Nyegenye, CKRC.

Charles Oyaya: I m Charles Oyaya, CKRC.

Com. Alice Yano: I am Alice Yano, CKRC.

Com. Mosonik arap Korir: I am Mosonik arap Korir, CKRC.

Com. Idha Salim: I think everyone has introduced himself or herself and therefore, now we can begin the first Session of our meeting. Honourable Samuel Kivuitu, Chair, ECK, Mrs. Abida Ali-Aroni, Chair, CKRC, Commissioners, Ladies and Gentlemen, I want to welcome you all to this historic get together of the two Commissions. I call it historic because indeed it is, because in this very last stage of the Review Process, the two Commissions have go together in tandem to complete the Process. Each Commission has its responsibilities, but the two together complement one another and therefore, I will look

forward very much to the discussions today and tomorrow for us to chart the way forward and complete this Process that has been going on for something like 5 years, actually it is slightly over 4 years and just like our colleague the Bishop has told us in his prayers, we owe the Kenyan people this new Constitution. We owe it to ourselves, we owe it to the next generations and beyond. I do not want to make a speech, I am simply chairing this particular Session.

I do not want to waste anymore time, but as you can see from the programme, this Session is basically one in which the two Chairs, the Chair of CKRC and the Chair of ECK give us their keynote addresses. I think, that is how they were described in the paper today and I think that is a more accurate description of what they will tell us. Then the programme states namely that these are opening remarks, but without wanting further to anticipate what will be said, let me therefore ask, first Honourable Samuel Kivuitu, Chair, CKRC-- I am sorry, Chairman, ECK, to give us his address. Honourable Kivuitu. *(Laughter)*. I think we have begun already to interact and be merged. *(Laughter)*. *Mheshimiwa*.

SESSION ONE:

Chair: Commissioner Prof. A.I. Salim, First Vice-Chairperson, CKRC.

OPENING REMARKS

Hon. Samuel M. Kivuitu, Chairman, ECK.

Commissioner Abida Ali-Aroni, Chairperson, CKRC.

Hon. Samuel Kivuitu: Thank you Ambassador Salim, the Chair of the CKRC, the Vice-Chair of CKRC, both of you, the Vice-Chairman of the Electoral Commission, Jacqueline from UNDP, Commissioners from both sides, Ladies and Gentlemen. When you enter a plane to fly, these days one of the things you are told is to sit and relax. I am trying to persuade you not to write anything, because you just sit and relax. Sit and listen, because I am not going to say anything now which you need to write. I think what I will say maybe you already know, I believe you already know. It is unfortunate that the newspapers gave us a new responsibility, because according to the programme we were to make opening remarks and not a keynote speech, there is a big difference.

You people in CKRC have been trying hard, you have been able to produce a Constitution, it does not matter who hates it or loves it, what is important is that you did it by consultation and I think that is a big achievement. We Kenyans owe you a lot gratitude and we should show it rather than revile you whenever something happens as if you are the ones who called the people who came before you, or the people you went around seeing and talking to. I was recently in Kiev and I met an American lawyer and he told me that it took 13 years for the Americans to have their Constitution. They never tell us, so that one was in private, 13 years for them to have a Constitution. I do not think we have done 13, I do not know, if we have it is

very close to that, or if we have gone beyond it is not very far. So, we are trying, because sometimes when we are doing things we try and compare ourselves with the West and with the white man and then we feel like we are inferior and one of the areas where my teachers – I now blame them, but they were very nice people, otherwise I would not be speaking before you, without their assistance - they made us believe that it was a great achievement for the white man to come to Africa, but he had to travel all the way - but when you imagine we also came to Africa, we were not born in Africa, we also came from outside but we never remember that, nobody reminds us that. Not only that, we actually walked, we did not even use a ship or boat, we walked across all the way and you know Shaka the Zulu, where he reached, he actually would have gone further if there was no ocean, he was intending to go on then he was stopped by the ocean. So, Africans have achieved a lot, that was an achievement. When you are comparing the white man, compare also with yours, I think we have done a lot.

Now, having said so, I have no written speech for this particular Session, I have a written speech for the other Session which will be distributed this afternoon, but I thought I should say a few things which, to me and my Commission, feel that they are very important for us. In the past we have had an unhappy relationship and we should not deny it, because denial is one of the grounds on which further dissent, you know, nourishes or flourishes and you know the background, our grudge being that we were not allowed to make our contribution as delegates during the Conference when we had a role to play. There developed quite a nasty feeling among the Electoral Commissioners, an aversion for anything CKRC. That is something which could easily hinder our work, it is something which we should work very hard to remove because it is of no good.

Despite that, we have achieved something little. At least when Judge William Mbaya was alive, jointly with his team and your team, you were able to produce some Draft Referendum Regulations, maybe they were based on previous Drafts, but at least you were able to discuss and come out with a Draft. Now, that is an achievement and a big one. We have also been able to hold another meeting with you previously and, if I remember very well, it was a very amicable meeting. So, it is not that we cannot work together, we can work together and we in the Commission, one area where we are very sensitive is to be associated with any politician, whether he is a Minister or what. That is an area where, when we see closeness between any group with any politician we start shying away, simply because our job is full of polemics and *fitina* and we do not want to get involved. So, it is very important that we forget the past and we seek understanding among ourselves. I think by exchanging views here and our experience about the perspectives for the future expectations, if we do so and we continue to do so in future, we will be able to break that barrier. I do not think it is a big barrier, I have a lot of friends among you, I have no enemy among you unless he is hiding or she is hiding. For all I know, I have go a lot of friends among you and I think we can work together.

I think all we need is to recognize our role and how they mutually meet. The making of the Constitution through Referendum is, as you know, the apex of freedom. I will quote a well known political – was he a scientist or philosopher – I do not know the difference, although I almost did political science at the University. Thomas Paine, who is known by most of you, once said in his book, “The Rights of Man”, one of the oldest books on political science. He said, “A Constitution is a thing antecedent to a

Government and a Government is only the creature of a Constitution” and then he says, “A Constitution is not the act of a Government, but of the people constituting Government. A Government without a Constitution is power without a right”. Placing the making of the Constitution in the hands of the people and the only way we can refer to the people directly is a Referendum. So, a Referendum is very important, as you all know that very well and for us to quarrel when we are involved in such an important document, I think it will not be fair to this country. We all know Kenya needs a new Constitution, there are a few people who, I do not know, I think they are a minority who do not want a new Constitution and they are there and they cannot cheat. We know them. at least a few have come out to show they do not want a new Constitution, or they want a Constitution which suits them.

The Constitution making in this country, the history is best know by you, but it has been torturous as you know and we are now beginning to see some little light at the end. I think it would be very good for us, a very big contribution to this country, if we work together and be able to reach that goal. Let us play the part which is left for us, let others fail but not us. If there is any failing let nobody say it is because the CKRC or ECK did not do their job, we just do our job and this is the belief in the Commission. In the Electoral Commission we simply say, “let us play our part”, if it is election, lay the ground and ensure everything is there, what they do when they come there is their business. If they elect a dog it is their business, I mean, they have selected a dog, it is not our mistake, you cannot blame us for a dog being elected. So, it is the same with us, let us lay the grounds jointly, boldly and let whatever comes out come out and the only ground we have is the Constitution is here, *wananchi*, do you want it or you do not want it? My worry is, when shall we get that Constitution. At the moment there is only one new Constitution, one proposed new Constitution and until (?) that is the one we are talking about.

We in the Commission, or at least me and I am sure the majority of my Commissioners or all of them, I expect from this gathering, we expect that we will be able to understand our respective roles. We also expect to understand the different way we work, the *modus operandi*, because we operate in different ways. We rarely hold workshops and seminars, but we hold a lot of meetings with stakeholders. We do not like workshops, because when you do this you are asked for allowances by the participants and they are the ones gaining. We were even asked for allowance by Members of Parliament when we held a meeting for many other people to discuss the best electoral system for Kenya and so, we prefer to hold meetings, we call them meetings. We call politicians and we tell them there is a meeting, we never call it a conference and set our *modus operandi* and we come and talk with them and then we give them food and we go, nobody asks for anything. So, that is one way we conduct our consultation.

There are many areas where we differ with you. If you ask me, you are a little bit sophisticated for us, in the way you work. We are a little bit down to earth in relation to the natives and so, you will forgive us, but that is our *modus operandi* and we are not going to change. We found it working very well with the *wananchi* and we will continue. There is a lot we will learn from you, maybe there is a lot you will learn from us, because in the area of Civic Education I think you are superb, you are far much ahead of us. We are hindered basically by finance, if we had finances we would have done better. If it was not because of

UNDP and when I saw UNDP here I felt very happy, although I also saw it somewhere else and we are not getting on well over there. (*Laughter*). Because we have done quite a number of projects with UNDP on Voter Education, very successful programmes with them. Their initial ideas, if they had been followed up by Government, even Civic Education, Voter Education would be so easy now, we would have reached everywhere but we were let down by donors, they wanted to do an example and then the rest can pick from there. They did the example and nobody else picked from there.

So, we should understand one another in that way. Then, we expect to create closer cooperation as we go on in our work. We expect that where we differ in opinions we should understand why we are differing and if possible, we should create a mechanism through which we can sort out any differences which might wreak or might in any way affect our mutual relationship, so that we can move forward in unison. In the Commission we do not like public debate on issues, particularly issues relating to the work. We are not afraid of it, but because of the way it is twisted by the Press, is that making a statement? We make a very honest and, you know, useful statement and the next thing you see is the Press is putting certain figures and other things, things we never said. The Press is our friend, we are very close to the Media and they know it, we appreciate that without the Media we would not be anywhere and I have always told them that our Media here compares very well with the Media in very advanced countries...

Tape 2

I have just come from Mali and previously I was in Kiev, but those countries can never match our Media and I have been to many parts of Africa and I know we have a very good Media, but I think it is their training and you know, once you are trained as a surgeon even when somebody tells you, "this eye is painful", you want to remove the eye because you are a surgeon, but a physician will treat the eye with some medicine. So, maybe their training is to twist things and I can understand, because if they are twisted the paper will find more buyers and therefore, they will get richer. So, we avoid that as much as possible, so matters which we discuss with you, we will be very happy if we limit the amount go public debate about them, unless it is a matter which is very straightforward.

The Referendum will certainly require very good planning and that we are capable of, I have no doubt about that. I think our experience with elections is enough for a Referendum. There is very little I can see which is going to be in our way, whatever there is we are still looking at, but I think, we will be able to do-- But we will have to do a lot of planning and I think I will be pleading with my fellow Commissioners that we should accept you as partners even in the planning, so that we can share and be able to move forward, because even when we are planning we seek Civil Society's ideas, we seek the Political Parties ideas, we seek ideas from Religious Organizations. I cannot see how we can fail to be with you, to consult you on these matters when we in the law are supposed to work towards a successful Referendum. In the end I expect, or we expect, that you will not be very energized, you will all come out from here feeling that you want to go, you know, it is going to be very difficult for Honourable Wako to block us when we start moving out now and I notice he is here. We welcome you, Honourable Wako, to the meeting, the Attorney General. We may not know who is Honourable Wako, he is the Attorney General, these days he is a

little bit blanked. (*Laughter*).

Finally, our approach will be that, let us be very candid. Let us not try to hide and let us be very candid, let us be very fair in the discussions, let us be focused on what we are discussing. Let us be objective and let us be constructive. If, in our view, we put ourselves within those parameters, we think we will be able to come out with helpful ideas. We will be able to move forward and that will be very good for our country. I am not going to be with you on 15th, in the afternoon, I have to leave in the late morning because I am attending another meeting with some people who might join UNDP as donors - although I understand that term is no longer good - development partners or democracy partners, but I hope in the end, when we get the results, we will feel energized to move forward. Tomorrow I will be able to expound a little bit on the law, not that I know any law, but it is there, it is written in that thing and when I was in the University many years ago, I was taught how to read a Statute and I think I have read it carefully. I will be able to say something about the law tomorrow and that is written, you will get the paper this afternoon.

Thank you very much for listening to me and I hope you listened and relaxed and you did not have to write anything. Thank you.

(*Clapping*).

Com. Idha Salim: Thank you very much, Chairperson, ECK. I would like to formally add my own welcome to the Attorney General, Amos Wako, who has just joined us, but he has joined us not as the Attorney General but as a CKRC Commissioner. You are most welcome.

Next, I would like to introduce the Chair of CKRC, Mrs. Abida Ali-Aroni, to give us her address. I hesitate to call it a keynote address, but *karibu*, Chair.

Com. Abida Ali-Aroni: Thank you, Salim. Senior colleague, Chairman, Electoral Commission, Honourable Samuel Kivuitu, Commissioner Wako, Distinguished Commissioners, Electoral Commission, fellow Commissioners, CKRC, UNDP representative, Jacqueline, staff of the two Commission, Ladies and Gentlemen.

After the reassuring and thought provoking speech by Senior Colleague Kivuitu, I am left to wonder whether I have anything useful to add, but you will allow me to say a few words. On behalf of the Review Commission I am pleased to welcome all of you to this workshop. I also wish to take this opportunity to thank UNDP and particularly Jacqueline, for coming to our aid at such short notice. Hardly a week ago we were not sure that this meeting would take place, because I think both Commissions are not well off at this time of the year and I should say that Jacqueline was very kind to accept and consider our proposal to UNDP. We appreciate your continued support. The Review Commission has had a long desire to have this workshop with the

Electoral Commission, but as you all know, due to various exigencies, this was not possible at an earlier time. We are glad that it is taking place this morning and for the next few days.

As you are all aware, our two Commissions formed a sub-committee that engaged severally and came up with the idea of this particular workshop whose objective is, 1) to discuss the mandate of the two Commissions as contained in the Amendment Law, 204, to discuss the existing law and agree on the way forward in terms of the law, to deliberate on rules and regulations for the Referendum, to discuss areas of mutual interest and cooperation, especially in regard to Civic and Voter Education and to discuss the mobilization of the people and the necessary logistics for the referendum. As a Review Commission we expect that this meeting will help the two Commissions to strike the cord for working together as a team in this most important exercise. I will, later on in my presentation, consider approaches to teamwork building, but I would like at this stage to urge all of us to spend the next few days in frank and open discussions, so that a common approach to Referendum issues might find favour in our two Commissions. This commonality of approach will become the foundational stone upon which our interactions in the coming months will be built on.

The road to Constitutional making has not been a very easy one, as we all know, it is one that has cost lives, time, resources and opportunities. Therefore, the Referendum to be facilitated in the next few months is a historic event of tremendous importance to our nation. It is a fulfillment of a dream that our people have held for many years and in which they have borne a dauntless struggle. We must make sure that the Referendum succeeds, so that we may bring honour and peace to those of us who have fallen along the way of the struggle, so that we might inspire the lives of the present generation and so that we might bequeath those after us a legacy of prosperity and a nation at peace with itself. I, therefore, urge all of us here today, to recognize the privilege in which we stand, the gravity of the issues that we are dealing with and to be inspired by this privilege and honour bestowed upon us.

Ladies and Gentlemen, in discussing the legal framework for the Referendum, there may be wisdom in the two Commissions considering some important themes in the process, some of which have received the attention of the Review Commission in recent deliberations. I would wish to share some of the themes with you this morning. 1), the wholeness of the Referendum Process. The Process is an integrated whole and although each of the Commissions may have distinct roles to perform, these roles should be performed harmoniously and complementary, rather than in competition with each other. It would be necessary for the two Commissions to work as a seamless team and to synergies the activities. Frequent and structured consultations between the two Commissions should be put in place to address the common challenges of the Process.

At this juncture, I wish to reassure our colleagues, our brothers and sisters at the Electoral Commission, of our utmost respect and regard towards them. We may have failed to exhibit this in the course of the Process, however, this has been our position nonetheless. Secondly, I would wish to refer to the limitations, if any, of the existing law. One cannot but appreciate that the existing law covering the last process of the Review is far from perfect. At the Review Commission and after length discussions,

we have resolved to move the Process forward by taking advantage of the opportunities created by the set law and to meander. Using the words of Professor Okoth Ogendo, “to meander through the shortcoming, if any, to enable our country achieve this long awaited Constitution”. Proposals for substantial legal changes are likely to introduce controversy in the remaining phase of the Process and needless to say, we may prolong it even further. We have considered the political mood and as much as the Constitution Making is a political process, cognizance should be taken of the fact that the country is moving forward and we may need to take advantage of the current political mood and goodwill by making preparations that will move the Process forward.

The other issue that is important is the time factor and we do realize that there are a number of activities that must be executed within a very short span. The two Commissions should utilize, in my view, the available time in laying strategies that would enable us efficiently and professionally perform our respective mandate. I propose that a time specific action plan to deal with the outstanding issues between the two Commissions should be adopted and followed to the letter.

Ladies and Gentlemen, in my considered opinion, our two Commissions need to work as a team in order to discharge the national duty ahead of us. We have no choice. Let us forgive each other for any past mistakes, omissions or Commissions. Let us together, consider the best possible way to discharge our respective mandate, let us assist each other by consulting and advising each other where necessary. Let us complement each other where we can, let us not blame, accuse or focus on weaknesses. It is my humble view as well, that together we must see how, 1), we can have a frame of mind and heart that seeks to put the national interest above all others. 2), seek solutions based on mutual agreement. 3), build a relationship based on mutual trust. Our engagement at the moment is based on law or no trust at all. Let us build a relationship of mutual trust and respect. Let us build confidence in each other, cooperate rather than appear to be in competition with one another. Let us seek the totality rather than the dichotomy of things. Let us remember that the alternative that arises from consultations is the better and higher alternative.

Colleagues, this workshop and the entire Constitutional Process, is part of the tremendous learning opportunity that we who have been part of the Review Process have had. It is in this spirit that the challenges that will confront the two Commissions in their respective responsibilities, should be taken. This Referendum is the first for our country and the two Commissions should seek to set a legacy for the future. To set this legacy we must be courageous, patriotic and faithful in discharging our respective tasks.

Thank you, Ladies and Gentlemen, and I wish you a successful deliberation and have a good day.

(Clapping).

Com. Idha Salim: Thank you very much, Abida, and I think, the important conclusion to draw from the two addresses is that

the two Commissions are very much for working together. It is most encouraging and we really look forward to the discussions that will follow this particular Session and even more so, looking forward to the last Session of the way forward, which I am sure, will come up with very strong recommendations for working as a team.

Now, I would like to finish this particular Session. I would like to introduce to you, to give a few words, Jacqueline Olweyo, sitting at this table next to the Chair of ECK. As you have heard from both speeches of the two Chairs, UNDP, for whom she is the Deputy Resident Representative, have been very good friends of the two Commissions. I can only speak more out of knowledge for ECK and more so, even parochially, for CEPIC, within the CKRC and say that UNDP have been a very, very good friend of the Process from the beginning. If you like, they have so far been one of the unsung hero's of the Process. They have given us a tremendous amount of support, financial as well as in terms of equipment. The Conference, for one, at Bomas was largely, in terms of communication, assisted by UNDP. So, I think I would like to ask her to greet us and say a few words to us. Jacqueline.

Jacqueline Olweya: Thank you, Chair. The Chairperson of the Electoral Commission of Kenya, Honourable Samuel Kivuitu, the Chairperson of CKRC, Mrs. Abida Ali-Aroni, the Attorney General of the Republic of Kenya, Honourable Amos Wako, Distinguished Commissioners, Ladies and Gentlemen.

Indeed, it is my great pleasure to be with you here today, but more so, to convey the commitment of UNDP to this Process. UNDP recognizes the critical role that your two respective institutions have to play in this country. UNDP also recognizes the mammoth task and the challenges that lie ahead of you in your respective institutions as you try to support the development process in this country. We do also recognize the complementary nature of your respective mandates, more so as you endeavor to provide a new Constitution to this country. It is in view of this recognition that UNDP is committed to provide support to your respective institutions in your respective mandates, but also to support you in this joint endeavor as you work toward finalizing the long journey for giving this country a new Constitution.

We appreciate the recognition that you have given to us in terms of the support that we do continue to provide to you and it is in view of that, that at a very short notice we were able to provide support to this particular workshop. The reason that I am actually here is to try and pick up from your discussions some of the possible areas in which UNDP can continue to support you. I hope that I will be able to get time in the course of the day, since I will be leaving by the end of the day, to discuss with the two Commissions, that is the Electoral Commission of Kenya as well as CKRC, on the possible support that UNDP can offer to your institutions individually, but also to your institutions in a complementary manner, in the Process that you have just initiated today. I hope that maybe over lunch or at a particular time, so that I do not in any way, interfere with the programme that you have ahead of you. If the Chairpersons could kindly give me some of your officers that I could possibly discuss with, then when I go back to the office I can come up with a comprehensive project, which again, we will share with yourselves for your input, on UNDPs support. I wish you all the best in your deliberations and in the huge task that you have ahead of you.

Thank you.

(Clapping).

Com. Idha Salim: Thank you very much, Jacqueline, and also for the offer to help us in this very, very last stage of our work. And with that, we finish this particular Session and I now invite you for a cup of coffee or tea just outside this hall. Thank you. We have just a quarter of an hour for the tea and coffee.

The Meeting broke for tea at 10.15 a.m.

Tape 3

The Meeting resumed after tea break at 10.30 a.m.

SESSION TWO.

Chair: *Commissioner Habel Nyamu, ECK*

Background to the Referendum

- **Overview of the history of the Referendum in the Constitutional Review Process.**

Commissioner Prof. H.W.O. Okoth Ogendo, Vice-Chairperson, CKRC.

Com. Habel Nyamu, (ECK): Attention, attention! I do not want to be blamed for lateness between now and the end of the day. We are already 15 minutes late and I want to open the second Session.

We are supposed to listen to the background of the Referendum. It is going to be based on an Overview of the history of the Referendum in the Constitutional Review Process. My disappointment is that Professor Okoth Ogendo, is going to only talk about the overview. My education tells me there is under view, middle view and then we come to the overview. *(Laughter)*. So, I am going to ask the Professor to try and attempt and endeavour to say something about the under view, middle view and then come to the overview, because a lot of us have not come across this work in our schooling. So, Professor, you are welcome to tackle the three suggested approaches. Thank you.

Com. Okoth Ogendo: Thank you very much, Habel. I am never very good at undressing things. *(Laughter)*. Therefore, when Habel is asking me to talk about under and over and middle, *(Laughter)* the graphic presentation is a little overwhelming,

but I will see how far I can get.

About one and a half years ago, at a venue not very far from here, the CKRC organized a workshop on the Referendum, at a time when we were not even certain that there would be a Referendum. At that meeting it was my privilege to address the workshop on the Referendum as an instrument of decision making and arising from the state of the law at the time, there was of course, uncertainty as to whether we would have a Referendum at all, but it was important for us, as Commissioners, to understand what a Referendum is, its nature, its function and its consequences. On that occasion I noted that a Referendum is a procedure through which citizens consciously accept or reject changes from one instrument of governance to another through the process of voting. The voting, however, is usually in terms of a very simple choice, a choice between a yes vote or a no vote and of course, it is not my concern at this stage to indicate whether or not that kind of simple choice - or you might even say simplistic choice - truly give you the views of the people.

But, Referenda as instruments of decision-making have always been hailed as a form of direct democracy, because the Referendum allows citizens to express their opinion on what clearly is a critical national issues and that is on change of a Constitutional structure, or instrument of governance. Philosophically, it is always presumed that participation by citizens on all matters of governance would reveal the general will of the people and therefore, it is important as a process for the consolidation of democracy and therefore, that the Referendum is an important instrument of determining or effecting that will. But, we want to understand that although the Referendum is unique and it is important and although the use of the Referenda has been growing in recent times, the Referendum as an instrument of direct democracy is not a common occurrence, expect perhaps in countries like Switzerland, where the Referendum is held very often. In most other countries the Referendum is a selective exercise, I have looked at the more than 230 Constitutions that are in existence today and I can tell you, that in no more than 30 countries have Referenda been held. We know of some of the older democracies that insisted on Referenda, like France, Denmark, Ireland and more recently Rwanda. Uganda has had some kind of Referendum and Zimbabwe, but generally, the Referendum always occurs in very special circumstances. It is usually called for where there is fundamental change, or where there are issues which cut across the political and cultural divide, or where broad citizen agreement is required for purposes of legitimacy.

The vast majority of existing Constitutions, however, draw their legitimacy from diverse meta-Constitutional principles and not just from the Referendum and those principles include enactment in accordance with the rules of change specified in existing Constitutions, the peaceful revolution if you like, which also is very rare. A vast majority of Constitutions draw their legitimacy from revolutionary action and in Africa, such action has included coups and insurrections leading to the overthrow of civilian authority and in some cases, Constitutions have drawn their legitimacy from imposition by a foreign power. The present German basic law was an imposition, as is the current Japanese Constitution. The question, of course, that one must wonder is whether a one day exercise, which is what a Referendum will involve, can really confer legitimacy for all time for such a fundamental process as Constitution making. When I spoke one and a half years ago, I cautioned and I want to repeat now, that a

Referendum, if not well managed, could be counter productive. Apart from the Referendum being an expensive exercise, the frequent use of Referenda can have consequences that are counter productive to the process of democracy, because what it might do is to undermine institutions of representative governance, for example, we operate under the theory that Parliament is the representative of the people, if you have to go beyond Parliament back to the people, it might indicate that our own faith in those representative institutions is less than satisfactory.

You can also invite a situation where the Referendum leads to majoritarian dictatorship. If you subjected a minority issue to a Referendum you might end up with a situation where the majority dictate what ought to happen. It can also lead to protracted disputes as to the consequences that arise from a Referendum. Therefore, there is real danger that the Referendum needs to be very carefully conducted and when to go for a Referendum becomes a very special matter for consideration. There may also be questions of the legality of the process itself, or even its Constitutionality. There are circumstances, as we have observed, most recently in France and in the Netherlands, that when people go to vote for the Referendum, the result may be heavily influenced by irrelevant factors, rather than on the Constitutional question that is put before the people. What happens on polling day may be more important than the merits or the substantive merits of the issue that people are voting for, because a Referendum sometimes tends to be a verdict on the performance of the Government of the day and on the day that the vote is taken voters may choose yes or no to a new Constitution, not on the merits of the Constitution itself, but depending on the side that the Government favours or does not favour. They may also vote as a sign of approval or disapproval, on the performance of the Government or its role in the Constitution Making Process. In other words, when people go to the Referendum, it may be simply an occasion for the public to vent their feelings, or their anger, or their likes and dislikes of the regime that is in existence at the time, rather than making rational choices of the substance of what is before them.

But, those were views, which I gave at a time when we were not clear that the Referendum would come to pass in this country. That is no longer the case today, thanks you might say, to the ruling in the Timothy Njoya case, the Referendum has now become inevitable. When this case came out, some of you may be aware that I argued strongly that that judgement was probably unnecessary and in some cases, as questions of jurisprudential principle was wrong. That stage has now been superseded by the fact that we do have an Act of Parliament, number 9 of 2004 that purports to incorporate the basic principle of Referendum as part of a Constitution Making Process. Therefore, today when discussing the Referendum as a device of Constitution Making, we have to look at that legislation and ask ourselves whether it provides an adequate instrument for the purposes for which it was enacted, which is to permit the people to put their imprimatur on the Constitution Making Process as the final stage, the constitutive stage of decision making in this very long drawn out exercise.

I am not, myself, going to discuss the merits of that legislation, I think by the time we finish this workshop we will have explored all those particular questions. I only want to remind you that that device, the device which is now in Act number 9 of 2004, was considered. It is not as if Ringera suddenly reminded Parliament that the Referendum was an important issue, it was considered, Parliament at various points considered it and if you look at the history of Cap.3(A), now you see the Referendum, now you

don't, depending on the different sides that were taken in the, perhaps, never ending battle over control of the Constitution Making Process and I have had occasion to talk about the cycles of control and the demands for control, not merely of the Process, but of the Commission, of its outcome, of its consequences and the Referendum was one way in which Wanjiku kept coming in and out of the Process. The original Review Act, as you remember, number 13 of 1997, did not provide for a Referendum and that Act, as you also will remember, received the remarkable feat of being amended even before it came into operation. But, now we now that in Kenya, amending legislation before it comes into operation is not that unusual, it has happened many other times before. It shows you, perhaps, the kind of philosophical confusion, which our Legislative arm of Government occasionally – no, not occasionally – often undergoes.

Although the legislation was assented to in November of '97, the operation of that legislation did not commence until a year later in December '98, but that was after widespread concerns that the Constitutional Review Process, which was envisaged under the original Act, would be greatly controlled by the Executive arm of Government and at that time, the debate was that it was necessary to free the Constitution Making Process from the Executive so that it could be truly people driven and people driven at large and also through their representatives in Parliament. The legislation, therefore, went through a number of other amendments, one of them was number 6 of 1998. That legislation, that amendment of '98 provided for important decisions of what was then being called the national forum, to be arrived at by a two-thirds majority of the members where there was no unanimity and then the Chairperson of the Commission was to forward the Draft Bill as adopted by the forum, to the Attorney General for introduction into the National Assembly. It remained unclear in what form and under what procedure the National Assembly was expected to dispose of the Draft Bill, but Parliament was conceived of, or conceptualized as the final decision maker in terms of the enactment of a new Constitution.

In 2000, the Referendum made its first appearance under the Constitution of Kenya Review Amendment Act of that year, number 5, and a new Section 28 now provided that after, what was now renamed the National Conference as opposed to the forum, had met, the Commission would consider the Draft Bill as adopted by the Conference and on the basis of the Draft Bill, finalize its report and the Draft Bill itself. This particular amendment gave the Commission the discretion to decide whether to submit the Draft Bill directly to the Attorney General, or to take that Draft Bill to the people of Kenya for decision at the Referendum. There was no guidance as to the conditions under which the Commission would decide to go to the Attorney General or go to the people. The Act merely placed that very onerous burden at the discretion of the Commission. An approval of the Draft Bill at the Referendum, or indeed, rejection of the Draft Bill at the Referendum did not, under that legislation, kill or necessarily give final legitimacy to the Bill. After that Referendum, the Commission still had to take that Bill to the Attorney General and submit it to the National Assembly.

Now, in many other countries, if you look at the Constitution of Malawi for example, what it provides is that, if a matter is taken to a Referendum and the Referendum votes affirmatively on it, it goes back to the National Assembly, but the National Assembly must pass it. That is what the Malawi Constitution says. If the Referendum says no and it goes to the National

Assembly, the National Assembly must reject it. We did not have that happy situation where the Legislative process had clarity on that matter. Now, the amendment of 2001, number 2 of 2001, is the one that provided that any question on a proposal for inclusion in the Constitution, needed to be carried by at least two thirds of the members of the National Conference. If the proposal was not supported by a two thirds vote, but was not opposed by one third or more of all the members of the Conference, then a further vote could be taken and in that further vote, it was provided that the members of the Assembly could agree on whether or not – again, by another two thirds majority – to send the matter to a Referendum and it would only indicate here that when the Conference was over, not a single issue was referred to a Referendum. In other words, in terms of the voting, two thirds, present and voting, all aspects of the Draft Bill were approved by the National Conference and it is at that point, that the Ringera judgment came like a ton of bricks on the Constitution Making Process, before the Commission was able to submit the Bill to the Attorney General.

Now, the common denominator of all the provisions relating to the Referendum in the various amendments of the Act that were looked at, was that they provided for an optional non-binding Referendum, all the provisions of the Referendum were predicated on the understanding that the Constitutional Review Process could not bring a new Constitutional dispensation, otherwise through the instrumentality of Parliament and Parliament had always assumed that it could bring in a new Constitution by virtue of the amending power in Section 47 and I have noted before, that many other countries in the Commonwealth have brought in whole new Constitutions using provisions that are similar to Section 47. The Ringera judgment or the Njoya judgment challenges that position by saying, (A), that the people of Kenya have a collective right to make a new Constitution and that Parliament cannot bring in a new Constitution merely by amending the existing Constitution.

Now, the most, perhaps, significant difficulty occasioned by that ruling, is that it displaces the basic premise on which the Review Act was predicated, which was that we could have a new Constitution by using the rules of change that are in the current Constitution. Now, it is that judgment which has gone into the drafting of Act number 9 of 2004, which is sometimes called the Consensus Act. My caution is that reading that legislation together with the judgment, one must still go back to the following jurisprudential position. Number one, that a new Constitution – a legitimate new Constitution – to come into effect otherwise than through a revolution and I am talking about revolution in terms of a complete break with the existing Constitutional order. A new Constitution will require, or rather, should draw its legitimacy from the present Constitutional order, the Referendum legislation then would define the conditions under which that Constitutional order that permits a Referendum, is implemented and that there would be infrastructure for that particular purpose.

What we have at the moment, therefore, is a situation where we are preparing for a Referendum, with what the court says is an important and fundamental last stage in the Constitution Making Process, without a clear and logical link with the provisions of the present Constitution. The questions that we will need to ask at this meeting, is whether we can indeed, produce a legitimate Constitution. We can produce a Constitution but whether we can produce a legitimate Constitution without a clear and necessary link with the current Constitutional order. But that, perhaps, is an issue which we cannot resolve at this particular

meeting, it is perfectly possible and in the language of politics - if I might offer you an olive branch on this one - if we were to proceed with the Referendum and conclude it in circumstances where it is clear to everybody that the current Constitution has no link with the process that we are indicating, then we might say that what we are now engaged in, is a truly revolutionary process. The problem will be that at the end of the day when the President says that the people have enacted a new Constitution and he is holding the new Constitution with the right hand and the old Constitution in the left, will he have the courage to throw the old Constitution in the dustbin and will the people accept it? That is the olive branch that I am throwing to everybody, that clearly, if we do not make that necessary link, then let us understand that we are involved in a truly revolutionary course of action for this country.

Tape 4

The success of the Referendum will require close attention to a number of things, most of them are logistic. Clearly, I have talked about the unassailable Constitutional and Legislative framework, finances we will discuss, the way in which the questions will be framed, we will (?) and the question of Civic Education for the Referendum. There will be a period of campaigns involving issues of eligibility to vote, voter registration, personnel etc, which the Electoral Commission, I believe, will address.

Finally, if the Referendum is to be successful and I am suggesting to you as a lawyer, that the course of action we are on now, the path we are on now is a revolutionary path, it is a path of discontinuity with the current Constitution unless we change the law to make that connection. The people must see the need for the process, they must believe that the process has integrity and that process itself must lead truly to legitimacy that lies, not in the current Constitution, but legitimacy that comes from broad acceptance by the people themselves. That, to me, is the only way in which I am able, in my own mind, to meander through the law. Thank you very much, Ladies and Gentlemen.

(Clapping).

Com. Habel Nyamu, (ECK): Thank you very much, Professor. I think, as you said at the beginning, this may well be an overview to the Referendum, as far as the Professor is concerned. To many of us in the ECK, it is a very deep affair, because we have never concerned ourselves with that area of our study.

Thank you very much, Professor, for your good paper. We are now at 11.00 a.m. some of us who went to school and went through allowed the school also to go through us, which means we should - as far as I am Chairing this - stop and allow the next Session and forego the Plenary discussion. Unless I am moderated by the Chair on my right to disregard that rule, I am tempted to stop there and allow the next Session to continue because school went through me. *(Laughter).*

(Consultations between Com. Habel Nyamu and the Chairperson, CKRC, Com. Abida Ali-Aroni).

Com. Habel Nyamu, (ECK): I am advised by the Chair of CKRC that because the paper may be deeper than a lot of us expected, people are free to seek clarification for a few minutes before the next Session. So, clarification, Ambassador.

Com. J.B. Tumwa, (ECK): Yes. Professor, you talked about revolutionary action, my simple question is, can we legalize that revolutionary action so that we have an acceptable Referendum?

Com. Habel Nyamu, (ECK): Before the Professor answers, what Professor talked about is law. If you talk to a geographer like me, there was a term called uncontinuity, which was more friendlier. Uncontinuity is this layer of rocks divided by a different layer and another one and they continue to grow together, but yours is discontinuity, which is a very dangerous thing. Professor.

Com. Okoth Ogendo: This is something that has been in public debate for a very long time. Why are we taking a route where many lawyers – I want to say many, I was going to say most, but I want to say many lawyers – believe that without a link to the current instrument, we are on a course that is open to challenge and just as the Ringera ruling challenged the assumption that Section 47 can produce a new Constitution, it is very, very likely that this particular course of action can be fundamentally challenged in the courts and indeed, there are numerous cases now in court challenging this process precisely on that point and I have said before, that there are very, very simple ways of sealing that loophole. One, is to entrench the entire process in the Constitution so it becomes a Constitutional Process. The other is to enact the Consensus Bill as a Constitutional Amendment, what Parliament would be doing is amending the Constitution, but to say that a Referendum is fundamental and then to say that there will be a process for that Referendum, so that the old Constitution produces the new Constitution.

But I have also said, I am defining revolution as change which violates the rules of change in the present Constitutional order and my view, as many of my colleagues know, is that this particular course of action will lead to change that violates the rules of change in the present Constitution in the present Constitution and therefore, ultimately it is a revolutionary act and being a revolutionary act will depend ultimately on whether or not there are challenges and so on and if you read the Ringera judgment, Ringera is implying that Act number 5 of 1969, which is the basis of the current Constitution, was itself a violation of the existing Constitution. But then Ringera says that nobody challenged it and we have accepted it and therefore, we have a Constitution based on what was probably an un-Constitutional Act. The question is, is it politically prudent for us to correct that mistake? Or should we proceed and hope that at the end of the day, whatever new document we have, will be accepted as the Constitution of Kenya and that the current Constitution will die a natural death through disuse.

As we consider that, let us remember what at least one country in Africa has gone through, which is Paul Biya's country, Cameroon. They are technically operating under two different Constitutions and if Biya does not like the old Constitution he uses the new one. I do not think we want to be in that kind of untidy situation, but as I say, and I think my colleagues will hear me say this for the first time, we can proceed along this revolutionary path and face the test later. The battle with the courts, the battle with the people. Thank you.

Com. Kavetsa Adagala: Thank you. It is always good to listen to Professor with the depth of thinking, maybe we will have to read the paper. We have been talking about a paradigm shift, which is the same as that revolutionary, well, to me it is the same, I do not know if too you it is the same, but there is a paradigm shift. A revolution in the thinking and going from one level to another, or even from one situation to another, which would be completely different. I do not know how you do it in legal terms and I think that is what you were referencing on.

This term, 'meandering through the law', it is very poetic, as a literature person I am drawn to it. It is in poetry, we do that, but I do not know what it means in terms of law. Today it has been said two times, it has been said a couple of other times in other fora, what does it mean? 'Meandering through the law'. What are the implications, let me say that, not what does it mean. What are the implications?

Com. Okoth Ogendo: You know, eventually the political process will determine where the loopholes are, where the exits are and how to close it. I think as technicians, as people who are supposed to move the process forward, I think 'meandering through' is saying, the politicians are telling you, this is the law make the best out of it, and if you cannot make the best out of it, we tell the politicians, we cannot make the best out of it, if you think you can, then you have to find the best way of doing with a bad thing, if you like and I think, we are in a situation where the politicians are not likely to listen to us and therefore, as people with the obligation to move this particular process forward, we may have to arm ourselves with the ability. Shall I say meander or muddle through? Whatever. (*Laughter*).

Com. Habel Nyamu, (ECK): I would like to allow two ECK clarifications in the form of questions, to CKRC and then we break there. We have already had one on each side. ECK, ECK, that is two, Kangu and Hassan from the other side. Those four and then we close. all right, yes, Lopokoiyit.

Com. Edward Lopokoiyit, (ECK): Thank you, Mr. Chairman and thank you, Professor. When Professor talks of revolution in Africa, it tends to worry other people's minds, but you say it is a revolution of mind.

What I wanted to find out is, what are the strengths and the weaknesses in law, of the process we are undertaking called Referendum and when you talk about the meandering, or any other language, trying to reach the end, trying to jump over the big river, or something like that. Which direction in law do you think the process can survive through or go across to the other end?
Thank you.

Com. Habel Nyamu, (ECK): Let us ask all of them and Professor will answer them together. Next ECK, Jura. And say your name so that the Press--

Com. Henry Jura, (ECK): Thank you very much, Mr. Chairman. My name is Henry Jura, Commissioner, ECK. Professor, you have given a very scary example of Cameroon, a country with two Constitutions and as you say, the President can choose to use one or the other depending on the circumstances, on what he wants to achieve and of course, you said probably that is where we are. Our Chairman was recently in Cameroon and I read his report, very interesting, but then, my question is, definitely Kenyans will not want to be in that kind of cross road situation. One would therefore - and I think this is the begging question - what is the way out for lawyers, Constitutional and otherwise, should be able to tell us and that would meet with the politics of the land today? Thank you very much.

Com. Hable Nyamu, (ECK): Mr. Kangu. Commissioner Kangu, please. Thank you.

Com. Mutakha Kangu: Thank you. Mine will be a comment and then, of course, on clarification. At the level of comment, I would like to say that I think the country is agreed and many people in fact, that this law as it stands is un-Constitution. The politicians themselves agreed except that the politics of that time were that they feared that they might not be able to secure the 65% in Parliament to amend the current Constitution, but the truth is, that they all know that this law is un-Constitutional without an amendment to the current Constitution. The Attorney General is here, he advised the Parliamentary Select Committee, that in fact, if for nothing else, at least for the avoidance of doubt, we must amend the current Constitution so as to provide a framework, a Constitutional framework for the Referendum to be held and I like my story of the Luyha chameleon. This Act will not kill the current Constitution as it produces the new one. The consequence is that we shall end up with two Constitutions in place.

The Luyha chameleon, it is said, when it wants to give birth, the mother bursts and dies for the child to move on, but the mother must carry the pregnancy before it finally bursts, to give birth to the child and the theory and philosophy of the Luyha chameleon is that, the child chameleon is so jealous, it cannot occupy the same territory with the mother chameleon at the same time. So, the mother must die for the child to start living and that is how a supreme Constitution is. It is so jealous, it cannot occupy the same territory with another, at the same time. One must die for the other to take space. Now, the problem we have is that Ringera has told us through the amendment Clause, we cannot kill the current Constitution and introduce a new one and the point is that since our Constitution does not have a Clause for replacement, it only has a Clause for amendment, we must amend that Constitution to now include a Clause for replacement and it is that Clause that will say, this is how, as a supreme Constitution, I am going to be replaced. Without following this procedure, I cannot be replaced, so this is how you replace me. So, my position--

Com. Hable Nyamu, (ECK): Can you make it short?

Com. Mutakha Kangu: Okay, I will be finishing. The point then is that, Professor said that the politics are such that we may

not be able to get the amendment, so we have to meander through. But, I want to say that those politics have changed now, we are now being told that they are together and working together. Now, if they are genuinely working together, we must take the responsibility and tell the nation, can you seize on the window of the opportunity when you are working together to provide the correct framework for delivering a proper Constitution, because if we do not do that, if the Judges will be unhappy with the new Constitution, someone will go to court and they will declare the old Constitution was never extinguished and it is the one in place. We will be in a mess.

Com. Hable Nyamu, (ECK): Okay, Commissioner Hassan.

Com. Ahmed Hassan: Thank you, Mr. Chairman. I have been advised that chameleons are reptiles, they lay eggs, they do not-- (*Laughter*). Unless it is the Luyha only one which gives birth. But, to go back to the comments of the guru, I think he has mentioned the fact that we are going through a revolutionary route and I am wondering whether it is right then, to subject this revolutionary route to the existing routes of change. What did the Ringera ruling say? I think we all know that both the last two speakers, Kangu and Okoth, had made very strong objections to that ruling and I think their views are known and when the Ringera ruling was made, I think apart from what the Professor said, it is very clear again, he set the stage for this revolutionary route and I think, perhaps – we do not have the ruling here – but if we could remind ourselves of what is said, it is that the people are sovereign and supreme in the Constitution Making Process and that Parliament had no power to enact a new Constitution for the people of Kenya, that this power lays with the people of Kenya and they can exercise this powers through a Referendum or through a Constitutional Assembly. It also said that, this power is primordial, it pre-exists the Constitution, it does not require any texturization in any law, that is that you cannot write it in the Constitution or an Act of Parliament. In fact, if we followed that ruling logically, the people could meet in Korogoshi and still make a Constitution. There was no need to amend the Constitution, there was no need to enact an Act of Parliament, it says that power was primordial, it pre-existed the Constitution.

But again, it says that there was no problem in Parliament passing an Act of Parliament to facilitate the exercise of this power by the people. So, if we can view this Consensus Act as a law which is meant to facilitate that primordial power, what is the problem with that, Professor? Maybe we could be educated and perhaps-- Because, if we follow through this route of calling it a meandering, I think we are bringing a problem rather than being a solution and I do not think here, as two institutions which are vested with this very important duty of delivering a Constitution for Kenyan, to start putting roadblocks and problems in the process. We should leave that to reform activists and Civil Society activists, who have already gone to court, who are already in court. They have filed three separate suits and this argument that you are making is probably going to be made there. So, I do not think it is in our position now, to really start arguing with these points. Thank you.

Com. Hable Nyamu, (ECK): Thank you. The Chair, CKRC, would like clarification.

Com. Abida Ali-Aroni: Thank you, Chair. I share the same sentiments with Hassan and I would like Professor Okoth Ogendo to clarify this. On the issue of us having two Constitutions at the end of the day, the Draft Constitution in Article 3.10 tells us about the effective date of the new Constitution. Section 3.1.1 talks about repealing of the old Constitution. Don't you think that we have cured that problem in the new Draft, so that as soon as the President ascends, the new Constitution takes effect and the fear that we may have two Constitutions is therefore unfounded? Thank you.

Com. Hable Nyamu, (ECK): In order for justice to be our defender and our shield, I want to ask whether the Chairman, ECK, would also like a clarification?

Com. Samuel Kivuitu: In order to recognize your Chairmanship. (*Laughter*). I can only say that it is a very novel idea, I had not thought about it, but what I see is that if it be valid and it could be valid, it should mean the whole exercise, since you started this Constitutional Review, was meandering and of no use, because the (?) will still remain there. It has been there all these years we have been spending money and something ought to have been done.

Com. Okoth Ogendo: Let me start by reminding my colleague, Hassan, that the Ringera judgment does not say that Parliament has to do anything. There is nowhere in that judgment that it tells Parliament, go and pass legislation to facilitate this ruling. It is a declaratory judgment and part of the problem with the Ringera judgment is that it gives instructions to nobody. Yet, Parliament then decided to pass the Consensus Act, they could have done better and I still hold the position that even if all these arguments that are being presented by my Chair and by Hassan, are correct, it is a much more superior process to have proceeded through a Constitutional amendment. That is what was agreed, there was a time when the Minister for Justice and Constitutional Affairs published a Bill to amend the Constitution. The CKRC itself, at one point, advised the Minister to do precisely the same. These arguments have been changing, the reason they have been changing is because the political games that everybody has been playing has been changing. It has nothing to do with strict jurisprudential principle, but you see, Constitutions are not made like-- It is not a textbook exercise and I, for one, will tell you that the vast majority of Constitutions that are made on this earth and especially in Africa, are in violation of existing Constitutions and I am on record as having said, if you cannot do it in Parliament, that primordial right can be exercised in the streets and in Korogosho, to quote Hassan. I would have no problem with the people in Korogosho rising up, going into the streets and saying, this is the Constitution of Kenya, subduing everybody, or indeed, what Obote did in 1966, (?) Parliament and said, this is the Constitution and you proceed with it.

Tape 5

So, revolutionary changes, a revolution is a basis for change in law. If you can do it without a revolution, fine, but let us be clear that that is what we are doing and pretending that all that Parliament is doing is providing procedure for legal change is, to me, not a proper interpretation, either of the Ringera ruling or of the Constitutional principles that we are dealing with. My problem with the Consensus Act is that it is that Act that says that there will be a new Constitution and I keep wondering to myself, can

an Act of Parliament repeal the Constitution in respect of which it was made? And some of these technical questions are important to me as a teacher. As a student, as a citizen in this country, it really does not bother me if at the end of the day Kenyans say, that even though you may have violated the existing Constitution, we are prepared to throw it in the dustbin and this is going to be our new Constitution, but let us understand that that is where we are going. Thank you.

Com. Hable Nyamu, (ECK): Thank you very much. Time is over. Thank you very much, Professor, for answering those difficult questions, thank you for allowing an explanatory area. We are now-- Time is over, Mr, sorry, Commissioner. We now have to vacate - some of us who are Chair - vacate and allow the next-- No, please, Commissioner, you know we are friends, no, no, I am on the Chair, you cannot transgress all over me. Thank you very much to all of you who have contributed. We will now allow the next Session to take place. Thank you. (*Clapping*).

SESSION THREE

Chair: Commissioner Ibrahim Lethome, CKRC

Comparative Referendum Experiences

Commissioner Dr. Mosonik arap Korir, CKRC

Commissioner Kihara Muttu, ECK

Com. Ibrahim Lethome: Fellow Commissioners, good morning. Good morning?

Response: Good Morning.

Com. Ibrahim Lethome: Yes, thank you. Welcome to the third Session this morning. We have eaten into half an hour of this Session, we were supposed to proceed from 11.00 a.m. to 1.00 p.m. so do not be surprised if we eat into the lunch hour, we might eat into it for thirty minutes, to do justice to this Session.

Well, we have heard that a Referendum is not a common occurrence, it is only held in special circumstances. We are about to face a Referendum for the first time as a country, but again, we have been told it has been held elsewhere, so we shall not be reinventing the wheel. We have experiences from other countries across the border, within Africa we have Rwanda and Uganda, so we have countries with the experience of holding Referenda.

Now, I have two Gentlemen with me here, that is, Dr. Mosonik arap Korir, Commissioner, CKRC and Commissioner Kihara Muttu, ECK. Is he here? Welcome here, Commissioner Kihara Muttu. So, between the two Gentlemen, we should be able to see what experiences we can borrow from other countries. The topic is 'Comparative Referendum Experience' and I think I want to begin with the Gentleman on my right, Commissioner Dr. Mosonik arap Korir, and I want to apologize on his behalf, he is not feeling very well, so do not be surprised if he walks out immediately after he presents his paper. I think I will give you-- Is half an hour enough for you, Dr.? yes, he is telling me that half an hour is more than enough for him and then after that, we will go to Commissioner Kihara Muttu, ECK, then we will have an opportunity for Plenary discussion before we break for lunch. Dr. Mosonik.

Com. Mosonik arap Korir: Ladies and Gentlemen, it is my pleasure to present to you some notes I made on the topic that as mentioned by the Chair of the Session, Commissioner Ibrahim Lethome. In many respects, when the guru has spoken-- In fact, it should be the other way round, that the student's first talk and then the guru can make the necessary corrections. But, my presentation was based on the assumption that we are going to the Referendum, that there is a law in place which is the basis for going to the Referendum and that, therefore, we need to draw lessons from others wherever necessary in respect of various issues, which I shall mention.

It has been said already by Prof. that there have been not so many Referenda globally or historically, but I have a figure that says, between 1791 and 1998, there were 1094 Referenda held worldwide. 1094 and that this figure excludes the Referenda held in two countries. One is Switzerland and the other one the United States. Switzerland, it has been said, is the place of origin of the concept of the Referendum, this Referendum having been used in that country as far back as the 16th Century. Switzerland itself is said to have had 297 Referenda since becoming a Federation in 1848. We take it that therefore, if we were to talk about Referenda and the world experience we would have to talk about 1094, over 1094 such examples. However, that is not possible and that is why I will take a selective approach mentioning where Referenda has been held.

My identification of these Referenda is being based on the evidence at our disposal. I think we also need to mention that the survey found, that the largest category of Referenda questions comprising of about 40% of the questions asked on Referenda, was on the Constitutional Referenda. So therefore, there are about 40% of that total number would be hinging on the issue of the Constitution. So, if we are going to do our job very well, it may help to compare what we are aspiring to, to what has happened in other countries and I am saying, example number one, which we hope all of us will study, would be Switzerland, the home of the Referenda.

Secondly, we could look at the example of the United States of America and to note from the beginning, that the United States has not used national Referenda. We shall come back to the issue, of which Referenda is which. However, a lot has been done in respect to Constitutional change in the United States through the initiatives of the lower organs, legislative organs and principally, of the States and presently all States except for one require proposed national Constitutional changes to be ratified

by Referendum when proposals are made about amending the Constitution, for example, or entrenching something in the Constitution, almost all States require that such issues go through Referenda which are held locally. I think you will know already that in the United States there is a two-thirds requirement of the legislatures of the States passing a particular law or Bill before it becomes law. I suspect many of us are aware of the ERA, the amendment called the ERA, Equal Rights Amendment, which was proposed to say simply, nobody shall be discriminated against on the basis of their sex. We talk about gender issues here, for example and it is not so difficult to talk about them, but it had to pass through two thirds of the State, 32 of the 50 or so States of the United States and it was filibustered and it was opposed, among others, by an organization called the Moral Majority. There was a woman called Phyllis Schlafly, leader of the Moral Majority who filibustered against that amendment to say it is very dangerous to say, nobody shall be discriminated against on the basis of their sex. They said, because if you do that, if you put that into the Constitution, then men will say they have the Constitutional right to enter women's washrooms and women may be conscripted into the army, both of which they said they did not want. But, the point is, you have to pass through two thirds of the States to have an amendment and it has not been easy and I think that amendment, I do not know whether it was approved, but it was about 20 years ago and a debate was being conducted on that.

Another example would be Canada, which has varied Referenda. Canada, since becoming a self-governing dominion within the British Commonwealth, has had 3 Federal Referenda on a variety of issues. One has been called a moral issue, a law on prohibition, to say ban alcoholic beverages. Another one during the Second World War, whether or not there should be conscription in to the Army and one in 1992 to amend the Constitution. So, you can see national Referenda can take various forms. There have been Referenda also, which are not nationally major, but have been of national interest, like Referenda on Quebec, which has considered seceding from the Federation. Then at a lower level numerous provincial and municipal Referenda on a variety of matters of local interest. There is the example of the United Kingdom and the United Kingdom will introduce another dimension besides internal issues like who should be a member of the UK and who cannot be in relationship to Ulster and Scotland and Wales, for example, or the issue of Devolution. There has also been a Referendum which was held in 1975 on membership in the European, then Common Market, which became the Community and now a Union.

There is the Republic of Ireland whose Constitution was approved by Referendum in 1937 and which holds a Referendum vote as a pre-condition to ratifying Constitutional change. Among the proposed changes to amend the Constitution, which have been undertaken between 1937 and 2004, 21 were approved and 7 were rejected. In the case of Italy, from World War 2 after the fall of fascism, is that Referenda votes have been taken on a variety of issues, not on the Constitution but on issues such as abortion, financing of political parties, they have even held Referenda on the need to close down a Ministry or to introduce a new one. We could go on and on, the point I am making is that maybe, once we decide what we want to do, we identify countries or situations in which similar things have been undertaken and then we try to draw lessons from those examples. The others, including France and Denmark, Spain and Belgium-- On the Belgian example, there is an issue in Kenya we have right now. You remember when the Consensus Bill was introduced, initially there were two requirements for passing the Draft through the Referendum, which is, one, a simple majority of the majority of this country, 51%, but also there was a requirement

very similar to the Presidential elections requirement about passing of half of the provinces of the country, the 5 province rule. Now, it is not there any longer, maybe somebody will explain later why it is not in the current Consensus Act, for example in the case of Belgium, they were voting whether their King, who had abdicated his responsibilities during the Second World War, should be reinstated or not. 57% favoured reinstatement, but this led to tension between communities with one side being considered to be anti-restoration and the other one pro. So, (?) was depending on how you make decisions, the requirements to pass the Referendum, you can also have disputes between communities.

Should we have the rule only of a simple majority of the population, for example, of Kenya, or should we take into consideration also the regions? That last time there was an element of the latter consideration and consideration of which area has passed this particular version of the Bill, for example. That same position holds in the case of Australia who's Constitution provides that it can only be changed through a Referendum, but the Referendum has to have a double majority. A national majority in terms of population, but also a majority of the States. They conducted a Referendum, for example, in 1999 to make Australia a Republic, they had a high turnout of voters, because in that country the voting in Referenda and in public elections is compulsory for all citizens – that is a question I would like for us to consider – when we say we are going to have elections and the ECK has registered voters, is that of any consequence in our law? What proportion of the population is in the voter's register? I have registered to vote and on a critical matter like this of the Constitution which we are writing for generations, what proportion is good enough to say, yes, it is legitimate, they passed, so that it becomes the supreme law of the land? But, in the case of Australia, voting is compulsory but also, you have to pass through a majority of the lower units which are called States there. The Republic question was rejected nationally and they even made an attempt to introduce a preamble to their Constitution, which was rejected by a higher margin than the issue of the Republic. 60% of the voters said no to introducing an amendment to their Constitution and 54% to the Republic question, but note the importance of the majority of States as opposed to simply the majority of the population.

I could go on to talk about New Zealand, countries that have been mentioned in the context of Latin America, Uruguay and Venezuela. There are the countries of the former Soviet Union which have introduced Referenda into their Constitutions, introducing Ukraina, where the Chair of the ECK says she was, it is called Ukraina, not Ukraine, Belarus and Estonia, etc. We need to consider also, whether the Referendum will address the issue of the relationship between our own country and other countries, as in the example of the European Union. Now, Rwanda has been mentioned, Uganda has been mentioned, Zimbabwe has been mentioned, so we can see that even in Africa, the concept of Referendum to make certain decisions is not a new one.

After we know all those examples, then we go to the issues, and the issues, Professor Okoth Ogendo also mentioned, for example the issue that he has raised which is the legal framework for the Referendum we are going to hold, that is one possibility. The second one being the responsibility for conduct of the Referendum and in almost all the cases internationally that I have read, there is the equivalent of our ECK, so that when the ECK have this responsibility, in many respects it compares

favourably internationally, the ECK or its equivalent. However, in the case of Canada, there is somebody called Chief Elections Officer who is an officer of the Legislature who conducts the same.

Com. Ibrahim Lethome:

(Inaudible).

Com. Mosonik arap Korir: Just to complete, please. On the issue of voters we can talk about the eligibility to vote, disqualifications from voting, for example in the Canadian case, they said anybody subject to a prison sentence of two years or more had no right to participate. The issue of the Register of Voters, the issue of voters abroad, like in the Canadians case, people can vote from overseas providing the ballot reaches the Chief Elections Officer by 6.00 p.m. of the day of the polling day. However, you know that in the case of Uganda they say specifically those who are outside the country are not eligible to vote. The issue of the assistance that you give to voters in certain categories, for example, the disabled, the issue of the Referendum Question and who formulates the Question. Then, how the campaigns are conducted, the issue of language in Civic Education, in a country like Canada, conducting this Civic Education using the local languages - they are called the languages of the first nations, - or the Aboriginal languages. What is our position in relation to that especially if we consider that there are illiterate citizens? Members of our society and citizens, the logistics, which we said we shall go into later, the finances and whether for example, foreigners can make a contribution or not. Then finally, the issue of resolution of disputes which arise very easily. The last presentation almost gave some indication of what can happen and ultimately, whether the results of this Referendum will be binding or not, or whether we are engaged in an exercise which will ultimately be futile.

So, I am suggesting that those kinds of issues need to be looked at in a comparative perspective, from a comparative perspective, in a comparative context, but the assumption behind that presentation was that we are going to the Referendum and the point that was made, I think, by Commissioner Ahmed Issak Hassan, but also by the Chair of the ECK. What is it that you have been doing all these last few years? We came into existence as a Commission finally, mid 2001, if it was also illegitimate then I think, we should, if we had that position, we should have reported earlier to the people of Kenya and said, ‘ please do not waste the scarce public resources on this exercise’, but I think, most of us Commissioners are agreed that we are engaged in a critical exercise which has been universally accepted by Kenyans and that it is our privilege to work with the ECK, which in this relationship would be like the senior sister. Thank you very much.

(Clapping)

Tape 7

Com. Ibrahim Lethome: Thank you, Dr. Mosonik, for that presentation and thank you also for correcting us, I think almost all of us have been presenting Ukaraina as Ukraine, but we know you are an authority because you lived in that part of the world, so we take it, it is Ukraina from today henceforth. For the historical dates and data, thank you, Dr. Mosonik, for those who do not know he is a historian by profession and currently the Chair for the National Archives of Kenya. Thank you for the

historical data, I know we shall have time for questions and maybe other remarks. I hope you will sit through. You want to leave? Okay, thank you. So, over to Commissioner Kihara Muttu. Dr. Mosonik took exactly half an hour, I do not know whether you want less or more. We want to leave time for discussions, we hope we shall be able to get half an hour or so. So, thank you and welcome.

Com. Kihara Muttu (ECK): Thank you, Chair. I think I will need far much less than that. I must apologize, Ladies and Gentlemen, I have got a bad cold, I sympathize whoever is sitting next to me, but I hope they will survive it. (*Laughter*).

Ladies and Gentlemen, mine is a small general commentary on Referendums. The paper that might have been passed to you is a little bit raw because it went to print before it was corrected. You will find that there are about, maybe three grammatical mistakes and about two typographical errors, I do apologize for that.

As the other speakers have said or you have read in the books, a Referendum is a vote taken on important issues. It could be by all the people in a given country, or it could be a part of that country, a state or whatever. So, it is one way through which people may express their views with regard to either Government policy or proposed legislation or some touchy matters, it might be either cultural or whatever. That poll, it is a poll and it is held in pursuance of any provision made by an Act of Parliament in that country and it could be on one or more questions as specified in accordance with such provision. A Question of course, would include a proposition and an answer accordingly, includes response. So, in whichever way you describe a Referendum or Referenda, or dress it in any other manner, it is simply an electoral process. Unlike in a normal election where people vote for candidates in this particular issue, you vote for issues or questions. More often than not, Referendums are held to resolve either political or economic or cultural issues where there is a lot of division between parties or various groups in a given country and those are the issues, as I said earlier, which may be either national or just affecting a section of the people.

That is why nearer home here, in 1964 there was a Referendum held in Uganda in respect of what used to be called the lost counties. There, the people of the then Buyaga and Babangaizi counties were given an opportunity through a Referendum to decide whether they would remain under the then Buganda Kingdom or they would like to join the Bunyoro Kingdom, or just become an independent district or a Kingdom by themselves. They opted to revert back to the Bunyoro Kingdom. It is more of a cultural issue, that one. You will find that under the normal circumstances, most national Constitutions will provide or make a provision for holding of a Referendum if need be, but of course, there are others in other countries which, as yet, have no provision. In our case, obviously, we did not have one and this is now what we are trying to sort out.

In countries where Referendums are frequent, or if I could give a small list showing how often they are held in various countries, you will find that in Canada there is one province of Quebec, which is mainly French, it is French speaking. They normally have several Referendums now and then or occasionally, to determine the issue, whether they should secede or still remain a province of Canada. Several Referendums have been held there and as of today, they are still a province of Canada.

1986, Spain's membership into the North Atlantic Treaty Organization, which is NATO, and now it is the European Union, it was decided by a nationwide Referendum. In 1999, further north in Egypt, a Referendum was held to determine whether President Hosni Mubarak should be given another term in office. When you look at Australia, there is a provision in their Constitution, that Constitutional amendments must be endorsed through a Referendum. There is no other way for their Constitutional amendments, it is mandatory that it should be through a Referendum. In November 1999, they held a Referendum that was to determine whether they would like to become a Republic or still remain a monarchy under the British or under the Queen, the Queen as Head of State. A majority of them had decided that they are still quite happy with the Queen and they are happily still under the monarchy. So, that was the result that is the majority opinion, which was accepted.

There are different ways that Referendums can be initiated, but it depends on a particular country and provisions made by the country, either in the Constitution or under the Act or special Acts of Parliament. The general provisions when it comes to the conduct of Referendums, perhaps you spread out and start with what they would call the Referendum period. Referendum period will be the time between when the papers are laid in Parliament that there should be a given Referendum on a given date. So, it is between that time and the date of the poll, that is the Referendum period and you must ensure that people are given sufficient time for public debate. The wording of the Referendum, this may be specified by subordinate legislation or a Commission may be consulted, if there is a Commission already, on the wording of the Referendum and the wording of the Question before the Draft is laid before Parliament. The Referendum Question is the Question or Questions to be included in the ballot paper.

In case, like what we are now, in our case and many other cases, you find in most cases there are only two sides, or two parties. Those two parties could be either a group or a registered party or a registered voter, etc. normally it is two way. Where there are only two possible questions or outcomes of a Referendum there must be sides, or rather, the Commission or whoever is conducting will have to prepare sides, a side for A and side for B, because the outcome is either yes or no. When there are political Referendums, unlike the cultural, where there is cultural change, the main issues will be the questions of change, about which the views may be strongly divided. It could be the introduction of a new Constitution, as we have in our case, it could be any such major issue when it is for the purposes of political referendums, but Referendums cannot always provide an answer for major political problems. What they can do is perhaps, significantly assist Governments before controversial legislations are introduced in Parliament and that will give legitimacy to new policies after such legislations have been passed.

Sometimes they are a threat, but they need not be a threat to the Parliamentary sovereignty. It is therefore open to Governments and Parliaments to set up Referendums either as primary legislation or alternatively to enact a special Act to cater for the conduct of a Referendum or Referendums, as the case may be. So, it is two ways, either it is in the Constitution itself, or have a special primary registry for that, as you now have, I believe, the Constitution Review Amendment Act, or a special Act which caters for nothing else but just Referendums when need arises. This is why you will find nationwide Referendums are there and

in fact, there are some countries which have never held a nationwide Referendum and that would include places like India, Israel, Japan, the United States, but you find in such countries, in various states, there may have been Referendum of various issues, but for the purposes of national or nationwide Referendum, these countries and a few others have never conducted any at any time. So, in short, Referendums have been used to solve a crisis and in quite a number of cases, endorse a new Constitution. You will find in France, for example, for endorsement – and this is very important – the Government used a Referendum in France to legitimize and entrench what they call the Maastricht Treaty, that was the Maastricht Treaty of 1992. It can also be that a Government has committed itself in an election or in an election manifesto, that once we are voted into power we will do this, and that is through a Referendum. I believe it happened in 2002, that you will get a Constitution within so much time as we enter powers. So, you have committed yourself already in your manifesto that you will give people a chance through a Referendum either to endorse a Constitution or otherwise.

That happened in New Zealand and that was in 1992, when the Government committed itself in the manifesto, that they will hold an election immediately after elections and they did that. Another case is where a legal mandate, it is a legal mandate, that is where it is entrenched in the Constitution, that you have really no choice. If you were to do this or if you were to change this Constitution, it must be through a Referendum. For the citizens you may find in a few Constitutions, I cannot give you any straight example, the citizens are empowered that on certain issues they can demand a Referendum, that is normally entrenched there in some few Constitutions in certain countries, rather than the Government initiating the citizens themselves on a certain issue, demand that there should be a Referendum. There is need for rules and guidance for the conduct of the Referendum, it is implicit, it is important, because a key element in the conduct of Referendums is to ensure that the way the Referendum is run is independent of any party interest. It is purely the body running it and this gives it legitimacy, independence of running the process and such guidance or rules should be drawn up to deal with organizational administrative and procedural matters that are associated with the Referendum.

Normally, established guidelines should include some fixed rules for some matters, for example, concerning the poll itself, the election machinery and the enabling factors. The most important factor for these rules and their applications would be whether such rules and factors and regulations, they are directing responsibility of an independent body that is running that process. Such functions or guidance and rules would include very briefly – in a summary – should include advising on the wording of the Question, liaising with and acting as moderator between campaigns groups, acting in an ombudsman manner or role, to deal with any complaints. Monitoring balanced access to the broadcast media, providing public information, supervising organization of each polling station and lastly, counting and declaration arrangements. These are functions that should be put in place well in advance.

Normally there is a permanent Electoral Commission existing in most Westminster style of democracies. Such Commissions normally or nearly always, more often than not, have the mandate and responsibility to run and to administer elections and Referendums as they arise. And on finishing, Referendums will be either mandatory or advisory. The status, if it is mandatory, an

example, a mandatory Referendum is like the legitimization of Constitutional change. Most cultural matters will be decided by purely advisory Referendums and whatever outcome is purely advisory, it is not mandatory that that must be done. For the Question to be put in the ballot, the wording should be accepted as objective and fair. In other words, the wording must be short and simple, notice of the Referendum, as I said earlier, must give the public enough time to canvas the issues before polling and polling is no different from the normal electoral process, it is always the normal polling hours and the results and announcements will be done at the polling station. Thank you, Chair. (*Clapping*).

Com. Ibrahim Lethome: Thank you very much, Commissioner Kihara, for that presentation. Ladies and Gentlemen, we have slightly over half an hour for discussion on the two papers and although Dr. Mosonik is not here with us, I am sure the people sitting with me here, including the guru of law - or these days he is called *Sibor* with a Capital S - will help us in responding to some of the issues.

So, what we have heard is, that between 1771 to 1998, there have been over 1094 Referenda held globally. Over 200 of those Referenda were held in Switzerland alone, something else that I have been able to pick out of the two papers is that these Referenda that have been held globally have been held for various issues, to vote on various issues and then we can draw also, a few comparisons to ours, where Referenda were held to ratify the Constitution of the country.

So, the floor is open now for discussion, we want to see balance between ECK, CKRC and gender balance. Can I begin with Commissioner Raiji, Commissioner Abuya Abuya, Commissioner Paul Musili, in that order. Commissioner Bashir, on this side, can I see some hands here. Okay, let me begin with those, in that order.

Com. Riunga Raiji: Thank you very much, Mr. Chairman. I think where interventions starts, although Dr. Mosonik is not here, with his opening remarks-- I think he opened with the assumption that Referendum law is varied and all that, and I think it is important at this very early stage of this meeting to disabuse ourselves of the notion that the Referendum law is invalid or something. First of all, as an elementary principle of law, an Act of Parliament remains valid and binding unless it is either or repealed by that Government or repealed by say, a Constitutional court if there is. So, the Constitution Review Act which has undergone several amendments, is the Act that has introduced at this very late stage, the requirement for a Referendum. Before that, a Constitutional court had ruled that irrespective of what Parliament does, Parliament cannot deliver a Constitution. It is only the people through the Referendum or through the Constituency Assembly who can do that. So, even if the Act was valid or not, the very act of adopting the Constitution, being an Act of the people and not the act of Parliament, is unassailable and I think we are probably misleading others if we continue giving those notions. I notice in today's paper, Mr. Chairman, that it is claimed that we have been given during the ICK, 1.7 Billion and 1.4 for the ECK, I think to run the Referendum. I think, in all fairness, taking into account the serious and the weighty nature of the exercise that we are engaged in, I think we should try very much, to find a way of ensuring that this exercise is concluded peacefully and not sowing doubts and confusion on the people as to the exercise.

Lastly, Mr. Chairman, I think we are all aware and I think it was mentioned by Commissioner Hassan, that the suit has been filed against both ECK and ourselves, in which certain Civil Society Activists, busybodies and others have been trying to overturn that Act. If they succeed, well and good, it is the right of every Kenyan to agitate any cause, whether meritorious or otherwise, in a court of law. But until we are handed a decision saying that, you stop what you are doing, I think, in all fairness and in order to carry out our respective mandates, I think we should just proceed on the basis that we are proceeding to conduct a Referendum, the ECK will do their part, we will do ours and also to educate Kenyans on how a Referendum is run. If at some time Parliament – they seem to have reorganized themselves now – even amend the law again before we carry out the Referendum, to remove the requirement of Referendum, then I suppose, as law-abiding citizens we will be bound to do that. So, I think really, that we should proceed on the basis that we are engaged in the law and a valid exercise and find a positive way to implement that exercise that we are doing at a great cost to Kenyan taxpayers. Thank you.

Com. Ibrahim Lethome: Thank you, Commissioner. I think the next one was Commissioner Abuya.

Commissioner Abuya Abuya (ECK): Chair, I would like to ask a simple base question and forgive me for my ignorance. At what stage, at least the Review Commission and the whole process, the Conference, at what stage did we decide, or did you decide what goes into the Constitution? The reason why I am asking that, is that I have gone through the Draft and there are matters that I thought would be catered for under certain sections of the law, for example, in the Act, rules and so on, and because of the weight of the matter, that it is going to go to the people of Kenya to decide, we need to get to explain to them what it means, why they are required to decide and what are these (?),

Therefore, I would like, really, on this, to be answered so that at least I know that it was the people's views taken as to give the weight to certain matters to get through the Constitution Chapters and if so, at what stage did the Commissions decided, experts, because there were Committees, the Conference and so that we understand that this process then, it is going to involve the people right from the beginning to the end when they made their decision.

Secondly, Chair, I think we may have to – before we leave here – say, define what procedures, process in a country to be applied for the people of Kenya to understand the decision they are going to make, because I feel it is very important where we are going to say yes or no and I will feel very guilty to participate in the process and the outcome is that our people do not understand exactly what they are deciding.

Com. Ibrahim Lethome: The contents of what they will be voting for?

Tape 8

Com. Abuya Abuya (ECK): Yes. And lastly – I wish the Attorney General was here – that recently, through this process of

Constitutionalism, at one stage, I think the President refused to assent to an Act of Parliament or some law that required that Parliament makes changes to an Act of Parliament by 65% or two thirds and yet the existing Constitution only limits that to a Constitution not an Act of Parliament and I wanted to get the Attorney General to explain a little, how come the whole Parliament, they went wrong, that Parliament which is full of Professors and lawyers, that that mistake could be made in our August House. Thank you.

Com. Ibrahim Lethome: Thank you. Maybe Professor Idha Salim and the other members of CEPIC, maybe there is a question that you will have to respond to, although you were not sitting here, because there is a question of Civic Education, definitely, that has been asked, maybe briefly. Paul Wambua, Commissioner.

Com. Paul Wambua: Thank you, Chair. My question relates to a point which is referred to in page 5 of the paper presented by Senior Commissioner Kihara Muttu and that refers to eligibility to vote. One of the areas of concern and I think we need to address it at this gathering, is who is going to vote on the Referendum. Is it the registered voters as per the register compiled by the ECK or is it any Kenyan above the age of 18? And that becomes important given the fact that the views which the Commission collected were from all Kenyans and therefore, there will be that question whether those views will then be decided at a vote where only the registered voters actually vote yes or no.

Com. Ibrahim Lethome: Thank you. Commissioner Bashir. Professor, I can see your hand.

Com. Bashir Sheikh(ECK): Thank you, Mr. Chairman. Mine are three questions actually, and they are all related to what has so far been mentioned. Mr. Chairman, the first one is the Civic Education. I think we were told earlier that CKRC will be starting Civic Education throughout the country very soon. My question is, Mr. Chairman, it is good to carry out Civic Education, but from what I have read so far, you have been insisting too much on the new Proposed Constitution. I have not seen any Civic Education on the existing Constitution, so what I want to know is, when you undertake this exercise, will you be talking to the citizens about the merits and demerits of the existing one, so that they can choose, instead of just telling them, vote for this document. I think it is unfair, people should know what was contained in the previous Constitution so that they make a comparison--

Com. Ibrahim Lethome: Commissioner, please speak into the microphone, because we are recording what you are saying.

Com. Bashir Sheikh (ECK): Yes. So, that is one, I wanted to know whether you will be educating them on the existing Constitution together with the proposed Constitution, that is one.

Now, the other one, Mr. Chairman, it was mentioned by my colleague Kihara Muttu, that there will be two sides on the ballot paper, one saying yes and one saying no, I think, and what I want to know is, when people choose to say yes or no, they

should also be able to identify-- We want to know these two groups. In running elections we have parties and these parties are registered bodies with office bearers and office addresses. What we want to know is, these two sides composed of the people who will say yes or no, how can we identify them? Will they be registered people who will say, we belong to the group that says yes, or that says no. That is the other one.

Now, the last one, Mr. Chairman, is this law which is before Parliament now and I think it was mentioned by somebody, that people have gone to court objecting to it, or to its composition or something. Now, I do not know law, I am not a lawyer myself, but what I would like to know is, does a judge have the power to order Parliament to do anything at all? And in case he says this law is defective, will Parliament be required to amend it? Thank you very much.

Com. Ibrahim Lethome: Thank you. Let me take two more hands and then we come back to the presenters. There is Commissioner Ahmed, Prof. Wanjiku and then Commissioner Nancy Baraza.

Com. Ahmed Hassan: Thank you, Mr. Chairman. Mine is just a comment, actually. The old law, before the amendment, of course we know, provided for an issue based Referendum. You will recall that before the Act was amended and we have this new law now, it is only that the issue which was not decided upon by the Conference when the Conference was having the Bomas III, when they were voting on the provisions of the Draft Bill. If there was one issue that they could not agree upon, or there was no vote of two thirds majority, then that issue was to be kept aside and referred to a people for a Referendum and that was therefore, an issue based Referendum and maybe to go back to that again, you will recall that both in October 2002 and on 15th March, 2004, we would have had a new Constitution, without the full Referendum on the whole document or even an amendment to the Constitution. In October 2002, when we had the old law, you will recall that we came here as a Commission in September at Leisure Lodge, prepared the Draft Bill, it was published and we called for the Conference and that time our Chairman, Prof. Ghai, was trying to rush the process so that we could have the new Constitution conducted under (?) directions of 2002, to be conducted under a new Constitution. So, there was that urgency to finish the process and in October 2002, we did convene the first national Conference, but you recall what happened is that the former President dissolved Parliament in October 2002, to try and, in a way, undermine the Conference so that we do not have any Constitution for the elections. But if that was not done, if Parliament was not dissolved by the President and we had gone ahead with that Conference, because of the mood of the country for a new Constitution for the new elections, we would have had a new Constitution and yet there was no Referendum and there was no amendments to any parts of the Constitution, but you would have had a Constitution. That is one.

Number two, on 15th of March, 2004, when there was the walkout from Bomas by a section of delegates, if there was no walkout, if people had agreed on the contents of the Draft, we would have had our new Constitution--

Com. G.K. Mukele(ECK): Point of order, Chairman.

Com. Ibrahim Lethome: Okay, on a point of order. Wait for the microphone.

Com. G.K. Mukele(ECK): In all fairness, let us try and concentrate on the topics we are presenting, because two Commissioners of CKRC have come out to give long submissions on other matters other than the comparative Referendum experiences. So, if we could concentrate on that, we will benefit. Thank you.

Com. Ibrahim Lethome: Point of order, sustained.

Com. Ahmed Hassan: Thank you, Mr. Chairman. I was doing this to counter a point, that if Kenyans agree on the contents of the Draft Constitution, on the contents, really it does not matter, in my humble view, how it comes through, which route it goes through, but that the most important thing really, is to agree on the contents. Thank you.

Com. Ibrahim Lethome: Thank you. Okay, we have Professor Wanjiku and then Professor Nancy. Kangu, you will be in the next lot, just hold on. Are you withdrawing? Has the chameleon burst? (*Laughter*).

Com. Mutakha Kangu: The point of order is sustained.

Com. Wanjiku Kabira: I think the Luyha chameleon has died. (*Laughter*). I wanted to raise an issue-- Sorry, not to raise an issue, to request Commissioner Kihara Mutu, to probably explain whether we are going to have a difference between the period of Civic Education and the campaign for the Referendum, because in the original Consensus Act, we had 90 days for Civic Education and one month for public campaign, assuming that the document had been disseminated to the Kenyans, they understand what they are going to vote for and then the campaign for the support or rejection of the Draft would continue, but that particular provision is not there. So, I am just wondering how we are going to handle that.

I also wanted Ali to interpret the meandering, because I think it is important for us to recognize that we have meandered for many years and I think, like Margaret Ogolla says, the river and the source. This river for Constitution making has been meandering and it is going back to the source, which is the people, who will actually now make a decision during the Referendum, as to whether they want this new Constitution or not, and if we meander or muddle, as Okoth Ogendo said, I think it is okay, the people will make the decision as to whether this is a Constitution they want through the Referendum. Thank you.

Com. Ibrahim Lethome: Commissioner Baraza.

Com. Nancy Baraza: Thank you, Mr. Chairman. I hope you will not rule me out of order, because I will not talk about the

Referendum, the topics that have just been spoken about. I want to talk about this meandering business. I think as Kenyans, we are here to understand issues bigger than what is on the table. I think there is no harm in understanding things at a larger level than what there is. There may be busybodies and other people in court, but they are there, we never know what the court rules. As a Commission we have agreed that we shall meander through a bad law, which means already we appreciate that there is a problem. So, I find it a problem when a scholar, Constitutional scholar, I really appreciate his problem, because that is how he understands the law and quite a number of Constitutional lawyers have a problem, but what we as a Commission have decided is okay, let us leave out legalities, let us not touch Section 47, let us not talk about whether a new Constitution can be brought into existence by the current Constitution, let us meander through a bad law. So, I find it a problem, that is a Constitutional scholar. If I was asked also to present, probably I would have that problem, so I think, let us see the bigger picture so that if the Constitutional Court rules, you here will understand why it has ruled the way it did, it could end up saying the law is bad. What is wrong with understanding? I think what we have decided as a country and more specifically as CKRC, is that we have this bad law and anyway, we have meandered through that law and therefore, let us meander and get a Constitution. But, as a scholar of Okoth's standing, I understand his dilemma.

Com. Ibrahim Lethome: Thank you, Nancy. Now, before I take some more, I can see the AGs hand is up. Okay, I will give you an opportunity before we come back here and meander with the responses. (*Laughter*).

A.G. Amos Wako: Mr. Chairman, thank you very much for giving me this opportunity. I think the letter that invited us to come here and the way I see this programme, it is a joint CKRC/ECK consultative workshop on the Referendum programme. That is what has brought us here. I do not see it as a consultative workshop on whether or not the law, the legalities are valid. But, of course we have our opinions, we have stated them before, they are in writing, but I doubt that this is the place to argue on the issues of the law, more so, when the issues are before the court and they will be handled by other people and depending on the outcome of that court, we may or may not have a Referendum.

So, I would urge the participants, that rather than being carried away into the legalities and Constitutionality's of the Act of everything, let us not be carried away by that. If that was the intention for us to discuss here, we would have come prepared to discuss it and I would have also placed my paper on the table for discussion. But, I came here to discuss really practical things, but here we are required to have this Referendum under the law, we have bodies responsible for working this out and therefore, what is a feasible programme for this and I think the programme is very well laid out, the way I see it. So if we can confine ourselves to the programme and begin working out something on the Referendum programme, bearing in mind by the way, that we do not have much time left. It is 90 days, we are supposed to conduct Civic Education, hold a Referendum, there are so many issues and therefore, I thought that this would be first of the many meetings, good meetings that the Constitution of the Kenya Review Commission and the Electoral Commission are going to have the entire bodies together, but also maybe joint Committees to discuss specific issues about the programme and the issues that I discussed.

So, my plea, really is, Mr. Chairman, that we should now really focus on-- Let us not be carried away too much into the legalities of all these issues, let us just focus on the programme which has brought us here and we do not even have much time to discuss it in greater details. Therefore, because I was out, my dear lady here, Jemimah Keli tells me some question was directed at me, but whoever asked that question, in the light of what I have said, I am prepared to discuss with you over a cup of tea, on what exactly happened. Thank you.

Com. Ibrahim Lethome: Thank you, Commissioner Wako. *Ndio Waswahili wanasema, penye wazee hakuharibiki jambo.* I think you have brought us back. I think, let us limit ourselves, limit our discussions to what brought us here and I think with that, I would like now to call upon the people sitting here and also the CEPIC people, specifically Professor Idha Salim, to throw some light on the questions on Civic Education, because they were raised and I will begin with Commissioner Kihara, and then, I know the two Chairs might have something to say, because their are questions also touching on both Commissions that need to be clarified. So, Commissioner Kihara.

Com. Kihara Muttu(ECK): Yes, thank you, Chair. It is, I think, just a small issue raised by Wanjiku Kabira and my learned friend there, it is about who will be entitled to vote and the time factor. Most issues, I believe both are legislative and we should, through the process, get an explanation, but I believe it appears to be, especially for the time factor, it may appear to be *faite accompli*, because when you talk of night and days and another maybe 30 days, it appears as if it is already fixed, so whether we believe it is sufficient or not, that appears to have been done already, I do not know. I do not know.

Com. Ibrahim Lethome: Professor Idha Salim. Can somebody give a mic to Professor?

Com. Idha Salim: Thank you, Mr. Chairman. I will be very brief as far as Civic Education is concerned. We have been working very hard on preparations for Civic Education for the Referendum. We have noted, for example, that for the remaining part of the process, it will be basically Civic Education for the Referendum. Of course, ECK have the role of giving voter education although, in our view, I am sure all of us is that even voter education is a form of Civic Education, but there is that division of labour between us and hopefully, by the end of tomorrow matters will be clarified as to how each one of us will carry out his role of giving Civic Education.

Mr. Chairman, as far as CKRC is concerned, we have a fairly bulky Civic Education plan, or strategic plan. Unfortunately, we have not brought copies for you to have a copy each, but that plan is very, very detailed and it deals with various issues or various forms of Civic Education which CKRC intends, in fact, has already started giving to *wananchi*. There are consultative workshops with various stakeholders, a series of such workshops has started, several workshops have been held and some more are going to be held. There is also the issue of Media or the use of Media in giving Civic Education, we have had for some time now, Sunday programmes on KBC radio, one in the morning in Kiswahili and one in the afternoon in English. Those programmes have also gone through various Chapters of the Draft Constitution and *wananchi* are asked, in fact encouraged, to

call in and questions have been raised, very, very important questions from all parts of the country for the Commissioners in the studio to respond to. In other words, the mechanism here, or the procedure, is a call in type of programme.

Then we have the major campaign of giving Civic Education in the form, the traditional form of going out to *wananchi* and explaining to them the contents of the programme. We did that, you recall, when we were going round seeking views from *wananchi* and now, this Draft Constitution, presumably after it has gone through Parliament, will also equally be disseminated throughout the country in a massive way as is possible, so that *wananchi* know what the contents are of that Civic Education. We will be visiting each and every constituency, having two minimum, or two venues in that constituency to disseminate the Draft Constitution.

In relation to that, a curriculum has already been prepared by CKRC. In addition, to help the providers of that Civic Education there will be a source book as well as a manual. Those are almost complete and hopefully, within a week or two we will have them ready. Of course, we will have to bear in mind that Parliament has given itself the mandate to amend the Draft Constitution and therefore, those amendments will be taken into consideration in advance of us going round to giving Civic Education.

Mr. Chairman, again very, very briefly, we have noted that not everyone can read the Draft Constitution in its present form - legalistic in form - and therefore, there will be a popular version of the Draft Constitution. We are even thinking in terms of a popular version in Kiswahili, not just in English. So, Mr. Chairman, very briefly, a lot of material is being prepared, we have pamphlets and brochures and ways of catering for our disabled Kenyans with various disabilities, so that they have materials also, that can help them appreciate the contents of the Constitution.

That, in brief, Mr. Chairman, is what is happening. I do not know whether any colleague from the Committee of CEPIC, which is Civic Education Publicity, Information and Communication within the Commission, wants to add to what I have said.

Com. Ibrahim Lethome: Prof. there was a specific question about the contents of the current Constitution. At this stage of Civic Education, specifically for the Referendum, shall we also go into teaching Kenyans about the contents of the current Constitution? I think that was the specific question also, by Commissioner Bashir.

Com. Idha Salim: I think, talking as a historian and taking ourselves back into the history of the process, in the course of going round explaining the need for changing the Constitution, or revising the Constitution, or reviewing it, we did give *wananchi* an insight into the present Constitution and there are very, very serious shortcomings and hence, the need for changing it, because we cannot tell people we want to change the Constitution without also telling them why we want to change it. So, some of that work has already been done, but I think, now it will be up to the individual Civic Education Providers, certainly the Commissioners, to approach the-- (*Microphone failure*).

Com. Idha Salim: Where was I? Yes, that then it will be left now, to the individual Civic Education Provider or the Commissioners who will be actually, Civic Education themselves, to approach this new Draft Constitution in a fairly flexible manner. As we proceed in explaining the contents, obviously we will say, this has been found to be necessary because the present Constitution does not have this. We come to the Preamble, for example, that Preamble is not there in the present Constitution and therefore, as we proceed we will be doing comparative explanations in the process, but if we want to actually deal with one in whole, then we move onto the other one, the time does not allow us, but I think we will expect to bring in the present Constitution in our dissemination of the new Draft Constitution, by explaining the omissions, whole Chapters let alone Clauses which are not in the present Constitution, are to be found in the new one. So that, I think, is the way we shall bring in the old Constitution in our discussion, or dissemination or giving of Civic Education. I hope, *Bwana* Bashir, that answers your question.

Com. Ibrahim Lethome: Thank you, Professor.

Com. Idha Salim: Thank you.

Com. Ibrahim Lethome: Professor Okoth Ogendo, anything to add from the questions that were raised.

Com. Okoth Ogendo: Chairman, listening to the Attorney General, I am not so sure that I should say what I am about to say, but I want to respond very quickly to three questions, one was on the length of the present Draft. What I would want to invite Commissioner Abuya to ponder, is that there is no standard length for a Constitution and if you look at them, they vary depending on the magnitude of what the people think is the magnitude of the issues that they are dealing with. The shortest Constitution in recent times is the Eritrean Constitution, one of the longest is the South African Constitution, and the difference lies in what those people were dealing with.

If you take our case, take the Children's Act for example, our view and most peoples view is that most of what is in the Children's Act ought to be in the Constitution, but we could not get them in the Constitution so we took the short cut by enacting that all children have basic rights, education and so on and so forth, those are the sort of things you find in the Constitution. Once we enact the new Constitution much of the Children's Act will go and therefore, again deciding on what goes in and what comes out is a question of choice. Ufungamano says that land should not be in the Constitution. Now, that has surprised very many people, because everybody around was telling us that land has been abused, the fact that the State owns land means that they are able to plunder it and so on and to most Kenyans, that is one important issue that must be in the Constitution. Ufungamano thinks that it ought to be in ordinary law and that it should be work as usual, leave it out there, let the State control it and abuse it and what have you. So, there is no standard length, there is only a stand and settle problems with the people.

The other point of course, is that a Constitution assumes that there will be a vigorous Parliament that will pass legislation to let it function. We know what our Parliament is like. If you look at the Devolution Chapter, we have provided some interim provisions and the reason we put them there is that Devolution should be up and running the minute the Constitution is approved and therefore, the legislation that we contemplate will be made, is provided for as interim provisions within the Constitution. When a Devolution Act is passed, that part of the Constitution called the interim provisions and therefore, you are bound to have your leaner Constitution as you go along. That is point one.

Point two, let me just clarify that legislation in the country is made by the National Assembly and the President. Parliament is the National Assembly plus the President. That is why, before the President signs the Bill, it is not an Act of Parliament and we have gone further to give the President the power to look at what the National Assembly has done and to satisfy himself or herself, that the National Assembly has complied with the Constitution. Now, in the case of this particular Consensus Act, the Constitution said, unless the Constitution itself provides for a two thirds majority, Parliament operates on the basis of a simple majority and therefore, patently, that particular part of the provision was un-Constitutional, but if the President had gone on to sign it, then of course my colleague Rajji would have said, it remains law until somebody else - that is the courts, say so, even though on the face of it, it is quite clear that it would have been bad law. So, the power of the President to return legislation arises from the fact that the President is the other part of the legislative arm that constitutes Parliament.

The third issue here was, can courts order Parliament? The simple answer is, that courts cannot order Parliament, but Parliament routinely respects what the courts decide and I can give you very many examples in which Parliaments have passed legislation overruling court, because they disagreed with them. Most recently in the United States, the courts of Florida said, they did not want to re-examine the case of a woman who was terminally ill and whose husband wanted the life support removed. It went all the way up to the Supreme Court, George Bush then went to Congress and they passed legislation that the courts look at it again, but it is not bound by what courts say, but, Parliament in a country that operates on the basis of rural law respects what the courts say, but they are not bound by it. Thank you.

Com. Ibrahim Lethome: I think we still have time for one or two comments if there are any. I am not trying to coerce anybody to make any comments, you do not have to. There are no hands, no comments? It is time to go and meander through our lunch and I think, as we come back in the afternoon, one thing to remember is that we have to limit our debate within what brought us here. This is a consultative workshop on the Referendum, so I think, we have had an opportunity to discuss the law, whether the law is proper or not. I think we now concentrate on the Referendum and with that, I think I will allow you to now go for lunch and can we all be here-- Attention please. Can we all be here at exactly 2.00 p.m. sharp, for the next session. Thank you for your listenership.

(Inaudible comments from the floor).

Com. Ibrahim Lethome: 2.30 p.m.? Okay, okay, I understand we need time to meander through the food and then the food to meander through our bodies.

The Meeting broke for lunch at 1.00 p.m.

The Meeting reconvened at 2.35 p.m.

SESSION FOUR

Chair: Commissioner Edward Cherono (ECK)

Topic: The Referendum Law: A Review of the Constitution of Kenya Review (Amendment) Act, 2004
and Referendum Regulations.

Presenters: Hon. Samuel Kivuitu, Chairman, (ECK)
Commissioner Ahmed Issack Hassan, CKRC

Com. Edward Cherono: Ladies and Gentlemen, I would like to start the session now, I am not sure whether there is timekeeper or a bell ringer or someone in charge of roll call to make sure that we are all here now.

The Chairman of the Electoral Commission, Honourable Samuel M. Kivuitu, and his co-presenter Mr. Issack Ahmed Hassan, fellow Commissioners, Ladies and Gentlemen, we have come to the afternoon session and I want to welcome you to this session. In the morning, you all remember that we had an overview of the history of the Referendum in the Constitutional Review Process. It was presented to us. We also had the opportunity to listen to two other presenters, on the comparative Referendum experiences. All those issues were leading to our current discussion, which is the Referendum Law. It is the Review of the Constitution of Kenya Review Act, 2004 and Referendum Regulations.

Now, we are going to deal with our own Act, which is giving us the opportunity to carry out a Referendum in this country. We are also going to discuss Referendum Regulations, so it is no longer discussing issues of other countries, it is no longer meandering, as we were saying in the morning. We have an Act of Parliament, which is giving us the way forward regarding the Referendum and this issue will be discussed this afternoon and it will be specifically on the Review of the Constitution of Kenya Review Act. It is not the meandering, it is the actual Act and we have two people to discuss it. We have Honourable Samuel M. Kivuitu, the Chairman of ECK and Commissioner Mr. Ahmed Issack Hassan, who are with me here and I will first call upon Honourable Samuel Kivuitu, to start the discussion. Honourable Kivuitu, over to you.

Com. Samuel Kivuitu: I greet you this afternoon with a lot of respect, I know you are tired after a heavy lunch and I hope you will not be overcome by sleep. The paper I have distributed, I have distributed – I distributed before lunch – is very lengthy but I have no intention of reading the paper. Part of the paper has got some mistakes, some very serious mistakes, others are spelling because I never had time to look at it, I wrote it under a lot of pressure.

So, I will try to be very brief so that we can allow discussion. This discussion is based basically on the review of the Constitution of Kenya Review Act, 2004 and the Referendum regulations. I would say Draft Referendum regulations. In the first part, in the preliminaries, we will discuss conserving the Referendum. Our basic target of focus will be on the Referendum. It is not going to be very much beyond the Referendum itself. We will try to discuss the roles of both Commissions and also look at the overall objective of the Act, but basically it will be on the Referendum and our roles. I say that our separate roles should blend together so that in the end we assist Kenyans to carry out their sovereign rights freely and meaningfully and then the two Commission on the overall consideration, a common but secret task and I believe it is a task we must embrace together as sisters and brothers and I submit, we owe it to our fellow dear Kenyans who have to bear with us that consideration at all times, that is the service to the people of Kenya.

(?) in my view, the legal regime governing this exercise is not the best. There ought to have been a Referendum Act or some law of that sort which could vest the necessary powers and obligation to whatever persons or entities and define these in a clear manner, including the manner of the exercise or discharge of those obligations. Instead, we have a law which, in my view as a litigation lawyer – I am trying to distinguish myself from Prof. Okoth Ogendo – as a litigation lawyer, the law as it is may invite law suits, not by busybodies, including people who are not busybodies who believe in what they are arguing for. The language at times is either unclear or capable of abuse, or may appear to contradict with the Constitution of Kenya, for there is an operational Constitution of Kenya. Nevertheless, we in the Electoral Commission have agreed to tread carefully through these laws – I think, that is the meandering, we call it to tread carefully, I think it means meandering – through these laws despite all these weaknesses and do our best to oblige Kenyans and that we would not stand in their way, whatever the circumstances.

Now, the objective according to the Act-- That is not very important, that was a little bit academic, so that page you can skip,

but all I am saying is that if you read the heading, “An Act on Parliament to amend the Constitution of Kenya Review Act to provide for the participation of the people of Kenya in the making of a new Constitution through the National Assembly”, then (?) there, why through the National Assembly? And then it says, “and a Referendum and to provide for certain other matters”. I am quarreling with that, because I am saying, Kenyans are not making the Referendum according to the judgement I hear you mention, the Constitution through the National Assembly, but through Referendum and then, thereafter, the National Assembly takes over. That is that particular paragraph.

Paragraph 3 is the Principle Role of the Electoral Commission and I think this is the most important part. The Act may have made provision for other matters, but it is clear that the entire purpose of passing it was to provide for the holding of a Referendum. That appears partly, in the object and more specifically, in Section 28 of the Act and since Section 28 places the responsibility of holding the Referendum on the Electoral Commission, it appears only fair that this paper should commence with reference to ECK, in other words. I did not start with the other Commission. Under the Act the relevant parts are the principle object, Sections 5, that is part IV and Section 8. It is written in the new Act and it is significant to read the title, “The Making of a new Constitution”. At no other place in the body of the Act do those words in that emphatic manner appear, except in the Preamble or principle object. It must mean that that is the part which provides for the making of the new Constitution and that is the part which involves essentially, the ECK, in this process. Under it are listed Sections 26,27 and 28A, it is the amended version of the principle Act, namely the Constitution of Kenya Review Act.

Section 26 is significant, it provides a preamble to Section 27. If you remember that Section, I do not know whether I need to read it, otherwise I will take too long. It reads like this; “Recognizing that the people of Kenya collectively, have the sovereign right and power to replace the Constitution with a new Constitution. Sections 27, 28, 28A, are enacted to facilitate that exercise of that right and power.

So, it is a preamble to-- It introduces section 27,28, 28A, and it recognizes the sovereign right and power of the people of Kenya to replace the Constitution and it states the provisions of Section 27,28 and 28A are enacted to facilitate these people in their exercise of this sovereign right and power. So, that is the purpose of those sections.

Discussions on Section 27 will be dealt with later, and that is where I am wrong, later on. They concern the timeframe with which Kenyans must exercise their sovereign right and power and that will be dealt with as a separate subject. The responsibility of holding the Referendum is placed on the ECK by Section 28 in a very unambiguous terms. ECK is directed by law to hold the Referendum, to give the people of Kenya the opportunity to ratify proposed new Constitutions.

Section 28A(2) specifies the question, namely, whether they are for or against the ratification of the proposed new Constitution. Usually, elections are said to be “held”, but they rarely, if ever, are said to be held by ECK or any such an authority. I am talking of the language here, because the Section talks of; “the ECK shall hold a Referendum”, one might interpret that narrowly

to mean just the day of doing the job. I go further to say, according to Oxford Advanced Learner's dictionary, the meaning of that kind of hold is given as, "to cause to take place". That meaning seems to fall very well with what the import of the entire Section 28 is, that is, the ECK shall cause a Referendum to take place, so as to enable the people of Kenya to express their preference for or against the ratification of the new Constitution. For ECK to perform this function, it must make preparations, plans and arrangements, which will facilitate these people of Kenya to exercise this sovereign right and power and there I list just briefly what they are likely to do. And the last sentences says, "and finally, Section 28A directs that ECK shall publish the result of the Referendum in the official gazette. It specifically says so, nobody else. This provision when read together with Section 28(3), which provides that the proposed new Constitution shall be ratified by a simple majority of the votes cast at the Referendum and the rest of Section 28, it appears clearly obvious that it will be the responsibility of the ECK to count the votes and announce the results of the count for purposes of the Referendum. In light of these provisions it is submitted that it is the ECK solely, which shall be responsible for the conduct of the Referendum. It will, therefore have, besides many other duties to do the following:

- a) design and acquire the ballot papers;
- b) acquire the required in the right quantities, Referendum materials from ballot boxes to stationery;
- c) decide on the Referendum infrastructure including locating and designing polling stations;
- d) recruit, appoint, train and designate Referendum officials;
- e) provide logistics and transport to the Referendum effort;
- f) count the vote;
- g) announce the Referendum results;
- h) arrange for the security of the ballot papers, of the Referendum officials and of the entire process; and
- i) manage and supervise the entire Referendum Process from the announcement of its date to the completion of the permitted litigation.

This is all provided for under Section 28(b) to (e).

Then there is the right to vote. I think that was an issue which was raised this morning, it is worth noting what the Act says. It says, Section 28(4) reserves the right to vote in the Referendum, to the registered voters. It is very clear, to the registered voters. We said we are following the law and that is what the law says. Voters are registered by ECK under Section 42(A) of the Constitution and the National Assembly and Presidential Elections Act and the Regulations made thereunder. Others are used under the Local Government Act, and the rules made thereunder. The same Act, that is the Local Government Act, allows for simultaneous registrations of voters, of those voters with those registered under Cap.7. consequently, ECK carries out the registration of voters for Presidential, Parliamentary and Local Government elections together, but thereafter, creates an electoral rolls or lists specifically for Local Government elections. Thus, all voters registered for these elections will be eligible to take part as voters in the Referendum and no other person. So, now questions of ID and whom you consulted is gone.

Number 5, what are they going to vote for? Section 27,28 and 28B are clear as to what will be the subject of the ratification and therefore, the Referendum. Clearly, it will be the product of the Bomas Draft Constitution - I think that is the one, you know, we do not know - after it has been duly amended by the National Assembly. There seems to be no room for other so called Draft Constitutions to come up with the Referendum under this Act. I think that is our interpretation. When we say Bomas of Kenya Draft Constitution, it is the one you sent to us, because you told us it was, at that time. I do not know whether it has been replaced, but to us a certain document has been agreed upon to be the one to be voted for and that is the one we are going to put before the people. We do not know which one it is yet, but we know this one which was sent to us, the Bomas Draft Constitution.

Now, Civic Education and Voter Education is where we might find some little comfort or discomfort, whatever it is called. There has never been a clear distinction between Civic Education and Voter Education, ECK never bothered to restrict itself when conducting Voter Education, as you will see in various booklets we have. Section 17 and 28(7) of this Act grants to CKRC, the power to conduct and facilitate, coordinate Civic Education to support the Referendum. ECK has the power to promote Voter Education at all times (see Section 42A of the Constitution). It is trite law that the fact that CKRC has been granted the power to facilitate and coordinate Civic Education cannot, *ipso facto* take away the Constitutional power granted to ECK as aforesaid. In any case, please see Section 123(13) and 124 of the Constitution. These are the ones which say, when a law conflicts with the Constitution, what happens. There could be a conflict between the two legal provisions. This is a matter which requires mutual discussion. In sort, we are now trying to seek to be superior on this matter, it is a matter we should discuss and be able to come to an amicable arrangement. We are not opposed to that. As I said in the beginning, the aim is to serve Kenyans.

And seven, Observation and Monitoring of the Referendum. Section 4 of this Act which amends the Principle Act, provides that CKRC shall; (c) monitor the conduct of the Referendum under Section 28. Unlike the National Assembly and Presidential Act, that should be Presidential Elections Act, this Act does not provide for observation of the Referendum. Indeed, this is the only reference to “monitoring” of the Referendum. No definition is given to this term, unless I was mistaken, my copy is a little bit unsatisfactory, and from the definition in the Oxfords dictionary, its meaning could include supervising or overseeing the process. This contradicts directly, Section 41(9) of the Constitution which provides as follows; “In exercise of its functions under this Constitution the Commission shall not be subject to the direction of any other person or authority”. I wish to refer to Section 42A and 124 of the Constitution.

Section 42 provides that; “ECK shall be responsible for promoting voter education and such other functions as may be prescribed by law” and the Constitution of Kenya Review Amendment Act which grants monitoring powers to CKRC, fall under (e), that is an Act which confers other functions to the Electoral Commission. It must abide by Section 124 of the Constitution, it should not conflict with it, to the extent that it contravenes or contradicts – which conflicts with that Section –

with Section 42A(e) of the Constitution, it is null and void.

This is an area where ECK holds very strong views. There may be others who do so outside the two Commissions and therefore, if they go to court they are not busybodies. The two Commissions should discuss this dilemma in a mature and patriotic manner and in the best interest of the people of Kenya.

Now, the errors are now on the next one. There are some errors there. Timelines. The timelines for holding the Referendum are set out under Section 27(1) of the Act. These are programmed in the following manner; The Section has to become operational, that means it will be enacted by the National Assembly and assented to by the President of the Republic. For all we know, that was done. This is one of the errors I had. I have just seen the copy we have does not have that information, but I have just seen from this copy this morning, that it was assented to by the President on the 29th of December and it commenced operations on the 22nd of April, 2005. So, that is the date it started to become operational and within 90 days after the Section became operational, that the era now is after assent was given, it later, on 22nd April, 2005.

The National Assembly must debate the Bomas Draft Constitution - that is, I think you also call it the Zero Draft - together prepared by the report which I CKRC, that is the Constitution and your report.

Tape 9&10

- (ii) the National Assembly must submit to the Attorney General that is still within those 90 days, the Draft Constitution with the Assembly's recommendations only on the Contentious Issues which the Parliamentary Select Committee on Constitutional Review had identified and recommended that they may be approved by the National Assembly.
- (iii) whilst the National Assembly considered the Draft Constitution, it can initiate measures as to facilitate and promote national consensus on the Contentious Issues which were mentioned earlier. We know they were in Naivasha, I suppose they were in Naivasha to promote national consensus

But all these matters must be done within the first 90 days so they started running on the 22nd.

- (c) Once the Attorney General receives the Draft Constitution from the National Assembly, he has 30 days within which he must publish the proposed new Constitution with such amendments as were approved by the National Assembly. This would seem to mean that the Contentious Issues which previously formed part of the National Assembly would somehow disappear which may be completely or re-appear in another form that is the amendments.
- (d) When the Attorney General publishes the new Constitution as above, then within 30 days, that should be 90 days, that is the other error, that should be 90 days, not 30 days, the ECK must hold the Referendum to ratify the proposed new Constitution.

From the foregoing, the maximum period allowed by the Act from the day the Act became operational to the Referendum is 150-- Is 210 actually, that is the correct number, I think the rest is correct now. So from 22nd April, there are 210 days. We know the date when the Act became operational, which is 22nd April, it would appear that the Naivasha Accord was part of the initiative or consultations by the National Assembly to create the National Consensus. There also seems to be in existence, in the National Assembly a Consensus Committee which may or may not mean that the national consensus has been reached. But the 90 days period is still running, irrespective.

Nevertheless the National Assembly reserved for itself the right to extend all these timelines, it can extend them under Section 37. That then means the 210 days time limit can be extended by the National Assembly if it so decrees. So though the time has been running they still can increase it. You can calculate and see when 210 days will end, I think 210 divide by 30 is 7 months, you add to April it comes to November but it can be added.

Right now it is not possible with any certainty to fix the date when the Referendum will be held. The Proceedings before the National Assembly have or have not commenced for all I know and hence I am not certain that the initial period of 90 days has or has not begun. Now it has begun, I do not know what I am saying there!

9. Campaign Period.

The Act does not state who will be the contestants in the Referendum that is why I have a difficulty myself, it does not say who are going to be the contestants, it mentions the questions. Indeed under Section 26 and 28, the contestants can only be identified as the people of Kenya because they are the ones who will be saying one thing or the other. The Act does not confer any personality or entity the power to decide this issue until the counting, when you will be counting and deciding who said what. Section 28 (5) cannot be stretched to support the existence of such power, hence in the making of the Referendum Regulations this is a matter which will have to be borne in mind. Indeed it is my conviction that the Regulations cannot be used to create sides except in the design of the ballot paper because I do not know how you will be able to say this side and the other side when the law itself does not see anything. But maybe some leeway or escape route or meander probably will be found under the Interpretation and General Provision's Act because that Act says that when you have given a power, you have also been enabled to do everything that is possible to make the power operative so you might extend that a little bit to see whether you can do that.

Section 28 applies to the Referendum Process, the provision of the National Assembly and Presidential Elections Act and the Election Offences Act (Cap 66) not (6), (Cap 66). The first Act is applied *mutatis mutandis*, that is with such variations and amendments that may suit the occasion. This gives the ECK a very broad discretion. It is the kind of discretion which attracts litigious people. I expect such people to become a real bother and I have actually told the Minister so and the Attorney

General.

The application of this two Acts of Parliament means ECK will be in some control over the electoral conduct of the canvassers of either view. However, it will not be easy to deal with Political Parties passé under this head – i.e. within the ambit of the provisions of the Electoral Code of Conduct which is necessary. The Place and the role of Political Parties in the Referendum process is omitted completely. It may require some uneasy stretching of the Act to rope them in because I think it is very important in our experience.

10. Legal Challenge of the Process

The Act anticipates that after the results of the Referendum are published, there may be litigation challenging the conduct of the result of the Referendum under Sections 28A and 28B. The challenge must be in the High Court and in the form of an application. It must be filed within 14 days of the publication of the Referendum results in the Official Gazette and the applicant or applicants must deposit Ksh. 5 Million with the High Court, within seven days of the filing of the Application. If no Application is filed within this stipulated period or Applicant(s) fail to deposit the money then the published results of the Referendum become final. But while the Application is pending in the High Court, the published results of the Referendum shall remain in abeyance until the Application is determined by the High Court. I expect a lot of Applications and therefore a very lengthy abeyance.

The Attorney General and the ECK must give notice of the Application within seven days if the Application is filed then the Applicant must inform the rest of the world through a Notice published in the Kenya Gazette within fourteen days of the filing of the Application.

There will be three Judges appointed by the Chief Justice to hear and determine the Application except Applications related to procedure or jurisdiction which will be heard by one Judge.

The Judges have power to:-

- dismiss the application;
- declare the published results incorrect;
- order ECK to repeat polling in one place or many places which means the whole of Kenya; and
- annul the result of the Referendum and order a new Referendum to be held.

The Court can order a Referendum to be annulled if it is satisfied that the law applicable to the Process has not been complied with and such non-compliance has materially affected the Referendum result. This section seems to go further than Section

123(7) of the Constitution which restricts interference of Courts to the excess or abuse of Jurisdiction or authority. It is an area which can form fertile ground for litigation.

11. Referendum Regulations

The Referendum Regulations have yet to be finalized by the ECK. Under Section 34 of the Principal Act as amended by Section 8 of this Act, the power for making the Regulations is vested on the ECK. However it must consult CKRC and the Parliamentary Select Committee on Constitution Review. This issue of consultation can be construed as interference with ECK's constitutional mandate and hence offending Section 41(9) of the Constitution without coming within Section 124(7) of the Constitution. Once again this could be a source of litigation. But the ECK is ready and willing to consult within fraternal limits.

The draft Regulation will be ready soon. They will have to be seen by the plenary of the ECK first before they are transmitted to CKRC and the Parliamentary Select Committee.

Referendum Regulations are not likely to depart too much from the Election Regulations. Some of the areas which call for serious and careful consideration will be:-

- the design of the ballot paper; I say so because even I have heard some of us say that the framing of the question must be simple, the ballot must be even more illustrative. Some countries put art representation plus the word "Yes" or "No", others they do not put that art they put the words "Yes" or "No". you can say, "*Kweli/wrongo*" as Kenyatta used to tell us and they will see whether it is wrong or *kweli*. It is something which it may on the face look simple, it is not, as far as I am concerned, that is one of the big, big problem which we must our heads on and then put our heads together on after we have produced a few designs; and then the second problem which must be dealt with more carefully is;
- whether it is necessary to identify definitely the opposers and the supporters of the ratification before the count is carried out.

You have heard my brother Com. Kihara call them sides, that word is not in the Act, it is no where, it is something we have got to think of, how we can do something to identify that without offending the law and relying basically on the Interpretation and General Provisions Act to see if we can provide some designs.

I think basically this is what I would have like to say in this paper. I am one of those people who are saying the question which is being put to the people is very difficult. Somebody said it here, it is not easy to see how you will ask people whether they will ratify the Constitution or not. Some of the people will accept the Constitution because they love the Government so they will be endorsing Government, others will vote against because they hate it and they know why people hate one another in Kenya, you

do not have to be told, it is not on principles. Others maybe because the Constitution contains just a few lines like Kadhi Courts. They do not want to hear Kadhi Courts, they think God might go away if he sees it is there, he might take refuge and they are left abandoned, it is a very difficult thing. If we had been consulted and also probably if you had been consulted, we probably would have made the question a little bit easier. It is even better to have several questions to ask than to ask a complex question like that which will be dishonestly answered because the answer will be dishonest, that is my view.

Those are the only words I wanted to say otherwise basically what we are saying is that whatever the law is, we will make an effort to see that Referendum is held unless we are blocked by the Politicians. We will cooperate in all aspects, there is nothing which is going to be on our way, between us and you. It is just like we always work with other groups, you are closer to us because you have been struggling to have a Constitution for Kenya for so long, we think we should come along to support you by working together with you, thank you. (*Clapping*).

Com. Edward Cherono (ECK): Now you have heard from Honourable Samuel Kivuitu, he has ably reviewed the Constitution of Kenya Review Act 2004, we will now ask Com. Ahmed Issack Hassan to make his contribution to this issue, Commissioner.

Com. Ahmed Hassan: Thank you Mr. Chairman. I apologize I have not prepared any paper which was to be given to the participants because Mr. Chairman I was informed that I was going to discuss, a discussion of the Chairman's Paper although I got this Paper just some few minutes ago and I did not have the opportunity to look at it earlier. And also the chairman, I think as the Chairman has quite ably captured in his Paper, it is quite clear now the holding of the Referendum and the publishing of the Rules has already shifted from CKRC, under the old Law, to ECK under the new Law so again it was quite appropriate that the Chairman should have done this very Paper that he has done. So for those two reasons basically Chairman, I will just be giving my own comments like all of you on the Paper and the subject which has been discussed.

Mr. Chairman, I will not meander, I will go straight with the Law that we have and the basis of the Referendum Law in my view and I agree with the Chairman is quite clearly captured in the Constitution of Kenya Review Amendment Act, Act No. 9 of 2004, what has been called the Consensus Act, although others call it the Contentious Act. But I think this new law and the Preamble of this new amended law as read by the Chairman clearly captures the purpose of this new Referendum. In my view, this is also a direct response of Parliament to the Ringera Judgment because the Chairman has read it very carefully it says, “*Recognizing that the people of Kenya collectively have the sovereign right and power to replace the Constitution with a new one.*” Section 27, 28 and 28(a) are enacted to facilitate the exercise of that power. Parliament is very carefully and clearly saying what it is doing here in this particular Section that the people of Kenya are the ones who are going to enact that Constitution and this Law is just to facilitate that power.

Now, Section 27 as has been mentioned sets out the process of consultation on the Bomas Draft. Parliament through PSC is

now in the process of consulting and trying to get consensus on the so-called Contentious Issues in the Draft so that it goes back to Parliament and Parliament can within 90 days then make the amendment that they want to make before submitting the revised Draft to the Attorney General who will then publish within 30 days so that you have a Draft Constitution published and thereafter ECK is to hold the Referendum within 90 days.

Now, Section 28(2) I think as clearly said by the Chairman, again it states the question of the Referendum, whether you are “for” or “against” the new Constitution. Now, in some other Constitutions, who is supposed to set these questions? I think the Chairman said that it is possibly ECK. It is not quite clear from the amended Act whether it is just ECK in consultation with the other bodies. In other Referendums, a Committee is set up to formulate these questions the work of the Judge is to approve the format of the questions but for our law that is one (?) we have in this Law in that it does not clearly say who should set up the questions and how we should do it although Section 28 (2) sets out in broadly what the question is.

Section 28(3a) sets out the ratification of the new Constitution. It says by a “*simple majority of the votes cast.*” So again with the threshold it is quite very low. We would have expected for example, in some other Constitutions you will find that it requires a simple majority in the votes cast plus another threshold. For example, you could say 25% of votes in two or three or four other Provinces or Regions but here you can see the threshold is quite minimal, it just says 25% again of the votes cast so if you have a very low voter turn out, that is also another issue we can think about because their thresholds could actually go lower. I do not know, maybe the Chairman will advise us especially on the number of registered voters that we have, we do not know it but I think ECK will be able to advise all of us and during the voter registration drive that you had conducted recently, I think it was reported in the Press that about 600,000 new voters were registered although there were major complaints by people who were not getting the right to register as a voter because of lack of ID cards again, so there is so much inter-connection. Yet we have this rule which states that the new Constitution was adopted by 51% of the votes cast, so that is also an area that maybe we could look at.

Now, all the Electoral laws are applied with necessary modifications to the Referendum under Section 28(5), these are I think the Electoral of Kenya Act and the National Assembly and the Presidential Elections Act. Now if you look at Section 28(5) on this bundle that you have, it says, “*The National Assembly and Presidential Elections Act shall apply with necessary modifications with regards to the conduct of the Referendum subject to the Regulations under Section 34(3).*” They have been questions raised by some of us that again this is subjecting an Act of Parliament to Regulations under 34(3) which also again presents a legal problem.

Section 28(a) provides for the Process after the Referendum, 28(a) basically in terms of what happens now once ECK has announced the results of the elections. Those who are going to challenge the Referendum. Of course anybody can challenge a Referendum Process. They are those who are going to say that it was wrong if I just vote, they are those who are going to say that may be it was wrong, we should have had a “no vote” and vice versa. So again this Section 28(a) provides the process

through which a challenge can be done. But one point I wanted to raise is that the Ksh. 5 Million deposit that is required in this petition, of course it is already part of the question that has been taken to court, those civil society activities who have gone to court to challenge this law have also raised this issue of the Ksh. 5 Million deposit as also one of the major challenges to the Act that it is unconstitutional, it restricts the right to challenge the Referendum, that those who are very poor cannot afford to raise this amount of money. Again, what is to be weighted again is the cost of the Referendum, the process that we have gone through. We have spent millions of shillings and the time and the time and so if we “Yes” vote to allow someone now to come and challenge that process again, there is also that public interest need to try and talk frivolous and vexatious litigations that can derail this Process so maybe as we wait for the judgment of the court this is also one area that has been said to be quite prohibitive for ordinary people .

Now the Referendum Regulations is to provide for the nitty gritty really of the conduct of the Referendum. The Act or rather Section 26, 27, 28 gives the broad framework of the Referendum law, this is the first time we have a Referendum law in Kenya and it is found in these Sections. We do not even have a definition of a Referendum in the Law so basically the Referendum and the (?) therefore will be used to try and fill all the gaps which are necessary to enable the ECK to conduct the Referendum probably so we expect that the Referendum Regulations will contain all the necessary details as to the voters registrations, what is required for the voter to be registered, who is to be registered as a voter, what about those Kenyans who are in Abroad what happens to them, can they vote? What about those who are in prisons and the categories of people can vote, the conduct of the Referendum itself, the polling stations, the employment of the officials who are going to conduct the Referendum, the returning officers, the presiding officers, all those, the ballot boxes, the transportation, the counting of votes the sealing, all those details we expect that they will be captured quite clearly in the Regulations so that we have the whole Regulations in proper.

Now, under the old law, under the CKRC Act before the amendments, it was the work of CKRC to conduct the Referendum and also to publish the rules for the Referendum in consultation with ECK. Now, we knew that time that the Referendum was to be issue based depending on issues and again even at that time most people had said that CKRC had taken the power and had the capacity to actually hold a Referendum. So in our discussion with ECK I think the general understanding was that although that was the law but ECK was going to do the Referendum anyway because that was their real function. It is good to see that under the new law now, the roles have been reversed and that properly the work of holding the Referendum has been back to where it belong which is ECK with the necessary capacity and infrastructure to hold the Referendum.

I think for now the Regulations therefore, if you look at the law as quoted by the Chairman, it requires ECK to consult with Parliamentary Select Committee and CKRC in publishing the Regulations. I do not know whether that again presents any problems but if you look at that particular Section, Section 34(3), it says, “*The Electoral Commission in consultation with the Commission and the Parliamentary Select Committee on Constitutional Review may make Regulations prescribing the procedures for the Referendum.*” So the consultation is mandatory, it is the making of the Regulations which is optional because the word used here is “May” but if incase ECK decides to publish Regulations for the conduct of the Referendum, I

think for it to consult PSC and CKRC is therefore mandatory under this Section so again that presents the question which the Chairman has said whether that again amounts to the interference with the work of ECK in its work but as he has read in the Constitution, ECK should also do any other work given to it by Parliament or by Law so again if you read that Section with this, you can easily say that there is no serious interference with the independence and integrity of ECK.

Now, one more question that I wanted make comments on is the issue of voter education and civic education. under the Constitution of Kenya Review Act Section 17 and 28, “*CKRC is to conduct civic education throughout the entire Review Process, before or after the Referendum.*” Now, voter education and civic education in my view are not necessarily the same thing and voter education perhaps you could say is specific education to a particular function or a specific activity, whether it is to vote on a particular Referendum or to vote on in an election, while Civic Education is much more broad, it is much more (?) that it also includes voter education basically and I do not think that if you look at the civic education which CKRC has conducted throughout this Process it included educating the public on the current Constitution, the weaknesses that we have, the constitutional amendments which have happened, the system of governance here and the new Constitution, the contents so it was content based and I do not think that will be equivalent to voter education and just to make one point again, during our civic education process, they were those who were saying that the voter education conducted by the Electoral Commission during the voting needs to be revised and a teacher was saying that when children are been taught in primary and secondary schools, “X” is supposed to be a wrong, an error of an answer, when a student makes a wrong answer, he is given an “X” and when he is correct he is given a tick, yet during the elections when you are voting for a candidate you have to put an “X” against the candidate you are voting for so a teacher was saying that perhaps there is need to also harmonize our education system with our voting, but that was just a statement by a teacher. I want to disagree with-- Or rather say that I do not think voter education can be said to conflict with CKRC’s mandate under the Act to conduct civic education. Thank you Mr. Chairman, for that. (*Clapping*).

Com. Edward Cherono (ECK): Thank you, very much. I think you will agree with me that the two presentations from Hon. Samuel Kivuitu and Com. Hassan have actually enlightened us, it has given us the understanding of the Review Act so we are now conversant with that Review Act. The Review Act as it is stated in the Act is to provide for participation of the people of Kenya in the making of new Constitution through the National Assembly and Referendum, that is why the Act was amended, to provide for the people of Kenya to participate through the National Assembly and the Referendum, that is what it states.

Now, the Act is there, they have gone through it, what we will do now, first is for me to thank them very much for that excellent presentation then request you to think over what they have discussed while we break for tea. You go for tea then thereafter we will have Commissioner, I think Kavetsa chairing the session for the discussion that is what the programme says. I am lucky I will be out of that discussion, I will be seating there, (*laughter*) so thank you very much, we go for tea. (*Clapping*).

Meeting adjourned for tea break at 3.35 p.m.

Tape 11

The Meeting recommenced at 4.05 p.m.

SESSION 5

Chair: Commissioner Kavetsa Adagala, CKRC

Plenary Discissions

Com. Kavetsa Adagala: The people who are outside, please come in, teatime is over. Welcome back, thank you for the *Kinara* roll. We are in our afternoon Session, Plenary and we have the discussion of the Session that has just ended on “The Referendum law, A Review of the Constitution of Kenya Review Amendment Act, 2004 and Referendum Regulations” and we have had two presentations, one by the Chair of ECK and another one, a kind of discussant role, by Ahmed Issack Hassan of CKRC.

Now, before we begin our discussion, before I open up the floor I have two contributions from up here. One of them is *Mzee* Kivuitu, he wanted to give you something to think about. *Mzee*.

Com. Samuel Kivuitu (ECK): Thank you very much, Chair. It is something in the Act, that is the Act, the Constitution of Kenya Review Amendment Act, which is amazing and which Hassan referred to. Section 28 Sub-Section 5 says, “The National Assembly and Presidential Elections Act shall apply with necessary modifications”. That is what I called *mutatis mutandis*, with respect to conduct of the Referendum, “Subject to regulations under Section 34(3)”. Now, I do not know 34(3) of which Act, because in the National Assembly and Presidential Elections Act, there is no Section like 34(3). So, I do not know which one it is, it should be clear.

A Commissioner: 34(3) of the very Act?

Com. Samuel Kivuitu: They do not say Act. they do not say, of the Act. They do not say, of the Act, they say Section 34(3), fullstop. So, I do not know which Act.

Com. Kavetsa Adagala: In law, that is a very serious omission. So, we could actually get stuck there and not move at all, isn't it?

Now, that is some enlightenment-- I would hope lawyers from both Commissions are listening and the Chair of CKRC has

something to say. Chair of CKRC.

Com. Abida Ali-Aroni: Thank you, Kavetsa. I was hoping that you would give me the opportunity last, just in case somebody else covers, but thank you all the same.

I want to make a comment on the presentation by Honourable Kivuitu, regarding Section 41 Sub-Section 9 and Section 42A of the Constitution. Now, in as much as I agree that we must consult outside the law and we must find a way of complementing each other, I just want the Chairman to confirm that he is not being too conservative in his application and interpretation of Section 41(9) and Section 42(A). My reading of Section 42A Sub-Section A to D, is very, very clear and explicit. “The responsibility for the Electoral Commission in (A) is the registration of voters and maintenance of the Register. (B), Directing and supervising the Presidential and National Assembly and Local Government Elections. It is so specific that we see you have three types of elections; a Presidential National Assembly and Local Government, then there is promoting free and fair elections, (D) promoting voter education.

My concern is that, as Commissioner Kihara Muttu mentioned this morning, that the Referendum is a vote taken on issues and my interpretation of 42(A), is that the Constitution does not make reference to a Referendum and therefore, as you rightly put in your presentation, this falls under (E); such other function as may be prescribed by law. So, if your mandate for carrying out the Referendum is under (E), you therefore cannot be so worried about the issue of monitoring as captured by 41(9), in this sense, that the Act of Parliament which is now the consensus law, or the amended law that talks about the Referendum, may give any other body, such as it has given you, the function of the Referendum to monitor, because to my mind, A to D does not capture the exercise of the Referendum.

So, I think, in my opinion, you are being rather conservative and probably we are worrying about something that should not worry us in terms of the law, although I entirely agree that we must discuss this matter and be able to compliment each other. So, I would like you to consider A to D and tell me whether under that law, you seriously feel that the amended law is not contravention of the Constitution, because I think otherwise.

Having said that, I want to request you humbly to look at the amended Rules and Regulations that we amended much earlier, which deal with the Referendum. You may be able to capture one or two relevant issues that we captured and I would also invite you to borrow the expertise that we may have. As you know, we have the AG as one of the Commissioners and we have the guru, Professor Okoth Ogendo, who would be more than happy if you could utilize the expertise that we have in the Commission as you formulate the Rules and Regulations before you embark on the consultation exercise. Thank you.

Com. Kavetsa Adagala: Thank you, both Chairs. This Session can run away very easily, like a part of the morning that was now meandering in a certain direction. So, I would like to say that, one, what I see in this Session is where the Chair of

CKRC has left off, it is that there is an interpretation and I think, we are really involved in that, that there is the law and there are interpretations of it and I think, part of our being here is to actually come to a common understanding that will help us move forward, so that we are sitting on one side of the table looking at what is ahead of us on the other side of the table, not being on opposite sides. Also, what the Chairman of the ECK has pointed out, combing through the regulations, so that we get the fine points clear and we move forward. I do not know if we can move forward with 33 without any reference to any law, Section 33, and then there is not reference, but at least he has pointed it out.

I, therefore, want to open the floor. I want to propose that we follow the Sections which are in the paper that was presented, so that we deal with each Section thoroughly, that is one way and the other one is that we just leave it open. For instance, we can deal with the Section on Regulations or the Section of registration of voters and so forth, and move forward. So, those two ways, we can choose which one we want to follow. Both? This is a lot of synergy. Yes, Zein. Oh, wait for the microphone.
Kimbia kijana.

Com. Zein Abubakar: Thank you, Madam Chair. I do not know, have you already agreed on both, then I can continue?

Com. Kavetsa Adagala: Some people said both. Are we agreed that we can use both?

Response: Yes.

Com. Kavetsa Adagala: Okay, but so long as we do not run away, meander. There is a river in the North which has meandered, the River Tana, and has left an irrigation scheme dry and it has gone in another direction. It is a fantastic sight. Yes, we are saying both, so the discipline is up to you, Zein.

Com. Zein Abubakar: Thank you very much, Madam. Allow me to thank both presenters and specifically extend a comment to the Chair of ECK and his Commissioners.

Chair, I think the Chair of ECK and the ECK Commissioners brought a lot of honour and pride to our country and in Africa, for the way they managed the elections in 2002 and because of that context, I am sure our people are expecting the same integrity, if not more, for the Referendum and any other elections that come after the Referendum. Having given that context, Chair, I would like to say that it seems we are emerging two viewpoints. One is saying, that we noticed there are many problems with this law, but let us keep quiet about them and meander. I would like to use the Honourable Chair's word, because it has a slightly different nuances with meander, that is treading carefully, and then the other view is that, we could even at this stage identify areas which have problems and try to solve them. Unfortunately, this second view is not getting a hearing, but I would like to confine myself to three issues, which I would request the Honourable Chair of ECK and my nodding brother Hassan, to address themselves to.

I agree with the Chair of the ECK, that, that regulation will not allow the creation of sides and contestants. Be as it may, it is a reality that the sides will become important in the management of the Referendum. In the elections we are used to, the contestants will appoint agents who would even be allowed in the polling station to verify the integrity of the process in the polling station, including helping those who do not know how to read and write, to exercise their right to vote. In the absence of sides, will this not undermine the integrity of the voting process? That is the first question.

The second one - bearing in mind my view is that even the general purpose principles will not help in that context - secondly, on the issue of the Question, I agree with the Honourable Chair, that it is a very complex matter and there are questions like, what language is the Question going to be in? apart from, are there going to be any symbols which will be assigned to different sides, what language is it going to be in? is it just English, or are we going to have both English and Kiswahili for the Question?

Then lastly, Madam Chair, there are certain gray areas which are here and if we, the two Commissions, talk about them and agree, we may enhance the integrity and the legitimacy of the outcome of the Referendum, but if we say we are just going to apply the law and not take them into consideration, they may undermine the integrity of the process. For instance, the question of who is going to vote. The law is clear, I agree with the Honourable Chair, that the role is clear here, that it is the person who has been registered to vote. We know many Kenyans have difficulties getting IDs when they turn 18 and they would like to participate in this process. If we say it is those registered and we do not do anything to allow young people who have turned 18 to get IDs, what will we be saying?

Lastly, Madam Chair, is the question of the areas which the Honourable Chair, uses, the language is either unclear or capable of abuse or may appear to contradict the Constitution of Kenya. Those areas, if we are aware of them, why is it so difficult to propose things which will make them not appear or attract litigations and one of the examples of this, is the one which Commissioner Hassan, my brother, identified, the requirement that somebody should be able to deposit 5 Million. The Court of Appeal in Tanzania, found that this was an un-Constitutional provision in their case, because it denies access to everyone, it is arbitrary, and so on and so forth. Why can we not propose, as two Commissions, to solve some of these problems before we come to them? Thank you very much, Madam Chair, for your indulgence.

Com. Kavetsa Adagala: Thank you, Zein, for kick starting the whole discussion. I would like to proceed in this way, I am borrowing the Chair's eyes. There is Zein-- Sorry, Raiji, Henry then Kangu, then-- This is Henry? There is someone over there?

A Commissioner: Edward.

Com. Kavetsa Adagala: Edward, yes. I am learning the names, although in a mist, and Kangu and then I will come to this

side, so be ready. Raiji.

Com. Riunga Raiji: Thank you very much, Chair. I just want to commend the Chair of the ECK, I think he did a very good critique of this Act, by pointing out various weaknesses and probably some strengths, although I think that was not emphasized very much.

I think, the important point – and I want to commend the two Chair's, like others have said – it is the idea that we are working together, even where the mandate, for example, appears to overlap, or where a Constitutional power that is exclusively vested in the ECK, I think the ECK Chair has graciously accepted that you probably welcome the input of other partners, including us and, I think, the PSC. But, there are very interesting issues that are coming, particularly like this one, the creation of signs and I think it is an important issue. Perhaps because we have not really had an experience of a Referendum, but I think last week, or two weeks ago, we have been having other Referendum, like the EU Constitution. The issue really is that, do you like it or not? I think, probably, we need to think outside the box, that we have traditional contestants, the adversarial kind of system that we have had, that you must have one supporting. I think this one is clear, that it is the people of Kenya and I would imagine that anybody who wanted to campaign for or against would be free, within the laws permitting peaceful assembling and so on, to go ahead and convene its meeting without constraint on party or any basis.

So, I think, Mr. Chairman, I think that is an interesting point. I do not know what the rules will finally look like, but I think the whole intention is to actually allow the people themselves, other than allowing parties to go and bulldoze people to vote for this, to go and propagate the ideas and make a decision and probably, maybe that is why Parliament did not create parties in this.

Now, I think the other thing is that, you mentioned, Chair, about the Draft Constitutions and I agree entirely. I think this one comes from-- Maybe we have not done enough Civic Education. If you read the whole Act, the Act actually emanates from the time when the Commission was set, it collected views, went through Bomas and so forth and it has been limited, the amendment is (?) limited reopening only on contentious issues. So, there cannot be anybody operating within the law, the question of that, unless maybe you instructed that part of your Constitution that relates to those contentious issues and submitted them to PSC as your views. So, I think, Chair, you did that and I hope we are able to explain to some of our brothers and sisters there, because I think, there is a misconception that there will be several Constitutions, so that you are asked to accept Ufunganamo, Law Society, Bomas, Kivuitu's, Abida's and so forth. I think that is something that we can do to educate our people. Thank you.

Com. Kavetsa Adagala: Okay. Henry.

Tape 12

Com. Henry Jura (ECK): Thank you, Madam Chair. I want to comment on what Commissioner Hassan said about the

simple majority, without weighting that one aspect with another, like the 25%. Now, it does not appear that the law has looked at the minimum number of the electorate that would be accepted when they vote. Like recently, we had a Referendum in Italy about unborn babies, I do not know what it is all about. the Catholics campaigned against this and advised people not to vote and they got less than 50% and therefore the Referendum was a nullity.

In this, do we have such a situation? If only 20% of the Electorate vote in the Referendum, not for or against, in the Referendum, what do we do with that? Do we accept it as representing the collective will of Kenyans? Thank you.

Com. Kavetsa Adagala: In other words, there was a low turnout?

Com. Henry Jura: Yes, there was a low turnout.

Com. Kavetsa Adagala: Because the Catholics--

Com. Henry Jura: Because the Catholics did not vote, I mean, in Italy less than 50%-- I think their regulations, their law is that if less than 50% turn out for the Referendum, that the Referendum is a nullity. Now, the exercise, I do not know how to put it in legal terms, so here in this country, if only 20% vote in the Referendum, not for or against, in the Referendum, do we consider that to represent?

Com. Kavetsa Adagala: Sorry, I was a bit slow, but those are the kinds of problems of manipulation which can happen, isn't it? Someone tells people to stay away.

Com. Henry Jura: Yes. Actually, all I am saying is that the law does not seem to have covered, for example, that kind of scenario. Thank you. So, if there is need for improvement--

Com. Kavetsa Adagala: Henry, the lawyers will answer these, because you and I are kind of in the same position.

Com. Henry Jura: Well, I was just commenting on that.

Com. Kavetsa Adagala: Yes. Edward.

Edward Lopokoiyt: Thank you very much, Chair. I would like to thank the Chairs of the two Commissions, for conducting this Session very well.

My feeling is that Section 4(F), where it says the CKRC monitor the conduct of the Referendum under Section 28, maybe you

have talked about it. To me, this tends to create two centers of power and the results, because if you monitor – this is my own, I am not a lawyer – but if you monitor, you have to present a report qualifying the results of the Referendum. The ECK will be publishing the results in the Kenya Gazette and CKRC, under that Section 4(F), will be submitting a report qualifying or otherwise, the results of the Referendum. That to me will create two centers of power and this easily could divide the Kenyan people into two. So, this is what I was observing. Thank you. My name is Edward Lopokoyit, Commissioner, ECK.

Com. Kavetsa Adagala: Yes, always state your name. I think this is what the Chair of ECK was saying, that there is no definition-- He is not listening. There is no definition to monitoring and it has kind of been left. I think we have to agree on this, but take heart, take courage, two centers of power are not so bad. (*Laughter*). Yes, Professor Kabira-- Kangu. Kangu, then Professor Kabira.

Com. Mutakha Kangu: Madam Chair, I wanted to try and see whether I can give a way forward. I will start by saying that the law is supposed to be a tool in the service of the people, in fact, the welfare of the people. The people are not supposed to be the slave of the law, so in providing a way forward I need to point out that right from the morning, in this age of consensus building, one can rightly say that there is a consensus in this room, that there are big problems with the law, that there are limitations in the law. Now if, as two Commissions, a national responsibility has been placed on our shoulders to guide the country in the process of delivering a Constitution, we need to find solutions to these problems we have identified and I doing so, we must be informed by what I have said, that the law is supposed to serve the people, the people are not supposed to be the slaves of the law.

How then do we move forward? Now, the problems you have identified, Mosonik said in the morning that in some countries they have a double majority and we have in this country, when we elect the President, the Constitution now requires that he wins the simple majority, but he must also get 25% of the votes in a number of provinces. I remember at an earlier stage, when we had started discussing or considering regulations under the earlier law, in our Commission we had considered that. In the current law there is no double majority and we can see that is a problem.

Now, we are talking about the issue of the Question. If you read the section dealing with the Question, the whole country is saying, there will be one Question, but talking as a teacher I can be able to set a question. In Biology - I did not pass Biology, anyway – the question can ask, that critically discuss, a), the features of a head of a donkey, b), the features of the legs of a donkey, c) the features of the stomach of a donkey. It is one question with three parts, so in this Constitution we could even set the Question as; ‘do you approve of this Constitution a), the Chapter on the Legislature, b) the Chapter on the Executive, c) the Chapter on the Judiciary, d), the Chapter on Commissions’. It is one question with several parts.

Now, many questions have been raised which clearly show-- And the Chair for the ECK said, some of the Clauses can easily attract litigation. So, as responsible Commissions we look for solutions and Zein has said one option of the solution would be to

sweep those problems under the carpet, would be to say, come here with a solution, do not come as a problem and when you think you are solving the problem you are simply postponing the problem. We had better swallow the bitter medicine and face the problem and solve it, rather than postpone.

Another way would be to say, we see the problem and then look for how to solve it. One way would be to say, as CKRC and ECK, can we find an interpretation here which can enable the two of us to work together without conflict? Between us that can work but for the outsiders, they can decide to go, to court as the ECK Chairman said. We will not have solved the problem, we will only have postponed it.

Another way would be to say, can we-- If you look at this law, CKRC throughout its work, has always consulted with the PSC on various issues. Now ECK has been brought in and there is a Clause that says, on making of regulations the ECK can consult with CKRC and can consult with PSC. The mandate of the CKRC to consult with the PSC generally, still remains to the end of the process. Why don't we be honest, be candid, be responsible and identify the problems, ask for a tripartite meeting with the PSC and tell them, you have given us, the two Commissions, a job to do. You have given us an infrastructure through which to do that job. Our honest view is that the infrastructure you have given us is not adequate and we think that some of the problems in the infrastructure can be solved by you, Parliament and by further amending the law and we are proposing that here you can put an amendment to deal with this, here you can put an amendment to deal with that and we tell them, we-- There is one way, we can ignore these problems and go on, but we see the danger of people going to court and challenging the entire process. Now, if you choose that you tell us you are not ready to change the law, we shall try to meander round it, but if someone goes to court and challenges and things are in a mess, do not say we never told you. That is my way forward.

Com. Kavetsa Adagala: Okay, thank you, Kangu. Let us have these questions answered and then we will start with Professor Kabira. Maranga and Lethome's very tall hand.

(Discussions at the "high" table)

Com. Kavetsa Adagala: Professor Kabira. I wanted to tell Commissioner Kangu that there are two species of chameleons, one give birth and the other one lays eggs. Endelea, *Professor Kabira*.

Com. Wanjiku Kabira: Thank you, Kavetsa. We were just discussing outside about this word which we have adopted, "meandering" and Kibisu said to me, you know, meandering is a sign of weakness, and I said no, it is actually feminine. You can decide to go round the problems because you know your destination and you do not want anything to block you, but for masculine, you have to demolish the building on your way to where you want to go. So, there are different interpretations.

On the issue of the campaign period, I like what Honourable Kivuitu has suggest here, because for me, I think it is important, either through the regulations as we look at the Presidential Act and the others, we are very clear that people cannot begin campaigning before Kenyans understand what the Draft is all about, like what we have, although I know you are saying that the law does not provide, so that we do not have people beginning to campaign against the Drafts, saying there is this and the other before proper Civic Education is carried out, so that people will be making decisions from an informed position. So, I hope that we will be able to do that.

I know there are no sides.. Well, it does not indicate the sides, but there are going to be sides, because we already know that people will be taking sides, maybe on the kind of Draft they are looking for. I also like your comment on Civic and voter education, because we have been discussing it among ourselves also at the Commission and saying, that it does not make sense for the Commission to go and talk about the Draft and then the questions are raised about how are we going to vote, what is the process, and then we tell them, ECK will come later to tell you how to vote. So, it is very important that we work together on this issue, so that we are able to deliver a full package wherever we go, whether we are ECK or CKRC. Thank you.

Com. Kavetsa Adagala: Thank you. Maranga, then Lethome. *Endelea Maranga.*

Com. Charles Maranga: Thank you. I want to also commend the presenters of the two papers, even though I did not get Henry's paper, but I think he did well orally.

Now, there are a number of issues which have come out. I think the first thing we must agree on is that there is no perfect law, even in your own house. In fact, you will find all the time you will need to change a few things and I think, starting from ECK, I know the Chairman has always been saying, the Parliamentarians have given me a bad law. If you give me a good law then I will be able to effect certain things, like violence during campaign period. I think it is an issue which they kept on raising, the same issue with supervision of Political Parties. I think, if we want to give examples, even ECK, as it is constituted, you will find that it is not perfect, the law is not perfect and no amount of amendments will, I think, change the attitudes of Kenyan and I think for my brothers who are insisting that we must have amendments before we have a new Constitution, then we would have as well started with a written Constitution which is in place then we see whether it is working or not, but which is also not possible.

So, I think the best way forward is actually to use the bad law to bring out something good, the very reason being that even the Chairperson of ECK did accept in the morning and he made a comment and he said, if you know that the very Constitution we have come into existence because of a bad law, then we are not going to change much. So, I think we need to perfect this kind of thing maybe later on.

The other question is interpretation. I think interpretation here varies from one individual to another. There are people who will

say, unless you amend this, then we will not be able to have this. There are other people who see it differently, that with this we can be able to move forward. The issue of the framing of the Question. I think the Act is very clear, it has already given us an indication of what kind of Question we need to ask. It is either Yes or No, we are not going to subject the Draft and say certain sections, in fact, that should have been an earlier way of approaching the issue of the Referendum. If it was issue based then I will have understood and then people will be asking, do you like Executive, do you like this, do you like Bill of Rights and so on, but that is not there. I think now, what we expect is the entire Draft Constitution, somebody to say Yes or No, based on probability, whether you like the Draft or you do not like it.

So, the other issue, maybe which I want to put to the Chairman of the Electoral Commission is about the timelines. We know very well that if we go for the actual date of polling, that means the actual date of the Referendum, it might fall between November-- Maybe around November and December, but you remember also, this is the period when we have schools carrying out their activities like examinations and so on. We have national examinations, we will have a national Referendum and we might have other national activities. What kind of mechanisms are you going to put in place? Because if it falls between November and December, the likelihood is that this Referendum might be pushed much further, maybe even to 2006, which is a likelihood. So, maybe I want to know what the Chair of ECK is going to comment on that.

The other issues is Civic Education. The Civic Education which is supposed to be carried out for purposes of carrying out that Referendum. Now, if the Attorney General is given the Draft Constitution, he has 30 days in which to publish that and after publication ECK-- I hope ECK will not be so conservative and decide we are actually having the Referendum the next day, before CKRC carries out the Civic Education. So, I think it is a question which we need to agree, the two Commissions, that the Attorney General does not publish the Draft Constitution and then the following week ECK is up with a date, that that is the day we are carrying out-- And you know Honourable Kivuitu, when he says that is the day, he will mean it, that is the day. So, we really need to agree upfront on this issue, that you will need to give us enough time as CKRC, because as you know, as much as we are carrying out Civic Education, the kind of Civic Education we are carrying out is not Civic Education for the Referendum until the National Assembly agrees on the Draft Constitution which is going out to the Kenyans.

The last comment which I will want Honourable Kivuitu to comment on, is the issue of the campaigning period, that campaign period and given that you do not have people with symbols and so on, maybe you might have to think given we do not have the site, but I think the campaign period we need to be very clear. What kind of period are you going to give the people? Just before the actual poll, what kind of period are you thinking about, so that we can be able to prepare Kenyans well and maybe the last question, which I want to comment on, is the people who will be turning 18, but they have not participated in the actual poll of the Referendum, but they will have Ids and they can easily go to court and say, look, I just turned 18 the other day, but I do not like what you people voted in for. So, what kind of mechanisms are we going to have, as two Commissions, to be able to move forward? Thank you.

Com. Kavetsa Adagala: Okay, let me just say, that last comment of Maranga's, there is an even more insidious problem. It is that people are registering people under 18, I hope you have heard that rumor, Chair, who are under 18 because of the Referendum. That has kind of being going around. Yes, Lethome.

Com. Ibrahim Lethome: Madam Chair, I think listening to the discussions going around, one can easily draw a line to separate between issues and non-issues and I think the purpose of this consultative meeting between ECK and CKRC is to try and see how maybe we can come out with a win-win situation on the issues pertaining to the mandate of each of the Commissions in as far as the Referendum is concerned.

Let me pick out one of the matters that I consider to be an issue, an issue that we need to discuss and maybe agree on how to tackle it, or meander around it. What has been raised here by the Chairman of ECK under Section 4 sub-section C, on monitoring the conduct of the Referendum. The Chairman has given us the oxford meaning of what monitoring is, and that is supervising and overseeing the process. Then, towards the end he has invoked the Constitution, Section 41 sub-section 9, which says that ECK shall not be subject to the direction of any other person or authority and I think there is no argument here, when there is a conflict between an Act of Parliament and the Constitution, the Constitution takes precedent, but in my humble view, there is no conflict here, because the Constitution under Section 41(9) talks about the ECK being under, or subjected to the direction of anybody, yet, in your definition of the word monitoring, there is no word 'direction' here, because when you talk about directing a body it means giving instructions, do this, do not do that. In monitoring we do not envisage that.

Way forward. Can the Chairman please move away from the words he has used in the last paragraph on that issue, that ECK has taken very strong views, because when we are talking about a win-win situation, people should move away from taking strong view. So, we move away from that and agree and say this, the law may not be perfect and we have agreed since morning that we are going to meander around this law and you have ended very well and said that we should discuss this dilemma in a mature and patriotic manner, in the best interest of Kenyans. So, in the best interest of Kenyans, the interpretation that I would give to monitoring of the process is that it has nothing to do with subjecting ECK to any directions. CKRC will only be monitoring with a view of getting something to write in its final report. That we kept an eye of the process right from voter registration to Civic Education, to voter education and the actual Referendum, but CKRC will not, in any way, direct ECK in what it shall do and I think if we take that approach, we shall have resolved that issue once and for all.

So, Mr. Chairman, I beg you to move away from that strong view, so that we can come out with a win-win situation. Thank you to Madam Kavetsa, for teaching us this approach, win-win situation. Thank you.

Tape 13

Com. Kavetsa Adagala: When I read, the Chair of ECK, I see on page 18 it is saying, "once again...". Okay, "...but the ECK is ready and willing to consult within fraternal limits". I do not know where you were reading the one of strong--

Com. Ibrahim Lethome: Page 11.

Com. Kavetsa Adagala: 11. Okay.

Com. Ibrahim Lethome: Just before timelines--

Com. Kavetsa Adagala: Our timelines.

Com. Ibrahim Lethome: Yes, timelines. That is where he begins by saying, “this is an area which ECK holds very strong views”. Underline that.

Com. Kavetsa Adagala: Yes. Okay. We will handle this, I think they are also talking about different dimensions there, or different timelines. Commissioner Nyamu, where is he? Okay, Nyamu, then Bishop, ECK Bishop. Anybody else on this line so we can finish. We only have about 15 minutes for response, so let us just have the-- Who is this here? Cheronon, and I think that should be it. Yes.

Com. Habel Nyamu: Yes, thank you, Madam Chair. Very, very briefly, three brief points. One of them is about monitoring. I am not a lawyer, by the way. Through ECKs usage, the electoral usage, there are two words that are free for us to use. One is observe, the other one is monitor.

Since 1992, we have never ever used the word monitor, usage only, because monitor to us at that time and we read extensively about monitor. Monitor is about full participation of the monitoring agent in the process of elections as opposed to observation, which does not allow the observer to interfere with the process itself. That is the distinction and I think, if we have appeared like we are taking very strong views, it is because of that usage. So, one can be an observer and if we agreed that observation is the better of the two, then there will be no problem, in my view.

The second point is, who is going to vote? And the answer is the registered voters. They are going to vote about what? They are going to vote on, in my view, a monster called the Constitution, at least that is what my mother would view it like. It is a completely unknown monster in her lifetime. Why am I calling it a monster? Because it is not voting about which color to give to our national flag, if it is colors then I am sure that my mother would vote for green, even without voter education, even without voter education and even without Civic Education. We are not going to vote about a simple thing like that. What are we going to vote about? Most of these people I am thinking about, it is about if Kibaki is a good President or a bad President. Is that the Constitution we are voting about, this monster? I do not think so. Others will vote, like people in Kirinyaga, where I come from will likely vote about if it is right for Kirinyaga and Embu and Mbeere to be a region like the Draft says? Personally, I know

what the Constitution is about, but a lot of people, over 50% in that area will care about how they dislike being lumped together, but that is not about the Constitution, that is about how that little group would like to live in the future.

There are a lot of people who think that the Constitution requires them to vote about their current MP, *vis a vis* the older MP. Is that what we are here in Mombasa trying to resolve? Certainly not, but you know, it is the reality, although that likelihood is likely to be reduced by Civic Education and voter education, but how far can people be convinced within 90 days to reduce their very close knit feelings about that?

Now, the last group who will vote the way they like and somebody has already said this but I have forgotten who, is what about the very strong Muslims? Are they going to vote for a Constitution which seems to belittle the Khadis' court? There will be a lot of questions about that. So, we need to be very, very careful in that. (?) second chamber, Executive, President or non-Executive.

Lastly, and I would like assistance from Professor Okoth Ogendo, whether the Review Act did not make an error by inserting the word Review, which the current Constitution does not allow. The word Review is a simple word, but I have go a feeling that the current Constitution does not allow that word to change the current Constitution. Would it have been better if the heading was 'An Act of Parliament, enabling Parliament to empower the people of Kenya'? Parliament empowers the people of Kenya to participate in the process of amending the Constitution. They resigned some of their power to enable the people of Kenya to amend the-- Because that is what the current Constitution allows. Amendment and alteration, those two things are allowed. So, if there is a way of bringing and conformity, which is friendly, and the way forward, rather than discontinuation on one side and the other side. I think that might help if amendments are still possible. Thank you very much, Chair.

Com. Kavetsa Adagala: Okay, thank you very much. Bishop, of ECK.

Com. Bishop M'Thambu (ECK): Thank you, Madam Chair. Mine is very simple and is more or less a question.

Com. Kavetsa Adagala: Go on, we are listening.

Com. Bishop M'Thambu(ECK): Are you?

Com. Kavetsa Adagala: We are listening.

Com. Bishop M'Thambu: Now, I think, Madam Chair, you will agree with me, from this morning, arising from what Professor Okoth Ogendo's presentation concerning hot cases and litigations that are taking place, and what Dr. Maranga has said is a worrying situation especially when, at this moment in time, we are really finding the way forward to holding the

Referendum. But, I am wondering, how far can those court cases hamper, though we may meander, we may find court cases being an impediment to our meandering process. Can we be actually enlightened on what actually the CKRC is actually thinking about these court cases that are really challenging the holding of the Referendum. We may talk and talk and talk and spend days here, but we find ourselves actually hampered. Can we be assured about what is really happening? Thank you.

Com. Kavetsa Adagala: Okay, a deep question. Lastly, Commissioner Cheron.

Com. E.C. Cheron: Chair, I see that we seem to be agreeing that we continue meandering throughout, because if we do not agree here that we accept that there are certain issues which need to be sorted out, agreed upon as issues (?), come up with those problems as we may have identified or maybe our lawyers have identified. So, we come up with a list of problems, issues that need to be tackled, discuss them, agree that they are not issues or accept that they are issues and then look for the solution. If we can come up with those issues, look at them critically without fear or without thinking that the only solution to those problems is agreeing to meander, then we will not have a problem. So, let us critically look at the issues as they are raised, list them, give them technical discussion, very technical, come up with the solutions and agree on how to sort them out without any fear.

I have heard, right from Professor Ogendo, when he discussed the issues relating to the Act and relating to the Constitution itself. If you look at the original Constitution, what you call the Constitution of Kenya Review Act before the amendment, there was a whole section of part 4, in which the amendment simply said, "part 4 of the principle Act is repealed and the following is substituted". You repealed the whole section which was giving you procedures and details of the making of a new Constitution. You repealed the whole section that discussed the issues of Bomas and how to come up with that Constitution and the whole thing is repealed and then you start with amendments recognizing the people of Kenya collectively and then you want them to give participation through the National Assembly and through the Referendum and then you use the same document that you have repealed certain sections. I am not a lawyer and I am not going to challenge it, because I do not even know if it is challengeable, but the issue is, Professor Ogendo raised certain issues and I like a situation or a position where us, as Kenyans, we take issues raised by individuals and record them as important until we discuss them through discussion and the issues which may have been raised by us at the Electoral Commission be taken, be listed, look for technical advice and we agree and then we come up with solutions to those problems. If it is possible to do it right here today, that will be wonderful, let us do it. But, if we can subject certain issues to certain discussions I think it will help us, because all of us are looking for a way forward. Let us avoid the situation.

I have heard the Chairman of the Electoral Commission when he says, the problem of all Kenyans is that they think every single one of us is useless, so whenever you have a discussion and you make a proposal you say that is a useless fellow and we do not know who is a useful fellow in this country. But if we take issues as they are and then we discuss them, I think it will help us. So, I am proposing a situation where we come up with the issues, let us look at them critically, whether the issues are within the

amendment or within the original process, if there are issues that we can still attend to, so that we can have amendments of the amendments enacted as soon as possible before we come to the conclusion of the exercise, we try to do it. If we cannot get it, then we all agree, like someone was proposing, that let us look for a way of working together like how you can monitor us in the best way possible that we will think we are not being monitored, maybe there is a way like that. So, that is what I am saying, Chair.

Com. Kavetsa Adagala: Yes, I can hear you and I appreciate very much your calmness and your tone. *(Laughter)*. I think it is called wisdom, and saying let us-- because there are other suggestions which have been made. When I suggested earlier on that we could go by what is in the paper, it was that kind of systematic finish with each one, because they are listed by the Chair of ECK. Also the issue of agreement, it will make a lot of difference if we can have grounds for agreement here. I think that is part of the win-win, then we would move forward to another set or another situation, or another scenario all together. It makes a lot of difference how we approach this, even with Civic Education in 90 days, you can achieve a lot if you have the right approach and the right intention and if you have what is called synergy, then things happen in an exponential way rather than being one plus one, because it could be one plus one is 52 or 2000 depending on how-- You know when you are in an agreement how things go, but I will let the senior man start and then – the other one is junior? Okay--

Com. Samuel Kivuitu (ECK): Only in age.

Com. Kavetsa Adagala: Only in age?

Com. Samuel Kivuitu(ECK): *(Inaudible)*.

Com. Kavetsa Adagala: Okay.

Com. Samuel Kivuitu (ECK): Thank you very much, Chair. I think there is in this document the programme for this conference, something which is called “emerging issues and the way forward and I think a lot of these things which have been raised, you can sort them at that stage, particularly what Commissioner Cheronno is saying. These are matters you can look at, I even think that applies to Mr. Mukangu. I am coming back to Mr. Mukangu, because there is something he said which I agree with-- Kangu, sorry. There is something he said which – I even told the Commissioners, has been bothering me – and he has mentioned it.

When you go home, those who think that our position on Civic Education and monitoring is wrong, although lawyers have go that tendency of not agreeing on interpretation, especially when they are representing different clients. In the first place, I agree with what Abida says, but I want you to look at that section which you are talking about, Section 41 Sub-Section 9. Let us look at it again, of the Constitution. It 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” and if you look at the next Sub-Section, it says, “the Commission may make rules or otherwise regulate its own procedure and with consent of the President, may confer upon powers and impose duties on any public officer or authority for the purpose of discharge of his functions”. In fact, I am surprised, that is not the way-- This is my Act, it is not the way it used to read. It used to say, “without prejudice to the provisions of Section 9..” I cannot see why this is not saying so, I do not know why they altered that. Meaning that Parliament was accepting that it is an authority, but it cannot pass a change which will look like interfering with out powers.

If you read that one-- First of all, I think, Lethome, when you supervise you interfere, because when you supervise you must tell someone, do this, do that, that is what supervision is all about. if you read that and then you read Section-- I do not know, it must be I was quoting the wrong section when I said 124.

Com. G.K. Mukele: *(Inaudible).*

Com. Samuel Kivuitu: It is 123-- I think it is 123, I do not know where my great lawyers are.

Com. Kavetsa Adagala: Great lawyers of ECK.

Com. Samuel Kivuitu: 104. is it the one where the law says that you are not subject to any direction, it does not mean-- You see, it is the interpretation, it is 124.

Com. Kavetsa Adagala: 124?

(Inaudible discussions on the floor).

Com. Kavetsa Adagala: 123.

Com. Samuel Kivuitu: 123? Yes, it is 123.

Com. Kavetsa Adagala: Yes.

Com. Samuel Kivuitu: Where? Anyway, you look for it and you will find that it says, whenever an Act of Parliament is contradicting-- Yes, it is 124. “This (?) shall have effect, notwithstanding the foregone provision...”. “And accordingly, if any such provision is inconsistent with the provision of this Chapter..”. No, it cannot be this one.

A Commissioner: *(Inaudible).*

Com. Samuel Kivuitu: Whatever the Section is and Lethome stated very, very correctly, any law inconsistent with section what?

A Commissioner: 123(8).

Com. Samuel Kivuitu(ECK): 123(8). Yes, it says--

Com. Ibrahim Lethome: No provision is-- *(Inaudible)*.

Com. Samuel Kivuitu(ECK): No, not that one. Anyway, any provision of the law, which contradicts the Constitution, is void to that extent, whatever it is, it says that. Now, we are saying, that any provision giving power to anybody to monitor and therefore, to supervise us, contravenes the section, Section 41 Sub-Section 9. clearly, there is no way, we see it very clearly. I am saying what we see. This question of saying a provision in mandatory, if it is mandatory in an Act of Parliament and it contravenes something in the Constitution, that mandatory has no meaning, it is nothing, as they say, (?).

Com. Kavetsa Adagala: Welcome back. *(Laughter)*.

Com. Samuel Kivuitu(ECK): In short, what we are saying is that, we view that as the position and that has been our interpretation. In fact, it has been our interpretation and all the Ministries keep off from us because of that. We say, you just bring this and you are interfering with us, please keep off, but if you want cooperation do and I said, and this is our position, we want the Referendum to succeed. It is not ours, it is for this country, it is for our brothers and sisters, mothers and fathers and grandfathers. We want it to succeed and so we must find a solution, solution is not very difficult. If you come to monitor, monitor is bigger than observe, so you can observe elections which means you will not interfere with the process, you will not talk to anybody and say, "why are you doing this? Do this?". You do not do that, you observe whatever you want to observe since you want to write a report. when you want to write a report you do not need to ask pompous questions. You look and write your report, nobody will bother you, that will be there, that is there. In fact, we are going to allow fellows from other countries to come and observe, they are not better than you, as I said, we are colleagues. We are in this game together. So, there is no problem, I am just saying that please, let us remember, if you exceed we might have a problem and we might start quarreling and that is one thing we do not want, we do not want quarrels. That is number one.

When we come to Civic Education and voter education, true, voter education merges into Civic Education. With us, when we are doing Civic Education or voter education, we do not even do it ourselves, we normally give this to NGOs to go and do the job and we just tell them, these are the limits. So, we can see no problem at all as such between us and you, at all, even whether the law conflicts it does not conflict. I am mentioning these things and even when I wrote to the Minister I told him all these

things and many more. I even told him this question of Question, we are just cheating people asking them a question like this, we are cheating people. But I said we are going to do the Referendum and I am glad, for example, we have this workshop, because we are going to come out of this knowing exactly what each one is thinking and we are going to work very well and that is all. So, that should not bother you, it should not even have taken so long to sort of argue, I think it is a matter that we have no big problem, but our view is very clear and what I fear most is because there are a lot of fellows – you are calling them busybodies – I think they are citizens, they have got a right to walk to court. In India you write a letter and the Supreme Court sits. Here you have got write a plaint or an application, they look at the affidavit, is it properly sworn. There you just write a letter, they do not care whose the signature is and the case goes to Supreme Court and you will find a big Government organization being upset by the court from a very small fellow who has no shoes.

So, somebody might take up these issues and delay. You are lawyers, a lot of you are lawyers, you know when something is filed in court, like this one, this application they are saying under 28. I am just looking at it and saying some of them might even take 3 years and that time no results can be announced. That is the purpose of the Referendum, we might even have a General Election before a Referendum is finished, because of pending cases. So, instead of giving people the opportunity to file, I would just say it was wrong to pass this law this way without considering these matters, because they can bring a lot of litigation and delay the process. This was the emphasis in my letter, this still remains my emphasis and my next emphasis is that let us work together, let us forget about all those. I was intrigued by what Mr. Kangu said, because I have been asking myself, yes, this sections says that the question will be whether they want the new Constitution ratified or no. So, it is a simple question, do you want the Constitution ratified or do you not want the Constitution to be ratified? Whatever it is, then you say Yes or No, it is a simple question, but like Mr. Kangu, I was asking myself, but is it not possible to split that thing into several parts and still be leading to the same conclusion and it will give you a quantitative response, because if it is questions about Kadhis' Courts, if it questions Executive, Devolution, the regionalism which *Mwalimu* mentioned, you know, those things you might be able to say 50% said they do not want regionalism. They are still trying to ratify the Constitution, but they are giving their reasons for not ratifying it. Those are things which have been bothering me, I am not asking you to think like me or Mr. Kangu, leave us alone, he is a chameleon, I am not. (*Laughter*).

All I am saying is that, if it is possible to devise questions which can make it easier for us to be able to reach the people, the people to know what they are answering and be able to interpret what they are thinking, I think I would gladly take *changaa* and that is the point. I think, basically, those are the main questions which were raised. As I said, I think most of these things we can finish them when we come to looking for the way forward. Zein's questions are very good, but I think they can also be dealt with at that time, the only thing is that I think it is impossible, absolutely impossible for us to do more than the Act says, when it comes to who may vote. I think it is so clear, there is no room for argument, it is the registered voter. Whoever did not register, too bad and that is all and I do not think we can do more than that and if you do not do it that way, you will see a petition in court and then the whole thing will be thrown out and there we are. After that you will see this fame of 2002 will be finished, everybody will say, these are the fellows who are running the bogus Referendum.

So, I do not want to say more than that. I think we have many problems under the Act, the Act was done in a great hurry. I enquired why and I was told and I was satisfied. As a result, a lot of things were left out and some of them are very frightening, even this majority thing. Simple majority is a very worrying thing in a Referendum, that can be done by a few people and that is the end of the matter and all of us will be said to have said Yes, because the law was there and nothing happened. So, these are some of the things which we might have to contend with and I think, when we come to look at the way forward, I think you people-- I will not be there, but I think as you go now and you think as you take *changaa* or whatever you take, as you read your Bible, your Koran, try to think about them and see what positive contribution you can make day after tomorrow, because I think that is the best way. We know the problems, we have identified them, now how do we get the solutions. The problem brought up by Professor Okoth Ogendo, is more profound. That one, I do not think we can solve, even in that way forward, (*Laughter*) tomorrow. It is so fundamental, that when I gave it a thought I said to myself, let us just pray to God, that might help.

I think that is why I can say for the time being, I am very grateful for what all of you have done, the contribution you have made, you have really enriched my thinking more and to tell you frankly, I have not put my mind on the Referendum regulations yet, personally. Mr. Mukele and his team have been working very hard on this, but because we have been traveling a lot, also on official duties, I have not had time and I have now started collecting materials for this, to see how I can also play a part, my contribution in the making of the regulations. It is a very silly law, because we are told to make regulations. If you look at all the other laws which are passed, you will find they say you can make your regulations and they say, without prejudice to the generality of this, these are the areas you can make regulations. This one says you can make regulations as to the procedure for Referendum and that is all, it does not give guidance. So, should we make regulations a fellow will come to court and say you went beyond the powers which you were given by the Act. I mean, we are at the mercy of God in some of these things and that is why I say, please, those who pray and normally their prayers are heard, do a little bit of a hard job than before. Thank you.

Com. Kavetsa Adagala: Thank you, Chair. Hassan, please proceed.

Com. Ahmed Hassan: Thank you, Chair. I do not think I want to add much after the Chair has spoken, but just to comment on what Zein has said on the contestant in the vote. I think it will depend on what comes out in the Draft Constitution after it goes through Parliament. Right now, Parliament is in the process of discussing the continuous issues and trying to reach consensus. So, once the amend the Bomas Draft, it will really depend on the extent of the amendment, once it comes out and it is very clear how far there has been a mutilation of the Bomas Draft, has there been just a 20% amendment to the Draft or not? And then it will become very clear, so that we have those who are for the Draft and those who are against the Draft, then it will become like the EU vote in France and Netherlands, where it was very clear that there were those who were against the new Constitution of EU and in Holland. Again, similarly here also, it will be very clear now, the contestants will be two people, those who are for the new Constitution because they are happy with the contents and the way it has been amended by Parliament,

and those who do not want it.

But again, unfortunately also, because it is very close to the elections, it could also be a Referendum on the Government. It could be seen that those who vote for the Constitution are also voting for the Government and it will become much more political than just a Referendum on the Constitution and it becomes the political legacy of the Government, because it is going to fight very hard to get it, so that if you get a Yes vote on the Constitution, that also translates into a Yes vote eventually, in 2007 and so on and so forth. So, again, it will depend really on the contents of the Bomas Draft, or after it comes out of Parliament and then we will be very clear and know who will be the protagonists. The question of whether it is going to be in Kiswahili or English, the Question, I think right now we do not have the law which makes English and Kiswahili as both official languages, although under the new Constitution, you know very well that both English and Kiswahili are going to be the version, but I expect ECK, in their regulations, will have that leeway to be able to put the Question in both English and Kiswahili for easy communication and access to all the people.

Now, on the questions which Kangu had raised, I think the question is very clear. Section 28 does not admit of multiple choices. I think that is to confuse the voters, it is going to convince people. The section is very clear, what is the kind of Question we are going to ask the people? As he has said, it is, do you want this Constitution or not? And you answer Yes or No. If you start going into A,B,C,D, you are actually going to rig the vote, that goes to rigging the vote and it is absolutely unnecessary and illegal, because if you have an answer of 50% saying Yes to Parliament on the chapter of the Executive and 40% or 10% saying Yes to the Judiciary, then you will have different voting majorities, how are you going to collate that and analyze that? It is going to be quite confusing, so I think we should just go with the wisdom of the law and just ask one very simple and generic question, do you want it or not, Yes or NO.

Com. Kavetsa Adagala: Nyamu raised a similar situation, isn't it?

Com. Ahmed Hassan: Yes, precisely.

Com. Kavetsa Adagala: Yes, that there are these problems.

Com. Ahmed Hassan: Now, it is also true that the simple majority rule to pass the Constitution, the threshold is very low. It does not say 51% of the registered voters, it just says 51% of the votes cast in the Referendum. So, actually, one province or one district can vote and still we will have a new Constitution to bind all of us. So, that is one area that I think-- I agree with the speaker who said in some of the Constitutions that we have had, regions vote, they require a certain threshold in regions, or the Upper House or the Lower House will both vote and so forth. So, if you look at today's Standard on page 17, if you look at the vote, what happened to the vote on the issue of the babies, the stem cell babies, the unborn babies in Italy, they got a 17% vote of the registered voters, they voted Yes. But, the law required for it to become law, over 50% of the registered voters to

have voted. So again, it is something which we can think about in this.

Finally, on the possible amendments to the law. You know, this law was passed in 1998, the CKRC Act was passed in 1998 and up to today we have had 5 amendments to the law at different points in time. In 1999 it was amended once, 2000, 2001 for the merger, 2002 twice and again 2004, last year, so we have had 5 amendments. This again, is testimony of the problems they are trying to amend, they are trying to address at different times in the political life of this process. Now, of course Constitution making is also a continuation of politics by other means, Professor Okoth has always maintained that. So, it is (?) political, we cannot be addressing political issues, political problems, but going back to the law and amending it. We cannot resolve political problems by amendment to the law. Sometimes, some of the difficulties which come out in the process have much more to do with politics and actually, the law itself. If there was political goodwill, in my view, and all of us were agreed on this process and the contents, these issues of trying to amend and do this, will really be a secondary issue and the (?), but because there is no political goodwill, there are a lot of protagonists, some of them disguise those political ones through legal amendments and legal problems. So, I do not know whether it is going to help us even if we make further amendments to the law, whether they are still going to give us a Constitution if there is no political goodwill.

Now, Maranga, I think the timelines, it is true that there are different timeframes for the law, but I wanted to mention this. Under section 37 of the new law, parliament has the power to extend the time in any of the sections. So, even if they cannot get consensus within 90 days, which they are now trying to do, they still have the power to go back to Parliament and pass a resolution to extend the time for themselves and even for ECK and for everybody else. So, really, we should not be unduly worried about that, although, that may again bring uncertainty to the problem, so that if the Referendum date falls on a school day or an examination day and we require the schools for polling stations, I do not think there is any problem if Parliament is again requested to extend the time for ECK to hold the Referendum and on the issue of the 18 years, those who have reached 18 years after the voters have been registered, I think the same law will apply, which applies to the General Elections. There are very many people who will become 18 years after we have already voted and I do not think they can go back and challenge the elections, basically. Thank you.

Com. Kavetsa Adagala: I am glad you talked about timelines, because the Chair of ECK brought it out, but maybe we can deal with it tomorrow. There was also the question of court cases and what Professor Kabira said, on a proposal to separate Civic Education period from the campaign period, I think that is a problem we have to deal with.

(Inaudible discussion from the floor).

Com. Kavetsa Adagala: Yes, I think tomorrow and the Chair did say, the Chair of ECK said that we need technical support. I think one of the other contributors here said, we need to work on this list – I think it was Cheronno who said it – and seek technical advice and perhaps, this is overnight, so that we make the list of issues show technically how they can go, I think

