

REPORT OF THE CONSTITUTION OF KENYA REVIEW COMMISSION

VOLUME ONE THE MAIN REPORT

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FOREWORD

The Constitution of Kenya Review Commission is pleased to reprint this report on its work and its recommendations for a new Constitution. This version incorporates technical and editorial correctios not attended to in the original document published on September 27, 2002.

The document is one of a number which the Commission has published. It has produced a short version of it, a draft Bill to amend the Constitution – indeed, for replacing the Constitution with a new document – and a series of reports for each of Kenya’s 210 constituencies, technical appendices and a volume on the Commission’s method of work. The authority to prepare and publish these documents is derived from Sections 26 (2) and (7) and 27 (1) of the Constitution of Kenya Review Act (Cap. 3A).

This particular volume has been prepared by the Commission working through Committees, Task Forces and Special Panels. Initial drafts came from the work of six thematic task forces constituted as follows:

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Dr. Githu Muigai	–	Convener
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Mr. Abubakar Zein Abubakar	–	Member
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<i>Ms. Sylvia Nyaga</i>	–	<i>Secretariat</i>
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<i>Ms. Jacqueline Obiero</i>	–	<i>Secretariat</i>

The Chair of the Commission, Prof. Y. P. Ghai, and the Chair of the Research, Drafting and Technical Support Committee of the Commission, Prof. H. W. O. Okoth-Ogendo, co-ordinated the work of these task forces.

Backstopping assistance to these task forces by way of research and logistical support was provided by the Technical Staff of the Research, Drafting and Technical Support Department of the Commission, consisting of :

Ms. Pauline Nyamweya	–	Deputy Secretary, Research and Drafting
Mr. Harrison Gicheru	–	Programme Officer, Legislative Drafting
Mr. Jeremiah Nyegenye	–	Programme Officer, Legislative Drafting
Mr. Charles Oyaya	–	Programme Officer, Research
Ms. Eunice Gichangi	–	Programme Officer, Research
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Mrs. Mary L. A. Rado	–	Secretary

The initial draft of the Volume was put together by the Research, Drafting and Technical Support Committee. This was later revised before approval for publication by a special task force constituted as follows:

1.	Prof. H. W. O. Okoth-Ogendo	–	Co-convener
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5.	Mr. Ahmed Issack Hassan	–	Member
6.	PLO-Lumumba	–	Member
7.	<i>Ms. Pauline Nyamweya</i>	–	<i>Secretariat</i>
8.	<i>Ms. Eunice Gichangi</i>	–	<i>Secretariat</i>

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

For all of us in the Commission, this has also been a journey of self-discovery. We have learned a great deal about our country and its people that we did not know before. Although we have been quite shocked at the levels of poverty in which the majority of our people live, the sad economic decline, the ethnicisation of politics and the violence which has accompanied it, we are confident that, given the right governance system and an enlightened leadership committed to national unity and equitable development, Kenya can rapidly recover its former place as one of Africa's most developed economies. We set out in the report the aims which we expected to be achieved through our constitutional proposals, which places people at the centre of politics and development.

We wish to acknowledge and thank the thousands of Kenyans, professional groups and institutions who offered their views freely and sincerely during the Commission's public hearings. Those views are the substance from which this volume is derived. We, as Commissioners are pleased to release this volume to the public for perusal and discussion.

No. Name:

1. Prof. Yash Pal Ghai, Chairman
2. Prof. Ahmed Idha Salim, 1st Vice–Chair
3. Mrs. Abida Ali-Aroni, Vice–Chair
4. Prof. H. W.O. Okoth-Ogendo, Vice–Chair
5. Dr. Mohammed A. Swazuri
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25. Dr. K. Mosonik arap Korir
26. Mr. Domiziano Ratanya
27. Dr. Andronico O. Adede
28. Hon. Amos Wako, Attorney-General – *ex officio*
29. PLO-Lumumba, Secretary – *ex officio*

ABBREVIATIONS

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

Ksh.	Kenya Shillings
LN	Legal Notice
LSK	Law Society of Kenya
MPs	Members of Parliament
NAFTA	North America Free Trade Areas
NCCCK	National Council of Christian Churches
NEIC	National Ethics and Integrity Commission
NGOs	Non-Governmental Organisations
NPEP	National Poverty Eradication Plan
PAC	Public Accounts Committee
PC	Provincial Commissioner
PCK	Peoples Commission of Kenya
PR	Proportional Representation
PRSP	Poverty Reduction Strategy Paper
PTA	Preferential Trade Area for Eastern and Southern Africa
RIF	Regional Integration of Facilitation Forum
s/sec	Section
UDHR	Universal Declaration on Human Rights
UN	United Nations
UNHCR	United Nations High Commission for Refugees
USA	United States of America
WHO	World Health Organization
WIPO	World Intellectual Property Organization
WTA	Winner-Takes-All System

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EXECUTIVE SUMMARY

1. This report is a condensed version of the verbatim reports in five volumes on the constitutional review process, which was, as has been aptly put, “a long, complex and arduous exercise”, by the Constitution of Kenya Review Commission (CKRC).
2. As mandated by the Act under which it was established, the Commission, between December, 2001, and July, 2002, went around the country to collect and collate the views of Kenyans of all walks of life concerning the issues they wanted addressed in the new Constitution. Although the information assembled is vast, this and other publications of the Commission is intended to make it conveniently available to the public. The volume is divided into three parts, as briefly outlined below:
3. Part One of the Report consists of two chapters. Chapter One provides background information on Kenya’s main features: its demographic and natural resource characteristics; its international boundaries; and its geo-political parameters in the context of the East African Community. The report also records, in Chapter Two, the stages of the negotiations which led to the establishment of the Constitution of Kenya Review Commission itself; its membership (a merger of the original fifteen selected by Parliament with those from the *Ufungamano Initiative*); the appointment of its Chairman and of the Secretary (administrative head); and the election of its other officers. The Commission’s mandate and method of work are also outlined in this chapter.
4. Part Two of the report, which consists of four chapters and which discusses the country’s constitutional development and the conduct of the reform process, is an analysis of the existing Constitution; explaining its adoption at the Lancaster House Conference in London and pointing out the difficulties inherent in that so-called independence Constitution. Chapter Three discusses the amendments made to that constitution after independence. The chapter concludes, *inter alia*, that the independence Constitution, together with the numerous amendments thereto, distracted attention from social policies and discouraged full and direct participation in government by the people of Kenya. The amended constitution had no provisions for accountability by the State and, most significantly, it lacked commitment to any fundamental constitutional principles. Chapter Four sets the stage for the review process and places the constitutional debate in the global, African and Kenyan contexts, emphasising the objects and the goals of the review process itself, outlining its various stages and signalling a number of issues that require particular attention. Chapter Five places these issues in their social, cultural, political and gender contexts. Part Two of the report ends with an analysis of people’s expectations as expressed during the review process and the extent to which they were able to own that process.
5. Part Three, which forms two thirds of the Report, is appropriately entitled: “Views from the People”. In order to make the presentation therein uniform, the nine substantive chapters of that part (Seven to Sixteen) are each designed to provide the following information:
 - (a) the mandate of the Commission relating to the chapter;
 - (b) conceptual discussions of the subject matter addressed in the chapter;

- (c) presentation of how the current Constitution deals with that issue;
- (d) a brief analysis of how other countries deal with that issue;
- (e) a synopsis of what the people said;
- (f) an analysis of what the people said; and
- (g) recommendations.

The main points made by Kenyans, on the basis of which specific recommendations were formulated by the Commission for its constitutional drafting exercise, are distinctly placed in several boxes within each chapter.

6. Thus, Chapter Seven, entitled “The Constitutive Process”, is a synopsis of what Kenyans said to confirm that they wanted to be part of the review process so that the new Constitution can express their sovereignty. This constitutes a marked contrast to the process which produced the independence Constitution, which was produced without participation by ordinary Kenyan citizens.
7. What the people of Kenya said about “The Bill of Rights” is recorded in Chapter Eight of the report, leading to one of the most detailed recommendations, going far beyond what the existing Constitution provides, as indicated in the analysis. In this chapter, the report records the forty-two specific views of the people of Kenya on an expanded Bill of Rights which sought to reaffirm the need to uphold: the dignity of the human person; equality, equity and non-discrimination, especially as regard ethnic or cultural minorities, older persons, people with disability, trans-border communities and citizenship categories; and affirmative action in appropriate circumstances. The people also stressed the need to have an appropriate machinery for securing Kenya’s access to such well known civil, political and social rights, and called attention to the less well known rights, such as access to health, housing, education (free and compulsory at the primary level), food, water and a clean environment. They suggested that such a machinery as discussed in Chapter Sixteen concerning the “Management of Constitutionality”, discussed below, should be in the form of a Commission on Human Rights and Administrative Justice with broad powers. All these have provided the basis on which a number of recommendations are made in the Chapter for drafting the new Constitution.
8. In Chapter Nine, “The State and the Political System”, and Chapter Ten, “Participatory Governance”, the report records, *inter alia*, the view by Kenyans suggesting the need to have a State ideology underlying the new Constitution; recognising the country’s cultural, religious and linguistic diversity; and emphasising the need to transform political parties into true vehicles for participatory governance by providing opportunities for full participation by women, the youth, people with disabilities, older persons and other groups. Such a new role for political parties, according to the recorded views, is to be accompanied by an equally revitalised electoral system to ensure proper representation and a transparent voting system. The report records fifty eight specific points made by the people of Kenya on these issues, and contains an analysis on the basis of which recommendations for drafting the constitution are made.
9. What Kenyans said about the structure of the government they want is contained in Chapter Eleven and Chapter Twelve of the report respectively entitled: “Organs of the Government” and “Devolution of Powers”. The report includes an analysis of salient points regarding the system of government and notes that it is that system which

determines the composition and powers of the principle organs of State (the Legislature, the Executive and the Judiciary) and establishes the manner of the exercise of those powers in relation to governance of the people, and of the allocation of resources and opportunities within the State. The emphasis was on recording the views of Kenyans on the crucial issue of separation of powers between the said organs of State so that they can function properly to enhance national values, promote democracy, facilitate social and economic advancement of the people, strengthen national unity and safeguard national integrity and the establishment of an efficient public service to support the government. In this regard, the people demanded, *inter alia*, appointment and promotion of civil servants on merit, advertisement of the positions of Permanent Secretaries and independence of the Public Service Commission. They demanded that public officials declare their wealth and be barred from doing business to ensure that civil servants are dedicated, and can deliver the services to the government in performing its functions nationally and for fulfilling its international obligations properly so as to protect the international image of Kenya, about which the people showed concern.

10. In this connection, in Chapter Eleven, the report records some eighty specific points made by Kenyans about diverse issues, such as: adoption of a Parliamentary system of government with either a unicameral or a bicameral legislature, leaning towards the latter; the role of the Executive, suggesting that there should be a Prime Minister as the Head of Government and a ceremonial President not younger than 40 years and not older than 75 years, with at least a college degree, directly elected together with a Vice-President as a running mate, both not being members of Parliament, made up of individuals with proven ethical and moral values, and who can be recalled for failing to perform their functions and with powers including those of vetting appointments by the Executive and supervising the conduct of foreign relations; and the Judiciary, now overwhelmingly characterised as mostly corrupt and inept, to be made up of new institutions such as the Supreme Court and Village Tribunals, to be revitalised by enhancing the independence of the Judiciary, establishing different procedures for appointing the Chief Justice and adoption of a code of ethics to guide the conduct of the Judiciary to eliminate corruption. Chapter Eleven also underscores the need to streamline the functions of the Kadhi's Courts, such courts to be institutions serving only the Muslim society in specified cases, namely; substantive and procedural law dealing with Islamic marriages and with issues arising out of Islamic divorce such as maintenance, custody of children, guardianship, adoption, division of matrimonial property and other related matters.
11. Chapter Twelve, of the report deals with the question of "Devolution of Powers", which it describes as "a practice in which the authority to make decisions in some sphere of public policy is delegated by law to sub-national territorial assemblies, e.g., a local authority – [entailing] a transfer of government or public authority – with powers of the constituent units determined by legislation rather than by the Constitution". The principles associated with this concept and its various levels and forms are also outlined in the report, as are its advantages and disadvantages. In light of the existing governmental structure, some thirty-four specific points were made by Kenyans on this issue, generally supporting its application and suggesting how, *inter alia*, the government should be decentralised; local councillors elected through new procedures, abolition of the Provincial Administration and restructuring of the system in such a way as to avoid concentration of power in the national government and in the President.

12. A five-tier devolution system is suggested and illustrated in the report: (1) a National level, served by a National Council; (2) a Provincial level, served by provincial councils; (3) a District level, served by district councils; (4) a Location level, served by councils of Elders; and (5) a Village level, served by Village Assemblies/councils. The details and functioning of the different units of devolution would be clearly elaborated in an Act of Parliament.
13. In Chapter Thirteen, on “Environment and Natural Resources”, the report notes, *inter alia*, that the current Constitution has very little to say about natural resources. The report proceeds to summarise the thirty-five specific points made by Kenyans to rectify the situation. These views were expressed on such issues as water, minerals, fisheries, wildlife and forests. On the basis of the specific views, recommendations are formulated which require the new Constitution to deal with environmental issues more effectively, *inter alia*, by calling upon Kenya to become party, if is not yet so, to the listed international agreements on the environment, and to implement them; urging Kenya to apply, in concrete cases, the regime of Environmental Impact Assessment and suggesting that the office of Director General of the National Environmental Management Authority be strengthened by giving the holder security of tenure.
14. Chapter Fourteen, on “Land and Property Rights”, contains a synopsis of the major issues relating to the land question: an analysis of general principles on land in the economy, society and politics and indicating the scope in which the current Constitution treats land issues. What the people said in general and in specific terms are outlined in the twenty-four main points set out in this Chapter. They emphasised, *inter alia*, that land belongs to the people and not to the government, that the land which was grabbed should be repossessed, that land unjustly expropriated by the colonial and current governments be restored to rightful owners, that efforts be made to resolve damage arising from the clashes, especially in the Rift Valley, Coast, North Eastern and parts of Eastern provinces, and that forests to be gazetted. On the basis of such views, recommendations are made in the report concerning the land tenure issue as it affects women, pastoral communities, the urban poor, farm dwellers, past law grievances and land tenure reforms. There are also recommendations which suggest, *inter alia*, the establishment of a new National Land Commission, a new land policy, a new system of land administration, the power of the State to compulsorily acquire land and a constitutional requirement for legislation addressing a number of specified issues, including recognition of customary law, establishing permanent Land Claims Tribunals to ensure enjoyment of rights and ownership in land without any form of discrimination.
15. It is also in this Chapter that the people’s views on the question of Intellectual Property Rights are recorded. The analysis points out that, although there is no provision in the current Constitution, Kenya is a party to a number of international agreements dealing with intellectual property issues which it needs to implement through appropriate domestic laws, such as the Industrial Property Act and the Copyrights Act. The report indicates that, recommendations are made in this connection, for (i) provision to be inserted in the Bill of Rights entitling each Kenyan to freely participate in the cultural life of his/her community and to enjoy the arts, and share in the benefits, of scientific advancement; (ii) provision to be made in the law for protecting all interests accruing from any scientific or artistic endeavour by any Kenyan; (iii) Parliament to formulate

legislation to promote cultural, industrial and scientific innovations, and appropriation of the benefits thereof by the inventors or authors; (iv) provision to be made in the Constitution for protecting indigenous knowledge.

16. The record of the views of Kenyans presented in Part Three of this report ends with Chapter Fifteen, on “Public Resources and Capacity Building”, and Chapter Sixteen, on “Managing Constitutionality”.
17. It is in Chapter Fifteen, “Public Resources and Capacity Building”, that the review process records the views of Kenyans on other issues relating to the role of the government in managing public finance and revenue. The analysis provides background on custody and withdrawal of public finance, expenditure of public funds, resource appraisal, audit and report thereon, the budgetary process, taxation, public debt, the institution of the Central Bank of Kenya, retirement planning and fiscal and monetary matters.
18. Among the fifteen specific points made by Kenyans on the above issues were those requiring the strengthening of the independence and powers of the Auditor- General, with functions separate from those of the Director of the Budget, the Governor of the Central Bank to be a constitutional office, greater involvement of Parliament in preparing and approving the Budget, thus justifying the establishment of a Parliamentary Budget Office.
19. A section of this Chapter is devoted to the question of Human Resource development, containing analysis of the general principles associated with the concept. The report indicates that the discussion of the issue provided Kenyans with another opportunity to reiterate their views. They made some seventy specific points on the problem of education, employment, health, water and sanitation and infrastructure. Here the people expressed thirty-eight specific points on energy development and use, industrialisation, information technology and research and training, and recognising the role of science and technology in fostering sustainable development.
20. In Chapter Sixteen, the report deals with the question of “Managing Constitutionality” and examines three specific questions: Constitutional Commissions; Constitutional Offices and Succession of Power, comparing the existing situation with what the new Constitution should provide. A total of 18 specific points were made by Kenyans on the question of constitutional commissions, their powers and functions: a total of thirty-three specific points were made on constitutional offices, including reiteration of views on the Judiciary, again with reference to the Chief Justice, Judges of the Court of Appeal, Judges of the High Court, the Chief Kadhi, the Attorney-General, the Commissioner of Police, the Controller and Auditor-General, Permanent Secretaries, Ambassadors, Secretary to the Cabinet and Director of Personnel.
21. On the question of power transfer, the report records that a number of specific points were made by the people addressing, *inter alia* the need for a clear line of succession, the duration of service by the President, who to swear in the Presidents, and security and welfare of former presidents. On the basis of the views on the above and other points made on the question of power transfer, the report records the specific recommendations on the order of succession as follows: (1) Vice-President; (2) a Minister designated by the

President; (3) a Minister designated by the Cabinet; (4) The Speaker of the National Assembly.

22. The final Chapter of the report, Chapter Seventeen, contains conclusions and a summary of key recommendations. A set of 193 such recommendations are thus summarised, preceded by a table which gives a breakdown of the material which the Commission received and recorded on the issues and areas of concern, as discussed during the process of collection and collation of the people's views to inform the drafting of their new Constitution.
23. The scope of the information condensed in the ensuing chapters of this volume, as summarised above, provides a clear picture. It leads to the conclusion that the review process did provide all Kenyans with the opportunity to take part in preparing a new Constitution for their country, to produce a legitimate instrument with which they can proudly identify as the supreme law of the land. It is also clear that not all the views expressed by the Kenyans would find themselves specifically reflected in the Draft Bill to amend the Constitution. Thus, the Commission had the daunting task of determining which of the views enjoyed the kind of support which would justify their reflection in the Draft Bill.

PART ONE

INTRODUCTION

CHAPTER ONE - A BACKGROUND OF KENYA

1.1 Geopolitical Parameters

1.1.1 Main Features

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

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

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

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

1.1.2 Demographic Characteristics

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

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

Figure 1: Kenya's Political Boundaries

Table 1: Demographic Trends Since 1969

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

Key:

M=Male

F =Female

Sources:

Central Bureau of Statistics, Ministry of Finance and Planning (1970), *1969 Population Census Vol. 4, Analytical Report*, Nairobi.
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1.2 Natural Resources Characteristics

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

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

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

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

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

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

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

1.3 Regional Parameters

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

Figure 2: International Boundaries of the East African Countries

Having been under the same colonial power, these three countries had, for over four decades, been drawn into a loose mainly fiscal and economic–association, which was later converted into a regional organ with decision-making powers and a secretariat. Although the East African Community, as it was called, did not last a decade, it was and remains an important symbol of the common bonds, which the three countries had developed through centuries of cultural and political interaction.

The collapse of the East African Community may have contributed, in no small measure, to the development and consolidation of separate national legal and constitutional values and processes and the rather traumatic historic trajectories taken by each country in the last four decades. Constitutional development in Kenya and the pressure for reform, e.g., in Uganda and Tanzania, cannot, therefore, be properly understood without an appreciation of these geopolitical parameters.

CHAPTER TWO- THE CONSTITUTION OF KENYA REVIEW COMMISSION

2.1 Appointment and Membership

For over a decade, a debate on whether or not Kenya's current Constitution should be reviewed or overhauled raged. After many years of intense negotiation among political parties, organs of the civil society, religious groups and other stakeholders, a legislative framework for reviewing the Constitution was finally agreed on in November, 2000.

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

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

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

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

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

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

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

These were to recommend appropriate operational infrastructure and budget. Other Committees were later established to facilitate the development of strategic options in various matters. The Commission's affairs were conducted through these Committees until more structured standing organs were established upon the publication of the Constitution of Kenya Review (General) Regulations, 2001 (LN. 12/2001) on 23rd July, 2001.

2.2 Negotiating a Common Review Process

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

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

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

The existence of the Commission and the *Ufungamano Initiative* side by side was obvious evidence of a serious fracture in the political landscape. The Commission was perceived as an instrument of the ruling political party and the *Ufungamano Initiative* as that of those in opposition to it. This was a clear indication of lack of consensus about

and commitment to what was to be perhaps the most fundamental political project in Kenya's forty-year history as an independent state.

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

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

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

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

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

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

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

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

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

(a) The Steering Committee

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

(b) Civic Education, Publicity and Information Committee

- | | | |
|-------------------------------|---|---------------------------------|
| • Prof. Yash Pal Ghai | – | <i>Ex officio</i> |
| • Prof. A. I. Salim | – | Vice Chairman (Committee-Chair) |
| • Mrs. Abida Ali-Aroni | – | <i>Ex officio</i> |
| • Mr. Abubakar Zein Abubakar | – | Commissioner |
| • Ms. Kavetsa Adagala | – | Commissioner |
| • Dr. Charles Maranga Bagwasi | – | Commissioner |
| • Ms. Salome W. Muigai | – | Commissioner |
| • Mr. Paul M. Wambua | – | Commissioner |
| • P.L.O. Lumumba | – | Secretary |

(c) Research, Drafting and Technical Support Committee

•	Prof. Yash Pal Ghai	–	<i>Ex officio</i>
•	Prof. A. I. Salim	–	<i>Ex officio</i>
•	Mrs. Abida Ali-Aroni	–	<i>Ex officio</i>
•	Prof. H. W. O. Okoth-Ogendo	–	Committee Chair
•	Ms. Kavetsa Adagala	–	Commissioner
•	Dr. Andronico O. Adede	–	Commissioner
•	Ms. Nancy Baraza	–	Commissioner
•	Ahmed Issack Hassan	–	Commissioner
•	Prof. Wanjiku Kabira	–	Commissioner
•	Mr. Mutakha Kangu	–	Commissioner
•	Bishop Bernard N. Kariuki	–	Commissioner
•	Dr. K. Mosonik arap Korir	–	Commissioner
•	Mr. Isaac Lenaola	–	Commissioner
•	Mr. Githu Muigai	–	Commissioner
•	Mr. Keriako Tobiko	–	Commissioner
•	Hon. Amos Wako	–	Attorney General (<i>ex officio</i>)
•	P.L.O. Lumumba	–	Secretary

(d) Resource Development and Budget Committee

•	Prof. Yash Pal Ghai	–	<i>Ex officio</i>
•	Mrs. Abida Ali-Aroni	–	Committee Chair
•	Prof. A. I. Salim	–	<i>Ex officio</i>
•	Hon. Mrs. Phoebe Asiyo	–	Commissioner
•	Dr. Abdirizak Nunow	–	Commissioner
•	Mr. Riunga Raiji	–	Commissioner
•	Mr. Domiziano Ratanya	–	Commissioner
•	Mrs. Alice Yano	–	Commissioner
•	P.L.O. Lumumba	–	Secretary

(e) Mobilisation and Outreach Committee:

•	Prof. Yash Pal Ghai	–	<i>Ex officio</i>
•	Prof. A. I. Salim	–	<i>Ex officio</i>
•	Mrs. Abida Ali-Aroni	–	<i>Ex officio</i>
•	Prof. Wanjiku Kabira	–	Committee Chair
•	Pastor Zablon Ayonga	–	Commissioner
•	Bishop Bernard N. Kariuki	–	Commissioner
•	Mr. Ibrahim Lethome	–	Commissioner
•	Dr. Abdirizak Nunow	–	Commissioner
•	Dr. Mohammed Swazuri	–	Commissioner
•	P.L.O. Lumumba	–	Secretary

A set of general regulations governing the Commission's work were also gazetted on 23rd July, 2001.

Between June, 2001, and September 2002, two significant changes occurred in the membership of the reconstituted Commission. The first was the resignation of Mr. Arthur O. Owiro as Secretary to the Commission and his replacement by Mr. Patrick L. O. Lumumba. The second was the sudden and sad demise of the First Vice-Chairperson, Dr. Oki Ooko-Ombaka on 15th July, 2002. The vacancy of a Commissioner thus created was filled with the appointment and subsequent gazettelement of Dr. Andronico O. Adede on 16th August, 2002.

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

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

2.3 The Mandate of the Commission

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

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

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

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

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

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

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

- (xiii) Examine and note recommendations on treaty-making and treaty-implementation powers of the Republic and any other relevant matter to strengthen good governance and observance of Kenya's obligations to international law;
- (xiv) Examine and make recommendations on the necessity of directive principles of state policy;
- (xv) Establish and uphold the principle of public accountability by holders of public or political offices; and
- (xvi) Examine and make recommendations on any other matter connected with or incidental to the foregoing and achieves the overall objective of the constitutional review process.

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

2.4 The Commission's Method of Work

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

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

Section 18 further requires the Commission to:

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

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

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

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

PART TWO

CONSTITUTIONAL DEVELOPMENT AND CONSTITUTIONAL REVIEW

CHAPTER THREE - CONSTITUTIONAL DEVELOPMENT IN KENYA

3.1 The Pre-independence Phase

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

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

The years 1905-1923, the next phase of constitutional development under colonialism, saw the transformation of the protectorate into a colony. Although the responsibility of supervising the protectorate had been transferred to the Colonial Office, it was not until 1920 that the protectorate was declared a crown colony. Letters of Patent under the Great Seal and Royal Instructions under the Sign Manual and Signet established the colony's new constitutional order. The Legislative Council Ordinance of 1919 gave effect to European settler representation in the Legislative Council and, under the Royal Instructions of 1919, Indians were permitted two nominated members while Arabs had one unofficial nominated member to represent their interests. While making the important policy declaration that the British government viewed the interests of the natives as paramount, the Devonshire White Paper of 1923 noted, however, that time was not yet ripe for direct native representation in the Legislative Council. In 1924, Dr. John Arthur, a Presbyterian Church missionary was nominated to represent African interests in both the Legislative and Executive Councils. In general, the Devonshire White paper set the tone for future constitutional negotiations.

The period between 1924 and 1951 witnessed the consolidation of colonial rule against a tide of competing political claims by various races. While the White Paper failed to draw up specific lines of constitutional evolution, the period between 1924 and 1951 saw

major changes in the country's constitutional make-up. This period witnessed increased African political activities through the formation of African political associations. The formation of the East Africa Association in 1921 and the Young Kavirondo Association in 1922 added a new dimension to the already existing political struggles between the Europeans and the Indians. Africans increasingly agitated for direct political representation. As a result in 1924, the government established the Local Native Councils (LNCs) under the Local Authority Ordinance to control African politics at the local level. The LNCs, which were under the District Commissioners, were not elective and European Field Officers nominated Africans who sat in it. The Hilton Young Commission, operating between 1929 and 1930 to consider the prospects of greater Union in Eastern Africa, presented the opportunity for various racial groups – Europeans, Indians and Africans – through 37 political associations to present their grievances. The African groups complained particularly of political marginalisation, lack of direct representation in both the Legislative and the Executive Councils, and the land questions arising out of the 1915 Crown Lands Ordinance that effectively reduced Africans to squatters on their own land.

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

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

The period between 1952 and 1960 was, therefore, one of increased political reforms against the backdrop of increasing racial tensions, the Mau Mau uprising and increased African agitation for self-rule. The lack of committed constitutional response to African grievances led to the outbreak of armed conflict (Mau Mau), and, in October 1952, the Governor declared the state of emergency. Jomo Kenyatta and six other political leaders were arrested and detained. Between 1953 and 1956 there was a total ban on African political organisation countrywide. However, the Mau Mau uprising not only forced the imperial and colonial authorities to undertake significant constitutional reforms to contain the African discontent but also brought the imperial government in London to play a greater role in the governance and management of the affairs of the colony.

Two important initiatives took shape in response to the failure by the constitutional system to accommodate the legitimate demands especially by Africans. These were the Lyttleton and Lennox-Boyd Constitutions. The 1954 Lyttleton Constitution, named after Sir Oliver Lyttleton, the new Colonial Secretary under the Conservative Government, sought to effect the principle of multi-racialism, correct the anomaly in the powers and composition of the Executive Council and regulate African political participation by providing for separate racial representation. The Lyttleton Constitution established the Ministerial system by creating the Council of Ministers, of which for the first time one Minister was an African, in charge of community development. In 1954, a British Parliamentary delegation visiting Kenya recommended permitting Africans to participate in politics and to cultivate a multi-racial society. The delegation also recommended that an acceptable basis for electing African representatives to the Legislative Council at the next General Election be found. A Commission was, therefore, established in 1955 to study how African representatives could be elected to the Legislative Council. The Imperial government however, decided that there would be no changes to the communal basis of franchise until the next General Election expected in 1960. In 1956 the government allowed the formation of district political associations. In March 1957, under the new electoral laws, elections were held in which for the first time eight African members were elected to the Legislative Council, a new and more assertive group, led by Jaramogi Oginga Odinga and Tom Mboya. The African members formed the Africa Elected Members Organisation to make demands on the colonial government. They rejected the Lyttleton Constitution and demanded fifteen more seats for Africans. They demanded other, and far-reaching reforms across the board and refused to take up the position reserved for them in the Council of Ministers, thus precipitating a crisis. Although the Lyttleton Constitution was to last until 1960, the new Colonial Secretary, Lennox-Boyd, was forced to take a fresh look at the colony's constitutional arrangements. He called for the resignation of all ministers, effectively nullifying the basis upon which the Lyttleton Constitution was founded. The result was the new Lennox-Boyd Constitution.

While retaining the principal tenets of the Lyttleton Constitution, especially the multi-racial principle, the Lennox-Boyd Constitution made far-reaching changes in the constitutional order. It abolished the Executive Council and replaced it with a Council of Ministers; increased the number of Africans elected to the Legislative Council from eight to fourteen, the same number as Europeans; provided for an electoral college consisting of elected members to choose twelve specially elected members to represent all communities (four each for Europeans, Africans and Asians); and established a Council of State to protect minority rights. The number of Africans in the Council of Ministers was increased to two; Asians had two; four European were Ministers without portfolio; and eight Ministers were Europeans. The powers of the Governor remained largely unchanged.

The African representatives in the Legislative Council rejected the Lennox-Boyd Constitution and demanded total control of government, given their numerical superiority. They also demanded a common electoral roll (as opposed to the communal roll) and unrestricted universal suffrage. They refused to co-operate in implementing the new constitution and even boycotted the Legislative Council; only the Council of Ministers was spared. In June, 1958, Mr. Odinga, addressing the Legislative Council,

astonished Europeans by stating that Jomo Kenyatta was a respected nationalist leader, Tom Mboya demanded in September, 1958, that October 20th, the day in 1952 when Kenyatta and others were detained, should be observed as a national day.

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

3.2 Independence Constitution

3.2.1 Essential Features

The origin of the current Constitution is the Independence Constitution, which came into force on 12th December, 1963. Since then it has been amended 38 times.

In its values and orientation, the current Constitution is different from the Independence Constitution, despite legal continuity. The Independence Constitution was the product of intense negotiations among various Kenyan political parties and the British Government. The result was that the Independence Constitution reflected the interests of the different negotiating parties and the manner in which these interests were balanced and harmonised.

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

Before the sixties, the principal differences on constitutional development took racial lines. Constitutional arrangements up to then were based on racial electorates and seats and on the balancing of claims by Europeans, Asians and Africans. Once it was obvious that Kenya was destined for independence, racial politics became less relevant to its future than divisions among African politicians that arose with the prospects of power.

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

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

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

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

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

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

(a) *Parliamentary Democracy*

The system of Parliamentary Democracy as agreed at independence was based on the classic British model in which the Head of State is separate from the Head of Government. The Head of State, who may be a monarch, a governor-general or a president, has a largely ceremonial role although he or she plays an important role in forming and dismissing the government and in dissolving the legislature. The Head of State appoints the Head of Government, often called Prime Minister, although there is little choice if a party or a coalition of parties has a majority of members in the legislature.

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

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

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

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

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

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

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

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

The Senate was given the critical role of protecting the Federal System, under which there were several restrictions on the powers of the central government. The usual safeguards of free and fair elections, an independent Judiciary, and a neutral public service were codified and institutionalised to a remarkable degree.

For example, although there was no express provision for a multi-party system, this was, in fact, guaranteed by the Bill of Rights which protected the freedom of expression and association.

In addition, the right to contest elections regardless of party affiliations and the right to vote were guaranteed. The conduct of elections was entrusted to an independent

Electoral Commission, which also had the power to draw constituency boundaries and supervise the registration of voters.

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

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

(b) *Devolution of Power*

(i) *The Majimbo System*

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

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

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

The Executive authority of the region was given to the Finance and Establishment Committee of the Assembly, assisted by a Chief Executive. The regions had their own

public service and police contingents, control of the latter being shared with the central authorities and the Inspector-General. Thus the regions had their own exclusive powers, while others were shared with central authorities. The regions were guaranteed transfers of funds from national revenues and had limited powers to raise money directly through local taxes.

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

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

Despite the fact that the regions' exclusive powers were limited, that central authorities had several powers of intervention in regional affairs and the power to direct some of these affairs, the federal system required the central government to consult with and, in some cases, secure the consent of regional authorities before the central authorities could make certain decisions (for example, about land, the Judiciary, and police).

Decisions over specific matters required a large majority for the decision-maker to mobilise significant support for its policy. These rules played the role of facilitating consensus decisions and reducing arbitrariness.

(ii) The Electoral System

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

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

In Kenya, where different communities live in separate and discrete geographical areas, this system could ensure their representation, but not representation of small communities living in constituencies dominated by larger communities.

Nor would it ensure minority representation in urban areas where populations are composed of different ethnic origins. People with special needs, such as those with disability, remained unrepresented, too. However, there seems to be little evidence that other systems of election or voting were demanded or discussed.

(iii) *Amendment Procedure*

The complex arrangements under the Independence Constitution were, for the most part, controversial. Therefore, the Constitution provided that they could not be easily altered or removed.

For the purposes of amendment, the provisions of the Constitution were divided in two categories, ordinary provisions and specially entrenched provisions.

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

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

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

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

3.2.2 General Assessment of the Independence Constitution

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

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

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

Fourth, the system of *majimbo* and local government, which was the primary feature of the Constitution, was so detailed and complex that it required, for its operation, the will of political leaders at all levels to compromise, as well as high administrative skills. It

also permitted extensive intervention by the central government in regional affairs, and this would undoubtedly have been a source of great conflict.

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

3.3 Constitutional Changes after Independence

3.3.1 The Nature of Constitutional Changes

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

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

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

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

(a) *Restoration of the Centralist State*

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

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

The changes did not, however, introduce common safeguards usual in a presidential system, such as the complete separation of powers between the Executive and the Legislature or impeachment of the President. Instead, the President now had power to dissolve Parliament at any time in his or her absolute discretion. He or she obtained a veto over legislative Bills, a power which the Governor-General did not have.

The merger of the offices of the Prime Minister and the governor-general created a powerful presidency. It was further reinforced by subsequent amendments to be

discussed below. In the somewhat hybrid nature of the political system that resulted, the President, who is also a Member of Parliament, was liable to a vote of no confidence. This introduced conflicts of interest and blurred the lines of responsibility, diminishing, among others, the role of the Legislature and its ability to control or monitor the executive.

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

Further there seems to have been an understanding among leaders that those provisions which they disapproved of or regarded as imposed by the British be repealed once independence was granted. Consequently, most of the powers of the regions which were not specially entrenched were repealed on the first anniversary of independence. Powers over the police and public services were restored to the central government.

Soon after, provisions guaranteeing fixed revenue for the regions were removed. Thus the *majimbo* system was effectively destroyed in little more than a year after independence.

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

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

(b) *The Rise of Presidentialism*

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

The first of these was achieved in a number of ways. Under an amendment in 1966, a new station was enacted requiring a Member of Parliament elected with the support of a party and who leaves that party and forms or joins another political party, to resign and seek a fresh mandate from his/her constituents.

Although an attempt was made to justify this principle on the basis of theories of democracy and representation, the amendment was motivated by the desire to curb the emergence of opposition to KANU led by Oginga Odinga who had formed the Kenya People's Union, a party that had attracted a number of KANU MPs. The amendment

was rushed through Parliament in a day by suspending Standing Orders which required notice of Bills.

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

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

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

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

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

Thereafter, what were intended to be special powers to be used in emergencies became residual powers of the administration. In respect of North-Eastern Province, these powers were set out in the North-Eastern Province and Contiguous Districts Regulations of 1966, which were used to suppress fundamental rights and freedoms and perpetrate atrocities for more than two and a half decades. These atrocities included the Bula Kartasi Estate Massacre in Garissa in 1980, the Wagalla Massacre in Wajir in 1984 and the Malka Mari Massacre in Mandera in 1987.

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

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

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

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

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

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

Third, in 1986, a far-reaching amendment removed the security of tenure of the Attorney-General. Hence he or she could be dismissed by the President. The exercise of the functions of that office, which include providing independent legal advice to the government, and impartial prosecution, were henceforth exposed to political influence. In 1986, too, the security of tenure of the Controller and Auditor-General was vetoed, thus reducing the independence of that office. In 1988, the security of tenure of judges of the High Court and the Court of Appeal was repealed, making their continuation in office dependent on the President's will.

(c) *Deconcentration of State Power*

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

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

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

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

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

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

The security of tenure of the Judges, the Attorney-General, the Controller and Auditor-General and the Commissioners of the Public Service Commission were restored in the next two years after 1990. The provision for a one-party state was repealed and a

subsequent amendment prescribed that no person could hold the office of the President for more than two terms of five years each. Further, s.127 of the Constitution and the North Eastern Province and Contiguous Districts Regulations of 1966, which allowed for the application of emergency law over those areas was repealed. In 1997, the Constitution explicitly declared Kenya a multi-party state. In that year:

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

3.4 Assessment of the Present Constitution

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

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

1. Is the Head of State and Commander-in-Chief of the Armed Forces, is the Head of Government and repository of the executive authority of the state, is a member of the National Assembly and may attend its sessions as a Member of Parliament, is defined as part of Parliament and has immunity from legal processes while in office, may declare a state of emergency in accordance with the preservation of public security Act and remains in office for several months after the formal end of his or her term of office.
2. Appoints the Vice-President and Ministers and controls their movements in and out of the country. He also appoints Permanent Secretaries, all holders of constitutional offices including the Chief Justice, judges, members of the Electoral Commission, the Commissioner of Police, the Attorney-General, the Controller and Auditor-General, members of the Public Service Commission and members of tribunal to investigate the removal of holders of these offices.

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

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

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

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

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

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

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

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

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

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

Third, the Bill of Rights is deficient in that:

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

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

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

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

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

3.5 Conclusion

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

CHAPTER FOUR - THE CONSTITUTION REVIEW DEBATE AND PROCESS

4.1 Pressure for Constitutional Review

4.1.1 The Global Context

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

The New World Order, dominated by the global capitalist market, increasingly allowed states and societies to participate fully in the international system only if they accepted and practised the free market economy.

Many states had undergone revolutionary changes, either with the overthrow of Communism or with the end of one-party or military regimes, and there was a need for new constitutional instruments.

These were often a result of struggles and efforts by the civil society, which placed high values on public participation in governance. Thus, due to both international and domestic circumstances, concepts of a liberal Constitution were adopted in numerous countries. Particular emphasis was placed on democratising constitutions, constitutional norms and institutions which would facilitate the full establishment of democracy.

More specifically, emphasis on constitutional reform was placed in three main areas. The first was in parliamentary democracy, whereby new constitutions were designed to confer full legislative authority on an elected assembly, responsible for installing and sustaining the executive arm of government. Political parties became the main instruments of representation and rule.

The second were diverse efforts to decentralise, arising from the fact that emphasis on highly centralised states in pre-Second World War Europe had been one of the causes of the war. However, federal models varied from state to state, depending on each one's historical underpinnings.

The third was a greater demand for the recognition of civil and political rights, with most of the post-war constitutions proclaiming, in different ways, respect for basic civil and political rights.

4.1.2 The African Context

The developments mentioned above had a profound effect on African politics in at least two ways. First, they led to disengagement by the Eastern bloc of countries and, to some extent, the United States of America from African affairs, thus leading, in some countries, directly to the collapse of economic, military and political support for domestic elite.

Second, it led to a spread of liberal ideas on state organisation, thus challenging in a most fundamental way the ideology of the developmental state still prevalent among African elite.

The immediate consequence of these was to open political space for internal dialogues in most African countries, leading rapidly to of pressure for constitutional reform.

Often called Africa's "second liberation", this pressure was exerted by civil society organisations and disenchanted political elites engaged in demonstrations, media campaigns and politics to force ruling regimes to embrace liberal constitutional values.

From the early 1990s there was considerable political change on the African continent. The spectre of coups and counter-coups that characterised much of the 1970s and 1980s began to give way to other processes of transfer of power.

Hence, by the end of the decade, the majority of African states had undertaken constitutional reforms to introduce legalised political oppositions, moves had been made towards electoral reforms and there had been a general relaxation of government controls on the political activities of citizens, accompanied by an increase in the freedoms of expression, press and association.

Building upon the gains made in the 1990s, Africa seems to have entered a new phase of constitutional development; namely concern with ensuring that constitutional values are indeed internalised and adhered to.

Three main features have largely marked this phase. First, perceived lack of commitment by the ruling parties to the new political or constitutional orders developed in the last decade. Second, weak commitment to legal review so as to bring about greater consistency between constitutions and existing laws. Finally, continued frequent violation of existing laws, including constitutional provisions, and with impunity.

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

4.1.3 The Kenyan Context

Years of a national clamour for a constitutional review to make the Constitution a better instrument in their service have passed. There has been dissatisfaction with the way in which valuable sections of the Independence Constitution were changed and power

concentrated in the President. Indeed, the many political, social and economic problems facing the country were attributed to deficiencies in the Constitution.

As noted earlier, the reform movement was after 1990, influenced by a global pro-reform wind.

The call for reform was motivated by the need to update and improve the current Constitution. It was not, as for example, in Uganda, South Africa and Eastern Europe, a call for a radically new Constitution.

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

The pressure for a review heightened as the movement for the restoration of multi-party politics started in the early 1990s, led by the Citizens' Coalition for Constitutional Change, (4Cs) and religious organisations.

A large number of organisations, religious and secular, NGOs and political groups joined this movement. Some examples are the National Council of Christian Churches (NCKK) the Episcopal Conference of Catholic Bishops, the Law Society of Kenya (LSK), the International Commission of Jurists Kenya Chapter (ICJ(K), and the Kenya Human Rights Commission (KHRC). Immense pressure was also brought to bear by women's organisations for provisions on affirmative action to be adopted during negotiation and review.

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

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

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

stagnation in the efforts, parliamentary political parties, including those that supported the initiatives of the National Convention for Constitutional Change, formed their own forum, the Inter-Parties Parliamentary Group (IPPG).

The IPPG agreed to a number of reforms to be implemented before the General Election of 1997. These included the independence of the Electoral Commission, repeal of a number of laws restricting civil and political rights, such as freedoms of association and expression by political parties and annulment of the offence of sedition that was being used to clamp down on people who agitated for their rights.

But these were only interim reforms to ensure fair elections, after which a comprehensive review would be undertaken in accord with the Government's position. As a result of the early dissolution of Parliament, not all the proposed reforms were enacted. However, as part of the IPPG package, the Constitution of Kenya Review Act (1997) came into force as the machinery required to meet the goals of post-election constitutional review.

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

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

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

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

The other was a parliamentary process backed essentially by KANU and allied political parties. This group established a Parliamentary Select Committee to determine what instruments would be necessary for a comprehensive review of the Constitution. This led to further amendments to the Review Act in 2000. The amendments introduced substantial changes in the legislative framework as agreed in 1998. Among these were that:

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

Following this amendment, the Constitution of Kenya Review Commission was finally established and fifteen Commissioners appointed in November, that year. The existence of two separate processes was obviously unsatisfactory. There was a danger that two opposed review Commissions would intensify political conflict, even cause violence, and that their results would not be adopted as the new Constitution since neither party had sufficient votes in the National Assembly. Efforts to bring about a merger of the two processes were undertaken by the Chairperson of the CKRC by facilitating negotiations between the Steering Committee of *Ufungamano* and the Parliamentary Select Committee. Sensing the deep and widespread wish by Kenyans for a common process to promote national unity and peace and to produce a Constitution enjoying nationwide support, the negotiating parties took several courageous decisions that led to the merger. The Review Act was again amended in May, 2000, to incorporate the terms of the merger agreement. Twelve Commissioners were, as a result, added to the membership of the CKRC. Neither commission had stood still during the negotiations.

At the time of the merger, the PCK had held hearings in all but one province and had collected a large number of views and recommendations from organised groups and individuals. The CKRC had set up an elaborate committee system, most of which had met several times to discuss programmes for civic education, publicity, research and drafting, while the finance committee had negotiated allowances for Commissioners and begun the purchase of vehicles. The Commission benefited greatly from synergy once the two groups merged.

One advantage in the long drawn out negotiations for a common process was that during this period there were numerous meetings and workshops to scrutinise the current Constitution and debate the goals of reform.

A national consensus was reached on the principal goals of reform. A number of organisations, mostly NGOs, were established to research on and lobby for reform on specific matters, such as the electoral system, land, the legislature, human rights, gender and minorities, disability, poverty and basic needs, the environment, corruption and public accountability and the economy.

4.2 The Legislative Framework for the Review

4.2.1 The Spirit of the Review Act

When Kenya became independent, the Constitution was not made directly by the people. It was negotiated at Lancaster House in London between the British government and representatives of Kenya's political parties who were members of the Legislative Council.

The people of Kenya were not consulted and the Constitution itself was adopted by the British Parliament, not by Kenya's Legislature.

Since then, the Constitution has been changed many times, though some changes have been reversed. The people had no say in the making of these changes, most of which were rushed through Parliament. No public discussion was allowed.

The spirit and approach of the Review Act is fundamentally different. The Act places people at the centre of the review process, referred to in popular terms as 'people-driven'. It aims to be a participatory and inclusive process. Since a Constitution is a contract between the people and the State for the governance of society, two aspects of Constitution-making are vital.

The first is the *process and procedure* by which the contract is negotiated and adopted. The second is the *content* of the Constitution, that is the outcome of the process.

On the process, the Constitution of Kenya Review Act prescribes, in detail, the organs of review and the procedure they have to follow.

On the content, the Act sets out the object and goals of review based on a prior consensus among the key stakeholders.

The object and goals of review, which are fairly comprehensive, are binding on all organs of review. But the rules and institutions to achieve the goals are to be decided by the people.

4.2.2 The Object and Goals of Review

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

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

(a) *National Unity and Ethnic Identity*

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

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

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

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

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

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

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

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

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

- the process of government must be transparent;
- public authorities must be accountable to the people;
- the administration must be fair;
- public officers, including ministers, must be free from corruption or other forms of abuse of power;
- state resources must be well managed; the Act requires that the system of managing and using public finances be improved (section 17(d)(viii)); and
- civil society organisations should have a role in managing public affairs (section 17(d)(xv)).

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

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

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

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

(c) *Human Rights*

All modern Constitutions guarantee human rights. And there are several international and regional treaties that commit states to protect rights within their borders.

The Review Act regards the protection of human rights and gender equity, along with constitutional governance, ‘as an indispensable and integral part of the enabling environment for economic, social, religious, political and cultural development’ (section 17(d)(iii)). The importance of human rights is shown in another objective creating conditions conducive to a free exchange of ideas (section 3(i)).

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

(d) Equal Rights for All

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

(e) Gender Equity

The Act has gender equity as an important goal of review. Gender equity is the equal treatment of men and women, especially on opportunities to participate in public affairs, commerce and social life, including the family.

The call for gender equity assumes that people (traditionally women) are treated unfairly on account of their genders.

Family law or customary law may at times discriminate against women, in the rights to inheritance, custody of children in the event of the family breaking down, commercial law or practices, especially concerning loans, etc.

There may also be social prejudices against participation by women in politics or commerce. Women in Kenya are victims of such laws and prejudices.

Gender equity should guarantee that women are enabled through legal reform and social practices to overcome these obstacles and enjoy the same rights and opportunities as men, even if this means adopting special measures, such as affirmative action, in women’s favour.

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

(f) Basic Needs of All Kenyans

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

These needs are usually secured by the state protecting social, economic and cultural rights.

The Act explicitly states that this goal should be achieved by setting up an equitable framework for economic growth and equitable access to national resources.

This is extremely important in view of the situation in Kenya, where nearly 60% of the people live in poverty. The situation of the poor is made worse by economic policies associated with globalisation which, as expressed in structural adjustment policies and aid conditionalities, oppose state subsidies to education, health and shelter. Meeting social and economic rights also requires us to address the enormous disparities of wealth and access to resources by a certain class and some regions that is obvious in Kenya.

(g) *People's Participation in Government*

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

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

(h) *Devolution of Powers*

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

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

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

(i) Constitutional Commissions and Offices

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

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

New commissions might include one to receive and investigate complaints about abuse of power by officials or public authorities, another to implement and supervise protection of human rights, especially promoting the rights and welfare of women and children.

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

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

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

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

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

Currently, a constitution cannot be purely a matter of national concern. Most states are members of regional and global organisations, which confer rights and impose obligations on states and their nationals, in regard to many subjects.

States are bound by international treaties on matters that traditionally form part of constitutions, for example, human rights. The ways in which these obligations are adopted and implemented by a state have profound consequences for national policy and institutions.

4.2.3 The Process of Review

(a) *The Modalities of Review*

One secret of success in a constitutional review process lies in the sequential perfection of the review stages. The first step is to establish and agree on the need for and, therefore, terms. This initial stage cost Kenya years of negotiation.

The next stage is to agree on the method. Here Kenya faced even greater controversy. On the one hand was the Government's preferred approach; that the review should be made from the "top", i.e., principally by the political elite as represented in Parliament and assisted by experts, and, on the other hand, the civil society and religious leaders, who wanted a "people-driven" process. The latter, in which ordinary persons, referred to simply as "Wanjiku"* , would be the main decision-makers, both by presenting their views and electing representatives to a Constituent Assembly to adopt the new Constitution. The dichotomy between the two views was probably false. The review and adoption of the Constitution is a complex and many-sided process in which various skills, talents and different forms of participation are necessary.

There is a role for the elite as well as for ordinary people, experts as well as lay people. The other secret of a good process is in a right combination of all the components establishing the balance between them.

The principal constituents of the process are to draft constitutional amendments or a new Constitution, and their adoption. Normally, drafting is best left to an expert body while adoption must be the responsibility of a representative body, whether Parliament or a specially convened assembly. The drafting can be left to the expertise of a committee (or even an individual) working in a degree of isolation from the raging national debate and formal submissions to the expert body.

Historically, almost the world over, constitution-making, both drafting and adoption, was the business of the elite. In contemporary times, the notion of people's sovereignty is so dominant in public rhetoric that the process has to be participatory, transparent and inclusive. The role of experts is now narrowed to listening to the people and translating their views into constitutional terms, within the mandate of the Review. If necessary, people must be educated on constitutional issues – given civic education – to facilitate their participation in the Review process.

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

The draft produced by experts must be subjected to keen scrutiny by the people, before it is submitted to the Legislature or a specially elected assembly.

Finally, the people must endorse the draft in a referendum, or at least vote on those matters that cannot be resolved by the assembly. This more limited form of referendum was provided in South Africa and Uganda, although in both cases the referendum was avoided due to a broad consensus in the assembly.

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

- Increasing people's knowledge of constitutional issues;
- Enabling people to become familiar with the new Constitution;
- Establishing a proper set of agenda for reform (public participation tends to broaden the agenda, especially on social justice issues);
- Enabling them to exercise their rights and fulfil their duties under the Constitution;
- Facilitating the implementation of the Constitution; and
- Ensuring the legitimacy of the new Constitution and its acceptance as the framework for development of consensus on the formulation and implementation of national policies and settlement of differences.

The Review Act, as successively amended, meets almost all the standards of contemporary constitution-making.

It is worth underlining a few fundamental principles required by the Act. The first is that the review process should be comprehensive, meaning that, apart from the values and institutions, mentioned in the Review Act for specific examination, any other matter can be examined if necessary or desirable.

The second is that the review process must be inclusive, accommodating the diversity of the Kenya's people, 'including socio-economic status, race, ethnicity, gender, religious faith, age, occupation, learning, persons with disabilities and the disadvantaged' (section 5 (b)). As we have seen, the composition of the organs of review is designed to reflect this diversity. The June, 2001, merger of the two commissions made the review process achieve this feature.

The third is that the process must be *open, democratic and accountable* to the people (section 5(a) and (c) (ii)). Meetings of the Commission to receive the public's proposals must be held in open sessions (section 21(3)). The records of the Commission must be made available to the public through public libraries, district documentation centres and the media (section 22).

The entire review process must be guided by respect for the universal principles of human rights, gender equity and democracy (section (5) (c) (iii)).

The Third Schedule to the Act sets out the Principles for a Democratic and Secure Process for the Review of the Constitution, which the Government, political parties, NGOs, Kenyans and the organs of review have undertaken to observe.

They recognise the importance of confidence-building, engendering trust and developing a national consensus for the process. They agree to avoid violence or threats of violence or other acts of provocation during the review process, and not to deny or interfere with any one's right to hold or attend public meetings or assemblies, or other rights and freedoms.

The fourth is that the whole process must be based on *consensus* after all views have been allowed to be expressed freely and openly, so that the process as well as its outcome enjoy the widest measure of national support.

Apart from the above undertakings, the rules of decision-making in the organs of review reflect the importance of consensus. Decisions on constitutional changes must be made by consensus. But if consensus is not reached on any point, decisions must be made by a two-thirds majority of all members of the relevant body (section 21(6) for the Commission, section 27(5) for the Conference and section 47 of the Constitution for the National Assembly). The emphasis on consensus reflects the view that the Constitution must be acceptable to the widest cross-section of the country; for it is the basis of governance, laws and policies which affect all Kenyans. If decisions can be reached by a consensus, national unity would be strengthened.

The fifth is that the highest importance is attached to participation by the people. The organs of review must provide the people 'with an opportunity to actively, freely and meaningfully participate in generating and debating proposals to alter the Constitution' (section 5(c)(i)). Moreover, they must ensure that the 'final outcome of the review process faithfully reflects the wishes of the people of Kenya' (section 5)(d)).

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

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

(b) *The Organs of Review*

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

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

(i) *The Commission*

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

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

(ii) *Constituency Constitutional Forum*

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

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

(iii) *The National Constitutional Conference*

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

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

(iv) *The Referendum*

A referendum is a process a bit like a general election. But, instead of voting for people to represent them, the voters give their views on one or more specific

questions. A referendum will be held only to decide those issues not resolved in the National Constitutional Conference.

(v) *The National Assembly*

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

(c) *Stages of Review*

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

Stage I – Civic education: preparing the people for participation

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

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

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

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

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

Stage III – Public consultations: listening to the people

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

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

Stage IV – Writing the report and preparing the draft bill

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

Stage V – Debating the Commissioners Report and Recommendations

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

4.3. Conclusion

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

CHAPTER FIVE - SOCIO-ECONOMIC AND POLITICAL CONTEXT OF THE REVIEW PROCESS

5.1 Defining the Context

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

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

5.2 The Social Context

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

5.2.1 Social Welfare

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

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

5.2.2 Food Security

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

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

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

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

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

5.2.3 Health and Health Care

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

However, the 1990s recorded deteriorating health situations set against a backdrop of complex epidemiological, social, economic, political and globalisation factors that posed equally complex problems in health needs and services. Kenya is ranked as one of the countries with the poorest health status and public health service deliveries in the world. The infant mortality rate increased from 70 per 1,000 live births in 1990 to 74 per 1,000 live births in 1999. The goal was to reduce the rate to 47 per 1,000 by the year 2000 below the target of 50 per 1,000. The under-5-years child mortality rate increased from 97 per 1,000 in 1990 to 118 per 1,000 live births, well below the global target of 70 per 1000 by the year 2000. The target for 2015 was set at 39 per 1,000 live births.

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

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

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

5.2.4 Education

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

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

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

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

5.2.5 Shelter

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

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

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

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

5.3 The Cultural Context

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

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

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

Indeed, the political establishment has since independence sought to pronounce ethnic identity as a constant threat to national unity while using the same to cause conflict, tension and even civil wars (ethnic clashes). Further, the new state, taking citizenship as the principal unity of state organisation, did not explicitly recognise ethnic groups as a locus of political expression and social life. Citizenship was, and is still, seen to provide for the direct relationship between a person and the state. The basic principle of such a state is the formal equality of all citizens, as individuals, not members of communities. Because indigenous cultures were seen as an impediment to forging national unity and modernism, the new government emphasised individualism and the importance of national unity at the expense of cultural diversity and communal rights. As a result, no special provisions were made either in the Constitution or in other laws on customary

rights on the basis of ethnic, linguistic or cultural policy. Consequently, there is no common, rallying and distinctive national cultural identity. Wearing “cultural” dresses in “official” places such as the National Assembly is banned.

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

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

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

5.4 The Economic Context

Underlying the social and cultural stresses of contemporary society has been massive regression in all sectors of the economy. During the first decade of independence, Kenya earned herself the enviable reputation as the fastest growing and best-managed economy in the region. Indeed, Kenya was at the same level as the Asian tigers now firmly placed among the newly industrialised countries. Rapid expansion of the production (GDP growth) – averaging 7% per annum–generated welfare of the people. Notably, the economy sustained an increase in real purchasing power by the people by more than 3% every year as the GDP, at 7%, was expanding faster than the rate of population growth, estimated at 3.5% -4% per year.

However, Kenya’s economy has been on the decline for the last two decades, with growth spiralling over the last five consecutive years from 4.6% in 1996 to negative growth of 0.3% in 2000. Similarly, over the last three decades, the GDP rate has continued to decline from an average of 5.2% per annum between 1974-1979 to 4.1% in 1980-1985, 2.5% between 1990 and 1995, reaching 1.9% between 1996 and 2000. Kenya is now ranked as one of the countries with the fastest declining economies, after Zimbabwe. The growth of per capita income has been less than the average population growth (2.8% per annum). Agricultural share of the GDP fell from 35% to 28% between

1970s and 1990s, and the share of industry in the GDP declined from over 20% to 16% during the same period. The growth of government services and official safety nets have been minimal, at 0.8% in 1997 and 1.2% in 1998. By 2000, one of the major social development indicators, unemployment, stood at 36%.

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

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

5.5 The Political Context

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

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

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

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

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

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

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

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

5.6 The Context for Women

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

5.6.1 Women in the Kenyan Economy

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

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

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

The relation between the policy instruments and the targets has not been analysed for a long time in gender-disaggregated terms that recognise the inputs of unpaid labour, particularly by women, as well as paid labour.

Women are persons with social rights; they are not just factors of production. This way of introducing gender-awareness into the design of economic policies is likely to benefit some men as well as women if it takes into account women's needs and rights in policy development and implementation.

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

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

5.6.2 Feminisation of Poverty

The feminisation of poverty in Africa may be a combination of many factors, such as limited skills and knowledge, unfriendly market structures that concentrate women in lower-paying and time-consuming work and restrict their access to capital and credit, traditional family structures perpetuating gender inequality through patriarchal norms of property ownership and inheritance, discrimination in the public domain and failure to recognise the value of women's work.

Economic, demographic, and political trends are changing the rural landscape, affecting women's activities. They have less capacity than men in terms of education and training, less time to devote to productively resources, and less control over important resources, such as land and capital. In Kenya, gender division of labour prevents women from growing crops for sale, although women remain responsible for the bulk of agricultural labour.

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

5.6.3 Women in Politics

Beyond lack of effective participation in the economy, women have made little progress in politics. This much is clear from the information provided on Table 2 below. The

primary reason for this has been the way in which Kenya, a male-dominated society, treats women in the political arena. In theory, the right to stand for elections, to become a candidate, and to get elected, is based on the right to vote. The reality is, however, that women's right to vote remains restricted principally because, in most cases the only candidates to vote for are male. Women do not often offer themselves for elective posts for reasons that have been thoroughly discussed by many scholars.

This unequal rate of participation in legislative bodies signifies that women's representation, rather than being a function of democratisation, is more a function of preserving the status quo. These reasons include culture, patriarchal systems, political institutional structures, and mode of elections.

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

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

Source: Electoral Commission, 1998

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

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

In the circumstances, the majority of women are denied the opportunity to play to the fullest extent their economic and intellectual roles, roles other than being wife and mother. Although most women participate in the electoral process as voters, very few offer themselves as candidates. Another impediment to women's participation in political decision-making is their high illiteracy rate. This has repercussions on women's awareness, as well as on their level of participation in political life.

Women's limited participation in political life is closely associated with such less visible factors as uneven distribution of roles and responsibilities between men and women, persistent differentiation in training and occupation and women's economic dependency. Above all, clear political will, development of appropriate policies, such as affirmative action policies, and a determined effort to make the electoral system and institutions such as political parties, gender-sensitive would go a long way towards ensuring gender equity in representation in the legislature, local authorities and other institutions. The

Constitutional review processes offers a great opportunity for women to negotiate the double covenant. The nation will have to make strategic choices to ensure greater economic and political empowerment and promotion of gender equality for its own benefit.

5.7 Conclusion

In the course of its public hearings countrywide, the Commission confirmed that most of these issues were perceived by Kenyans not merely as fundamental outcomes of bad governance but also as consequences of a defective constitutional structure.

We examine in Chapter six some of the concerns about to these issues which the people thought should be resolved in the framework of a new constitutional dispensation.

CHAPTER SIX - OWNING THE PROCESS

6.1 A People-Driven Process

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

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

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

6.2 People's Expectations

6.2.1 Expectations about the Process

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

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

The above expectations and aspirations form the content of the mandate of the constitutional review as laid out in section 3 of the Constitution of Kenya Review Act.

The people expected the process to be conducted in an open manner, guided by the principle of respect for human rights, gender equity and democracy. They expected the process to accommodate their diversity, including their disparate socio-economic status, race, ethnicity, gender, religious faith, age, occupation, learning, persons with disabilities

and the disadvantaged. The people expected the Commission and its organs to be committed to impartiality, independence, integrity, punctuality, sincerity, good faith and dedicated to their interests.

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

Specifically the people wanted assurance that:

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

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

6.2.2 Expectations about Outcomes

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

Fourteen main points from the people:

Give us the chance to live a decent life: with the fundamental needs of food, health-care, water, clothing, shelter, security and basic education met by our own efforts and government assistance;
We want peace and stability and a crime-free society;
We want a fair system of access to land and justice for the wrongs of the past;
Let us have more control over the decisions that affect our lives, bringing government closer to us, and let us understand better the decisions we can't make ourselves but which affect us deeply;

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

6.3 The People's Fears and Concerns

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

6.3.1 Those Relating to the Process

On the process, a number of fears and concerns were carefully expressed. The first and most important of these was that the Commission was not entrenched in the Constitution. They thought that, without entrenchment, the Commission could be wound up at any time by the Executive.

Second, there were initial doubts as to the independence of the review process. People feared that it was not possible to have an impartial process without Government interference.

Third, concern was expressed that the process would not be inclusive, that, because of ignorance, the process was likely to be hijacked by the elite and that the reviewed Constitution would be a reflection of elite views. With the passage of time, these fears and concerns appear to have dissipated and the people's confidence correspondingly enhanced.

Fourth, there was fear that there was not enough time for the Commission to complete its work. In their perception, the Commission was working with a deadline pegged to the life of a Parliament which could be dissolved at the President's whim and whose mandate, in any event, was fixed by the current Constitution. The majority thought that a thorough review was not possible in these circumstances.

Fifth, the fact that this country has had a large number of Commissions whose reports have never been released to the public or implemented was reason for particular public concern. They feared that the process was just another Government gimmick. According to one member of the public,

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

Sixth, there was also concern that the review process might fail to accommodate the diversity of values of the Kenyan people. They emphasised that their cultural values were unchangeable even by the Constitution. According to one presenter,

“...why tell us that we are not educated, we have scholars, but when we say that we want to go to madrassa as muslims, there is somebody is (sic) the Constitution Review says, ‘Ah!’ What are muslims? We want our values, we want them recognised for that.”

Finally, there was concern about transition politics and fear that the views were being collected at a time when the debate on the presidential succession was at its climax and when Kenyans expected to be going to elections later in the year. As a result, many of the views collected were coloured by the Commissioners’ own political preferences and choices.

6.3.2 Those Relating to Issues

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

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

(a) *Lack of Equal Access to Resources*

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

(b) *Absence of Economic and Social Justice*

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

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

(c) *Lack of Transparency and Accountability*

Transparency and accountability in Government were major concerns for the people. In their view, the Government of the day had failed to be accountable and transparent in running public affairs, decision-making, use of national resources, expenditure, tendering and management of public projects, running of Government bodies, elections, administration of justice and law enforcement.

The people called for a Constitution that would make government accountable to them and in which everyone would be subject to the rule of law.

(d) *Lack of Respect for the Rule of Law*

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

6.4 Taking the People Seriously

6.4.1 Analysing the People’s Views

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

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

To the extent possible, the people's voices have been accurately recorded and given due weight in designing the new Constitution. Where the people's views have not been taken into account, it is largely because the Commission considered alternative formulations more practical and in accord with the general principles of constitutionalism and democracy. The Commission has, in addition, carefully considered the fears and concerns of the people and fully taken them into account in designing the new Constitution. Although many of these fears and concerns cannot be resolved in the context of constitution-making, care has been taken in the report to indicate alternative policy and the administrative and political modalities of dealing with them.

6.4.2 The People's Views in Constitutional Design

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

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

6.5 Conclusion

The Commission is very happy with the way the people responded to the chance to participate in the review. It is grateful to them for the support they have always given to it to enable the Commission to overcome several hurdles and to resist attempts to derail the process. We believe that the process so far has been very valuable. We have always considered that the review is more than merely agreeing on the terms of the new Constitution. It is about self-discovery and identity. It is to give voice to the people and to affirm their sovereignty. It is to give them an opportunity for reflection on our national and constitutional history. It is also an audit on our State and Government, the first truly popular assessment of the record of the present and past administrations. It is a process to discover how the ordinary person defines what it is to be a Kenyan, and to articulate

their singular and multiple identities. It is to reaffirm our commitment to a united Kenya and the resolve to find a framework for the co-existence of communities. It is to agree on, and strengthen, national values and goals. It is to find, together, the devices to realise our collective vision of a caring, humane and just society. These aspects are particularly important when a state is trying to transform itself into a nation. The function of a Constitution is not merely to provide a framework for society but also to create and consolidate it. We believe that the review process has been critical to the success of these objectives.

PART THREE

VIEWS FROM THE PEOPLE

CHAPTER SEVEN-THE CONSTITUTIVE PROCESS

7.1 The Mandate of the Commission

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

7.2 Constitutional Supremacy

7.2.1 General Principles

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

The extent to which a constitution is regarded as supreme law depends, to no small extent, on the ease or otherwise with which its provisions may be amended.

Experience in Africa and elsewhere shows that, while it may not be so difficult to make a good constitution, it is very difficult to implement and observe it and all too easy to alter or even overthrow it. This was an important concern during the public hearings, during which the following issues were frequently raised:

- Considering how quickly and fundamentally the independence Constitution was amended, how can we protect the new constitution from a similar fate?
- How can we prevent the decay of constitutional institutions and state organs, as has happened with the institutions of the present Constitution?
- How can we be sure that the changes introduced by the new Constitution will be implemented?
- How can we ensure that the powers bestowed by the Constitution are not abused?
- How can we hold ministers and other public servants accountable for their policies and actions?
- What remedies will the people have against violations of their rights?
- How can we be sure that judges will interpret the law and decide cases impartially?
- What do we need to do to ensure free and fair elections?
- How can we protect constitutional values, like consensus, people's participation, the independence of constitutional offices and bodies? and
- How can we eliminate corruption, which is responsible for the denial of so many rights and is an important reason for our poverty?

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

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

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

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

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

7.2.2 Supremacy in the current Constitution

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

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

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

Section 3 of the current Constitution provides that:

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

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

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

7.2.3 Supremacy in other Constitutions

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

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

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

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

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

7.2.4 What the People Said:

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

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

- (vi) on the question of who should conduct the referendum, proposals ranged from: the Electoral Commission, an independent constitutional commission, the members of Parliament, non-governmental organisations and religious bodies.

7.2.5 Commentary

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

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

7.2.6 Recommendations

The Commission thus recommends that:

- (i) the new Constitution should have some entrenched provisions – for example, on human rights, that Parliament does not have power to amend;
- (ii) the new Constitution should address the issue of the relationship between the various organs of State and must deal with checks and balances;
- (iii) the new Constitution should have a supremacy clause that could state that the Constitution is binding on all the people and all organs of State and at all levels;
- (iv) the Constitution shall only be amended by at least 75 % of members of parliament; and
- (v) the amendment procedure should make the following distinction:
 - (a) A Bill seeking to amend an entrenched provision should not be passed unless:
 - it receives the support of two thirds of members of Parliament at the second and third readings; and subsequently
 - it receives approval at a referendum.
 - (b) The entrenched provisions should include:
 - the procedure on amending the Constitution itself;
 - the provisions establishing the Republic of Kenya;
 - the provisions on sovereignty of the people;

- the provisions on supremacy of the Constitution;
 - the Bill of Rights;
 - separation of powers; and
 - provisions on existence and powers of independent commissions and bodies.
- (c) A Bill seeking to amend these provisions should not be passed unless:
- it receives the support of two thirds of Parliament at the second and third readings; and
 - it receives the support of two thirds of bodies at national or sub-national levels (this is tied to the question of devolution).
- (d) Non-entrenched but special provisions would include:
- provincial, district or constituency boundaries; and
 - change in the number of constituencies.
- (e) A Bill seeking to amend the provisions of the Constitution should require a two thirds majority at the second and third readings.

7.3 Constitutional Interpretation

7.3.1 General Principles

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

7.3.2 Interpretation in the current Constitution

Save for pronouncing constitutional supremacy and declaring inconsistent laws void, the current Constitution is silent on cannons of interpretation. The courts, therefore, have unfettered discretion to interpret the Constitution as they deem fit. The Constitution does not provide for a constitutional court to deal with issues concerning interpretation of it. However, the High Court, which, has unlimited original jurisdiction in all civil and criminal cases, has been the forum which determines constitutional interpretation by way of a constitutional reference from a lower court. Whenever an issue affecting

interpretation of the Constitution arises in a lower court, either party usually files a constitutional reference in the High Court. The Chief Justice then appoints a bench of two or three judges of the High Court to sit as a Constitutional Court to hear and determine the case. The decision of the court is final and is not subject to appeal to the Court of Appeal.

7.3.3 Interpretation in other Constitutions

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

7.3.4 What the People said:

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

7.3.5 Commentary

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

7.3.6 Recommendations

The Commission, therefore, recommends that:

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

7.4 Sovereignty of the People

7.4.1 General Principles

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

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

The Review Act obliges the Commission to secure provisions that ensure free participation by the people in their governance and in managing public affairs (section 3

(d) &(j). The Act has set the stage for making a Constitution that responds to the people's voice, one that reflects national needs as perceived by the people.

7.4.2 The People in the current Constitution

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

7.4.3 The People in other Constitutions

Many written Constitutions recognise and acknowledge that sovereignty resides in the people. The Constitution of the United States of America, promulgated in 1789, acknowledges this for example in its preamble, as do many modern constitutions. In a more elaborate fashion, the latter generation of constitutions now define what the doctrine of sovereignty of the people means and entails. The French Constitution, 1958, specifies that

“national sovereignty belongs to the people, who shall exercise it through their representatives by way of a referendum.”

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

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

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

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

7.4.4 What the People Said:

The people told the Commission that:

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

7.4.5 Commentary

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

7.4.6 Recommendations

The Commission recommends therefore that:

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

7.5 Nationality and Citizenship

7.5.1 General Principles

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

7.5.2 Nationality and Citizenship in the current Constitution

Under the current Constitution, citizenship can be acquired by birth, naturalisation, registration and descent. There are, however, a number of anomalies in the current citizenship provisions that the Commission set out to review. The first was the question of dual citizenship. Both the present and the Independence Constitution do not allow dual citizenship. If a person who has attained 21 years had the citizenship of another country, he or she is required to renounce that citizenship otherwise he or she may lose the Kenyan

citizenship. Furthermore, if a person who has attained 21 years acquires the citizenship of another country by a voluntary act other than marriage or through any other manner and does not renounce it, he or she automatically ceases to be a Kenyan citizen.

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

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

While a woman in the same position

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

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

7.5.3 Nationality and citizenship in other Constitutions

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

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

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

7.5.4 What the People Said:

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

- (i) *General principles:*
 - a) Citizens should have equal rights regardless of their way of acquiring citizenship;
 - b) All documents whose issue required production of an ID should be used as evidence of citizenship;
 - c) Communities living in international border areas should be accorded a dual citizenship;
 - d) Subjecting ethnic Somalis to screening cards for IDs to end;
- (ii) *Automatic Citizenship*
 - a) Child born of a Kenyan man;
 - b) Child born of a Kenyan woman;
 - c) Woman married to a Kenyan man;
 - d) Man married to a Kenyan woman;
- (iii) *Citizen by Registration*
 - a) People residing in Kenya for more than 10 continuous years;
 - b) Businessmen with over sh.10 million investment in the Kenyan economy, preceded by their denouncing of their former citizenships;
 - c) Anyone born to at least one Kenyan parent shall be a Kenyan citizen.
- (iv) *Naturalisation*

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

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

Should be permitted, especially for communities living along international borders or those resident overseas.

7.5.5 Commentary

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

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

7.5.6 Recommendations

The Commission therefore, recommends that

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

7.6 The Republican State

7.6.1 General Principles

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

7.6.2 The State in the current Constitution

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

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

7.6.3 The State in other Constitutions

For very good reasons, the constitutions of most independent African countries proclaim the sovereignty of the State. Having emerged from years of colonial dependency it became more than a mere symbolic gesture to acknowledge this in the primary instrument constituting the polity. That formulation continues even in the more recent revolutionary or people-driven constitutions. Thus the Constitution of Uganda states, in Article 5(1), that Uganda is a sovereign state and a Republic.

Similar provisions exist in the Constitutions of South Africa, Ethiopia, Eritrea and Nigeria. Many of these recent instruments then go on to define the character of the state, especially its boundaries, official language(s), secularity, national symbols and political philosophy. The Constitution of Ethiopia, 1995, for example, states in Article 1 that -

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

Article 2 adds that

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

7.6.4 What the People Said

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

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| <ul style="list-style-type: none">(i) <i>On boundaries they said that</i><ul style="list-style-type: none">a) the Government should review the current boundaries and make the necessary changes;b) the boundaries with Uganda and Tanzania in Lake Victoria should be redrawn to accord Kenya and her people more access to the lake's resources;(ii) <i>On internal security they said that -</i><ul style="list-style-type: none">a) arbitrary police searches and arrests were rampant and must stop;b) there was a general breakdown of law and order, as shown by rising violence and crime;c) action should be taken against the circulation of illegal guns and ammunition in certain parts of the country;d) violation of human rights, including rape, by security forces during operations must be investigated and stopped; ande) general idleness by members of the armed forces in times of peace. |
|--|

7.6.5 Commentary

The issue of boundaries was particularly emotive for communities living around Lake Victoria. They reported constant harassment by Ugandan security forces and lamented lack of swift or any response from the Kenyan Government. Some thought that this was evidence of lack of care and protection by the Government. Hence the need to overhaul state structures. It is not entirely surprising that the Kenya-Uganda boundary was the one never fully demarcated and agreed upon.

7.6.6 Recommendations

The Commission recommends therefore that:

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

7.7 State Values and Goals

7.7.1 General Principles

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

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

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

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

Preambles generally fulfil several functions:

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

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

7.7.2 Values and Goals in the current Constitution

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

7.7.3 Values and Goals in other Constitutions

Many constitutions (old and new) prescribe the values and goals upon which the state is founded and according to which it is expected to operate. These are contained either in preambular provisions or in articles specifically dedicated to this purpose. Examples of such prescriptions are to be found in numerous constitutions, among them those of the

United States, Uganda, Ghana, South Africa, Fiji and Nigeria. For example, in its preambular provisions, the constitution of Eritrea extols

with Eternal Gratitude..... the scores of thousands of..... martyrs who sacrificed their lives for the causes...of rights and independence, during the long and heroic revolutionary struggle for liberation and....the courage and steadfastness of....Eritrean patriots...

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

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

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

7.7.4 What the People Said

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

(i) *as regards the preamble that*

- a) The Constitution should recognise that our country Kenya is not a nation but a conglomeration of many nations; the preamble should reflect this reality and the Constitution should accommodate that diversity;
- b) We consider ourselves equal, regardless of political opinion, race colour and creed or social status and will unite to build a peaceful and strong nation;
- c) The Constitution should salute those who have fought for Kenya's freedom;
- d) It should extol the democratic values of transparency, accountability, respect for human rights and social justice;
- e) By way of example, the public suggested that the Commission include preambular statements as follow:
 - "We, the people of Kenya, in order to form a multi-party democracy, establish justice, ensure domestic tranquillity, protect the rights of citizens, promote the general welfare and secure the blessings of liberty to ourselves and our posterity, do hereby ordain and establish this Constitution and any person acting under the authority of this Constitution will be doing so with the blessing of the people."

- "We, the People of Kenya...

AWARE that governments are created to serve humankind in the pursuit of peace, prosperity, security, happiness, environmental integrity and dignity of human life;

NOTING that the goals have been violated in the past by tyrannical, despotic, fascist and authoritarian governments;

KNOWING that the sustainability of democracy requires constant vigilance by the people to ensure the growth of civil society and the institutions of good governance, such as an independent judiciary, a professional civil service and a truly representative legislature.”

(ii) *that directive principles be included to*

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

7.7.5 Commentary:

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

7.7.6 Recommendations

The Commission recommends therefore that the new Constitution should

- (i) *contain a preamble which, inter alia,*
 - a) acknowledges the significance God to the Kenyan people;
 - b) recognises the struggle for independence and the role of freedom fighters;

- c) recognises the sovereignty of the people in establishing the Constitution and in setting up the means of governance for themselves and posterity;
 - d) affirms the religious, cultural and ethnic diversity of Kenyans;
 - e) reaffirms the indivisibility of Kenya as a nation'
 - f) seeks to heal post-independence wounds caused by political conflict.
 - g) reaffirms commitment to social justice; and
 - h) reaffirms commitment to democracy, constitutionalism and the Rule of Law.
- (ii) *also contain directive principles of state policy requiring all persons and organs of state to*
 - (a) respect the Rule of Law, protect democracy, democratic institutions, freedoms and rights of citizens; and
 - b) respect the letter as well as the spirit of constitutional provisions of fairness and good governance.
 - (iii) *require state organs not to exercise power* arbitrarily or in a discriminatory manner.
 - (iv) *guarantee* freedom, equality and justice for all persons.
 - (v). *require state organs to manage the country's resources* sustainably, to respect ethnic, regional diversity and communal rights, including the rights of communities to organise and participate in cultural activities and the expression of their identities.

7.8 The Legal System

7.8.1 General Principles

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

7.8.2 The Legal System in the current Constitution

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

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

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

- The Constitution;

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

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

7.8.3 The Legal System in other Constitutions

Although most constitutions leave the issue of the character of the legal system, including choice of a forum or of law rules, to statutes, or to case-by-case determination by the courts, some of the more recent instruments, especially those of multi-cultural societies now provide for this. The reason is to ensure legitimacy to the sometimes-plural jural traditions which constitute the national legal system. The Constitution of Papua New Guinea provides, for example, that its laws consist of

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

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

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

7.8.4 What the People Said

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

The people told the Commission that

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

7.8.5 Commentary

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

7.8.6 Recommendations

The Commission recommends, therefore, that:

- (i) *the Constitution should state the sources of law as consisting of -*
 - a) The Constitution, and subject thereto;
 - b) Acts of Parliament;
 - c) African Customary Law;
 - d) Personal Islamic Law;
 - e) Personal Hindu Law;
 - f) The East African Community Law; and
 - g) International Law.
- (ii) *on Islamic, Hindu and customary laws as sources of law, these must be limited to personal law.*
- (iii) *the legal system should ensure equality for all before the law and an equitable legal process.*
- (iv) *courts will ensure the creation and development of a common law of Kenya.*

CHAPTER EIGHT - THE BILL OF RIGHTS

8.1 The Mandate of the Commission

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

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

8.2. The Scope of the Bill of Rights

8.2.1 General Principles

(a) An Expanding Horizon

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

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

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

- Civil and political rights are directed to ensuring a secure space for individuals to pursue their values and interests and are aimed at limiting State intervention in their lives.

- Economic, social and cultural rights, on the other hand, may require the State to take specific action to facilitate the enjoyment of the rights and, therefore, assume an active State. The State is not required necessarily to provide free education or medical services, etc., but to pursue policies that enable individuals, families and groups to earn a living and ensure these facilities for themselves by providing an honest administration, equitable distribution of resources, and appropriate policies.

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

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

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

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

Fifth, rights empower citizens and residents, by giving them a central role in decision-making, in organs of the State and the right to associate and by protecting their vital interests against violation by the State. Sixth, rights limit State power and protect against the excesses of 'majoritarianism'. Seventh, rights justify special treatment of minorities and other disadvantaged communities and, eighth, rights are necessary for establishing and protecting democracy, including accountability of public authorities. In addition, respect for rights limits internal and external conflicts and strengthens national unity.

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

conditions for all. These included the right to education, employment, shelter, health, and food.

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

(b) Dimensions

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

8.2.2 The Bill of Rights in the current Constitution

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

- the rights to life and liberty;
- the right to be protected against slavery; forced labour; torture, and inhuman or degrading treatment;
- protection of the right to private property;
- the right to be protected against arbitrary search and seizure;
- protection of the rights of conscience, expression, assembly, association and movement;
- the right not to be discriminated against on the basis of sex, race, tribe, place of origin, residence or other local connections, political opinion, colour or creed.

- the right to a fair trial before an independent tribunal established by law in a criminal case, including the right to be considered innocent until proved guilty; and right to a lawyer.

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

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

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

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

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

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

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

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

In addition:

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

8.2.3 The Bill of Rights in other Constitutions

There is hardly any written constitution that does not have provisions for a Bill of Rights. The only difference is that, while the earlier essentially pre-1966, instruments emphasise civil and political rights, the more recent ones are comprehensive, incorporating, as they do, the values, principles and norms embodied in international treaties and conventions. The following table synthesises a few of the Bill of Rights provisions in other constitutions:

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

8.2.4 What the People Said

<p>Most submissions touched on human rights, directly or indirectly. Complaints and or demands were received on:</p> <ul style="list-style-type: none"> (i) the need to remove restrictions on rights; (ii) greater accountability of police and an end to police harassment; (iii) arbitrariness of officials, particularly chiefs; (iv) access to information held by the Government; (v) discrimination by the Government against minorities and prejudice by the public; (vi) discriminatory legislation and other measures used to harass the public, especially in North-Eastern and Eastern provinces; (vii) inadequate protection of religious freedom, days and modes of worship and even styles of dress; (viii) demand for affirmative action to enable disadvantaged groups to catch up with other groups in social and economic development; (ix) tribalism or ethnic prejudice; (x) Government favour of particular communities and discrimination against others; (xi) better protection of property, particularly land; (xii) better distribution of land; (xiii) degradation of the environment and destruction of forests; (xiv) access to and guarantees of preservation of their cultural sites and shrines; (xv) secure land for shelter;

- (xvi) guarantees of shelter;
- (xvii) lack of transport facilities and poor road conditions, especially in the rural areas;
- (xviii) equal (and equitable) rights and access to land;
- (xix) protection of the rights of people with disability;
- (xx) special status and protection of rights of older persons;
- (xxi) protection and rehabilitation of street children and orphans;
- (xxii) recognition of workers' rights;
- (xxiii) protection of journalists and of freedom of press in general;
- (xxiv) free and compulsory primary education and subsidised education thereafter;
- (xxv) free or subsidised health facilities;
- (xxvi) lack of safe and clean water;
- (xxvii) malnutrition;
- (xxviii) opportunities for employment or self-enterprise;
- (xxix) better access to courts;
- (xxx) lack of an institution to which they can take their complaints about arbitrary administration;
- (xxxi) more humane treatment in prisons for inmates;
- (xxxii) torture at the hands of the police;
- (xxxiii) long periods of remand pending trial;
- (xxxiv) respect for international treaties on human rights;
- (xxxv) more effective machinery for protecting their rights;

- (xxxvi) more involvement in decisions which affect their daily lives;
- (xxxvii) protection of children generally;
- (xxxviii) arbitrary arrests and searches;
- (xxxix) insecurity;
- (xl) failure to recognise certain groups during census;
- (xli) full rights to citizenship, including to obtain identity cards, voting cards and passports;
- (xlii) exclusion from public employment of some citizens, e.g., Goans and Nubians.

8.2.5 Commentary

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

(a) *An Expanded Bill of Rights*

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

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

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

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

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

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

(i) Rights of Women

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

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

(ii) The Rights of Older Persons

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

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

(iii) The Rights of Children

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

(iv) The Family and Personality Rights

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

(v) Rights of Persons with Disabilities

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

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

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

(vi) Rights of Refugees

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

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

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

In the absence of specific laws on refugees, the immigration laws, as contained in the Immigration Act (Cap179), are applied to the refugees, even though this is clearly inappropriate, as the Act is intended to regulate the entry into Kenya of persons who voluntarily come from other countries for some specified purpose. Refugees in Kenya basically stay in designated camps and cannot travel out of there except with permission from the local administration or unless in a specified cause, such as medical treatment or to attend an official UNHCR sanctioned activity in Nairobi. The UNHCR also provides

to the refugees ration cards to enable them to get their monthly food rations and a “protection letter” which identifies a person as a refugee out of a designated camp for a specified reason.

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

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

There has been a lot of inconsistency in police and courts’ conduct and practice when dealing with refugees. When any refugee is arrested, either because he is found outside his camp or he has no permit to stay out of the camp, the police and immigration tend to treat the refugee as any other alien despite his or her status. Such a refugee is either handed over to the UNHCR or sent back to the refugee camp, in the first instance, or, at other times, is charged in a criminal court for the offence of being in the country illegally. Where the refugee pleads guilty, as is usually the case, the courts, in recognition of the status of the accused, would initially order the refugee to be taken back to the camp. But in recent times the practice has been to convict the accused and sentence him or her to some months in prison. This is in addition, or as an alternative, to of a prescribed fine, and after the sentence is served or the fine is paid, the accused is ordered to be

repatriated. This court's repatriation order is duly carried out by the police, who escort the convict up to the 'No-man's Land' on the border. This repatriation order is in total violation of the non-refulgent principle of international law, which forbids the forcible return of a refugee to his or her home country.

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

(vii) *Abolition of the Death Penalty*

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

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

(viii) *Protection of Privacy*

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

(ix) *Access to the Media*

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

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

As for economic or social rights, it is recognised that the State does more than its resources reasonably permit. Given the abject poverty in this country, it is important for the Constitution to take account of these rights. In addition, deprivation of these rights has implications for other rights. For example, the burden placed particularly on women by the necessity to walk long distances for water means that the question has importance for gender equity and for human dignity. Sanitation is an aspect of health and was a

matter of great concern to many who made representations to the Commission, especially slum dwellers. Evidence also made clear the prohibitive costs of burying the dead for many people – surely an aspect of human dignity. These rights were among the most forcefully demanded by ordinary people.

(xi) *The Right to Social Security*

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

(xii) *The Right to a Healthy Environment*

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

(xiii) *The Right to Shelter and Housing*

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

(xiv) *The Right to Education*

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

(xv) *Protection of Language and Culture*

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

(xvi) Access to Information

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

(xvii) The Need for Just Administrative Action

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

(xviii) Rights of Detained Persons

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

(xix) Consumers rights

Everyone in society is a consumer – of goods and services produced by the Government or private enterprises or non-governmental organisations. While there is truth in the saying "you get what you pay for", it is equally true that in Kenya today consumers do not get many of the services they pay for especially those offered by government bodies

in return for taxation and rates. Consumers themselves have a responsibility to be observant, to demand what they are entitled to. But it is also appropriate that in a Constitution such as this, which is intended to provide a comprehensive framework, protection should be extended to consumers.

(b) Comprehensive Enforcement Provisions

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

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

(c) Necessary Limitations

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

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

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

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

8.2.6 Recommendations

The Commission recommends, therefore, that the new Constitution –

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

- o) give the civil society the opportunity to participate in and to comment on the process of monitoring and reporting on international treaties and instruments;
- p) ensure not only that the Government do report but that the obligations to report are turned to positive advantage at the national level; and
- q) prescribes the duties and responsibilities of citizens, emphasise the responsibilities that individual citizens have for a caring and humane society and require compliance with a code of good citizenship in the public service code;
- r) provide mechanisms for domesticating international norms and treaties;
- s) guarantee all workers the right to trade unions, etc;
- t) recognise the indivisibility and interdependence of all the civil, political, economic, social and cultural rights and environmental and development rights and guarantee them;
- u) establish polices and institutions which facilitate the people's endeavour to provide education, health, shelter and food to themselves;
- v) establish a framework for economic, social and cultural rights, which requires the State to allocate resources more carefully to ensure minimal wastage while aiming to realise the basic needs of Kenyans; and
- w) prohibit discrimination in the social and economic spheres on the basis of sex, pregnancy and marital status;

(ii) *as regards women should*

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

(iii) *as regards children should*

- a) provide specifically for the rights and needs of those who are a special category of our population;
- b) entrench certain provisions of the Children's Act of 2001;
- c) impose an obligation on a child's mother and father, whether married to each other or not, to protect and provide for the child; and
- d) provide specifically for every child to have the right to:

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

(iv) *on persons with disability should*

- a) make a provision recognising the rights of persons with disabilities as a special category of people with special needs requiring special recognition and protection by the State and society;
- b) comply with the international conventions that touch on the right of persons with disabilities;
- c) require that persons with disabilities be provided with reasonable facilities and opportunities to realise their potential and advancement; and
- d) recognise that persons with disabilities have a right to affirmative action to redress imbalances created by history, tradition or law; by ensuring that
 - the rights to respect and human dignity are given to persons with disabilities;
 - society is educated on the cause of disability and on the need to respect and treat them with dignity;
 - education, institutions and facilities for persons with disabilities are integrated into society as a whole, in step with the interests of persons with disability;
 - there is adequate access to all places, public transport, information and communications and housing for persons with disabilities;
 - the development and use of sign languages, Braille and other appropriate measures of communications are supported;
 - official usage in any language of words that are demeaning when applied to persons with disabilities is eliminated;
 - easy and cheaper access to gadgets for persons with disabilities is assured;

- persons with disabilities exercise their rights to vote and participate fully in the electoral process;
- persons with disabilities serving jail terms are accorded the special rights provided for in this Constitution; and
- persons with disabilities are accorded job opportunities commensurate with their skill and training.

(v) *as regards the older persons should*

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

(vi) *as regards refugees, should*

- a) require the State to make a provision recognising the rights of refugees as a special category of people with special needs requiring recognition and protection by the State; and
- b) require the State to take legislative, administrative and other measures to ensure that:
 - the right to asylum for refugees is recognised and granted in accordance with international law and practice;
 - no person may be extradited from Kenya to another country if he is to be charged with an offence whose punishment is the death penalty;
 - within one year of the new Constitution coming into force, there is full compliance with the international law and practice governing the procedures of granting asylum to refugees;
 - the international conventions dealing with the rights of refugees will be ratified and domesticated;
 - refugees have the right not to be returned to a country where they have a well founded fear of prosecution or of other treatment which would justify their being regarded as refugees.

(vii) *as regards marginalized groups, should*

- a) require the Government to take affirmative action on groups marginalised on the basis of gender, numbers, disability, age or any other reason created by history, tradition or custom; and

- b) provide that programmes of affirmative action, both justified by full data, using appropriate means and goals, transparently operated, limited by time, and adequately monitored, are not unfair.

CHAPTER NINE -THE STATE AND THE POLITICAL SYSTEM

9.1. Mandate of the Commission

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

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

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

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

9.2 The Ideology of The State

9.2.1 General Principles

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

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

9.2.2 Ideology in the current Constitution

(a) The Independence Constitution

At independence, Kenya was declared a Republic and one of the conditions for independence was that the independent state had to put in place a government founded on the people and a decentralised (*majimbo*) system. This was meant not only to provide

political protection for everyone but also to ensure ethnic minorities shared power sharing and participated in governing the new State. The decentralised system was however, not very popular with the new leaders and, as a result, the *majimbo* system was dismantled soon after independence to be replaced with a centralised system based in Nairobi.

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

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

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

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

Clearly, neo-liberal ideology is anti-popular and affirms on the one hand, the total market, with, on the other hand, a non-interventionist State, which does nothing to redress social imbalances and is basically a technocracy in the service of transnational capital. It is an ideology adopted for the Third World by the World Bank, the International Monetary Fund and other international agencies. It is noted that countries such as Japan, South Korea or Taiwan do not follow and have never followed the neo-liberal model.

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

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

(b) *The Current Constitution*

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

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

9.2.3 Ideology in other Constitutions

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

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

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

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

9.2.4 What the People Said:

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

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

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

9.2.5 Commentary

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

In addressing the people's will, cognisance should be taken, therefore, of two matters. First, the natural and instinctive will and wish of every human being to survive and preserve himself and to be secure and safe. This will is common to all, regardless of age, sex, ethnicity, race, social status or religion. The threat to this particular will was what prompted the rise of the political society, of law and government. Second, the temporary desire by a few to represent the people must be informed by the first will – the people's interests. This should be the foundation of any government.

9.2.6 Recommendations:

The Commission recommends, therefore, that –

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

9.3 Cultural, Religious and Linguistic Diversity

9.3.1 General Principles

(a) *Cultural and Religious Diversity*

Cultural and religious values prompt people to mobilise for specific goals. Religions were born largely of values, i.e., justice, love, security and charity. These then led to stratification, codes and covenants with the divine to enhance their influence.

The role of cultural and spiritual leaders/reformers is of the utmost importance in the delicate and often slow process of custom and value reform. They exercise their power in the realm of spiritual governance. What people seem to be rejecting today – consciously or not — is exaggerated secularism that begins by setting up a dualism of convenience between matter and spirit, between body and soul. This dualism separates religious faith and knowledge from “science” and ends up, in practice, by denying the reality of all that is not measurable and marketable.

There are people searching for “a new global ethic”, some simply for “a common good” or “social justice” ethics, others for conventional ethics. There are yet others, for whom, ethical bases are not enough. They look at a transcendent reference of religion and faith on which to base their commitment and action. At the most personal level, many people are moved by deep underlying moral and spiritual assumptions that reflect and explain reality and that support the values that guide their decisions on whether to change or not to change.

Ethics and religion are closely related for deeply religious humanity. Religions whether formalized and codified or otherwise have used their ideologies to impose their ethical systems, first, on their members and second, on others who are brought under the influence of that religion. The positive aspect of this interaction between ethics and religion has been a peaceful infiltration of virtue into societies, social groups or even countries.

(b) *Linguistic Diversity and Language Policy*

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

Language is often described as a carrier of culture, of which it is also an aspect. It plays an important role in determining the extent of mass involvement in national affairs, education and diffusion of knowledge. The choice of a language has a lasting impact on a nation’s political, cultural, social and economic development. Choices that are sensitive to a people’s aspirations are lasting. They are likely to ensure the realisation of the basic and fundamental rights of individuals and communities. Such choices must of necessity be guided by a concern for the people’s involvement in national life as well as the need to improve their social and economic status.

Kenya is a multi-lingual and multi-ethnic country. In the absence of reliable statistical data, we have no precise knowledge of the demographic sizes of the languages spoken in Kenya. We do know, however, that distribution by language is very uneven, ranging from a few hundred to about three million speakers.

Kenya has about 70 languages and distinct ethnic groups. They have their own territories, traditions and history. Generally, the name of each language depicts the culture of its native speakers. Thus, Dholuo, for example, refers not only to the language but also to the specific culture of the Luo people. There is, however, a distinction to be observed between being linguistically competent and having knowledge of the culture.

At independence, Kenya adopted English as the official language. It has for many years remained the language of the Government, education, justice, administration and the national system as a whole. The preference for English is based on the argument that there was too much ethnic and linguistic diversity. The general belief is that the choice of one local language over others would inevitably trigger ethnic rivalries and threaten national unity. There was the erroneous assumption that a foreign language would create unity and cohesion.

As a consequence of the status that English was given, the elite developed a negative attitude towards African languages. From their perspective, it would seem that progress and modernity could be achieved only through English. Currently, it is of popular acceptance that linguistic diversity a natural phenomenon does not need to be divisive and linguistic homogeneity does not necessarily lead to social or national cohesion. The fact that some of the most tragically disunited African countries are predominantly monolingual— Rwanda, Burundi and Somalia being examples – are evidence of this fact. Linguistic diversity does obviously represent a challenge for language planning in multi-lingual societies.

Language policy is, therefore, of vital importance for political stability and state legitimacy. Most contemporary African states are experiencing acute economic, social and political problems and have many symptoms of a crisis in education due to the fact that the most of African governments are run in languages the majority of the people do not comprehend.

There is an urgent need to give serious attention to the language question in Africa. Indeed, there is no country in this world that has ever achieved a sustainable level of development on the exclusive basis of a foreign language that the majority of its population does not understand. Many countries, such as India and Tanzania, have taken steps to develop and enforce a language policy for their countries. Their experience demonstrates that:

- Even though it may represent a real challenge for language policy and language planning, linguistic and ethnic diversity within a country should be positively viewed as a natural way of life rather than a plague;
- Language planning in a traditionally multilingual society cannot reasonably aim at linguistic homogeneity; it must be pluralistic;
- Language planning must always be in tune with the socio-linguistic realities of the country where the planning is taking place; and
- Language planning is primarily a matter of political will; it does not need to be successful at the first attempt.

(c) *State and Religion*

The relationship between the state and religion is an important issue. A number of issues arise here:

(i) *Pluralist Understanding of Religious Beliefs and Spiritual Values*

While some would look to religious beliefs for spiritual enlightenment and encouragement only; others would look to religious institutions and systems for personal guidance and social teaching; and, finally, many would see religious institutions as playing a specific role in fostering social responsibility and values. Yet most believe that religion and religious values involve either positive or negative influences for modern development, which they see as significant and believe they must be taken into account when researching and formulating a plan of social development.

(ii) Secular Society versus the Spiritual World

It must be understood that a secular society is a construct of convenience in Western society and is still unknown in many Asian and African societies. In these cultures, a sense of the “sacred”, of “God” and of “spirits” still permeates the daily lives of most people. In Africa, in general, and Kenya, in particular, even well educated and professional persons consume much energy, time and resources trying to placate the “the living dead”. It appears that neither Islam nor Christianity, nor yet, certainly, the neo-liberal ideology of the World Bank, for that matter, has succeeded in exorcising, integrating, rechannelling or even sounding the depth of the multiple energies. Africans devote time daily to dealing with the spirit world, which continues to be an integral part of the African identity.

(iii) Secular State or Religious State

A secular state as such is not particularly objectionable if it means that the State should not be under control of any particular institution. A secular state would be a situation whereby the State does not interfere in matters of religion and, at the same time, religion does not interfere in matters of the State. However, it wouldn't be reasonable to dismiss all religious references and to diminish religions and spiritual values as irrational myths and superstitions. People are asking their governments and their foreign partners to respect their beliefs even if they do not share them and are requesting that space and time be given for this mechanism to play their role in integrating new values and new paradigms in development.

The involvement of religious and spiritual leaders in explaining important changes would increase their acceptance. This is possible only in a secular state, as opposed to a religious one.

9.3.2 Cultural, Religious and Linguistic Diversity in the current Constitution

The current Constitution has not specifically addressed the language issue except in section 53 (1), where it refers to the official languages of the National Assembly. The section states: “Subject to this section, the official languages of the National Assembly shall be Swahili and English and the business of the National Assembly may be conducted in either or both languages.”

Sub-sections (2) and (3) go on to single out English for use in any resolutions, amendments, documents and quotations that shall be made by the National Assembly.

The languages are also in competition in terms of the required language skills by parliamentarians. Section 34(c) of the Constitution requires that, at the time of nomination for election to the National Assembly, the candidate “be able to speak and, unless incapacitated by blindness or other physical cause, to read the English language well enough to take an active part in the proceedings.” There is no provision for the linguistic needs of the physically challenged. Contestants not competent in English have legally been barred from contesting elections. Parliamentarians are allowed to debate in Kiswahili all Bills drafted in the National Assembly.

Although English is the official language, functioning as the language of government, Kiswahili plays a quasi-official role in Parliament. National documents, for example, registration forms for the national identity cards and passports, are found in both languages. But Kiswahili is not viewed as a language important for national unity and cohesion. The current Constitution does not recognise it as an official language *per se*, despite its importance nationally, regionally and continentally. Furthermore, the current Constitution is silent on the role of other Kenyan languages and there are no mechanisms for their protection, promotion and development.

Kenya is essentially a multi-religious state, with freedom of conscience. This firmly, if not elaborately, enshrined in the Constitution. Kenya's religions can broadly be divided into Christians, the majority, Muslims, coming second, followed by traditionalists or naturalists (e.g., Dini ya Msambwa, Tent of the Living God, etc.). Other religious affiliations include Hindus, Buddhists and Bahais. Section 73 of the Constitution provides, therefore, that:

1. Except by his own consent, his person shall be hindered from enjoying his freedom of conscience and, for the purposes of this section, that freedom includes freedom of thought and of religion, freedom to change his religion or belief, and freedom, either alone or in community with others and both in public and in private, to manifest and propagate his religion or belief in worship, teaching, practice and observance.
2. Every religious community shall be entitled, at its own expense, to establishing and maintaining places of education and to manage a place of education which it wholly maintains; and no such community shall be prevented from providing religious instruction to members of that community in the course of any education provided at an institution it wholly maintains or in the course of any education it wholly provides.
3. Except with his own consent (or if he is a minor, the consent of his guardian), no person attending an educational institution shall be required to receive religious instruction or to take part in or attend a religious ceremony or observance, if that instruction, ceremony or observance relates to a religion other than his own.

9.3.3 Cultural, Religious and Linguistic Diversity in other Constitutions

Constitutional instruments, especially of multi-ethnic or otherwise culturally plural societies, make clear provisions on culture, religion and language. Provisions on culture are generally aspirational and appear either in preambular statements or in directive principles of state policy. Culture is also recognised as a basic right in the Bill of Rights of many constitutions. Socialist constitutions, as Chapter Five of the Constitution of the Republic of Cuba indicates, have extensive provisions on culture. Language and language policy are also gaining increasing recognition in the constitutions of many jurisdictions. Article 6 of the constitution of South Africa for example, states, that

- (1) The official language of the Republic are Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa, and isiZulu.

- (2) Recognising the historically diminished use and status of our people's indigenous languages, the state must take practical and positive measure to elevate the status and advance the use of these languages.

In Ethiopia's Constitution, the right to speak, write and communicate in one's own language is guaranteed.

On religion, most constitutional instruments make two clear distinctions. The first is recognition of religions freedom as a fundamental right. This is stated to include the freedom to hold or practiced a religion or belief; to manifest that religion or belief in worship, observance, practice and teaching; and to establish institutions of religion, education and administration to propagate and organise religion. The second is the secular character of the state. Except in some Islamic jurisdictions, where state and religion are inseparable, therefore, most constitutions provide for a clear separation between religious and civic spheres. Thus Act 11 of the Ethiopian Constitution provides that

1. State and religion are separate;
2. There shall be no state religion; and
3. The state shall not interfere in religious matters and religion shall not interfere in state affairs.

Except to the extent indicated above, most constitutions recognise, as Article 5 of the Constitution of Fiji Islands does, that

Although religion and state are separate, the people.... acknowledge that worship and reverence of God are the source of good government and leadership.

9.3.4 What the People Said

What the people told the Commission may be classified under the following heads:

- (i) *On religion*
 - a) the Constitution should guarantee all Kenyans freedom of worship.
 - b) the Constitution should guarantee all Kenyans freedom of movement, expression, assembly, association and conscience;
 - c) the Constitution should entrench social, economic and civil rights;
 - d) Muslims should be allowed to observe Friday as their day of worship as Seventh Day Adventists should be allowed Saturday;
 - e) freedom of worship should be limited; and
 - f) freedom of worship should be abolished.
- (ii) *On Culture and Language*
 - (a) Should we have two national languages?
 - The majority of Kenyans are illiterate thus cannot read or speak English;

- The needs of the disabled have not been considered in terms of a national language;
- Having more than one national language would tend to divide Kenyans and having one national language would unify Kenyans;
- English is a colonial relic, thus a betrayal of the country's culture;
- Adopting indigenous languages as national languages would promote tribalism;
- Most Kenyans said that Kiswahili should be adopted as an official language in addition to English;
- Quite a number said that English be adopted as a national language;
- Some proposed that English, Kiswahili, Sign language, and Braille be adopted as national languages; and
- A few Kenyans said Kiswahili should be adopted as a national language while English is retained as the official language.

(b) Should the Constitution recognise and promote indigenous languages?

- Kenya's culture in terms of language is diminishing;
- Promotion of indigenous languages would divide Kenyans along ethnic lines, thereby facilitating tribalism;
- Promotion of indigenous languages would not enhance development.
- Most Kenyans proposed that the Constitution should recognise and promote indigenous languages;
- A number of people said the Constitution should promote indigenous languages;
- However, some said the Constitution should not promote indigenous languages;
- Other Kenyans said the Constitution should not recognise or promote indigenous languages.

9.3.5 Commentary

What the people told the Commission suggests that, while cultural and religious diversity is strongly defended, we are a long way from being able to develop a clear and universal national cultural and language policy. As to religion, it is clear that Western religious influence is firmly embedded in the cultural life of the Kenyan people. Further debate and research is, therefore, necessary on how this matter can be tackled.

9.3.6 Recommendations

The Commission recommends, therefore,

(i) *On religion, that*

- although freedom of worship is enshrined in the Constitution, it is becoming common for some religious sects to infringe on other people's rights;
- any religion which incites its followers against other citizens, leads its followers towards some kind of frenzy and encourages zealots and fanatics to pull out

swords against the followers of other faiths, shows that it is not a religion in any sense of the word;

- c) although citizens are entitled to free exercise of religion according to the dictates of conscience, it is desirable for all religions to share respect for humans and all creation, enforcing a moral obligation upon its adherents, encouraging them to promote tolerance, peace and charity;
- d) the Constitution should ensure that freedom of worship is not used to infringe on other people's freedom of religion; so there is a need for a religious jurisprudence that accommodates and is not selective in justice dispensation;
- e) the Constitution should be clear on the fact that no religious test will be required as a qualification for any office or public trust in the Kenyan Government;
- f) no person shall suffer on account of his religious belief or opinion;
- g) apart from providing for freedom of worship the bounds within which religion and the State matters apply need to come out very clearly in the new Constitution;
- h) the Constitution must state that Kenya is a secular State and that the Government will not do anything to help, encourage or promote any particular religion;
- i) there is a need to acknowledge God in the Constitution;
- j) there is a need to set up mechanisms to ensure the removal of socio-cultural and religious obstacles to national integration and unity;
- k) there is a need to accommodate different religious groups' days of worship, while, at the same time, respecting the International Labour Organisation's conventions on rest days.
- l) there is a need to state clearly that no person shall be compelled to participate in any activity or ritual or take any oath, bear any arms or work or study on any day, if doing such an act violates the person's freedom of religion and conscience.

(ii) *On Culture and Language that:*

- a) the Constitution should provide for a clear language policy and effective implementation mechanism covering the following areas:
 - an education policy that encourages the learning and use of local languages;
 - a media policy that promotes the language;
 - a governance policy that encourages local languages in public affairs;
 - an economic policy that recognises the economic value of a national language and local languages; and
 - a language policy that promotes and encourages the use of sign language and Braille;
- b) the Constitution should recognise Kiswahili as the national language and accord this requisite status during national functions;
- c) the Constitution should recognise both Kiswahili and English as the official languages at the national level; all national documents should be made available in the two languages;
- d) in the context of devolution of power, the Constitution should recognise Kiswahili, English, sign language as the preferred language(s) as official languages at the district level;
- e) the Constitution should require Parliament to enact legislation to establish institutions for promoting of English, Kiswahili, sign language and Braille; a

- national Kiswahili Council and an Institute of Kiswahili Research should be provided for in the statutes;
- f) proficiency in Kiswahili should be made a prerequisite for conferring citizenship and work permits to foreigners;
 - g) the Constitution should oblige the Government to set aside a budgetary allocation for promoting national languages, sign language and Braille;
 - h) recognising the important economic value of Kiswahili at the international as well as the regional level, there is a need for the Constitution, through relevant statutes, to promote and encourage Kiswahili;
 - i) Kenya should endeavour to encourage the teaching of Kiswahili abroad and, where necessary, in conjunction with Kiswahili-speaking countries, establish institutes where Kiswahili is taught on a commercial basis.
 - j) the Constitution ought to safeguard the linguistic and cultural rights of all people in accordance with the Universal Declaration of Human Rights (UDHR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) to emphasise the importance of culture and language; and
 - k) language planning in Kenya should take into consideration the country's geo-political diversity, and the proposed devolved system of governance can be used as a basis to start a language-planning programme.

9.4 Political Parties

9.4.1 General Principles

(a) *Definition*

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

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

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

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

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

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

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

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

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

- Mobilise opinion, as, for example, in the struggle against colonialism;
- Bring together opinions and resources enabling people with similar views or interests, whether economic, social, religious, etc., to organise and co-ordinate their activities and lobbying;

- Provide the principal means through which ordinary people can participate in political and constitutional processes and exercise many of their civil and political rights;
- Mediate in several ways between civil society and State institutions;
- Secure the representation of the people in State institutions, particularly the legislature, offer them political, social and economic choices, especially through the electoral process, and bring public opinion to bear on government policies;
- Provide the means which bring a section of the people to power and provide cohesion and discipline to the Government; and
- Hold the Government accountable to the Legislature and the people, especially as opposition parties.

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

(b) *Evolution of Political Parties in Kenya*

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

As part of the global system, Kenya has been exposed to situations where, at one point, the political party was regarded as an extra-governmental organisation fully separated from it, which is why the Independence Constitution, popularly referred to as the *Majimbo* Constitution did not make any reference to political parties. But, with the emergence of a *de facto* one-party state during 1964-1981 (except for a short period in 1966-1969), the ruling party (KANU) emerged as the unchallenged party. This, however, did not necessitate transforming the party into an organ of State. The situation remained unchanged even during the period Kenya was a *de jure* one-party State (1982-1991). It is important to note that the single-party system did not enhance the ruling party's governance role so as to its being incorporated into a power-sharing structure, and making it a State organ.

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

There are now about 47 registered political parties, but only eight are represented in Parliament. The majority exist only in name. For the active ones, the problem of internal governance has persisted over the years and there is increasing demand their internal democratization. They are characterised as arbitrary, autocratic and unaccountable. In

nearly all, the leadership tolerates no healthy dissent and democratic elections are rarely held or, when held, are perfunctory. Even membership rolls may not be available. Furthermore:

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

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

Most parties source their funds from members' contributions, donations from "well wishers", fund raising activities and sales of documents, publications and souvenirs. It is usually assumed that political parties can, on their own, manage to raise enough funds for activities without state intervention. This has, however, made them become vulnerable to "forces of evil" that try to capture them for selfish ends rather than in the public interest. Because political parties play a critical role in nurturing, maintaining and sustaining democracy, including organisation, formation and political legitimisation of State organs through Parliament, there has been pressure on the State to provide some form of party financing. This would free them from the mercy and influence of their donors (sponsors), which, in many ways, is detrimental to their own operational freedom and to national democratic development.

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

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

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

9.4.2 Political Parties in the current Constitution

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

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

- The Constitution merely defines a party as one which has been duly registered. There is no special procedure for forming parties; parties are registered under the Societies Act and it is not necessary to show any degree of popular support for the party;
- Candidates for presidential elections must be nominated by a political party.
- Candidates for the National Assembly must be nominated by a political party;

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

9.4.3 Political Parties in other Constitutions

It is now recognised worldwide that political parties play a crucial role in democratic governance. As a general rule, however, many constitutions merely provide for authority to legislate for regulating political parties. Thus Article 3(2) of the Constitution of the United Republic of Tanzania merely states that

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

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

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

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

9.4.4 What the People Said

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

- (i) *on whether the Constitution should regulate the formation, management and conduct of political parties the people were of the view that*
 - a) tribalism in political parties was rampant;
 - b) there are too many political parties;
 - c) politicians have at times used the armed forces wrongly making them look like terrorists;
 - d) the current Constitution does not compel political parties to conduct proper internal elections or practice democracy; as such we have ended up with autocratic parties with self-interest as their main cause of existence;
 - e) nowadays there are 'briefcase' parties ready for sale;
 - f) parties are nowadays formed for personal enhancement;
 - g) the Government may suppress the opposition and freedom of association by regulation, formation and management;
 - h) political thuggery has taken root;
 - i) the Constitution should regulate the formation and management of political parties;
 - j) the formation of political parties should not be based on ethnic grounds.
 - k) political parties should have a national outlook;
 - l) political parties should have autonomy on party registration, membership and manifesto;
 - m) the formation and management of political parties should be gender —sensitive in that there should be gender equity in membership;
 - n) before any political party can be registered, it should be scrutinised, especially with regard to:
 - o) political parties should have a clear manifesto, i.e. what it intends to do for the people when it's in power. The issue, which came out strongly, was promotion of democracy and advocacy for peace and national unity;
 - p) the formation of political parties should be regulated by the Electoral Commission; and
 - q) there should be a code of conduct, adhered to by all party members.
- (ii) *on whether the number of political parties should be limited and; if so, how; the people were of the view that*
 - a) many political parties have created divisions among Kenyans;
 - b) so many political parties have encouraged the system of divide and rule.
 - c) there is a lot of confrontation and confusion among Kenyans and uncontrolled and unnecessary defections;
 - d) multi-party politics has led to increased ethnic chauvinism;
 - e) most of the political Parties duplicate one another's policies;
 - f) many political parties are used as a means for getting into Parliament; and
 - g) having many political parties has led to the decline of the economy.

(iii) *On whether there should be limitation on the number of political parties, the people were of the view that*

- a) political parties should be limited to five;.
- b) the country could have more than five political parties; some felt we could have as many as 40 political parties;
- c) alternatively, there should be no limitation on the number of political parties; we could have as many as we can possibly have.

(iv) *On whether political parties play roles other than political mobilisation, the people were of the view that*

- a) most parties easily degenerate into hooliganism when there is a contest;
- b) no checks and balances to help root out corrupt and careless practices are not in place;
- c) the administration and the police have abused licensing of political meetings to punish those whom the State does not favour;
- d) political parties often are tools for fighting the Government and international organizations;
- e) political parties should be more involved in initiating development programmes, to promote the people's socio-economic status;
- f) should be more involved in mobilizing people on politics;
- g) political parties should be involved in civic education;
- h) political parties should carry out the role of governance;
- i) a political party's major role should be promotion of national unity;
- j) political parties should be involved in disaster management programmes.

(v) *On whether public funds should be used to finance political parties and if so on what terms; people were of the view that*

- a) Kanu should not own Kenyatta International Conference Centre as it belongs to the nation;
- b) particular individuals, on account of their financial standing, dominate political parties;
- c) most political parties lack finances and, therefore, cannot run their affairs efficiently;
- d) the more money a party has, the higher its chances of winning an election;
- e) if not funded, political parties will end up begging from external sources and losing their independence due to influence;
- f) the Government should be responsible for financing political parties;;
- g) political parties should fund themselves from membership fees;
- h) political parties should be funded by donors and other well-wishers;
- i) financing of political parties should be based on a party's system of transparency and accountability;
- j) the relevance of party manifestoes should be demanded before funding is given;
- k) The parties should also have sufficient members before funding is given;
- l) funding political parties should be based on parliamentary representation, i.e., how many party members are in Parliament;

- m) political parties should be funded equally regardless of their manifestos or parliamentary representation; and
 - n) political parties should be funded only for the General Election.
- (vi) *On general political issues the people were of the view that*
- a) the exercise of presidential powers during elections can unfairly manipulate the election process;
 - b) Government harassment should be banned.
 - c) by being a member of a political party, the President is tempted to use public resources to promote his party's activities;
 - d) the functions of the ruling party and those of the Government should not be mixed up;
 - e) there should be co-operation between the State and the opposition political parties;
 - f) the head of State should not be affiliated to any political party; and
 - g) the ruling party should not use State machinery for its own campaigns and, if it does, all political parties should be allowed to carry out their campaigns through State machinery.

9.4.5 Commentary

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

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

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

However, the Constitution or the law on political parties should set clear conditions for forming and registering parties to effectively regulate their. We consider that the number of parties will decrease if it is no longer necessary for presidential and parliamentary candidates to be nominated by political parties, as we have recommended in the chapter

on Electoral System and Process. The number of parties will also decrease if stringent conditions are set for registering of parties (as we recommend below).

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

9.4.6 Recommendations

The Commission recommends, therefore:

- (i) On the Right to form Political Parties that -*
 - a) the right to form political parties shall be protected, subject to the provisions of the Constitution; and
 - b) political parties which intend to contest elections should be required to register with the Electoral Commission; qualifications for registration should aim at ensuring internal democracy and accountability as well as external accountability.
- (ii) On Qualifications for Registration as a Political Party, that*
 - a) the Electoral Commission shall be the registration agency;
 - b) in seeking registration, parties should satisfy the following criteria and undertake to meet the following conditions after registration. The party shall be required to:
 - promote and uphold national unity; every political party shall have a national character and its executive committee shall be representative of all parts of the country;
 - abide by democratic principles, undertaking to promote and practise democracy within the party by holding regular, free and fair party elections;
 - follow democratic decision-making procedures;
 - not expel any member from the party except for a good reason and after due process; and the party shall respect the Constitution and laws of the land; and
 - promote and respect human rights, including gender equity;
 - c) provide that at least one third of candidates put up for geographical constituency seats must be women; the party shall be encouraged to field women candidates in constituencies which the party may consider safe constituencies in which party is assured of winning;
 - d) the party cannot be founded purely on a religious, linguistic, racial, ethnic, gender, corporatist or regional basis; it must also promote the objects and principles of the Constitution and laws of Kenya; political parties are forbidden from engaging in propaganda based on these considerations;
 - e) political parties are forbidden from engaging in or encouraging violence or intimidation of members, supporters or opponents; they shall not establish or maintain a paramilitary militia or any such organization;
 - f) the party must keep proper accounts that must be audited annually; the audited accounts must be filed with the Electoral Commission and be available to the

- public for scrutiny; the Electoral Commission may, in consultation with the Auditor-General, prescribe regulations for the form and standards of accounts of political parties; the Auditor-General may examine books and accounts of any political party that receives funding from the State (see below for State funding);
- g) the party, once registered, shall be obliged to subscribe to a Code of Conduct (similar to the one in the Presidential and Parliamentary Elections Act) that imposes legal obligations on the party to observe its terms; a party in breach of the Code shall be liable to penalties; and
 - h) the party shall be required to publish a manifesto before elections.

(iii) *On Temporary Registration,*

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

(iv) *On deregistration of Political Parties, that*

- a) the law must provide for deregistration of a registered party found in breach of its own constitution or of this Constitution or of a Code of Practice for the Conduct of Elections or any law relating to elections;
- b) the law may give the Electoral Commission the power to give the party reasonable warning; but if the party shows no willingness or ability to comply with its obligations, the Electoral Commission must be obliged by the law to institute proceedings for deregistration; the party will have the right of appeal to the High Court;
- c) as a lesser penalty, the Electoral Commission shall withhold State subsidies from parties in breach of their obligations;
- d) such an action should also be open to members of the party who have failed to secure redress through the internal machinery of the party; and
- e) parties which have not put up any candidates for two General Elections in succession shall also be deregistered.

(iv) *On the Right to join a Political Party, that*

- a) everyone is free to join a political party;
- b) no one can be compelled to join a party;
- c) a person who has been convicted of an electoral fraud, as a result of which he is debarred from voting for a period, is also debarred from party membership for that period;
- d) only citizens can become members of a political party.

(v) *On Functions and Roles of Political Parties, that*

- a) political parties are free to participate in shaping the political will of the people, to disseminate political ideas and social and economic programmes of a national character, sponsor candidates for election to any public office and facilitate participation in public affairs;

- b) a party will have the principal objective of enhancing the wellbeing of the people of Kenya as well as the common good and welfare of society, whether it is ruling or in opposition, and all the ideals of good and republican governance;
- c) the State shall observe strict neutrality *vis-a-vis* all lawful political parties; the State shall provide a fair opportunity to all political parties to present their programmes to the public by ensuring equal access to State – owned and private media; and
- d) state functions or powers cannot be delegated to political parties.

(vii) *On Financing of Political Parties, that*

- a) state funding should be provided only for
 - Covering election expenses;
 - Broadcasting of party policies and programmes through public and private media;
 - Civic education in democracy and electoral procedures;
 - In addition, an amount not exceeding 10% of the total of these expenses may be given to parties for organisational expenses; and
 - Parties that receive not less than 5% of national votes cast;
- b) corporate bodies (foreign or national) should be prohibited from donating financial, material or other contributions to political parties, except in circumstances that may be prescribed by the Electoral Commission;
- c) individual contributions should be restricted to a maximum amount to be determined periodically by the Electoral Commission;
- d) parties registered with the Electoral Commission should be entitled to State subsidies;
- e) the formula for entitlements to parties and the modalities for disbursement should be prescribed by law on the recommendations of the Electoral Commission;
- f) the formula should take into account the support received by the party at the previous General Election; where a political party received insufficient support at the previous election to entitle it to any funding, but succeeds without public finding in reaching that level of support at the succeeding General Election, it should be entitled to have a contribution to its election expenses paid retrospectively;
- g) contribution from public funds should be limited to approved election expenses on public education on elections and voting, plus a further 10% of the sum on the above basis which may be made available for the party's running expenses between elections.

(viii) *On Supervision of Political Parties, that*

- a) elections to party offices and committees shall be conducted or supervised by the Electoral Commission;
- b) parties must submit an annual report on their activities and accounts to the Electoral Commission, in its capacity as the Registrar of Political Parties, to which the public shall have access;
- c) the Commission should use its power to secure the deregistration of parties to ensure the promotion of rights, democracy, fair competition and fair elections;
- d) the Electoral Commission should promote civic education to educate people on their constitutional rights, particularly as these pertain to the electoral process on

- its own as well as in conjunction with political parties, other State institutions and organs of the civil society; and
- e) the Electoral Commission should prescribe the maximum amount a party or candidate may spend on electoral campaigns, the amount to be determined to ensure that elections do not become too expensive as to favour the wealthy and restrict participation by parties and independent candidates in the electoral process.
- (ix) *On disciplining Party Members, that*
- a) the Constitution should require political parties to establish an internal machinery for ensuring discipline consistent with the principles of democracy, justice and the rule of law; and
- b) a Member of Parliament shall not be punished or victimised by their sponsoring parties for the contributions he makes in Parliament, including voting in a manner that may be contrary to the sponsoring party's position.
- (x) *On the Relationship between the Ruling Party and the State, that*
- a) the State or Government resources shall not be used to promote party activities by those holding public offices;
- b) The President and other senior Government officials shall not hold any official positions in their respective political parties; once appointed to a senior public office, one shall resign immediately from any party position one may be holding other than membership in the party;
- c) cabinet ministers shall be appointed outside Parliament and will immediately resign from any party position they may be holding at the time of appointment;
- d) party manifestos, constitutions, by-laws or any other policies shall be consistent with the constitutional provisions on the directive principles of the State;
- e) all parties (either winning or losing party) shall be required by the Constitution to conduct their political activities in the interest of the welfare and common good of society; and
- f) members of Parliament or representatives to the local authorities once elected shall owe their allegiance and loyalty to the Constitution of Kenya and all the members thereof.
- (xi) *On Defections, that*
- a) members of Parliament and local government representatives who decide to cross the floor or defect from their sponsoring parties should seek a fresh mandate from the electorate; and
- b) participation in a coalition government does not *per se* constitute defection.
- (xii) *On the Law on Political Parties, that*
- a) provision be made in some detail on the condition that a party seeking registration under the act should satisfy;
- b) the functions and roles of political parties in democratic governance be defined;
- c) internal democracy and governance of political parties be streamlined;
- d) sanctions associated with failure to comply with the law be provided;
- e) type of institutions that cannot engage in political and electoral activities be prescribed;
- f) unofficial membership of or dual association with political parties be abolished;

- g) the circumstances under which a political party should dissolve itself or be proscribed be clarified;
- h) the Electoral Commission's authority to register or deregister political parties be defined;
- i) inter-party co-operation inside and outside Parliament be encouraged;
- j) state funding of political parties and legitimacy of sources and ceiling of funds to be received from any given source, particularly to donations and regulation of the receipt of financial support from foreign sources be established; and
- k) accountability of political parties and appropriate sanctions for not complying with the law, etc., be established.

9.5 The State in the Global System

9.5.1 General Principles

(a) *Meaning and Relevance*

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

In general globalisation is driven by the private sector usually in pursuit of profit and often spurred by competitive pressure. Globalisation is proceeding rapidly, particularly in international finance, and this has had the effect of not only bridging the economic gap between countries but also disrupting the economic and political *status quo* at both country and international levels.

(b) *Globalisation and the Economy*

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

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

- Deregulation of markets in developed countries;
- The advent and spread of new micro-electronics based information and communication technologies;
- Globalisation of finance; and
- Change of policy orientation in the development of former socialist countries.

These are the elements that define the framework in which the law of globalisation and globalised values operates. And in this framework, one can begin to understand the disruptive nature of globalisation, including today's global hierarchy of inequalities in the

distribution of resources, and the subordinate role of poor countries in the global market. Indeed, the poor countries are reduced to sub-contractors in the global economy.

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

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

(c) *Regional Integration And Cooperation*

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

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

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

- The resurgent political will expressed in the Abuja Treaty of 1991;
- Forming and strengthening various regional blocs outside Africa, such as the East Asian Economic Caucus, the European Union and the Mercosur and NAFTA in the Americas;
- Small national markets as far of marginalisation in a world dominated by powerful trading blocs; Africa markets are small and limited because *inter alia*, of the dominance of the subsistence sector; without a strong

industrial and technological base, expanded intra-African trade is highly restricted;

- Liberalisation initiatives, which have created a conducive environment for outward-looking economic policies;
- The need to address the longstanding problems of the land-locked economies, and conflicts; and
- The need to attract Foreign Direct Investments.

(d) Kenya's Regional Integration Policy

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

Kenya's regional integration policy is based on the principles of non-alignment, non-interference in internal affairs of other States, good neighbourliness, peaceful settlement of disputes and adherence to the charters of the United Nations and the African Union. The driving factor in Kenya's regional integration policy is the need to create and promote a favourable environment for trade and investment in response to the emerging challenges of globalisation and liberalisation.

One key feature of Kenya's regional policy is its membership to multiple regional integration schemes briefly described below. This tendency, however, hinders integration because of duplication of efforts and resources and lack of harmony in such policies as rules of origin and customs procedures, information gaps and changing political positions.

(i) Cross Border Initiative (CBI)

CBI, also known as Regional Integration Facilitation Forum (RIF) was started in 1992 to foster regional integration and give impetus to restoring East African co-operation. The members of the CBI are Burundi, Comoros, Kenya, Madagascar, Malawi, Mauritius, Namibia, Rwanda, Seychelles, Swaziland, Tanzania, Uganda, Zambia and Zimbabwe. Within the CBI framework, member countries (including the EAC) in 1993 adopted a trade liberalisation programme that involved:

- Removal of all Non-Tariff Barriers on all imports from participating countries (a list of a few imports for health and security are exempted);
- Timetable for intra-regional tariff reduction requiring a 60% reduction by October 1993, 70% by October 1994, 80% by October 1996, 90% by October 1999, and 100% by October 2000;

- Movement towards CET by adopting import duties on third countries of members with the lowest rates;
- Harmonising of tariff rates (3-4 tariff bands, including zero, average trade weighted tariff of at most 155, and a maximum tariff of not more than 20-25);
- Harmonising of customs procedures and the possibility of forming a Customs Union.

(ii) *East African Community*

Efforts begun in 1993 to restore the East African Community (EAC) among the three East African countries of Kenya, Uganda and Tanzania with the formation of a Permanent Tripartite Commission, which culminated in an EAC secretariat in March, 1996. Subsequently, the Treaty establishing the EAC was signed on November 30, 1999, and the Community was officially launched in January, 2001.

The objectives are to develop policies and programmes aimed at widening and deepening co-operation among the partner States in political, economic, social, and cultural fields, research, technology, defence, security and legal and judicial affairs for their mutual benefit (Article 5 of the EAC Treaty).

The key principles that govern the East African Community (Article 6) include:

- Mutual trust, political will and sovereign equality;
- Peaceful co-existence and good neighbourliness;
- Peaceful settlement of disputes;
- Good governance, including adherence to the principles of democracy, the Rule of Law, accountability, transparency, social justice, equal opportunities, gender equality and respect for human rights;
- Equitable distribution of benefits; and
- Co-operation for mutual benefits.

(iii) *Common Market for Eastern and Southern Africa (COMESA)*

COMESA was formed as a Preferential Trade Area for Eastern and Southern Africa (PTA) in 1981, transformed to COMESA in 1994. COMESA has 20 member states, among them, Kenya and Uganda. The COMESA member states are in the process of forming a Customs Union with a Common External Tariff (CET) by 2004. It is designed to deal with the structural and institutional weaknesses of its member states by pooling resources. COMESA focuses on the following priority areas:

- Increasing productivity in industry, manufacturing, processing and agro-industries;
- Increasing agricultural production;
- Promoting, expanding and facilitating trade;
- Developing transport, communication and other services; and
- Developing a comprehensive, reliable and up-to-date information database.

The COMESA region is the leading destination of Kenya's exports. Over the last four years, exports to COMESA increased from KSh. 51.4 billion in 1997 to KSh. 56.7 billion

in 2000, a total increment of 10.3%. The COMESA region, however, remains an insignificant source of import for Kenya, imports decreasing from KSh. 6.6 billion to KSh. 5.2 billion between 1997 and 2000 (Republic of Kenya 2002).

(iv) *Inter-Governmental Authority on Development (IGAD)*

To tackle the problems of drought and desertification regionally, the Inter-Governmental Authority on Drought and Desertification (IGADD) was formed in 1977 by Djibouti, Ethiopia, Kenya, Somalia, the Sudan and Uganda. Eritrea became the seventh member of in 1993. Soon after, the name of IGADD changed to Inter-Governmental Authority on Development (IGAD) with focus on economic, political and security co-operation. Regional integration for food security, environmental protection, natural resource management, economic co-operation and promotion of peace and security were particular concerns. IGAD has three divisions: Economic Co-operation, Agriculture and Environment, and Political and Humanitarian affairs.

Its main preoccupation for the last few years has been to resolve the conflicts in the Southern Sudan and Somalia. During its 8th Summit of Heads of State and government in 2000, members undertook to encourage facilitation and expansion of intra-state trade among IGAD member countries, and the Sudan has drafted a trade protocol now being studied.

(v) *African, Caribbean and Pacific (ACP)–European Union (EU) Partnership Agreement (ACP-EU)*

Kenya is a signatory to the ACP-EU Partnership Agreement signed in Cotonou on 23rd June, 2000, that brings together 15 European and 77 ACP states. The central objectives of ACP-EU partnership are poverty reduction and, ultimately, eradication; sustainable development; and progressive integration of the ACP countries into the world economy. To achieve these objectives, the Agreement emphasises regional co-operation and integration with the aim of:

- Fostering gradual integration of the ACP States into the world economy;
- Accelerating economic co-operation and development both within and between the ACP regions;
- Promoting the free movement of persons, goods, services, capital, labour and technology among ACP countries;
- Accelerating diversification of the economies of ACP States; and co-ordinating and harmonising regional and sub-regional cooperation policies; and
- Promoting and expanding inter – and intra-ACP trade with third countries.

The key areas of regional economic integration include capacity-building to promote regional economic co-operation and integration; establishing regional markets and sharing the benefits from there; implementing reform policies; liberalising trade and payments; promoting cross-border investments, and so on.

9.5.2 Global relations in the current Constitution

Three issues are considered here. The first is Kenya's treaty-making competence, the second its conduct of diplomatic and consular relations, and the third, the authority to declare war.

(a) *Treaty-making Competence*

Kenya's treaty-making competence is a function of its adherence to the theory that international treaties are a separate legal system as opposed to domestic or municipal law. Thus a treaty by which a state has expressed consent to be bound does not automatically become domestically applicable. A transformation process must occur. Appropriate national legislation must be enacted to enable the treaty to become domestically applicable. This approach, known as the dualist position, is adopted by nearly all states that were colonised by the United Kingdom. The mode of domestication or "transformation" normally occurs through direct incorporation of the treaty rules through a drafting technique which gives the force of law to specified provisions of the treaty or the whole treaty. Thus most jurisdictions will merely schedule the treaty to the transforming Act.

A second perspective, known as the monist approach, makes no distinction between international and domestic law. Many jurisdictions now adhere to this approach.

Kenya is a party to some 93 multilateral treaties on various subjects. Another 69 multilateral treaties fall within subject-matters which Kenya should arguably be interested in, but to which it is not a party. At independence, the President inherited all the prerogative and executive powers that the Queen could exercise over to Kenya. These powers did not make any express reference to the conduct of international law. This remains the position to date.

The conduct of international law issues is deemed and implied to fall under the powers accorded to the President under section 23 of the Constitution. In addition, the powers and functions of the legislature do not expressly provide for domestication of international law but again it is implied as one of the legislative powers.

Kenya's treaty-making practice borrows heavily from English practice. Treaty-making is an exclusively Executive function. The negotiation, signing and final consent to treaties is made by the Executive, through the President, involving the Ministry of Foreign Affairs and the parent ministry that may be concerned. Parliament is involved in the process only when the treaty is finally brought before it for domestication in order to give municipal effect to its provisions. Thus, the Executive commits the State on the international plane before domestic legislation can be put in place to enable the treaty to be given effect. We may, therefore, be required to honour our international commitments long before Parliament has domesticated the their international provisions.

(i) *The Pre-Independence Treaties*

By his Note EXT.237/003A of 25th March, 1964, addressed to the Secretary-General of the United Nations, the Prime Minister made a Declaration which was to determine the legal status of treaties entered into between the Government of the United Kingdom and other Governments and applied or extended to Kenya. Kenya declared her willingness to succeed to the pre-independence treaties for 2 years, i.e., from 12th December, 1963, to 12th December 1965. During the two years, the Government had to review the treaties in question and decide whether or not the relationships formerly established with other Governments by the United Kingdom on behalf of Kenya should continue.

With regard to bilateral treaties, this period was, in the words of the Declaration, “intended to facilitate diplomatic negotiations to enable the interested parties to reach satisfactory accord on the possibility of the continuance or modification or termination of the treaties”.

On multilateral treaties, the Government intended within the 2 years from independence, or such later date as may be notified, to indicate to the depositary State or organisations the step the Government wished to take on each multilateral treaty. The notification was to be over either a confirmation of termination or a confirmation of succession or accession. During the interim period of review, any party to a multilateral treaty applied or extended to Kenya prior to independence, might on the basis of reciprocity, rely as against Kenya on the terms of such a treaty.

In the two-year period of review, it was not possible to finalise matters with the interested foreign States. Hence a supplementary declaration was issued extending the period for a further two years to 12th December, 1967. During this second period, Review Notes were addressed for the Government to various governments inviting them to agree to continued application of the treaties in question pending conclusion of new treaties, negotiated directly between the Government and other governments.

Responses to the Kenya Review Notes were received from various governments indicating their willingness to continue the relationship established under the treaties in question. Such treaties remained thus in force beyond December 12th, 1967, pending modification or termination as the case might be. But the treaties on which no responses were received from the governments concerned automatically ceased to be in force in Kenya after 12th December, 1967. The same policy applied to of multilateral treaties continuation of which the Government did not notify the depositary State or organisation. Such multilateral treaties, to which Kenya has not acceded may also be said to have ceased to be applicable to Kenya on 12th December, 1967.

(ii) *Contemporary Practice*

Kenya has, over the years, exhibited a rather haphazard treaty-making practice that needs to be streamlined in the Constitution. The question of how Kenya elected to be party to some treaties and not others needs an answer. This indeed reflects the troublesome issue

of Kenya's attitude and position on the so-called "colonial treaties", such as on the controversial use of the Nile Waters, about which there has been a major debate.

(b) Diplomatic and Consular Relations

Diplomatic and consular relations are key to furthering a State's interests. They are tools for obtaining maximum national advantage peacefully and without causing resentment. The functions of diplomatic missions are clearly spelt out in the 1961 Vienna Convention on Diplomatic Relations as

- (a) Representing the sending State in the receiving State;
- (b) Protecting, in the receiving State, the interests of the sending State and of its nationals, within the limits permitted by international law;
- (c) Negotiating with the Government of the receiving State;
- (d) Ascertaining by all lawful means conditions and developments in the receiving State, and reporting from there to the Government of the sending State; and
- (e) Promoting friendly relations between the sending State and the receiving State and developing their economic, cultural and scientific relations.

States, being legal entities, can only act through individuals as agents or representatives. The chief representative of a State is the Head of State. In addition, there are diplomatic agents, defined in the Vienna Convention as "*the head of a mission or a member of the diplomatic staff of the mission*".

Heads of mission are categorised as follows:

- (a) Ambassadors or *nuncios* accredited to Heads of State and other heads of mission of equivalent rank – ambassadors hold the highest rank among diplomatic representatives; ambassadors were initially exchanged only between the principal monarchies, with envoys or charges d'affaires sufficing to conduct relations within the less powerful States;
- (b) Envoys, ministers and inter-*nuncios* accredited to the Heads of States;
- (c) Charges d'affaires accredited to the Minister for Foreign Affairs - Charges d'affaires may be appointed permanently or on a temporary basis, for instance, where the head of mission is absent or where his appointment is pending.

The power of and responsibility for appointing diplomatic agents varies from one jurisdiction to another.

The power is *exclusive* where it is vested in a sole appointing entity of State, usually the Executive. The Executive would then be responsible for appointing diplomatic agents. In some countries, the power may be vested solely in the President or Head of State as head of the Executive. Countries such as Germany, Spain, Argentina, Iraq, Indonesia, Cameroon and Zambia are in this category.

Section 111(2) of the current Constitution provides that:

"The power to appoint a person to hold or act in the office of Ambassador, High Commissioner or other principal representative of Kenya in another country and to remove from office a person holding or acting in any such office shall vest in the President."

Kenya's position is, therefore, totally exclusive in nature as the President exercises absolute authority in appointments.

(c) *Declaration of War and commitment of Kenya's Forces abroad*

In many countries, the issues of who may declare war and what amounts to war is the subject of great debate. Few constitutions make any reference to these issues.

The current Constitution does not discuss the issue of declaring war or committing Kenya's forces outside the boundaries of the State. This is, however, implied as one of the President's powers and functions under section 23.

9.5.3 Global Relations in other Constitutions

Three specific issues were of concern to the Commission on this matter, namely: treaty-making competence, diplomatic and consular relation, and the authority to declare war or commit the armed forces of the Republic to engagement abroad. These, as have been indicated, are not issues normally dealt with in constitutions. In the United Kingdom, for example, they are reserved by custom to Executive privilege or royal prerogative. The Constitution of the United States of America, however, has very specific provisions on treaty-making competence by the President. Article II (2) provides that the President

has power, by and with advice and consent of the Senate, to make treaties, provided two thirds of the Senators present consent.

Once so made, treaties form part of the Supreme law of the United States. In somewhat different language, Article 55 of the Constitution of France provides that

treaties or international agreements regularly ratified or approved have, from the date of their publication, an authority superior to municipal law.

More recent constitutions, such as those of Uganda, Ghana and South Africa, contain principles incorporating treaties and customary international law into their national legal systems. On appointing diplomatic and consular officers deploying the armed forces, most jurisdictions confer exclusive authority upon the Executive. Only in restricted cases is such authority shared with the Legislature.

9.5.4 What the People Said

The people told the Commission that—

- (i) *in respect of treaty-making, a provision be made*
 - a) specifically addressing of treaty-making, rather than leaving it to be implied in the functions of various organs of State;
 - b) involving bodies other than the Executive in treaty-making;

- c) treaties be implemented only after being vetted and ratified by Parliament;
 - d) once vetted and ratified, treaties and conventions and the regional and bilateral agreements should have automatic effect in domestic law;
 - e) treaties should be subject to public scrutiny before implementation; but a good number of people thought that the Executive should retain a free hand in treaty negotiation; and
 - f) the issue of pre-independence treaties, such as on using waters feeding into the Nile, e.g., Lake Victoria, was raised, largely by the people living around and relying upon the Lake.
- (ii) *in respect of diplomatic and consular affairs -*
- a) the current diplomatic and consular arrangements are inadequate;
 - b) the conduct of foreign affairs should not exclusively be an Executive function;
 - c) Parliament should be involved in vetting and appointing diplomatic agents; others submitted that the Executive should play no role, that this should be a purely legislative role; and
 - d) Parliament should play some role in appointing diplomatic agents.
- (iii) *in respect of a declaration of war, provision be made*
- a) denying the Executive exclusive power to declare war; Parliament should be involved; some suggested that this should be an exclusively Legislative function;
 - b) requiring the involvement of both the Executive and the Legislature and requiring that Parliament's approval be sought by the President before declaring war;
 - c) requiring Parliament's approval be by a two thirds majority vote to declare war; and
 - d) denying the use of the armed forces in foreign countries.

9.5.5 Commentary

There was widespread awareness of the extent to which Kenya's internal affairs are influenced and, to some extent, conditioned by global political and economic developments. Similarly, the people thought that decision-making on international relations ought to be shared by the Executive and the people's representatives in Parliament. The notion that the former should be in a position to saddle the people with obligations without the approval or even scrutiny of the latter was clearly rejected.

9.5.6 Recommendations

The Commission, therefore recommends that:

- (i) *On Globalisation and Regional Integration,*
 - a) in order to maintain consistency in negotiation, follow-up and implementation, the Executive organs or ministries involved in the new ministerial trade committee or

- multilateral trade agreements should be required by the law to be responsible for negotiating designing and implementing trade policies;
- b) the Constitution should provide that, as a member of the United Nations, Kenya shall use her position to challenge inequities in the global social, economic and financial structure, external debt, militarism and lack of transparency in international decision-making processes;
 - c) the Constitution should require Parliament to enact a piece of legislation on international trade and economic integration in order to:
 - facilitate and guide the country's bilateral and multi lateral trade negotiations;
 - ensure that economic policies remain focused on the people's sovereign interests, welfare and needs in accordance with the Constitution's provisions;
 - ensure that trade agreements to which Kenya accede remain consistent with the provisions of the constitution laws as well as strategic interests and vision of the nation;
 - ensure informed and strategic integration of the economy into the global and regional economy; and
 - establish a mechanism to monitor; regulate and, if necessary, control the international financial flows especially if speculative and short-term in nature.
- (ii) *On Treaty-Making,*
- a) the Constitution should provide that Kenya shall adopt the dualist approach to treaty-making that includes a specific role for Parliament as part of its "input" into or supervision of the treaty-making powers of the Executive;
 - b) a timeframe should be specified within which Parliament has to act to transform treaties into domestic law for the people's benefits for their rights to be protected under a specific instrument;
 - c) customary international law should be applicable to Kenya, unless it is inconsistent with the Constitution and laws;
 - d) the Constitution should specify, in addition to mentioning international law generally – as part of the applicable law in Kenya – that international agreements to which Kenya is a party will form part of the system of laws to be interpreted and applied by the courts as such throughout the country;
 - e) treaty negotiation and signing shall be an executive function (through the President or his agent), subject to of the Constitution's provisions;
 - f) Parliamentary approval should be sought before the Executive gives consent to any treaty;
 - g) participants approval should be by a simple majority in Parliament, subject to the Constitution's provisions;
 - h) a distinction should be made between self-executing and non-self-executing treaties, with domestication being required only for the latter;
 - i) non-self-executing treaties to which consent has already been given shall be incorporated into the body of national laws by Parliament within 12 months from the date of consent;
 - j) pre-independence treaties applied to Kenya should remain in force only on condition of reciprocity (as is the case in France);
 - k) Parliament may identify treaties to be consented to by the Executive and approved by Parliament only after a referendum or other means of securing direct citizen approval, as may be prescribed by law;

- l) the Constitution should provide a treaty clause which identifying specific activities, such as those affecting Kenya's international boundary; those requiring a substantial budgetary allocation for implementation; those committing Kenya's armed forces to any external action or, in peacekeeping activities, those concerning Kenya's commitment to a public debt from foreign sources;
 - m) Parliament shall authorize the Executive to commit the Government to a public debt from bilateral or multilateral international sources; and
 - n) Parliament shall define the process of constituting a Kenyan delegation to bilateral or multilateral negotiations and conferences.
- (iii) *On Diplomatic and Consular Relations,*
- a) Kenya shall adopt the shared method of appointment – the President should appoint heads of mission (ambassadors or high commissioners) with Parliament's approval;
 - b) the President should receive foreign envoys or heads of mission accredited to Kenya;
 - c) The Constitution should, *inter alia*, ensure reliance upon professionalism and integrity among the cardinal qualifications for appointment to public office at home or abroad, applicable to diplomats and representatives at either bilateral or multilateral forums;
 - d) the Constitution should cause Parliament to enact a law on Diplomatic and Consular Immunities and Privileges consistent with the provisions of the Constitution, taking into account:
 - the Vienna Convention on Diplomatic and Consular Relations;
 - the United Nations under its convention on privileges and immunities;
 - Specialised United Nations agencies under their respective conventions on privileges and immunities;
 - inter-governmental organisations' agreements;
 - multilateral finance institutions;
 - bilateral agreements;
 - that the law shall also address the question of exemptions to international organisations which operate in Kenya and are not entitled to the range of diplomatic and consular privileges and immunities; and
 - that the law shall state that such privileges, immunities and exemptions are subject to the Constitution and the general welfare of Kenyans and shall respect the sovereignty of the Republic.
- (iv) *On Declaration of War and Commitment of Kenya's Troops Abroad,*
- a) the President should declare a war in consultation with the Defence Council and with Parliament's approval through a simple majority vote;
 - b) any commitment of Kenya's forces outside the international boundaries, any participation in peace-keeping operations should require Parliament's approval through an absolute majority vote;
 - c) Parliament should prescribe the terms and conditions under which Kenya shall commit its troops to participate in peace-keeping, cross-border or international action, including the question of determining the benefits from participation in the peace-keeping operations.

CHAPTER TEN-PARTICIPATORY GOVERNANCE

10.1 The Mandate of the Commission

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

- guaranteeing peace, national unity and integrity of the Republic to safeguard the people's well-being;
- establishing a free and democratic system that enshrines good governance, the rule of law, human rights and gender equity;
- promoting people's participation in governance through democratic, free and fair elections and devolution and exercise of power;
- strengthening national integration and unity;
- examining the various structures and systems of government, including the federal and unitary systems, and recommending an appropriate system for Kenya; and
- examining and recommending improvements to the electoral system;

10.2 Participation and Governance

10.2.1 General Principles

The idea that people – all people – must be involved in all the governance and development processes is extremely important. The notion of people's participation in their own governance and development is this one of the hallmarks of a republican and democratic society. At the heart of nation-building, therefore, lies the ultimate and overriding goal of people-centred governance and development that ensures their wellbeing. Through full and effective participation, people assume both the right and the responsibility to be involved in charting their own national goals, values, policies, laws and programmes that aim to sustain and improve their wellbeing.

Participation is, in essence, empowering the people to actively and effectively involve themselves in creating the structures, systems, policies, laws and programmes that serve the interests of all; as well as effectively implementing and contributing to the development process and sharing equitably in its benefits.

Participation is thus a means and an end. As an instrument of democratic governance and development, participation provides the driving force for collective commitment based development processes and will to make sacrifices and expend social energies on governance and management. Participation entails:

- Control–actually determining what a policy or a decision should be;
- Involvement–being part of the decision-making body;
- Influence– affecting decision-making;
- Consultation–being asked what one thinks about a decision to be made or an action to be taken;
- Information–being informed of what the factors are and what decisions are being made and how they are being implemented; and

- Monitoring—being involved in watching and assessing how decisions are effected and how processes, such as elections, work.

Enhancing participation has thus been a major theme in the Constitution review process, including concerns raised by the people, governmental and non-governmental organisations and the civil society. In part, this has stemmed from a sense that citizens are generally disillusioned with Government structures, specifically with politics. Representative democracy is widely thought to have been fundamentally a failure. Poor people, especially, find that public institutions are corrupt, distant and unaccountable.

Further, it has been realised that democracy has a tendency to exclude as well as include. Women and minorities are often under-represented, for different reasons, as are the poor. The will of ‘the majority’— which actually may mean that of a minority – may be oppressive, as much as the will of a monarch or dictator. Indeed, not all attempts to involve the people are successful. Each method has its enthusiasts, its doubters and its detractors. There are risks inherent in the whole idea of popular participation. For example:

- The chance to participate may be hijacked by the elite if not very carefully planned;
- Problems may arise because those who set up participatory mechanisms may not know how local institutions work; sometimes they may not understand how people respond, who comes to meetings and when;
- There are the risks of deliberate manipulation; for example, village assembly meetings in India have sometimes been held at such times and places that they have been quite ineffective;
- Many participation initiatives have had a particular desire to involve women; however, simply having a certain proportion of women may not have any, or even the desired effect. The issues, which centre on interaction between women and men may be ignored; not all women’s issues are exclusively ‘women’s issues’; women may accept cultural limitations – is it right to deny them?
- The introduction of fully participatory methods at the village level or into societies with rigid social structures may give rise to tensions in the community; and
- Not everyone involved in participatory exercises has the same agenda; local and foreign NGOs, foreign donors, local government, local communities the central government etc., may differ in their aims; there may be instances of some bodies bringing in inappropriate foreign ideas – or inappropriate ideas from elsewhere in the country or from the governmental system; local bodies may end up, perhaps unwittingly, being tools of the central Government.

While participation may not be the panacea to all evils of governance, it is looked upon as providing a way of making government more accountable, of making it more effective and responsive to the public needs – and of making it more just. Accountability and effectiveness should mean less waste of resources and more intelligent prioritisation of government action. More effective and accountable government should mean more

satisfied citizens and ultimately greater social stability – or at least stability that stems from commitment rather than from sullen submission.

There is no gainsaying the fact that people's participation is the foundation of good governance. This implies a universal sense of the politics of consent, consensus, representation, conviction, commitment, compassion and accountability. Consensus politics involves people in the process by which policies, laws, plans and programmes are developed and practised. It entails listening to what people have to say and adapting the approach of leadership and government in the light of these. By so doing, the Government is most likely to win the trust, confidence and consent of the majority, if not of all the people, to the course of action being pursued for the common good.

Good governance encompasses efficient and effective people-based management of the political system, societal relations and resources, for maximum and equitable societal benefits. Good governance is the major mechanism for transforming society to a people-centred development and decision-making. Its role is to create an enabling environment for inclusive development to protect the socially disadvantaged and vulnerable.

The need to develop appropriate governance systems and structures is, therefore, critical, particularly if we are to understand and appreciate the conditions under which national goals are to be realised. Creation of enabling systems and structures not only ensures proper and efficient use of resources, but also to deliver quality and responsive services by creating the necessary boundaries of operations and functions of the various structures, organs and levels of the State.

10.2.2 Participatory Governance in the current Constitution

Apart from the generalised nature of freedom of assembly and association, as found in the current Constitution, there is no specific provision on participatory governance. On the whole the Constitution does not provide for direct popular participation in public affairs.

In common with other constitutions of its generation, the Constitution assumes that people's participation is achieved through the electoral process. The only provisions that address participatory democratic process are, therefore, those on:

- constituency boundaries;
- the functions of the Electoral Commission (especially voter education);
- the role of the nominated members of Parliament as representing 'special interests';
- the requirement of a national spread of support in presidential elections; and
- provisions on the rights of expression, assembly and association are also relevant.

But there are no constitutional provisions on local government and no provision for any other institution that provides for accountability to or participation by the citizenry.

10.2.3 Participatory Governance in other Constitutions

In recent years, concern about participatory governance has gained prominence in the constitutions of many jurisdictions, including South Africa, Uganda, Portugal, Madagascar, Finland and Ethiopia. Even the United Kingdom that espouses no single written constitutional text has proposed recently that public bodies be under a general duty to consult with the public on important matters affecting them. Article 57 (1) of the Constitution of South Africa provides that the National Assembly may make rules and orders concerning its business:

with due regard to representation and participatory democracy, accountability, transparency and public involvement.

Constitution of Ghana provides, more specifically, in Article 35 (6) that the state shall take appropriate measures to

- (d) make democracy a reality by... affording all possible opportunities to the people to participate in decision-making at every level of national life and in government.

At Article 37 (2), that Constitution provides further that the state shall enact laws to ensure

the enjoyment of rights of effective participation in development processes, including... rights of access to agencies and officials of the state necessary in order to realise effective participation in development processes.

Similar provisions exist in the constitutions of Uganda, Portugal, Madagascar, Finland, Ethiopia, Brazil and Mozambique, among others.

10.2.4 What the People Said:

The views from the people may be summarised as follows:

- (i) *On Women, that*
 - (a) women are poorly represented in governance and other areas of decision-making;
 - (b) women are rated 2nd class citizens since they cannot be cleared to travel abroad without their husband's consent;
 - (c) women are weak physically and should thus be given special treatment;
 - (d) some cultural beliefs and customs discriminate against women;
 - (e) married women are restricted to family matters, hence little participation in governance;
 - (f) women should be involved in governance through a quota system;
 - (g) $\frac{1}{3}$ of all public servants in all areas should be women;
 - (h) the Government should fund women's groups to teach them their rights and obligations in governance;
 - (i) women should be accorded 50/50 participation in all areas of governance;

- (j) a department should be established to deal with women's affairs;
 - (k) unmarried women should not represent married women; and
 - (l) women should be given incentives for economic and political participation.
- (ii) *On People with Disabilities, that*
- (a) people with disabilities are looked down upon by able persons;
 - (b) people with disabilities are discriminated against in employment, schools and other institutions;
 - (c) people with disabilities are not catered for in recreation facilities, transport, communication facilities and general infrastructure;
 - (d) people with disabilities are poorly represented in all organs of the State, and the private sector;
 - (e) people with disabilities are financially weak since they have a low output;
 - (f) people with disabilities should be encouraged and motivated to participate fully politically, socially and economically;
 - (g) people with disabilities should be consulted and included in the decision-making process;
 - (h) a welfare fund should be established for the people with disability;
 - (i) people with disability should be helped to form representative groups; and
 - (j) Parliament should reserve seats for people with disability.
- (iii) *On the Youth that*
- (a) youth are given a raw deal in governance, yet they are the majority;
 - (b) youth do not have funds like others to push for their concerns, e.g., campaigns;
 - (c) youth can be moulded into good citizens and leaders;
 - (d) youth are represented by old people who do not understand their problems;
 - (e) seats should be reserved for the youth in Parliament;
 - (e) a quota system should be used to appoint public servants and the youth should be entitled to their quota;
 - (g) young people who present themselves for elections should be funded in addition to being given incentives to contest;
 - (h) the skills and talents of the youth should be tapped by incorporating them in governance; and
 - (i) the youth should manage and control their own affairs by establishing a youth department in governance.
- (iv) *On Minority Groups, that*
- (a) minority groups have been neglected in education, health and general infrastructure in their regions;
 - (b) the minority are not represented in governance, hence their issues are not addressed;
 - (c) minority groups are oppressed and discriminated against;
 - (d) minority groups, such as the Ndorobo and the Ogiek, who live in forests, should not be interfered with;

- (e) minority groups should be represented in Parliament and government;
- (f) the Constitution should protect the minority; and
- (g) the minority should be given special treatment in education, health and finance.

(v) *On The Older persons, that:*

- (a) the older persons are not represented in governance;
- (b) the older persons suffer a lot because they do not have a source of income;
- (c) illiteracy among the older persons is alarming;
- (d) people no longer have respect for the older persons;
- (e) the older persons should be represented in both Parliament and governance;
- (f) a welfare fund and a universal social security system should be set up to cater for the needs of the older persons; and
- (g) the Constitution should protect the older persons.

(vi) *On other groups that:*

- (a) professionals, religions, the business community, refugees, farmers, pastoralists and other specialised groups should be incorporated in governance; and
- (b) special seats should be reserved for these groups.

10.2.5 Commentary:

In their presentation to the Commission, the people demanded full involvement in the running of public affairs and in making decisions on issues which affect them, such as spending public money, managing natural resources, dispute-resolution, making laws, including amending the Constitution, policy-formulation and planning of development programmes. They want a government closer to the people. They want women, the youth, people with disability and minority and vulnerable groups to be involved.

10.2.6 Recommendations:

The Commission recommends therefore that:

- (i) the Constitution should affirm the importance of the people and their institutions in promoting democracy and republican principles, values and practice. The state should promote and encourage direct and indirect public participation in decision-making and in managing of public affairs at all levels of government.
- (ii) the Constitution should give the people the right to participate in solving State matters, both directly and indirectly, and through freely elected representatives. Every citizen of voting age has the right to participate in political or electoral activities to influence Government composition and policies.
- (iii) the State should at all times promote participation by the people in formulating, monitoring and evaluating national and local development policies and programmes and support initiatives by the people in their development endeavors.

- (iv) public authorities should promote individual and communities opportunities to participate in social activities to influence decisions affecting them.
- (v) the State shall establish appropriate mechanisms to ensure Government accountability at all levels and afford people the opportunity to participate effectively in.
- (vi) direct participation by citizens in managing their affairs should be safeguarded by referenda, opinion polls and by other means specified in law.
- (vii) the Constitution should require public institutions to consult the people. Reports by all public institutions should state whether the obligation to consult with the people has been complied with.
- (viii) people should exercise popular and informed participation in the administration of justice through public and customary tribunals and through the jury and assessor systems. The State should take necessary steps to enhance the rights of citizens to go to court, to present friends-of-the-court arguments (*amicus curiae*), to approach public institutions for redress etc.
- (ix) all citizens should have the right individually or jointly, to submit, petitions, representations, claims and complaints to the organs of supreme authority or any other, to defend their rights, the Constitution, the laws, or the general interests of society and to be informed of the result as provided by law.
- (x) the state should promote and protect the interests and equal rights of women, the youth, people with disability, older persons, orphans, widows, destitutes, children and minorities to ensure their full and equal participation in all political, economic and social endeavours; including access to all services and opportunities.
- (xi) the devolution or any form of decentralisation required by the Constitution should have positive effects for participation at all levels of governance.
- (xii) the Constitution should require Parliament to enact a law guaranteeing the role of traditional leadership, customary law and community customs; establishing councils of traditional leaders and any such provisions that may be deemed appropriate.
- (xiii) the Constitution should require the Legislature to establish mechanisms to enable:
 - a) and empower citizens to discuss draft laws/Bills to initiate amendments and formulation of Bills; to petition Parliament for legislation; to ask to appear before parliamentary committees discussing or investigating particular issues of national or public significance; legislative proposals to access either individually or through civil society groups;
 - b) Parliamentary Committees should hold public hearings and consult with and seek technical assistance from policy think-tanks, including research institutions; and
- (xiv) the Constitution should create a mechanism to enable people to monitor the performance of elected representatives and to recall them if their performance is not up to standard.

10.3 The Electoral System and Process

10.3.1 General Principles

The cornerstone of participatory governance is to hold free, fair and periodic elections. Elections serve not only to choose people's representatives, but also to elect or determine government election or appointment. They demonstrate the people's sovereignty and accountability by politicians. They lend legitimacy to governments. For this to occur, a number of prerequisites must be in place, including agreement on the system of elections to be used, equitable delimitation of electoral boundaries and transparent management of the electoral process.

(a) *The Electoral System*

An electoral system here means the method used to determine how votes are cast and translated into seats won by parties and/or candidates. The electoral system thus consists of mediation between votes and representation as established by the electoral law. On the other hand, the electoral process refers to the management and administration of the whole electoral system.

Critical to electoral system stability are the following:

- The electoral system must be well understood by voters if it is to facilitate their effective and meaningful participation in the electoral process. Complicated electoral system may disenfranchise many potential voters, especially the illiterate.
- The choice of an electoral system should take into consideration the cost of running the system. The cost may be too high and out of a country's reach and may plunge the entire electoral system into chaos.
- The system must also take into consideration the uniqueness of the country's political system and history, social and demographic structure, ethnic diversity, education, cultural, religious diversity, the civil society structure, the economy, and so on, in its basic design and operation.

In designing an electoral system, such factors as the country's political history, social forces at play, such as ethnic and religious diversity, the vigour of social movements, such as labour, NGOs, etc., the level of political and/or civic awareness, the literacy levels, geographical accessibility, religious composition, and level of economic and technological development are critical.

Electoral systems vary. The most common ones include:-

- (a) The Majoritarian system, also known as First-Past-the-Post (FPTP) or Winner-Take-All System (WTA), is what is currently in use in Kenya. The candidate who obtains the highest number of votes cast in an election, compared with his/her competitor, wins the seat and thus becomes the representative of the constituency. The winner needs to get only most of the votes and not necessarily an absolute majority. It is called FPTP simply because only one candidate can be declared the

winner. The system has many variants, depending on the formula used to determine the winner.

- (b) The proportional representation (PR) system, parliamentary seats are located proportionately to the votes cast for each party that wins seats in the Legislature. The idea at both the constituency and parliamentary any levels is to ensure that the results reflect more closely the voters' wishes. The basic principle underpinning the system is that a party should receive seats in proportion to its share of the total vote. Typically, at the constituency level, there would be several Members of Parliament from each (large) constituency. Thus, if a party wins 10% of the votes in a Parliament of 100 seats, the party will be awarded 10 seats. Or where there are 5 members in a constituency, if a party wins 40% of the votes, it gets 40% of the seats, to be allocated to the top 2 candidates on its constituency list. At the national level, therefore, the make-up of Parliament would reflect the national support for the various parties. If another party wins 1% of the votes, the party will be awarded only one seat. The most commonly used variant of PR is the Party List Proportional Representation, in which people vote for a party rather than a candidate and the parties receive parliamentary seats in proportion to their overall share of the national vote. Thus each party wishing to participate in the elections draws up its list of candidates up to the number of seats to be filled. The names on the list are arranged in order of preference. If the party wins only five seats, the first five party candidates on the list become the party's representatives in parliament. In this system the party machinery draws up the list from among members. The party must, therefore, develop acceptable criteria for choosing candidates and the order in which they will appear on the party list.

An ideal electoral system should ensure or promote representation of the people and all major interests in a political system. The system operating in the framework of a republic should, therefore, be as inclusive as possible by making it possible for as many of the divergent interests and concerns as possible to be represented. Identifying these interests is critical to ensure no one interest group dominates the rest, as this would be unrepresentative and undemocratic.

In liberal democratic systems, such as Kenya's, political parties provide the channel by which different shades of citizenry and interest groups are organised and compete for representation in the legislative body. In this sense, an electoral system can determine what kind of political parties are formed. In situations where parties may not provide an adequate channel for interest aggregation such as on the basis of religion, labour, gender, etc., the electoral system should facilitate their representation in a proportional manner. In this case, the manner of electing the representatives would be indirect, e.g., by nomination.

In general, therefore, the principal functions of the electoral system include:

- Promoting and ensuring effective representation in the Legislature and other organs of governance and decision-making;
- Registration of the people's views;
- Choice and formation of government;

- Provision of the mechanism for holding people's representatives and the government accountable;
- Providing people with choices about public policies, plans and programmes; and
- Promotion and facilitation of a competitive political and party system.

Kenya's electoral system does not; however, seem to fulfil most of these functions. Doubts have also been expressed whether the electoral framework, or the way it is operated, is a truly for a neutral framework where all parties and candidates have equal opportunities to be elected. The main problems of the current system are:

- Lack of proportionality—the President as well as the ruling party may well have obtained a minority of votes in the election; there is particular resentment that a person can be elected president when a majority of Kenyans did not vote for him or her;
- Support for parties is concentrated in specific geographical areas; the candidate of the party in such an area is sure to win; the country is thus divided between parties in a kind of electoral “zoning”; there arises the notion that different parts of the country are preserves of particular parties and competing parties face obstacles, including intimidation, in campaigning there;
- This notion of ‘safe areas’ or ‘safe seats’ means that parties make no serious efforts to win support in areas deemed to be strongholds of other parties; the people there have no genuine choice between candidates;
- The First Past – the Post – system is adversarial and candidates or their parties have no incentive to co-operate;
- Fundamentally, voting has become ethnic, although this is not the only factor; and this is reflected in the nature of party membership as for example, in 1997, in constituency elections, people voted predominantly for a local candidate, based on his ethnic affiliation, but, in the presidential elections, gave few votes to the leader of that candidate's party if he or she belonged to a different ethnic group. Rivalries between individuals have turned into competition among ethnic groups, yet it is essential for national unity and integration to move away from ethnic voting;
- The dominance of ethnicity means that social or economic issues seldom feature in electoral campaigns; so voters are offered little choice about these matters, although they are more vital to their lives than ethnicity;
- Kenya has a large number of parties—deemed to be undesirable for electoral and democratic politics—although many are inactive, and there are recent trends towards merger/co-operation/alliances; these, however, may have more to do with presidential elections than with constituency support;
- Bribery and patronage are prevalent; support for candidates and parties depends more on their ability to offer individual benefits than on their promised or proven ability to benefit the country;
- There is very considerable gerrymandering—manipulating constituency boundaries with marked differences in the number of voters among the constituencies in violation of the general principle of equal suffrage -one person, one vote, one value;
- The system disadvantages the smaller and newer parties that may represent interests not catered for by the bigger parties;

- There are complaints about inadequacies in the registration of voters, which leave many eligible citizens without a vote;
- Occasionally obstacles are placed in the path of persons seeking to present their nomination papers as candidates;
- There are complaints about rigging;
- Elections become occasions for violence and ethnic cleansing, intimidation by provincial administration and other officials or private armies, manipulation of electoral boundaries and other aspects of the electoral system, corruption and bribery;
- The electoral system tends to encourage both inter – and intra–party conflicts as each party and candidate tries to do all within his or her power and means, including violence and such other illegal means as bribery, to win election;
- Parties disregard policy choices in pursuit of ethnic and sectarian support, thereby promoting ethnic conflict during electioneering and;
- the current electoral system gives equal weight to votes not taking into account the value of various categories of voters, including parties.

Thus, far from strengthening democracy, elections have put democratic practices under great strain; and far from emphasising national unity and integration, they tend to fragment the people along ethnic and other sectarian cleavages.

(b) *Electoral Process*

The electoral process consists of all activities designed to ensure that the electoral system functions in a manner which truly reflects the people's will. The components of the process include:-

- The right to vote and stand as candidates;
- Compilation of a register of voters;
- Nomination of candidates;
- Timing of elections;
- Accessibility of voting arrangements;
- The electoral rules set to ensure free and fair elections;
- Election campaigns and control of expenses;
- System of voting and counting of votes;
- Supervision of the conduct of political parties and disqualification or penalties for candidates or political parties;
- Smooth and dignified succession to office,
- System of settling electoral disputes; and
- Election observation.

(c) *Delimitation of Electoral Boundaries*

The delimitation of constituency and other electoral boundaries remains central to fair and free elections so long as elections are based on single member constituencies. The first parliamentary constituencies totalling 117 were established in 1963 as a result of the Report of the Constituencies Delimitation Commission. These were formalised into law by the Lower House Constituencies Regulations of 1963 and followed by amendments in the (Elections) (Amendments of Laws) Regulations of 1963.

When the Independence Constitution was transformed, between 1965 and 1966, the existing parties agreed to create new parliamentary constituencies for the Members of the Senate, which was to be abolished. These constituencies were created through the Constitution of Kenya (Amendment) (No. 4), 1966, *vide* section 6, and the Third Schedule, which the Electoral Commission adopted in the legal Notice No. 344 of 19.12.66.

By 1996, there were 188 constituencies and Parliament directed the Electoral Commission to create an additional 22 constituencies, increasing the number to the present 210. The constituency voting population varies greatly, from less than 4,000 in Mandera West and 7,631 in Wajir North to 113,848 in Embakasi (1997, figures). Many people believe that urban constituency numbers, need to be increased – Nairobi, with 10% of the national population, has 3.8% of the seats. We, therefore, consider that clearer guidelines should be provided to the Electoral Commission.

(d) *The Management of Elections*

The Electoral Commission (ECK) is Kenya's election managing body. It is responsible for election conduct (s. 42A, s. 17A of the National Assembly and Presidential Elections Act, (Cap 7)). The Constitution says the Commission shall consist of not less than four, or more than 22, members, appointed by the President; the current membership is 22. In order to ensure its independence, members cannot be MPs, civil servants or military officers. Their independence is also secured through a special procedure for their dismissal. The Constitution says: "in the exercise of its functions under this Constitution the Commission shall not be subject to the direction of any other person or authority" (section 42(9)).

The functions of the Electoral Commission are to:

- Determine the number of constituencies (within the limits prescribed by Parliament);
- Determine the constituency boundaries;
- Register voters and maintain and revise the register of voters;
- Direct and supervise the presidential, National Assembly and local authority elections;
- Ensure free and fair elections; and
- Promote voter education throughout Kenya.

Unfortunately, the Electoral Commission does not enjoy the reputation among political parties or civil society organisations of independence or impartiality. One important reason that it is appointed by the President, without any requirement that he follow – or even seek – the advice of any other person or body. In such a situation the provision that the Commission is not to be subject to direction from any other person or authority is not sufficient to remove suspicions about its independence.

While the ECK seems to have the necessary authority and power to ensure free and fair elections. S.42(A)(c) of the Constitution, s.s. 3(3), 17, 17(A), and 34(A)(5) of the National Assembly and Presidential Elections Act, it claims that it is powerless for the following reasons:

- No independent Police Force has been set up under the command of the ECK;

- Its prosecutions are liable to be taken over or stopped by the Attorney General under s. 26 of Constitution; and
- Its powers under paragraphs 8 and 9 of the Election Code are liable to a review or depend on court orders – the element of timely intervention, therefore, ruled out.

The ECK claims may not be entirely justified (it could, for example, set up a mechanism to monitor election campaigns the speeches of candidates and supporters and their acts for infringements of the Code).

But there is a case for giving it greater authority to enforce the Code and other provisions designed for free and fair elections. The responsibility to enforce the Code of Conduct has to be the ECK's. It has asked for powers to deal with infractions of the law which do not necessarily amount to electoral offences, so that it can resolve disputes of a technical or mathematical nature but whose resolution or determination would enhance the conduct of elections in terms of transparency and expedition (quoting the Uganda Constitution (s. 65(f)), which gives the ECK the power '*to hear and determine election complaints arising before and during polling*'). No appeal from these determinations should be allowed, except as petitions after the elections.

The Electoral Commission may need to take over from the Registrar of Societies the registration and deregistration of political parties the law allows the Registrar to register any political party even if it has no following beyond its subscribers (discussed in the section on political parties).

10.3.2 Electoral System and Process in the current Constitution

The right to vote is dealt with in the chapter on Parliament (s. 32(2)) in the current Constitution. The right is given only to a person who 'is registered in a constituency as a voter in elections of elected members'(s. 32(2)). To be entitled to registration, a person must be a citizen of at least 18 years of age (s. 43(a)). He or she should also have been ordinarily resident in Kenya for at least one year immediately preceding the registration or for four years in the preceding eight years (s. 43(b)) and must have been a resident in, or have other prescribed connection with, the constituency in which registration is sought (s. 43 (c)).

The Constitution provides that "at intervals of not less than 8 years and not more than 10 years, and whenever directed by an Act of Parliament, the Electoral Commission shall review the number, the boundaries and the names of the constituencies and may, by order, alter the number, the boundaries or the names, subject to and in accordance with this section, to the extent that it considers desirable in the light of the review".

Detailed provisions for election conduct are made in the National Assembly and Presidential Elections Act (Cap 7).

10.3.3 Electoral Systems and Process in other Constitutions

Although detailed provisions on country's electoral process, including the procedure for delimiting boundaries and managing elections are usually found in ordinary legislation, an increasing number of constitutions now provide for these matters in articles dealing

either with representation generally or, more often, election of representatives to legislative organs. For example, Chapter Five of the Constitution of Uganda provides, *inter alia*, for the right to vote, the establishment of an independent Electoral Commission, delimitation of constituency boundaries and system of voting. On the electoral system, Article 66(1) of the Constitution of Tanzania provides, for example, that

There shall be the following categories of Members of Parliament:

- (a) members elected to represent constituencies;
- (b) women members being not less than fifteen *per cent* of the members mentioned in paragraphs (a), (c) and (d) elected by the political parties represented in the National Assembly, ... on the basis of proportional representation among those parties;
- (c) five members elected by the House of Representatives (i.e., the Zanzibar Parliament) from among its members;
- (d) the Attorney-General, the President and the Vice-President shall not be a Member of Parliament.

Chapter Six of the Constitution of the Fiji Islands in makes detailed provisions, *inter alia*, for distributing electoral seats among different electoral rolls, delimiting of electoral boundaries by a Constituency Boundaries Commission, voting and other matters, nominating candidates for elections, and composition of the House of Representatives and the Senate. Similar provisions have been included in the constitutions of Nigeria, Ghana and South Africa, among others. These provisions also empower the Legislature to enact specific legislation on these matters.

10.3.4 What the People Said

The Commission received a lot of views on the electoral system and process from the public. The majority were of the view -

- (i) *On representation that:*
 - (a) the current majoritarian system, based on simple majority rule, be retained;
 - (b) there was a need to increase representation of such marginalised groups as women, the disabled, ethnic minorities, the youth and other vulnerable groups in Parliament and the local authorities;
 - (c) seats should be reserved for some of these special groups in percentages ranging from 33 to 40, particularly for women in Parliament and local authorities;
 - (d) the electoral system should be computerised;
 - (e) the disabled are discriminated against through the current system at both the parliamentary and local government levels and would, therefore, wish to be given special attention and representation opportunities;

- (f) youth should be adequately represented at all levels of decision-making, including parliamentary and local governments;
- (g) the category of nominated members of Parliament be abolished; and
- (h) elections be held regularly on a fixed date.

(ii) *On voting, that:*

- (a) the current voting system that links the right to vote to a national identity card and a voter registration card be abolished;
- (b) that the voter's and identity cards be issued simultaneously but continuously rather than periodically or that one side of the national identity card should be a voter's card;
- (c) women who get married before getting ID's or those who marry after getting IDs but find it difficult to change their names are most disadvantaged, as are divorced women who cannot easily revert to their maiden names;
- (d) the youth who have just attained majority age are also excluded by their inability to get IDs;
- (e) The infamous screening card among the Somali community is a major impediment to meeting their voting rights and duties;
- (f) Voting rights and residence be delinked since, on most occasions, the voting right and the residency required. Many complained that the voting date finds them in places other than where they are registered as voters; this was the case among nomadic communities; and
- (g) transparent ballot boxes should be used.

(iii) *On eligibility for elections, that:*

- (a) independent candidates should be allowed to contest elections;
- (b) only people with proven leadership qualities should contest elections; quality being indicated by age, intellectual, moral and ethical standing and gender;
- (c) There should be a lower-age and upper-age limit for various positions;
- (d) For the president the lower-age limit should be raised from 35 years to between 40 and 45 years and the upper-age limit should be between 70 and 75 years;
- (e) minimum academic qualifications for various positions be set;
- (f) for the president, minimum academic qualifications should be a university degree;
- (g) for MPs, at least a secondary school certificate or a university degree certificate should suffice;
- (h) for councillors academic qualifications might vary between at least Standard 8, a primary school certificate or its equivalent or a minimum of a secondary certificate;
- (i) women should be exempted from these academic qualifications on the grounds that, for many areas, women have been marginalised in education and may not meet these basic qualifications;
- (k) leaders should be morally and ethically upright; here, proposals on declaration of wealth and its sources and a proof of stable family were made;
- (l) Candidates seeking elective positions should not be required to resign their civil service positions; instead, they should be allowed to take leave and resign only when they win the seat;

- (m) the language test once the qualifications above have been met should be abolished; and
- (n) there should be a leadership code.

(iv) On Election Results, that:

- (a) The president should win an election by more than 50% of the votes cast;
- (b) the 25% rule in five provinces be retained in addition;
- (c) Alternatively, a simple majority with at least 25% votes in at least 4 provinces should suffice;
- (d) there should be a run-off in case none of the candidates wins more than 50% of the total vote in presidential elections;
- (e) A presidential candidate should not run for a parliamentary seat but, on failing to win the presidency, should be allowed to become a member of Parliament if he has secured a certain percentage of the vote;
- (b) alternatively, a presidential candidate should run for both the presidential and parliamentary seats and the one who wins the presidency should cease to be an MP and a by-election should be called to fill in the vacancy; and
- (g) the president should always be elected directly by the people.

(v) On the Conduct of Elected Representatives, that:

- (a) Non-performing representatives should be subject to
 - recall as a manifestation of the people's sovereignty;
 - increase people's participation in the political process and reduce voter alienation;
 - promote a more vigilant electorate and provide incentives for it to monitor the MP's performance; and
 - emphasise the MP's accountability to the electorate and encourage him or her to perform well.
- (b) The recall process should be protected from abuse since this would
 - destroy representative government by restraining energetic MPs;
 - discourage qualified persons from seeking public office;
 - allow the losing political party a second opportunity to win office; and
 - encourage frivolous harassment of MPs; and permit removal of officers for inadequate reasons.

10.3.5 Commentary

The views expressed here have far reaching implications for designing a new system of elections and managing the process. It is clear, for example, that many people wanted to see a more predictable, transparent and efficient system. They also wanted to see more educated and morally upright leaders elected to serve them. A large number of those who appeared before the Commission expressed great dissatisfaction with the conduct of their representatives, accusing many of disappearing, once elected to Nairobi only to return five years later. Many hoped a new system would be in place for the next General Election. But most felt so tired of the current group of leaders that they wanted new elections at any cost.

10.3.6 Recommendations

The Commission recommends, therefore,

- (i) *On the structure of representation, that*
 - (a) Parliament should be composed of two elective chambers at the national level; namely, the National Council and the National Assembly;
 - (b) there should also be provincial and district councils for purposes of power devolution;
 - (c) the National Assembly should:
 - adopt the Mixed Member Proportional system for electing representatives to the National Assembly;
 - retain the current 210 constituencies to which representatives can be elected directly by the people through the single – constituency system using majoritarian system;
 - introduce additional 90 seats for proportional representation;
 - for the proportional representation seats political parties be required by law to nominate men and women candidates on a 50-50 basis; within each gender category, people with disability, the youth, ethnic minorities and other interest groups as are determined by the electoral law will be represented;
 - require political parties to place one third of the candidates to be women on the single constituency party list and 50% on the proportional representation list for the National Assembly;
 - use the zip system in preparing proportional representation party list;
 - political parties to nominate at least one third of their candidates from among women for single constituency seats for the National Assembly; and
 - abolish the current system of nominations.
 - (d) the National Council:
 - should consist of 100 representatives;
 - 70 representatives should be drawn from each of the 69 existing districts and Nairobi;
 - the 70 should be elected from the districts through a method to be determined by the electoral law;
 - 30 women representatives four elected from each of the seven provinces and two from Nairobi; and
 - the women representatives, elected through a method determined by electoral law.
 - (e) the Provincial Council:
 - should consist of two representatives from each district and other stakeholders and interest groups elected in a manner determined by at least one third of the provincial representatives who shall be women;
 - professional groups as may be determined by the District Electoral Commission;
 - Chairperson, treasurer and other officials of the Provincial Council be elected from among the voting members to form the Provincial Executive Committee;

- the Provincial Chief Administrator (Provincial Secretary) elected directly by the people;
 - persons wishing to be elected to the council nominated by political parties or to run as independent candidates; and
 - the Provincial Council is the decision-making and policy-making, and legislative organ of the province.
- (f) the District Council:
- the electoral unit shall, as now, be the ward;
 - at least one third of the representatives elected from all districts wards shall be women;
 - political parties shall be required to nominate at least a third of their candidates from among women for direct election to the council;
 - the chairperson, treasurer and other officials of the district Council shall be elected from among the elected members by the voting members of District Council to form the District Executive Committee;
 - the District Chief Administrator (District Secretary) shall be elected directly by the people;
 - the District Council is the decision-making, policy-making and legislative organ of the district
- (g) the Location Council of Elders:
- the Location Council shall consist of two elders elected from each village through a method to be determined by elected law;
 - the administrator of the Location Council shall be elected directly by the people;
 - at least one third of members of the Location Council shall be women; and
 - the Village is based on the existing cultural or neighbourhood groupings.
- (ii) *On the Electoral Process, that*
- (a) Parliament shall stand dissolved automatically 5 years from the date of the last General Election;
 - (b) a General Election should be held 45 days before the dissolution of the National Assembly;
 - (c) except for the next one, the General Election should be held on the first Tuesday of the second full week of August after every five years;
 - (d) when the office of the President is vacant due to resignation, death, incapacity, or impeachment, an election should be held within 30 days. The Speaker of the National Assembly should be the acting President in the meantime;
 - (e) in other circumstances, the election should be held 45 days before the termination of office of the incumbent president;
 - (f) the principal message of the Code of Conduct needs to be reflected in the Constitution;
 - (g) severe penalties for a breach of the Code should be provided for;
 - (h) no use of Government facilities by candidates to campaign;
 - (i) fair time on State media for all parties;
 - (j) all State media should be required to ensure a balance between political parties; all parties should be required by law to broadcast and debate their policy messages through the State media;
 - (k) restriction on the expenditure of money and resources on elections;

- (l) counting of votes should be carried out at the polling stations; for future purposes, the constitution or relevant statute need to set up a voting machine to enable vote – counting to take place at some central computer centre;
- (m) a general statement by the Electoral Commission must ensure that polling booths are accessible to all and that all reasonable steps are taken to ensure that all voters can vote in secret;
- (n) the Constitution should recognise the value of election observation and monitoring and oblige the EC to facilitate it;
- (o) the Constitution should refer to a necessity to take account of international standards and experience of effective observation and/or monitoring;
- (p) the Constitution should recognise and facilitate the right of the civil society to participate in election observation and monitoring, even offer financial subsidies;
- (q) there should be a statement in the general introductory article on principles of elections that votes are not to be bought;
- (r) the principle of limitation of election expenditure should be in the Constitution;
- (s) the Constitution should state that every citizen has a fundamental right to vote; the right should be included in the Bill of Rights;
- (t) voting must be seen as both a right and a fundamental duty of every citizen and must not be abused but exercised responsibly for the common good;
- (u) the State has a duty to enable every citizen to exercise his/her democratic right and duty to vote and to remove all impediments to voting;
- (v) the Constitution should entrench the principle that elections shall be by secret ballot;
- (w) proof of citizenship and age required for registration as a voter should be based on any credible evidence, not only the ID or passport;
- (x) the Constitution should provide that registration of voters shall be a continuous process, not confined to particular periods;
- (y) remand inmates and those in hospitals, schools and other institutions should be allowed to vote by making the voting stations as accessible and convenient as possible;
- (z) polling stations for people with disability should be made as accessible and convenient as possible;
- (aa) in nomadic pastoralist areas, the Electoral Commission may establish mobile polling stations;
- (bb) bankrupts should be allowed to vote;
- (cc) disciplined forces should be allowed to exercise their voting rights;
- (dd) conviction of an election offence or a guilty ruling in an election petition case should debar one from only one General Election, except in serious cases of violence, bribery, vote rigging, incitement to violence and hate;
- (ee) the residence requirements should be retained but be subject to periodic reviews by the Electoral Commission, as election technology changes;
- (ff) voters should be allowed to vote for the president anywhere in the republic;
- (gg) the Constitution should state that the electoral law may impose reasonable residence requirements, taking into account the devolved structures;
- (hh) the President's power to annul disqualification imposed for an electoral offence from registering as a voter or standing as a candidate should be repealed;
- (ii) the Constitution should guarantee citizens living, studying, visiting or working outside the country who satisfy the general rules, the right to vote in elections;

- (jj) the election day should be declared a public holiday; but if the election continues the following day (s), the subsequent days shall not be public holidays;
- (kk) the Constitution and laws shall ensure free and fair elections, which are fundamental to democracy;
- (ll) the franchise shall be equal and secret;
- (mm) the electoral system shall aim at proportionality and inclusiveness;
- (nn) all candidates and parties shall be free to campaign without hindrance; and
- (oo) all candidates and parties shall avoid violence.

(iv) *On Candidature, that*

- (a) the nomination papers at all levels of the electoral system should require candidates to state the precise level of their educational and professional qualifications.
- (b) They should also be required to provide information on:
 - all their past convictions and sentences, and whether any charges are pending;
 - their assets, including transfers carried over a period of three years preceding the date of nomination;
 - liabilities, if any, particularly those due to public authorities, as has been decreed in India by the Supreme Court; this information must be readily available to the electors; and
 - a medical Certificate;
- (c) participation in governance at different levels requires basic qualifications; this is necessary to ensure quality and effective governance that can properly serve the welfare of the people;
- (d) independent candidates for the presidency, the National Assembly and all councils should be permitted, i.e., it should not be necessary for nominations to be made by parties only;
- (e) presidential candidates should be at least 35 years and at most 70 years at the time of seeking office;
- (f) a candidate for an elective position can be disqualified for a number of reasons, which may include being
 - under a death sentence or a sentence of more than six months;
 - of unsound mind;
 - an undischarged bankrupt;
 - the holder of an interest in a contract with the Government, such as may be prescribed by Parliament; and
 - the holder of a public office, including in the Judiciary, a local authority or be armed forces
- (g) Parliament may also provide that a person who has held an office, which is a ground for disqualification, may be disqualified for a period not exceeding six months after he/she has ceased to hold such office;
- (h) persons seeking an elective civic and parliamentary position must have the minimum of a secondary school certificate or equivalent;
- (i) a presidential candidate should have the minimum of a university degree;
- (j) under lawful and reasonable limitations, representation at the national and lower levels of governance must be open to merit of every description, whether young or old, and without regard to poverty or wealth or any particular religious faith, ethnicity, sex or race;

- (k) a person who has been convicted for corruption or dishonesty or any other offence under the Constitution and laws for a period of over of three years should be excluded from standing for elections for a period equivalent to one term after his or her release from prison;
- (l) any breach of a Leadership Code should also disqualify a person for 10 years.
- (m) except for those individuals debarred by the Constitution, civil servants should be allowed to take leave of absence to seek elective offices unless and until they are elected;
- (n) a retired President shall not stand for any elective position.
- (o) the Constitution should define the following:
 - those totally debarred (possibly some of these should be debarred even for some time after leaving office);
 - those debarred from standing for geographical constituencies but could be on a party list for 'topping up' seats based on the MMP electoral system;
 - Those who can stand for any type of seat they would have to resign if elected; and
 - those who may stand but would have to take leave without pay if elected.
- (v) *On term of office of the President, that*
 - (a) the President's term of office should be no more than five years;
 - (b) no person should hold the office of the President for more than two terms of not more than five years each;
 - (c) if the President resigns, is impeached or dies in office, and less than thirty months of his term remain, the remainder of that term shall not count as a 'term' for the purpose of calculating the entitlement of the person who takes over;
 - (d). restrictions on the President's term shall apply retrospectively and apply to previous holders of the office; and
 - (e) the running presidential candidate should have secured 20% votes in more than half of the provinces and more than 50% of the national vote. If no candidate satisfies these criteria, the top two candidates should go for a runoff in which the simple majority rule will apply.
- (vi) *On impeachment and recall, that*
 - (a) the President should be liable to impeachment proceedings for a breach of the Constitution or law or serious misconduct on charges brought by a majority of the members of the National Assembly and determined by the National Council. The President of the Supreme Court shall preside over the proceedings;
 - (b) there should be adequate mechanisms to avoid the risk of impeachment being used for purely political motives;
 - (c) the Constitution should specify the grounds for recall; which may include:
 - a physical or mental condition rendering the MP incapable of discharging the functions of the office;
 - misconduct or misbehaviour likely to bring about hatred, ridicule, contempt or disrepute to the office; or
 - persistent desertion of the electorate or persistent neglect of parliamentary duties without reasonable cause.
 - (c) recall cannot be done before two years have elapsed after election, except in cases of physical or mental infirmity;

- (d) to initiate the process of recall, at least one fifth of the electorate in the constituency or any other electoral unit specified by the law should petition the Speaker (at the provincial, district or location levels a petition the relevant Chairperson), setting out the grounds for the recall; the authority aforementioned would request the Electoral Commission to inquire into the allegations; if proven to the satisfaction of the Electoral Commission, the Speaker/Chairperson shall declare the seat vacant; apart from losing the seat, the MP or councillor would be prevented for a further term of five years from standing for election;
 - (e) clearer guidelines and procedures be developed by the Electoral Commission to determine when a member has defected (whether by writing, actions or even speeches) from a political party, and that they be applied strictly.
- (vii) *On the Management of Elections, that*
- (a) the words ‘independent and impartial’ should appear in the Constitution in relation to the Electoral Commission;
 - (b) appointment to the Commission should follow after a short-listing mechanism, vetting by the National Assembly, with advice of the National Ethics and Integrity Commission (NEIC) and any appointment should be by the President, who must accept the names recommended, as with judicial appointments;
 - (c) the Commission should be financially independent; the expenses should come from the Consolidated Fund (like judges – this means that there does not have to be a vote in Parliament and a debate and that payment is assured);
 - (d) the Commission should have its own accounting officer;
 - (e) it should have the corporate status – a separate legal person with the right to bring legal actions and defend them;
 - (f) criteria for membership should be spelt out and include not having been involved in any recent active political party activity;
 - (g) political parties should not play any role in appointments, given political hostilities and the danger of bringing these to the Commission itself;
 - (h) the number of commissioners should be reduced to not less than 7 and not more than 11 – most countries have found it expedient to do with a smaller commission, much of the detailed work being done by a competent staff;
 - (i) the term of office should ensure that a commissioner sits through two elections, so experience is not wasted; membership should be staggered;
 - (j) the commissioners should have security of tenure; removal should be by an inquiry by a genuinely independent tribunal;
 - (k) the commissioners should be persons of personal integrity, proven good behaviour and conduct, a good measure of public service and an education level to be defined;
 - (l) the fact that the results of a presidential election are to be declared by the Commission should be stated in the Constitution;
 - (m) police officers should not be present in a polling station this is against international standards;
 - (n) the Constitution should accord the Commission adequate power to make rules aimed at improving effectiveness and efficiency by the electoral process;
 - (o) the Commission should be devolved to the district level to support the electoral process at that level;
 - (p). retired or former commissioners should not stand for any elective office for a period equivalent to one term;

- (q) the Commission should be accorded the power to deal with certain electoral disputes or offences immediately; it is desirable to devise a way of resolving disagreements that arise in the voting process, if possible without waiting until a full-scale election petition hearing takes place; in some countries, the Election Commission has the power to deal with such disputes; for example, in Uganda the Election Commission is given this role; and
 - (r) with regard to election disputes:
 - it should be possible (as it was until a Court of Appeal decision) for the petition to be drawn to the attention of the MP or President or councillor whose election is challenged by a notice in the *Government Gazette* and a daily newspaper – it is all too easy for that person to avoid receiving the document in person;
 - the court could consist of 2 rather than 3 judges;
 - the court should sit in the province from which the petition has arisen; and
 - all election petitions shall be heard within one year from the date of election.
- (vii) *On Election Boundaries:*
- (a) a special Electoral Boundaries Commission should be appointed within 2 years of coming into force of the new Constitution to address:
 - the existing boundary disputes;
 - petitions for new electoral (single-member constituencies, location/ward) boundaries; and
 - creation of new electoral units as a result of devolution of power to the province, district, location and village levels.
 - (b) The Constitution should clearly establish a norm for constituency sizes by dividing the national population by the number of constituencies required. The Electoral Commission should be allowed a deviation of approximately 10% either way from the norm; very exceptionally a wider deviation should be tolerated; candidates and MPs from geographically large constituencies (as in North Eastern Province) should be provided with special logistical and financial assistance to cover the constituency; and
 - (c) the process of reviewing or delimiting electoral boundaries should occur every 10 years using the results of the population census as a basic resource; the process should be transparent and opportunity for public consultation, debate and input should be guaranteed; the Constitution should make it difficult for Parliament and/or Executive to be able to change electoral boundaries at will.

CHAPTER ELEVEN - ORGANS OF GOVERNMENT

11.1 The Mandate of the Commission

An important object of review under the Act is to:

... recognise and demarcate divisions of responsibility among the various State organs, including the Executive, the Legislature and the Judiciary so as to create checks and balances between them and to ensure accountability of the Government and its officers to the people of Kenya.

Consequently the Commission was required to

.... examine and recommend the composition and functions of the organs of State, including the Executive, the Legislature and the Judiciary and their operations, aiming to maximise their mutual checks and balances and secure their independence.

In addition, the Commission was specifically mandated to

.... examine and make recommendations on the Judiciary generally and, in particular, the establishment and jurisdiction of the courts, aiming at measures necessary to ensure the competence, accountability, efficiency, discipline and independence of the Judiciary.

11.2 The System of Government

The most important decision in constitution-making and the conventional function of constitutions is to design the power map of the state, i.e., the system of government. The map determines the composition and powers of State organs, the manner in which they exercise those powers, particularly as relates to governance, and the allocation of resources and opportunities within the State. Government systems are determined by the powers and functions of principal organs of State the structures of these organs and the relationship between them. The principal organs are the Legislature, the Executive and the Judiciary.

Therefore, it is important to define a country's system of government because this influences its basic function, the organisation of politics, accommodation of group interests in society, participation by the people in governance and implementation of the principles of efficiency, transparency and accountability. In addition, the system can be structured to achieve and enhance national values, promote democracy, facilitate social and economic advancement and strengthen and safeguard national unity and integrity.

Consequently, the Commission framed a number of questions to the people on the three organs of state namely, the Legislative, the Executive and the Judiciary. An important concern of the Commission was to access the people's views on separation of powers between these organs.

The doctrine of separation of powers means that there should be a demarcation in the functions and powers of the three organs, so that no organ has excessive powers and there are checks and balances between them to ensure accountable government free of overlaps and bureaucratic conflicts and inefficiency.

11.3 Legislature

11.3.1 General Principles

Legislatures may be divided into two broad types: unicameral and bicameral. Unicameral legislatures consist of one chamber, while bicameral ones are composed of two. In the latter case, the composition and functions of the upper chamber differs from country to country.

In federal systems, such as India, Nigeria and the United States, the bicameral legislatures represent regions. In unitary political systems, such as Kenya, Uganda and Eritrea, unicameral legislatures have been adopted. Bicameral legislatures represent diverse interests, facilitating a more deliberative approach to legislation and thus a higher quality of laws. They also provide enhanced oversight and control over the Executive. In contrast, unicameral legislatures may be faster in decision-making, cost less in terms of resource and time and be more effective in representing homogenous and less populous nations.

Legislatures perform three main functions, namely:

- Representation;
- Law-making; and
- Supervision of government conduct.

The representation function of legislatures is derived from the fact that, in most jurisdictions, legislators are elected by the people and have the mandate to propagate their views. Legislatures, therefore, represent popular sovereignty. Effective legislatures must have effective ways of bridging the gap between the people and their government and must creatively represent the people's vision of their life. Legislature must strive to effectively represent the people and their interests, a task that requires constant outreach to ensure the people's views are reflected in every government issue.

The law-making function of legislatures also derives from the fact that laws should express the people's sovereignty. By making laws, the legislature ensures that the people's visions and aspirations are promoted and safeguarded. Therefore, it should have the capacity and expertise to appropriately and accurately transform those ideals into enforceable norms. The law-making function of Parliament is by far the most sensitive as it hinges on power allocation, equitable distribution of the national resources and services among all citizens and at all places and, as a correlative, social optimisation of resources and opportunities to benefit all citizens and regions. To some extent, the Legislature shares this role with the Executive.

The supervisory function of the Legislature has become most significant in recent times. The Legislature acts as a watchdog over the Executive. Oversight involves monitoring policy and allocation and use of resources to ensure that there is social optimisation. Monitoring ensures that policies relate to the people's priorities and that revenue and expenditure procedures and processes are appropriately designed to achieve those priorities. The Legislature's ability to perform this role effectively depends on the formal supervisory powers it draws from the Constitution and the laws it makes, the resources – including expertise at its disposal, and the political will and consciousness of the Members of Parliament themselves. One salient mechanisms for parliamentary control over the

Executive is the confidence/motion or censure procedure. In developed parliamentary democracies, these are cited for the government survival.

11.3.2 The Legislature in the current Constitution

(a) Background

The Independence Constitution provided for a Parliament made up of the Queen in Parliament and the National Assembly. The National Assembly was bi-cameral, consisting of the House of Representatives as the Lower House and the Senate as the Upper House. There were 41 Senators elected from 41 senatorial districts, specified in the Constitution as the Nairobi Area, Tana River, Lamu, Kwale, Kilifi, Mombasa, Taita, Marsabit, Isiolo, Meru, Embu, Kitui, Machakos, Kiambu, Thika, Murang'a, Nyandarua, Kirinyaga, Nyeri, Turkana, Samburu, West Pokot, Trans Nzoia, Elgeyo-Marakwet, Baringo, Laikipia, Nandi, Nakuru, Uasin Gishu, Narok, Kajiado, Central Nyanza, South Nyanza, Kericho, Kisii, Bungoma, Kakamega, Busia, Mandera, Wajir, and Garissa. The Senate was meant to be a political safeguard for regionalism and had a crucial role to play in constitutional amendments in that at least sixty-five per cent of all the members of both Houses had to vote in favour a motion for it to succeed. The Senators elected their Speaker and Deputy Speaker from among themselves or from persons qualified to be elected as Senators. Senators were elected for a period of six years. The elections were conducted by an independent Electoral Commission, which registered the electorate for each electoral district.

The House of Representatives consisted of members elected on the basis of constituencies demarcated by the Electoral Commission in accordance with the Constitution, and members specially elected by Members of the House themselves after the General Election or after the occurrence of a vacancy in the office of a specially elected member. The number of specially elected members was the total number of elected members divided by ten (10); their number was between 11 and 13 since the number of constituencies at independence was fixed by the Constitution at a minimum of 110 and a maximum of 130. The Governor-General (the Queen's representative in Parliament) had, on the Prime Minister's advice, the power to call sessions and to prorogue and dissolve Parliament. Legislative power lay in the National Assembly and was exercised by way of Bills. These could originate from either House; however, money Bills would constitutionally originate only from the House of Representatives. The Regional Assemblies also shared legislative power. The Constitution provided for a list of exclusive and concurrent matters in which the national and regional assemblies would exercise their power.

(b) The Current Constitution

Chapter III of the current Constitution provides for a Parliament which is unicameral, composed of the President and the National Assembly. Members of the National Assembly are either elected periodically on the basis of constituencies established by the Electoral Commission of Kenya or nominated by parliamentary parties according to their proportions in the House.

The Constitution provides for 12 nominated Members of Parliament. The total number of constituencies is 210. The Speaker and the Attorney-General are *ex officio* Members. The National Assembly elects the Speaker and the Deputy Speaker in its first sitting. The Speaker is not an elected Member of Parliament. The High Court constitutes itself into an Electoral Court to hear disputes relating to the election of Members of Parliament, including the President. The Constitution also provides for the office of the Clerk to the National Assembly and other staff, which, before the 1999 amendment to the Constitution, were Public Service offices. That amendment created the Parliamentary Service Commission, to which the Clerk now belongs.

The summoning, prorogation and dissolution of Parliament lies in the hands of the President. Otherwise, Parliament stands dissolved on the fifth anniversary of the date on which it was sworn in after the last General Election. On dissolution, the election must be held within three months. The Constitution envisages no Confidence motions in the Government; it provides in Section 59 that if the National Assembly passes a Resolution supported by a majority of the members to which not less than seven days notice had been given, the President must dissolve Parliament within three days. Otherwise, Parliament stands dissolved on the fourth day. The legislative power of Parliament is exercised by way of Bills it passes and forwards to the President for assent within 21 days. The President may decline to assent to a Bill; in that case, he must within 14 days state the reasons for his refusal in the form of a memorandum to the National Assembly. The latter then has to reconsider the Bill, taking into account the President's comments and either approve the President's recommendation and convey the Bill for assent or refuse the President's recommendations and approve the Bill in the original form. In this case, it must be supported by not less than 65% of all members of the National Assembly. The President must then assent to the Bill within 14 days. Only Ministers of the Government may initiate money Bills in Parliament.

Parliament has power to make Standing Orders of procedure for the orderly conduct of its business and to establish committees to facilitate its work. To achieve this, Parliament has made for itself National Assembly Standing Orders detailing its procedure and internal organisation. The Standing Orders establish several Committees of Parliament, including the watchdog Committees (Public Accounts and Public Investment) and the departmental committees (Agriculture; Lands and Natural Resources, Energy; Communication and Public Works, Education Research and Technology, Health, Housing, Labour and Social Welfare, Administration, National Security and Local Authorities, Finance, Planning and Trade, Administration of Justice and Legal Affairs, and Defence and Foreign Relations). There are also in-house Committees (House Business, Estimates, Library, Speaker's, Liaison, Standing Orders, Ways and Means), the Committee of the whole House and *ad hoc* Committees. The most important Committees are the Departmental ones. According to Standing Order 151, extracted here below, the functions and powers of Departmental Committees are:

...to investigate, inquire into, and report on all matters relating to the mandate, management, activities, administration, operations and estimates of the assigned ministries and departments;

to study the programme and policy objectives of the ministries and departments and the effectiveness of their implementation;

to study and review all legislation after First Reading, to study, assess and analyse the relative success of the Ministries and departments as measured by the results obtained as compared with its stated objectives;

to investigate all matters relating to the assigned ministries and departments as they deem necessary, and as may be referred to them by the House or Minister, and;

to make reports and recommendations to the House as often as possible, including recommendations of proposed legislation.

In their deliberations,

...The Departmental Committees shall enjoy and exercise all powers and privileges of Parliament, including the summoning of witnesses, and the request for and receipt of papers and documents from the Government and the Public...

The powers, functions and privileges of the legislature and legislators are further defined:

- The National Assembly Remunerations Act (Cap 5);
- The National Assembly (Powers and Privileges) Act (Cap 6);
- The National Assembly and Presidential Elections Act (Cap 7); and
- The Parliamentary Service Act (No. 10 of 2000).

11.3.3 The Legislature in other Constitutions

Whether written or unwritten, all Constitutions, have provisions for some form of legislature. What would be useful is to survey the major types of legislatures that most constitutions provide for. Unicameral legislatures are common in jurisdictions based on a unitary system of government, whether or not exercise of power is purely parliamentary or a hybrid between a parliamentary and presidential system. Many African constitutions, including those of Uganda, Tanzania, Zambia, Botswana, Malawi, Zimbabwe and Ghana, are essentially unicameral. Some of these countries such as Zimbabwe and Botswana, also have special chambers (e.g., the House of Chiefs) which are not, however, strictly speaking, considered as part of the Legislature. Bicameral legislatures, on the other hand, are common in jurisdictions based on federal or substantially devolved systems of government. In these jurisdictions, legislative authority is shared between a “lower house” and an “upper house” although the degree of responsibility between them varies. These jurisdictions include Ethiopia, South Africa, Nigeria, the United Kingdom, India, the United States of America and the Federal Republic of Germany.

The decision to adopt a unicameral or bicameral system is often conditioned by a desire to ensure effective representation of diverse social interests. That, in turn, is often determined by the dominant ideology of the state. Thus centralised or planned economies, on the one hand, have always preferred unicameral systems. More liberal and diverse political orientations, on the other, lean towards bicameral systems, especially where these are accompanied by extensive devolution of power. The point to emphasise

is that the nature of the legislature adopted in any jurisdiction generally reflects the political and economic ideology espoused by the state itself.

Consequently, the composition of the legislatures will also vary depending on the interests sought to be protected by or reflected in that system. Thus, whereas in the United Kingdom the historical baggage of feudalism continues to justify the existence of the House of Lords, in the United States, the Senate, which was originally designed as the symbol of equality of States within the Union, now performs very different governance functions. Other variations include chambers designed to protect cultural or special authorities or “nationalities”, as is the case of the House of the Federation under the Constitution of Ethiopia.

The primary functions of legislatures, however, are similar despite variations as to type or composition. These are:

- representation of the constituent power;
- enactment of legislation; and
- supervision and control of the Executive.

11.3.4 What the People Said

The people told the Commission

(i) *that Parliament should*

- a) take over the vetting and approval of senior appointments to various constitutional and public offices from the President, for example, the Attorney-General, the Auditor-General, Permanent Secretaries, the Chief Justice, Judges, and so on;
- b) be strengthened through the Committee system to enable it to perform its functions efficiently and effectively for – example, establishing an estimate committee to scrutinise Government budget proposals to enhance control over State finances; other suggestions were that a stronger Committee system be secured;
- c) have a calendar of its own procedures;
- d) have its proceedings broadcast live on radio and TV, where applicable; and
- e) have a higher quorum.

(ii) *that Members of Parliament should*

- a) satisfy moral and ethical standards for elections to Parliament;
- b) be subject to recall;
- c) work full-time;
- d) not be nominated or alternatively nomination be restricted to marginalised groups, such as women the disabled, minorities;
- a) have their remuneration packages determined by an independent commission.
- f) be required to have a minimum education level of Form Four.

(iii) *that*

- a) measures be taken to increase women's participation in Parliament and the consensus was that at least 1/3 of MPs and Cabinet ministers be women;
- b) there is a need for a second chamber, although the views differed on its role and composition; and
- c) that Parliament have the power to dismiss the Government of the day through a vote of no confidence and to impeach a sitting president.

11.3.5 Commentary

The people told the Commission that they wanted the Legislative to be more responsive to their needs, to share power with the Executive and to manage its own affairs free of executive interference.

11.3.6 Recommendations

The Commission recommends, therefore

- (i) *the establishment of a bi-cameral legislature consisting of:*
 - (a) an Upper House called the National Council, composed of
 - Sixty-nine Members from each district,
 - One Member from Nairobi.
 - Thirty women members made up as follows
 - Four from the provinces, and
 - Two women from Nairobi - for a total of one hundred members.
 - (b) a Lower House composed of 210 elected representatives from all constituencies and 90 nominated through the Mixed Member Proportional election system; and
- (ii) *the term of Parliament:*
 - should last from election to election, i.e., start from swearing in MPs and run until the next General Election.
- (iii) *to qualify for election to Parliament a member must*
 - a) have at least a Secondary Certificate of Education;
 - b) be proficient in both English and Kiswahili;
 - c) be a persons of high moral integrity; and
 - d) be of a minimum age of 21 years.
- (iv) *the functions of Parliament should be to-*
 - a) represent the people in governance and provide a platform through which the people's needs may be articulated;
 - b) make laws and policies for the better running of the Government and pass Bills that are then forwarded to the President for assent in his/her capacity as the Head of State;
 - c) act as a watchdog over the Executive; this would be an effective system of checking the excesses of the executive;
 - d) vet and approve key presidential appointments to public and other constitutional offices; for instance, appointments of the Attorney-General, the Auditor-General, permanent secretaries, the Chief Justice, heads of commission, and so on.

- e) control and oversee prudent use of State finances by establishing appropriate committees;
- f) participate in treaty- making;
- g) designate and constitute ministries, where appropriate; and
- h) That the political party with the majority form the government. In the event that there is no majority, the parties could form a coalition government

(vi) the following principles should govern the operations of the government:

- a) Parliament shall have unlimited powers over its own procedures;
- b) Parliament would have its own calendar of when to convene, go on recess and be dissolved;
- c) Parliament shall regulate its procedures through Standing Orders;
- d) being a Member of Parliament should be a full-time occupation;
- e) all Ministers, except the Prime Minister and his/her Deputies, should be appointed from outside Parliament;
- f) members of Parliament be subject to the power of recall by the electorate in their respective electoral areas;
- g) to overcome the deficiency of representation of women and guarantee effective participation of women, minorities, people with disabilities and other interest groups, the Mixed Member Proportional Representation system be adopted;
- h) at least one third of the representatives be women;
- i) Parliament should have power to dismiss the Government through a vote of no confidence;
- j) Parliamentary proceedings be broadcast live on television and radio;
- k) there be a Speaker and a Deputy Speaker for each chamber;
- l) there be constituency offices for Members of the Parliament;
- m) Parliament should have the powers to pass a vote of no confidence in the President;
- n) Opposition parties' members of Parliament should choose the Leader of the Official Opposition;
- o) the Leader of the Opposition should accorded a senior position in the hierarchy of State offices and given appropriate honour on State occasions;
- p) the Leader of the Opposition appoint a shadow cabinet; and
- q) the office of the Auditor-General should assist parliamentarians to scrutinise Government expenditures and assess their efficiency and effectiveness.

(vii) the following principles be adopted to enhance people's participation in the legislature

- a) requirement that all legislative proposals be submitted to relevant social groups for comment.
- b) there be a right to petition Parliament for legislation, for redress of grievances or for information (the last could be to ask Members to raise a question with relevant ministers, perhaps if the question is of general national importance, or if a local MP has not been responsive to the issue);
- c) provisions be made under which groups or citizens can ask to appear before Parliamentary Committees discussing or investigating particular issues (a sort of *amicus curiae* function);

- d) more use be made of parliamentary committees to enhance participation by the people, through, for example, public hearings, in Nairobi and other parts of the country; and
- e) MPs be encouraged to seek assistance from organisations, and academics for research, etc.

11.4 The Executive

11.4.1 General Principles

(a) *Types of Executive Systems*

There are two major types of executive systems: the *pure presidential executive*, where the President is not a part of the representative assembly; and the *pure parliamentary executive*, where the Executive is part of the Legislature and is a ceremonial Head of State.

In the *pure presidential executive*, executive power is vested in the President who:

- Is not a member of the Legislature but is directly elected by the people;
- Has a fixed term in office, which may not be altered by the Legislature except through a restricted procedure of impeachment;
- Names and directs members of his/her government, who are also not members of the Legislature.

In the *pure parliamentary executive*, Parliament has the executive authority:

- all members of government are also members of the Legislature.
- the State President or monarch performs the representative duties of State, thus manifesting a clear demarcation of power;
- the majority party in the Legislature after an election forms the government and its leader assumes the role of head of government; and
- the Cabinet performs the executive functions and is subject to the Legislature's confidence.

The major differences between a parliamentary and presidential systems are:

- in a parliamentary system, the separation between the Executive and the Legislature is not as sharp as in the presidential system;
- there are more checks and balances in the presidential system, though there is continuing accountability of government to the Legislature in the parliamentary system as the Prime Minister and ministers sit in Parliament, have to defend their policies and are subject to a vote of no confidence;
- Ministers are members of the Legislature in the parliamentary system while in the presidential system, a legislator cannot become a minister unless he/she resigns;
- in the presidential system, there is a fixed term for both Executive and Legislature;
- in the parliamentary system, the head of state is not the head of government;
- in the presidential system, the head of government is elected directly, but he is appointed in parliamentary. The head of government in a parliamentary system shares responsibility with the rest of the Cabinet, but he is the sole authority in presidential system.

The other executive type is a variation or combination of these two and is called the *mixed presidential and parliamentary executive*. Many countries fall under this category. Under this system, the President is elected by popular vote and may or may not be a member of the Legislature. In most cases, however, the President has the power to dissolve the Legislature.

It is also the practice in the mixed system for the President to deal directly with the Cabinet, members of whom he may appoint or dismiss according to his will. The Cabinet consists of members of the Legislature. They are subject to parliamentary confidence and may individually be voted out if a motion of censure is passed. Sometimes, there is a Prime Minister who is a Member of Parliament and becomes the Head of Government. He, too, is subject to the confidence of both the assembly and the President.

In other circumstances, the Executive may be formed in a power sharing arrangement in which different political groups are represented. This situation arises when no party emerges with a large enough majority of members in the Legislature to form the government. Consequently, like-minded political parties coalesce and the coalition forms the Government. The mechanisms for such power sharing are negotiated and agreed upon by the parties concerned and, in most cases, may not be a matter of constitutional elaboration. However, certain constitutions make direct mention of the matter.

(b) The Nature of the Power of the Executive

The executive is the branch of government that carries out the work of governing by implementing laws and policies. Public policies are made and implemented by the Executive; which is responsible for managing state revenues, internal and external security, foreign relations and enforcing laws as some of its principal tasks. To an extent, the Executive is the most powerful State organ.

Executive authority is personified in the sovereign of the State, who may be a president in a republican state or a monarch in a monarchical state. It may be divided between a president and a prime minister. However, in practice, it is exercised by a broader group of persons, among whom are persons in charge of vital Government departments, including the civil service, the police, the armed forces, the provincial administration and, to some extent, the local authorities.

The character of the Executive has a significant impact on the power it exercises and the means for control of that power. A pure parliamentary executive would lend itself to a more direct control by and enhanced accountability to the Legislature through the confidence motion process. Conversely, the mixed executive, like Kenya's, exhibits a higher level of control over the Legislature by the presidency.

11.4.2 The Executive in the current Constitution

(a) Background

At independence, executive authority was vested in the Queen of England and exercised on her behalf by the Governor-General. A Prime Minister appointed by the Governor-General from among the members of the House of Representatives. Ministerial offices were established by Parliament. The Prime Minister and other Ministers constituted the Cabinet,

which was collectively responsible to the two Houses of Parliament and which was to advise the Governor-General in the performance of his duties. The Governor, on advice from the Prime Minister, had the power to appoint Parliamentary Secretaries to assist Ministers in the performance of their duties. There was a Cabinet Secretary whose office was in the Public Service and who was to administratively conduct the Cabinet offices as directed. The executive authority in the regions was exercised by what was referred to as the Finance and Establishments Committee, established by the Regional Assembly.

A regional President headed the Committee and a Vice-President appointed by the Regional Assembly, and which had authority to establish other committees to effectively superintend the regional affairs.

It is worth noting that the institution of Presidency of the Republic was a creation of the first Constitutional Amendment (Act No. 28 of the 24th November, 1964). From 1964 to 1969, the House of Representatives elected the President. This changed with the 10th Amendment (Act No. 45 of the 12th July, 1968) that provided that the President was to, henceforth, be directly elected by the national electorate.

Important observations may be made in respect of the Executive at independence. First, the powers exercised were varied but effected after consultation with either the Cabinet or other independent Constitutional officers. The unilateralist, who characterises the powers of the presidency in the current Constitution, is a result of the whittling away of the safeguards by the 11 amendments that took place between 1964 and 1969. The effect of those amendments was to consolidate immense powers in the Presidency and form an a potential loophole for abuse and misuse of power.

(b) The Current Constitution

Section 23 of the Constitution vests executive authority of the Government in the President, which may be exercised by persons subordinate to him. Sections 4-21 establish the Executive, which consists of the President, Vice- President, Ministers, and Assistant Ministers, who are all members of the National Assembly. The Cabinet, established under Section 17, is the highest decision-making organ of State and advises the President on governance. The President is, however, not bound by Cabinet decisions. The Cabinet is composed of the President, the Vice- President and Ministers.

The Executive as mirrored in the Presidency exercises immense powers. Some of the powers are that the President:

- Is the Commander of the Armed forces;
- Is responsible for creating and abolishing all offices in the public service;
- Is the chancellor of all public universities;
- Appoints members of government including the permanent secretaries;
- Appoints the Attorney-General and the Solicitor-General, whose offices are in the Public service;
- Appoints the Controller and Auditor-General;
- Appoints ambassadors or principal representatives of Kenya to other countries;
- Appoints the Chief Justice and other judges of the High Court and the Court of Appeal;

- Appoints the Police Commissioner and other senior members of the Police force;
- Exercises the prerogative of mercy of the Republic;
- Has power to prorogue and dissolve Parliament;
- Assents to all Bills made by Parliament and possesses a limited veto power over legislation;
- Appoints Electoral Commissioners;
- Appoints Public Service Commissioners and other senior civil servants;
- Is immune from legal proceedings while in office;
- Is entitled as Head of State to address Parliament at any time he/she so wishes and, as Head of Government, attends all meetings of the Assembly and takes part in the proceedings of the House, including to vote in all matters put to the vote.

In addition to the Constitution, other statutes have granted the President various powers. Under the Commissions of Inquiry Act (Cap. 102), the President has power to constitute, at any time, a Commission of Inquiry to consider certain matters of public concern and to appoint the holders of the offices of such Commissions. The Government Lands Act, (Cap. 280) gives the President special power to make grants or dispositions of any estate, interests or rights in or over unalienated government land.

11.4.3 The Executive in other Constitutions

An analysis of executive systems has already been given. What requires elaboration here is how other constitutions treat such issues as:

- the character and composition of the Executive;
- power-sharing with other organs of state; and
- accountability of executive organs.

On the character of the Executive, a number of jurisdictions, such as Australia, Canada, Germany, the Netherlands and the United Kingdom, provide for a ceremonial head of state (by whatever name) and a strong head of government (usually designated as Prime Minister). In these and similar jurisdictions, the head of state is often (although not always) a hereditary monarch, while the head of government and most cabinet ministers are elected members of the Legislature. In other jurisdictions, such as the United States, Nigeria and El Salvador, the President and cabinet ministers are not members of the Legislature. Hybrid systems, in which the head of state shares significant executive powers with the head of government (as in France), or in which the former, though retaining full executive authority, also appoints a Prime Minister (as in Tanzania and Uganda), are also common.

Issues of power-sharing, especially with the Legislature and the Judiciary, and accountability, are usually dealt with by an elaborate system of checks and balances. These include confirmation by the legislature of high-level Executive appointments, impeachment of the head of state/government by the Legislature, and judicial review of executive action. These are common features in many English-speaking jurisdictions.

11.4.4 What the People Said:

What the people told the Commission:

- (i) *with respect to the system of government,-*
 - a) ensure that the organs are totally independent of one another;
 - b) the Constitution should adopt a parliamentary system of government; with a Prime minister as the Head of Government and a largely ceremonial President as be the Head of State; this was suggested by a majority of people;
 - c) the President would play the role of an Elder of State serving as a symbol of national unity and identity; to advance this position, a higher minimum qualification age was suggested, ranging from 40 years to 50 at the lower limit, and between 70 and 75 years as the upper limit;
 - d) there should be great flexibility in the Constitution to allow for a coalition government or power-sharing.
- (ii) *with respect to the office of the President, that*
 - a) the President should not be above the law, a majority asserted; their concerns were that it should be possible to prosecute him/her for offence while in office; in this regard, it was also suggested that the Constitution provide for the President's removal for misconduct;
 - b) the powers of the President should be curtailed; Kenyans felt the President should not have the exclusive power to appoint senior government officers; indeed, it was suggested for many of the appointments to be vetted by Parliament; that the President should not have the power to determine the election dates was a specific concern of many Kenyans;
 - c) the powers of the President and Prime Minister need to be elaborated in the Constitution;
 - d) the President should not be a Member of Parliament;
 - e) the President should be elected directly; here it was suggested that the candidate must garner more than 50% of the total valid votes cast countrywide; in case there is a tie, there should be a run off between the two leading candidates, in which case the one who obtains a simple majority should be declared the winner;
 - f) the President should have 25% support in five provinces was a disputed recommendation; there was considerable support for it, although others felt it should be at least 20% in four provinces, while others suggested that 50 % national support was sufficient;
 - g) apart from education and age, the President should be a married person with a stable family and impeccable character;
 - h) the President should possess minimum education qualification to enable him/her to manage the affairs of State. The majority was of the view that the President should possess the minimum of a first degree;
 - i) the Vice-President should be elected directly by the people as President's running mate;
 - j) both the President and Vice- President should not be Members of Parliament.

(iii) with respect to Ministries of government that

- a) the number of Government ministries should be reduced to 15 and be approved by Parliament; and
- b) ministers should be appropriately qualified to match their ministerial responsibilities; views went both ways on whether members of the Government should also be part of Parliament.

11.4.5 Commentary

It is clear that what the people want is a mixed system very different from the divisions and power structures under the existing Constitution. The parliamentary system, which is recommended, provides for collective leadership and better accountability. It, however, also implies greater separation of powers than is usual in parliamentary systems by the rule that Ministers may not be members of the National Assembly. This recommendation takes into account that a large majority of Kenyans have expressed a preference for some form of parliamentary system. A purely presidential system, in which all power is vested in the President, is unlikely to assist in overcoming the culture of authoritarianism. That office would continue to be the focus of elections, the lynchpin of party organisation and the fount of all power. Given Kenya's history, an over-powerful presidency would retard the effective separation of powers and the system of checks and balances or a better distribution of power. It would also continue to foster ethnic politics, for each ethnic group would want a member of its own community to occupy that office. It would promote fears of 'ethnicisation' as well as personalisation of state power. A partisan presidency would undermine the role of national unity.

Equally, a purely parliamentary system may not serve Kenya's interests. It would shift most of the powers to the Prime Minister, and lessen people's control of the choice of government leaders. The stability often associated with a presidential system may be hard to secure, given the intrigues of parliamentary politics and the possibility of motions of no confidence. A well functioning party system is critical to the success of a parliamentary system. A parliamentary system, with the Cabinet as the principal decision-making body, allows collective decision-making and accommodation of diverse interests, including multi-ethnic interests. It is, therefore, more inclusive and participatory than a presidential system. It would also be a more accountable system, since retention of power by the Government would depend on its ability to maintain the National Assembly's support.

On balance, a modified form of parliamentary system is best able to achieve the principles of government outlined above. The aims of the modifications would be a more balanced Executive, with internal checks; to establish a collective form of government to facilitate coalition – building across ethnic lines. It would cut across geographical areas and provide a basis for effective as well as accountable government through greater separation of powers. There are three principal elements of the modification.

First, the Head of State, the presidency, must be more than ceremonial. He/she should have reasonable powers. However, those powers should be limited. Excess powers upset the internal balance within the Executive. The principal function of the presidency would be to

symbolise national unity and promote national integration, security of the State and the protection of the Constitution and to provide an element of stability of administration.

Second, the Cabinet would be drawn largely from outside Parliament to promote effective government and the separation of powers. Ministers would have to be qualified for the portfolios assigned to them, and not be burdened with constituency business or suffer conflict between national and constituency interests. They would be able to devote all their time and energies to their ministry. However, in order to ensure proper ministerial accountability to the National Assembly, Deputy Ministers would be expected to play an active role in the National Assembly. Ministers themselves would have to appear before the National Assembly to explain major policies and to answer questions when the National Assembly requires them to. There would be a close relationship between Ministers and relevant Parliamentary Committees.

Third, Parliament must be strengthened, with more control over its calendar and resources, and the ability to exercise greater supervision over and accountability by the Government. In order to achieve this, Members of Parliament must be full time legislators and being a parliamentarian should be seen as career, rather than a stepping stone to ministerial or other forms of promotion. It is important to recognise that in a parliamentary system, unlike the US presidential system, it is not possible to have a strict parliamentary control over its dissolution and the dates for General Elections. A key element of the parliamentary system is Legislature's the right to get rid of the Executive or at least force a General Election on a vote of no confidence.

The trend worldwide is that the Executive dominates the Legislature, as a function of government, and the revenue that passes through it as well as the bureaucracy that serves it increase. This erodes democracy; the elected legislative bodies are less and less able to take their own legislative and policy initiatives or scrutinise and control the Executive. In many countries, including Kenya, few politicians see their career as purely being parliamentarian, or professional politicians committed to their party manifesto or the good of the constituency or the country. They regard Parliament as a stepping stone to ministerial or other high office. Consequently, they do not take enough interest in the work of Parliament. As a consequence of this trend, a number of proposals have been made to strengthen the role and capacity of the National Assembly in many parts of the world.

11.4.6 Recommendations

The Commission recommends, therefore, that a new structure be adopted as follows:

(i) *The President:*

- (a) that a presidential candidate must have the following attributes:
- Age minimum 35 and maximum 70 years;
 - Should be a graduate from a recognised university and or relevant experience as a Member of Parliament or leader;
 - Should be married with a stable family;
 - Must be a person of high integrity;
 - Shall serve for a maximum of a two five-year terms; and
 - Shall not be a Member of Parliament.
- (b) Presidential candidates be elected directly by the people through universal suffrage, and

- Presidential aspirants be nominated (sponsored) by registered political parties or run as independent candidates.
 - A presidential candidate who obtains 20% of the votes cast in at least 5 Provinces and an overall 50% of total valid votes cast countrywide shall be declared the winner; in case there is no outright winner, there will be a runoff in a month's time between the two candidates with the highest number of votes, in which case the candidate with a simple majority is declared the winner.
- (c) the President should have and exercise following functions:
- symbolise and enhance national unity; He/she should defend the country's integrity;
 - upon election, sever links with political parties; he/she will not hold any elective office or be an active member of any political party;
 - protect national sovereignty and territorial integrity;
 - safeguard the Constitution and uphold the rule of law;
 - assent to Bills before they become law;
 - have power to ask the Supreme Court for an advisory opinion on a constitutional question;
 - preside over the National Security/Defence Council;
 - declare a state of emergency on consultation with the Prime Minister;
 - have the power to declare war on consultation with the Cabinet and the National Security Council, subject to approval by Parliament.
 - appoint judges in accordance with the recommendations of the Judicial Service Commission and Parliament's consent;
 - ratify treaties that have been approved by the Government and approved by the Parliament; and
 - preside over the opening of Parliament.
- (d) the President should
- enjoy such as other powers as may be derived only from the Constitution.
 - be liable to impeachment for gross misconduct, breach of the Constitution or economic sabotage.
- (ii) *The Vice- President:*
- a) each Presidential candidate shall nominate a Vice-President who shall be his/her running mate;
 - b) the Vice-President shall assist the President in the execution of presidential functions, subject to the provisions of the Constitution;
 - c) in the event of the death, impeachment or resignation of the President, the Vice-President, upon approval by Parliament, shall assume the office of the President for the remainder of the term. If the remainder of the term exceeds two and a half years, that term shall count as the first presidential term of the person so appointed by the President.
 - d) if the office of the Vice-President becomes vacant, the President shall appoint a Vice-President from among elected members of Parliament.
 - e) in the event of the death of both the President and the Vice-President, the Speaker shall act as President.
 - f) the Vice-President shall act as President when the President is out of the country.

(iii) *The Cabinet:*

(a) Prime Minister:

- the Prime Minister should be the Chief Executive–Head of Government and leader of the Cabinet;
- the Prime Minister should be responsible to Parliament;
- the Prime Minister should be the leader of the largest political party in Parliament or a coalition of parties represented in Parliament;
- the Prime Minister would exercise the following authority:
 - develop and implement national budgets and policy;
 - implement and administer legislation; and
 - prepare and implement Government legislation;
- the Prime Minister shall chair all Cabinet meetings and keep the President informed of government business;
- the Prime Minister's term shall continue unless he/she resigns, dies or is dismissed; and
- Parliament may dismiss the Prime Minister by passing a vote of no confidence in him/her.

(b) Deputy Prime Ministers:

- there should be two deputy Prime Ministers appointed by the President and confirmed by Parliament; and
- the function of the deputies is to aid the Prime Minister in performing the duties prescribed by the Constitution.

(c) Ministers:

- there should be Ministers of the Government;
- the offices of ministers should not be less than 7 and not more than 15;
- ministers should not be Members of Parliament but must attend Parliamentary proceedings as *ex officio* members;
- ministers should be professionally qualified for the Ministries to which they are appointed;
- ministers should be appointed by the President as nominated by the Prime Minister and confirmed by Parliament.

(d) The Attorney-General:

- there should be an Attorney-General appointed by the President with Parliament's approval;
- the AG would be the principal legal adviser to the Government; and
- Functions of the Attorney-General would include
 - representing the Government in courts or any other legal proceedings;
 - drawing contracts, treaties, agreements, etc, to which the Government is a party;
 - other duties of a legal nature as may be referred or assigned to him/her by the Prime Minister.

(e) Director of Public Prosecutions

- there should be a Director of Public Prosecutor appointed by the President on recommendation by the Public Service Commission;
- the Functions of the Director of Public Prosecutor would include
 - directing investigations of a criminal nature;
 - instituting criminal proceedings; and
 - taking over and continuing any proceedings, etc.

11.5 The Judiciary

11.5.1 General Principles

The courts play a fundamental role in upholding constitutionalism and legality. The most important element of the courts is the people who staff it – the Judiciary. The principal functions of the Judiciary are to:

- Make authoritative interpretations of the law, without directions or pressure from the executive or other sources;
- Ensure the supremacy of the Constitution by declaring void all laws which are inconsistent with the Constitution;
- Develop constitutional norms and help adjust them to changing social and economic circumstances; the US Constitution has been amended relatively few times because the courts have given new interpretations to its provisions more consistent with changing values;
- Provide guidance to the organs of State, private corporations and individuals on the rules of the Constitution and the law;
- Inculcate respect for constitutional procedures and values, in part through persuasive and learned judgments;
- Keep both the legislature and the executive within their lawful authority, and prevent arbitrariness and unfair procedures within the Government and encourage rules for good decision-making;
- Protect the rights and freedoms of the people as well as protect the public interests;
- Settle legal disputes that are referred to it; and
- By settling disputes in accordance with the law and generally enforcing the principle of legality or the Rule of Law, help create stability and maintain peace, and to provide the predictability necessary for people to make contracts and other transactions.

A number of specific issues concerning the Judiciary may be highlighted here. These are judicial independence, accountability, integrity and accessibility to justice.

Judicial independence consists of two main elements as follows:

- *Decisional independence*, i.e., the Judiciary should be independent of extraneous influences; this enables it to render impartial and objective decisions in individual cases; the law and the law alone must guide the court in determining the issues before it;
- *Institutional independence*, i.e., the Judiciary is an independent organ of state, and is equal and co-ordinate to the other organs of government. The judiciary is not to receive instructions or be controlled by any other organ of government. This has a particular bearing on appointing and removing judicial officers, their security of tenure, their financial independence in terms of budgetary allocation and remunerations, and judicial discipline.

Judges must be accountable to the society in the manner in which they exercise their judicial power. The following are some of the considerations in respect to judicial accountability:

- The higher principles of natural justice and the ideal of human dignity call upon judges to exercise and dispense objective justice;
- Judicial precedent and constitutional supremacy remain important benchmarks for decisional independence;
- An effective appeal process ensures that the exercise of judicial power is kept under effective review by peers;
- Publicity of judicial proceedings and decisions subjects the judiciary to public scrutiny and criticism; and
- Judicial removal and disciplinary procedures remain important processes ensuring that errant judicial officers are dealt with; the efficiency of such systems is a critical component of accountability.

The conduct and work ethics of individual members of the Judiciary must reassure the public. This involves the following:

- The competence, diligence and output of judges;
- The requirement that judges retain a high level of judicial propriety in the way they relate to other members of society;
- The requirement that they avoid complicity in corruption and other vices; and
- The formulation and obeisance of a Judicial Code of ethics to ensure respectable behaviour of the judges in all places.

A properly functioning judicial system must ensure that it is accessible to all persons. This ensures and promotes the equality of all persons before the law. Accessibility of justice has a number of requirements, some of which may be outlined as follows:

- The physical accessibility of courts to all persons, including those physically impaired;
- The question of legal aid to those who cannot afford court fees;
- Alternative dispute resolution mechanisms;
- Civic education programmes; and
- Information technology and publicity of the court process.

11.5.2 The Judiciary in the current Constitution

(a) Background

The Independence Constitution provided for an impartial and independent Judiciary made up of subordinate courts, the Supreme Court, the Court of Appeal and the Judicial Committee of Britain's House of Lords.

(i) The Superior Courts of Record

The Supreme Court was established with original and unlimited civil and criminal jurisdiction. It also handled constitutional interpretation and matters relating to enforcing fundamental rights. Members of the Court were the Chief Justice and other puisne judges. The Chief Justice would be appointed by the Governor-General in consultation with the Prime Minister, who was enjoined to consult with all the Presidents of the regional assemblies, at least four of whom had to support the candidate. The Governor-General appointed other judges in consultation with the Judicial Service Commission.

The number of judges and their tenure was prescribed by Parliament. There were removal procedures in case either the Governor-General, the President of a Regional Assembly or the Chief justice had made a representation to that effect; in which case, a judicial committee was put in place. The Public Service Commission in the case of the Chief Justice and, the Chief Justice, in the case of other puisne judges, appointed members of the Committee.

The Constitution also envisaged a Court of Appeal to hear appeals from the Supreme Court on all matters, including the interpretation of Constitution and enforcement of fundamental rights and freedoms. There was also envisaged an inter territorial Court of Appeal to hear matters referred to it by the member States. The East Africa Court of Appeal served as the Appeal Court for all the three East African countries until it was dismantled in 1977.

The Judicial Committee of the House of Lords handled appeals from the East African Court of Appeal on constitutional and fundamental rights issues and civil and criminal matters, the only distinction was between matters that lay as of right and those that had to be preceded by leave granted by the Court from which they emanated.

(ii) The Subordinate Courts

Also established by the Constitution were the subordinate courts and the Kadhis' courts. Their numbers, jurisdictions and procedures were to be prescribed by Parliament. They were to exercise their functions subject to the Constitution, but the Supreme Court played a supervisory role over them.

(iii) The Judicial Service Commission

The Independence Constitution also provided for an Independent Judicial Service Commission, whose membership was the Chief Justice as Chairman, two judges and two persons appointed on advice by the Public Service Commission.

The primary function of the Service was to make appointments to the Judiciary including the registrars of the various courts. The Commission's decisions required concurrence by a majority of all the members. The Judicial Service Commission also advised the Governor-General on the composition of the Public Service Commission. In exercising of its functions, the Commission was not subject to any person's direction or control.

The overriding characteristics of the independence Judiciary was that it was the final constitutional arbiter. It was staffed by officers enjoying security of tenure, and the appointment procedures were rigorous enough to secure competence by the judges appointed.

(b) The Current Constitution

The current Constitution provides for a number of matters on the judiciary:

(i) The Superior Courts of Record

It establishes the High Court and grants it unlimited civil and criminal jurisdiction on all matters. It provides that the number of judges of that court shall not be less than eleven, subject to Parliament providing for other judges. The details on organisation, jurisdiction and procedure are provided in the Judicature Act (Cap 8).

The procedure for appointing the judges is stipulated. The President appoints the Chief Justice. On advice from the Judicial Service Commission he appoints other judges. Removal, in case of infirmity or misbehaviour is preceded by a tribunal appointed by the President on advice from the Chief Justice to consider the issue and report to him for action.

The Constitution grants Parliament the power to prescribe judges' retirement age, which, the Judicature Act prescribes as 74 years.

It also establishes the Court of Appeal to determine such appeals from the High Court as may be conferred by law. The substantive law on appellate Court procedure, powers and organisation are found in the Appellate Jurisdiction Act (Cap 9).

(ii) Subordinate Courts

Sub-ordinate courts are established, and subject to the supervisory powers of the High Court. Pursuant to that provision, Parliament enacted the Magistrates Courts' Act (Cap 10) to lay down the jurisdiction and procedure of these courts. The levels of the magistracy are: chief magistrates' courts, senior principal magistrates courts, principal magistrates' courts, senior resident magistrates courts, resident magistrate courts and district magistrate courts of classes I, II and III.

(iii) Kadhi's Courts, Chief Kadhi and Kadhi's

The Kadhi's Court, the Chief Kadhi and the other Kadhis are constitutional offices established under the Constitution. A kadhi is, strictly speaking a judicial officer, a judge or magistrate presiding over an Islamic court called Kadhi's Court, where Islamic law or Sharia is applied and, subject to the court's jurisdiction all the parties before it profess the Islamic faith. But a Kadhi is not necessarily a spiritual leader or imam.

The Constitution provides for the office of the Chief Kadhi and such number of other kadhis, not less than three, as may be prescribed by the law. Parliament may prescribe for subordinate courts to be held by Kadhi. The jurisdiction of the Chief Kadhi and the other kadhis is to hold a court with jurisdiction within Kenyan and extending to determining questions of Muslim law on to personal status, marriage, divorce or inheritance in proceedings in which all the parties are the Muslim .

The Chief Kadhi and the other Kadhis are appointed by the Judicial Service Commission.

The qualification for Kadhis (who include a Chief Kadhi) is under section 66, sub-section 2 of the Constitution, that one must profess the Muslim religion and posses such

knowledge of the Muslim law applicable to any Muslim sect as is satisfactory to the Judicial Service Commission.

Pursuant to these provisions of the Constitution and for the Kadhis to better carry out their functions, Parliament has passed the following Acts:

1. The Kadhis Courts Act (Cap 11);
2. The Mohammedan Marriage and Divorce Registration Act (Cap 155);
3. The Mohammedan Marriage, Divorce and Succession Act (Cap 156); and
4. The Law of Succession Act (Cap 160) .

Under the Kadhi's Courts Act, Parliament has established twelve courts. The Kadhis' Courts Act, passed in 1967, initially established six Kadhis' courts, subordinate to the High Court, four having jurisdiction within the former Protectorate, one in Nyanza, Western and parts of Rift Valley provinces and the last one having jurisdiction over the former Northern Frontier Districts of Garissa, Wajir and Mandera.

An appeal from a Kadhis' court usually goes to the High Court; which sits in appeal with the Chief Kadhi or other Kadhis as assessors. Their opinion as assessors is not however, binding on the judge in deciding the appeal, especially if he disagrees with their opinion. An appeal also lies in the Court of Appeal from the High Court and, in that final court, the Chief Kadhi or any other kadhi does not sit even as an assessor.

Kadhis' courts existed in the East Coast of Africa long before British colonisation. In Kenya, they existed along the Coast, which, during colonisation, was under the Sultan of Zanzibar. In 1895, the Sultan gave the British power to administer a 10 mile coastal strip provided that they would respect the existing kadhis courts, among other things. The British did so and declared a protectorate over the coast while the rest of Kenya was a colony proper. The Sultan, however, retained sovereignty over the 10 – mile coastal strip. During the last years of the independence struggle and at the start of the Lancaster House Constitutional talks in 1961, the status and fate of the coastal strip came up for determination. The British organised separate talks for the delegates from sultanate and those from the colony. The British government and the Sultan also appointed a Commissioner, Mr. James R. Robertson, to study the issue of the coastal strip, consult all those concerned and report to them. In *The Kenya Coastal Strip – Report by the Commissioner*, he reported that opinion was divided as to whether the coastal strip should join an independent Kenya, or be declared independent on its own, or reverted to the Sultan of Zanzibar. He, however, recommended that it should join Kenya subject to the Kenyan Government guaranteeing respect for the Kadhis' courts, among other conditions. Prime Minister Jomo Kenyatta and Zanzibari Prime Minister Shamte (on behalf of the Sultan of Zanzibar), signed an agreement in October, 1963, in the form of an exchange of letters whereby the Sultan surrendered his sovereignty over the coast of Kenya in return for Mzee Kenyatta guaranteeing the continued existence of the kadhis' courts, among other things. When the independence Constitution was written, the kadhis courts were enshrined under a rubric on the Judiciary.

The current status of the Kadhi's Courts is as follows:-

Although the Kadhis' Court Act states that Islamic law and rules of evidence shall be applied in the court, this does not happen in practice for the Islamic law and rules of evidence have not been made by the Chief Justice. Instead, the kadhis use the law and rules of evidence as provided for under the Evidence Act (Cap 80). Yet section 2 of the Evidence Act clearly states that it shall apply to all other courts, except the kadhis' courts. There appears to be a conflict between section 6(iii) of the kadhis' courts Act, which permits the application of the law of evidence under the Evidence Act and section 2 of the Evidence Act which excludes the kadhis' courts from its application.

Again, the kadhis' courts Act states that the Chief Justice shall make rules of practice and procedure for the court but, to date, this has not been done. Instead, the kadhis use the procedures of the Civil Procedure Act (Cap 21). This is provided for under section 8(2) of the Kadhis' Courts Act; which just as section 6(iii) discussed above, appears to violate the spirit of section 66 of the Constitution. In practice the two sections have acquired the character of claw –back or derogatory clauses to the extent that they have been used in lieu of the Islamic law and rules of evidence and the practice and procedure of the court as ideally envisaged under sections 6(1) and 8(1) of the Kadhis' Courts Act.

Since the kadhis are not trained lawyers who necessarily understand the Evidence and the Civil Procedure it is not desirable for them to use these Acts to administer their courts. There is now an urgent need for the Chief Justice to provide for correct Islamic law procedures, practice and evidence for the kadhis' courts, for them to effectively and competently fulfil their mandate. In view of the Chief Justice's failure to make and provide for these rules for the kadhis' courts, it may be worthwhile to follow the examples of other countries which Kadhis' courts or that of the Chief Kadhi the power to make their own rules.

(iv) The Judicial Service Commission

The Judicial Service Commission (JSC) is established under the Constitution. It is composed of the Chief Justice as chairman, the Attorney-General, two judges appointed by the President and the Chair of the Public Service Commission. The JSC appoints the magistracy and staff of the High Court and the Court of Appeal other than the judges.

The Constitution vests the role of constitutional interpretation and enforcement of the Bill of Rights in the High Court.

11.5.3 The Judiciary in other Constitutions

The structure and organisation of the Judiciary differs from one jurisdiction to another. Certain principles, such as on the administration of justice and independence of the Judiciary, however, do not vary. Most constitutions establish a hierarchy of courts usually commencing at the local (village, county or district) levels to an apex court usually styled Supreme Court or Court of Appeal. In many jurisdictions, such as South Africa, India, Nigeria, Ghana, United States of America and Uganda, the apex court is also the final court on constitutional matters. In yet others, the apex is the constitutional court.

The level of decentralisation and nature of jurisdiction of courts varies not only with the system of government (i.e., whether unitary, federal or confederal), but also with the level of social and cultural complexity. Thus Nigeria has a complex structure of Islamic and customary law courts within and across the various federal states. Indeed, apart from providing for a hierarchy of courts with civil and criminal jurisdiction, the Constitution of Nigeria provides for a complete hierarchy below the Federal Court of Appeal of Sharia and customary courts, with original and appellate jurisdictions on personal law. This level of detail, however, is not usual in jurisdictions which maintain strict separation between state and religion. In these contexts, personal law based on religion or custom is generally dealt with at the subordinate court levels. Thus Article 129(1) of the Constitution of Uganda provides, *inter alia*, for the establishment of

- (d) such subordinate courts as Parliament may, by law, establish, including Kadhis' courts for marriage, divorce, inheritance of property, and guardianship..

11.5.4 What the People Said

The people expressed extensive views on of the structure of the Courts, the appointment of the Chief Justice and other judges, the organisation and structure of the Kadhi's Courts, and general principles of administration of justice. The may be summarised as follows:

- (i) *On the Judiciary in general, that*
 - a) the independence of the Judiciary should be entrenched in the Constitution;
 - b) the Constitution should ensure that there is no interference in the Judiciary by the Executive and by politicians;
 - c) cases should be determined expeditiously;
 - d) judges should be qualified for their jobs;
 - e) court procedures should be simplified;
 - f) all people should be treated fairly and equally before the courts.
 - g) access to courts could be improved by:
 - free legal aid;
 - reducing court fees or paying fees in instalments;
 - simplifying probate procedures; and
 - Increasing the number of judges and magistrates and decentralising the court system to the districts;
 - h) on the structure of courts, a majority expressed a need to establish a constitutional court, supreme court, and village tribunals.
- (ii) *On the appointment of the Chief Justice,*
 - a) it was also suggested that the appointment of the Chief Justice and other judges be undertaken by Parliament on recommendation by the Judicial Service Commission; and
 - b) minimum qualifications were suggested for all judges and basically that judges should be graduates of law.
- (iii) *On the question of discipline by judicial officers, that*
 - a) the Judiciary should have its own code of ethics enforceable and barring members from private business;

- b) an effective complaints procedure be entrenched in the Constitution;
 - c) judges should be disciplined through interdiction, dismissal, suspension, sacking and prosecution;
 - d) corrupt judges should be sacked; and
 - e) a judge should not remain in one station for more than 3 years.
- (iv) *On the Chief Kadhi and Kadhi's courts, that*
- a) Muslims must be consulted in appointing the Chief Kadhi and other kadhīs; they should either elect them or be members of the appointing authority, i.e., the Judicial Service Commission; that Muslim organizations, such as Supreme Council of Kenya Muslims, should be consulted;
 - b) there should be some minimum academic qualifications for the Chief Kadhi and the other Kadhīs, e.g., a degree in general and Islamic Law from a recognised university;
 - c) the Kadhi's Court be empowered to up a scheme of service, improve terms of service and conditions of employment, e.g., salaries, staff, communication facilities, etc;
 - d) the Chief Kadhi be given the same status as a High Court judge and the kadhīs as a chief magistrate.
 - e) the number of kadhīs' courts be increased and such courts set up in every province and district;
 - f) the Kadhi's Court should have a separate appeal court and no appeal should lie in the High Court;
 - g) Muslim judges skilled in Islamic law be appointed to the High Court to hear appeals from the Kadhīs' courts;
 - h) the kadhīs' courts be empowered to determine both the substantive and the procedural law on inheritance and succession for Muslims;
 - i) the Kadhīs' courts be expressly empowered to deal with not only divorce in Islamic marriages but also on issues arising out of such divorces, e.g., maintenance and custody of children, guardianship, adoption, division of matrimonial properties after divorce and other matters incidental and connected with.
- (v) *On subordinate courts, that*
- (a) the Constitution should recognise traditional and local courts with jurisdiction over small claims and matters of personal law; and
 - (b) the authority of traditional elders be recognised.

11.5.5 Commentary

Serious allegations were made against the Judiciary, including inefficiency, incompetence and corruption. Besides, it was fairly evident that the people had lost faith in the Judiciary's ability to dispense justice fairly, impartially and without fear. Similar sentiments had been expressed by a committee established by the Judiciary itself – the Kwach Report and, a Report by Commonwealth Judicial panel of experts.

In the case of the kadhis' courts, however, it was clear that, for Muslims, these had become an indispensable symbol of their Islamic faith and culture. But, more importantly, for the Muslim women, the courts had become an important site for resisting the oppression experienced in marriage and in domestic circumstances in a traditionally patriarchal and male-dominated society. Through these courts, Muslim women have succeeded in fighting protection and enforcement of their rights as guaranteed under Islamic law and to challenge negative cultural practices and customs of Muslim communities that tend to undermine these rights. Islamic law does not permit a woman to be a kadhi, but this does not prevent a woman from being appointed an assistant to the kadhi to help in those instances where women litigants find it difficult to explain to the male kadhi the delicate and intimate details of some of their domestic problems.

11.5.6 Recommendations

The Commission recommends, therefore,

(i) *on the judiciary, that*

- (a) The Chief Justice will be the head of the Judiciary and President of the Supreme Court;
- (b) There should be an independent Judicial Service Commission (JSC) whose functions are to
 - recommend to the President persons for appointment as judges;
 - review and make recommendations on terms and conditions of service for judges, magistrates and other judicial officers, other than salaries and remuneration, to be determined by a tribunal covering all public services;
 - appoint, discipline and remove registrars, magistrates and other judicial officers, including paralegal staff, in accordance with the law as prescribed by Parliament;
 - receive and investigate complaints against judges in accordance with the Constitution;
 - prepare and implement programmes for educating and training judges, magistrates and paralegal staff;
 - advise the Government on improving efficiency in the administration of justice and access to justice, including legal aid; and
 - encourage gender equity in the administration of justice.

(ii) *as regards courts, that*

- (a) there should be a Supreme Court whose functions are to -
 - arbitrate over civil and criminal cases.
 - act as a referral court in cases arising from disputes between district and provincial councils;
 - act as the final court of appeal in all matters;
 - give advice to the Executive or Parliament on the interpretation of the Constitution;
 - Solve disputes arising from presidential elections; and
 - exercise original jurisdiction as provided by this Constitution and by legislation;
- (b) there should be a court of appeal to hear appeals from the High Court on all matters;

- (c) the High Court should have unlimited criminal and civil jurisdiction in all matters; the courts should include specialised courts where appropriate, among which would be
 - the Family Court (as now);
 - the Children’s Court (as now);
 - Commercial courts (as now);
 - a constitutional and administrative Division;
 - an industrial Division;
 - a criminal division;
 - Kadhis Courts; and
 - subordinate courts (magistrates court);
- (d) there would specialized tribunals as may be established by legislation; should be such
- (e) there should be village elders tribunals—for each village or related villages with jurisdiction to
 - hear and determine land disputes; and
 - hear and determine matters relating to personal law;
- (f) the Constitution would provide further that
 - courts should generally be accessible to disabled people;
 - court proceedings be conducted in a language which the people understand;
 - courts are equipped with noticeboards and adequate signs for members of the public to read what is happening and, if they have business, or simply wish to watch the system of justice in operation, know where to go;
 - cases be determined expeditiously; and
 - Judges and magistrates dispense justice speedily, especially to render judgments, orders and rulings within 21 days after the close of the case or application.

(iii) as regards qualifications of judicial officers that -

- a) the minimum qualification for appointing the Chief Justice or a judge of the Supreme Court shall be fifteen years’ experience; as a judge of the High Court or Court of Appeal, practising as an advocate or a full-time law teacher in a recognised university;
- b) the minimum qualification for appointment as a judge of the Court of Appeal shall be ten years’ experience as a judge of the High Court, a practising advocate, or a full-time law teacher in a recognised university;
- c) the minimum qualification for appointment as a judge of the High Court shall be ten years’ experience, a qualified magistrate or a practising advocate;
- d) the JSC should also consider the candidate’s intellectual ability, measured by criteria such as academic qualifications; and
- e) the retiring age for all judges and magistrates should be 65 years.

(iv) as regards the Kadhi’s Courts, that

- a) they should continue to handle cases on personal status, marriage, divorce or inheritance in proceedings in which the parties profess the Muslim religion; however, apart from civil cases, they should be empowered to handle commercial cases involving Muslims only;

- b) the Chief Kadhi and other Kadhis should be appointed by the Judicial Service Commission in consultation with Muslim organisations, such as SUPKEM;
 - c) the Chief Kadhis and Kadhis minimum academic qualification should be a university degree on Islamic law from a recognised university;
 - d) the Chief Kadhi should have the same status, privileges and immunities as a High Court judge; the senior kadhi as a chief magistrate and the kadhi as a resident magistrate.
 - e) in the case of the Chief Kadhi:
 - must be a Muslim; aged 35 years and above but below 65 years.
 - be an advocate of the High Court or qualified to be appointed as one and has been a legal practitioner for not less than 10 years; and
 - have obtained at least a degree in Islamic law from a recognised university; or
 - have had not less than 10 years' practical experience in of Islamic law, has held the office of a kadhi's court for the same period and has at least a degree in Islamic law from a recognised university;
 - f) if a Kadhis is the qualification as (a) above, the exception shall be 5 years under each of the categories of qualifications;
 - g) the number of kadhis courts should be increased and they should be set up in every Province and District;
 - h) Kadhis' courts shall have appellate jurisdiction.
 - i) each Kadhi Court shall have a Muslim female assistant to handle cases involving women;
 - j) Muslims of the Shia sect should be appointed as kadhis to cater for the interests of the Shia Muslims; and
 - k) Kadhis' courts procedures shall be simplified without impeding dispensation of substantive justice.
- (v) *as regards transitional provisions, that*
- a) all judges would retire at 65;
 - b) all judges: Puisne judges, judges of appeal, judges of the Industrial Court, the Chief Justice and the Chief Kadhi, currently serving in the judiciary and have attained 55 years would be entitled to retire with all benefits with additional pension the equivalent of 5 years' service; this right must be exercised within 30 days of the coming into force of this Constitution;
 - c) subject to (b) above, on the coming into force of this Constitution, any judge against whom a formal complaint is pending with the JSC, the Anti-Corruption Authority, the Advocates Commission or the Advocates Disciplinary Committee shall proceed on paid leave, pending hearing and determination;
 - d) where, after this Constitution has come into effect, a judge has not exercised any option under (b) above, and is not the subject of (c) above he/she will, within 60 days, file with the Judicial Service Commission all documents and evidence required under the leadership code, provided for in Chapter sixteen;
 - e) where, after receipt of the documents and evidence set out in (d) above, and if the JSC thinks that the judge does not satisfy the criteria under the leadership code, it shall dismiss the judge without loss of accumulated benefits;
 - f) no judge shall have his/her pension or other benefits paid, if she/he has not delivered all pending rulings and judgments and accounted for all funds and property of the Judiciary;

- g) No judge who has retired under this Constitution shall be eligible for reappointment.
- h) after the new Constitution has come into force, the JSC shall be reconstituted, no matter whether representatives of the High Court and the Court of Appeal have not been appointed; the Parliamentary Judicial Committee shall, within 30 days of the opening of Parliament, ensure the constitution of the JSC;
- i) within 30 days of the Constitution coming into force, the JSC shall advertise such positions of High Court or Court of Appeal judges as shall require filling and prepare a short a list to be presented to Parliament to fill the positions not later than a month;
- j) in respect of the Supreme Court, the President shall, in consultation with the Prime Minister, nominate suitable persons within 45 days of the coming into force of this Constitution, subject to approval by the Parliamentary Judicial Committee;
- k) subject to the Advocates Act, any judge leaving office under these provisions shall be at liberty, without hindrance, to practice law as an Advocate of the High Court; and
- l) the President shall appoint a Chief Justice from among those persons appointed to the Supreme Court.

11.6 The Public Service

11.6.1 General Principles

Although not normally regarded as an arm of government, it is obvious that the public service carries the burden of public administration. It was important, therefore, that this institution should be examined. Indeed, by requiring the Commission to examine and make recommendations on the establishment of mechanisms to enhance good governance and democracy, an implied mandate to examine the public service is given.

The public service is an important component of the executive organ of government. It consists of persons in-charge of vital functions and the delivery of public services, including formulation of policy. The Public Service is crucial for national cohesiveness and independence.

The Public Service has two main functions:

- implementation of Government policies and laws; and
- provision of manpower to deliver public services.

Kenya's Civil Service currently consists of the following major offices and departments:

- All Permanent Secretaries;
- Staff of all ministries, including the Office of the President, and their departments and training institutes;
- The provincial administration;
- The disciplined forces;
- The Police and other security services;
- Local government officials;
- Officers in parastatals and state corporations; and
- Officers in constitutional commissions and other constitution Offices.

In 1999, the public servants were of various types distributed as follows:

<u>Departments:</u>	<u>Number of Public Servants:</u>
Central Government	208,500
Teachers Service Commission	105,200
Local Government	78,000
Business in which the Government holds a majority share	48,000

According to the Constitution, Parliament enacted the Service Commissions Act (Cap.185) to provide for the composition and mode of operation of the Public Service Commission.

11.6.2 The Public Service in the Constitution

(a) Background

The Independence Constitution provided for a Public Service Commission for the Republic and a Public Service Commission for each region.

Membership of the Commission consisted of a chairman, a deputy chairman, two members appointed by the Governor-General, acting in accordance with advice by the Judicial Service Commission, and 3 representative members appointed by the Governor-General, acting in accordance with advice by the President of the Regional Assembly of that region.

The qualification requirement prohibited from appointed any public officer and any member of the National Assembly (or any previous member or any person ever nominated for election as a member of the National Assembly or Regional Assembly of local authority).

The Public Service Commission had the following mandate:

- to appoint persons to hold or act in offices in the public service;
- to discipline and control persons holding or acting in such offices; and
- to remove such persons from office.

The Commission also advised the Governor-General on appointing the following persons:

- the Auditor-General;
- the Attorney-General;
- Permanent Secretaries and the Secretary to the Cabinet; and
- *Liwalis* and *Mudirs* of the Coast Region.

There was security of tenure for the members; they could be removed only on investigation by a tribunal set up for that purpose. The Governor-General had the authority to establish the number and kinds of offices for the country and the Public

Service Commission supplied the staff. The provisions of other Constitutions dealing with the Public Service generally concern themselves with the following value matters:

- Professionalism;
- Independence and political neutrality;
- Recruitment and promotion procedures;
- Terms, schemes and conditions of service;
- Training and continued education;
- Pensions rights and retirement benefits of public servants and employees of private establishment and retirement;
- Staffing and retrenchment, size and propriety of service; and
- Official secrets and the right to public information.

(b) The Current Constitution

The current Constitution provides for a Public Service Commission. The public service functions are stated to include appointing, disciplining and removing civil servants, including those in the local government, save those, specifically left to the discretion of the President or other authorities.

The Public Service Commission is composed of the Chairman and sixteen members, all appointed by the President. A member has a 3-year term but may be relieved of his or her duties by the President. The Commission is not subject to the control of any person or authority in exercising its functions. The President is empowered to compulsorily retire any expatriate member where a suitable Kenyan exists to replace him.

The Constitutions also deal with public service pension benefits, protecting pension rights by providing that it is a charge upon the Consolidated Fund and that the Public Service Commission must consent to reducing, withholding and suspending benefits. Majority of the pension clauses deal mainly with protecting the pensions of the pre-independence expatriates by providing/allowing export of the pensions without application of any charge or levy.

11.6.3 The Public Service in other Constitutions

Because of their centrality in government operation, most constitutions define the principles governing the appointment and discipline of public servants, establishing an independent institution to recruit and discipline them or both. Those provisions usually cover central and local government, and parastatal offices. That is the case in Ghana, Singapore, India and Uganda. While many jurisdictions merely create a single “Public Service Commission” with responsibility over the entire service, others set up sector-specific commissions. The constitutions of Ghana and Uganda provide, respectively, for the former and latter categories. Thus, in Uganda, the Constitution creates, in addition to a Public Service Commission,

- an Education Service Commission;
- a Health Service Commission; and a
- District Service Commissions.

The choice of model usually depends not only on the degree of independence desired for each sector of the service but also on the complexity of the system of governments in a given jurisdiction.

11.6.4 What the People Said

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

- (i) *as regards appointment, that*
 - a) Civil servants should be appointed and promoted on merit after regular interviewing procedures;
 - b) all public service employees should be appointed by the Public Service Commission;
 - c) the positions of permanent secretaries should be advertised;
 - d) the President should appoint Public Service Commission members.
- (ii) *as regards independence, that*
 - a) the Public Service Commission should be an independent body;
 - b) there should be no political appointments as a way of strengthening the Commission's management and discipline roles;
 - c) public servants should have security of tenure; and
 - d) the Commission should be an independent body be composed of nominees from the ruling party.
- (iii) *as regards terms and Conditions of Service, that -*
 - the Government should improve the terms and conditions of service, especially the salaries of all civil servants, including teachers;
 - police should be well remunerated and well housed; and
 - the civil service needs to offer desirable benefits to its employees to attract competent Kenyans.
- (iv) *on Declaration of Wealth and Code of Ethics,*
 - a) all public officers will be required to declare their wealth; and
 - b) public officers should have a binding code of ethics.
- (v) *on Discipline and Efficiency,*
 - a) those who misuse Government resources should be investigated and if found guilty prosecuted and all the resources confiscated;
 - b) Parliament should vet members of the Public Service Commission to ensure they are not corrupt and incompetent;
 - c) persons with bad records should not be entrusted with public offices;
 - d) the Public Service Commission should transfer public servants after regular intervals to maintain efficiency and discipline;
 - e) public servants charged in court should be suspended pending determination of suits;
 - f) public servants who do not perform should be dismissed by the Public Service Commission and not transferred to other stations;

- g) action should be taken against senior civil servants(s) who malign, intimidate and victimise junior officers without any just cause; and
 - h) the Public Service Commission should not infringe on the rights of civil servants;
- (vi) *on excluding Civil Servants from Private Business, that*
- a) Government officers should not be allowed to operate business;
 - b) Government doctors should not run private clinics;
 - c) the Ndegwa Commission report on the public service be reviewed.
- (vii) *on Regional Representation in the Public Service Commission;*
- a) the public service should have regional representation at the membership level and be gender-balanced.
- (viii) *on Retirement and Pension Benefits:*
- a) Views on retirement age varied between retaining it at 55 and extending it to 65;
 - b) many were of the view that retirement benefits should be reviewed for both retired and serving public officers;
 - c) Other recommended that those who have retired should be awarded their benefits promptly;
 - d) A considerable number them said there is a need to give special status to retired civil servants by classifying them as senior citizens with full social welfare benefits.

11.6.5 Commentary

It is clear that what the people were asking for was the re-establishment of principles of public service neutrality, impartiality, and independence. The people want to see appointment processes that are transparent and offices that are not only accountable to the people but also capable of guarding public wealth and resources. There was considerable disquiet about the apparent inability of public officers to exercise powers independently of political pressure, and of the fact that appointment procedures even where clearly set out in the law, were often subordinated to demands of patronage. The clear impression being projected was that public service appointments were often based on criteria other than merit, competence or relevant experience. To restore public confidence in the service, demands were justifiably being made for security of tenure, adequate remuneration, and strict neutrality.

11.6.6 Recommendations

The Commission recommends, therefore, that:

- (i) *as regards the establishment of a Public Service Commission-*
 - a) there is need a establish an independent Public Service Commission.
 - b) powers and functions of the Public Service Commission should :
 - to advice the Prime Minister in performing his or her functions.

- to appoint, promote and exercise disciplinary control over persons holding office in the public service of Kenya.
 - to review the terms and conditions of service, training and qualifications of public officers and matters connected with personnel management and development of the public service and make recommendations to the Government.
 - to guide and coordinate District Service Commissions.
 - to hear and determine grievances from persons appointed by Districts Service Commissions.
 - to perform such other functions as may be prescribed by the new Constitution or any other law.
- c) The Commission would make a report to Parliament in respect of each year on the performance of its functions.
- d) Parliament would, by law, empower the Public Service Commission to make regulations for the effective and efficient performance of its functions under the new Constitution or any other law.
- e) the Directorate of Personnel Management should be abolished.
- f) the President, should subject to approval by Parliament, appoint members of the Commission.
- g) The Commission should consist of
- between 8 and 10 commissioners serving for a term of 5 years (renewable subject to review by Parliament).
 - persons reflecting the diversity of the Kenyan people.
- h) all Public Servants shall sign a Code of Conduct / Ethics which shall bind them to observe it as a part of their employment obligations.
- i) to qualify for appointment to the Commission, one should be of high moral character and proven integrity. Appointments to the Public Service Commission should be based purely on merit; considering academic qualifications and professional experience.
- j) public service employees should be entitled to favorable terms of service as a mechanism to attract competent Kenyans to work in the civil service.
- k) a person holding any of the following offices shall relinquish his or her position in that office on appointment as a member of the Commission.
- a Member of Parliament
 - a Member of District and Provincial Council.
 - an executive member of a political party, or political organizations; and
 - a public officer.
- l) the emoluments of the members of the Commission shall be prescribed by Parliament and shall be charged on the Consolidated Fund.
- m) in the absence of both the Chairperson and the Deputy Chairperson the President may designate one of the members to act as Chairperson.
- n) A member of the Commission may be removed from office by the President only for:
- inability to perform the functions of his or her office rising from infirmity of body or mind.
 - misconduct; and
 - incompetence.
- o) public servants should retire at the age of 65.

(ii) *On pensions and other benefits, that*

- a) the Constitution should guarantee pension rights and retirement benefits to public servants:
- b) a public officer should be entitled to his/her terminal dues on retirement.
- c) the Pension Act should state that civil servants who have attained retirement age should be retained in the service until they are paid their full benefits, pension and allowances.
- d) senior citizens, (old retirees) should be entitled to State welfare benefits (housing and healthcare).
- e) senior citizens (retired civil servants) need formal recognition/ identification.
- f) pension laws and protection rights should be reviewed (pension is a right not a privilege).
- g) pension benefits should remain a charge of Consolidated Fund.

CHAPTER TWELVE - DEVOLUTION OF POWERS

12.1 The Mandate of the Commission

In addition to examining and making recommendations on organs of government, the Review Act requires the Commission to examine and make recommendations on:

- structures and systems of government, including the federal and unitary systems;
- the place of local government in the constitutional organisation of the Republic; and
- the extent of devolution of power to local authorities.

Further, the Act requires the Commission to ensure that the review process:

- promote people's participation in national governance by devolving power;
- respect ethnic and regional diversity and communal rights, including the communities' rights to enjoy their cultures and express their identities;
- establish a free and democratic system based on good governance and the separation of powers and checks and balances; and
- promote the accountability of public authorities.

At the core of this mandate is the challenge of devolution of power.

12.2 Levels of Devolution

12.2.1 General Principles

Traditionally, it has been assumed that only a strong national State, with a unitary system of government, could deploy resources and capacity. The argument is often made that only a strong centre can

- assure national unity;
- achieve growth and redistribution;
- promote democracy; and
- satisfy the people's liberty and self-actualisation.

However, due to frequent failings by unitary or centralised systems, manifested by increased marginalisation of minority groups, abuse of power, inequitable distribution and mismanagement of national resources, there have been calls in the last two decades to decentralise government powers and functions.

Decentralisation refers to geographic transfer of authority, whether by deconcentration of administrative authority to field units of one department or level of government, or by political devolution of authority to local government units or special statutory bodies.

Decentralisation has thus political and administrative aspects. The exact character takes in different countries depends very much on the specific circumstances and experiences. Underpinning the concept of decentralisation is the idea of distribution of state powers between the centre and the periphery. The key questions being debated are:

- the form and extent to which the power and authority of the State to tax, spend, regulate, provide and deliver services, distribute and redistribute, define and enforce rights and control land and other resources should be decentralised; and
- the extent to which power should be concentrated in the hands of a single set of institutions or the extent to which such powers should be dispersed across a range of sub-national or local institutions, each possessing or controlling some level of authority or autonomy.

Decentralisation can be applied to both unitary and federal governments. Thus, it may not be necessary, for example, to create a federal system or structure in order to devolve power to lower levels, regions or units. Decentralisation of state power and authority, in its wider sense, takes two forms: deconcentration and devolution.

(a) Deconcentration

Deconcentration refers to administrative decentralisation and involves the transfer of administrative authority, perhaps co-ordinated by a representative of the central government in that area, from the centre to the field. It is the delegation of authority to public servants working in the field and responsible in varying degrees for government policy within their territories to make administrative decisions on behalf of the central administration.

There are no legal guarantees for exercising transferred powers. The government may at any time recall them. In practical terms, this involves dispersion of government bureaucracies to the field. Deconcentration is thus at the heart of the daily administration by the Executive and is realised through the public services. Kenya's provincial administration system is a good example of deconcentration.

Public administration in this sense has a very real impact on the people's lives and the manner in which it is carried out has constitutional relevance. The general rule is that the authority must be exercised within the law, both procedurally and substantively, and without any ill will as to disentitle a citizen of what he is by law entitled and, as a corollary, to grant benefit to one who is not in law entitled to receive it. Closely associated with public administration is discretion. By constitutional standards, discretion ought to be exercised objectively and after careful consideration of the relevant factors. It is required of the Constitution to legitimise and create checks on this power and to design mechanisms for convenient adjudication for validity.

(b) Devolution

Devolution is the practice in which the authority to make decisions in some sphere of public policy is delegated by law to sub-national territorial assemblies (e.g., a local authority). Devolution entails transferring governmental or political authority – with the powers of the constituent units determined by legislation rather than by the Constitution.

Thus devolution is by all means, a political device for involving lower-level units of government in policy decision-making on matters that affect those levels while deconcentration is its administrative counterpart. Devolution, as a specific category, refers to the arrangement where the powers and structures of decentralisation are provided in the ordinary law and can thus be modified or repealed more easily than can federal

arrangements and does not normally require the consent of the devolved unit. London's devolution to Scotland is of this type.

The term, "devolution", is commonly used to refer to those situations in which a previously unitary state distributes power to other territorial units (as in India, Nigeria or Kenya at independence).

A large number of states today are federal or have elements of devolution. One estimate is that 40% of the world's population lives under some form of devolution. In the Commonwealth, these include: Canada, India, Malaysia, Australia, South Africa, Nigeria, Pakistan and Britain. In Africa, there are the Nigerian and Ethiopian federations. Some of the longest surviving Constitutions - the US, Switzerland and Canada, are federal. The European Union is a modern example of several important and well-established states delegating large elements of their sovereignty to a common political and administrative entity. The current moves towards a federation of East Africa and the ambitious plans of the African Union are examples of this latter tendency. In every one of these efforts, there is an overarching orientation to devolution.

(i) Rationale

For many reasons, devolution is popular. The earlier examples represent separate sovereign States coming together to form a federation to strengthen their defence capacity or to create economies of scale (that is to say, create larger markets and pool resources) or to manage sovereignty over large distances. In Africa, at various times, the appeal of devolution was to give expression to the desire for a continental or regional unity.

When devolution takes the form of power distribution from a unitary centre, the reasons are usually different. In India, Nigeria and Ethiopia, for example, devolution was a response to demands by ethnic groups, usually minorities, for a bigger share in the affairs of the State, which they considered they could not achieve in a unitary State.

Modern instances of devolution are almost always examples of accommodating and consolidating ethnic, regional, linguistic or religious diversity, as in Bosnia-Herzegovina, the Russian Federation, Puerto Rico and the USA, Spain and the Philippines, and the recent recognition of autonomous aboriginal areas in Canada. In these instances, sometimes power is devolved to geographical areas to safeguard ethnic and cultural interests and identities. Devolution is thus seen as the response to the multi-ethnic or multi-nationality character of the national population, an attempt to retain intact the sovereignty and unity of the State.

In these situations, the aim has not been to eliminate diversity, but rather to accommodate, reconcile and manage it within an overarching harmony and unity. This suggests, that many federal political systems by reconciling the need for a large-scale political organisation with the recognition of ethnic, linguistic or historically derived diversity, have the advantage of a closer institutional approximation to the multi-national reality of the contemporary world.

Apart from these broad considerations, it has been argued that, by dispersing power to different levels, devolution promotes good governance, enhances separation of powers, multiplies the incidence of checks and balances and enhances bureaucratic effectiveness, transparency and accountability of governmental power.

However, the extent to which devolution succeeds to limit power and to achieve these values has a lot to do with the design of devolution itself. The ideal is always a discrete model that ensures effective separation and check on power and functions at all levels and units of devolution, as opposed to a system in which institutions, powers and functions overlap. Essentially, the different levels and units of devolution act as locations of power and enlargements of democratic space, thus enhancing and deepening democracy, democratic methods and people's participation in government processes. Location of power closer to the people also achieves public accountability since power is easier to control at the local rather than at the national level.

One of the vital characteristics of ideal devolution models is not only that the residents are constantly consulted on decisions but also are part of the decision-making process. Constant popular consultation and participation nurtures the spirit of ownership of development processes and is, therefore, able to achieve a more responsive and more effective management of resources and government processes.

The other value of public participation is that it nurtures the spirit of ownership of resources and the development process and, therefore, has the potential to lubricate the distribution of resources by fostering need based development criteria.

Devolution has served as an invaluable development mechanism in many ways. Various units of devolution are in themselves autonomous development regions and, as such, are points for a more equitable distribution of development funds. In any event, they encourage experimentation, localisation and flexibility in the more general national policies and institutions, to meet identified priorities.

(ii) Disadvantages

However, devolution may not necessarily translate into greater democracy because, in a number of instances, it may serve only to put power in the hands of local autocracy. This is why it is necessary, while considering the options, keep in mind the need to ensure that the subjects of devolution are sufficiently motivated and organised to participate vigorously in managing local affairs and that appropriate mechanisms are in place to underpin democratic values.

Similarly, devolution may undermine national unity and inflate ethnic, religious and cultural diversities. It has capacity to lead to an even greater marginalisation of minorities, especially the minorities within minorities.

Again, poorly designed devolution units may mean expensive duplication of ineffective government; over-bureaucratising the decision-making process as well as weakening the process of accountability. Moreover, the unjustifiable multiplication of machineries and processes of intergovernmental consultations may result in government rigidity and the accompanying resource and opportunity costs.

In other respects devolution diminishes the national government's power and value to redistribute resources. This necessarily creates disadvantage for less developed units and may thus generate dependency and, where this is chronic, result in instability.

In general, it is difficult to generalise the form, structures, method, extent, and consequences of devolution since each experience has its own historic or specific context. Nevertheless, the result is a combined system of 'shared rule' at the centre and 'self-rule' in the regions. Some matters are dealt with by the central government in which all communities participate, while others are to be dealt with by the communities, usually in specified geographical areas, in various combinations between unity and diversity.

(iii) Considerations in Devolution Process

The primary purpose of devolution varies from place to place, with implications for structure, distribution and degree of co-operation between different levels of government. Logically, therefore, the level and form of devolution adopted must be informed by the peculiar circumstances of each case and the underlying reasons for its establishment. There are, however, important considerations that are instructive in the decision process.

First, there must be a consideration for the levels of devolution. First, the units to which power is devolved should be identified. As much as possible, the units should experience equal or near-equal social, economic, demographic and geographic circumstances.

Second, it is always necessary to consider the broad principles and values to guide devolution and the operation of devolved units. The values reiterate the general standards to be applied on such issues as allocation of resources, delivery of services and regulation of the relationship between the governors and the governed.

Third, the devolved powers must be clearly defined. Some powers may be exercised exclusively by the units or concurrently by both the units and the national government. Greater power to the units means greater autonomy for them. But there is always an imperative need to ensure that autonomy is balanced against the need for a unified homogeneous State.

Fourth and perhaps most important consideration is the financial arrangement between the centre and the units. It is helpful that the details on sharing resources and opportunities, the division of power in relation to raising, spending and transfer revenue, and more so, the establishment of criteria for assisting less endowed units, be set clearly in the constitutive document. The manner in which the resources are mobilised and spent goes to the heart of the viability of the devolution itself and thus the need to design devolution structures that optimise use and equality in distributing resources.

Finally, and equally important, the framework of the relationship between the central government and the units should be explained. It may be achieved by reiterating the powers and functions of each unit and by explaining clearly the areas of interface. Equally, the mechanism for settling any disputes that may arise requires to be provided for. Closely related to the relationship between the units and the centre is the need to clearly demarcate and balance between the interventionist power that the national government may exercise over the units and the latter's desirability for some level of independence and autonomy.

Although devolutions throughout the world have been modelled at the state level, it is important at the regional, provincial, district, municipal and village levels, to consider in choosing a model, the factors outlined above be considered together within the context of a

political consensus to ensure viability. Consensus is the single most crucial factor in deciding on the powers, functions, and structural arrangements of the devolved units.

(iv) Forms of Devolution

Devolution may take one or several forms, namely, federation, confederation or local government. Federation is considered the highest form of devolution and refers to the arrangement existing in federations. Federations are compound polities combining strong constituent units of government and a strong central government, each possessing powers delegated to it by the people through a Constitution, each empowered to deal directly with the citizens in exercising legislative, administrative and taxing powers; and each directly elected and accountable to its citizens.

By complex mechanisms, federations enable strong federal and strong sub-federal governments, each directly responsible to the citizens. What distinguishes them from constitutionally decentralised states is that each level of government derives its full authority from the Constitution, not the other level of government, and that the Constitution cannot be amended unilaterally by one level of government.

The other fundamental and distinguishing characteristic of federal systems is that the central and the regional governments are not subordinate to each other but are, instead, co-ordinate. It is also the case in a federal system that, once established, the powers are distributed to all units equally. Federal units constituting the system can have a local government system. In this case, it is the responsibility of the sub-national units constituting the federation to determine the scope of the responsibilities of the local government authorities. The parliaments of the sub-national units can alter the distribution of power between it and the State governments in the same way as is done in the unitary systems.

Federalism provides a technique of political organisation that permits action by a shared government for certain common purposes together with autonomous action by regional or local units for other purposes that relate specifically to maintaining their distinctiveness. More recently, federations have been viewed as utilities for uniting constituent units based on different ethnic nationalities and as a way of forestalling the pressures of fragmentation.

Confederations as opposed to federalism, embody two or three constitutional orders of government. The centre is created by the constituent units and the centre exercises power delegated by its constituting units.

Under a federal system, the various sub-national units can have a local government system. In this case it will be the responsibility of the sub-national units, to determine the scope of responsibilities of the local government authorities.

The Parliaments of the sub-national units can, in other words, alter the distribution of power between them and the State governments in the same way as under unitary systems.

Devolution, then, may, in principle, take widely different forms, ranging from very limited legislative powers granted to assemblies in one selected province only to a comprehensive decentralisation of government granted to assemblies in all provinces, wielding extensive powers to legislate and to control provincial governments, and therefore, implying a great

reduction in the scope of the central legislature and government. Thus, even with such forms of decentralisation, a country could still have local government systems by creating local authorities in each province or region. A local government system can thus operate both under a unitary system and under a federal structure.

Traditionally, local government systems developed to deal with specific urban problems. This has changed over time. In contemporary state organisation, local governments concern themselves not only with urban matters, but also with delivery of a number of services to rural as well as urban communities. Local governments serve the following principal functions:

- Establish representative government institutions through which appropriate services and development activities can be made more responsive to the local wishes and initiatives;
- Enable the people to exercise the right to self-government;
- Mobilise local resources by involving local communities; and
- Provide a two-way channel of communication between local communities and the central Government.

Local government structures, character and functions differ from country to country. So does the level of autonomy they exercise. In developed countries, the local government system is nothing but a complementary to the national government providing services, mobilising and administering people and local resources towards development goals.

12.2.2 Devolution of Powers in the current Constitution

(a) Background

At independence, Kenya was a constitutionally devolved State. Significant power was devolved to regions and entrenched in the Constitution. Regions enjoyed certain tax and financial powers and had both legislative and executive authorities. Regional government dealings with the national Government were deeply entrenched in the Constitution and Kenyans had a right to live and settle anywhere in the country; discrimination was expressly prohibited. This system of devolution was popularly referred to as *majimbo*. In constitutional terms, *majimbo* can be seen as a form of federalism (more precisely, semi-federalism), even though it could be, and was, abolished purely by a decision of the National Assembly.

Today, it is not clear what is meant or involved when people talk of *majimbo*. Sometimes, it is discernible from the way people talk or react to issues relating to decentralisation that the term is used or interpreted to mean the division of the country into autonomous ethnic homelands. On other occasions, it is used to refer to the unit of devolution, for example, the province as opposed to the district. Some of those interpretations are clearly out of tune with the values ingrained in the *Majimbo* system at independence.

The main values and characteristics of the independence *majimbo* system were as follows:

- division of the country into seven regions, namely, Coast, Eastern, Rift Valley, Nyanza, Western, Eastern and the Nairobi Area;

- a regional assembly composed of elected members and specially elected members, the number of which was the elected members divided by ten; one had to show a genuine connection with the region to vote’.
- the President of the region, elected by the elected members from among themselves or from those qualified to be elected; the candidate had to garner a 2/3 majority of the Electoral College, and was removable by a vote of 3/4 of the members;
- a vice-president was elected and dismissed in a manner similar to that of the President;
- the region’s executive power was known as the Finance and Establishments Committee, and was mandated to establish one or more committees to deal with commerce and industry, education, health, land agriculture and forests, local government administration, public order and safety, works and communication, the region had authority to levy tax on a number of minute commercial and commerce – related activities, while the central Government was under obligation to transfer certain percentages of revenues to the regions;
- a regional civil secretary appointed by the Public Service Commission in consultation with the regional president in charge of the civil servants largely deployed by the national Public Service Commission in consultation with the region;
- a regional police force, headed by a regional police commissioner, appointed by the Police Service Commission in consultation with the region; and
- a list of detailed areas of legislative competence for the regions, providing for matters that the Regional Assembly may exclusively legislate and others in which there was concurrent competence with the National Assembly.

Regional boundaries could only be altered by the Regional Assembly’s approval and upon a resolution by both Houses of the National Assembly.

The Constitution also provided for a local government system. Each Region was divided into local authority areas headed by elected Local Authority Councils. There was a Regional Local Government Staff Commission charged with the welfare of the Local authorities’ staff within the Region. There was a national Minister in charge of Local Government areas, who ensured that they exercised propriety in their affairs.

The Regions were dismantled by carefully orchestrated constitutional amendments in the 1964 –1969 period. The first of these was an amendment in 1964. It amended a schedule of the Constitution by removing all, except the specifically entrenched powers, from the Regional Assemblies. Thereafter, another constitutional amendment deleted certain specially entrenched clauses concerning the Regions, especially those on financial arrangements between the centre and the regions. The amendment also made less rigid the method of altering of Regional Assemblies.

In June, 1965, the Constitution was amended for a third time to abolish the special entrenchment of certain sections on to the executive powers of the Regional Assemblies. It also renamed the Assemblies as Provincial Councils. In 1968, the Upper House of Parliament, the Senate, was merged with the House of Representatives to establish the unicameral House. Parliament’s life was extended by two years while senatorial districts were reorganised to merge them with certain constituencies. Later, the Provincial Councils were abolished and the provisions protecting provincial and district boundaries from erratic alterations were deleted.

(b) The Current Constitution

The current Constitution does not provide for any form of devolution or make any reference to the local government system. The only mention of local government is in the provisions vesting trust lands in the county councils. A local government system is, however, in place.

(a) The System of Local Councils

The Local Government Act (Cap. 265) establishes a full-fledged system of local councils headed by a Minister.

There are various types of council: county councils, a city councils, municipal councils, town councils and urban councils. Further provisions are made in the Act establishing local government boundaries, constitution of authorities and elections, proceeding general administration and committees, powers, duties and functions and finances. They provided for the reporting, investigation and control of local authorities. The Minister for Local Government exercises immense powers over the councils including the power to establish any area to be or cease to be a municipality, county, or township; to define the boundaries of a municipality, county or township, to assign or alter the name of a municipality, county or township; to alter the boundaries of a municipality, county or township, by either adding or subtracting from its area; to amalgamate two or more counties into one county; to investigate the affairs of local authorities and to issue an order for the winding up of a local authority and to appoint a commission, among others.

These authorities are constituted by such a number of councillors as may be elected, nominated or appointed. The Electoral Commission establishes the electoral areas and boundaries from which the councillors are elected. The nominations are based on the proportion of political parties in the respective councils.

Elections to local councils are based on wards. The Electoral Commission has stepped in to rationalise the number of wards. The Commission, after a public hearing, drastically reduced the number of wards that had been created unjustifiably and for political reasons.

At their first meeting after election, the councillors elect their leaders; in the case of the city and municipal councils, the mayor, deputy mayor; and in the case of county and town councils, the chair and deputy chair.

Local authorities are run by Government officers from the Public Service Commission. This arrangement has often created a lot of problems for the local authorities since the Government officials seconded to the authorities do not owe any allegiance to the elected councillors. Conflicts are, therefore, commonplace.

The primary function of local authorities is to render services to residents. These include markets and social welfare, regulating liquor sales and certain businesses and land use planning.

Local authorities are largely funded by the central Government, even though they may raise their own revenue by licensing business premises. The Local Authorities Transfer Fund (Act

no. 8 of 1998) establishes the Local Authorities Transfer Fund to which the Government remits 5% of all income tax collections to fund affairs of local authorities.

A commission of Inquiry into the Affairs of Local Authorities (the Omamo Commission) and other bodies, including submissions to this Commission, have identified various problems affecting local authorities. Among these are:

- the functions of local governments are mainly administrative and regulatory, having little to do with self-determination;
- local development strategies are based on central planning;
- centralisation of power in national Government ministries has led to a wide variety of constraints on local government development;
- Central Government grants to local authorities are increasingly inadequate;
- a general lack of managerial and technical expertise precludes the formation of effective local government institutions and a desirable working relationship between the central and local governments;
- creation of councils is erratic and done without any consultation with the residents; indeed, urban, municipal, and town councils have been created without any objective criteria. There is thus there is much in-congruency throughout the country.
- the Act lacks uniform application throughout the country and is inadequate in several areas - for example, it does not state the consequences of particular designations- Nairobi has had a city council since 1950, yet there is no provision for a city council, nor does the Act state what special responsibilities and privileges a city council has, the law does not say that each district area has to be a county council.
- the criteria for composing local authority areas are superfluous and result in a bloated and largely inefficient council, it gives no criteria or qualifications for nominating and appointing councilors; neither are special interest groups defined; nominated councillors serve merely the interests of nominating parties or individual politicians;
- the Ministry of Local Government has no facilities or capacity to supervise local authorities, the minister has wide powers exercised without consultation with and participation by the people; ministers have used such powers to create new haphazard counties and municipalities; and
- the fact that local government powers and finances are not protected by the Constitution has exposed the system to manipulation, high-level corruption and unbridled plenary powers to the minister.

(ii) The Provincial Administration

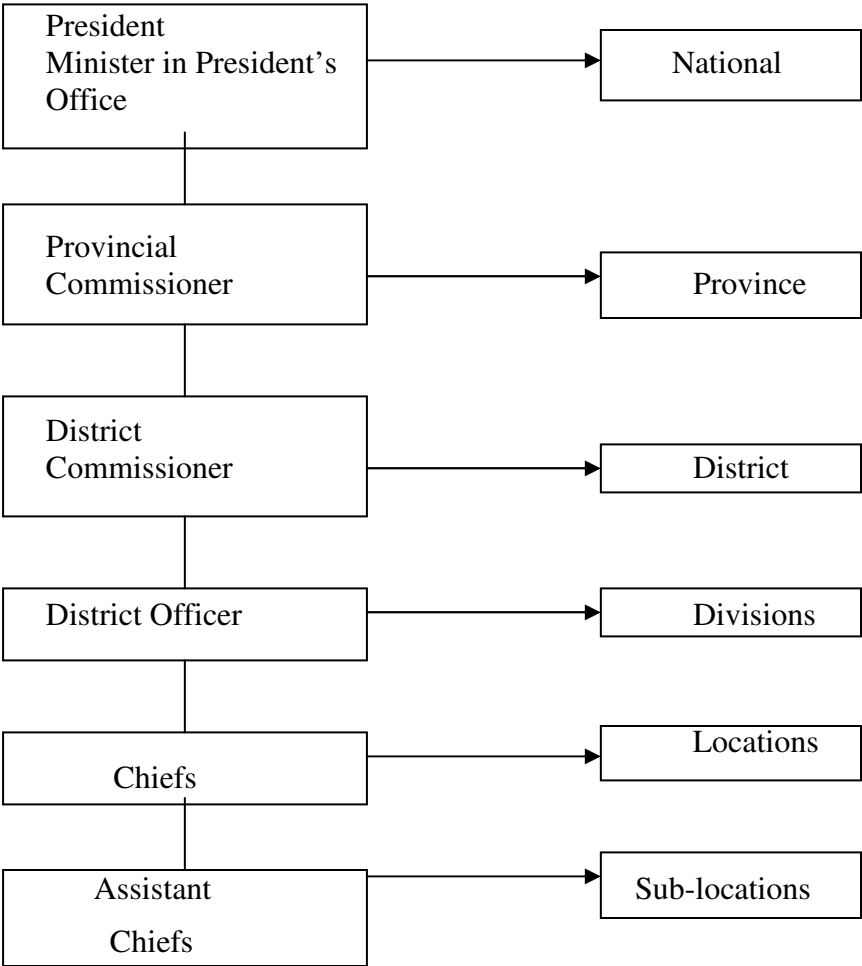
In addition to local government authorities, there is a provincial administration system, although the Constitution makes no mention of it. Historically, it is a replica of colonial administrative institutions developed to ensure that the colonial regime knew what was happening throughout the country. It was, as now, a system of deconcentration, in which the central government agents were posted to the various administrative divisions. One of the glaring legacies of the system is that it did not allow for public participation and has, in submissions to the Commission, been referred to as the "...antithesis of people's right to govern themselves..."

Today, its role and orientation has not changed significantly, except that it has, in addition, continued to play a key role in the planning and implementation of Government policies,

public administration and security enforcement from the province to the village. All provincial administrators attend security training for six months to enable them to deal with law and order. For example, in the Poverty Reduction Strategy Paper, it was said that: ‘the provincial administration is responsible for providing leadership, policy direction and secure environment in order to achieve social, economic and political stability.’

The structure of the Provincial Administration as given in Figure 3 below, consists of the provincial commissioner, the district commissioner, the district officer, chiefs and sub-chiefs. under the Chiefs Act (cap 128), chiefs and assistant chiefs have a wide variety of administrative and law and order powers. They have functions in connection with public health (like preventing water pollution), preventing crime (like arresting people and seizing stolen cattle). A minister may order a chief to require people to perform community service in emergencies or to conserve natural resources.

Figure 3: Kenya’s Provincial Administration Structure



The administration has been severely criticised as both authoritarian and paternalistic. Complaints of misuse of power, corruption and abuse of citizens' rights have been levelled against it. It has also been used to repress political plurality. Although some of the most objectionable features of the system were removed when the Chiefs' Act was amended in 1997, in practice, provincial Administration's operations have not changed.

12.2.3 Devolution of powers in other Constitutions

As we have indicated, devolution of powers can take many forms. The distribution of functions between the various government units and the extent to which power is shared among and across those units will depend, therefore, on the structure of devolution in any given jurisdiction. The most extensive systems of devolution are those associated with confederal systems of government, such as Switzerland and the emerging European Union. Confederal systems permit autonomous political entities to come together for strictly limited purposes, usually foreign affairs and defence and, more recently, economics. Next are federal systems, such as the United States, India, Nigeria, Malaysia and Brazil. In federations, there is usually a strong constituent and an equally a strong general government, each exercising powers delegated to it by the people. Some 23 jurisdictions around the world are formally federal. Then there are decentralised systems operating on the basis of regional or local government structures. The extent of devolution in these systems varies in detail and complexity, depending on the range of issues the national constitution seeks to manage. The constitutions of most African countries have entrenched this system. Whatever system of devolution of power in any jurisdiction, constitutional provisions normally provide, *inter alia*, for:

- a clear structure for each level of devolution;
- specific areas of responsibility for the national government at those levels;
- delineation of autonomous functions and powers vested in the various levels of devolution;
- inter-governmental relations among devolved units and the national government;
- financial and resource control by devolved government units; and
- the system of representation by the people in the organs of devolved units.

12.2.4 What the People Said

Many people spoke on the issue of devolution. Their views may be summarised as follows:

(i) *On structure, that*

- a) Government should be required to apportion resource benefits between the national Government and the communities where such resources are found;
- b) while some said that powers should be devolved to provinces, others favoured districts as the principal units of devolution;
- c) many people, especially in Coast Province and parts of the Rift Valley, recommended *majimbo*; on the other hand, many opposed *majimbo*.
- d) there was wide support for local government, which people said should be strengthened to support the State in local administrative, management and development activities;

- e) There was also a widespread feeling
 - of alienation from central government power since power is concentrated in the national Government, and to a remarkable extent in the President power is also concentrated spatially in the capital .
 - that local authorities have been weakened;
 - of marginalisation and neglect, indeed, of victimisation for their political affiliation;
 - of unjust deprivation of resources;
 - that their problems arise from government policies over which they have no control;
 - that devolution (perhaps resulting in a different constituency structure) would give them parliamentary and local representation and greater control of resources, especially land;
 - that there should be more communal forms of organisation, including the role of elders; and
 - that they should be enabled to determine their own choices, lifestyles, e.g., pastoralism.

(ii) On election of councillors, that

- a) all councillors should be elected none should be nominated;
- b) Mayors and chairs of local authorities should be elected directly by the people;
- c) Councillors should be required to have a set minimum educational qualifications;
- d) there should be a certain proportion of women in local councils; and
- e) local elections should not be on a party basis.

(iii) On land administration, that

- a) chiefs should be elected;
- b) a role should be found for traditional institutions, including elders;
- c) establish a council of elders to handle village administrative and development matters;
- d) the provincial administration should be abolished entirely or retained only at the district level and below but not at the province level; and
- e) replace Provincial Administration with strengthened local authority administrations, or with elected bodies, to make them answerable to the people.

(iv) On other matters, that -

- a) the local community should control/regulate land;
- b) districts should not have 'tribal' appellations, e.g., Kuria, Kisii and Embu;
- c) local councils should be involved at the center of decision-making through by establishing a senate;
- d) Local authority budgeting should be done at the grassroots level;
- e) local communities should be involved in resource management; they should also benefit from resources developed locally, and taxes collected from citizens; other residents and companies should be

justly distributed between the central Government and local authorities and that local authorities should enjoy financial independence and no interference by Parliament.

(v) *On decentralisation in general, that*

- a) central government powers and functions should be decentralised;
- b) there should be an end to the colonial and post-colonial history of excluding communities at the grassroots from participating in local governance;
- c) Organs of devolution should include
 - a Provincial Council – an elected provincial commissioner and his deputy and two district representatives.
 - two types of local authorities rural counties and urban county councils;
 - local government supervision councils oversight councils working in consultation with provincial councils to supervise the functions of local authorities;
- d) The functions of local authorities should include
 - provision of social services;
 - maintenance of local infrastructures, such as roads, hospitals, schools and recreation parks;
 - promotion of cultural activities; and
 - promotion of participatory democracy within the local community.

(vi) *On the Provincial Administration system, that*

- a) because district commissioners and district officers are not usually local people, they have little understanding of the local situation and concerns;
- b) There has been a tendency recently for staff recruited to the provincial administration to be from specific ethnic groups and political shades which support the President; the current Provincial Commissioner (PC) of North-Eastern Province is the first from the area and this has made a big difference to the role of that office;
- c) there are complaints that the Chiefs have failed to take account of the fact that the Chiefs' Act has been amended;
- d) the use of the provincial administration system, with its close association with the ruling party, is felt to be an obstacle to fair voting – because it keeps order at polling stations and essentially conducts elections and the Electoral Commission relies heavily on it,
- e) although people do look to the provincial administration for help, but women, particularly, have sometimes complained of lack of attention, especially where reports on domestic violence are made.
- f) people complained of rampant corruption, inadequate personnel, poor equipment, poor management and lack of skills to resolve conflicts, inadequate capacity to manage cross-border activities, poor service delivery and poor co-ordination of rural development.

- g) the District Development Committees, as currently set up, are not representative of the local community; most members are civil servants who do not come from the area and who often stay there for only a short while;
- h) the system has a stifling impact on local government; on many occasions, the provincial administration has refused to co-operate with the local authorities, ignoring their views, refusing them licences and central Government funds;
- i) the overall structure of decision-making bodies at the local level is under-funded, bureaucratic and excessively centralised.
- j) establish a gradual process of abolition of provincial administration and transfer its functions to a new local government system;
- k) if the provincial administration is retained, it must be more accountable to the people or be replaced with a strengthened elected local authority administration answerable to the people; and
- l) any development, planning, policy formulation and budgetary allocation should involve local communities.

12.2.5 Commentary

There is a broad consensus among the people that state power and authority should be devolved.

It was also obvious that the people want the functions carried out by the provincial administration to be given to the local government agencies. There was a general agreement that the provincial administration, in its current form, needs to be phased out.

But, although there was a general agreement among Kenyans that devolution is necessary, there was less agreement on its form and levels. While many people in provinces such as Coast and parts of the North Eastern and Rift Valley, proposed a federal form of devolution (*majimbo*), many people in Central, Nairobi, Eastern, Western and parts of Nyanza provinces proposed devolution within a unitary system. In either case, few submissions to the Commission provided details.

Nonetheless, the people feel they are subjects, not citizens. At present, they feel disempowered and alienated from the government. They feel that decisions about their lives are being made in places remote from themselves and without consultation with them. They consider that they are discriminated against and that they have been unjustly deprived of their resources. There is a widespread wish for people to take charge of their own lives. They want to use community institutions for land management and other local affairs; they want power closer to where they live and to participate in public affairs.

The Commission, therefore, has no doubt that — consistent with the goals of review and people's views — there has to be a transfer of very substantial powers and functions to local levels. It is also very clear to us that the transfer has to be to bodies which are democratic and participatory. People will not be content with mere administrative decentralization (deconcentration).

The Commission believes that the way forward is to design a system of devolution which tallies with the reasons given for it by the people.

These demands, couched in terms of devolution, are as much criticisms of the present political system and how it has been used as amounting to a desire for a particular alternative structure. The Commission considers that some of the problems of alienation and unjust distribution of resources would be taken care of by the system of government we now recommend. The new system would be participatory and people would have possibilities and procedures to influence policy and institutions to which they can make complaints and seek redress. The oppressive weight of provincial administration would be taken off their back.

12.2.6 Recommendations

The Commission recommends, therefore

(i) *On principles of devolution, that*

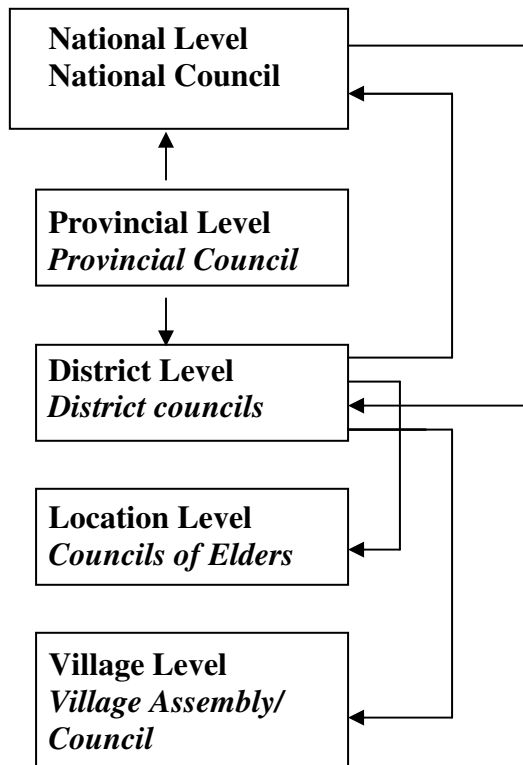
- a) the model of devolution adopted should reflect a cost-benefit analysis of devolution and what devolution is meant to achieve;
- b) the levels of devolution and the powers to be exercised by the devolved units would be clearly defined by an Act of Parliament;
- c) the model of devolution should reflect the following broad principles:
 - discrete demarcation of the functions and powers within and across the units of devolution in a way that checks power and reduces conflict in its exercise;
 - efficient and equitable mobilisation, allocation and management of resources;
 - a need to enhance participatory governance and accommodate diversity; and
 - including cultural diversity, the needs of vulnerable groups, such as women, children, the disabled, minorities and the marginalized;
- d) the financial arrangements for funding devolved units and for the relationship between the national Government and the unit, including the mechanisms to co-ordinate the interlink between the various levels of government (national, provincial, district and local) fashioned in a way that ensures autonomy and accountability by the devolved units;
- e) the new Constitution should set up transitional mechanisms for phasing out the *status quo* and replacing it with the new order;
- f) there should be an ingrained dispute settlement mechanism;
- g) devolved units are entitled to an equitable share of revenue raised nationally to enable them to provide basic services and perform their responsibilities;
- h) national Government institutions and departments should be arranged to ensure equitable distribution of resources throughout the country; and
- i) the details of the functioning of the different units of devolution would be clearly enunciated in an Act of Parliament.

(ii) *On the structure of devolution, that*

- a) there be a five-tier devolution system involving national, provincial, district, local and village institutions, with the district as the principal unit of devolution below the national levels indicated in figure 12b;
- b) separate provisions for urban areas;
- c) the system of devolution based on elected councils and elected executives accountable to the councils at each level, characterised by the separation of powers;

- d) at least one third of the members of each Council be women;
- e) the electoral system to ensure representation of all cultural communities at each level;
- f) an Act of Parliament to provide for recall of a council by voters;
- g) the village and location to have executive powers only — they shall relate largely to implementation of the policies of the district council, but shall include initiatives of a local nature and settlement of disputes like a small claims court;
- h) District and provincial councils to have both legislative and executive powers;
- i) the interests of the provincial and district councils be complementary, not antagonistic; and
- j) electoral units be determined by electoral laws.

Figure 4: Proposed Devolution Structure



(iii) *On functions of units of devolution,*

- a) that village councils would -
 - mobilise residents on local issues as the point of contact between the village and the location/wards; and
 - be managed and administered by village elders.
- b) that Locational Councils would
 - enable communities to manage their own affairs;
 - exercise only executive functions in particular,
 - administration at the location level;
 - initiation of development projects;
 - advice to the district council on matters affecting the community;
 - solve disputes like a small claims court;
 - mobilise people around local units;

- mobilise and manage community resources and development funds and processes; and
 - implement policies approved by the district council to develop the location;
 - be run by a council of village elders, two from each village in the location; the elected representatives shall elect among themselves the chairperson, treasurer and other officials;
 - the location executive would consist of the councils, officials and the administrator as an *ex officio* member;
 - there would be a small secretariat to assist the location council to manage its affairs; and
 - the location administrator would be elected directly by the people, as prescribed by the district council;
- (c) that District councils would
- be the principal level of devolution;
 - perform both legislative and executive functions;
 - have as its district council the legislative organ;
 - have an executive organ responsible to the district council; and
 - have power to hire and fire their staff;
 - have power to:
 - formulate policies within their areas of jurisdiction;
 - provide public services and infrastructures;
 - execute development programmes;
 - raise and spend revenue locally by levying taxes, rates and duties;
 - liaise with central authorities; and
 - recruit, retain and dismiss staff;
 - be composed of councillors drawn from the number of wards in the current county councils elected as follows:
 - the councillors to be elected for a term of 4 years;
 - the elections to be conducted by the Electoral Commission of Kenya;
 - the candidates must have attained KSCE level education;
 - nomination of candidates to be through political parties, but the provision of independent candidates to apply at this level; and
 - candidates for nomination shall be of the minimum age of 21 years;
 - in principle, be permitted and able to operate under national legislation in concurrent laws, but be authorised to adopt national laws to local circumstances within limits to be laid down in an Act of Parliament; thus, the content and style of drafting central legislation should allow for modification and implementation by districts;
 - in principle, be the vehicle through which the national government implements policy;
 - in principle, be able to seek assistance from the national Government to discharge their responsibilities;
 - be subject to the jurisdiction of a national ombudsman, the human rights Commission, etc;
 - at their first sitting, elect one of their own as chairperson;
 - Be administered by a district governor;
 - the governor to be the political head of the district;
 - elected directly by universal adult suffrage of the entire District for a term of 4 years renewable once;

- who must be a resident of the respective districts;
 - who is less than 35 years and not more than 70 years old and a graduate from a recognised university;
 - who shall run the affairs of the district with the assistance of persons with appropriate qualifications drawn from the district; the number of persons to assist the governor shall be ten to form a District cabinet;
 - answerable to the people in the District directly; and
 - removable by the electorate or by a vote of no confidence by the council;
- (d) that Provincial councils would consist of chairpersons of district councils and other stakeholders; members of the provincial council would determine their chairperson on a rotational basis, have both executive and legislative powers on subjects within their executive responsibilities among which would be to
- promote co-operation between districts;
 - increase the capacity of districts and facilitate the effective discharge of their functions;
 - co-ordinate issues that affect districts;
 - deal with trans-provincial issues/concerns;
 - manage provincial institutions and resources;
 - plan the province's development;
 - develop and monitor the provincial infrastructure; and
 - provide technical assistance to district councils, where necessary;
- (e) that urban councils operate within the district councils in which they are located, although they may be allowed to retain a special administrative mechanism since they are complex ecosystems; and
- (f) That Nairobi shall be treated as the national capital territory and be administered in accordance with an Act of Parliament.

iv) *On the relationship between District and Provincial Councils*

That they may co-operate in discharging their functions; for this purpose, they may set up joint committees or joint authorities; the majority's support of the members of each council shall be necessary for co-operation; cooperation arrangements may be terminated on a majority vote of district councillors.

(v) *On the sharing of natural resources between the District and the Central Government*

That legislation should entitle districts to a substantial share of the revenue from local resources; provisions would be made for allocating a fixed percentage to the communities in whose area the resources are located.

(vi) *On financial arrangements in general, that*

- a) the national Government be responsible for collecting major sources of revenue;
- b) District councils may impose taxes or levies to be specified in an Act of Parliament;
- c) the national revenue be shared equitably with the district councils;
- d) detailed legislation be enacted providing for
 - allocation of a fixed percentage to the communities in whose area the resources are located;
 - a ratio for sharing the national resources in district councils' territories;
 - taxes and levies which the district council may impose;
 - financial and accounting procedures of accounts;
 - provision of equalisation grants or grants-in-aid to marginalised communities;

- e) Provincial secretariats funded from the Consolidated Fund, District contributions and revenue raised from provincial utilities;
- f) Districts funded by Government grants, Government transfer funds and revenue raised from local utilities;
- g) accounts of devolved funds audited by the Auditor General; and
- h) national revenue shared equitably between districts and the national Government.

(vii) *On intergovernmental relations,*

- a) the national Government would establish a ministry [of devolution/district governments] to deal/liaise with the provincial and district councils.
- b) the State would establish a ministry of devolution to deal/liaise with provincial and district councils;
- c) the central Government's public servants posted in provinces and districts would liaise with district and provincial councils to exchange information and co-ordination of policies and administration;
- d) a district council may be suspended in case of emergencies, war or corruption or gross inefficiency; except for the first two cases, no council may be suspended unless an independent commission of inquiry has investigated allegations against it and the President is satisfied that the allegations are justified; during the suspension, arrangements for discharging of the functions the District council's functions, as specified in an Act of Parliament, shall be put in place; the authority shall closely liaise with the relevant provincial council; no suspension can last for more than 90 days, during which new council elections must be held if necessary;
- e) the functions and resources to be transferred to district councils be phased out to ensure that councils have the requisite ability; and
- f) no one may hold public or political office in both the central Government and a devolved government.

(viii) *On abolition of Provincial Administration, that*

- a) the provincial administration be abolished;
- b) the central government may station its officials in provinces and districts to carry out central Government functions.

(ix) *On entrenchment, that*

- a) the devolution structures and levels be entrenched in the Constitution;
- b) the Constitution should list the names of the districts and provinces to which power is to be devolved; and
- c) the already established Boundaries Commission should have power to establish, abolish, create, recreate, align and realign provincial and district boundaries for the purposes of the Constitution;

(x) *On dispute Settlement Mechanisms, that*

- a) all disputes between district councils, between district council and the provincial council, and between district councils and the national Government be first determined by the High Court; and
- b) the right of appeal lies in the Court of Appeal and the Supreme Court in that order.

CHAPTER THIRTEEN - ENVIRONMENT AND NATURAL RESOURCES

13.1 The Mandate of the Commission

Although no express mandate is given on the environment, the Review Act requires, *inter alia*, that the Commission ensure that there are provisions in the Constitution for establishing an equitable framework for economic growth and access to national resources. The state of natural resources and the environment is an important parameter of this challenge.

13.2 The State of Kenya's Natural Resources

13.2.1 General Principles

Natural resources play a major role in modern social and economic development. At the macro-level, African countries rely on resources such as water, minerals, forests and wildlife as a source of much needed revenue. At the micro-level, communities depend entirely on them for their livelihood. Regulation of natural resources is necessary mainly because of their scarcity, increasing demand and increasingly varied uses of natural resources.

Kenya is relatively well endowed with natural resources. These include energy, water, minerals, fisheries, wildlife and forests. Approximately 19% of the total energy consumed by the domestic and industrial sectors is biogas, i.e., fuel-wood derived from forests, woodlands, shrubs and farm trees.

Consumption of wood for fuel both depletes the nation's forest cover and is a factor in global warming. In the drought prone areas, devegetation has outstripped the ecosystem's ability to sufficiently renew wood. This has been made particularly grave in the arid and semi-arid lands (ASALS) of Northern Kenya — Kakuma in Turkana and Dadaab in Garissa — where hundreds and thousands of refugees have been settled for over a decade.

Hydroelectric power produces most of Kenya's electricity, but large dams have their social and environmental costs. Solar power is perhaps the best alternative energy source. Some constitutions contain obligations on the State to develop and encourage the use of renewable energy.

Kenya's water resources consist of:

- Inland saline or fresh water lakes;
- The Indian Ocean;
- Permanent and seasonal rivers;
- Wetlands;
- Boreholes;
- Dams; and
- Ponds.

Of special mention are wetlands, marshes, fens, peatland or waterlands. Wetlands serve many functions and have a number of important benefits, including ground water

recharge, flood control, erosion control, water supply and biodiversity reserves. The major threats to wetlands are reclamation into farmland and pollution.

Water resource use is estimated to be distributed as follows:

- Agriculture 65%;
- Domestic use 18%;
- Industrial use 13%; and
- Other functions 4%.

Water use conflicts arising from shortages for domestic, industrial and irrigation use abound. Critical issues of equity in extraction and supply of water, conflict on riparian rights and ecological balance, therefore, proliferate. In particular, there is the issue of upstream extraction of water for irrigation and hydro-power, etc., and the effect on the river regime, volume of flow and hence the impact on the downstream beneficiaries of river water. This is particularly the case with the Tana and the Uwaso Nyiro rivers. While the latter has dried up completely due to over-extraction upstream, the former has had its volume of flow reduced significantly due to the many hydro-power projects on its upstream and other uses there. This has affected the livelihood of pastoralists who make the majority – if not all – of the downstream beneficiaries of both rivers.

There is also the issue of the 3 mile strip of the Tana River placed, as well with Garissa, and in Coast Province by the colonial government giving rise to conflict over access to the river's water.

Population growth, currently at 2.9% per annum, and the over dependence on a diminishing water resource, will push Kenya beyond the water barrier of less than 5m per capita per annum by 2025. Kenya is already categorised as one of the “chronic water shortage states”, by the World Resources Institute Report of 2000. It is obvious that water needs to be used efficiently and effectively and that the Constitution ought to provide an equitable and sustainable balance between competing interests.

Kenya has a wide variety of mineral resources, both metallic and non-metallic, including: titanium, silver, lead, soda ash, salt and sand. These may be found in land under any type of tenure. Exploiting them presents a clear and common dilemma. On the one hand, it offers a valuable source of revenue for the nation and opportunities for local income generation, but, on the other, mineral exploitation virtually always involves environmental damage. It means destruction of vegetation, water bodies and bio-diversity and land pollution, disturbance to human and wildlife populations and loss of cultural and aesthetic sites. The dilemma is encapsulated in the fact that, while the submission to the Commission by the Ministry of Environment and Natural Resources proposed a number of measures to remove bureaucratic and legal obstacles to mineral exploitation, the Government's 1999 Sessional Paper committed it to enhancing protection against environmental damage impacts by mining. The challenge is to reconcile these aims and to define the respective roles, responsibilities and rights of the State and local communities on minerals.

Significant incomes are generated from fishing for local consumption and export, or as sport. Countrywide, around 1 million people derive their livelihood from fisheries — directly or indirectly through supplementary services like fish processing, marketing, boat

building and repairs, etc. There must be sufficient safeguards on the use and management of fisheries to ensure sustainability. The nature of nets and the regulation of catch should be laid down.

Kenya's wildlife is found in national parks, game reserves and other protected areas — covering about 44,564 km² or 75% of the country's land mass. However, a significant population of wild game is found outside the protected areas. Ninety per cent of these areas are in the ASALS. Community-based privately owned game parks are also emerging in recent years.

Conflicts between human and wildlife interests are common in these areas and take two main forms:

- Damage by wildlife to human beings, crops and livestock; and
- Humans causing damage to wildlife through poaching and destroying the habitat.

Ineffective management of these conflicts may lead to loss of property, life and interest in wildlife conservation. Forests are being lost through excisions every year. Forest resources are pivotal to sustaining both the local and national economies. Locally, forests are the source of food, fodder, wood fuel, construction material, spiritual and cultural nourishment and traditional medicines, among others. At the national level, forest plantation is a major source of industrial forest products. The environmental and ecological functions and employment value of the sector are also critical. The forest policy affirms that forestry ranks as one of the country's most important national assets.

Traditionally, forests belonged to communities, and approximately 15,000 traditional forest owners live in indigenous forests, including the Somek of Mt. Elgon, the Ogiek of the Mau forest, the Mijikenda of the Kaya forests and the Boni of Boni forest in Lamu and Ijara districts. It is also estimated that the 2.9 million people who live next to indigenous forests directly depend on forest resources for their livelihood. The current forest policy contains provisions that recognise the role of local communities in conserving and managing forests and forest resources. The management practices under the Forest Act, however, still reflect the firm application of command and control principles instituted during the colonial period.

13.2.2 Natural Resources in the current Constitution

The current Constitution has very little to say about natural resources. Under the 1963 Constitution, all minerals, water bodies, national (i.e., gazetted) forests were the property of the State or, in restricted circumstances, the regions. With the abolition of regionalism most of these resources reverted to ownership and control by the President as the guardian of State property. That is the situation today.

13.2.3 Natural Resources in other Constitutions

Provisions for managing and controlling natural resources, i.e., water, forests, wildlife, biodiversity and marine resources, among others, are now common in many constitutions. These are found in the bills of rights, the directive principles of state policy or special chapters.

For example, the Constitution of Uganda provides in the section on National Objectives and Directive Principles of State Policy that

The State shall protect important natural resources, including land, water, wetlands, minerals, oil, fauna and flora on behalf of the people of Uganda.

The Constitution of Ghana provides in Article 268 (1) that

Any transaction, contract or undertaking involving the grant of a right or concession by or on behalf of any person, including the Government of Ghana, to any other person or body of persons howsoever described, for the exploitation of any mineral, water or other natural resources of Ghana, made or entered into after the coming into force of this Constitution, shall be subject to ratification by Parliament.

The general approach in these and similar constitutions is to

- ♦ create an obligation to protect and manage natural resources substantially; or
- ♦ otherwise regulate the appropriation or exploitation of these resources.

13.2.4 What the People Said

Public views on ownership, control and management of natural resources were extremely candid. They may be summarised as follows:

(i) On Water:

- a) the Government should take up the responsibility of providing clean piped water to all its citizens;
- b) every Kenyan should have access to clean piped water;
- c) the Government should protect all water catchment areas;
- d) dams should be cleared and reclaimed;
- e) adequate resources should be allocated to rehabilitate depleted water schemes and facilitate the harvesting of rain water;
- f) the Government should dig up boreholes and dams in arid and semi-arid areas, especially in northern Kenya and North-Eastern Province;
- g) water should be provided in at least every 2 km radius;
- h) environmentally friendly water projects should be implemented;
- i) residents should benefit from water resources originating from their areas, for example, the people of Taita Taveta and the Mzima Springs;
- j) rivers passing through a region should be used to supply the people of that region and river courses should not be diverted to serve other regions for example, the Uwaso Nyiro River in North-Eastern Province.

ii) On Minerals:

- a) mineral exploitation should benefit the communities around such resources, i.e., 50% of the incomes generated should be left in such areas to develop them;

- b) the laws pertaining to mineral exploitations should be in line with local needs;
- c) the Government should put more research into mineral exploration and excavation for the benefit of the people;
- d) mineral mining rights should be given to the local communities;
- e) communities residing where minerals are discovered should be properly compensated; and
- f) the mining policy should be reviewed to benefit the public.

(iii) On Fisheries:

- a) the fishing industry has been faced with problems of:
 - Insecurity: foreigners fishing in Kenya's waters;
 - Restrictions: Kenyans were not free to access all parts of the beaches available; and
 - Poor fishing skills.
- b) Kenyans felt that security should be granted to fishermen and that the fishing industry should be revived;
- c) Restrictions on fishing should be imposed only on foreigners;
- d) Small-scale fishing should also be legalized; fishing protection laws should be enforced; and
- e) The Government should provide fishing equipment and skills to fishermen, and fishing nets.

(iv) On Wildlife:

- a) wildlife be protected from poaching;
- b) national parks should be fenced;
- c) new and rare wildlife species should be added to the parks;
- d) the size of national parks be reduced and the land recovered distributed to people;
- e) one third of the revenue generated from the national parks be reserved for the local area;
- f) damage caused by wildlife to the communities around should be compensated; and
- g) Human deaths caused by wildlife be compensated at Ksh.3 million while compensation for property damage should be over Ksh.100,000; the Act on national parks should be repealed to incorporate game reserves in total.

(v) On Forests:

- a) the Government should undertake massive afforestation to prevent desert encroachment;
- b) forest land should not be allocated to individuals or illegally acquired;
- c) environmental protection issues, such as prohibition of clearing of the remaining natural forests, should be included in the Constitution;
- d) stiff penalties should be meted out to individuals and companies involved in environmental degradation, like deforestation;
- e) agro-forest tree nurseries should be established for trees to be planted throughout the country;
- f) forest land should not be degazetted; and
- g) the local community should have a role in the managing and protecting forests and be consulted about all excisions.

13.2.5 Commentary

Not expectedly, the people want to own and control their resources. They demand a constitutional dispensation to ensure that the incomes and other benefits derived from those resources are used for, and applied to, development programmes in their local areas. Specifically they emphasise that many of these resources are essential to eradicating poverty. They argued, for example, that, since it is a basic need, the Government should ensure that every Kenyan has access to clean water. Many submissions from the arid and semi arid regions emphasised the fact that pastoralists had suffered a great deal searching for water in other areas. They lamented that no water projects had been established in their regions. It was also pointed out that most of the tribal clashes in their regions were caused by the struggle for access to water points. Regarding minerals they lamented that communities around whom minerals are found had not benefited from such excavation and had lost their lands and properties with minimal or no compensation at all. Foreigners appear to have had more rights than the indigenous people where mining is concerned. On wildlife many decried the fact that under current laws wildlife is better protected than human beings near protected areas. Indeed, wildlife appears to be more valuable to the Government than the communities and so large tracts of land were reserved for them while human communities remained landless.

13.2.6 Recommendations

The Commission recommends therefore, that

- (i) natural resources including minerals, water, land, forests, fisheries and wetlands, within Kenya's jurisdiction shall belong to the people, except where ownership is expressly vested in other persons or people by the Constitution; any such other person or people shall hold any such natural resources as are formally vested in or managed by it in trust for the people;
- (ii) Parliament would be the public trustee over natural resources and shall exercise the overall control of transactions, contracts or undertakings in granting rights or concessions, to ensure protection and sustainable use by the present and future generations;
- (iii) any transaction, contract or undertaking involving the grant of a right or concession by or for any person, including the Government, to any person or body, however described for the exploitation or use of any minerals, petroleum and oils, water, forest or forest products, fisheries, flora and fauna or other natural resources, including major changes in land use, shall be subject to ratification by a two thirds majority of Parliament;
- (iv) whenever Parliament considers ratification of any transaction, contract or undertaking under the foregoing, it shall decide by a resolution supported by not less than two thirds of its total membership, that there is, where applicable, satisfactory preparation of the following plans:
 - a) an environmental management plan;
 - b) an environmental restoration plan;
 - c) a resettlement plan;

- d) a revenue management plan, ensuring that the proceeds from exploiting the natural resources will be used for effective national socio-economic development;
 - e) an industrial development plan, ensuring that the natural resources promote national industrialisation and that, in every case, value is added before export;
 - f) a socio-economic development plan, establishing that the transactions and use of the natural resources, including revenue management, shall result in sustainable socio-economic development and benefit local community; and
 - g) an environmental impact assessment.
- (v) the State shall promote protection of natural resources to ensure that the management of energy, water, land, air, wetlands and other resources is done in such a manner as to promote sustainable development for the present and future generations; and to create the right conditions for securing participation by the people to safeguard the environment;
 - (vi) it shall be the duty of the State, through appropriate bodies and with recourse to popular initiative, to:
 - a) prevent and control pollution and its effects and all harmful forms of erosion;
 - b) have regard in regional planning to creating balanced biological areas;
 - c) create and develop natural reserves, parks and recreational areas and classify and protect landscapes and sites to ensure conservation of nature and preservation of the cultural assets of historical or artistic interest; and
 - d) promote rational use of natural resources and safeguard their capacity for renewal and ecological stability;
 - (vii) the State must take steps to carry out assessments of the existing ecological and other natural resources of the nation and maintain a data bank, to be revised every ten years;
 - (viii) in developing management strategies, the precautionary approach, including a precautionary principle, environmental impact assessment, environmental audit and environmental monitoring, shall be applied so that, where there are threats of irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective action to prevent environmental degradation;
 - (ix) the State shall protect, establish and develop natural reserves, national parks, as well as recreation areas and ensure conservation of flora and fauna and preservation of biological diversity for the present and future generations;
 - (x) decisions on protecting and exploiting natural resources must pay special heed to people's interests, especially of communities affected by virtue of their historic connection with the areas involved or by residence;
 - (xi) persons and communities who suffer harm as a result of conservation or preservation measures on natural resources shall be adequately compensated by the State;
 - (xii) so far as reasonably possible, the administration of natural resources must involve participation by the local community, while not losing sight of the need for natural resources to be protected and developed for the benefit of the nation as a whole; these principles are to be applied to all projects, including national parks, mineral exploitation, tourism development, dam and irrigation projects;

- (xiii) there should be no arbitrary restrictions on the period in which Trust Land should be set aside for mineral exploitation, such as is now found in S. 115 (3) of the Constitution (2 years);
- (xiv) include in the Constitution a provision that the law regulating mining should be reviewed and streamlined, incorporating provisions which reflect environmental and resource preservation and social justice/affirmative action;
- (xv) anyone who exploits mineral resources is obliged to restore the damaged environment by such technical means as may be legally required by the appropriate public agency.

13.3 The State of Kenya's Environment

13.3.1 General Principles

The term “environment” is used here to refer to all natural resources and the context in which they exist and interact as well as the totality of the infrastructure constructed to support human socio-economic activities. The impact of technology, human consumption and an increasing population has led to pressure on and imbalances in the environment which require management interventions.

The primary challenge is to manage the environment sustainably. The most famous statement of what sustainability means is: *“development which meets the needs of the present generation while not compromising the ability of future generations to meet their needs.”* The same concept is to be applied between the present generations. In practice, this concept has been translated into a number of governance principles and structures and enacted into legislation in many African jurisdictions.

The sustainable management of the environment requires fidelity to a number of values and principles; including precocity, trans-generational equity and responsibility for and prevention of environmental damage. More recently, public participation in decision-making affecting the environment, including the right to receive information, has become an important principle in environmental governance.

13.3.2 The Environment in the current Constitution

The current Constitution makes no mention of the environment as such. Some have argued, based on court decisions in other countries, that the right to life includes a right to an environment not dangerous to health. The Environmental Management & Co-ordination Act (Act No. 8 of 1999), provides, however, that ‘Every person in Kenya is entitled to a clean and healthy environment.’ In addition, Kenya is a signatory to many of the major environmental treaties and non-binding agreements, including:

- The International Convention for the Prevention of Pollution of the Sea by oil;
- The Convention on the High Seas (London), 1954;
- The African Convention on the Conservation of Nature and Natural Resources (Algiers) 1968;
- The Convention on Wetlands of International Importance, especially as Waterfowl Habitat (Ramsar), 1971;
- The Convention Concerning the Protection of the World Cultural and Natural Heritage (Paris), 1972;

- The Convention on International Trade in Endangered Species (CITES) of Wild Fauna and Flora (Washington), 1973;
- The United Nations Convention on the Law of the Sea (1982);
- The Vienna Convention on the Protection of the Ozone Layer (Vienna), 1985;
- The United Nations Convention on Biological Diversity (Nairobi), 1992;
- The United Nations Framework Convention on Climate Change (Rio de Janeiro), 1992;
- The United Nations Convention to Combat Desertification (Paris), 1994;
- The Declaration of the United Nations Conference on Human Environment (1972); and
- The Rio Declaration on Environment and Development (1992).

Mount Kenya is a World Heritage Site under the Convention for the Protection of the World Cultural and Natural Heritage, and Kenya must “ensure the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage.” Lakes Nakuru and Naivasha are protected wetlands under the Ramsar Convention.

A number of countries, including Brazil, South Africa, Uganda, Namibia, Malawi, Thailand and India, have elevated the kind of entitlement in the Act to the level of a constitutional obligation.

13.3.3 The Environment in other Constitutions

Most modern constitutions now have extensive provisions on the environment. Such provisions, apart from being contained in statements of Directive Principles of State Policy or the Bill of Rights, also appear in articles dealing with land and natural resources. In more recent constitutions, the environment is usually treated as a separate issue. The general approach in such constitutions is to:

- create a right to a clean and sustainable environment;
- impose an obligation on the state, individuals and other juristic entities to preserve and conserve the environment;
- accord a *locus standi* to any person to protect and defend environmental values through recourse to the courts;
- establish infrastructure for environmental governance;
- require that mechanisms be established for general environmental education; and
- require that an environmental impact assessment be conducted and the results built into decision-making prior to the exploitation of any environmental resources.

Constitutions which entrench these and other principles include Brazil, South Africa, Uganda, Malawi, Portugal, Ethiopia and Ghana.

13.3.4 What the People Said

Many people told the Commission that:

- (i) environmental protection should be enshrined in the Constitution;
- (ii) natural resources exploited from a region should benefit the local communities of that region, the local community, as a stakeholder getting at least 60% of the benefits;
- (iii) communities residing where natural resources are discovered should be adequately compensated and resettled;
- (iv) a limited amount of environmental resources with irreplaceable value, e.g., indigenous forests and endangered species, should be protected;
- (v) the Constitution should protect the environment against deforestation, pollution, poaching and soil erosion;
- (vi) the community and Government should be stakeholders in environmental protection;
- (vii) laws protecting the environment should be enforced by the Government;
- (viii) natural resources to be protected should include minerals, forests, wildlife, water catchment areas and land;
- (ix) the Government should own all the natural resources but the management, revenue collection, preservation and protection should be entrusted to the local communities; and
- (x) Forest land grabbed by politically correct people should be repossessed.

13.3.5 Commentary

It is evident that, although the level of public awareness of environmental issues was quite high, it tended to vary from region to region. This is to be expected since environmental concerns cannot be uniform throughout the country or between urban and rural areas. Nevertheless, a desire to preserve and protect the quality of environmental resources was evident among all categories of people who addressed the Commission.

13.3.6 Recommendations

The Commission recommends, therefore, that:

- (i) The new Constitution must provide for environmental rights and duties as well as conservation and sustainable use of Kenya's natural resources as well as intra — and inter-generational equity;
- (ii) The Constitution should require that the following principles guide all administrative and judicial decisions on the environment and natural resources to ensure development:
 - a) the principle of public participation in the development of policies, plans and processes for managing the environment;
 - b) the principle of inter-generational equity, ensuring that the present generation uses and enjoys environmental and natural resources without jeopardising the interests of future generations;
 - c) the polluter-pays principle, which requires that those responsible for degrading environment and natural resources are responsible for the costs of redress including reparation/compensation;

- d) that social and cultural values traditionally applied by any community to manage the environment or natural resources be observed so long as they are relevant and are not repugnant to justice, morality or any written law;
- e) the principle of international co-operation in managing the environment and natural resources, where such resources are shared with other States or where management measures in one State may have adverse or positive consequences in another State;
- f) the precautionary principle which requires a precautionary approach, includes an environmental impact assessment and, where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent new or continuing environmental degradation;
- g) the principle that exigencies of sound environmental protection should be integrated in all development planning and management;
- h) the principle that for every aspect of environmental planning, there should be an institutional policy framework to implement it;
- (iii) the Constitution should contain provisions giving every person in Kenya a right to protect the environment through reasonable legislative resources protected, for the benefit of present and future generations;
- (iv) the State should promote progressive and rapid improvement of the quality of life for all Kenyans;
- (v) the Government should be under a duty to:
 - a) protect Kenya's wildlife, genetic resources and biological diversity;
 - b) protect forests and encourage and carry out reforestation;
 - c) practise, encourage and, where practicable, require waste minimisation and recycling;
 - d) practise, encourage, and where practicable, require water conservation, specifically protection of water catchment areas, water bodies and groundwater conservation areas;
 - e) practice, encourage, and where practicable, require use and development of energy-efficient technology and renewable energy sources;
 - f) legislate to protect the environment, giving priority to preventing environmental damage and degradation, but also providing for restoration in case of existing or unavoidable damage and for compensation to those affected;
 - g) set up and ensure an effectively functioning system of environmental impact assessment which:
 - applies to all projects likely (alone or with other projects) to have a significant impact on the environment or natural resources, including government projects;
 - is open to and gives adequate opportunity for public comment;
 - is scrutinised by a body independent of the project's proponent, the views of which must be taken into consideration when deciding whether or not to approve the project.
 - i) set up systems of environmental audit and monitoring;
 - j) ensure that environmental standards keep up to par with developing standards internationally; and
 - k) promote environmental education at all levels of instruction and help increase public awareness of the need to preserve the environment.

- (vi) behaviours and activities deemed injurious to the environment shall subject the culprits, whether individuals or legal entities, to criminal and administrative penalties, apart from obligating them to repair the damage;
- (vii) notwithstanding the provisions of any written law authorising individuals to seek redress in a court of law for environmental violation, any Kenyan may petition the High Court to require the Minister and the project's proponents to comply with the conditions already presented to Parliament if there is evidence of deviation from these;
- (viii) the State must ensure that environmental protection is accorded sufficient significance in the minister's responsibilities, and that enforcement agencies are sufficiently resourced to enable implementation of this aspect of the Constitution;
- (ix) the minister(s) responsible for the environment and natural resources shall present reports to Parliament every two years, or any time frame deemed fit, providing details of progress made in implementing environmental operations and plans and may, by resolution, order modification or variation of the procedure for implementation;
- (x) where Parliament, after receiving a report, is convinced that there are gross violations of the plan originally ratified, may, by a resolution supported by a simple majority, order cessation of activities until a subsequent report confirms that the conditions are being complied with;
- (xi) the State shall seek co-operation with other States and, where appropriate, competent organisations to develop treaties for protecting the environment and promoting sustainable development at the regional or global levels for the present and future generations, and set up appropriate mechanisms for implementing the treaties, provided that, where observation of the State's international obligations will cause environmental damage and harm, the environment's safety and preservation shall prevail;
- (xii) the office of the Director-General of the National Environmental Management Authority should be established with security of tenure; and
- (xiii) the Director-General shall be appointed from among three distinguished experts in the environmental field after a public search for a candidate from among leading national authorities and shall exercise powers in accordance with the Environment Management and Co-ordination Act.

CHAPTER FOURTEEN - LAND AND PROPERTY RIGHTS

14.1 The Mandate of the Commission

The Commission's mandate under the Act is:

...to examine the place of property and land rights, including private, government and first land in the constitutional framework and the law of Kenya and recommend improvement that will secure the fullest enjoyment of land and other property rights.

That mandate must be read together with other aspects of what the Act requires the Commission to examine, especially concerning the economy, the environment and natural resources.

14.2 The Land Question in Kenya

14.2.1 General Principles

(a) Land in Economy and Society

The land question — its ownership, access and use — has come to occupy a central place in public policy and political discourse in Kenya. This is because land has been the crux of cultural, economic and socio-political change. In fact, Kenya's political, economic, social and cultural history since the Arabs arrived at the Coast; and European settlers later in the 19th century, has been largely dominated and influenced by questions of access to, and control over land. Kenya's independence struggle was rooted in land. Furthermore, the management the household, community and national economies is closely tied to land.

Following years of systematic imposition of Western land tenure and management systems, a large segment of the population continues to have difficulties not only in adapting to the modern agrarian economy but also in coping with the increasingly fragile and marginal environment, land degradation, low agricultural output and intensifying conflicts over access to and control of land and pervasive poverty. This situation has generated an increasing interest in land tenure and land use issues by scholars, policy-makers, politicians, the international community, governments and some international organisations for the last decade. They have invested heavily in land reform schemes. In Kenya, the Njonjo Commission on land laws is an example.

The advent of colonialism led to radical changes in land relations in Kenya and, especially, in the system of ownership, control and use by indigenous communities. By little more than a declaration, the communities were deprived not only of ultimate ownership but also of the most fertile areas of the country. These were turned over to European settlers. Indigenous communities were, in turn, shunted to reserves, from which they were managed as labour pools for European agriculture.

In Kenya's coastal area—the ten—mile strip stretching inland from Vanga in the south to Kisumu in the north — the story was very different. Here, the Sultan of Zanzibar

acquired sovereignty over land on the mainland and, in 1895, the Coastal strip was the subject of a lease from the Sultan to the British government. Some pre-1895 land titles were recognised. At independence, some indigenous peoples were disappointed to discover that this did not mean land was to be returned to them. With independence, the problem of absentee landlords remained and the majority of indigenous coastal peoples have remained squatters on their own lands.

(b) *The Land Economy*

Kenya's economy is and will, for a long time, remain primarily dependent on agricultural and pastoral land uses. Current estimates indicate that agriculture and pastoralism not only provide livelihoods for over 75% of the population, they support 70% of all wage employment and contribute over 80% of export earnings. Crops that dominate the agricultural economy include coffee, tea, cashew nuts, sugar-cane, rice, citrus fruits, maize, sorghum, millet, cotton, horticulture and sisal. These are grown for both cash and subsistence by large and small-scale farmers in the medium to high-potential areas. Livestock farming for dairy and beef production is also a significant undertaking, especially in the ASAL, where over 50% of Kenya's livestock is located. Major land uses outside agriculture and pastoralism include harvesting of forest products timber and fuel wood — tourism, mining, fisheries and infrastructure. These together define the environment in which Kenya's land economy functions.

According to the economic survey for 2000, the economy has been in recession for the last three years. All major indicators recorded negative growth rates between 1997 and 1999. Growth in manufacture slumped primarily due to competition from cheap imports, dilapidated infrastructure and lower aggregate demand. In agriculture, growth rates fell from 1.5% to 1.2% between 1997 and 1999. Production of all major crops, except horticulture and coffee, declined sharply in the same period. Even where production increases were recorded, actual gross earnings declined. A national poverty survey indicates that the prevalence stands at 52.2%, meaning that this proportion of Kenyans cannot achieve the minimum expenditure needed to acquire basic food and other items. The survey also indicates that overall poverty stands at 53.9% and 49% in rural and urban areas, respectively. In rural Kenya, the incidence remains intricately linked to the state of the land economy.

A number of factors explain this rather dismal performance. First, there is inadequate rain in major food-growing areas following hard on the heels of severe El Nino downpours only a few years earlier. There is then the cost of agricultural inputs and labour shortages in an otherwise labour-intensive enterprise. This constraint was, among other things, a function of the escalating morbidity and mortality among the rural labour force due to the spread of HIV/AIDS infections. Third, there are exceptionally high pre-harvest and post-harvest losses due to inefficient production and storage technologies. Finally, is the effect of more systemic problems, the most important of which is decimation of land quality and destruction of associated resources through deforestation, encroachment on marginal lands, an increased population pressure, poverty-induced land use responses and a general absence of sound land and resource use policies.

(c) *Land Politics*

Beyond economic parameters, however, it is important to recognise that land issues are, in addition, deeply emotive and this for political and socio-cultural reasons.

The political parameters that have shaped the nature and characteristics of issues surrounding land are intricately intertwined with the country's history. A distinction must be made here between the ten-mile coastal strip (now part of Coast Province) and the rest of the country. Because the former was, until 1964 controlled and administered by colonial authorities for the Sultanate of Zanzibar, the politics of access to and control of land has always been and remains a complex issue, involving, as it does, interaction between the indigenous populations, Arab landlords and the State.

Although the control and administration of the rest of the country, including areas that were not under European settlement, was more direct, the land question remains an important factor in the political dynamics there as well. Indeed, as a settler enclave, political relationships among white settlers *inter se* and between them and Africans were always determined by the land question: acquisition, ownership, control, use and distribution.

Thus, being central to political discourse throughout the country, the land question was, also not surprisingly, the primary driver in the independence struggle. Beyond independence, in 1963, the land question quickly asserted itself as the fundamental factor in the dynamics of power and wealth allocation among the elite, who were now in control of the instruments of State. The land question, therefore, remains high on the political and development agenda.

14.2.2 Land in the current Constitution

(a) *Background*

Under the 1963 Constitution, any land rights of the colonial government were given to the region in which the land was situated. This meant that Crown Land, and the interest in leased land, when the lease ended, reverted to the Government. At the same time, all land in the "native reserves" became Trust Land vested in the county councils. The councils had to hold that land for the benefit of those who lived on it, and were required to recognise rights under customary law, which applied to that land.

When the regional structure was abolished, trust land remained with the county councils.

(b) *The Current Constitution*

Land is dealt with in the current Constitution at two levels. First, rights in land, as property, are protected by section 75, hence may not be expropriated without prompt compensation. Second, chapter IX of the Constitution vests trust land — ownership, control and management in county councils, which must hold and use them for the benefit of the communities entitled to them in accordance with customary law. Under the Trust Land Act (Cap 288) this trust is held by the Commissioner of Lands for county councils.

Trust land may, at a county council's request, be adjudicated and registered as individual property. When that happens, such land ceases to be trust land and may be disposed of free from any obligation. Trust land may also be set apart either by the county council or by the President in consultation with the relevant county council for use and occupation by a public body or authority or for public purposes.

Besides the Constitution, more elaborate provisions on land and land management are found in many other legislative instruments. Kenya's present legal framework for land management may broadly be said to recognise three categories of land, namely: government land, private land and Trust Land. These are the subject of a morass of legislation which may be categorised into those creating and defining substantive property rights in land (the Registered Land Act (Cap 300), the Indian Transfer of Property Act, 1882); those providing for transition from customary land tenure to individualisation of tenure systems by registration (the Land Adjudication Act (Cap 284), the Land Consolidation Act (Cap 283), the Registration of Titles Act (Cap 281)); and those regulating transactions in land (the Land Control Act (Cap 302)). Regulation of land use is governed by a number of statutes, including the Agriculture Act (Cap.318), the Public Health Act (Cap 242), the Chief's Act (Cap 128), the Local Government Act (Cap.265), and the Physical Planning Act (Act No. 6 of 1996). Customary law remains part of Kenya's legal system and applies in so far as it is not inconsistent with any written law.

Of these statutes, the Agriculture Act and the Physical Planning Act deserve particular mention. The former, which is the primary instrument for rural land use regulation is concerned with promoting, sustaining and conserving agriculture, protecting soil and its fertility, and stimulating the development of agricultural land in accordance with the accepted management and husbandry practices. The Act vests wide discretionary powers in the minister, including the power to make regulations on preservation, use and development of agricultural land. Rules under the Act use authorised persons to prohibit clearing vegetation and depasturing livestock and requiring tree planting to prevent soil erosion. Failure to comply with the requirements is a criminal offence. Further, powers are vested in the Director of Agriculture to issue land preservation orders requiring landowners to take conservation measures or prohibit activities incompatible with good land management. These provisions may be used to enforce proper land use and management, a necessary condition for sustainable development.

The latter legislation is an instrument of development control throughout the country, especially in urban areas. The Act is applicable at the regional level, to any Government land, Trust Land or private land under a county council to improve the land and provide for the land's physical development. The Act can also be applied to secure a suitable provision for infrastructure, such as transportation, public utility and commercial, industrial, residential and recreational areas, including parks, open spaces and reserves and to make a suitable provision for using the land for building. The Act provides for planning, replanning or reconstructing the whole or part of a given land area under a regional physical development plan and for controlling the order, nature and direction of local development. In Urban areas, including cities, the Act provides for short-term and long-term physical development, renewal or redevelopment to guide and coordinate the development of infrastructure and services, and specifically to

control the use and development of land or to provide any land in such areas for public purposes. In general, the Act provides for preparing regional and local physical development plans, controlling development including development permission or approval, subdivision and disposal of land, extension of leases, etc., subject to the Government Land Act, the Trust Land Act and any other written laws on land administration.

It is important to note that, under the Physical Planning Act, local authorities will continue to control and prohibit land development and use in the interest of proper and orderly development in their areas of jurisdiction but in a manner consistent with the provision of the physical development plan (s) approved by the Director of Physical Planning. To ensure that land sub-division in local authorities areas is an orderly, registered physical planners must carry out the sub-division.

14.2.3 Land in other Constitutions

Constitutions generally deal with land issues in one or both of two ways. The first is to include it in the general provisions which protect property rights; hence to make no distinction between land and other forms of property. Most constitutions handed down by the British colonial authorities to independent governments around the world have tended to take this approach. The right to property in land in such constitutions, therefore, is treated as an inherent (or fundamental) right. The second is to separate land (i.e., immovable property) from other forms of property and to classify it as a national asset requiring a special and more elaborate constitutional treatment. More recent constitutions, especially those enacted in Africa in the last decade, have, in general, taken this approach. The Constitution of Uganda states in article 237(1), for example, that

Land in Uganda belongs to the citizens of Uganda and shall vest in them in accordance with the land tenure systems provided for in this Constitution.

Article 40 (3) of the Constitution of Ethiopia states that:

The right to ownership of rural and urban land as well as natural resources is exclusively vested in the State and in the people of Ethiopia. Land is the common property of Nations, Nationalities and Peoples of Ethiopia and shall not be subjected to sale or other means of exchange.

Because of a long history of political subjugation founded on land expropriation, the Constitution of South Africa has, understandably, very elaborate provisions on land. For example article 25 provides, *inter alia*, that

- (5) The State must take reasonable legislative and other measures within its available resources to foster conditions which enable citizens to gain access to land on an equitable basis...

- (7) A person or community dispossessed of property after June, 1913, as a result of past racially discriminating laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress;
- (8) No provision of this section shall impede the State from taking legislative and other measures to achieve land... and related reform to redress the results of past racial discrimination...

14.2.4 What the People Said

There were extensive views on the land question and, in particular, the constitutional status of Trust Lands. These may be summarised as follows:

(i) as a general rule, that

- a) all land should belong to the people, not to the Government;
- b) all Government land which has been “grabbed” should be repossessed;
- c) trust land should be vested in local communities directly;
- d) land distribution should be equitable;
- e) land unjustly expropriated by the colonial or current Government should be restored to the rightful owners or, where this is not practicable, reparations should be made; and
- f) restitution should be made for damage arising as a result of land conflicts or clashes, especially in the Rift Valley, Coast, North-Eastern and parts of Eastern provinces.

(ii) in specific terms, that

- a) forest areas being ‘degazetted’, allocated to individuals and deforested for environmental and resource considerations or even of resident communities would effectively destroy the livelihood of the people, (for example, clearing parts of the Mau forest would finally deprive the Ogiek people and ultimately destroy the community itself);
- b) the effects of unjust deprivation of land during the colonial period are still felt by some communities;
- c) some communities are deprived of access to important cultural sites;
- d) There is a good deal of land lying idle while others are crying out for access to land;
- e) some hold land as a symbol of power, rather than for productive use;
- f) many asked for an upper limit on the amount of land that can be held by an individual; land held above this ceiling to be expropriated and re-distributed to landless people; and
- g) women should have better rights to land: in terms of control of the land they cultivate, inheritance rights, and matrimonial property rights.

14.2.5 Commentary

Ample evidence of the importance of land reform and the land question has been provided to the Commission in its hearings throughout the country. Indeed, there is hardly a part of the country that does not suffer land conflicts.

The underlying causes of land-related conflicts include:

- colonial and post-colonial legacy;
- downgrading of customary law on the imposed English law;
- use of powers over land allocation to further political and ethnic interests;
- widespread manipulation and deeply rooted corruption in the alienation of Government land;
- deprivation of the poor of their land and displacement of people;
- concentration of land ownership in a few hands;
- increasing privatisation and commoditisation of land and erosion of people's rights to use and occupy land, to bury the dead and to have access for gathering natural products;
- growing poverty and human misery created by landlessness and tenure insecurity in both rural and urban areas;
- environmental degradation due to a breakdown in natural resource management, particularly common property resources;
- degazettement and alienation of forest reserves, in some cases long used and occupied by indigenous people;
- lack of State organs to address complaints and to resolve land disputes in a timely and even-handed manner;
- gender and age discrimination in both customary and statutory law in land administration; and
- lack of a coherent national land policy.

To these factors must be added population growth, which in some areas has led to farms being sub-divided many times over to levels that are sub-economic and to economic decline. The HIV/AIDS pandemic is causing many demographic changes and normal patterns of land holding and transfers. Many people are unexpectedly deprived of the support of relatives. Parents are inheriting land from their children, not the other way round. Women are left with young children and their only form of support is the land they till but which they cannot own.

14.2.6 Recommendations

The Commission recommends, therefore, that the following principles, as more specifically elaborated at 14.3.6 *infra*, be embodied in the new Constitution:

- (i) All land belongs to the people and that
 - a) the people will hold such land in accordance with systems of tenure defined by legislation; and
 - b) non-citizens of Kenya would be prohibited from acquiring land except on the basis of leasehold tenure;
- (ii) Land shall be classified as either public, private or community and that
 - a) public land be clearly delineated and held in trust for the people in terms of legislation defining the nature and extent of such trust;
 - b) private land be acquired and held by individuals or other juridical persons in accordance with systems of tenure defined by legislation;
 - c) community lands be clearly delineated and vested in communities or their agents, in accordance with systems of tenure defined by legislation;

- (iii) property rights lawfully acquired shall be protected and may be freely alienated without gender discrimination, subject only to such restriction as are inherent in the tenure systems creating them;
- (iv) all land, however acquired or held, are subject to the inherent power of the State to acquire or regulate such land in the public interest or for the public benefit;
- (v) there be established a land commission whose functions will include:
 - a) holding title to public land;
 - b) a periodic review of land policy and law;
 - c) developing principles for sustainable use and management of land; and
 - d) exercising residual land administration functions.
- (vi) Parliament shall make law within two years of its first sitting under the new Constitution providing for:
 - a) incorporation of the above principles;
 - b) mechanisms for resolving land disputes under different tenure categories;
 - c) the system of land administration under different tenure categories;
 - d) an expeditious and cost-effective system of land alienation — transfers and transmissions;
 - e) equitable distribution of land, including resolution of problems of landlessness, or spontaneous urban settlement;
 - f) investigation and resolution of historical claims, especially in the Coast, Rift Valley and North-Eastern provinces and other areas;
 - g) introduction of tax on idle and underused land; and
 - h) co-ordination and simplification of land laws.

14.3 Tenure and of Administration of Land

14.3.1 General Principles

(a) Systems of Land Tenure

Land tenure refers to the terms and conditions under which access rights are acquired, retained, used, disposed of or transmitted. An examination of land tenure is, therefore, central to the formulation of an adequate land policy; there are three ways of classifying land tenure regimes in Kenya.

The first concerns the location of the radical title to specific territorial land units, i.e., whether as “government” under the Government Lands Act (Cap 280) or as Trust Land. As a form of tenure, the classification of land as “government” means that such land is “private” to the Government and may be and has, in practice, been used and disposed of as such. Indeed, there is no legal requirement under the Act, or any other principle of law, for the Government to respond to any public obligation on the stewardship or use of land so classified. There is, therefore, no category of land that is public in the sense that it is held for and meant to be used for the benefit of the citizens. Thus, being an “estate” exclusive to the Government, it is not surprising that Government land has, in the last four decades, been the object of speculative disposition, wrongful appropriation and wanton destruction.

The classification of land as “trust” means, at least in terms of the Constitution and the Trust Land Act, that such land must be held for the benefit of the residents of those

territorial units. The legal regime governing tenure relations in all Trust Land units is, therefore, customary law. Vesting both radical title and control of Trust Land in county councils, coupled with allocation of administrative responsibility for it, in the Commissioner of Lands, means, however, that customary tenure principles are hardly ever respected. Indeed, the constitutional contempt for Trust Lands evidenced, *inter alia*, in the lack of security for customary land rights and its perception as a transitory domain to be phased out at the earliest opportunity by privatisation of ownership rights, has led to expropriation of community property in many parts of the country.

The second way in which tenure regimes may be classified is in the legal regime governing land relations, i.e., whether that regime is statutory or customary. And the third is in the quantum of rights held, i.e., whether as freehold, leasehold or commonhold. As in the case of the first, these two regimes are also governed by distinct bodies of law made up of their own unique modes of derivation, alienation and ascertainment. As a result, Kenya's property law remains one of the most fragmented, complex and inflationary in the region.

(b) Problems relating to Tenure

In addition to the fact that the law regime governing land tenure is complex and virtually inoperable, it has long been conceded that a number of problems will need to be resolved for Kenyans to have equitable access to land.

(i) The Status of Women

The first of these is to resolve women's status. Women constitute over half the population and play a central role in agriculture: sixty-nine percent of the active female population work as subsistence farmers compared with 43% of men. Yet they own less than 10% of the available land. Women form the majority of the poor, and families headed by women are significantly poorer than those headed by men. Lack of ownership of property by women reduces production incentives, retards development and contributes to poverty and low self-esteem.

African customs support patrilineal inheritance and male control of decision-making that frequently exclude females from land ownership. Women are regarded as belonging neither to their natal nor to their marital clans, and get land from neither. Even where women do have rights to family land, male relatives take advantage of the adjudication and land titling process to deny women their share. Sometimes women support these traditions.

Widows are often disowned by their in-laws and rendered homeless. Since many wives have little control over income, during marital discord many women are sent away with little, if any, means of survival. Even when they have taken care of their parents, brothers often evict sisters when the parents die. Ten per cent of women slum dwellers left their rural homes because their marriages broke down, 8% because they were widowed and 8% due to pressures of single motherhood.

HIV/AIDS is seriously affecting the rights of surviving widows and orphans to customary land. In some cases, women are dispossessed of their land and property after

their husbands' death. Widows are often unjustly condemned as the ones who have infected their husbands and are subsequently under pressure to leave their marital homes. Widows are mere trustees of the property, on behalf of the children. They cannot mortgage away the land and they lose the right to it on remarriage. Where such women are married without children, the norm is for them to be sent back to their parents as soon as the spouse is buried. Children, irrespective of their ages, are the most affected. Orphans are often disinherited by their adult male relatives. The rights of children of single mothers who die of AIDS are at the greatest risk due to the mother's uncertain position in her community and the stigma associated with the disease.

Although the Constitution prohibits discrimination on the basis of sex, s. 82 (4) makes exceptions on matters of personal law, including devolution of property upon death (which means that customary, Islamic and Hindu law, where applicable, and statutes which discriminate, are not contrary to the Constitution). The Law of Succession Act (Cap 160), which provides for dependants if a husband dies but there is no will, tries to expand the notion of dependants to include widows and children in polygamous as well as monogamous unions. However, there is an exception in s. 32 for agricultural land, livestock and crops in gazetted areas, which means that customary law, even if discriminatory, applies. Muslim law is also now excluded from the Act. If a man dies without leaving a will, his wife gets an interest in his property but this lasts only until she dies or remarries. If a man dies before his parents and leaves no will, his property goes first to his father, but, if the father is dead, to the mother — in other words, the father gets precedence. A child whose parents were not married (an illegitimate child) can inherit property from his or her father only in certain circumstances. Some of these laws can be considered discriminatory, but it is possible that they are not unconstitutional.

Kenya does not have a local statute on dividing of matrimonial property. The law is the 1882 Married Women's Property Act of England. Although this law says that when a woman marries she keeps her own property, the position on about the family house is unclear. The law tends to assume that land belongs only to the person in whose name it is registered; even if the wife has contributed by her remuneration from employment, or by her domestic work, to acquiring or developing the property, she may have no rights to it at all. When there is a divorce, or the husband decides to sell the house, the wife may find she has no rights and can be thrown out of the house. This may seem unfair, but it is not clear that it is discriminatory contrary to the Constitution.

(ii) Pastoral Communities

The second relates to the rights of pastoral population. The way in which pastoralists use land is rather different from the way in which settled communities do. There is even more emphasis on community land use. Pastoral people hold that land belongs to a group or "family" linked by descent or cultural affiliation. It is not owned in the sense that users enjoy unlimited rights to exploit and dispose of it at will. It is held in trust by the living for future generations, and the living have rights of use only, or "usufruct", which limits the intensity of use. This is the right to enjoy the product of land only if it does not cause damage and reduce its long-term productive capacity. Today, this concept is little understood and even less respected. The result has been the overriding

customary pastoral land tenure systems to the great disadvantage of pastoral peoples. Land, once used sustainably, has been alienated and have often become degraded.

In 1968, with the support of donors, Kenya introduced group ranches in the semi-arid regions, which conferred formal and legal land tenure on a community of co-residents. Some pastoralists accepted the group ranch concept as a way to acquire legal tenure that would enable them to qualify for loans. However, the programme was unsuccessful because none of the group ranches was viable as an ecological or social unit. In the 1980s, the Government encouraged subdivision of the group ranches for individual owners. This created a stampede for individual titles, widespread fraud and land theft. Today, land use patterns and holding units are not able to meet subsistence and social needs or enhance sustainable resource management.

Despite a great deal of research, which has demonstrated the value of the pastoral way of life and the inappropriateness of past Government policies and interventions aimed at settling pastoralists, the negative image and poor understanding of the pastoral way of life continues. Pastoral communities, such as the Pokot, were among those who made the strongest presentations to the Commission on the damage done to their way of life by loss of land. The Government committed itself in its 1999 Sessional paper No. 6 to supporting pastoralism, where environmentally appropriate.

Any attempt to secure pastoral land rights should, however, be informed by a clear understanding of the reality of pastoral land use. Pastoral communities should thus be effectively involved in making decisions that have a direct bearing on their livelihood. Securing pastoral land rights, therefore, entails giving legal recognition to the existence and validity of their community-used property rights. These are rights that derive their authority from the community in which they are practised.

(iii) The Needs of the Urban Poor

The Third relates to the land needs of the urban poor. Of Nairobi's population of 2.5 million, about 60% live in slums. Kibera, Africa's largest slum, is in Nairobi and is home to an estimated 0.75 million people. Nairobi's municipal waste collection rates dropped from 90% in 1978 to 33% in 1998. When it rains, storm water washes the accumulated waste into water sources used by the poor. Despite this, poor, landless, people continue to move to the city. Similar problems occur in and around Mombasa and other major towns.

Of the many lessons being learnt from past urban development failures, the most important is that improvements must involve local people in a meaningful way. Building trust and co-operation between Government officials and residents of informal settlements and creating the conditions for delivery of basic services (e.g., water and sanitation, waste management, safety and security) will take time. The efforts made by residents of informal settlements to improve their lot and organise services in the absence of any official assistance should be acknowledged. They find ways to clear and remove rubbish and construct latrines without official assistance. Community leaders emerge and small amounts are collected for services that people organise for themselves. These bottom-up developments in urban management and service delivery can be built on by the authorities and facilitated as part of a programme to bring about

informal tenure arrangements within the ambit of the law. New ratepayers with property rights are in a much stronger position to improve their own social and economic well-being by investing in their holdings, in the knowledge that shelters will not be bulldozed and that they will reap the benefits of their labours.

Family members in informal settlements need to be assured that they will not be evicted without compensation; that they can improve their houses to protect themselves against weather, thieves, fire, floods, etc; that their children can inherit this property or that they can sell or otherwise transfer it. They may need to borrow money using the property as collateral. They may seek a reduction in property disputes, to have access to potable water, electricity, waste collection, basic health services, safe playing areas for children and upgraded roads. They need an inexpensive and accessible system of administering their property rights and escape exploitation from “slumlords”. There is a great deal of experience in other countries that can be drawn on.

If a system preventing eviction is instituted as an interim measure, it may be advisable to provide that from the date on which the new Constitution is enacted (or perhaps even from an earlier date) no evictions at all shall take place for a specific period to avoid a rush of evictions from landowners or public bodies trying to defeat the constitutional protection.

(iv) The Status of Farm Dwellers

The fourth relates to the status of farm dwellers, otherwise known as “squatters” Farm workers and their families and so-called ‘squatters’ often live on land owned by others. Landowners often infringe their basic human rights (e.g., human dignity, freedom and security, protection from servitude and forced labour). The redistribution of farms in the former White Highlands has resulted in complex land use and tenure arrangements. Due to spontaneous settlement, poor people are frequently without title deeds and are subject to eviction, as landowners (often absentees) seek to assert proprietary control over their land. An inevitable result of the sale or transfer (or redistribution) of large farms and certain types of Government land is that farm-worker tenants and their families as well as other beneficial occupiers are subject to summary eviction without compensation.

Kenya should introduce effective measures to protect from eviction farm dwellers and people in long-term beneficial occupation of land. Due to poverty, there is a need for State legal advisory services to the poor who have little or no recourse the present legal system. Illiterate and poorly served by public information services, they remain unaware of their rights under the existing or any new Constitution and other new laws. The few rural legal advisory offices, operated by NGOs, will be inadequate for the immense task of providing advice, information and representation in rural areas.

(v) Past Land Grievances

The fifth relates to grievances on land expropriations in colonial and post-colonial Kenya. The most important of these concern ethnic Arab occupation of land in the Coastal strip and the massive expropriation of Maasai land under the guise of “agreements” signed with colonial authorities in 1804 and 1911. In more recent times,

expropriations have occurred as a result of ethnic clashes in the Rift Valley, Coast and parts of Western and Nyanza provinces.

To reverse the process of land dispossession and return land to the descendants of previous users presents major practical difficulties. Today's communities are much larger than those originally evicted. It would be necessary to determine the situation prior to eviction and to identify the qualifying descendants of former owners. To what precise point in history should the clock be turned back? What criteria should be used to evaluate claims? It is not necessarily the case that all communities, or all individuals within communities, are equally disadvantaged. To give special treatment to a community on the sole basis that it was historically deprived of land may result in benefiting certain communities at the expense of people who are even more deprived. Again, certain land reforms which took place following independence on the basis of the willing-buyer, willing-seller principle have resulted in areas being occupied by communities who were not the original, pre-colonial, occupants.

(vi) *Land Tenure Reform*

The sixth relates to the impact of land tenure reforms; a comprehensive programme started in the mid-1950s with the sole purpose of individualising land holding in the African, i.e., Trust Land areas. That programme was and still is based on an old orthodoxy, namely, that, by changing tenure *per se*, rather than the agrarian structures and conditions under which production relations operate, it is possible to generate efficient land use practices. This proposition is founded on the thesis that ownership, *per se*, especially if it is individualised and is secure against State interference, is the foundation of economic initiative.

The above argument has been sold by free-enterprise economists and planners in Africa on two complementary fronts. First, it has been offered as the explanation for the alleged inability of indigenous tenure institutions to stimulate agricultural development, it being contended that, because of their communal nature, these institutions are inherently incapable of accommodating modern production methods, techniques and practices. Second, it has been offered as the panacea for the morass of underdevelopment that continues to plague agriculture throughout Africa. The implication, therefore, is that salvation lies along the path of privatisation of land ownership rather than in the public control of land use.

Although a number of African countries have accepted this and, in consequence, invested staggering resources in tenure reform programmes, there is evidence that its wider political and economic consequences have not always been assessed or fully appreciated. In particular, the impact of tenure reform on the economic, political and social organisation of rural society has never been fully weighed against its alleged contribution to rapid growth in the agricultural sector. More recent studies, including a major empirical exercise by the World Bank, have now established that these assumptions are misleading. They demonstrate beyond any doubt that what is required is a comprehensive agrarian reform; that is to say, that beyond the property structure, there is a need to reform production structures and support service infrastructures.

(c) *Issues Relating to Land Administration*

Land administration embraces all activities relating to procedures for delivering land rights, systems of land rights, security; including demarcation, survey and registration, regulation and control of land use, land use planning, land market regulation, and the processing of land disputes.

The main weaknesses of the current land administration is lack of transparent and effective institutions to deal with public land and customary land, the administration of which is perceived to be corrupt, highly over-centralised and remote from the resource users. The Government needs the system to be nationally uniform and sustainable. It needs a basis for implementing local taxation, land use and building control and to provide infrastructure. It requires a flexible means of administering property rights (e.g., the ability to accommodate individual and group rights, the rights of the middle class, business people and poor people). It needs to deliver land titles to the people in an accessible and user-friendly manner and to allocate land titles that are not perceived as inferior.

The land survey and title deeds registry for private land will have to be thoroughly overhauled if confidence in private land titles is to be restored and the land market and investment area is to flourish. Decentralisation of the land registry is essential. The current situation, in which titles are issued to strangers without any reference to the informal rights holders, using and occupying the land is intolerable and represents a gross violation of basic human rights.

14.3.2 Tenure and Administration of Land in the current Constitution

As indicated above, only trust land is addressed specifically in the Constitution. That provision, however, is concerned mainly with administration rather than tenure. Consequently, the complex questions surrounding the manner and conditions in which land may be held are left largely to general law.

Here, a distinction must be made between statutory and customary tenure regimes. The former has several pieces of legislations, the most important of which are:

- the Transfer of Property Act of India, 1882;
- the Registered Land Act (Cap.300);
- the Registration of Titles Act (Cap.281); and
- the Registration of Documents Act (Cap.285) and the Land Titles Act (Cap.282).

The latter is made up of rules and norms governing land relatives recognised by indigenous African communities.

All land held under any tenure may be compulsorily acquired by the State for public purposes or if the public interest requires it. The acquisition procedure for land held under statutory tenure is set out in the Land Acquisition Act (Cap.295). For land held under customary tenure, the procedure, referred to as “setting apart”, is indicated, in the Constitution and the Trust Land Act (Cap.288).

14.3.3 Tenure and Administration of Land in other Constitutions

Most constitutions, except those of South East Asian countries, do not address issues of tenure of land. Land administration, however, is often taken care of by establishing land commissions or similar institutional structures at the national and local government levels. The Constitution of Uganda provides for both of these issues as follows

237 (3) Land in Uganda shall be owned in accordance with the following land tenure systems

- (a) Customary;
- (b) Freehold;
- (c) wakfs; and
- (d) leasehold...

238 (1). There shall be a commission to be known as the Uganda Land Commission...

239. The Uganda Land Commission shall hold and manage any land vested in or acquired by the Government in accordance with the provisions of this Constitution

241 (1). There shall be a District Land Board for each district...

241 (2). In the performance of its functions, a District Land Board shall be independent of the Uganda Land Commission and shall not be subject to the discretion or control of any person or authority...

Generally speaking, therefore, issues of land tenure and administration is left to ordinary legislation or custom.

14.3.4. What the People Said

The Commission heard detailed and extensive views from the people on land tenure and land administration. These may be summarised as follows:

- i) land may be held under customary, private or public tenure systems;
- ii) all such land used and/or occupied by local residents and from which they derive their daily livelihood shall be vested in them on the basis of either private or customary tenure, as such, determined by the local land body, which, in making that determination, shall take into account all the prevailing circumstances;
- iii) any other such land not used or occupied, or set apart as above, shall be reserved as a land bank for future use in the interest of public order, morality, health and development;
- (iv) the Constitution should establish principles for a coherent policy on land, which includes

- a) respect for individual and community rights under customary law;
- b) just reconciliation of customary and statutory rights;
- c) sufficient flexibility to permit tenure changes in the public interest and not detrimental to existing rights holders;
- (v) the responsibilities hitherto exercised and rights held by county councils should be vested in the National Land Commission;
- (vi) all land hitherto known as trust land, which is still unadjudicated and unregistered, is to be referred to as land held under customary tenure;
- (vii) all such land used and/or occupied by local residents and from which they derive their livelihood shall be vested in them on the basis of either private or customary tenure, depending on the prevailing circumstances;
- (viii) such land not occupied or not in the immediate use by local residents shall be set apart for and vested in the indigenous communities as commonage;
- (ix) any other such land not used or occupied, or set apart as above, shall be reserved for future use in the public and/or communal interest;
- (x) any trust land for which the lease has expired shall immediately revert to the National Land Commission for reallocation by the land board and reclassification as stated above; and
- (xi) private property should be protected.

14.3.5 Commentary

Although a more comprehensive inquiry into land issues is under way by a different Commission, this Commission is convinced that radical changes are necessary on land. There is a need, in particular, for a comprehensive statement of land policy, revision and rationalisation of land laws, and a more efficient and transparent land administration system.

14.3.6 Recommendations

The Commission recommends, therefore, that:

- (i) *a new land policy should be designed to take into account the reasonable expectations of the existing owners and occupiers specifying, in particular, that*
 - a) private landowners shall enjoy security of tenure, save for considerations of public interest, good order, morality, health and development, which may take precedence over individual rights;
 - b) no one may be deprived of his/her land or right to land except as provided for under this Constitution;
 - c) no one may be deprived of property on the basis of gender, marital status, age or any other reason created by history, tradition or custom; and
 - d) extinction of a private landowner's rights will take place only in accordance with the requirements of the Constitution;
 - e) all land hitherto referred to as unalienated Government land shall belong to the people in their sovereign status;
 - f) all public land shall be used only for public purposes and in public interest;
 - g) privatisation of public land shall take place only if it promotes public interest;

- h) the Government or a local government may acquire land in public interest in a manner prescribed by Parliament;
 - i) the Government shall, as determined by Parliament, protect lakes, rivers, wetlands, forests, game reserves and national parks and hold them in trust for the common good;
 - j) any alienation and disposal of protected areas, including forest reserves, should be done in a manner that maintains biological diversity, productivity and capacity for regeneration as well as paying due regard to its future ecological, economic and social functions and to the local people's land needs;
 - k) land is a national resource and should be used in a manner that enhances the interest of present and future generations;
 - l) ownership carries a social obligation to serve the larger community;
 - m) the State shall recognise, respect and protect the rights of indigenous cultural communities to preserve and develop their cultures, traditions and institutions on land; it shall consider these rights in formulating national plans and policies;
 - n) the system of land marketing is efficient, cost-effective, accessible, secure, transparent and free of unnecessary disputes;
 - o) the policy respects
 - customs and traditions and the importance of land in the culture of many communities;
 - sacred and culturally important sites even where the community no longer occupies large parts of the land;
 - efficient land use in both urban and rural areas; and
 - the constitutional principles of human rights, including gender equity.
- (ii) *The state right to compulsory land acquisition should clearly conform to the following principles:*
- a) the public interest must be clearly defined and be sufficiently compelling to justify compulsory acquisition; it should not cause undue hardship to individuals or communities deprived of land;
 - b) land acquired but not used for public purposes should revert to the original owners;
 - c) an acquisition should be subject to challenges by the owner/occupier;
 - d) the Constitution should provide for compensation to reflect a variety of factors along the lines of the South African provision.
 - e) it seems unnecessary to have a detailed provision – such as now appears in the Constitution – to the effect that quite ordinary legal measures, such as seizing property for non-payment of tax, or in execution of judgment of a court, are not unconstitutional.
 - f) the amount of the compensation and the time and manner of payment should be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to the relevant circumstances, including the history of the acquisition and land use; and
 - g) it might, however, be desirable to include a statement to the effect that regulation of land use in the interest of conservation, environmental protection and planning does not amount to acquisition of rights, to avoid the risk that individuals, drawing on US cases, especially, might try to argue that they are constitutionally entitled to resist such regulation or seek compensation.

- (ii) *A National Land Commission be established to*
- a) hold and administer all public land to be held in trust for the people, including future generations;
 - b) exercise trusteeship in terms of legislation defining its nature and content;
 - c) perform the following functions, to:
 - ensure faithful implementation of the constitutional provisions on land, including the directive principles of state policy and national goals;
 - provide space for unhindered public dialogue on various land issues on a continuous basis;
 - oversee a new beginning in land tenure administration, review and verification of the title deeds already provided;
 - oversee creation and management of land banks/public aimed at servicing new, emerging and future development needs of the country;
 - ensure efficient, orderly, optimal and sustainable land use for various identified purposes;
 - follow up areas where consensus has not developed, including redressing past wrongs through restitution, where appropriate, resettlement in alternative land, monetary compensation, among other things;
 - promote public education on land matters, particularly constitutional and legal ones;
 - be the trustee for the Kenyan people and protector of their rights, including the rights of indigenous communities to preserve and develop their cultures, traditions and institutions on land; and
 - advise Parliament and other organs of State on land matters of constitutional significance, including legislative, legal and policy matters.
- (iii) *Provision should be made in the Constitution on legislation to:*
- a) recognise customary law;
 - b) give greater recognition to the interests of dependants in the case of death, including the rights of women who have been cultivating land;
 - c) protect the matrimonial homes of all parties to a marriage during, and at the conclusion, of the marriage;
 - d) protect equal rights of men and women in marriage, during marriage and at its dissolution;
 - e) enjoy the common ownership of spousal land as long as such land is the family's principal residence or is principal source of income or sustenance;
 - f) prohibit discriminatory access to land by reason of gender, marital status, age or other distinction;
 - g) recognise and protect pastoral community rights;
 - h) ensure participation by pastoral communities in decisions that have a direct bearing on their livelihood;
 - i) set out the manner and process by which to redress of past wrongs;
 - j) establish conditions, including providing necessary finance, to enable people to gain access to land on an equitable basis;
 - k) ensure that all irregularly acquired public land immediately reverts to the National Land Commission, unless the holder pays to the authorities compensation considered reasonable in the circumstances; and

- l) establish a permanent Land Claims Tribunal to investigate claims of past land injustices to individuals or communities; this must be done within two years from the date of enactment of the new Constitution.
- (iv) *A system of land administration be established which*
 - a) is independent of political forces;
 - b) involves local communities in ways that genuinely permit them to make a significant input into establishing local priorities and into decisions at all levels;
 - c) is transparent; in this context, interests in private property must be subordinated to the need to maximise effective and constitutionally principled use of a national resource, and to control corruption;
 - d) is supported by local land boards and committees; these bodies should reflect local interests, including the interests of women and other disadvantaged and vulnerable groups;
 - e) incorporates a system of tribunals or courts to deal with land issues; organisations representing the interests of the local or national community must be able to present arguments before such bodies ,where appropriate.

14.4 Intellectual Property Rights

14.4.1 General Principles

Discussions on property often only cursorily touch on intellectual property issues. Intellectual property is recognised as a major instrument for innovation and socio-economic development. Intellectual property comprises:

- patents – to protect inventive information;
- copyright – to protect original information in the expressive sense;
- trade marks – to protect symbolic information;
- trade secrets – to protect information on trade released in confidentiality;
- utility models – to protect novel innovations;
- industrial designs – to protect designs of a visual nature; and
- traditional or indigenous knowledge.

The main national institutions dealing with intellectual property issues are the Kenya Industrial Office (KIPO) and the Copyright Section of the Attorney- General’s office. KIPO established under the Industrial Property Act,(Act No.2 Of 2001) is responsible for industrial issues. Its functions include registration of trademarks, technology transfer and granting patents and utility model certificates. The Copyright Section deals with copyright in music, art, film and publishing, among other things. The Copyright Act (Act No. 12 of 2001) creates a Kenya Copyright Board that brings together the diverse interests in the Copyright industry. It generally directs, co-ordinates and oversees the implementation of copyright law.

14.4.2 Intellectual Property Issues in the current Constitution

Although there is no provision in the current Constitution on intellectual property, Kenya is a signatory to a number of international conventions on the issue, including the Biodiversity Convention and conventions establishing the World Intellectual

Property Organisation (WIPO) and the African Regional Intellectual Property Organisation (ARIPO).

14.4.3 Intellectual property Issues in other Constitutions

Specific recognition and protection of intellectual property rights is rare in most constitutions. The reason is that the general protection of property clause is thought to be sufficient even for this very special domain. The fact that not many jurisdictions agree on what constitutes “intellectual” property has, however, led to many disputes to how much protection a general property clause can confer.

The 1987 Constitution of the Philippines is among the few that have tried to address this matter. Article 13 thereof provides that –

The State shall protect and secure exclusive rights of scientists, inventors, artists and other gifted citizens to their intellectual property and creations, particularly when beneficial to the people, for such a period as may be provided by law.

Nothing is said, however, of indigenous knowledge pools and similar resources that are often transmitted from generation to generation.

14.4.4 What the People Said

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

- (i) inventors of things e.g., medicines and aircraft, be promoted by the Government;
- (ii) the Constitution should provide intellectual property rights for inventions by our citizens;
- (iii) a law should protect Maasai intellectual rights;
- (iv) patent rights on technology should be waived after 25 years;
- (v) the Constitution should take cognisance of social dynamism, advancement of human knowledge and technology;
- (vi) the Constitution should protect and promote intellectual property rights and innovation;
- (vii) inventors should be rewarded by the Government;
- (viii) patent laws should be strengthened to protect Kenyan inventions; the inventors should also be rewarded and their ideas put into place;
- (ix) encourage patenting to protect local investors;
- (x) all our discoveries should be patented;
- (xi) registration of patents should be reviewed to allow for cheap and easy ways of registering inventions;
- (xii) investors should be allowed land in rural areas;
- (xiii) the Government should encourage technological developments and assist inventors; and
- (xiv) plagiarists of research and innovation should be punished; some taxes should be directed towards research.

14.4.5 Commentary

There is no doubt that people of all walks of life understand and appreciate the importance of intellectual property, in particular, cultural property. Very strong views were presented by indigenous neutralists who decried the destruction of forests by multinationals searching for medicinal plants. Preservation was thus seen not only as a heritage issue; it is to them a livelihood matter as well.

14.4.6 Recommendations

The Commission recommends, therefore, that:

- i. provision be inserted in the Bill of Rights entitling each Kenyan to freely participate in the cultural life of his/her community, enjoy the arts and share in the benefits of scientific advancement;
- ii. provision be made in the law to protect all interests accruing from any scientific or artistic endeavour by any Kenyan;
- iii. Parliament should formulate legislation to promote cultural, industrial and scientific innovations, and the appropriation of the benefits to the inventors or authors;
- iv. provision be made in the Constitution to protect indigenous knowledge.

CHAPTER FIFTEEN - PUBLIC RESOURCES AND CAPACITY BUILDING

15.1 The Mandate of the Commission

In addition to land and natural resources, the Commission was required by the Act to examine and make recommendations on management of public resources crucial to establish an equitable development framework. Specifically, the Act mandated the Commission to examine and review the management and use of public finances and recommend improvements. In pursuit of its general mandate, the Commission also examined capacity building, particularly human resource development and science and technology.

15.2 Public Finance and Revenue

15.2.1 General Principles

(a) The Role of Government

The importance of financial control and accountability hardly needs emphasising. In most countries the government is the largest employer. Much money moves in Government activity. It has the power to tax; use and abuse of financial resources causes more complaints than perhaps any other aspect of Government. Normally, the complaints are about allocation on the basis of political loyalties, not need, the siphoning off of resources (which ultimately means money) from places which generate them to those more politically favoured, the plundering of the State by means of corruption or – more bluntly – theft.

Money is easily linked to evil, especially when it becomes first priority. Without it, Government activities cannot run smoothly. But it needs extraordinary vigilance as Government resources are prone to great abuse. The financial resources available to the Government are generated from three main sources; namely, taxation and other levies, internal loans and external loans and grants.

Currently, there are not – but there should be – provisions requiring those charged with raising and spending public money to generate appropriate vision, mission, objectives, strategies, programmes and activities to ensure optimisation of revenue and expenditure programmes. There is no provision for efficient programme implementation and monitoring, evaluation and feedback to engender value for money as a component part of the execution of the social contract between the governor and the governed. The provisions are essentially about ensuring that money is collected and spent by those who have the authority to do so, but there lacks a real effort to ensure wisdom in financial decisions.

Overall, the role of Parliament is very limited. This is partly due to the pressure of time, partly to want of expertise by individual MPs, and partly as a result of a lack of a proper committee system. There are some uncertainties, too, on how far Parliament can change elements in the Budget, and whether expenditures from funds other than the Consolidated Fund are subject to the audit process. There is also the Westminster

tradition, which is one of limited involvement of Parliament in the system – especially at the budgetary formulation stage. Finally, where the Government has a large majority in the House and party discipline is exercised, as will be on the Budget, debate is unlikely to be robust; this is another product of the parliamentary system.

(b) Allocation of Financial Resources

Financial Government resources from various sources need to be allocated on the basis of a proper balance between efficiency and equity. The role of the public sector is also to create an enabling environment to facilitate savings, investment production and service delivery by the private sector. This calls for continual improvement of communications and informational infrastructure, delivery of certain essential services that cannot be delivered by the private sector and generally taking measures to reduce the practice of rent seeking and increase economic efficiency.

(c) Custody and Withdrawal of Public Finances

Once money has been raised for the Government, it is important to keep it securely and used only for the purposes for which it is raised, as the law provides. Most of Government revenue is placed in the Consolidated Fund, from where it may not be withdrawn except on authority. The Government is also empowered by the current Constitution to create a contingency and other funds, as it deems necessary, where to deposit revenue from certain sources. It is important to ensure that not too many funds are created, as that might cause confusion in the execution of custody. There must also be a set of financial rules to ensure safe custody, appropriate withdrawal and sound use of such money.

(d) Expenditure of Public Funds

Revenue should be applied effectively, efficiently and with the highest degree of economy to maximize the national benefits of such expenditure. Sound strategic planning is required to ensure that these objects are attained. Excessively stringent provisions for revenue custody and withdrawal would slow down and ultimately choke Government expenditure programmes and hence become a source of inefficiency. However, liberal provisions would leave the funds open to manipulation and misuse. It is, therefore, important to strike a balance between these extremes.

(e) Resource Appraisal and Audit

It is important that the level and state of the national financial resources be known at any time to facilitate sound planning and decision-making. This calls for proper application of appropriate systems of assessing and appraising the financial resource base.

Exercising the above functions requires control and audit to ensure prudence, accountability, diligence, efficiency, effectiveness and economy. This calls for appropriate financial and programme audits to prevent misbehaviour and correct in time any mistakes.

(f) *Expenditure Audit and Report*

Expenditure audit and reporting enables checks to be made to ensure that public resource are expended as authorised by Parliament. It involves the following activities:

- (a) Deciding what must be audited, how and by whom, and establishing the machinery for auditing;
- (b) The auditing process; and
- (c) The scope of auditing (for example, does it deal with efficiency and effectiveness?)

The questions of what is done with the reports of the auditing body, to whom they go, by whom they are considered and who acts on them are pertinent and important. There is, therefore, a need for an expenditure audit and a reporting mechanism on public funds.

(g) *The Budgetary Process*

Estimates of revenue and expenditure are traditionally submitted to Parliament through the annual Budget speech and the accompanying Finance Bill. The Budget preparation process has traditionally been shrouded in secrecy. The minister's proposals are unveiled only in the Budget speech. Certain lobby groups do present their views to the ministry and may be accorded an opportunity to discuss such proposals. But there is no forum for openly informing the Budget through participation of various interest groups. Some secrecy is justified, but there should be room for a public input.

When the Budget is presented to Parliament, usually on or before June 30 each year, the House transforms itself into a Committee of the Whole House (the Committee of Ways and Means) and it gives precedence to the Budget for most of the next 7 days. This debate is a general one on the policy that the Budget is intended to support. On Budget Day, the House passes a resolution which endorses tax changes and this is to bring the changes into effect immediately to prevent tax evasion, and chaos as people try to avoid the consequences of new taxes, or refuse to carry out transactions until new reductions come into effect. This resolution is given the final force of law when the Finance Act is passed. At the end of this debate, the House passes a motion that authorises the use of half the estimated expenditure. Twenty days are allocated to a detailed consideration of the Budget by another Committee of the Whole House called, the Committee of Supply. All this is completed by October 31 and on the final day all votes must be passed. Some will not have been discussed because of the use of the guillotine that enables debate to be curtailed. It is possible for the House to alter specific sub-heads of expenditure, though this rarely occurs.

Once approved, all withdrawals from the Consolidated Fund must also be approved by the Controller and Auditor General, (CAG).

At the end of the financial year, the Treasury prepares accounts by the end of October. The Controller and Auditor General then audits them and, at the end of 7 months (a period which may be extended by the National Assembly), sends the report to the

minister, who tables it in the National Assembly. In fact, in many years, it is more like 2 years before the report reaches Parliament. The report is then discussed by the Public Accounts Committee, which highlights important issues. The committee reports to Parliament as a whole, and the Treasury is required to explain what action it has taken on the PAC recommendations. In reality, though the PAC comments often cause immediate reaction in the Press, this is brief, and abuses go unremedied. There is a similar process for state corporations involving the Auditor-General and the State Corporations and the Public Investment Committees.

(h) Taxation:

Revenue is raised to finance Government recurrent and development expenditure. There is always the tendency to attempt to raise as much revenue as possible. This has led to the charge that the country is heavily overtaxed. The cost of raising revenue consists of the direct cost of financing the personnel and operational expenses and, in addition, the indirect cost of crowding out the private sector, in the sense that tax revenue is not available for private investment. There is, therefore, the need to strike a balance between these costs and the revenue raised, otherwise beyond a certain level, raising additional tax revenue becomes counter-productive and hence injurious to the economy. It is a challenge for the tax authorities to seek and attain that balance.

(i) Public Debt

The need for external loans arises principally for financing development expenditures which cannot be financed from taxation, and other revenue of the Government. In some cases, external loans could be used to finance short-term adjustments, as in the case of loans from the IMF.

Use of external financing should ideally help ensure that tax rates do not escalate and that control on taxation level is not achieved at the expense of Government programmes. In the absence of external borrowing and, given controlled taxation levels, the other alternative available to the Government would be a reduction in expenditure programmes to achieve a balanced budget. Internal borrowing could close the financing gap. Internal borrowing, which is typically finance raised by issuing Treasury Bills and Bonds, may also be used to control the level of money supply through open market operations – sale and purchase of Government securities – and hence control of inflation. Due to the ease with which money can be raised through this source, it needs to be controlled to ensure that only such levels of domestic debt as are truly required for the legitimate source are raised and that the terms of such debt are not inimical to economic performance.

(j) The Central Bank

The Central Bank of Kenya is one of the most important national institutions. Yet it does not have a home in the Constitution. This is an anomaly that must be corrected. The Central Bank of Kenya Act (Cap 491) establishes the Bank and the Kenyan currency. The Act defines the principle objects of the bank to be:

- (a) to regulate the issue of notes and coins;
- (b) to assist in developing and maintaining a sound monetary, credit and banking system conducive to economic development and currency's external stability;
- (c) to serve as banker and financial adviser to the Government;

(k) Retirement Planning

Pensioners have the disadvantage of changing economic circumstances, as their pension entitlements do not change with the times. Unlike salaries, pensions are not subject to increment to cushion the rising cost of living.

Many persons retire to receive a miniscule pension, which cannot by itself maintain such persons and their families. Unless one benefits from a substantial contribution during employment one also invests wisely during that period, one is adversely affected by the small size of the pension, which is further diminished by the effect of inflation. Unless one can also find some viable opportunity upon retirement. One is not likely to make ends meet without downsizing their consumption basket. This situation often leads to non-use of productive human capacity, exposes employees to severe psychological risks and their families to financial risks. This is particularly aggravated in the case of early retirement and retrenchment unaccompanied by appropriate outplacement programming. It is, however, recognised that, should pensions be made subject to increment, account also has to be taken of the additional financial burden that would have to be assumed by the employers, and in the specific case of public employees were such resources to be drawn from the Consolidated Fund. However, with better management and prudent investment of pensions and provident funds, such funds could grow appreciably in time to create opportunities for improved payment to pensioners. This is a better and more viable option than soliciting funds from an already overburdened Consolidated Fund. Employers should also be required to provide training to employees on retirement planning so that employees can make the necessary investments (e.g., share investments) while still in employment which can generate a useful personal investment fund upon retirement.

(l) Fiscal and Monetary Matters

Matters related to national fiscal and monetary affairs are of paramount importance in executing the social contract between the governors and the governed. They determine the extent to which the Government of the day provides opportunities and an enabling environment for mobilising resources to facilitate the meeting of the people's basic needs and improved welfare. Such important matters call for the highest attention in order to be handled at the highest possible degree of efficaciousness to discharge the obligations imposed on the Government in the social contract. This can be achieved by entrusting the responsibility to a high-powered independent group of appropriately qualified and experienced persons in the form of an economic and financial affairs commission entrenched in the Constitution to provide for such a body and clearly define its powers and responsibilities. Such a commission would continually assess the state of design and implementation of fiscal and monetary policy and monitor, evaluate and advise on the policy's dynamics. Five years ago, the Government announced a Planning Commission, which did not materialise. Given the concerns expressed from time to time, it is suggested that the time has come for such a Commission.

15.2.2 Finance and Revenue in the current Constitution

Section 48 of the current Constitution prohibits the National Assembly from proceeding with a Bill or a motion proposing taxation measures, a change on or withdrawal of money from the Consolidated Fund, or composition or remission of a debt due to the Government except on a recommendation by the President signified by a minister. Part VII of the Constitution makes elaborate provisions for establishing and appropriating the Consolidated Fund, establishing a Contingencies Fund, managing the Government's public debt, and the office of the Controller and Auditor-General.

These provisions are further elaborated in specific Acts of legislation, among which are:

- The Exchequer and Audit Act (Cap.412);
- The Kenya Revenue Authority Act (Cap. 469);
- The Paymaster General Act (Cap.413);
- The Government Contracts Act (Cap.25); and
- The Central Bank Act (Cap.491).

15.2.3 Finance and Revenue in other Constitutions

Provisions on finances and revenue management are standard in all constitutions, old or recent. Responsibility for fiscal policy, taxation, approval of appropriations and prudent management of public revenue is usually shared between the Executive and the Legislature. The general principle is that, although responsibility for raising revenue and incurring expenditure vests in the Executive, this can only be exercised with approval by or concurrence of the legislature. Some constitutions, such as that of South Africa, also establish a commission to advise the Legislature and/or the Executive on financial and fiscal matters.

15.2.4 What the People Said

People who spoke on public finance and revenue were concerned mainly about the following issues:

- (i) strengthening the independence and powers of the Auditor-General;
- (ii) better controls over expenditure of State revenue out of the Budget;
- (iii) greater transparency of the process;
- (iv) greater involvement of the public and Parliament in preparing and approving the budget;
- (v) more transparency over tax waivers;
- (vi) senior officers of the Kenya Revenue Authority to be appointed by Parliament;
- (vii) establishing the Budget Office of Parliament;
- (viii) separating the two functions of Budget control and audit;
- (ix) tightening Parliamentary control of Government borrowing;
- (x) Constitution to include principles of fair and prudent taxation;

- (xi) office of the Governor of the Central Bank to be established by the Constitution and given security of tenure and independence of operations;
- (xii) systemising the financial provisions; gathering them in one place;
- (xiii) the nation's currency should have a national image, not an individual's portrait;
- (xiv) revenue should be shared between the central Government and lower levels at certain percentages, between 10 and 20% to the central government.

15.2.5 Commentary

The people were acutely aware of the fact that taxation is the main source of Government revenue. But they were also aware that the current taxation rates are too high and, indeed, punitive. Further, the fact that a politically correct elite evades tax with impunity was widely noted.

So, the people wanted their Government to ensure that all citizens pay all the taxes irrespective of their social status. There was an outcry for the Government to revise the prevailing tax rates and improve collection systems.

On equity in national wealth distribution, the Government was implored to apportion the benefits from the resources (tax included) in a given area between the people and the central Government. The majority of the Kenyans want the Government to take only 20% of the benefits and leave 80% for developing the area in which the resource is found.

In addition, the people were critical of government borrowing, in particular, of accumulation of a large internal and external debt, as now. The Government, they urged, must live and spend within its means. The need for vigilance by Parliament was, therefore, emphasised.

15.2.6 Recommendations

The Commission recommends, therefore:

- (i) *On budgeting, that*
 - (a) the budget-making process should allow for participation by all key stakeholders, taking into account the need for affirmative action for disadvantaged economic groups;
 - (b) statement of principles should clarify the basis of the Budget submissions to help the stakeholders appreciate the Budget assumptions and objectives and the constraints that may be encountered in implementing such proposals;
 - (c) the Constitution should provide for a Parliamentary Budgetary Committee to work closely with the Treasury in developing the Annual Financial Bill with the mandate of monitoring the National Budget's development, taking into account the need to ensure efficiency and equity, as reflected by the capacities and needs of various groups and regions;

- (d) the Constitution should provide for a Parliamentary Budget Office in the form of a Secretariat to render technical assistance to the Budget Committee on financial control and audit;
 - (e) the Budget Office should have a capacity for independent research, adequate research staff and enough flexibility in using consultants for it to best assist the Parliamentary Budget Committee to:
 - answer specific queries by MPs on public expenditure;
 - seek and process public and expert opinions/views on budgetary matters;
 - produce independent evaluations of budget proposals;
 - co-ordinate amendments to the Budget;
 - promote compliance with a framework that ensures Budget balance;
 - produce technical studies on the Budget; and
 - provide an analytical backup service to parliamentary committees working on different sectors of the economy;
 - (f) all revenue generation and fund-holding and spending Government units shall prepare a detailed 3-year strategic rolling plan to accompany and serve as the basis preparing the annual revenue and expenditure estimates;
 - (g) Parliament shall debate the strategic plan along with the Budget and propose such improvements as, in its opinion, ought to be made, and should, if not satisfied with the strategic plan of a particular unit, instruct that a revision be made and resubmitted to it within one calendar month; and
 - (h) Parliament may also require the minister for the time being responsible for finance and planning to prepare such other longer-term plans as he may deem necessary.
- (ii) *On the Office of Controller and Auditor-General, that*
- (a) the President, on the recommendations from an appropriate constitutional commission, shall appoint the Controller and Auditor-General subject to ratification by the National Assembly;
 - (b) the office of the Controller and Auditor General should enjoy security of tenure and there should be entrenched in the Constitution severe consequences of interfering with such tenure;
 - (c) the duties of the Controller and Auditor-General provided in Section 7 (1-2) of the Exchequer and Audit Act (Cap 412) should be entrenched in the Constitution;
 - (d) the Controller and Auditor-General should be a certified public accountant and a registered member of the Institute of Certified Public Accountants of Kenya, among other qualifications to be specified by the appointing body;
 - (e) the Controller and Auditor-General shall not have attained the age of 65 years on first appointment and should not exercise the duties of that office beyond 75;
 - (f) the office of the Controller and General be run by two independent officers as follows:
 - Budget Controller, to oversee the Budget implementation as approved by Parliament by ensuring money is actually spent according to plan and to provide accounts of actual versus budgeted expenditure on a rolling basis;
 - the Auditor General to audit the expeditiously the expenditures and revenues of all Government departments and state corporations and to provide timely reports to Parliament on the extent to which the budgetary regulations, procedures and achievement have been adhered to;

- (g) Parliament should not go on recess before debating the report and if it is on recess by the time the Auditor-General's report is submitted, it should be recalled immediately to discuss it;
- (h) Parliament should, within six months of the report's submission, debate and take appropriate action;
- (i) the Auditor-General should submit his/her report directly to Parliament with a copy to the minister for the time being responsible for finance; and
- (j) The Auditor-General should give his/her report quarterly to Parliament in sequence, with each quarterly report being subjected to a time-frame.

(iii) On Taxation, that

- (a) there should be a clear basis for imposing any form of tax and a set of general principles to be followed in the process, which should include the following:
 - there should be no taxation without representation;
 - taxation should, to the extent practicable, achieve a balance between the people's needs and their ability to pay tax;
 - every effort should be made to ensure that the same institution or individual is not burdened with many different taxes as to make the overall tax burden unbearable;
 - the principle of tax payment, as a civic duty, should be inculcated taxpayers minds;
 - a proper balance should be struck between the services required to be rendered by local authorities and the their revenue base in tax, etc;
 - Parliament should expressly determine those cases deserving of a tax waiver and only such waivers should be allowed; and
 - every effort should be made to promote investment as the most sustainable source of tax revenue;
- (b) a simplified statement on tax levying and collection, indicating the extent of powers conferred on the different organs of Government, should be provided for;
- (c) the power to impose or vary taxes should be expressly vested in Parliament which should establish
 - an authority or organ to discharge this responsibility, but with Parliament maintaining its control over their actions; and
 - a tax tribunal to handle all tax matters, including a waiver or varying of tax by an Act of Parliament.

(iv) On Public Debt, that

- (a) section 103 should be amended to require that all public debts be approved by Parliament before they are incurred and that, to this end, Parliament should provide appropriate guidelines for contracting debts (external and internal);
- (b) the terms and conditions for borrowing must be tabled before Parliament for approval thirty (30) days before the contract is effected.
- (c) Parliament should, by a majority vote, authorise the Government to enter into an agreement to lend money out of any public funds or commit the country to any debt, external or internal; and
- (d) a ceiling on total Government borrowing should be set at 30% of the GDP of the financial year immediately preceding the year in which the Budget proposals have been made.

(v) *On the Central Bank, a that provision be made in Constitution*

- (a) establishing the Central Bank of Kenya as an independent institution and as the Supreme Monetary Authority of the Republic;
- (b) establishing of the Office of Governor of Central Bank of Kenya, appointed by the President from among persons with qualifications in economics, finance and/or accounting, the appointment subject to approval by Parliament;
- (c) the person appointed Governor of the Central Bank shall serve for two five-year terms, during which he cannot be removed from office except with approval of Parliament for inability to perform his functions or for gross misconduct;
- (d) The principal objects of the Central Bank shall be to:
 - protect the value of the currency in the interest of a balanced and sustainable economic growth;
 - issue notes and coins;
 - act as banker of and financial adviser to the Government;
 - conduct the monetary policy of the Government in a manner consistent with the relevant provisions of the law; and
 - encourage and promote economic development and efficient resource use; and
- (e) Parliament shall pass legislation providing for a method by which the Bank may be organised and run.

(vi) *On Retirement Planning, that*

- (a) a Retirement Benefits Authority be entrenched in the Constitution by providing that:
- (b) Parliament shall establish a Retirement Benefits Authority with a mandate to regulate the management and investment of pensions and provident funds for the employees for whose benefit such funds have been invested, in a manner consistent with the regulations for the time being allowed for trust investment and providing appropriate sanctions in default; and
- (c) such funds shall be paid out in regular monthly intervals to the employees for whose benefit the funds are invested upon retirement; employers shall be requested to provide such minimum training in retirement planning as may be prescribed by appropriate legislation.

(vii) *On Fiscal and Monetary Issues, that*

- (a) there be established an Economic and Financial Affairs Commission consisting of a chairman, a director-general, a deputy director-general and 3 such other members as may be appointed by the President with the National Assembly's approval;
- (b) Such a Commission shall recommend to Parliament that
 - criteria and standards for formulating, implementing, monitoring and evaluating policies and strategies for optimising expenditure of revenue from taxation and other measures, domestic and external debt acquisition and disposal of Government assets and institutions and related matters;
 - innovative ways and means of raising additional revenues for the exchequer as well as measures to generate revenue for local authorities and other levels of government devolution;
 - measures required to promote domestic and foreign investment to enhance the national revenue base;

- measures required to attain equity in raising and expending revenue, including measures to achieve a desirable level of affirmative action for disadvantaged groups and regions;
 - ways and means of monetising domestic services and labour in the informal sector of the economy.
 - transparent and accountable ways and means of acquisition and disposal of government assets, property and institutions and for privatisation and commercialisation of government services.
 - ways and means of developing viable linkages between taxation and representation and taxation and the delivery of services.
 - systems for evaluating the performance of all institutions that have been charged with financial responsibilities; and
- (c) Parliament may make appropriate legislation providing for the effective operation of the Commission.

(viii) On Development Planning that-

- (a) all revenue generation, fund holding and spending units of Government shall prepare a detailed strategic 3-year rolling plan which shall form the basis of, and accompany preparation of annual estimates of revenue and expenditure.
- (b) Parliament shall debate the strategic plan along with the budget and propose such improvements as in its opinion that ought to be made and should if not satisfied with the strategic plan of a particular unit instruct that a revision thereof be made and resubmitted again within one calendar month.
- (c) Parliament may also require the Minister for the time being responsible for finance and planning to prepare such other longer terms plans that he may deem necessary.

(ix) On the Consolidated Fund and the Contingency Fund that-

- (a) the Constitution should require Parliament to authorize withdrawals from the Consolidated Fund and prescribe the manner in which such withdrawals may be made.
- (b) the annual budget estimates, should be accompanied with detailed strategic plans providing clear definition of outputs, monitoring and evaluation indicators, standards and means of verification; this end, Parliament should set criteria to be used for;
- (c) programmes and plans for economic and social development be included in the budget estimates.
- (d) estimates of revenue and expenditure covering periods exceeding one year be included in budget estimates.
- (e) establishment of a high-powered committee (within the Parliament) that vets estimates of revenue and expenditure made for an item or vote on other than for the contingency.
- (f) an overall ceiling for supplementary estimates, (proposed at the level of 10% of annual estimates for the current financial year) be set.
- (g) the Constitution should limit the total amount authorised for withdrawal from the Consolidated Fund in advance of appropriation an amount not exceeding one third of the appropriation made for the ordinary services of the Government in respect of the immediate preceding year.
- (h) the constitution should provide that such sums be advanced within 3 months of the financial year or the coming into operation of the Act, whichever is earlier.

- (i) Parliament should make laws to provide for regulations for the operation of the Contingencies Fund to ensure operational transparency and accountability.
- (j) Parliament should make rules for the establishment of criteria for determining the type of contingencies that will be allowed for purposes of the Consolidated Fund.
- (k) the spending units should be allowed flexibility to reallocate their approved budgets by up to 10% above and below any budget line in order to allow for a midstream reordering of priorities and maintain appropriation integrity.
- (l) Parliament should make laws to provide for safe custody, appropriate withdrawal and sound use of the resources of the Contingencies Fund.

15.3 Human Resource Development

15.3.1 General Principles

Human resources are required in practically every situation to combine with other resource systems -finance, technology, materials, facilities, land, premises- to execute development intervention and social welfare improvement programmes. The human resource is the most important of these resource systems, endowed, as it is, by its Creator with the power of thinking, reasoning and action. Consequently, the manner in which a country acquires, develops, allocates, mobilizes, motivates, treats and rewards its human resources determines the quantum, quality, and direction of development and social welfare generation.

The proper management and use of human resources optimises all other resource components. The need to optimize the planning, development enhancement allocation, mobilization and motivation of the human resource base cannot, therefore, be underestimated.

Kenya currently has a population of 30 million, which is growing at an average rate of 3% per annum. The growth of the human resource in terms of numbers has been a center of controversy for some time.

On the one hand, there are those who view it as representing a burden to the country's economy, to the extent that it represents an additional challenge in the fulfillment of basic needs for all. They argue that the answer, therefore, lies in controlling the growth of the population, so that there are fewer mouths to feed and fewer people to provide shelter, education, health, infrastructure, services and other basic needs for.

On the other hand, there are those who see the growth in the population as representing a potential pool of labour and enterprise that is required by the economy in the future as the new-born grow into adulthood and are able to participate effectively in the delivery of development intervention and social welfare programmes. They argue that it is not the numbers *per se* that matter, but rather the manner in which all the resources of the Nation are marshaled. They say that if these are properly mobilized, it is possible to cater for the growth in population. They further argue that the preponderance of opinion lies in favour of placing resources into development programmes rather than wasting them in population control, since it, as well established by study, manages itself and tends to become lower and lower as society develops in accordance to the natural law of social balance.

Both arguments have merit in principle. A large population presents both a burden and a resource. It is a burden in the early years of the development of a child, up to the age of 18 years. It is a potential resource for the balance of life from age 18, to later years of life between the age of 18 years and 25 years on the lower end of the scale, to between 50 and 75 years on the upper end but only if it is properly mobilized. Beyond age 75, in the greater majority of cases, the population may again become net consumers of the Nation's wealth and therefore dependent on the productive population.

The overall state of the human resource base should be known at all times. It all begins with the population census which is carried out every 10 years and which consists of detailed information on the population fulfilling certain standardised characteristics. This detailed information on the population fulfilling certain standardised characteristics. This is a very important baseline.

At the centre of optimal development of human resources, lie issues of health, education, occupational engagement, and the provision of shelter including adequate social infrastructure.

(a) *Health*

The people's health is paramount during all stages of the life. A healthy population is able to grow and mature into productive adulthood where good health becomes paramount in laying the ground for productive employment or entrepreneurial engagement. An unhealthy population is not only relatively unproductive, but also presents an economic and social burden to both the sick and those responsible for looking after them. It contributes to the drain of natural resources, particularly where health facilities, resource equipment and machines have to be sourced from outside the country, which, for Kenya, most of the time.

Kenya has an unfavorable distribution of health services that continues to widen with observed disparities in access and affordability across the country. Currently, according to National Development Plan (2002-2008), only 42% of the population has access to health facilities within 4 km. and 75% within 8kms radii. Disparities also exist in the distribution of medical personnel. There is only one doctor for every 33,000 of rural population compared to one doctor for every 1,700 urban residents. Retention of medical personnel in the public health facilities has remained a major challenge due to poor remuneration.

The Kenya Health Policy framework launched in 1994, was to purposely articulate the Government's commitment to improve the health of the population. This was translated into actionable policy framework, the National Health Strategic Plan (1998-2004). Given the proper mechanisms, constitutional or legislative, the efforts in the National Health Strategic Plan (1999-2004) would streamline the provision of health services to rural areas, with more emphasis on preventive and promotional health services. The issues that would need to be addressed by the Government in conjunction with development partners include: nutrition, efficiency improvement, health care financing, training and research, health standards and regulatory framework.

The impact of the Acquired Immune Deficiency Syndrome (HIV/AIDS) cannot be ignored in addressing health issues. The AIDS scourge has become a major threat to the welfare of poor families and to the agricultural and industrial labour force. The care of Aids patients has put the already limited health care resources under severe pressure.

Access to adequate and reliable supply of clean water and sanitation is key to public health, especially for low-income groups. Water sanitation impacts significantly on family welfare and quality of life. To curb this problem, there is need for appropriate technical services, community management, and realistic poverty focused planning and social appraisal. According to the National Poverty Eradication Plan 1999-2015, the current estimates of water supply indicate that 75% of the country's urban population has access to safe drinking water, while 50% of the rural population has access to potable water from various schemes.

In the rural areas, deep well sinking and spring protection works are mostly required. Poverty and lack of water are often linked. In the dry areas, and in dry season periods, women spend half of their day traveling and queuing for water as water sources dry up. This is a heavy cost on their time.

In setting sector delivery targets for safe water, the key social indicator for achievement will be the impact on women's workload, since collection of water has predominantly been women's labour and it affects their priorities for family care. There are various on-going water schemes by the Ministry of Water Resources, and it is anticipated that once completed, they will reduce poverty by giving all households access to safe potable water systems within 3 km radius by year 2010. The Sessional Paper No.1 of 1999 on National Policy on Water Resources Management and Development presently guides water resource management. The overall goal of the national water development policy is to facilitate the provision of water in sufficient quantity and quality and within a reasonable distance to meet all competing users in a sustainable, national and economical way.

(b) Education and Manpower Development

A conceptual distinction is usually drawn between education and manpower development. Education is generally used to refer to the academic process of improvement, the cultivation of a person's intellectual prowess in preparation for the life's challenges. Manpower development proper refers to the aspect of training for the purpose of impartation of skills required to prepare or improve a person's output as a professional or deliverer of services. Both education and manpower development thus involve the impartation of knowledge and experience that enables the recipient to be a relatively more productive person in terms of work. They should help persons to face the challenges of life with a greater state of preparedness absent if one does not receive such knowledge or experience.

Improving access to education for children of low-income groups will require a combination of policy and management initiatives and a rigorous focus on increasing primary school enrollment and completion rates for disadvantaged groups, especially girls from low income families. The policy and management initiatives might include a primary school curriculum focused on key universal skills, more effective and

decentralised primary school management, and a teaching cadre committed to lead in the search for broad based social development. The key poverty reduction target in education reflects mainly financial and qualitative aspects of primary school teaching and learning.

(c) *Occupational Engagement*

One of the greatest challenges facing the nation is that of creating employment opportunities for a growing population. Upon attaining an appropriate age, individuals endeavour to secure some sort of engagement either by being employed or starting their own businesses. This is necessary both for the purpose of securing gainful employment and also for the enhancement of self-esteem and human dignity. To the extent that individuals are prepared by the social system to take up engagements in society are they in a position to make a useful contribution to their own existence and to the welfare of society. To that extent, and also as far as such individuals are allocated tasks and provided with the necessary and appropriate tools and a facilitative environment to work will they be able to optimize their contribution to the overall societal welfare and quality of life in a significant way.

(d) *Shelter and Infrastructure*

Access to shelter, infrastructure and services will have the potential to enhance welfare and the quality of life of the people in a profound way. This will greatly improve their productivity in the delivery of goods and services and will thus greatly contribute to economic growth and social welfare. The current state of shelter leaves much to be desired. Yet there are numerous opportunities for improving the situation through securitisation of mortgages and introduction of mortgaged-backed securities. There is also ample scope for improving the state of shelter through application of appropriate technologies for the fabrication of inexpensive but durable housing materials, products and designs. Similar improvements could also be made in respect of infrastructure and services that have been in a deplorable state for the last two decades.

15.3.2 Human Resource Development in the current Constitution

The current constitution does not address the issue of human resource development; not even as elements of fundamental rights and freedoms. There are, however, legislations dealing with these issues. These include:

- The Education Act (Cap. 211).
- The Universities Act (Cap. 210 B).
- The Higher Education Loans Fund Act (Cap. 213).
- Legislations setting up public universities (Caps. 210, 210A, 210C, 214 etc).
- The Public Health Act (Cap. 242).
- The Housing Act (Cap. 117); and
- Employment Act (Cap. 226)

15.3.3 Human Resource Development in other Constitutions

Provisions relating to human resources development, particularly on education, training, professional development, job-creation and employment mobility are usually part of the Bill of Rights in most constitutions. Occasionally, however, some constitutions establish or provide for the establishment of infrastructure for the development and management of broad human resource issues. One of the functions of Uganda's Education Service Commission, for example, is under Article 168(1)(c), to –

“review the terms and conditions of service, standing orders, training and qualifications of public officers in the education service...”

As a general rule, therefore, detailed prescriptions on human resource development will be found in legislation enacted by Parliament.

15.3.4 What the People Said

What the people said on human resources development and related issues may be summarized as follows:-

(i) *On Education, that:*

- (a) University Senates should appoint Chancellors and Vice- Chancellors.
- (b) needy students should get bursaries, and the bursary programme should be run by independent committees or Chiefs.
- (c) the Constitution should require the Government to provide food and all learning materials to all schools.
- (d) the Constitution should provide that the Government should assist in building schools and furnish them with the necessary learning equipment and facilities.
- (e) the Constitution should provide free education up to secondary level.
- (f) education is very expensive thus most students cannot afford it and end up dropping out of schools.
- (g) the 8-4-4 education system is too theoretical thus not enhancing practical skills.
- (h) institutions of higher learning are accepting unqualified students thus lowering the standards of the institutions.
- (i) the number of universities is not adequate to accommodate the large number of qualified students.
- (j) establishment and maintenance of schools is very costly thereby becoming a burden on parents.
- (k) Teachers do a lot of work and are not adequately remunerated and motivated.
- (l) students are not conversant with the Constitution and its content.
- (m) basic education should be free for all.
- (n) the Constitution should be taught in schools.
- (o) the Constitution should provide that the Government should assist in building schools and provide them with necessary learning equipment and facilities.

- (p) corporal punishment should be encouraged in schools because it previously worked well in the student discipline.
- (q) the Government should fix secondary school fees and subsidize them.
- (r) sign language should be introduced in all school curricula.
- (s) admission to institutions of higher learning should strictly be on merit.
- (t) salaries of teachers should be reviewed and increased.
- (u) the education system should be revised to meet the demands of today's dynamic world and should involve teachers.
- (v) the quota system should be abolished.
- (w) the 8-4-4 system of education should be abolished and replaced by 7-4-2-3 system.
- (x) nursery school teachers be paid by the Government.
- (y) teacher's salaries should be commensurate with their qualifications.
- (z) the Constitution should provide that the Government establish universities in all Provinces.

(ii) On Employment that:

- (a) one person to one job employment policy should be adopted.
- (b) the Constitution should guarantee employment as a basic right for all Kenyans.
- (c) men and women should have equal employment opportunities.
- (d) pension should be increased when salaries are being increased.
- (e) jobs should be awarded on basis of merit and academic qualifications.

(iii) On Health that:

- (a) drugs are inadequate due to siphoning.
- (b) Hospitals are poorly staffed
- (c) drugs are available in private hospitals and not public hospital at a very high prices.
- (d) medical facilities often have no equipment
- (e) most poor people cannot pay hospital bills
- (f) cost sharing has done more harm than good to the citizens.
- (g) there is congestion in hospitals due to lack adequate facilities.
- (h) corruption is endemic among the medics especially in mortuaries.
- (i) there is harassment in public hospitals.
- (j) medical personnel have a negative attitude against the public.
- (k) the number of hospitals is inadequate to meet the large population.
- (l) government employed officers should not be allowed to own private clinics.
- (m) government should provide adequate staff in hospitals.
- (n) cost sharing in public hospitals should be stopped.
- (o) the Government should build more health centres and hospitals at the grassroots level.
- (p) the Government should provide enough drugs in hospitals.
- (q) hospitals charges should be reduced in the whole country.
- (r) private clinics and chemists should be scrutinized and their establishment regulated by the Government.
- (s) National Hospital Insurance Fund should be encouraged to work hand in hand with hospitals in the country.

- (t) Kenyans should enjoy better medical services.
- (u) government should address remuneration of the hospital personnel.
- (v) mobile clinics should be established in arid areas.
- (w) mortuaries should be free.
- (x) the Ministry of health should get 20% of the total annual budget and other funds be given to it.
- (y) doctors' conduct towards their patients should be monitored.
- (z) hospitals should have a policy of identifying people with disability and seeing if anything can be achieved by early interventions.

- (iv) *On Water and Sanitation that:*
 - (a) the government should revive water projects initiated along time ago, so as to provide clean water to all citizens.
 - (b) the government should provide proper drainage systems throughout the country.
 - (c) the government should ensure proper and adequate sewerage systems in Kenyan.
 - (d) the Government should provide all public utilities with toilets, and waste disposal sites.
 - (e) the Government should provide clean piped water to all Kenyans.
 - (f) each district should be provided with a borehole drill to alleviate water shortages.

- (v) *On Infrastructure, that:*
 - (a) the Government should create an atmosphere of economic development by developing good transport and communication infrastructure.
 - (b) transport and communication facilities should be provided in North Eastern Province and other pastoral areas to attract investors.
 - (c) rural roads should be tarmacked
 - (d) railway communication should be improved for accessibility purpose.
 - (e) the government should ensure that there is a proper communication network in the country.
 - (f) infrastructure should be equally spread out.

15.3.5 Commentary

The importance which the people attach to human resource development is clear from the very emphatic positions which they took on various aspects of the issue. The general state of dilapidation of social infrastructure was lamented across the country. Indeed to many people that was evidence of either inability or unwillingness of government to discharge its functions. Particular attention was paid to education, health and employment; which people saw as the gateway to the improvement of living conditions and enhancement of the quality of life. The need to channel more resources towards the sector was, therefore, given very high priority.

15.3.6 Recommendations

The Commission recommends therefore as follows:

(i) *On Economic and Social Planning that -*

- (a) the State should restrict private wealth and privately operated enterprises, if they are deemed detrimental to the balanced development of national wealth and people's livelihood.
- (b) in the Constitution should provide that the people of Kenya collectively, or individually have the right to improve their standard of living.
- (c) the Bill of Rights should be expanded to include social and economic rights.
- (d) the Charter for Social Integration should be entrenched in the Constitution.
- (e) the new Constitution should establish a national systems of planning that facilitates the attainment of national objectives in economic and social matters.
- (f) The new constitution should provide for an appropriate accounting and management systems and procedures for effective control of the use of resources.

(ii) *On Education, that -*

- (a) there be established an Education Service Commission that shall continually review the terms and conditions of service, standing orders, training and qualifications of public officers in the education service and matters connected with their management and welfare to make recommendations on them to Government.
- (b) the state should be responsible for promoting free and compulsory basic education.
- (c) the state should take appropriate measures to afford every Kenyan an equal opportunity to attain the highest education possible.

(iii) *On Health, that -*

- (a) the state should develop a National Health Policy which meets the basic health needs of the people of Kenya.
- (b) a Health Service Commission should be established.
- (c) in order to deliver subsidized health services to all citizens, innovative strategies be adopted to improve efficiency in revenue collection to balance the "revenue generation" and "access" objectives to assure quality services, and to direct government financial support.
- (d) as a constitutional right, health to all is being advocated, so should the legal framework be restructured to promote those in medical practice.

(iv) *On Water and Sanitation that*

- (a) the state should preserve, conserve and protect available water resources and its allocation in a sustainable, rational and economical way due to its uneven distribution both in space and time.
- (b) adequately water supply to meet the various water needs be provided.
- (c) the safe disposal of wastewater and protection of the environment be ensured.
- (d) an efficient and effective institutional framework to achieve systematic development and management of the water sub-sector for sustainable economic growth and poverty reduction be established.

- (e) sound and sustainable financing mechanism for effective water resources management as well as water supply and sanitation development and management be developed.
 - (f) the state should ensure that all Kenyans have access to clean and safe water.
 - (g) the state should provide for legislation and instrumental framework to achieve systematic development and management of the water sub-sector for sustainable economic growth and poverty reduction and to oversee the implementation thereof.
- (v) *On Roads, that -*
- (a) public roads should be commercialized for better management and maintenance.
 - (b) an autonomous executive road board, with majority private sector participation, to administer the Road Maintenance Levy Fund be established.
- (vi) *On Employment Opportunities that -*
- (a) the new Bill of Rights should declare that Kenyans have the right to:
 - work under satisfactory safe and healthy conditions;
 - equal pay for equal work;
 - reasonable rest days and entitlement to public holidays;
 - form or join a trade union and for every employee to join a trade union; and
 - to collective bargaining.
 - (b) innovative policies for employment generation be formulated and implemented.

15.4 Science and Technology

15.4.1 General Principles

Broadly speaking, technology is an association of methods, techniques and equipment, which together with people using them can contribute, significantly to solving varieties of human development problems. Appropriate technology, therefore, means that besides being scientifically sound, technology is also acceptable to those who apply it for purposes of sustenance. Appropriate technology thus, incorporates, reflects and perpetuates value systems and it not only influences society which imposes limits on the choice and development of it.

The role of science in industrial production is still very marginal in Kenya. This can be partly explained by the fact that the industrial sector is largely linked to the parent firms in the industrialized countries from which it draws scientific knowledge. Indeed, nearly all the contractual arrangement entered between Kenya and foreign technology supplies guarantee the transfer of new scientific and technological knowledge. However, when plants become operational, they face localized problems, which require the generation of localized scientific knowledge. It is in fact through the accumulation of local scientific and technological knowledge that a country develops and becomes self-reliant.

Growing areas in science and technology include information transmission, medicine, nutrition, agriculture and biotechnology. Constitution making must recognise the revolution in social and economic life, which is occurring as a result of advances in science and technology.

15.4.2 Science and Technology in the current Constitution

The current constitution makes no reference to science and technology. Legislations do, however, exist, for a limited form of technology production and management. These include the Factories Act (Cap 514), and the Industrial Property Act (Cap 509 and Act No. 2 of 2001). Constitutions of many countries now makes provision for science and technology.

15.4.3 Science and Technology in other Constitutions

Constitutional provisions regarding science and technology is not common in most jurisdictions. The rapidity with which the domain of science and technology is developing is probably one reason why specific provisions are seldom fossilized in constitutional text. Jurisdictions, which include these concerns, therefore, do so in terms of encouraging investment in research and the development of new technologies. The Constitution of Ecuador, for example, expects priority to be given by universities, polytechnics, superior technical institutes and schools, to research in and teaching of science and technology. That Constitution also expects research institutions to incorporate science and technology issues into productivity and the sustainable management of natural resources. It also guarantees the right of access to sources of scientific and technological information, and to seek, receive and utilize such information. Article 71 of the Constitution of the Philippines provides, *inter alia*, that -

“Science and technology are essential for national development and progress. The state shall give priority to research and development, invention, innovation, and their utilization, and to science and technology education, training and services”.

Nearer home, Article 12 of the 1998 Constitution of the Republic of the Sudan provides that -

“The state mobilizes its official resources and the popular institutions for combating illiteracy and ignorance, strengthening educational systems, and promoting science, research, scientific co-operations and facilitating access to education and research....”

15.4.4 What the People Said

Although issues of science and technology were not put to the people directly, views were indeed expressed on related matters. These may be summarized as follows:

- (i) *On Energy Development and Use that -*
 - (a) the Constitution should ensure that the government provides electricity to all citizens in both rural and urban areas, and makes it more affordable by removing VAT from electricity bills.
 - (b) the government should also allow other private companies to compete with Kenya Power and Lighting Company to remove monopoly.

- (c) the Constitution should take into consideration the aspect of social dynamism, advancement of human knowledge and technology.
- (d) the Government should lower electricity tariffs to ensure lower cost of production by the industries.
- (e) tower generating and supply companies should position themselves to meet the demands of the technologically advanced industries. This supply should be affordable, efficient and reliable.
- (f) taking electricity to more customers will substantially improve the economy, as well as Kenyans' living standards, and hence development in general.

(ii) *On Industrialization that -*

- (a) industries in Kenya should be decentralised, and evenly distributed across the Provinces and 60% of income generated by them used there.
- (b) the Government should ensure that the industrialization process is achieved using local resources e.g. coconut tree and its by-products.
- (c) local industries should be protected against undue competition from external industries, by enacting policies to this effect.
- (d) policies should be put in place to restrict exportation of raw materials, which are locally available, at the same time to set up policies that will boost competition among the local industries.
- (e) sugar and cashew nuts industries should be revived to create jobs for the locals and new industries set up for mango and coconut to process those products
- (f) the Government should support all agro-based industries to prevent them from collapsing e.g. Kenya Co-operative Creameries, Kenya Meat Commission, Rivatex ,etc.;
- (g) more attention should be given to the *Jua Kali* sector by the Government through financial facilities e.g. loans and promotion of *Jua Kali* products.
- (h) processing industries should be located at the agricultural areas of production, and that these industries should be established in each Province.
- (i) the Government should license independent energy producers in Kenya.
- (j) the government should look into possibilities of establishing nuclear energy plants, expand wind and geothermal energy.
- (k) fish processing plants should be established next to water bodies to benefit the local communities; while the Kenya Meat Commission, now in Nairobi, should be located in the North Eastern Province for easy accessibility of the animals and slaughter houses.
- (l) the Government should be compelled by the Constitution to financially assist Kenyans who come up with original inventions and innovations, and should protect and promote their intellectual rights and innovations.

(iii) *On Information Technology that -*

- (a) the Constitution should ensure that the media, both print and electronic are fully liberalized in their operations, as long as the media operates independently and free from any manipulation whatsoever.
- (b) the public media should not, at the expense of other political parties/politicians, give all or most of the attention only to the ruling party.
- (c) all political parties, and regions should get equal coverage by State owned media.

- (d) the media should cater for persons with disability, e.g., interpretations for the deaf persons and in all vernaculars, as well as Newspapers published in Braille.
- (e) private entrepreneurship should be allowed to establish radio and television stations at cheaper rates.
- (f) although the Constitution should grant the media the liberty to report events, it should put forward mechanisms to regulate the kind of programmes they bring.
- (g) The media should be restricted from bringing immoral programmes that have consequently diluted the morals of Kenyans, and continue to do so.
- (h) there should be no restrictions in licensing of broadcasting stations, but a probation period of 30 days should be given.
- (i) all statutory restrictions imposed on radio and television broadcasting should be removed.
- (j) the government should allow the establishment of a Media Regulatory Council. Professionals from media services should head it.
- (k) the Government should support media that promotes democracy.
- (l) women should not be used as sex objects on television. Television and radio programmes should be censored to protect children from negative information.
- (m) private entrepreneurship should be allowed to establish radio and television stations at cheaper rates. Internet service provision should not be restricted.
- (n) there should be a Media Bill ensuring that two copies of each newspaper are taken to the Attorney-General before the street vendors start selling.
- (o) media advertisement of cigarettes and alcohol should be stopped.
- (p) there should be live coverage of parliamentary proceedings.
- (q) public mass media houses should be impartial in their coverage in the election campaign.
- (r) consumers should be provided with facts needed to make informed choices and be protected against dishonest or misleading advertising and labeling through the developments of consumer information programmes.
- (s) business language should be simple.
- (iv) *On Science Research and Training, that -*
 - (a) there is a crisis in science education in Kenya consequently, there should be a lot of motivation to study science at school, especially among girls, through provisions of practical experiences that involve the use of appropriate toys and games.
 - (b) The Government should allocate more funds to research and development in information technology.

15.4.5 Commentary

Developing countries, including Kenya, may gain especially high rewards from new technologies, but they also face especially severe challenges in managing the risks. Moreover, while some risks can be assessed and managed globally, others must be taken into consideration locally.

The key problem Africa is facing today is under development that manifests itself in terms of poverty, diseases, ignorance and many other forms. It is regrettable to have to recognise

that due to apparent lack of funds and other resources, many African countries have remained impoverished over the years. The weak fiscal status and the dim prospects for drastic economic improvement coupled with mismanagement, corrupt and despotic regimes in the continent also militate against any significant local support to alleviate the problems of underdevelopment in the near future.

Talented Kenyans working in aspects where local materials are used do not receive recognition by the Government in terms of rewards and promotion. Very few of such Kenyans are given loans to improve production.

15.4.6. Recommendations

The Commission recommends, therefore, that:

(i) On policy development, that -

- (a) the Kenyan Government should make provisions in the form of directive principles of the State in order to incorporate science and technology as the basis of industrialization and hence economic growth and development, particularly, in the health sector.
- (b) a set of policy considerations should be adopted, relating to long-term strategic measures, which can help Kenya consolidate its technology base as a tool for raising the living conditions of the people and enhancing its competitiveness in the international market.
- (c) the government should appoint Parliamentary Science Fellows so that they can provide Parliament with the necessary technical knowledge of science and technology.
- (d) appropriate technology should be adopted and seen as a means to stimulate economic progress by making optimum use of available resources. It should be conducive to social progress by enabling the mass of the population to share the benefits and not just a privileged few.
- (e) a Science & Technology policy should be put in place in order to improve the effectiveness of the national system of innovation, supporting public research and education, and sustaining the competitiveness in the business sector.

(ii) On Information, Education & Training that -

- (a) since the amount of quality information available on industrial activities is crucial to the formulation and implementation of viable projects, technological undertakings should be subjected to independent evaluations as a way of reducing the possible biases that may lead to cost over-runs or project failure.
- (b) given the current rate of technological change in the international market, it is important to constantly monitor development and identify the various options that are available and suitable for Kenyan conditions.
- (c) education should be designed to play a deliberate role in demystifying the negative attitude towards work and locally manufactured goods.
- (d) colonial attitudes, ways and relics should be removed from educational materials and textbooks.
- (e) modalities should be put in place to ensure that technical and vocational education and training programmes are implemented without delay if technological goals and accelerated industrial development are to be achieved.
- (f) there is need to improve domestic technological bargaining skills to improve domestic capacity to absorb and adopt foreign knowledge.

- (g) the Government should encourage the growth of a technological culture by encouraging technical training, possibly up to the university level;
- (h) middle level institutions should be strengthened to produce the required manpower.
- (i) the curriculum for courses in middle level institutions should be re-designed to promote entrepreneurship and self-employment.
- (j) the government should ensure that more active collaborative mechanisms between industry and training institutions are put in place to ensure relevance of technical training.
- (k) when the curriculum is being revised, examinations should be re-designed to place emphasis on talent development, creative thinking and promotion of innovativeness.
- (l) indigenous technology is important; therefore, the government should encourage and promote it through education, training and research as a basis for accelerated growth of the economy and industrialization.
- (m) the teaching staff should be adequately trained and regularly in serviced.
- (n) the Government should recognise talented Kenyans by giving them a 'push' through financial assistance, i.e., loan facilities and/or promoting them and their inventions or innovations.

(iii) On Research, that -

- (a) there should be more and stronger links between public sector and research institutions and the private sector so as to increase the application of their research output in the domestic industrial sector.
- (b) the government should offer incentives to the private sector to increase its funding and support for research and development activities.
- (c) the government should increase the proportion of total public research expenditure allocations to industrial research and development activities and opening such funding to competition from both private and public research institutes.

CHAPTER SIXTEEN - MANAGING CONSTITUTIONALITY

16.1 The Mandate of the Commission

An important concern in Constitution making is to develop structures and principles that would facilitate the internalization and supervision of constitutionality. The review Act required the Commission, to examine and make recommendations on:

- existing constitutional Commissions, institutions, offices and the establishment of additional ones to facilitate constitutional governance.
- succession to office and a system for the dignified transfer of power after an election or otherwise.
- any other matter incidental to the foregoing.

In pursuit of this mandate, the Commission examined the following specific issues -

- Constitutional Commissions.
- Constitutional offices.
- Succession and transfer of power.

Other aspects of this mandate such as jurisdiction and powers of courts, constitutional adjudication and amendment procedure are dealt with in other chapters.

16.2 Constitutional Commissions

16.2.1 General Principles

Constitutional commissions serve an extremely important function in any given constitutional system. These bodies independently seek to protect and enforce the constitutional provisions as laid out in the Constitution and further ensure their implementation. In order to do so, the commissions must be seen to be totally independent from the influence of the State organs in all aspects.

Constitutional Commissions share common goals and objectives. Thus, in considering any given constitutional commission, regard must be given to the following broad principles, against which proposals are made which apply to all commissions.

The first is independence. An effective commission is one capable of acting independently of Government, of party politics and all other entities and situations that would be in a position to affect its work.

The independence of a commission is determined by several factors.

- mode of establishment,
- financial autonomy, and
- appointment dismissal procedure.

The second is the definition of powers and functions. These must be clear. This avoids overlap in the functioning of the commissions and ensures that the commissions

complement rather than compete with one another. The legislation establishing a Commission must also ensure that it can effectively perform its functions.

The third is accessibility. It is important for the provisions establishing the commission to specify the persons who may lodge a claim to the commission. This may be either individuals who are personally aggrieved, family members on behalf of victims, Non-Governmental Organisations or aggrieved groups. In addition, the procedure of lodging a claim to the institution should be simple, clear and devoid of technicality. The ideal situation would be one whereby the aggrieved party merely needs to lodge an oral complaint.

The fourth is accountability. This aspect is usually dealt with through reporting obligations. Commissions are required to submit detailed reports of their activities to Parliament and/ or to the State through the President for consideration. The commission should also be accountable to the public. Its reports must be open to public scrutiny.

16.2.2 Constitutional Commissions in the current Constitution

The current Constitution establishes the following constitutional Commissions:

- the Electoral Commission,
- the Parliamentary Service Commission,
- the Judicial Service Commission, and
- the Public Service Commission.

Although established by the Constitution and supported by complementary legislation defining their powers and functions, most of these Commissions enjoy little independence from the executive arm of Government. Appointments are made by the President, dismissals, are initiated by him/her and their finances are controlled by government ministries.

16.2.3 Constitutional Commissions in other Constitutions

Most commissions entrenched in Constitutions are administrative or managerial in that they are expected to facilitate the work of, or advice specific organs of government e.g. the legislature, executive, judicature or the public service. The most common of these include commissions on elections, the judicial service, the public (including local government) service, and salaries and remuneration. Virtually all modern constitutions make provisions on these matters. More recently, a new category of commissions with a more general mandate have found their place in constitutions. These latter, are assigned the function of “supporting democracy or “supervising constitutionality”. Commissions of this genre are normally responsible to the legislature. Says Article 181(5) of the Constitution of South Africa,

“These institutions are accountable to the National Assembly and must report on their activities and the performance of their functions to the Assembly at least once a year”.

Common among such commissions are those on human rights, ethics, gender, language, public protection, corruption and economic crimes. The Constitutions of South Africa, Uganda, Ghana have, at various levels of detail, created commissions of this genre.

16.2.4 What the People Said

The people had a lot to say about constitutional commissions, their powers and functions, mode of establishment and financing. These views may be summarised as follows:

(i) *On Commissions generally, that -*

- a) the commissions should have their powers and functions clearly set out in the legislation creating or establishing them.
- b) they should be independent.
- c) they should have the power to enforce their recommendations.
- d) where necessary, they should be given powers to prosecute.
- e) they should be empowered to enforce the law in the different sectors of government.
- f) they should, in conducting their affairs, follow the laid down procedures.
- g) they should be vigilant in protecting citizen's rights.
- h) the chairpersons of these Commissions should have security of tenure.
- i) their role is to bring people together in their respective areas of operation to identify, mobilize and decide on the usage of resources and to share information with the communities to enable them make informed choices.
- j) they should have public information and education programmes in their respective areas.

(ii) *On existing Commissions that -*

- (a) the Public Service Commission should be required to eliminate
 - corruption, discrimination and nepotism in employment;
 - lack of transparency in the recruitment process;
 - insincere advertising for job vacancies;
 - unfair promotions;
 - retrenchment without a human face.
- (b) the Electoral Commission should be staffed by educated Kenyans appointed by Parliament, not the executive, and
- (c) the Judicial Service Commission should:
 - have its membership drawn from the legal fraternity, the judiciary, professional bodies, the clergy and interest groups.
 - the appointments to the Commission will be made by the President after Parliament in the form of a parliamentary judicial committee approves.
 - The Commission will deal with disciplinary matters.

(iii) *On the establishment of new Commissions, that*

- (a) the following new Commissions be established:
 - the Commission for Human Rights and Administrative Justice,
 - the Ethics and Integrity Commission,
 - the Salaries and Remuneration Commission,

- the Gender Commission,
 - Disciplined Forces Complaints Commission.
- (b) In asking for a Commission on Human Rights and Administrative Justice, the people submitted that it should:
- act as a watchdog against the existing widespread violation of human rights;
 - ensure protection, development and attainment of human rights;
 - investigate allegations of human rights violations;
 - carry out programmes to educate the public on their rights.
 - handle the 1991 - 1997 land clashes;
 - deal with past human rights abuses;
 - deal with past political assassinations;
 - investigate and redress historical injustice among the pastoralists in North-Eastern Province during colonial and post colonial era;
 - promote dialogue and peaceful conflict resolution through mediation and arbitration;
 - deal with losses and displacement of land;
 - deal with poor political representation and exploitation;
 - deal with social and economic injustices such as ethnicity, corruption and nepotism committed against Kenyans since colonial times; and
 - deal with those who have looted public funds since 1963 and ensure that they make restitution.
- (c) In asking for a Gender commission the people submitted that
- the Commission should develop a policy on protection and promotion of women's rights and facilitate the repeal of all laws that have provisions that are discriminative in terms of gender.
 - most customary laws and practices which clearly discriminate against women in general and the girl child should be eradicated.
- (d) In asking for a Disciplined Forces Complaints Commission the people submitted that
- policemen who do not follow the process of the law should be sacked.
 - there should be no extra-judicial killings of suspects, as everyone is presumed innocent until proved guilty.
 - corrupt police officers should be brought to book.
 - there should be a special unit in the police force to investigate corruption.
 - the police and other members of the disciplined force should be politically neutral.
 - the Police Commissioner should be independent and appointed by the President with approval from Parliament.
 - victims of police brutality or those tortured by the police should be compensated.
 - there should be no arbitrary arrests and suspects should be informed of the reason for their arrest.
 - there should be no arbitrary search of premises and affected parties be given the search warrant.
 - action be taken against police officers who engage in crime or aid and abet in the commission of crime.

- (e) In asking for an Ethics and Integrity Commission the people submitted that
 - an independent Anti-corruption Commission should be formed and entrenched in the Constitution.
 - the defunct Kenya Anti-Corruption Authority should be revived.
 - an Ethics Commission should be established.
 - there should be anti-corruption committees whose members shall be elected and shall have a predetermined security of tenure. The members should be drawn from religious organisations, administrative and professional bodies.
- (f) In asking for a Salaries and Remuneration Commission, the people submitted that it should
 - determine the salaries of various employees both in the civil service and public sector so as to check corruption and the incidences of strikes.
 - review the benefits, salaries and working conditions of Members of Parliament.
 - review salaries every three years
 - administer pensions for retired workers
 - look into the terms of workers in county councils and municipalities.

16.2.5 Commentary

Many Kenyans see constitutional commissions as mechanisms that would rid the country of corruption, discrimination, unfair treatment in access to employment, police brutality and harassment, human rights abuses and others. Although they may have placed too much faith in these mechanisms, their diagnosis of contemporary Kenyan policy is clearly accurate. Indeed the Commission received first hand information on many of these ills and in respect of all levels of Government and civil society.

16.2.6 Recommendations

The Commission recommends, therefore, that -

- (i) *the establishment of constitutional commissions should conform to the following principles-*
 - (a) Mode of establishment
 - the constitutional commissions proposed should be established by the Constitution and subsequently provided for by legislation.
 - (b) Financial autonomy
 - the budget of commissions should not be linked to the relevant Government ministry or department.
 - the budget of each commission should be prepared by the commission members and submitted direct to Parliament for approval.
 - the commission should be accountable to Parliament for its expenditure.
 - (c) Method of appointment
 - the number of members of each commission will vary depending on the nature of the commission, however, such numbers should not exceed ten.
 - The members of the commission should be appointed by the President subject to the approval of Parliament through the relevant Parliamentary committee.

- Appointment of members should take into account the diversity of the Kenyan people including: socio-economic status, race, ethnicity, gender, religious faith, age, occupation, learning, persons with disability and the disadvantaged.
 - the staff of the commission should be appointed by the commission in consultation with the Public Service Commission.
 - the staff should be paid by the relevant commission.
- (d) Criteria and qualifications for appointment
- the composition of the commission should also be representative in nature and should have a wide range of members drawn, *inter alia*, from non-governmental organisations, trade unions, professional and religious organisations.
 - generally, the members should be persons of recognised knowledge in the particular field covered by the commission.
 - the members should also be persons of impeccable integrity and objectivity.
 - full-time members of the commission should hold no other office at the same time.
 - the members must comply with the provisions of the Leadership Code.
- (e) Duration of appointment
- appointments should be for a term of five years.
 - the term may be renewed once.
 - the retirement age should be pegged at sixty-five.
- (f) Dismissal of members
- removal from office should be for misbehaviour, incompetence or inability to perform the functions of the office arising from infirmity of the body or the mind.
 - the question of removal of the member should be presented to the parliamentary committee that shall inquire into the matter and make the decision whether to remove the member or not.
- (g) Functions and powers
- Generally, all commissions should seek to educate the public on their role, purpose and function.
 - the commissions should have powers to conduct investigations.
 - the commissions should have power to *subpoena* officials, individuals or organisations.
 - bodies or individuals under investigation should be under a duty to produce all necessary information, be it oral or written.
 - in cases of non-compliance the commission should have the power to cite the person or group before a competent court for contempt.
 - the bodies should possess the powers necessary for conciliation, mediation and negotiation with the aim of producing a settlement that is agreeable to the complainant.
 - the members should have immunity for acts done while in office unless these are done in bad faith.
 - the commissions should have the power to award compensation.
- (h) Accessibility
- complaints may be lodged directly by aggrieved individuals, their family members or interest groups - such as Non-Governmental Organisations.
 - complaints may be lodged orally or in writing, with no requirements on formality or technicality or language.
 - the commission should be able to initiate investigations or inquiries on its own initiative.

- branches of the commission should be established at district/ or provincial level.
 - the services of the commission should be free.
- (i) Accountability
- commissions should be accountable to Parliament and to the President.
 - the commissions should prepare annual reports on their overall performance — in terms of meeting their objectives and their financial position.
 - specific reports may also be made as and when required.
 - once a report is submitted to Parliament and to the President, Parliament and the President should give a response indicating whether any action has been taken based on the report, and if not why.
 - Parliament should utilize its committees to scrutinize the reports in depth.
- (ii) *the following specific Commissions be established :*
- a) the Commission for Human Rights and Administrative Justice comprising:
- the Peoples Protector.
 - Human Rights Commissioner.
 - Gender Commissioner and with a general mandate to
 - investigate and establish as complete a picture as possible of the nature, causes and extent of gross violations of human rights committed;
 - give an opportunity to victims and their families to relate the violations they suffered through hearings or other means;
 - address the question of granting of amnesty to persons who were involved and who make the disclosure of all the relevant acts associated with the crimes;
 - make recommendations on reparation and the rehabilitation of the victims or families of the abused;
 - propose measures aimed at the restoration of the human and civil dignity of victims;
 - report its findings to the Nation;
 - promote respect for gender equality and equity;
 - investigate and seek to resolve any gender — related complaints;
 - participate in the formulation of national development policies and exercise general supervision over implementation of national policy on gender and development;
 - formulate programmes and advise on the establishment and strengthening of institutional mechanisms which promote gender equity in all spheres of life and in particular, in education, employment and access to national resources;
 - plan, supervise and co-ordinate education programmes to create public awareness and support for gender issues;
 - liaise with Government Ministries and Departments on gender issues;
 - advise the Government on appropriate allocation of resources to ensure gender mainstreaming;
 - monitor and evaluate policies, practices and adherence to domestic and international law by
 - organs of State at all levels;
 - statutory bodies;
 - public bodies, enterprises and institutions;
 - private bodies, enterprises and institutions;

- receive and investigate complaints against disciplined forces officers - including police officers, army officers etc. on issues such as harassment, negligence, complicity in handling a matter etc.
 - investigate and conciliate complaints on its initiative.
 - conduct public education on the role and functions of the police force vis-à-vis the role and functions of citizens.
 - issue summonses requiring the attendance of any person, group or organisation before it.
 - issue summonses requiring the production of any relevant documentation to it.
 - require full disclosure of any information required.
 - cite a person or group or individual before a court for contempt for failure to attend, produce relevant information or make full disclosure of information.
 - recommend prosecution or disciplinary action on any individual police officers.
-
- order compensation to any victim of police torture, harassment etc.
 - provide accessible machinery and prompt remedies for the people.
 - improve the standards of competence, honesty, integrity and transparency in the services provided to the public.
- (b) the Public Service Commission with a general mandate to:
- include not just the public service but also the police, teachers and parliamentary employees.
 - include the function of reviewing various aspects of the public service and reporting and recommending on this to Parliament and to the President
 - make appointments in consultation with relevant public service sectors.
 - have between eight and ten members, spread across the different sectors.
- (c) the Electoral Commission with functions similar to those in the present Constitution.
- (d) the Judicial Service Commissions composed as follows:
- Judge elected from the Supreme Court by judges of that court.
 - Judge elected from the Court of Appeal by judges of that court.
 - Judge elected from the High Court by judges of that court.
 - the Chief Kadhi.
 - two magistrates from the subordinate courts nominated by any organisation(s) representing magistrates.
 - two practising advocates nominated by the Law Society of Kenya to represent the society.
 - two lay members of the public nominated by the members outlined above at their first meeting.
 - two members elected by faculties of Law of the universities in Kenya.
 - one member representing the Public Service Commission.
 - the Attorney-General who should be an *ex officio* member. and with a general mandate to review, process and investigate complaints against judges and magistrates lodged by members of the public or any organisation(s) representing magistrates. At present, only the Chief Justice can initiate and investigate against the judges;
 - initiate investigations against judges and magistrates on its own initiative;
 - coordinate continuous education and training of all judicial officers.
 - advise the Government on improving the efficiency of the administration of justice and access to justice.

- make recommendations to the President on the appointment of the Chief Justice and Judges.
- (e) the Ethics and Integrity Commission with a general mandate to -
- to enforce the leadership code and to check corruption.
 - ensure that all specific officers (all constitutional office holders and members of all commissions and Members of Parliament) declare their wealth and that of their spouses
 - within three months of commencement of the Code;
 - within three months of assumption of office;
 - thereafter, on an annual basis.
 - compliance with aspect of the code aimed at prohibiting conduct that is likely to compromise honesty, impartiality and integrity of the officers —such conduct shall be fully defined in subsequent legislation;
 - put in place measures aimed at prevention of corruption,
 - investigate instances of corruption
 - examine the practices and procedures of public bodies and ensure that they are not conducive to corruption;
 - educate the public on the dangers of corruption.
- (f) The Salaries and Remuneration Commission with a general mandate to set -
- the salaries, allowances and benefits of all constitutional office holders and members of Constitutional Commissions including: the President, Vice-President, Prime Minister, Ministers, Assistant Ministers, Judges, Attorney-General, Director of Public Prosecutions, Auditor General, and all Commission members.
 - the salaries, the salaries, allowances and benefits of Members of Parliament.
 - The salaries, allowances and benefits of all public servants as well as employees of parastatals.
 - the pensions of the Constitutional office holders.
- (g) The Constitution Commission with a general mandate to -
- ensure that constitutional provisions requiring legislation and administrative action are fully implemented within the time frame established in the transitional provisions efficiently and effectively.
 - work closely with heads of constitutional commissions and office holders to ensure that the letter and the spirit of protective provisions of the Constitution are respected.
 - Ensure that the operation of the constitution is left constantly under review.
 - recommend on legislative or administrative measures to ensure the values of the Constitution.
 - report on any proposed constitutional amendments before or after the introduction of a bill for amendment, and for this purpose it will have to hold public hearings.
 - hold regular consultations with the President, one of whose principal functions under our recommendations will be to safeguard the Constitution.
 - report semi-annually basis to the public through the National Assembly on the progress of implementation and will outline any special difficulties that obstruct the timely implementation of the Constitution.
 - five members appointed by the president with the approval of parliament and consisting of members drawn from various disciplines including administration, economics, politics, cultural and social issues. It will be authorized to employ consultants and to set up working committees, including persons from outside.

16.3 Constitutional Offices

16.3.1 General Principles

The goals and objectives of constitutional Commissions as set out above apply equally to the establishment of constitutional office holders who enjoy security of tenure.

16.3.2 Constitutional Offices in the current Constitution

Apart from constitutional offices forming part of the legislative or executive organs of the Government, the Constitution establishes the following other offices:

- The Chief Justice
- Judges of the Court of Appeal
- Judges of the High Court
- The Chief Kadhi
- Kadhis
- Attorney-General
- The Commissioner of Police
- The Controller and Auditor General
- Permanent Secretaries
- Ambassadors
- Secretary to the Cabinet
- Director of Personnel.

As a general rule, holders of these offices are expected to perform their functions without interference from any quarter. This, however, is hardly the case in Kenya where the President wields enormous power over all other organs of government.

It is worth noting that the Constitution says nothing about the qualifications necessary for appointment as Chief Justice. For High Court and Court of Appeal Judges, however, these are stated as follows:

- one must be or have been a judge of a court having unlimited jurisdiction in all matters in some part of the commonwealth or in the Republic of Ireland or in a court having jurisdiction in appeals from such a court; or
- one must be an advocate of the High court of Kenya of not less than seven years standing; or

As regards the Chief Kadhi and Kadhi, the Constitution is clear that one must -

- profess the Muslim religion, and
- be in possession of such knowledge of Muslim law as would satisfy the Judicial Service Commission.

The Attorney-General must be a

- person qualified for appointment as a judge of the High Court.

Nothing is said in the Constitution of the qualifications necessary for appointment as Commissioner of Police, Controller and Auditor-General, Permanent Secretary, Secretary to the Cabinet, ambassador or Director of Personnel.

16.3.3 Constitutional Offices in other Constitutions

Constitutional offices are generally of two kinds. The first are those that are part and parcel of the architecture of a constitution and which, therefore, form part of the description of the functions, powers and values which a constitution seeks to establish. Such offices include those constituting the executive, the judiciary, and the legislature. The second are offices which support other constitutional functions, especially where the relevant Constitution also creates values, the internalization of which is necessary for the maintenance of constitutionality. Such offices include those of the Ombudsman or Parliamentary Commissioner, and the Public Defence. This category of offices are sometimes created *in lieu* of Commissions especially where a large bureaucracy is not necessary.

Holders of constitutional offices are protected from interference with the performance of these functions, have security of tenure and their remunerations (or resources needed for the operation of those offices) charged directly on the Consolidated (or equivalent) Fund. As regards appointment, most constitutions now require that this be made by the executive and approved by or with the concurrence of the legislature. That is the principle adopted in the Constitution of Uganda, South Africa, Ghana, and Nigeria. In the Constitution of Ethiopia, holders of some of these offices e.g. the President and Vice-President of the Federal Supreme Court are, appointed by the legislature.

16.3.4. What the People Said

The majority of the people lamented the lack of impartiality and independence in the discharge of functions by holders of constitutional offices. In summary they demanded that -

- (i) constitutional office holders should be accorded protection from political interference through -
 - (a) proper security of tenure;
 - (b) a guaranteed income and benefit;
 - (c) an enabling working environment.
- (ii) there should be a code of ethics governing the conduct of all constitution office holders;
- (iii) as regards the office of the Attorney-General there should be clear separation of powers and, in particular, the holder of that office should not -
 - (a) perform the roles of independent prosecutor, legislator and member of the executive,
 - (b) be an executive appointee of the president, and
 - (c) interfere with private prosecutions.

16.3.4 Commentary

The protection of holders of constitutional offices is clearly central to management of constitutional order. The fact that the people appear to have lost so much faith in existing holders is a matter of grave concern. There is need therefore for a through shake-up in the

structure and composition of existing constitutional offices. The Commission, therefore, recommends as follows:

16.3.6 Recommendations

The Commission recommends therefore, that

- (i) *In addition to existing constitutional offices, the Constitution should also create the following:*
 - a) The Director of Public Prosecutions
 - b) The Public Defender
 - c) Controller of Budget
 - d) the Auditor - General
 - e) The Governor and Deputy-Governor of the Central Bank
 - f) Director of the Kenya Correctional Services
 - g) Director of the Central Bureau of Statistics
 - h) Director of the Kenya Police Service
- (ii) *the Chief Justice and Judges:* be appointed by the President on recommendation by the Judicial Service Commission and in consultation with the Parliamentary Committee responsible for this docket.
- (iii) *the Director of Public Prosecutions:*
 - a) be responsible for criminal investigations and prosecutions.
 - b) be appointed by the President in accordance with the recommendation of the Public Service Commission and with the approval of the Parliamentary Committee responsible for legal and constitutional matters;
 - c) should have qualifications equivalent to those of a High Court Judge;
 - d) should shall have security of tenure and shall be removed from office only in the same manner and for the same reasons as a High Court Judge;
 - e) should ensure that in all courts in Kenya prosecutions are conducted by legally qualified persons operating under the direction of the DPP.
- (iv) *the Attorney-General should -*
 - a) give legal advice and legal services to the Government on any subject — the principal legal adviser to the Government;
 - b) draw and peruse agreements, contracts, treaties, conventions and documents to which the Government is a party or in respect of which the Government has an interest;
 - c) represent the Government in courts or in any legal proceedings to which the Government is a party;
 - d) be appointed by the President with approval of the Parliamentary Committee responsible for legal and constitutional affairs; and
 - e) have qualifications equivalent to those of a High Court Judge.
- (v) *in addition to issues specific to particular offices it is recommended that:*
 - a) once the new Constitution comes into effect, all current Constitutional officers must comply with its provisions, including these provisions as to qualifications and the Leadership Code.

- b) officers who do not comply with the new Constitutional provisions or do not qualify to hold office under the new constitutional provisions shall be entitled to payment of their pensions, gratuities, compensation or such other like allowances as shall be determined.
- c) the law to be applied with respect to pension, gratuities, compensation, or other such like allowance in respect of holders of a constitutional office shall be the law that was in force at the date on which those benefits were granted.

16.4 Succession and Transfer of Presidential Powers

16.4.1 General Principles

By requiring the Commission to examine issues related to succession and transfer presidential powers, the review Act obviously had its sights on the transition from the current President to his successor. That is an issue which has consumed the energies of Kenyans ever since the Constitution was amended in 1992 to limit Presidential term of office to two five- year terms. The Commission has, nonetheless taken liberty in other chapters to examine a secondary but equally important aspect of transfer, namely the measures needed to transit through the old to the new Constitution.

16.4.2 Succession and Transfer of Presidential Powers in the current Constitution

The current Constitution, for obvious reasons, does not contemplate the second aspect of the transfer. It does, however, address the question of transfer of power from one President to the next. First, the Vice-President is expressly stated being in the line of succession of power, and where he is unable to discharge such function, a Cabinet Minister, appointed by the Cabinet shall do so. However, there is no provision to compel the President to appoint a Vice-President following Presidential elections or if a vacancy arises in the Vice-President's Office.

Second, the Constitution provides that a person elected as President shall assume office as soon as he is elected and shall unless his office becomes vacant by reason of his death, his resignation or his ceasing to hold office by virtue of any other cause, continue in office until the person elected as President at a subsequent presidential election assumes office. From these provisions it is apparent that there are no express provisions for a handing over period between the outgoing and the President- Elect.

There is however, no provision in the Constitution for the temporary transfer of presidential powers other than expressly, in writing, to the Vice-President.

16.4.3 Succession and Transfer of Presidential Powers in other Constitutions

There are perhaps three issues to consider here. The first is transfer of power in situations of absence or temporary incapacity of the holder of office of President. This is usually dealt with in terms of the definition of a clear line of succession. Thus section 90(1) of the Constitution of South Africa provides that in situations of temporary absence of or vacancy in the office of the President, the powers of that office will devolve in an acting capacity, in the following order shown –

- the Deputy President;
- a minister designated by the President;
- a minister designated by the cabinet, and
- the Speaker of the National Assembly

The second is the transfer of power on death, removal or resignation of the holder of that office. This is dealt with in one of two ways. A limited number of Constitutions such as that of the United States of America and the more recent Central European countries provide for automatic assumption of office by the Vice-President. Article 25 of the Constitution of the United States for example, is categorical and provides as follows –

- (1) In case of the removal of the President from office or of his death or resignation, the Vice-President shall become President,
- (2) Whenever there is a vacancy in the office of the Vice-President, the President shall nominate a Vice-President who shall take office upon confirmation by a majority votes of both Houses of Congresses.

Under Constitutions that establish parliamentary systems of government, the death, removal or resignation of the President operates to dissolve Parliament, leading consequently to new elections. That is still the position in most English-speaking African jurisdictions. The third is the actual modalities for the transfer of instruments of power. This is rarely set out in detail in any constitution. Most Constitutions simply provide for –

- the commencement and termination of the term of office of the executive,
- formalities necessary before assumption of office, and
- procedure for the transfer of power otherwise than in consequence of a general election.

The Constitution of Uganda, however, is one of the few that is fairly explicit on this matter. According to Article 103,

- (7). The Electoral Commission shall ascertain, publish, and declare in writing under its seal, the results of the presidential election within forty-eight hours from the close of polling,
- (8). A person elected President during the term of a President shall assume office within twenty-four hours after the expiration of the term of the predecessor and in any other case, within twenty-four hours after being declared elected as President.

16.4.4 What the People Said

Transition issues were obviously in the minds of many of those who spoke to the Commission. Many people suggested, *inter alia*, that:

(i) *As a general rule -*

- a) a clear line of succession should be established to avoid confusion in cases of death or resignation of the President.
- b) the Vice-President should take over Presidential powers for the remainder of the term.
- c) the new President taking over after an election should be sworn in on a specified date.
- d) the duration of service as President should remain restricted to two five-year terms.

(ii) *Specifically, the people:*

- a) want election results of the President to be announced by an Independent Electoral Commission.
- b) feel elections could be announced through the media. Kenyans want an open and transparent manner to ensure that there is no interference with the election results. There were suggestions that results should be announced at the polling stations and others say this should be done in the presence of the contestants and their representatives.
- c) want the next elections to be announced immediately after the results. The suggestions range from 24 hrs to 90 days after the elections with many Kenyans suggesting between 24hrs to 30 days.
- d) feel that the President should assume office immediately while others say that a specific date should be set for the President to take office.
- e) want to leave no doubt as to whether the new President is properly elected and to ensure that there is opportunity to contest the results if the need arises. This makes majority of Kenyans want some space between the election results and the swearing in of the President.
- f) want the Chief Justice to be vested with the responsibility of swearing in the incoming President, a few people want others such as the Speaker, church leaders, Court of Appeal, Parliament to do the job.
- g) want the instruments of power transferred immediately. They think that this transfer of instruments of power should not be delayed while some say that they would like clearly defined procedures for the transfer of the instruments.
- h) want a State function/ceremony to be held to transfer the instruments of power by the outgoing President.
- i) suggest alternatively that there should be an official handing over presided over by a parliamentary commission and the Chief Justice, or that the Speaker should do it, while others suggested that an electoral college comprising of ECK, Judges and civil servants should oversee the transition.
- j) proposes that definite dates for take over and swearing in be entrenched in the Constitution and that the Constitution should spells out the mode of transfer of power.
- k) need a mode of transfer of power and instruments of power that is definitive, predictable and smooth. They don't want to be taken by surprise by hearing that the president was sworn in the morning. They want a clearly well defined process.

- l) want the incoming president to assume office 30 days after election. While others felt that this date should be specified in the Constitution, a few suggested that the incoming President should assume office immediately after the elections.
- m) want the instrument of power transferred to an incoming President by the outgoing President after the swearing in ceremony.
- n) want clear constitutional provisions to ensure the security of the former presidents. Some indicate that the outgoing President should enjoy State security during transition.
- o) want no legal immunity for a former President but others think the Constitution should provide for it.
- p) want the Constitution to provide for the welfare of former presidents. They want pensions and other retirement benefits for ex presidents.

16.4.5 Commentary

Questions relating to the transitional mechanisms required to bring a new Constitution into force have not been covered here for a good reason. They are dealt with in other chapters. In any event, some of the issues mentioned were purely technical and will be handled in the Draft Bill.

16.4.6 Recommendations

The recommendations made herein are therefore restricted to the issue of succession and transfer of power from one President to the next. The Commission recommends that -

- (i) *the order of succession should be -*
 - a) Vice-President,
 - b) Minister designated by the President,
 - c) Minister designated by the Cabinet,
 - d) The Speaker of the National Assembly.
- (ii) *When the President is absent from Kenya or unable to perform the functions of his office, the Vice-President shall perform until the functions of his office until the President returns or is able to perform them.*
- (iii) *The President-Elect will assume office on swearing or affirming faithfulness and obedience to the Republic and the Constitution of Kenya at a public swearing-in ceremony to be held on the day the incumbent's term expires.*

CHAPTER SEVENTEEN - CONCLUSION AND SUMMARY OF KEY RECOMMENDATIONS

17.1. Conclusion:

The Constitution review process was a long, complex and arduous exercise. The Commission received a great deal of information from around the country and from people of all walks of life. A large percentage of that information was concerned with basic livelihood issues. That, however, is as it should be because it is these matters, which shape the spirit of any nation. It was the responsibility of the Commission to interpret and translate these issues into Constitutional principles. The pattern in Table 3 emerges from a preliminary analysis of oral and written memoranda received by the Commission as at this writing. The total memoranda received by the commission was 35,413 which was tabulated into 34,157 pages of text as follows:-

Table 3: Memoranda received by CKRC by Issue/Areas of Concern

No.	Issue/Area of Concern:	From:	To:	Pages
1.	Preamble	1	464	464
2.	Principles of State Policy	465	778	314
3.	Supremacy	779	1438	660
4.	Citizenship	1439	2713	1275
5.	Defence & National Security	2714	3613	900
6.	Political Parties	3614	4717	1104
7.	Structure & Systems of Government	4718	6331	1614
8.	The legislature	6332	10034	3703
9.	The Executive	10,035	12908	2874
10.	The Judiciary	12,909	14608	1700
11.	Local Government	14,609	16654	2046
12.	The Electoral Systems	16,655	19447	2793
13.	Basic Rights	19,448	22647	3200
14.	The Rights of Vulnerable Groups	22,648	23687	1040
15.	Land and Property Rights	23,688	25852	2165
16.	Cultural, Ethnic and Regional Diversity	25,853	26606	754
17.	Management and Use of National Resources	26,607	28011	1405
18.	Environment and Natural Resources	28,012	28632	621
19.	Participatory Governance	28,633	29021	389
20.	International Relations	29,021	29197	177
21.	Constitutional Commissions, Institutions and Offices	29,198	29939	742
22.	Succession and Transfer of Power	29,940	30529	590
23.	Women's Right	30,530	31046	517
24.	International Policy	31,047	31071	25
25.	Regional Policy	31,072	31082	11
26.	National/Sectoral Policies	31,083	33471	2389
27.	Customary, Statutory and Islamic Laws and Bills	33,475	33870	396
28.	General and Cross-Cutting Themes	33,870	34157	288

Clearly what the Commission received is in excess of what was strictly necessary for the drafting of a new Constitution. Not all recommendations made to or by the Commission have, in the event, found their way into the draft Constitution.

17.2. Summary of Key Recommendations

The summary, which follows, is of the recommendations, which the Commission has reformulated and incorporated into the design of the Draft Constitution. These are as follows:-

On Constitutional supremacy, the new Constitution should -

1. have some entrenched provisions, which Parliament would have no power to amend without first seeking the views of the people at a referendum.
2. address the issue of the relationship among the various organs of state and must deal with checks and balances.
3. have a supremacy clause that should state that the Constitution is binding on all the people and all the organs of the state and at all levels.
4. except as provided in (1) above, only be amended by at least 75% of members of Parliament.

On Constitutional interpretation, the new Constitution should -

5. contain an interpretation clause worded in a manner that assists the interpreters to appreciate the fundamental values of the Constitution without taking away the judicial creativity that permits the Constitution to be a living document.
6. have a provision that sets out the principles governing interpretation which should include the promotion of values that underlie an open and democratic society based on human rights, equality and freedom.
7. establish a Supreme Court as the final arbiter on the interpretation of the Constitution.

On sovereignty of the people, the new Constitution should -

8. acknowledge the sovereignty of the people.
9. acknowledge that government derives its power from the people.

On nationality and citizenship, the new Constitution should -

10. treat women and men equally as regards conferment of citizenship whether married to a Kenyan citizen or a foreigner.
11. state that all citizens have a right to a national identity card and a passport.
12. provide for dual citizenship, naturalisation, registration and permanent residence status.
13. create and entrench an independent body to take responsibility for citizenship issues so as to prevent interference with citizenship rights.
14. provide for citizenship by adoption and legitimation;
15. provide that children under a certain age found within Kenya, and whose parents cannot be found, should be accorded citizenship.
16. firmly entrench the equality of all citizens regardless of race, ethnic origin, age, place of birth, gender or any other difference

On territoriality and defence, the new Constitution should -

17. define Kenya's international boundaries, and proclaim Kenya's sovereignty over its territory.
18. create security and defence forces that are politically neutral, disciplined, patriotic and totally under civilian control.
19. specify the circumstances under which a declaration of war may be made or the defence forces of the Republic committed to operations outside the borders of the state.

On State values, goals and ideology the new Constitution should -

20. have a preamble which *inter alia* acknowledges the significance God to the Kenyan people; recognises the struggle for independence and the role of freedom fighters; recognises the sovereignty of the people in the establishment of the Constitution and setting the means of governance for themselves and the posterity; affirms the religious, cultural and ethnic diversity of Kenyans; re-affirms the indivisibility of Kenya as a nation; seeks to heal post-independence wounds caused by political conflict; re-affirms commitment to social justice; and re-affirms commitment to democracy, Constitutionalism and the rule of law.
21. also contain directive principles of state policy requiring all persons and organs of state to respect the rule of law, protect democratic principles, protect fundamental rights and freedoms, exercise power justly and manage the country's resources sustainably.
22. entrench the republican principles of good governance, democracy and the rule of law
23. proclaim that Kenya is a sovereign Republic that derives all its powers from, and shares in the common interest of her people.
24. proclaim that the Republic shall be a multiparty democratic state committed to promoting the full participation of the people in the management of public affairs either directly or indirectly.
25. proclaim that all power derives from and is exercised on behalf of the people.
26. clearly state and outline the country's basic national ideological principles and values, which direct the new social, political, cultural, economic and environmental dispensation.

On the character of the legal system, the new Constitution should –

27. state clearly the sources of the laws of Kenya .
28. acknowledge the viability and integrity of African customary law, Islamic law and Hindu law.
29. declare the customary international law and treaties binding on Kenya are part of domestic law.

On the Bill of Rights, the new Constitution should -

30. in addition to civil and political rights entrench social, cultural, economic and development (or solidarity) rights.
31. state that the Bill of Rights has 'horizontal effect i.e. applies not just to people in the government but between the people.

32. restrict circumstances in which the state of emergency can be declared and the time and those who may declare it.
33. ensure accessibility to courts and fair administration of justice.
34. establish institutions other than courts for the supervision the Bill of Rights.
35. provide specifically for the rights and needs of women and of children.
36. make provision recognizing the rights of persons with disabilities.
37. make provision to recognise the right of the elderly.
38. recognise the rights of refugees.
39. require government to take affirmative action in respect of groups marginalized on the basis of gender, numbers, disability, age or any other reason created by history, tradition or custom.
40. provide that programmes of affirmative action be justified by full data, use appropriate means and goals be transparently operated and limited by time, and be adequately monitored.
41. abolish the death penalty.
42. give general protection to privacy of the home, person, correspondence and other form of communication.
43. give general protection to the media, including protection from government interference.
44. recognise the value of local languages and the right of people to use them, and the duty of the government to communicate in them, and to provide for their development where desirable and appropriate.
45. guarantee access to government information, subject to reasonable exceptions for national security and to the information held by others that is necessary in order to enforce rights.
46. protect the right to just administrative action.
47. protect the rights of people in detention or custody.
48. guarantee the rights of consumers to appropriate quality of goods from whatever source, fair advertising and consultation.

On cultural, religious and linguistic diversity, the new Constitution should -

49. ensure that freedom of worship is not used to infringe onto other people's freedom of religion.
50. state that no religious test will be required as a qualification to any office or public trust under Kenyan Government.
51. declare that Kenya is a secular state and that the government will not do anything to help, encourage or promote any particular religion;
52. put in place mechanisms that will ensure the removal of socio-cultural and religious obstacles that hinder or impede national integration and unity.
53. provide that no person shall be compelled to participate in any activity or ritual or take any oath, bear any arms or work or study on any day, if doing of such acts violates the person's freedom of religion and conscience.
54. provide for a clear language policy and effective implementation mechanism;
55. recognise Kiswahili as the national language and accord its requisite status during national functions.
56. recognise both Kiswahili and English as the official languages at the national level and provide that all national documents would be made available in the two languages.

57. in the context of devolution of power, recognise Kiswahili, English, sign language and the preferred language(s) of particular areas as official language at the District level.
58. provide for the enactment of legislation to establish institutions for the promotion of English, Kiswahili, sign language and braille.
59. place obligation on the government to set aside budgetary allocation for promotion of national languages, sign language and braille.
60. safeguard linguistic and cultural rights of all people.

On political parties, the new Constitution should -

61. protect the right of all Kenyans to form political parties.
62. provide that political parties, which intend to contest elections be required to register with the Electoral Commission.
63. provide that the Electoral Commission be the registrar and supervisor of political parties.
64. prohibit the founding of political parties purely on religious, linguistic, racial, ethnic, sex, corporatist or regional basis.
65. prohibit political parties from engaging in activities that compromise public order or public peace.
66. provide that political parties once registered, shall be obliged to subscribe to a legally binding Code of Conduct.
67. define the circumstances under which political parties may be de-registered or re-instated.
68. define the conditions under which and for what activities political parties may receive public or more funding.
69. provide that everyone is free to join a political party ; no one can be compelled to join a party; and that only citizens can become members of a party.
70. prohibit the delegation of state functions to, or the use of state resources by, political parties.
71. require that election to offices and committees of political parties be conducted by or supervised by the Electoral Commission.
72. provide for the regulation of expenditure by political parties during elections.
73. require political parties to establish internal machinery for ensuring discipline that are consistent with the principles of democracy, justice and the rule of law.
74. prohibit political parties from disciplining Members of Parliament on the basis of contributions made in Parliament including voting in a manner that may be contrary to the position of the sponsoring party.
75. provide that the President and other senior government officials may not hold any official positions in their respective political parties.
76. provide that political parties must publish their manifestoes before participation in elections.
77. provide that Parliament shall enact a law on political parties.

On the state in the Global system -

78. require Parliament to enact legislation to facilitate informed and strategic integration of Kenya's economy into the global and regional economy.

79. provide that Kenya shall adopt the dualist treaty-making process that includes specific role of the Parliament as part of its “in-put” to or supervision of the treaty-making powers of the Executive.

On participation and governance, the new Constitution should -

80. affirm the importance of the people and their institutions in promoting democracy and republican principles, values and practice.
81. provide that the people of Kenya have the right to participate in the affairs of government either directly or through freely elected representatives.
82. provide that it is the duty of public authorities to promote individual and community participation in the activities of society and to influence decision-making affecting them.
83. establish appropriate mechanisms to ensure the accountability of the government at all levels and to afford people the opportunity to participate effectively in the governance of the state.
84. establish mechanisms to facilitate decision—making by the people on Constitutional issues whether through referenda or otherwise.
85. require state institutions to conduct public enquiry before important decisions affecting the public welfare are made or implemented.
86. reserve the people the right to individually or jointly to petition or address complaints to public institutions and authorities including Parliament and to insist that these be acted on.
87. provide that Parliament enact a law defining the role of traditional leadership, customary law and the customs of communities.
88. create mechanisms that would enable and empower people to monitor the performance of elected representatives and to recall them if their performance is not up to expectation.

On the electoral system, the new Constitution should -

89. adopt the Mixed Member Proportional system for the elections of representatives to the National Assembly involving:-
- the retention of the current 210 constituencies through single member constituencies,
 - and the introduction of 90 proportional representation seats based on party lists distributed equally between men and women and also taking into account Kenya’s diversity.
90. require that at least one-third of all candidates presented for elections by political parties, and one-third of elective and appointive positions in public institutions be reserved for women.

On the electoral process, the new Constitution should -

91. state that it is both a fundamental right and duty of every citizen to vote or otherwise participate fully in the electoral process.
92. require the state to protect the right of every citizen to exercise his/her right duty to vote.

93. provide that voting materials, polling stations and polling personnel be accessible to voters with disability, nomadic communities and other minorities.
94. entrench the principle that elections shall be by secret ballot.
95. guarantee the rights of the disciplined forces, persons in custody, bankrupts and those in hospital, to vote
96. provide that registration of voters be a continuous process, not confined to particular periods.
97. provide that in a Presidential election a registered voter may vote anywhere in the Republic irrespective of the station where he/she is registered.
98. provide that Parliamentary elections be held on a specific or predictable day every five years.
99. empower electors to recall their representatives at council and Parliamentary levels for specified acts of commission or omission during their tenure of office and in accordance with clearly defined procedures.
100. require election candidates to possess minimum academic and other qualifications and to provide such other information as may be specified by electoral law at the time of nomination.
101. allow independent candidates to stand for Presidential and Parliamentary elections
102. specify the circumstances under which a candidate for election may be disqualified from offering himself/herself for election.
103. provide that except for the public servants debarred by the Constitution, civil servants be allowed to take leave of absence in order to seek elective offices.
104. provide for the enactment of a code of conduct governing elections and the conduct of election candidates and specifying penalties to be exacted for violation thereof.
105. require state media to give balanced coverage to all persons and parties participating in elections.
106. recognise and facilitate the right of civil society and other organisations both domestic and institutional to participate in election observation and monitoring, even with financial subsidies.

On management of elections, the new Constitution should -

107. establish an independent and impartial Electoral Commission, comprised—of Commissioners of integrity appointed by the President with the approval of Parliament and funded directly from the Consolidated Fund.
108. provide that Commissioners serve for a maximum of two five year terms but who otherwise have security of tenure.
109. give the Electoral Commission the power to deal with certain electoral disputes or offences immediately.
110. provide for the establishment of a special Electoral Boundaries Commission within two years of coming to review constituency boundaries and where necessary create new constituencies on the basis of criteria specified in electoral laws.
111. provide that the delimitations of constituency boundaries be done every ten years.

On the legislature, the new Constitution should -

112. provide for a bicameral legislature consisting of an Upper House called the National Council and a Lower House called the National Assembly both collectively referred to as Parliament.

113. provide that the National Council shall consist of 100 members of which 70 members shall be elected from the districts (including Nairobi) and 30 women elected from the provinces (4 from each province and 2 from Nairobi).
114. provide that the National Assembly be composed as indicated in recommendation number 89 above.
115. provide that the term of Parliament shall last five years from election to election.
116. provide, in detail, the functions of Parliament.
117. provide that the political party with a majority of members or a coalition of such parties would form the government.
118. provide that Parliament has unlimited powers over its own procedure and full control of its own calendar.
119. require that members of Parliament work full time.
120. stipulate clearly that Parliament has the power to dismiss the government through a vote of no confidence.
121. require that members of Parliament establish constituency offices.
122. stipulate that the office of Leader of the Minority party be established and recognised in Parliament.
123. enhance the capacity of Parliament to supervise the operations of the executive branch.

On the executive, the new Constitution should -

124. provide for an executive branch consisting of a President and a cabinet headed by a Prime Minister.
125. stipulate that a Presidential candidate be nominated by a political party or be an independent candidate aged between 35 and 70 years, a graduate from a recognised university, and of high integrity and moral probity.
126. stipulate that the President be elected directly by the people on the basis of universal suffrage.
127. provide that a Presidential candidate, who obtains 20% of votes cast in at least 5 provinces and an overall 50% of the total valid votes cast countrywide be declared elected and that where there is no outright winner, a run off shall be held between the two candidates with the highest number of votes, and the candidate with a simple majority in the run off be declared winner.
128. exclusively define the powers of the President and the circumstances under which he/she may be removed from office and procedure for impeachment.
129. provide that every Presidential candidate must nominate a person qualified to be President as his/her running mate who upon election shall become Vice President .
130. stipulate that in the event of death, impeachment, or resignation of the President, the Vice-President shall assume the office for the remainder of the term of the President.
131. provide that if the office of the Vice-President becomes vacant, the President shall appoint a Vice-President from among elected members of Parliament.
132. provide that in the event of death of both the President and the Vice President, the Speaker shall act as President
133. provide for the appointment of a Prime Minister responsible to Parliament and head of the Cabinet in the Government of Kenya.
134. provide that the Prime Minister be appointed from the party or coalition of parties with the largest number of members in Parliament and be the head of the Cabinet.
135. provide that the term of office of the Prime Minister continues for the life of Parliament unless he/she resigns, dies or is dismissed by Parliament on a vote of no confidence.

136. provide for the appointment of two Deputy Prime Ministers to assist the Prime Minister in the performance of his/her functions.
137. limit the size of the cabinet to not more than fifteen ministers and that ministers be appointed from outside Parliament but approved by it.
138. provide for the appointment of a person qualified to be a High Court judge as Attorney-General as the chief legal advisor for the Government.
139. provide for a separate and independent office of Director of Public Prosecutions.

On the judiciary, the new Constitution should -

140. establish the office of Chief Justice the holder of which shall be the head and member of the Judiciary and President of the Supreme Court.
141. establish an independent Judicial Service Commission and define its membership and functions.
142. establish a new court structure consisting of -
 - Supreme Court
 - Court of Appeal
 - The High Court
 - Kadhi's Courts
 - Subordinate Courts
 - Specialized Tribunals
143. provide that the Supreme Court be the Constitutional Court and the ultimate court of appeal in all matters.
144. provide for the establishment of tribunals composed of village elders to adjudicate on land, and personal law matters at the local level.
145. clearly define the qualifications necessary for appointing a judicial officer at any level.
146. fix the retirement age for all judges, Kadhi's and magistrates at 65 years.
147. accord the Chief Kadhi the status of a High Court Judge
148. provide that upon coming into force all judges of the High Court, Court of Appeal and the Chief Kadhi comply with the terms and conditions set in its transitional provisions.

On the public service, the new Constitution should -

149. establish an independent Public Service Commission and define its membership, functions and powers and mode of appointment.
150. provide that all appointments to the public service be made by, and discipline of public servants be executed exclusively by the Public Service Commission.
151. provide that all public servants shall retire at the age of 65 years.

On devolution of powers, the new Constitution should -

152. provide for a four tier devolution structure based on the province, district, location and village.
153. provide that Nairobi be state capital territory and be governed in accordance with special legislation.
154. provide that other municipalities be governed in accordance with legislation establishing units of devolution.
155. entrench the structure of devolution
156. provide that upon coming into effect the provincial administration will stand abolished.

On the management of natural resources, the new Constitution should -

- 157. vest all natural resources including minerals, water, land, forests, fisheries and wetlands in within the jurisdiction of Kenya in the people of Kenya except where ownership is expressly vested in other persons or people by this Constitution.
- 158. provide that the state under the supervision of Parliament be under a public duty and trust to manage the country's resources on behalf of the people.
- 159. provide that structures should exist through which communities can participate in the administration of natural resources

On the environment, the new Constitution should -

- 160. create environmental rights and duties as well as standards for the conservation and sustainable utilization of the natural resources.
- 161. contain provisions giving every person in Kenya a duty to have the environment protected for the benefit of present and future generations.
- 162. establish a National Environmental Management Commission to take custody of environmental resources.

On the land question, the new Constitution should -

- 163. declare that all land belongs not to the state but to the people of Kenya in their individual and collective capacity.
- 164. prohibit non-Kenyans from holding land other than in terms of leases
- 165. provide that land be held as either public, community and individual property, and that all three categories be clearly defined.
- 166. reserve in the state, the power of compulsory acquisition and authority to regulate the use of land.
- 167. establish a National Land Commission to *inter alia*, hold title to and administer public land
- 168. require Parliament to establish mechanism for the investigation and recovery of all public land irregularly disposed of, and the investigation and regulation of land expropriated during colonialism or through other causes.
- 169. require government to design and publish a national land policy
- 170. provide for security of land rights for all land owners irrespective of tenure
- 171. require the government at all levels to establish an efficient, transparent and cost — effective land administration system.
- 172. recognise customary land law as the regime governing the delimitation of right in community property and the transmission of those rights as part of the personal law of indigenous Kenyans.
- 173. recognise the right to matrimonial property and equitable access to such property by spouses during and after marriages.

On intellectual property rights, the new Constitution should -

- 174. protect indigenous knowledge and skills and promote their development and nurture.

- 175.require Parliament to enact legislation to promote cultural, industrial and scientific innovations and to enable inventors or authors to appropriate benefits derived from such innovations.

On public finance and revenue management, the new Constitution should -

- 176.establish an inter-disciplinary Economic and Financial Affairs Council comprised of such members and exercising such powers or performing such functions as may be defined in legislation.
- 177.provide for a Parliamentary Budgetary Committee that to work closely the Treasury in the development of the Annual Financial Bill.
- 178.provide for a Parliamentary Budget Office in the form of a Secretariat that would render technical assistance to the Budget Committee on matters relating to financial control and audit.
- 179.establish a Central Bank of Kenya as an independent institution which shall be the supreme monetary authority of the Republic, headed by a Governor and Deputy Governor exercising such powers as may be specified in legislation.
- 180.prohibit the raising or levying of taxes without the authority of Parliament.
- 181.prohibit the incurring of the public debt of the Government of Kenya without the prior approval of Parliament.
- 182.provide for the creation of two separate Constitutional offices of Auditor-General, and Controller of the Budget and define their functions.

On human resource management, the new Constitution should -

- 183.require Parliament to enact legislation establishing an efficient, effective, accountable and motivated public service.
- 184.guarantee to every Kenyan free and compulsory basic (i.e. primary) education.

On Social infrastructure, the new Constitution should -

- 185.include, in the Bill of Rights, the basic right to health, shelter and efficient physical infrastructure.

On science and technology, the new Constitution should -

- 186.require the state to design and implement a science and technology policy to improve the effectiveness of the national system of innovation and research.

On Constitutional commissions and offices, the new Constitution should -

- 187.create and define the powers and functions of special Constitutional Commissions and offices to supervise Constitutionality.
- 188.provide that the appointment of holders of Constitutional Commissions and offices be made with the approval of Parliament.
- 189.establish a Salaries and Remunerations commission to determine the remuneration and benefits of holders of Constitutional offices.

On ethics and leadership, the new Constitution should -

- 190. establish a leadership code to regulate the conduct of all public offices including those holding Constitutional offices.
- 191. establish an Ethics and Integrity Commission to administer the leadership code.

On succession and transfer of power, the new Constitution should -

- 192. provide detailed provisions relating to the management transitional issues consequential upon its commencement.
- 193. provide that any person who has ever held the office of President for more than two terms under the old Constitution be banned from holding office under it.

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The External Loans and Credit Act, Cap 422 of the Laws of Kenya;
The Government Contracts Act, Cap 25 of the Laws of Kenya;
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APPENDICES

APPENDIX I

CHAPTER 3A

THE CONSTITUTION OF KENYA REVIEW ACT

ARRANGEMENT OF SECTIONS

PART I — PRELIMINARY

Section

- 1— Short title.
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- 3—Object and purpose of constitutional review.
- 4—Organs of review.
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- 6—Establishment and membership of the Commission.
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- 9—Chairperson and vice-chairpersons.
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CHAPTER 3A

THE CONSTITUTION OF KENYA REVIEW ACT

6 of 1998

5 of 2000

2 of 2001

An Act of Parliament to facilitate the comprehensive review of the Constitution by the people of Kenya, and for connected purposes

ENACTED by the Parliament of Kenya as follows:-

PART I — PRELIMINARY

Short title. **1.** This Act may be cited as the Constitution of Kenya Review Act.

Interpretation. **2.** In this Act, unless the context otherwise requires –

6 of 1998. s.4

5 of 2000. s.3

2 of 2001. s.3

“chairperson” and “vice-chairpersons” means the chairperson and vice-chairpersons appointed under section 9 of this Act;

“Commission” means the Constitution of Kenya Review Commission established under section 6;

“Commissioner” means a Commissioner appointed under this Act;

Cap. 7

“constituency” has the meaning assigned to it in section 2 of the National Assembly and Presidential Elections Act;

“Constituency Constitutional Forum” means a forum established in accordance with section 20;

“the Constitution” means the Constitution of Kenya;

Cap. 265

“County Council” has the meaning assigned to it in section 2 of the Local Government Act, and for the purposes of this Act, includes the City Council of Nairobi;

Cap. 221

“Kenya Broadcasting Corporation” means the Kenya Broadcasting Corporation established under the Kenya Broadcasting Corporation Act;

Cap.225

“Kenya National Library Services Board” means the Board established under the Kenya Library Services Board Act;

“National Constitutional Conference” means the National Constitutional Conference referred to in section 27(1)(c);

No. 19 of 1990

“Non-Governmental Organisation” mean a Non-Governmental Organisation registered under the Non-Governmental Organisations Co-ordination Act, 1990;

“secretary” means the secretary appointed under section 11.

Object and purpose of constitutional review.

6 of 1998. s.5

2 of 2001. s.4

3. The object and purpose of the review of the Constitution is to secure provisions therein –

- (a) guaranteeing peace, national unity and integrity of the Republic of Kenya in order to safeguard the well-being of the people of Kenya;
- (b) establishing a free and democratic system of Government that enshrines good governance, constitutionalism, the rule of law, human rights and gender equity;
- (c) recognising and demarcating divisions of responsibility among the various state organs including the executive, the legislature and the judiciary so as to create checks and balances between them and to ensure accountability of the Government and its officers to the people of Kenya;
- (d) promoting the peoples’ participation in the governance of the country through democratic, free and fair elections and the devolution and exercise of power;
- (e) respecting ethnic and regional diversity and communal rights including the right of communities to organise and participate in cultural activities and the expression of their identities;
- (f) ensuring the provision of basic needs of all Kenyans through the establishment of an equitable frame-work for economic growth and equitable access to national resources;
- (g) promoting and facilitating regional and international co-operation to ensure economic development, peace and stability and to support democracy and human rights;
- (h) strengthening national integration and unity;
- (i) creating conditions conducive to a free exchange of ideas;
- (j) ensuring the full participation of people in the management of public affairs; and

(k) enabling Kenyans to resolve national issues on the basis of consensus.

Organs of
review.
6 of 1998. s.5
2 of 2001. s.5

4.(1) The organs through which the review process shall be conducted shall be -

- (a) the Commission;
- (b) the Constituency Constitutional Forum;
- (c) the National Constitutional Conference;
- (d) the referendum; and
- (e) the National Assembly.

(2) The organs specified in subsection (1) (a), (b) and (c) shall not be dissolved except in accordance with section 32.

Guiding
principles.
6 of 1998. s.5
2 of 2001. s.6

5. In the exercise of the powers or the performance of the functions conferred by this Act, the organs specified in section 4 (a), (b), (c) and (e) shall -

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

PART II – ESTABLISHMENT AND COMPOSITION OF COMMISSION

Establishment
and member-
ship of the
Commission.

6.(1) There is established a Commission to be known as the Constitution of Kenya Review Commission.

(2) The Commission shall be a body corporate

6 of 1998. s.6
5 of 2000. s.5
2 of 2001 s.7

with perpetual succession and a common seal and shall,
in its corporate name, be capable of –

- (a) suing and being sued;
- (b) taking, purchasing or otherwise acquiring, holding, charging, or disposing of movable and immovable property; and
- (c) doing or performing all such other acts necessary for the proper performance of its functions under this Act which may lawfully be done or performed by a body corporate.

Cap.446

(3) The provisions of the State Corporations Act shall not apply to the Commission.

(4) The Commission shall consist of-

- (a) the chairperson appointed from amongst the commissioners in accordance with section 9;
- (b) twenty-seven commissioners nominated by the National Assembly and appointed by the President in accordance with section 7;
- (c) the Attorney-General or his representative and the secretary who shall be *ex officio* commissioners without the right to vote.

(5) In nominating persons for appointment as commissioners, the National Assembly shall have regard to -

- (a) Kenya's ethnic, geographical, cultural, political, social and economic diversity; and
- (b) the principle of gender equity.

Procedure for
appointing
commissioners.
6 of 1998. s.7
5 of 2000. s.6
2 of 2001. s.8

7.(1) The National Assembly shall, within seven days of the commencement of this Act, by advertisement in the Gazette and in at least three daily newspapers of national circulation, invite applications from persons qualified under this Act for nomination as commissioners.

(2) An application under subsection (1) shall be forwarded to the National Assembly within fourteen days of the advertisement and may be made -

- (a) by any qualified person; or

(b) by any person, organisation or group of persons proposing the nomination of any qualified person.

(3) The National Assembly shall, within fourteen days of the expiry of the period prescribed in subsection (2), consider the applications received pursuant to that subsection and shall nominate twenty-seven persons for appointment as commissioners.

(4) In considering the applications under this section, the National Assembly shall consult widely.

(5) The National Assembly shall submit the list of nominees under subsection (3) to the Attorney-General for onward transmission to the President.

(6) The Attorney-General shall forthwith submit the list of the nominees received under sub-section (5) to the President.

(7) The President shall, upon receipt of the names forwarded under subsection (6), notify the appointment of the twenty-seven persons nominated under subsection (3) as commissioners.

Qualifications and
disqualifications
for appointment
as commissioners.
6 of 1998. s.8
5 of 2000. s.7
2 of 2001. s.9

8.(1) Subject to subsection (3), of the twenty-seven commissioners referred to in section 6 -

(a) eleven shall have knowledge of and at least five years' experience in matters relating to law; and

(b) sixteen shall have knowledge of and experience in public affairs:

Provided that –

(i) the persons qualified in terms of paragraph (b) shall comprise two persons from each province;

(ii) the total membership of the Commission shall not comprise more than four persons from any one province; and

(iii) at least six members of the Commission shall be women.

(2) Notwithstanding the provisions of subsection (1), no person shall be qualified for appointment as a commissioner –

(a) unless such person –

(i) is of sound mind; and

(ii) is of good character and integrity; or

(b) if such person is an undischarged bankrupt.

(3) All Commissioners once appointed shall cease active participation in political parties or any other organisation, whether registered or otherwise, propagating partisan views with respect to the review process.

Chairperson
vice-
chairpersons.
6 of 1998. s.9
5 of 2000. S.8
2 of 2001.s.10

9.(1) There shall be a chairperson of the Commission who and shall be appointed by the President from amongst the commissioners appointed under section 8(1) (a).

(2) There shall be three vice-chairpersons of the Commission, one of whom shall be a woman, elected by the commissioners from amongst their number.

(3) The chairperson shall, within fifteen days of the appointment of the commissioners, convene the first meeting of the Commission at which the commissioners shall elect three vice-chairpersons of the Commission as specified in subsection (2), one of whom shall be designated as the first vice-chairperson.

Establishment of
Parliamentary
Select
Committee.
5 of 2000. S.9
2 of 2001. S.11

10. The National Assembly shall, in accordance with its Standing Orders, establish a Select Committee consisting of not less than five, and not more than twenty-seven members to assist it in the performance of its functions under the Act.

The Secretariat.
5 of 2000 .s.10
2 of 2001. s.12

11.(1) There shall be a secretary to the Commission who shall be appointed by the President from two persons nominated by the National Assembly.

(2) The secretary shall serve on a full-time basis.

(3) Where a vacancy occurs in the office of the secretary the Commission shall within fourteen days of the occurrence, submit to the Parliamentary Select Committee three names of persons qualified under this Act to fill the vacancy.

(4) The Select Committee shall within seven days of receipt of the names from the Commission, submit to the National Assembly names of two persons from whom the President shall appoint a secretary.

(5) The President shall, within seven days of receipt of the names submitted under subsection (4) appoint a secretary.

(6) There shall be at least three deputy secretaries appointed by the Commission to assist the secretary in administration, research and drafting and other duties or functions of the Commission.

Staff of the
Commission,
experts and
consultants.

12.(1) The staff of the Commission shall comprise –

(a) such officers and other staff as the Commission may appoint to assist it in the discharge of its functions under this Act; and

(b) such public officers as may be necessary for the purposes of the Commission as may, upon the request of the Commission, be seconded thereto by the Public Service Commission, the Parliamentary Service Commission, the Judicial Service Commission or the Teachers' Service Commission, as the case may be and such public officers shall, during their secondment, be deemed to be officers of the Commission and subject to the direction and control of the Commission.

(2) The Commission may employ experts or consultants to assist the Commission as appropriate and necessary under this Act.

Oaths of office
6 of 1998. s.11

13.(1) A commissioner, the secretary and the deputy secretaries appointed and under this Act shall, according to their religious or other beliefs –affirmations.

(a) make and subscribe to the oath prescribed in the First Schedule; or

(b) make the solemn affirmation in the form prescribed in the First Schedule before the Chief Justice, prior to embarking on the duties of the Commission.

(2) Every oath and affirmation made and subscribed to under this section shall be deposited with the secretary and with the Chief Justice.

Code of
conduct.
6 of 1998. s.12
5 of 2000. s.13

14.(1) For the better discharge of the functions of the Commission and the Secretariat of the Commission under this Act, the code of conduct prescribed in the Second Schedule shall apply.

(2) A person who breaches the provisions of the code of conduct shall -

(a) in the case of a commissioner or the secretary, subject to the provisions of section 15(4), be disqualified from holding office as such; and

- (b) in the case of a member of staff of the Commission, be liable to such disciplinary action as the Commission may prescribe.

Tenure of office
of commissioners
and secretary.
5 of 2000. s.22
2 of 2001.s.14

15.(1) The term of office of a commissioner (other than the *ex officio* commissioner under section 6(2)(c)) or the secretary shall be from the date of appointment under section 7 or 11 respectively and shall, unless the commissioner or the secretary resigns under subsection (2) or the office falls vacant earlier owing to any reason specified in subsection (4), terminate on the date of enactment of the Constitution as stipulated in section 33, subject to the provisions of that section as to the winding up of the financial and administrative affairs of the Commission.

- (2) A commissioner or the secretary may, at any time after appointment, resign, by notice in writing to the President through the chairperson of the Commission and the resignation shall take effect within seven days of the date of that notice.

- (3) The President shall notify every resignation in the Gazette within fifteen days thereof.

- (4) The office of a commissioner or the secretary shall fall vacant if the person -

(a) dies; or

(b) resigns from office; or

(c) is adjudged bankrupt; or

(d) is convicted of an offence and sentenced to imprisonment for a term of six months or more without the option of a fine; or

(e) is in breach of the code of conduct prescribed under section 14; or

(f) without reasonable excuse, fails to attend three consecutive meetings of the Commission; or

(g) is by reason of physical or mental infirmity, unable to discharge his duties as a commissioner or as the secretary; or

(h) is for any other reason, unable or unwilling to act as a commissioner or as the secretary,

and in any case to which paragraphs (e), (f), (g) and (h) apply, the breach, failure, inability or unwillingness is noted by the Commission in its records and supported by a resolution of two-thirds majority of the members and the person is

informed of the termination of the appointment in writing through the secretary, or where the affected person is the secretary, through the chairperson.

- (5) Where any vacancy occurs in the Commission, the Commission shall within fourteen days of the occurrence, submit to the Parliamentary Select Committee a list of three names of persons qualified under this Act to fill the vacancy.
- (6) The Select Committee shall, within seven days of the receipt of the names submitted under subsection (5), submit to the National Assembly names of two persons from whom the President shall appoint a Commissioner.
- (7) The President shall, within seven days of receipt of the names submitted under subsection (6) appoint a commissioner or commissioners holding the same qualifications and from the same province as the commissioner in respect of whom the vacancy has arisen.
- (8) No act of the Commission shall be called to question on the ground merely of the existence of any vacancy in, or defect in, the constitution of the Commission.

Disqualification of commissioners for election. 6 of 1998. s.14

16. The office of a commissioner shall be deemed to be an office for the purposes of subsection (1) (f) of section 35 of the Constitution.

PART III – FUNCTIONS, POWERS AND PRIVILEGES OF THE COMMISSION AND COMMISSIONERS

Functions of the Commission.
6 of 1998. s.15
5 of 2000. s.26
2 of 2001. s.15

17. The functions of the Commission shall be-

- (a) to conduct and facilitate civic education in order to stimulate public discussion and awareness of constitutional issues;
- (b) to collect and collate the views of the people of Kenya on proposals to alter the Constitution and on the basis thereof, to draft a Bill to alter the Constitution for presentation to the National Assembly;
- (c) to carry out or cause to be carried out such studies, researches and evaluations concerning the Constitution and other constitutions and constitutional systems as, in the Commission's opinion, may inform the Commission and the people of Kenya on the state of the Constitution of Kenya; and
- (d) without prejudice to paragraphs (b) and (c), to ensure that in reviewing the Constitution, the people of Kenya -

- (i) examine and recommend the composition and functions of the organs of state including the executive, the legislature and the judiciary and their operations aiming to maximise their mutual checks and balances and secure their independence;
- (ii) examine the various structures and systems of government including the federal and unitary systems and recommend an appropriate system for Kenya;
- (iii) examine and recommend improvements to the existing constitutional commissions, institutions and offices and the establishment of additional ones to facilitate constitutional governance and the respect for human rights and gender equity in Kenya as an indispensable and integral part of the enabling environment for economic, social, religious, political and cultural development;
- (iv) examine and recommend improvements to the electoral system of Kenya;
- (v) without prejudice to subparagraph (i), examine and make recommendations on the judiciary generally and in particular, the establishment and jurisdiction of the courts, aiming at measures necessary to ensure the competence, accountability, efficiency, discipline and independence of the judiciary;
- (vi) examine and review the place of local government in the constitutional organisation of the Republic of Kenya and the degree of the devolution of powers to local authorities;
- (vii) examine and review the place of property and land rights, including private, Government and Trust land in the constitutional framework and the law of Kenya and recommend improvements that will secure the fullest enjoyment of land and other property rights;
- (viii) examine and review the management and use of public finances and recommend improvements thereto;
- (ix) examine and review the right to citizenship and recommend improvements that will, in particular, ensure gender parity in the conferment of the right;
- (x) examine and review the socio-cultural obstacles that promote various forms of discrimination and recommend improvements to secure equal rights for all;

- (xi) examine and review the rights of the child and recommend mechanisms that will guarantee protection thereof;
- (xii) examine and review succession to office and recommend a suitable system for the smooth and dignified transfer of power after an election or otherwise;
- (xiii) examine and recommend on the treaty-making and treaty-implementation powers of the Republic and any other relevant matter to strengthen good governance and the observance of Kenya's obligations under international law;
- (xiv) examine and make recommendations on the necessity of directive principles of state policy;
- (xv) establish and uphold the principle of public accountability by holders of public or political offices;
- (xvi) examine and make recommendations on any other matter which is connected with or incidental to the foregoing and achieves the overall objective of the constitutional review process.

Powers of the
Commission.

5 of 2000. s.28
2 of 2001.s.16

18.(1) The Commission shall have all powers necessary for the execution of its functions under this Act, and, without prejudice to the generality of the foregoing, the Commission –

- (a) shall visit every constituency in Kenya to receive the views of the people on the Constitution;
 - (b) shall, without let or hindrance, receive memoranda, hold public or private hearings throughout Kenya and in any other manner collect and collate the views and opinions of Kenyans, whether resident in or outside Kenya, and for that purpose the Commission may summon public meetings of the inhabitants of any area for the discussion of any matter relevant to the functions of the Commission;
 - (c) may summon any public officer to appear in person before it or before a committee or to produce any document or thing or information that may be considered relevant to the functions of the Commission.
- (2) Any public officer who, without lawful cause, fails to appear before the Commission pursuant to any summons by the Commission under subsection (1) (c) commits an offence and shall be liable on conviction to a fine not exceeding ten thousand shillings, or to imprisonment for a term not exceeding three months, or to both.

19.(1) The Commission may establish such committees of the Commission as it may deem necessary for the better carrying out of its functions under this Act.

(2) For the purposes of subsection (1) a meeting of any committee established for purposes of collecting the views of the public during the review process shall be deemed to be a meeting of the Commission.

Constituency
Constitutional
Forums.
6 of 1998. s.18
2 of 2001.s.18

20. The Commission shall, in the performance of its functions under this Act facilitate the establishment of Constituency Constitutional Forums for the debate, discussion, collection and collation of the views of the members of the public on proposals to alter the Constitution.

Procedure.
6 of 1998. s.19
2 of 2001.s.19

21.(1) Subject to this section, the Commission shall regulate its own procedure and that of its committees.

(2) Subject to subsection (3), the Commission shall hold such number of meetings in such places, at such times and in such manner as the Commission shall consider necessary for the discharge of its functions under this Act.

(3) All meetings of the Commission for the collection of the views of the public shall be held in public:

Provided that nothing in this section shall preclude the Commission from receiving evidence in private if circumstances so warrant.

(4) The chairperson shall -

(a) preside over all meetings of the Commission, and in the absence of the chairperson, the first chairperson shall preside and in the absence of both the chairperson and the first vice chairperson any one of the other vice-chairpersons may preside as the Commission may determine;

(b) be the spokesperson for the Commission and in the absence of the chairperson, the first vice-chairperson shall be the spokesperson and in the absence of both the chairperson and the first vice-chairperson any of the other vice chairpersons may be the spokesperson as the Commission may determine;

(c) supervise and direct the work of the Commission:

Provided that in the absence of both the chairperson and all the vice-chairpersons, the commissioners present shall elect one of their number to perform the functions under this subsection during such absence.

- (5) The quorum of the Commission and of any of its committees shall be one half of the members.
- (6) All questions before the Commission or a committee thereof shall be determined by consensus, but in the absence of consensus, decisions of the Commission shall be determined by a simple majority of the members present and voting
- (7) The secretary shall be responsible for -
 - (a) the day to day administration of the affairs of the Commission;
 - (b) the co-ordination of the Commission's studies, research and evaluations;
 - (d) the recording of the proceedings; and
 - (e) custody of all records and documents of the Commission.

Publication of
Commission's
records.
6 of 1998. s.20
2 of 2001.s.20

- 22.**(1) Save as may be provided for in the Regulations, the Commission shall avail the record of the proceedings of every meeting of the Commission through-
- (a) the documentation centres established under section 23;
 - (b) the libraries provided by the Kenya National Library Services Board throughout the country; and
 - (c) through the print and the electronic media.
- (2) The Commission shall, for the purposes of subsection (1)(c), consult with the Kenya Broadcasting Corporation and other broadcasting stations licensed under the Kenya Communications Act, 1998 in order to secure suitable arrangements for the –
- (a) allocation of air-time and space for purposes of disseminating the report of the Commission through the electronic and print media; and
 - (b) provision of a sign language inset or subtitles in all television programmes aired for purposes of paragraph (a), all newscasts, civic educational programmes and in all other programmes covering the constitutional review process.
- (3) Where a broadcasting station is consulted by the Commission under subsection (2), such station shall make suitable arrangements to air such programmes whose broadcast is specified by the Commission.

Documentation
centres.
6 of 1998. s.20

23. (1) Notwithstanding the provisions of any other written law, the county council of every district shall facilitate the establishment by the Commission of a documentation centre in the district for the preservation and dissemination to the public of the records of the deliberations and proceedings of the Commission and such other information as the Commission may direct.

(2) Any person may, during working hours, inspect at the documentation centre, any of the records preserved therein and may obtain copies thereof upon payment of such fee as the Commission may prescribe.

Civic Education.
2 of 2001. s.21

24. The Commission shall, during the entire period of its work, facilitate and promote civic education in order to stimulate public discussions and awareness of constitutional issues.

Privileges of
Commissioners or
and secretary
during office
and other
immunities.

25.(1) A commissioner or the secretary shall not be liable to any civil action suit for or in respect of any matter or thing done or omitted to be done in good faith as a commissioner or as the secretary.

(2) No commissioner or secretary shall be liable to arrest under civil process while proceeding to, participating in, or returning from any meeting of the Commission or of any committee thereof.

(3) No person who appears before the Commission shall, whether such appearance is in pursuance of any summons by the Commission under this Act or not, be liable to any criminal or civil proceedings, or to any penalty or forfeiture whatsoever in respect of any evidence or information given to the Commission by such person.

PART IV – REPORT OF THE COMMISSION AND ACTION THEREON

Completion of
work, report
and action
thereon.
6 of 1998. s.21
2 of 2001. s.22

26.(1) The Commission shall complete its work within a period of twenty-four months of the commencement of this Act.

(2) For purposes of subsection (1), the work of the commission shall consist of visiting all the constituencies in Kenya, compiling reports of the Constituency Constitutional Forums, the National Constitutional Conference, conducting and recording the decision of the referendum referred to in section 27(6), and on the basis thereof drafting a Bill for presentation to Parliament for enactment.

- (3) Where the Commission considers this period inadequate, it may, at least twelve months after the commencement of its work, request an extension of the period by the National Assembly.
- (4) Notwithstanding any extension of time under subsection the Commission may, where circumstances demand, recommend such minimum amendments to the Constitution or any other law as may be necessary towards fulfilment of any of the objects of the review process, which shall be considered by the National Assembly in accordance with its Standing Orders.
- (5) The National Assembly may, upon a request under subsection (3), by resolution, extend the period prescribed under the Act by such period as it may deem appropriate.
- (6) Where an extension of time is granted to the Commission under this section, the Commission shall proceed expeditiously with its work in accordance with the provisions of this Act.
- (7) The Commission shall, compile its report together with a summary of its recommendations and on the basis thereof, draft a Bill to alter the Constitution.

National
discussion of
Commission's
report.
2 of 2001. s.23

27.(1) The Commission shall -

- (a) upon compilation of its report and preparation of the draft bill referred to in section 26-
 - (i) publish the same for the information of the public in the manner specified in section 22, for a period of thirty days; and
 - (ii) ensure that the report and the draft Bill are made available to the persons or groups of persons conducting civic education;
 - (b) upon the expiry of the period provided for in paragraph (a)(i), convene a National Constitutional Conference for discussion, debate, amendment and adoption of its report and draft Bill.
- (2) The National Constitutional Conference shall consist of –
- (a) the commissioners who shall be *ex-officio* members without the right to vote;
 - (b) all members of the National Assembly;
 - (c) three representatives of each district, at least one of whom shall be a woman, and only one of whom may be a councillor all of who

shall be elected by the respective county council in accordance with such rules as may be prescribed by the Commission;

- (d) one representative from each political party registered at the commencement of this Act, not being a member of Parliament or a councillor;
- (e) such number of representatives of religious organisations, professional bodies, women's organisations, trade unions and non-governmental organisations registered at the commencement of this Act and of such other interest groups as the Commission may determine;

Provided that –

- (i) the members under paragraph (e) shall not exceed twenty-five per cent of the membership of the National Constitutional Conference under paragraphs (a), (b), (c) and (d); and
 - (ii) the Commission shall consult with and make regulations governing the distribution of representation among, the various categories of representatives set out in paragraph (e).
- (3) The chairperson of the Commission shall be the chairperson of the National Constitutional Conference.
 - (4) The quorum of the National Conference shall be one half of the members.
 - (5) All questions before the National Conference shall be determined by consensus, but in the absence of consensus, such decisions shall be determined by a simple majority of the members present and voting;

Provided that –

- (i) in the case of any question concerning a proposal for inclusion in the Constitution, the decision of the National Constitutional Conference shall be carried by at least two thirds of the members of the National Constitutional Conference present and voting; and
- (ii) if on taking a vote for the purpose of subsection 5(i), the proposal is not supported by a two thirds vote, but is not opposed by one third or more of all the members of the National Constitutional Conference present and voting, then, subject to such limitations and conditions as may be prescribed by the Commission in the Regulations, a further vote may be taken; and

(iii) if on taking a further vote under paragraph (ii), any question on a proposal for inclusion in the Constitution is not determined, the National Constitutional Conference may, by a resolution supported by at least two-thirds of the voting members present, determine that the question be submitted to the people for determination through a referendum

(6) The Commission shall record the decision taken by the National Constitutional Conference on the report and the draft Bill pursuant to its powers under subsection (1) (c) and shall, submit the question or questions supported by a resolution under subsection 5 (iii) to the people for determination through a referendum.

(7) A national referendum under subsection (6) shall be held within one month of the National Constitutional Conference.

Introduction of
Commission's
Report to the

Assembly.
2 of 2001. s.24

28.(1) The Commission shall, on the basis of the decision of the people at the referendum and the draft Bill as adopted by the National Constitutional Conference, National prepare the final report and draft Bill.

(2) The Commission shall submit the final report and the draft Bill to the Attorney-General for presentation to the National Assembly.

(3) The Attorney-General shall, within seven days of the receipt of the draft Bill, publish the same in the form of a Bill to alter the Constitution.

(4) At the expiry of a further period of seven days of the publication of the Bill to alter the Constitution, the Attorney-General shall table the same together with the final report of the Commission before the National Assembly for enactment within seven days.

PART V – EXPENSES OF THE REVIEW PROCESS

Funds for
expenses of
the review
process.

6 of 1998. s.23
2 of 2001. s.25

29.(1) The expenses of the constitutional review process incurred by the Commission, the Constituency Constitutional Forums, the National Constitutional Conference and the referendum in accordance with this Act shall be charged on and issued out of the Consolidated Fund without further appropriation than this Act.

(2) Without prejudice to subsection (1), there may be made to the Commission grants, gifts, donations or bequests towards the achievement of the objects of the review process specified in section 3:

Provided that no grant, gift, donation or bequest shall be made on any condition that the Commission perform any function or discharge any duty or obligation other than duties under this Act aimed at achieving the objects of the constitutional review process.

Constitution of
Kenya Review
Fund.
6 of 1998. s.23
2 of 2001. s.26

30.(1) There is established a Fund to be known as the Constitution of Kenya Review Fund which shall be administered, on behalf of the Commission, by the secretary.

(2) There shall be paid into the Fund –

(a) such monies as may be appropriated out of the Consolidated Fund for the constitutional review process pursuant to this Act; and

(b) any grants, gifts, donations or bequests received under section 29(2).

(3) There shall be paid out of the Fund all payments in respect of any expenses incurred in pursuance of the provisions of this Act.

(4) The secretary shall, in administering the Fund, consult with the Permanent Secretary to the Treasury and, subject to provisions of the Exchequer and Audit Act, manage the Fund in such manner as promotes the object and purpose of the review process.

(5) Upon the dissolution of the Commission under section 33, any assets standing to the credit of the Constitution of Kenya Review Fund shall, subject to any condition attached to a gift, donation or bequest, be credited to the Consolidated Fund.

Cap.412

Remuneration
and allowances
of commissioners.
2 of 2001. s.27

31. The Minister in charge of finance in consultation with the Parliamentary Select Committee, shall determine commissioners and the remuneration and allowances of the shall scrutinize and approve the budget of the Commission.

Accounts and
Audit.
6 of 1998. s.23
Cap.412

32. The accounts of the Constitution of Kenya Review Fund shall be kept, audited and reported upon to the National Assembly in accordance with section 18 and 19 of the Exchequer and Audit Act.

PART VI - DISSOLUTION OF ORGANS OF REVIEW AND FINAL PROVISIONS

Dissolution of
Commission
6 of 1998. s.24

33.(1) Upon the enactment of the Bill to alter the Constitution tabled before the National Assembly pursuant to section 28, the Commission shall stand dissolved and

2 of 2001. s.28

the terms of office of the Commissioners shall thereupon expire, save that the secretary and such number of staff as shall be necessary, shall remain in office for a period of three months to conclude the financial and administrative affairs of the Commission.

Regulations.

2 of 2001. s.29

34.(1) The Commission shall make Regulations generally for the better carrying out of its functions under this Act.

(2) Without prejudice to the generality of subsection (1), regulations under this section may -

(a) prescribe anything required by this Act to be prescribed;

(b) subject to this Act, prescribe the procedure for-

(i) electing the vice-chairpersons and filling any vacancies arising in respect thereof;

(ii) facilitating and promoting the provision of civic education;

(iii) the establishment of Constituency constitutional forums;

(iv) the Constitution and conduct of the National Constitutional Conference;

(v) resolution of any disputes arising in the course of the review process.

(c) prescribe the disciplinary procedures applicable to the staff of the Commission; or

(a) prescribe the procedure for the holding of a referendum under section 27:

Provided that regulations under this paragraph shall be made in consultation with the Electoral Commission of Kenya.

Act to bind the Government.

2 of 2001. s.30

35. This Act shall bind the Government.

FIRST SCHEDULE (s.13)

6 of 1998.

5 of 2000.

OATH OFFICE OF A COMMISSIONER

I being appointed a commissioner under the Constitution of Kenya Review Commission Act do solemnly swear that I will faithfully and fully, impartially and to the best of my ability discharge the trust and perform the functions and exercise the powers devolving upon me by virtue of this appointment without fear, favour, bias, affection, ill-will or prejudice and to the end that in the exercise of the functions and powers as such commissioner I shall not be influenced by any political party, religious society or other organisation or person which may have nominated me for appointment. So help me God.

.....
COMMISSIONER

.....
CHIEF JUSTICE

SOLEMN AFFIRMATION OF A COMMISSIONER

I being appointed a commissioner under the Constitution of Kenya Review Commission Act do solemnly declare and affirm that I will faithfully and fully, impartially and to the best of my ability discharge the trust and perform the functions and exercise the powers devolving upon me by virtue of this appointment without fear, favour, bias, affection, ill-will or prejudice and to the end that in the exercise of the functions and powers as such commissioner I shall not be influenced by any political party, religious society or other organisation or person which may have nominated me for appointment.

.....
COMMISSIONER

.....
CHIEF JUSTICE

OATH OF OFFICE OF THE SECRETARY OR A DEPUTY SECRETARY

I being appointed the secretary/a deputy secretary under the Constitution of Kenya Review Commission Act do solemnly swear that I will faithfully and fully, impartially and to the best of my ability discharge the trust and perform the functions and exercise the powers devolving upon me by virtue of this appointment without fear, favour, bias, affection, ill-will or prejudice and to the end that in the exercise of the functions and powers as such secretary/deputy secretary I shall not be influenced by any political, religious or other interest, or by any person. So help me God.

.....
SECRETARY/DEPUTY SECRETARY

.....
CHIEF JUSTICE

SOLEMN AFFIRMATION OF THE SECRETARY AND A DEPUTY SECRETARY

I, being appointed the secretary/a deputy secretary under the Constitution of Kenya Review Commission Act do solemnly and sincerely declare and affirm that I will faithfully and fully, impartially and to the best of my ability discharge the trust and perform the functions and exercise the powers devolving upon me by virtue of this appointment without fear, favour, bias, affection, ill-will or prejudice and to the end that in the exercise of the functions and powers as such secretary/deputy secretary I shall not be influenced by any political, religious or other interest, or by any person.

.....
SECRETARY/DEPUTY SECRETARY

.....
CHIEF JUSTICE

SECOND SCHEDULE

6 of 1998.

5 of 2000.

CODE OF CONDUCT FOR MEMBERS AND STAFF OF THE COMMISSION

Impartiality and Independence of Members

1. (1) Every member of the Commission shall serve impartially and independently and perform the functions of his office in good faith and without fear, favour or prejudice.
2. (1) No member of the Commission shall, during tenure of office, be eligible for appointment or nomination to any political office.

(2) No member of the Commission may -
 - (a) by his or her membership, association, statement, conduct or in any other manner jeopardize the perceived independence of the member, or in any other manner prejudice the credibility, impartiality, independence or integrity of the Commission;
 - (b) make private use of or profit from any confidential information gained as a result of being a member of the Commission.

Disclosure of Conflicting Interests

3. If a member of the Commission is directly or indirectly interested in any contract, proposed contract or other matter before the Commission, such member shall disclose the fact and shall not take part in the consideration or discussion of, or vote on, any question with respect to the contract or other matter, or be counted in the quorum of the meeting during consideration of the matter.
4. This Code shall apply with necessary modifications to the staff of the Commission.

**PRINCIPLES FOR A DEMOCRATIC AND SECURE PROCESS
FOR THE REVIEW OF THE CONSTITUTION**

The Government of the Republic of Kenya, the organs of review of the constitution, political parties, non-governmental organisations, and all Kenyans shall –

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

APPENDIX II

THE CONSTITUTION OF KENYA REVIEW ACT (CAP 3A)

IN EXERCISE of the powers conferred by section 33 of the Constitution of Kenya Review Act, the Constitution of Kenya Review Commission makes the following Regulations:-

THE CONSTITUTION OF KENYA REVIEW (GENERAL) REGULATIONS, 2001

PART 1 - PRELIMINARY

Citation 1. These Regulations may be cited as the Constitution of Kenya Review (General) Regulations, 2001

Interpretation 2. In these Regulations unless the context otherwise requires –

“committee” means the Steering Committee, a working committee, a panel or any committee of whatever nature established for purposes of these Regulations;

“documentation centre” means a documentation centre established pursuant to section 23 of the Act;

“meeting of the Commission” means and includes all meetings of the Commission or of its committees whether in ordinary, extra ordinary or special session and includes public hearings, expert consultations, panel discussions and workshops for which notice has been given;

“office of the Commission” means the office of chairperson the vice-chairpersons and the chairpersons of the committee of the Commission;

“secretariat” means the Secretary, the Deputy Secretaries and staff of the Secretariat;

“select committee” means the Parliamentary Select Committee established by the National Assembly in accordance with section 10 of the Act;

“staff of the Secretariat” means all persons appointed or seconded to the Secretariat of the Commission other than persons to whom regulation 7 applies;

“staff of the Commission” means all staff whether permanent or temporary, employed or engaged by the Commission to perform any function for which the Commission is established and includes staff to whom regulation 7 applies.

PART II – THE SECRETARIAT

The Secretary 4. In the furtherance of the performance of his functions and duties under the Act, the Secretary shall –

- (a) supervise the day-to-day operations and functions of the Secretariat;
- (b) send timely notices of all meetings of the Commission and ensure that minutes of such meetings are accurately recorded;
- (c) ensure that Commissioners have access to the minutes of the Commission;
- (d) facilitate the deposit of such records of the Commission as are required to be deposited with documentation centres;
- (e) ensure that the decisions of the Commission are followed up and implemented;
- (f) provide adequate services for all committees of the Commission;
- (g) keep custody of all records and property of the Commission;
- (h) perform such other functions as the Commission may assign to him,

The Deputy Secretary 5.

- (1) The Deputy Secretaries shall be recruited by the Commission from among persons with knowledge and expertise in fields relevant to the work of the Commission
- (2) The mode of recruitment of the Deputy Secretaries shall be through open advertisement and competitive interviews.
- (3) The Deputy Secretaries shall assist the Secretary in the day-to-day performance of his functions under the Act and these Regulations.
- (4) Notwithstanding the generality of sub-regulation (3) the Secretary may assign a Deputy Secretary to each of the committees of the Commission but such assignment shall not in any way prevent the Secretary from himself performing the functions that are the subject of such assignment.

The staff of the Secretariat 6.

- (1) The Commission may recruit such number of staff, as it shall by resolution determine.
- (2) Positions on the staff of the Secretariat shall be advertised in the press and recruitment shall be by way of competitive interviews.
- (3) Nothing in sub-regulation (2) shall prevent the Commission from recruiting any member of the staff of the Secretariat through secondment from Government departments or other public agencies.
- (4) All staff of the Secretariat shall be subject to the general direction and supervision of the Commission.

Recruitment of temporary staff.	7.	<p>(1) The Secretary may, on the instructions of the Commission, recruit such number of temporary staff as may be required for the effective performance of specific functions of the Commission.</p> <p>(2) Except as the Commission may otherwise determine, staff recruited on a temporary basis shall not be retained in the service of the Commission for a continuous period exceeding three months and no such staff shall be so retained for a cumulative period exceeding six months.</p>
Welfare of staff	8	<p>(1) Under the general direction of the Commission the Secretary shall take all necessary measures to ensure that the welfare of the staff of the Secretariat and other staff of the Commission is take care of.</p> <p>(2) Notwithstanding the generality of sub-regulation (1) the Secretary shall ensure that –</p> <p style="padding-left: 40px;">(a) adequate medical cover for staff is arranged; and</p> <p style="padding-left: 40px;">(b) staff on Commission business out of station are properly insured.</p>
Discipline of staff	9	<p>(1) Disciplinary action shall be taken against a member of staff of the Commission who fails to adhere to lawful instructions issued by the Commission or violates the provisions of the Act or these Regulations or otherwise compromises the functions or the integrity of the Commission.</p> <p>(2) The Commission shall by resolution, establish disciplinary procedures governing the conduct of all staff of the Commission whether or not such staff are seconded to the Commission from other organizations.</p>
Remuneration of Commissioners	10	<p>PART III – THE STATUS OF COMMISSIONERS</p> <p>(1) The Commissioners shall receive such remuneration and allowances, as may be determined under the Act.</p> <p>(2) Where calculated in cash such remuneration and allowances shall be paid monthly in arrears.</p> <p>(3) The Commission shall arrange for full medical cover and adequate insurance for all Commissioners.</p>
Security of Commissioners	11	<p>(1) All Commissioners shall, throughout their tenure of office be provided with adequate security.</p> <p>(2) The Commission shall by resolution determine the nature and extent of the security to be provided under this regulation.</p>
Removal of a Commissioner or Secretary	12.	<p>(1) Where the Commission has reason to believe that a Commissioner or the Secretary is in breach of section 15 (4) (e), (f), (g) and (h) of the Act, any Commissioner or group of Commissioners with information</p>

to that effect may –

- (a) where the allegation relates to paragraph (e) thereof, prepare a detailed statement specifying the various acts constituting the alleged breach of the Code of Conduct by the Commissioner or the Secretary; or
 - (b) where the allegation relates to paragraph (f) thereof, require the Secretary to produce the record of attendance at meetings of the Commission not being meetings of the committees of the Commission by such Commissioner; or
 - (c) where the allegation relates to paragraph (g) thereof obtain such certified copies of the medical records of the Commissioner or Secretary as indicate that he is unable to discharge his duties by reason of physical or mental infirmity; or
 - (d) where the allegation relates to paragraph (h) thereof, prepare a brief that indicates unequivocally, that the Commissioner or the Secretary is unwilling or unable to act as a Commissioner or the Secretary.
- (2) Any statement, record, certificate or brief prepared in support of any allegation made under sub-regulation (1) shall be –
- (a) furnished in advance to the Commissioner or the Secretary by the Chairperson at least seven days before the Commission meeting at which the matter is to be tabled;
 - (b) presented before a meeting of the Commission convened specifically for that purpose, and if after a full and exhaustive deliberation during which the Commissioner in question or the Secretary, as the case may be, shall be given an opportunity of being heard, the Commission resolves by a two-thirds majority that the tenure of office of the Commissioner in question or the Secretary shall be determined, the President shall be informed accordingly.
13. (1) Whenever a vacancy occurs in the office of Commissioner or Secretary, the Commission shall advertise such vacancy in the press requiring any person qualified to be a Commissioner or Secretary under the Act to submit an application within seven days of the occurrence of such vacancy.
- (2) Applications received in accordance with the sub-regulation (1) shall be considered by a full meeting of the Commission convened specifically for that purpose and a decision shall be taken thereon in accordance with the provisions of section 15 of the Act.

Replacement
of
Commissioners
or Secretary

Committees of
the
Commission

14 **PART IV – THE COMMITTEES OF THE COMMISSION**

(1) The Commission shall exercise its functions and the duties through advisory committees as follows –

- (a) the Steering Committee;
- (b) Working Committees;
- (c) Panels;

(2) The Secretary shall be the Secretary to all committees of the Commission

Membership of
committees of
the
Commission

15 The Steering Committee shall consist of the chairperson of the Commission, the Vice chairpersons of the Commission, the chairperson of committees of the Commission and two other Commissioners elected by the Commission in ordinary session.

(2) Subject to sub-regulation (1) the committees of the Commission shall comprise –

- (a) the chairperson of the Commission and the vice chairpersons of the Commission, as ex officio members; and
- (b) at least five Commissioners elected by the Commission in ordinary session.

Composition
and functions
of committees

16 The Commission shall by resolution determine the number, composition, organization and functions of committees established in accordance with regulation 15.

Meetings of
committees of
the
Commission

17 (1) Except as the Commission may otherwise determine, committees of the Commission shall –

- (a) be convened by the Secretary on the instructions of the chairperson;
- (b) meet as often as may be necessary to discharge their functions under these Regulations;
- (c) ensure that proper records of their proceedings are prepared and lodged with the Secretariat; and
- (d) submit any decision made in the course of their deliberations to the Commission for approval.

(2) The quorum for the transaction of the business of any committee of the Commission shall be one half of its members.

Decisions of
the
Commission

PART V – THE PROCEDURE AND POWERS OF THE COMMISSION

- 18 The decisions of the Commission shall determine by consensus, but in the absence of consensus, such decisions shall be determined by a simple majority of the members of the Commission present and voting.
- Election to
offices of the
Commission 19 (1) The vice-chairpersons of the Commission shall be elected at a meeting specifically convened for that purpose from among members of the Commission but nothing in this regulation shall prevent the Commission from transacting any other business at such meeting.
- (2) Elections to all offices of the Commission other than those specified under sub-regulation (1) shall be conducted at an ordinary meeting of the Commission.
- Meetings of
the
Commission 20. (1) Except as it may otherwise decide, the Commission shall meet –
- (a) in ordinary session at least twice in every month to transact its business;
- (b) in extra-ordinary session at any time upon the requisition in writing by the chairperson or at least one half of its members, to transact the business specified by the chairperson or the members requisitioning such a meeting; and
- (c) as often as may be necessary to transact any business for which the Commission has been established.
- (2) Except as may otherwise be provided in these Regulations, all meetings of the Commission shall be convened by the Secretary on the instructions of the chairperson.
- (3) The quorum for the transaction of the business of the Commission shall be one-half of its members.
- The conduct of
business of the
Commission 21. (1) All meetings of the Commission other than those to which regulation 20(1) (a) and (b) apply shall be –
- (a) held in public at a venue or venues determined by the Commission;
- (b) advertised as widely as possible in the print and electronic media;
- (c) conducted in such manner and in such language or languages as the participants find acceptable; and
- (d) deemed to be properly constituted if presided over or convened by a Commissioner

Provided that upon the written request of any person appearing before it the

Commission shall, if circumstances so warrant, meet in private for the whole or part of the meeting question.

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| Additional means of information gathering | 22 | <p>(2) The Commission may, for the better conduct of meetings held in public or private, divide itself into two or more panels and shall, at its discretion, determine the programme and itinerary of any such panels.</p> <p>(3) The Commission may, in addition to such other meetings as it may conduct, hold such hearings and expert consultations as it may, in the course of its work consider necessary.</p> <p>(1) The provisions of regulation 21 notwithstanding the Commission shall solicit views and obtain such information or data as it may require through such methods and instruments not requiring the convening of formal meetings or hearings as it may determine.</p> <p>(2) Information or data generated by the Commission in accordance with this regulation shall, unless the Commission otherwise specifies, be submitted in any form or language.</p> |
| Engagement of experts and consultants | 23 | <p>(1) For the more effective fulfillment of the objectives and purposes for which it is established, the Commission may authorize the Secretary to engage such number of experts and consultants as it may require.</p> <p>(2) Experts and consultants engaged in accordance with this regulation shall –</p> <p style="padding-left: 40px;">(a) not by reason of such engagement become members of the Secretariat;</p> <p style="padding-left: 40px;">(b) be engaged in their individual capacities and in recognition of their personal expertise in specific areas; and</p> <p style="padding-left: 40px;">(c) be engaged on such terms and conditions as the Commission may determine.</p> |
| Issuance of summons | 24 | <p>(1) The Commission may issue summons requiring any public officer to appear before it and testify in respect of any matter to which that person is privy.</p> <p>(2) All summons issued by the Commission shall –</p> <p style="padding-left: 40px;">(a) be in the name of the Secretary;</p> <p style="padding-left: 40px;">(b) be transmitted in such form as the Commission may by resolution determine;</p> <p style="padding-left: 40px;">(c) contain a notice of the penal consequences attendant upon non-compliance therewith.</p> |
| Analysis of information and data, | 25 | <p>All information and other data whether oral or documentary, obtained by or surrendered to the Commission shall be deposited with the Secretariat and upon receipt of such information and data, the Secretariat shall forthwith cause them to be compiled and analyzed and the results of such analysis</p> |

		transmitted to the Commission for consideration.
Establishment of documentation centres	26	<p>(1) The Commission shall, in consultation with county councils establish documentation centres at all district headquarters in the country.</p> <p>(2) The documentation centres shall be managed in such a manner and by such staff not being members of the staff of the Secretariat as the Commission may, in consultation with the county council assign.</p> <p>(3) The Commission shall pay such allowances to staff assigned to documentation centres as it may determine.</p> <p>(4) All documents and materials deposited at documentation centres shall be open for perusal by the public but such documents and materials shall remain the property of the Commission.</p>
Establishment of constituency fora	27.	<p>(1) The Commission shall, in consultation with elected leaders and active civil society groups facilitate the establishment of a forum or several fora for the articulation of views at constituency level throughout the country.</p> <p>(2) Subject to such guidelines as the Commission may issue, constituency fora shall be managed by persons freely chosen by the stakeholders at that level and the Commission shall not impose any particular pattern of organization upon such fora.</p> <p>(3) Views expressed through constituency fora shall be transmitted to the Commission in any form of language</p> <p>(4) Nothing in this regulation shall prevent any person or groups of persons from transmitting their views to the Commission otherwise than through a constituency forum.</p>
The conduct of civic education activities	28	<p>(1) The Commission shall facilitate the institutionalization and active articulation of civic education activities specifically directed at the fulfillment of the objects and purposes for which the Commission is established, in all constituencies.</p> <p>(2) Notwithstanding the generality of sub-regulation (1) the Commission shall –</p> <p style="padding-left: 40px;">(a) harmonize the content of the curricula used by civic educators in furtherance of civic education;</p> <p style="padding-left: 40px;">(b) provide such facilitation as the process of civic education may require.</p>
Convening of the National Constitutional Conference	29	<p>(1) The Commission shall, in compliance with section 27(1) of the Act, convene a National Constitutional Conference to deliberate on the report and draft bill prepared and discussed in accordance with that subsection.</p> <p>(2) The National Constitutional Conference shall meet a such venue in</p>

Kenya as the Commission shall determine.

PART VI – THE FINANCES OF THE COMMISSION

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| The
Constitution of
Kenya Review
Fund | 30. | (1) All funds, monies, or other finances appropriated to or otherwise intended for the use of the Commission shall be held in the Constitution of Kenya Review Fund established under the Act. |
| | | (2) The Fund shall not be managed, administered, or disbursed for any purpose or purposes except in accordance with the Act and these Regulations. |
| Accounts
of the Fund | 31. | (1) The Fund shall be held in two principal bank accounts as follows –

(a) a Public Fund Account to be opened in such bank as the Commission may, with the approval of the Treasury appoint;

(b) a Private Fund Account to be opened in such bank as the Commission may appoint:

(2) Notwithstanding the generality of sub-regulation (1), before establishing any bank account, the Commission shall record a formal resolution authorizing the opening of such account.

(3) There shall be deposited into the Public Fund Account such monies as have been appropriated out of the Consolidated Fund.

(4) There shall be deposited into the Private Fund Account all monies received by the Commission in the form of grants, gifts, donations and bequests other than those specifically required to be deposited into the Public Fund Account. |
| Interest
accruing into
the Accounts | 32. | Any interest earned from any of the Fund Accounts shall unless otherwise specified by the contributor to the Account, be rolled over into the principal sum held in the relevant Fund Account. |
| Auditing of the
Fund | 33. | In addition to the requirements of the Act regarding the procedure for the audit of the Fund, the Commission may, at any time and shall, if so requested by the Treasury or any other person or agency which may have made a contribution to any of the accounts of the Fund, order an examination or independent enquiry into the accounts of the Fund. |
| Rules of the
management | 34. | The rules governing the management, administration and disbursement of the Fund shall be as set out in the Schedule. |

PART VII – MISCELLANEOUS

- | | | |
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| Code
conduct | of 35. | All staff of the Commission shall be bound by the Code of Conduct set out in the Second Schedule to the Act. |
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SCHEDULE

RULES FOR THE MANAGEMENT OF THE FUND

The fund shall be managed and administered in accordance with the following rules –

1. The Secretary shall be responsible for the day-to-day management of the Fund and under the supervision of the Commission shall ensure that –
 - (a) a proper income and expenditure account is prepared and presented to the Commission at intervals of every three months.
 - (b) books of account and all relevant documents are available for inspection at the offices of the Commission by any Commissioner or other parties entitled to inspect them; and
 - (c) the provisions of rule 6 are complied with.
2. The Commission shall prepare and approve a comprehensive estimate of its expenditure on an annual basis and such estimate shall specify –
 - (a) the line items of expenditure which the Commission expects to incur during that year;
 - (b) the specific Fund Account or Accounts out of which each line item is to be funded;
 - (c) the source or sources from which the monies drawn from a Fund Account supporting that line item are derived; and
 - (d) the projected cash flow for that year.
3. All expenditure of the Commission other than that required to be met from any particular Fund Account shall be charged to the Public Fund Account.
4. The signatories to all Fund Accounts shall be the Chairperson, the secretary, the vice-chairpersons and one commissioner nominated by the Commission.
5. all withdrawals of monies from the Fund Account shall carry the signature of the Secretary and that of any two of the signatories designated in rule 4.
6. subject to the provisions of rules 4 and 5, the following procedure shall be followed in respect of any expenditure to be incurred out of any of the Fund Accounts -
 - (a) only the Secretary shall have power to commit or incur expenditure out of any Fund Account;

- (b) payments shall be made by way of vouchers prepared by a member of staff of the Secretariat other than the Secretary or a Deputy Secretary and certified by the Secretary, or a Deputy Secretary designated specifically for that purpose;
- (c) no purchase orders shall be committed or issued without prior confirmation of funding in respect of that particular expenditure;
- (d) all cash books shall be written up and balanced daily;
- (e) bank reconciliation shall be prepared and received monthly; and
- (f) any impress issued to any Commissioner or member of staff of the Secretariat shall be surrendered fully before any subsequent imprest is issued to the same imprest holder.

7. All procurements to be made by or on behalf of the Commission shall be made in accordance with the provisions of the Exchequer and Audit (Public Procurement) Regulations, 2001, made pursuant to section 5A of the Exchequer and Audit Act (Cap. 412)

Dated the 23rd July, 2001.

Y. P. GHAI,
Chairman, Constitutional Review Commission of Kenya

APPENDIX III

THE CONSTITUTIONAL REVIEW PROCESS IN KENYA: ISSUES AND QUESTIONS FOR PUBLIC HEARINGS

Preamble

Most modern Constitution have a preamble stating why the Constitution is being enacted. The Kenyan Constitution does not have one.

- Do we need a preamble in our Constitution?
- What national vision should be set out in the preamble?
- What common experiences of Kenyans should be reflected in the preamble?

Directive Principles of State Policy

Some modern Constitutions have principles and values that govern how State power is exercised. The Kenyan Constitution does not include such statements.

- Do we need statements in our Constitution capturing the national philosophy and guiding principles?
- What democratic principles should be included in the Constitution?
- Do Kenyans have important values that should be reflected in the Constitution? If so, what are they?
- Should these principles be enforceable in law?

Constitutional Supremacy

The current Constitution allows Parliament to amend any part of the Constitution by a 65 percent majority vote.

- Should we retain this procedure? If not, what should replace it?
- Should Parliament's power to amend the Constitution be limited? If so, how?
- Should any parts of the Constitution be beyond the amending power of Parliament? If so, which ones?
- Should the public be involved, through referendums, in amending the Constitution? If so, which parts?
- Who should conduct the referendums?

Citizenship

Citizenship is one of fundamental factors of a state. How should it be defined, conferred, maintained or denied?

- Who should be regarded as automatic citizens of Kenya?
- How else should Kenyan citizenship be acquired?
- Should spouses of Kenyan citizens, regardless of gender, be entitled to automatic citizenship?
- Should a child born of one Kenyan parent, regardless of the parent's gender, be entitled to automatic citizenship?
- What should be the rights and obligations of a citizen?
- Should the rights and obligations of citizens depend on the manner in which citizenship is acquired?
- Should the Constitution allow dual citizenship?
- What documentation should Kenyans carry as evidence of citizenship?

Defence and National Security

In the current Constitution, defence and national security is the responsibility of the President, subject to certain constitutional provisions.

- Should the disciplined forces the military and paramilitary, police, prisons and so on be established by the Constitution?
- What mechanisms should be used to discipline the Armed Forces?
- Should the President be the Commander-in-Chief of the Armed Forces?
- Should the Executive have exclusive power to declare war?
- Should the Constitution permit use of extraordinary powers in emergency situations such as war, national disasters, insurrection and breakdown of public order?
- Who should have the authority to invoke these emergency powers?
- Should Parliament have any role in effecting the emergency powers?

Political Parties

Political parties play an important role in the democratic process in terms of mobilizing the public.

- Should political parties play roles other than political mobilization? If so, which?
- Should the Constitution regulate the formation, management and conduct of political parties? If not, what mechanisms should be used?
- Should the number of political parties be limited? If so, how many should we have?
- How should political parties be financed?
- Should political parties be financed from public funds?
- What terms and conditions should be imposed on financing of political parties?
- How should the State and political parties relate to one another?

Structures and Systems of Government

There are several systems of government to deal with the exercise of executive authority. These include presidential, parliamentary, mixed and monarchical systems. Kenya has a presidential system.

- Should we retain the presidential system of government?
- Should we adopt a parliamentary system of government, in which a Prime Minister is appointed from the majority party in Parliament and the President remains more or less ceremonial? If so, what should be the powers of the President and Prime Minister?
- Should we adopt a hybrid system in which executive authority is shared between the President and Prime Minister? If so, how should the powers be shared?
- Should we retain the unitary system of government in which all affairs of state are controlled by the central government? Explain why.
- Should we adopt a federal system of government in which executive and legislative authority is split between the central government and distinct regional or other units? Explain why.
- How else could power be devolved to lower levels of government such as districts, local authorities and provinces?

The Legislature

The current Constitution provides for a single chamber Legislature that is supreme in law making.

- What appointments should be vetted by Parliament?

- Should the functions of Parliament be expanded? If so, in which way?
- Should Parliament have unlimited powers to control its own procedures through Standing Orders?
- Should being a Member of Parliament be a full time occupation or remain part time?
- Should changes be made to age requirements for voting and contesting parliamentary seats or the presidency? If so, what changes?
- Are the language tests required for parliamentary elections sufficient? If not, what changes should be made?
- Should we introduce moral and ethical qualifications for parliamentary candidates?
- Should the people have a right to recall their MP? If so, what should be the procedure?
- Should MPs act on the basis of conscience and conviction or instructions from their constituents or parties?
- Who should determine the salaries and benefits of MPs?
- Should we retain the concept of nominated MPs? If so, what changes, if any, are required?
- Should there be special measures put in place to increase women's participation in Parliament? If so, which ones?
- What rules should govern the conduct of parliamentarians in a multi-party state?
- Should the Constitution permit coalition governments or should we retain the present system in which the dominant political party forms the government?
- Do we continue with the current multi-party system in the Legislature and one party in the Executive, or do we change to a system that demands multi-party representation at both levels of government?
- Should we have more than one chamber of Parliament? If so, what should be the composition of the different chambers?
- Is Parliament's power to remove the Executive through a vote of no confidence adequate? If not, what changes are required?
- Should the President have the power to veto legislation passed by Parliament? If so, in what circumstances?
- Should the Legislature have the power to override the President's veto? If so, in what circumstances?

- Should the President have the power to dissolve Parliament? If so, in what circumstances?
- Should we stagger elections for Parliament, so that there is no time when there no sitting MPs? If so, how?

The Executive

In Kenya, executive authority of the state is vested in the President

- Should the Constitution specify qualifications for presidential candidates? If so, what should they be?
- Should the presidential tenure be fixed? If so, how many terms and how many years each?
- Should the functions of the President be defined in the Constitution? If so, what should they be?
- Should the Constitution set limits on presidential powers? If so, what power should taken away?
- Should the Constitution provide for the removal of a President for misconduct while in office? If so, specify the circumstances and recommend the procedure to be followed.
- What should be the relationship between the President and Parliament?
- Should the President be a Member of Parliament?
- Do we need the provincial administration? If so, what should be its role?

The Judiciary

The present structure of the Judiciary consists of subordinate courts including magistrates' courts and Kadhi's Courts the High Court and the Court of Appeal.

- Is the present structure of the Judiciary adequate? If not, how else could it be structured?
- Do we need a Supreme Court?
- Do we need a Constitutional Court?
- How should judicial officers be appointed?
- What should be the minimum qualification of judicial officers?
- What should be the tenure of judicial officers?

- What mechanisms should be used to discipline judges and other officers enjoying security of tenure?
- Should the Chief Kadhis/Kadhis be restricted only to judicial work like all other judicial officers? If not, what other work should they do?
- Should the Chief Kadhis/Kadhis have qualifications similar to other magistrates? If not, what should be their qualifications?
- Who should appoint the Kadhi's?
- Should the Kadhi's court handle other matters related to Islamic law other than marriage, divorce and succession? If so, which matters?
- Should the Kadhi's court have appellate jurisdiction?
- Should the judicial powers of the State be vested exclusively in courts? If not, what other bodies can exercise judicial powers?
- How can the Constitution ensure all people have access to the courts?
- Should there be a constitutional right to legal aid? In what circumstances?
- Should there be provision for judicial review of laws made by the Legislature?

Local Government

In the current dispensation, local authorities are the most basic level of government, which makes them closest to the people.

- Should mayors and council chairmen be elected directly by the people?
- Is the current two-year term for mayors and council chairmen adequate? If not, how long should they serve?
- Should councils continue to operate under the central government? If so, how should power be shared between councilors chief officers?
- Should there be minimum educational qualifications for councilors?
- Is the requirement of language tests when vying for local authority seats sufficient? If not, what changes should be made?
- Should there be moral and ethical qualifications for local authority seats?

- Should the people have a right to recall their councilor? If so what should be the procedure?
- Who should determine the remuneration of councilors?
- Should we retain nominated councilors? If yes, what should be the criteria for nomination?
- What rules should govern the conduct of councilors in a multi-party state?
- Should the President or minister in charge of local government have the power to dissolve councils? If so, in what circumstances?

The Electoral System and Process

There are several electorate systems, including representative, proportional and mixed. Kenya currently has a representative electoral system.

- What electoral system should we practice?
- Should we retain the simple majority rule as the basis of winning and election? If not, what other mechanisms can be introduced?
- Should the electoral process be designed in such a way as to increase the participation of women in Parliament and local authorities elections? If so, how?
- Should there be a minimum percentage or number of votes that a ward, constituency and presidential candidate must attain in order to be declared the winner? If so, what should it be?
- Should candidates who fail to seek nomination in one party be allowed to switch over and seek nomination from another party?
- How should we deal with defections from parties and parties crossing the floor?
- Should we retain the rule on 25 percent representation in at least five provinces for presidential election?
- Should we have seats reserved for specific interest groups? If so, which interest groups should be considered?
- Should we retain the current geographical constituency system?
- Are you satisfied with the demarcation of constituencies and wards? If not, what changes are required?
- Should civic, parliamentary and presidential elections continue to be held simultaneously? If not, how should they be conducted?

- Should our election process be simplified? If so, how?
- Should there be a limit on election expenditure by each candidate? How and by whom would such limit be enforced?
- Should the election date be specified in the Constitution?
- How should presidential elections be conducted?
 - By an electoral college?
 - Directly?
 - Indirectly?
 - Others (Please specify)
- How should the electoral process for the 2002 elections be conducted? What specific aspects, if any, of this electoral process need improvement?
- There are 22 Electoral Commissioners and the chairperson. Their main function is conducting elections and by-elections.
- What qualifications should be required of the Commissioners?
- How should they be appointed?
- Should Electoral Commissioners enjoy security of tenure? If not, why and how long should they serve in office?
- How should the retirement of the Commissioners be timed vis-à-vis elections?
- How should the Commissioners be removed from office?
- How should the Electoral Commission be funded?
- How many Electoral Commissioners be removed from office?
- How should the Electoral Commission be funded?
- How many Electoral Commissioners should be appointed? Why?

Basic Rights

The current Constitution guarantees civil and political rights but does not make provision for social, economic and cultural rights.

- Are our constitutional provision for fundamental rights adequate?

- What other rights should be entrenched in the Constitution?
- The Constitution guarantees the right to life. Should the death penalty be abolished?
- Should the Constitution protect security, health care, water, education, shelter, food and employment as basic rights for all Kenyans?
- Who should have the responsibility of ensuring that all Kenyans enjoy basic rights such as security, health care, water, education, shelter, food and employment?
- What specific issues in security, health care, water, education, shelter, food and employment should the Constitution deal with?
- Should the Constitution provide for compulsory and free education? If so, up to what level?
- Should Kenyans have the right to access to information in the possession of the State or any other agency or organ of the State? If not, explain why?
- Should the Constitution guarantee all workers the right to trade union representation? If not, in what circumstances?
- What other basic needs of Kenyans should the Constitution guarantee?

The Rights of Vulnerable Groups

Some Constitutions make special provision for the rights of groups of people who have suffered from marginalisation due to historical, socio-cultural or other reasons. Our current Constitution does not.

- Are the interests of women fully guaranteed in the Constitution? If not, how should women's rights be addressed?
- Are the interests of people with disabilities fully taken care of?
- What specific concerns of people with disabilities should the Constitution address?
- How can the Constitution guarantee and protect the rights of children?
- What other groups do you consider to be vulnerable? Why?
- Should the Constitution make provisions for affirmative action in favour of women and other vulnerable groups? If so, what form should such provisions take?

Land and Property Rights

Land is the basis of economic development in Kenya and should be owned and managed in a sustainable way.

- Who should have ultimate ownership of land (the State, the Government, the local community or the individual?)
- Should the Government have the power to compulsorily acquire private land for any purposes? If so, under what terms and conditions?
- Should the State, Government or local authority have the power to control the use of land by the owners or occupiers?
- What issues concerning transfer and inheritance of land rights should be addressed in the Constitution?
- Should there be a ceiling on land owned by an individual?
- Should there be restrictions on ownership of land by non-citizens?
- Should the procedures for transfer of land be simplified? How?
- Should men and women have equal access to land? If so, what mechanisms should be put in place to ensure this?
- Should the pre-independence land treaties and agreements involving certain communities such as the Maasai, Mazrui and the Coastal Strip be retained? If not, why?
- Should Kenyans own land anywhere in the country or should there be restrictions?
- Should the Constitution guarantee access to land for every Kenyan?

Cultural, Ethnic and Regional Diversity and Communal Rights

Kenya has a rich diversity of cultures that are not addressed in our Constitution

- Does Kenya's ethnic and cultural diversity contribute to a national culture?
- Should cultural and ethnic diversity be protected and promoted in the Constitution?
- What cultural and ethnic values derived from our collective experience should be captured in the Constitution?
- Do you consider yourself part of a distinct social group whose interests should be catered for in the Constitution?
- How would you like the Constitution to ensure that your interests as a distinct group are fully taken care of? What specific concerns should the Constitution address?
- How should ethnicity be dealt with to ensure unity in diversity and security of the person and of property?

- Should the Constitution provide for protection from the discriminatory aspects of culture?
- Should we have one national language or two?
- Should the Constitution recognise and promote indigenous languages?

Management and Use of National Resources

Our nation has experienced problems with raising revenue, management and distribution of finance and management of human resources. The Executive currently controls these powers.

- Should the Executive retain these powers? If not, who should?
- Should Parliament retain the power to authorize the raising and appropriation of public finances?
- What other methods, besides taxation, can be used to raise public finances? How can they be controlled?
- What mechanisms can be entrenched in the Constitution to ensure equitable distribution of national resources?
- Should the Government be required to apportion benefits from resources between the central government and the communities where such resources are found?
- How can we enhance the role of the Controller and Auditor-General in checking the Government's handling of public finances?
- Who should appoint the Controller and Auditor-General?
- What other mechanisms can Parliament use to control management and use of public finances?
- How can we attract competent Kenyans to work in the public service?
- How can we strengthen the management and discipline roles of the Public Service Commission?
- Who should appoint members of the Public Service Commission?
- Should there be a code of ethics for holders of public office?
- Should public officers be required to declare their assets?

Environment and Natural Resources

The sustainable management of the environment and natural resources, water bodies, forests, rangelands, minerals, wildlife and so on is a fundamental issue in contemporary development.

- What environmental protection issues should be included in the Constitution?
- Who should have the power to enforce laws on the protection of the environment?
- Who should own natural resources?
- What should be the role of local communities in the management and protection of the environment?
- What natural resources should be protected by the Constitution?
- Who should be responsible for management and protection of natural resources?
- How should our natural resources be managed and protected?

Participatory Governance

Democratic government requires effective participation of all people at all levels of government.

- Should non-governmental organisations and other organized groups have a role in governance? If so, what should that role be?
- What issues relating to civil society organisations should the Constitution address?
- Should the State regulate the conduct of civil society organisations, including the media?
- Should the Constitution institutionalize the role of civil society organisations? If so, in what form?
- What mechanisms should be put in place to ensure maximum participation in governance by:
 - Women
 - Persons with disabilities
 - Youth
 - Minority groups
 - The elderly
 - Others (Please specify)

International Relations

Globalization means that many norms and obligations are being created at the international level. This has implications for domestic law.

- Should the conduct of foreign affairs be the exclusive responsibility of the Executive? If not, who else should carry out this role?
- What role, if any, should Parliament play in the conduct of foreign affairs?
- How should the role of Parliament in the conduct of foreign affairs be distinguished from that of the Executives?
- Should international treaties and conventions and regional and bilateral treaties have automatic effect in domestic law? If not, how else could they be effected?
- Should laws and regulations made by regional organisations that Kenya belongs to have automatic effect in domestic law? If not, how else should they be effected?

Constitutional Commissions, Institutions and Offices

Some countries have found it necessary to have Commissions, institutions and offices that supervise the exercise of constitutional functions.

- Do we need constitutional commissions, institutions and offices? If so, which ones and why?
- Should we introduce the office of Ombudsman? If so, how should this office relate with other arms of Government?
- What other constitutional commissions should be established?
 - Human Rights Commission?
 - Gender Commission?
 - Anti-Corruption Commission?
 - Land Commission
 - Others (Please specify)
- What should be the powers and functions of such Commissions?
- Is there a need to have a Minister of Justice or Constitutional Affairs as distinct from the office of Attorney General? If so, what should be the functions of the two offices?

Succession and Transfer of Power

A good Constitution should provide for a clear, dignified and orderly process for the transfer of power. Our current Constitution does not.

- Who should be in charge of executive powers during presidential elections?
- How should the election results of the President be declared?
- How soon after elections should the incoming President assume office?

- Who should swear-in the incoming President and what should be the procedure to be followed?
- At what point should the instruments of power be transferred to an incoming President by the outgoing President?
- What should be the mode of transfer of instruments of power?
- Should the Constitution make provision for a former President in terms of:
 - Security
 - Welfare
 - Immunity from legal process
 - Others (Please specify)

