

CONSTITUTION OF KENYA REVIEW COMMISSION

RESEARCH, DRAFTING AND TECHNICAL SUPPORT COMMITTEE

REFERENDUM REPORT

1. Background and purpose of the Referendum Report

On 21st November 2005, the people of Kenya voted on the question whether to ratify or not to ratify the Proposed New Constitution. The result was a resounding vote rejecting the Proposed New Constitution. The Constitution of Kenya Review Commission was a major player in the process leading to the holding of the referendum on the Proposed New Constitution.

Section 33 of the Constitution of Kenya Review Act (as amended in 2004, hereinafter referred to as the Review Act) provides for the events to follow in the aftermath of the referendum. Section 33(2) in particular, provides –

If the result of the referendum is that the people of Kenya have not ratified the Proposed New Constitution, the Commission shall stand dissolved thirty days after that result became final.

Under section 33(3) of the Review Act, the Commission is required to ensure that its affairs are wound up in an orderly way, and in particular to ensure that –

- (a) those aspects of its work that will be of value to other institutions are preserved, documented and transferred to the relevant Ministry; and

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(b) its files and records are preserved and transferred to the relevant Ministry.

For these reasons, the Commission finds it necessary to prepare a brief report on the conduct of the referendum. Such a report would be useful to any initiative subsequent to the dissolution of the Commission.

2. Legislative framework for the referendum

Prior to the passing of the Constitution of Kenya (Amendment) Bill, 2004 (Act No 9 of 2004) also known as the “Consensus” Act, the Constitution of Kenya Review Act, Cap 3A was the sole legal authority for the holding of a referendum as part of the constitutional review process. The referendum provided for was, pursuant to sub-sections (5) and (6) of section 27 of the Act, an optional referendum contingent on a failure by the National Constitutional Conference to garner a two-thirds majority vote on any question, and a further two-thirds majority vote in support of submission of the question to referendum.

Going by the law as it stood on 15th March therefore, the Proposed Constitution (commonly known as the Bomas Draft) was properly passed by the National Constitutional Conference and should have been enacted by Parliament as the new Constitution of Kenya. Notably, there would not have been a referendum as all questions were decided by the requisite two-third majority and no question was submitted for referendum.

That position changed with the ruling of the High Court in the case of **Timothy Njoya & Others – Vs- the Constitution of Kenya Review**

Commission and the National Constitutional Conference (the *Njoya Case*).

The Court Ruling was to the effect that the sovereign right to replace the Constitution vests collectively in the people of Kenya and shall be exercisable by the people through a referendum or a constituent assembly. The High Court therefore made a referendum a prerequisite for the replacement of the Constitution with a new Constitution as opposed to the optional referendum provided for by section 27 of the Act.

The High Court Ruling, having made a referendum mandatory, the question which then arose, was whether the Ruling, without more, was adequate basis to conclude the constitutional review process up to and including the referendum.

This question was disposed of in the negative when a series of initiatives culminated in the publication of a Bill to amend the Constitution of Kenya Review Act. The Amendment Bill was the result of convergence of legal opinion that the Court Ruling in the *Njoya Case* having made a referendum mandatory, had rendered conclusion of the constitutional review process impossible without some changes to the law.

Pursuant to the amendments, section 28(1) of the Review Act provided that –

Within ninety days after the Attorney-General publishes the Proposed New Constitution, the Electoral Commission shall hold a referendum to give the people of Kenya the opportunity to ratify the Proposed New Constitution.

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Subsection (2) further provided that the question to be submitted to the people in the referendum would be whether they are for or against the ratification of the Proposed New Constitution.

Subsections (3), (4), (5) (6) and (7) respectively provided for:

- the Proposed New Constitution to be ratified by a simple majority of the votes cast;
- voters in the referendum to be only those persons registered to vote in elections to the National Assembly;
- the National Assembly and Presidential Elections Act to apply with the necessary modifications with respect to the conduct of the referendum, subject to such Regulations as may be made by the Electoral Commission in consultation with CKRC and the Parliamentary Select Committee (on the Review of the Constitution) prescribing the procedure for the holding of the referendum;
- the Election Offences Act to apply in respect to a referendum as though it were an election within the meaning of that Act;
- CKRC to facilitate and coordinate civic education on the referendum;
- and
- CKRC to monitor the conduct of the referendum.

A series of new sections inserted in the Review Act dealt with other aspects of the referendum as follows:

- Section 28A – process after ratification of the referendum;
- Section 28B – applications to the court to challenge the referendum;

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- Section 28C – composition of court to entertain challenges to the referendum;
- Section 28D – powers of the court in disposing of challenges to the referendum;
- Section 28E – applications challenging referendum to be determined on priority basis;
- Section 28F – court’s decision on challenges to referendum to be final;
- Section 28G – withdrawal of application process after ratification of the referendum;
- Section 28H – application of certain provisions of the National Assembly and Presidential Elections Act to applications challenging the referendum; and
- Section 28I – Chief Justice to give directions with respect to the procedure for applications challenging the referendum.

Section 34(3) of the Review Act, gave the principal responsibility of making the Referendum Regulations to the Electoral Commission. Prior to the passage of the amendments, the Review Act provided that Regulations made by the Commission would prescribe the procedure for the holding of a referendum, if any was to be held. It further provided that such Regulations would be made in consultation with the Electoral Commission. As amended in August 2004, the Act provided that -

The Electoral Commission, in consultation with the Commission (CKRC) and the Parliamentary Select Committee (on the Review of

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the Constitution), may make Regulations prescribing the procedure for the holding of a referendum under section 28.

The Referendum was accordingly held in terms of the Regulations as made by the Electoral Commission of Kenya. These Regulations were published on 12th August 2005 as the Constitution of Kenya Review (Referendum) Regulations, 2005 (Legal Notice No. 100 of 12th August 2005).

3.0 Discharge of mandate and role of the Commission in relation to the referendum

The referendum was one of the five organs of the review process. The others were the Commission, the Constituency Constitutional Forum, the National Constitutional Conference and the National Assembly. The referendum was expected to give the people of Kenya an opportunity to ratify the proposed new draft constitution.

3.1. Planning for the Referendum

Various activities were undertaken by Commission in preparation for the referendum. Consultations between The Commission and the Electoral Commission of Kenya were held in December 2003 with the establishment of a joint task force to prepare for the referendum. A workshop on the referendum for two Commissions, Commissioners and Secretariat staff was held at Whitesands hotel Mombasa from 7th to 10th December 2003. It was conducted with the provisions of the Review Act, as it then stood, in mind and considered the intellectual and practical intricacies of running a

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referendum if one was to become necessary. It recommended that a checklist based on the report of the workshop be developed. The key facilitators were drawn from Canada, Uganda and Rwanda, countries that have had referenda. Draft referendum regulations prepared by the Commission were discussed.

Subsequently, two meetings between the two Commissions' secretariat staff were held on 15th December 2003 and 6th January 2004. Six task forces were formed to start contingency plans for holding of the referendum. They were: personnel, civic education, finance and budgeting, mobilization and logistics, timetabling and election materials and voter registers.

The two Commissions held a joint Workshop at the Leisure Lodge Resort in Kwale between the 14th and 17th Aug. 2005. Contingency plans for the Commission's involvement in a referendum were done. This included the development of a work plan that outlined the sequence of events (with a time frame) leading to a referendum. Tentative programmes and budgets were developed. Implementation of these programmes commenced once the Constitution of Kenya Review (Amendment) Bill 2004 was enacted into law.

CKRC district offices and documentation centres were re-activated. About fifty former District Coordinators took up their former jobs. The remaining twenty four districts had to get new District Coordinators, a process that took about three weeks to finalize.

Previously, Constituency Constitutional Committee (CCC) members had been identified as suitable replacements for the vacancies that arose from

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time to time in different districts. In five districts, CCC members were hired, Nakuru, Tana River, Marakwet, Mwingi and Makueni. Active Office Assistants in places with vacancies were also considered and in Lugari-Malava and Transmara, those hired did a commendable job. Commission used the same method to fill the existing vacancies.

A three-day workshop for the District Coordinators was conducted after their recruitment and before they re-established their offices. The main objectives of this workshop was to familiarize the District Coordinators with the contents of the draft bill, develop strategies for its dissemination, develop clear plans of action for civic education process and develop a training module for the CCC members. Other objectives were to identify materials to be used by the providers of civic education, identify target groups that the CCC would deal with and develop tools for monitoring and evaluation of civic education.

The District Coordinators had to reconstitute the CCC's. They were expected to use knowledge gained from the workshop to train the CCC's and other leaders in the constituencies who will be the eventual providers of civic education. The Commissioners assisted by Programme Officers supervised this exercise.

The objectives of this training was to familiarize the CCC members with the contents of the Proposed New Constitution, develop a plan of action for civic education in each constituency and division and develop a training module for different target groups in the district. The opportunity was also used to identify materials to be used by the civic education providers,

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identify target groups that the CCC will deal with and launch the constituency civic education programme countrywide.

3.2. Workshops in Preparation for the National Referendum

The Commission organized three District Coordinators' Workshops in preparation for the National referendum and played a key role in several other workshops organized by other departments in the Commission.

A workshop was held for the twenty-one newly recruited District Coordinators between March 20th – 24th, 2005. The workshop was aimed at ensuring that the new coordinators are introduced to the general review process and the Commission's activities.

The workshop also inducted the Coordinators on the review process, organs of review, and the general principles and guidelines governing the review process. They were also introduced to their terms of reference, the duties and responsibilities of the CCCs, financial management and civic education.

The Commission organized two more capacity building workshops for the coordinators. These workshops were held between 24th and 30th July 2005 and September 25th to 30th September 2005 respectively. The workshops aimed at providing skills on reactivation and mobilization of the CCCs, capacity building for planning civic education and mobilizing the people for the same, and for the referendum.

Other objectives of the workshops included, to -

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- a) familiarize the district coordinators with the contents of the proposed new constitution;
- b) develop strategies for its dissemination;
- c) develop clear plan of action for civic education process;
- d) identify target groups that the CCC and CEPs were to deal with;
- e) develop tools for monitoring and evaluation of civic education; and
- f) acquaint participants with financial management and accounting procedures

Other Workshops in Preparation for the Referendum

Other workshops held in preparation for the referendum included:

Provincial Launch Workshops

for Civic Education - 18th-21st, Sept. 2005

Induction Workshop for CCCs and

CEPs in all Districts - 25th Sept. - 7th Oct. 2005

CKRC Workshop to finalize preparation

of civic education materials - 2nd – 6th Oct. 2005

Induction Workshop for National

CEPs - 11th Oct. 2005

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Re-establishing District Offices & Documentation Centres

In August 2005, the Commission re-established the district offices and documentation centers in all the seventy-four (74) districts. The district Coordinators and office assistant were engaged in August 2005 to coordinate the process in the districts.

The Documentation Centres were stocked with materials and literature necessary for the review exercise. These materials included the Proposed New Constitution, both in English and Kiswahili versions, the Review Act, Civic Education Curriculum, Popular Version of the Proposed New Constitution, the source book and the trainer's manual.

3.3 *Reconstituting and Training of CCCs*

The Commission carried out a process to obtain crucial information and data on the CCCs. The information obtained was used in planning for civic education and mobilization of the people. The information collected included: postal, courier and telephone contacts, physical address, academic and professional qualifications, previous experience in mobilization and previous experience in conducting of civic education.

Constituencies with vacant CCCs positions were identified and the coordinators mandated to work with their respective members of parliament (MPs) to fill the existing vacancies.

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A two-day workshop at each district headquarters was held for the purpose of inducting new CCC members, building capacity of all the CCCs, helping them understand their roles and responsibilities in the current phase of the review process, equip them with relevant skills to mobilize and provide meaningful and relevant civic education.

3.4 Re-establishing Linkage with the Provincial Administration and the Police Force

Commission renewed the partnership with the provincial administration and the Kenya police which contributed greatly to the success of the process. These organs contributed towards security and mobilization of the public to participate in civic education and voting during the referendum. Provision of security during the civic education and the campaigns was critical particular after the initial cases of violence.

3.5 Roll out and provision of civic education

Commissioners were paneled into twenty-three groups to visit constituencies to conduct civic education on the proposed new constitution. Apart from conducting civic education, the commissioners also carried out an evaluation of the training carried out by the local and national civic education providers. The evaluation and monitoring process involved meetings with CEPs and CCCs to gauge the progress, address emerging challenges and issues and chart the way forward.

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CCCs and CEPs were trained by the Commission to mobilize the public to attend civic education meetings at grassroots level. Strategies were developed that ensured adequate meetings were held in each constituency. An average of fifteen meetings were held per constituency and efforts were made to see that these meetings were equitably spread to ensure maximum coverage of the constituency.

The Commission conducted and facilitated civic education to support the referendum. Civic education for the referendum included the provision of information and education on the Proposed New Constitution. The context that explained the process of referendum was a major component of the civic education as it prepared and empowered Kenyans to actively and voluntarily participate in the referendum. The Commission therefore needed a deliberate process of information dissemination, education instruction and awareness to enable Kenyans understand and appreciate the issue(s) and question(s) to vote on and procedures for participation.

Civic education by Commissioners and secretariat staff at the constituency level was divided into two phases; lasting three weeks and one week respectively.

Several strategies were developed for conducting civic education. These strategies included; debate in local (vernacular) media - both electronic and the print (e.g. Pwani FM, Baraka FM, Sayare, Cioro, Kameme, Taifa Leo, and other regional papers), institutions (Churches, Mosques, Schools, Colleges) and organized groups (women, youth, professionals etc). Other strategies included involving the Provincial Administration, displaying the

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Proposed New Constitution at the administrative offices and other strategic places, documentation centres, religious groups (reaching their faithful), involving the opinion leaders, local authorities, use of social functions (e.g. weddings, fund raisers etc), convening forums at the lowest levels (e.g. sub locations, villages), and publicising the availability of copies of the Proposed New Constitution for people to obtain and read them.

Civic education at the grassroots levels took a total of thirty days.

3.6 Monitoring of the National Referendum

Being the first time a referendum was being held in Kenya; the country was faced with the daunting challenge of ensuring that it was well organized and conducted. The Commission paneled commissioners and staff to visit different parts of the country to observe the referendum. Roll out plans, logistic support and obtaining accreditation from the Electoral Commission of Kenya for all the Commission's representatives taking part in the referendum as monitors and observers were some of the most important measures in preparation for the referendum.

Commissioners, members of staff and members of the CCCs were stationed in all the constituencies to observe the exercise. Each constituency had an average of seven observers who visited an average of three polling stations in their area.

4.0. Referendum lessons and challenges

4.1 Adequacy of legislative framework

The question which persisted for a long time, even as preparations for the referendum proceeded was whether the Review Act (and any subsidiary legislation under the Review Act or any other statute) constituted “adequate law” for the successful holding and conduct of the referendum without the need for any other statutory changes whether to the Review Act or otherwise. This question led to a more fundamental question that was raised about the Review Act. The question was whether following the Ruling in the *Njoya Case*, the Review Act, itself an ordinary statute, was adequate legal basis for the conclusion of the broader constitutional review process up to and including the referendum.

The basic question was whether the current Constitution of Kenya could be extinguished and another given life in its place otherwise than as provided for in the Constitution and on the basis only of the provisions of an ordinary Act of Parliament. One school of thought argued that the essence of the principle of the supremacy of the Constitution is its superintendence over all other law, which other law is null and void to the extent of that it is in conflict with the Constitution. To this school, an ordinary statute in so far as it purported to prescribe the manner in which the Constitution of Kenya would cease to have effect and another Constitution to have effect in its place was unconstitutional and null and void to that extent.

The other school of thought argued that in line with the Ruling of the High Court, the sovereign power of the people to replace their Constitution by a referendum was primordial and did not require to be in any text, whether a

Constitution or otherwise. Such power, this school argued, was exercisable independent of the Constitution.

These arguments occupied public debate up to the very last week preceding the referendum and spilt over into the vote. It was the bone of contention in the case of *Patrick Ouma Onyango and Other vs the Hon Attorney-General and Others*

On 15th November 2005 the High Court ruled that:

The referendum does in a way, for a split second give the people executive, legislative and judicial powers to determine whether they were sufficiently involved and consulted and whether the final product has the content and the substance, whether the final product was properly framed and whether it is a document they would want to enact. Upon enactment in the referendum they shall have put their final seal of approval.

This decision paved the way for the holding of the referendum by declaring the referendum to be lawful.

4.2 Mandate and role of the Commission in relation to the referendum

Section 17 of the Constitution of Kenya Review Act provided as one of the functions of the Commission “*to conduct and facilitate civic education to support the referendum on the Proposed New Constitution.*” Additionally, the Commission under the same section was mandated “*to monitor the conduct of the referendum.*”

4.3 Civic education

Section 28 of the Review Act required that the Electoral Commission hold the referendum within ninety days of the publication of the Proposed New Constitution by the Attorney-General. As part of the mandate of the Commission under section 17 of the Act was to conduct and facilitate civic education to support the referendum, this period was to be crucial to the Commission as it was the time during which the civic education would be conducted.

The Commission began its civic education programme as provided for by law, thirty days after the publication of the Proposed New Constitution. This period, as discussed above was required for preparations prior to launching the exercise. By his time, the battle lines for the referendum debate had been drawn. Similarly, the campaigns for and against the Proposed New Constitution had commenced even before the Attorney-General had published it. Since the Commission could not commence civic education on a yet to be published document, this meant that the Commission was the last to arrive on the scene after politicians and civil society players had already canvassed their positions and occupied the national space.

The following constitute a summary of the testimonies of the commissioners and staff during the civic education exercise:

Disinformation and propaganda.

As already observed, the Commission was a latecomer to the referendum debate, having had to await the publication of the Proposed New

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Constitution and also to undertake the necessary preparations for the exercise. The Commission found the civic education scene awash with propaganda and disinformation and charged with the intensity of polarization. Among the aspects of the Proposed New Constitution that were most subject to propaganda and disinformation included:

- Provisions on inheritance of property, particularly by women;
- The perceived position of the Proposed New Constitution on homosexual relations and same-sex marriages;
- Provisions relating to abortion;
- Provisions on women's rights generally;
- Provisions on land, especially on minimum and maximum acreage of agricultural land;
- Provisions on the Executive;
- Provisions relating to religious courts;
- Provisions on devolved government and the future of existing districts; and
- Transitional and consequential provisions.

On women's rights for example, the argument was pushed that married women would troop back to their ancestral homes to share land with their male siblings.

It was claimed that the Proposed New Constitution allowed same-sex marriages and would liberalize abortion.

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On transitional provisions, it was claimed that if the Proposed New Constitution passed, there would be no presidential election and the incumbent would remain in office until 2010.

Time for provision of civic education.

The period of ninety days set aside for civic education was clearly inadequate for the arduous task involved, especially in the paneling of commissioners. This meant that the Commission was not able to reach as many people as it would have wished. Similarly, there was inadequate time for an in-depth debate and dissemination of the Proposed New Constitution. In the prevailing circumstances, a longer period would have been necessary.

Timing of the civic education exercise.

Somewhat related to the question of time was the issue of the timing of the referendum exercise. A good part of the civic education period coincided with the Muslim holy month of Ramadhan, which is a time of fasting from dawn to dusk. In areas with a high Muslim population, this affected the turnout at the civic education sessions. The period also coincided with a serious drought and famine ravaging parts of the Eastern, Rift Valley and North Eastern provinces. In these areas the search for water, pastures and food was a greater priority than attending the Commission's civic education events. In some instances the Commission had to utilize money meant for civic education logistics to purchase water for residents before civic education could be undertaken.

To further complicate matters, the period during which civic education was being conducted was also the secondary school examination season and

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where secondary schools were used as venues, a balancing act had to be maintained between the smooth running of school programmes and civic education exercise.

Ideally, civic education should have preceded the referendum campaigns for the “Yes” and “No” sides. However, due to the lack of a proper legal framework, campaigns preceded civic education, and also continued alongside civic education. This made the work of the Commission was made difficult as it was as it were, competing for public attention with politicians. Also the passions and euphoria kicked up by political rallies sometimes affected the follow up civic education by the Commission if it came hot on the heels of such rally. The civic education events could not match the pomp and colour of campaign rallies and as such attracted little interest.

Funding limitations.

The civic education mandate of the Commission was severely constrained by funding limitations. The average figure of 1 million set aside for civic education providers (CEPs) in every Constituency was clearly inadequate. This meant that the funds allocated by the Commission to the civic education providers (CEPs) with whom the Commission was in co-operation was far too low to enable them to carry out any meaningful civic education.

Selection of CEPs

The choice of CEPs to be accredited by the Commission at both the local and the national level was a major challenge. Thousands of applications were received from all manner organizations. Some were clearly partisan while others clearly had no capacity to do what they claimed they could do.

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Political and other interests from within and without the Commission also threatened to compromise the integrity of the CEPs accreditation process.

Absentee National CEPs.

In the experience of the Commission, some of the National CEPs remained at the national level and did not reach the people at the grassroots. The rationale for cooperation with national CEPs had been that these had an expansive geographical spread, a national outlook and a nation-wide network. None of these advantages were brought to bear on the civic education exercise by most of the national CEPs. The delayed release of funds and logistical problems owing to limitations of time may have been contributed to this.

Negative perception of the Commission.

The Commission was saddled with a negative public perception as it went about its work. A series of statements by some members of Government had portrayed the referendum as a Government project with the result that persons unhappy with the performance of the Government in general were hostile to the Proposed New Constitution. Matters were aggravated by the fact that some commissioners had come out in public either in support or in opposition to the Proposed New Constitution. The use by the Commission of vehicles with Government registration numbers further undermined the Commission's perception as an independent and impartial body. Some perceived the Commission as having betrayed the Bomas Draft and joined the political bandwagon.

The Role of sitting members of Parliament.

Sitting members of Parliament adversely affected the civic education exercise. Where the sitting member took a position either in support or in opposition to the draft, his political adversaries in the district oftentimes took the contrary position. The referendum debate then became a contest for political supremacy. Wananchi's loyalties to the protagonists then took center stage at the expense of the constitutional debate.

The unfinished business of MOU.

A pre-election pact now widely known as the "MOU" entered into by a number of leading political players in the ruling coalition has continued to be the source of national concern. During the referendum campaigns the MOU again reared its head.

At the heart of the MOU saga, is a claim by a section of political players that their protagonists betrayed the MOU on the sharing of power and failed to meet their side of the bargain. For this reason, they argue, their protagonists cannot be trusted with anything of national significance. In addition, no opportunity is lost for revenge for that betrayal.

The referendum provided yet another opportunity for the politics of revenge and retribution in respect of the unfinished business of the MOU.

The Role of religious leaders.

The referendum debate brought to the fore the power wielded by religious leaders in shaping the political opinions of their faithful. A number of religious leaders called on their faithful either to support or to oppose the

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Proposed New Constitution. The faithful by and large, went along with this advice thereby rendering civic education by the Commission of little value.

In contrast, a number of mainstream churches did not set out their stand and instead asked their faithful to decide on their own. Even in such situations, it was clear from the manner and tone of the leadership of these churches what side they supported.

Partiality of CEPs and CCC members.

Many CEPs, particularly the community based organizations played a major role in compromising the impartiality expected of CEPs. Their mobilization of the people for the civic education exercise was minimal. In addition, most of the CEPs adopted the position held by the local community where they operated or gave in to the pre-conceived position held by the local community. As a result, CEPs in areas predominantly supportive of the Proposed New Constitution went all out in support of the YES vote under the guise of civic education. The same was true of CEPs in areas predominantly against the Proposed New Constitution. This undermined the credibility and objectivity of the civic education exercise.

The conduct of some members of the Constituency Constitutional Committees was also adverse to the proper conduct of civic education.

Outstanding issues on the Proposed New Constitution.

It was quite clear that a number of important issues in the Proposed New Constitution were still outstanding and had not been agreed upon. The document split the country into two distinct sides; those who identified with

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the ownership of the document and its provisions and who saw the document as advancing their interests and those who felt excluded and alienated. The latter saw the Proposed New Constitution as a document put together by a few, to the exclusion, and indeed detrimental, to the rest of the country. To the first group, civic education by the Commission was serving to reinforce their support for the Proposed New Constitution. The second group was suspicious of any civic education initiatives and saw these initiatives as seeking to win them over to support the Proposed New Constitution.

Choice of Venues.

With the benefit of hindsight, some of the venues chosen for civic education events were less than appropriate. Market places, stadia and open grounds, while they might be accessible and open, were not well suited to serious discussion of constitutional issues. Schools would have been appropriate in other circumstances, but the schools were in session at the time and the civic education events were interfering with school programmes. Places of worship were more orderly and conducive, but they were also not entirely appropriate if the particular religious group had publicly stated its stand for or against the Proposed New Constitution.

Appropriateness of civic education materials.

Most of the civic education materials were balanced and objective. However, some were criticized as being misleading. The Popular Version of the Proposed New Constitution in particular came in for criticism as having factual inaccuracies and as having been sugar coated so as to leave out the contentious aspects of the Proposed New Constitution. The title of the document was similarly criticized with some arguing that the word “popular” was leading and that the document should simply have been called

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a “Simplified Version”. There were not nearly enough copies of the Proposed New Constitution in Kiswahili which was the preferred language for most people.

It must be mentioned however, that it was not all criticism for the Popular Version of the Proposed New Constitution. In some areas, the Popular Version was received with enthusiasm and praised for being an easier to read and more friendly document. It would appear that in those parts of the country supportive of a “Yes” vote, the Popular Version was welcomed, while those for “No” vote, were unhappy with it.

Influence of significant groups in society.

The Proposed New Constitution was opposed by significant and influential groups in the society. These included the Kenya National Union of Teachers, the Central Organization of Trade Unions and the Provincial Administration. The teachers union was opposed to an Article in the Proposed New Constitution whose effect was to put a sizeable proportion of its membership under the jurisdiction of district governments in matters of hiring, firing, discipline and remuneration. The Provincial Administration for their part were opposed to transitional provisions that would have seen the system of Provincial Administration phased out and the persons serving therein re-deployed in other capacities.

The members of these groups and others used their influence to campaign against the Proposed New Constitution.

Security threats.

Threats were made against the Commission in some places owing to the hostility of the residents or politicians, especially MPs of those places to the Proposed New Constitution and the Commission's perceived support for the same.

The Ethnic Question.

The referendum debate took on a distinctly ethnic dimension with most communities taking a collective decision one way or the other. The political leaders rallied their communities to view the Proposed New Constitution as either perpetuating or subverting their ethnic fortunes. In such a situation, civic education, however objective, was of little value.

Low turn out at civic education events.

A combination of factors, some of which have been earlier mentioned, conspired to lead to very low turn out at the Commission's civic education events. Many of those who came were only keen to pick the available literature and then leave. Purely in terms of the numbers of the voting population reached, the impact of the Commission's civic education exercise was modest. Of note however, is that most of those members of the public who did attend the civic education sessions, stayed for the entire duration. That said, it may however also be observed that turn out in what turned out to be YES strongholds was significantly higher than the national average.

➤ **Referendum campaigns**

The referendum campaigns have to be understood against the backdrop of the factors recited above. The campaigns begun prematurely -even before the Proposed New Constitution was published and way before the time allowed by the Electoral Commission of Kenya. By its own admission, the

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Electoral Commission found itself unable to act in the face of open violation of the rules it had set by, among others, senior Government officials. That Commission was reduced to merely threatening to withdraw from the entire referendum process, an abdication of a constitutional duty whose validity would be subject to debate.

The campaigns were characterized by the use of inciteful and inflammatory language. Unprintable words hitherto unheard of in civilized society were used with abandon at public rallies to pillory or intimidate opponents.

There were also incidents of violence and the unlawful use of force at rallies by the police leading to the killing by police of eight people, among them children, in Kisumu and Mombasa.

The campaigns cannot be characterized as having been free and fair. In fact, the campaign period served to create situation of fear and national anxiety about the outbreak of violence on or after the polling date.

Uproar by civil society, the international community and the general public served to restore some sanity and to calm the temperatures as the referendum polling day approached. The Government made a commitment to ensure that security was maintained during and after the polling day.

➤ Polling day

Pursuant to its mandate under section 17 of the Review Act, the Commission dispatched commissioners and staff to monitor the conduct of the referendum on polling day at various polling stations across the country. To

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enable them to also vote, commissioners and staff were as far as was possible, assigned to the polling stations at which they are registered as voters, and to the extent feasible, neighbouring polling stations. A checklist of matters to look out for and report on was provided to all such commissioners and staff. These included questions on:

- The time the polling station was opened and when it was closed;
- Arrival and good order of materials and equipment;
- Preparedness and competence of polling officials;
- Security and general order at the polling station;
- Whether there was violence, bribery or intimidation, campaigning or other unlawful activity in or around the polling station;
- Whether there were polling agents for both sides;
- Confidentiality of voting;
- Assistance to illiterate or otherwise incapacitated voters;
- Conduct of counting of votes; and
- Overall assessment of the referendum polling day process.

In their reports and submissions, commissioners and staff were unanimous that polling day was remarkably different from the campaign period preceding it.

In terms of the opening and closure of polling stations, the times prescribed were by and large observed at most of the polling stations monitored around the country. Materials and equipment were generally adequate and in good order.

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Polling officials were generally well prepared for the task and were of adequate competence. Security and order was generally maintained at polling stations and few incidents of violence were reported across the country.

Isolated incidents of bribery and undue influence were reported, as was campaigning, on polling day. A few cases of multiple voting were also reported.

In relation to polling agents, it was observed that in some polling stations there were no polling agents for one of the sides. This was particularly the case in areas that were predominantly either in favour or in opposition to the Proposed New Constitution.

In relation to the voter registers, it was observed that the question of listing of voters' names commencing with the surname was the cause of confusion, especially among Muslims, some of whom do not have the concept of "surnames". When asked for their surname, such persons would give any of their names with the result that their details were looked for under the wrong surname. In this regard, the Electoral Commission needs to re-think the manner of listing of voters' names.

Voting was generally confidential but it was observed that in areas that were predominantly partisan, voters were even enthusiastic to indicate how they would vote or how they had voted. Illiterate or otherwise incapacitated voters were also assisted. In this regard, it may be mentioned that in some polling stations, where a voter was illiterate the confidentiality of his or her

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vote was compromised as the agents were called to witness how the ballot paper was marked. In others, the presiding officers took it upon themselves to mark the ballot paper on behalf of the voter. In such event not only was the confidentiality of the voter compromised but also there were no safeguards to ascertain that the presiding officer had marked the ballot paper as directed by the voter.

The counting of votes was generally free of incident. It needs to be observed, however, that there were a substantial number of spoilt votes probably arising from inadequate voter education. Some voters not only put a mark against their preferred choice, but also indicated their disapproval of the other choice or went ahead to indicate their names. Others put a mark or marks indicating clearly what their preferred choice was but not in the manner prescribed by law. Some presiding officers accepted such votes while others rejected them as spoilt.

The overall assessment of the Commission of the polling day was that it was by and large peaceful and orderly. In terms of fairness of the poll, the Commission is guided by the report of the Electoral Commission of Kenya.

3. Conclusions and recommendations

This report would be incomplete without the conclusions and recommendations of the Commission arising from its observations during the discharge of its mandate in relation to the referendum.

The issue of the legislative framework for the conduct of future referenda needs to be considered. The High Court decision in *Patrick Ouma Onyango*

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vs. Attorney General, notwithstanding, no less an entity than the Electoral Commission of Kenya itself has raised this matter. During consultations between the Commission and the Electoral Commission of Kenya this matter came up over and over again. The Electoral Commission never tired of reminding the public that its superintendence of the referendum process was severely constrained by the absence of a statutory framework.

The mandate assigned to the Commission or a corresponding similar body and the time for discharging such mandate would need to be carefully considered. Clearly, the Commission did not have adequate time and indeed resources to fully discharge the civic education mandate. The monitoring mandate was also the cause of controversy. The Electoral Commission of Kenya maintained that it could not accept or allow a situation where it was monitored by any other body and that this would be so notwithstanding the express words at section 17 of the Review Act. Indeed, the Commission was only accredited as an “observer” and the commissioners and staff were allowed into polling stations only as “observers” and not “monitors.” It would appear that to avoid protracted conflict, the Commission accepted these “altered mandate”.

Some thought might also be given to the prudence of having a body so intricately involved with the production of a document being the same body that is required to conduct dispassionate and objective civic education on it. To what extent is such a body perceived as “selling” its own document?

A referendum should probably only be held in future if there exists an overwhelming groundswell of public support for the Proposed New

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Constitution. This would avoid a situation where the referendum rather than cementing national unity, is the cause of national discord and threatens the harmony and stability of the country. National resources would similarly be saved. Time spent in the pursuit of a genuine and broad national consensus prior to a referendum, would be time well spent.

The obstacles that bedeviled the civic education project have already been adequately addressed above. A future civic education project would need to avoid the same shortcomings.

The question should probably be raised whether the country was ready for some of the revolutionary changes proposed in the Proposed New Constitution. The scrapping of the Provincial Administration which had been so fervently advocated, without a viable replacement, was frightening to the Kenyan public. Women's rights were the cause of widespread consternation among many communities. The district government as proposed in the Proposed New Constitution was resisted by many. There are a number of other examples.

Little progress will be made on any future referendum if negative ethnicity and ethnic chauvinism and suspicion are allowed to flourish. Sections of the country clearly perceived the passage of the Proposed New Constitution as being good for them and their ethnic interests. Others perceived the Proposed New Constitution as the project of one community or a few communities for the purpose of perpetuating their dominance on the national, political and economic stage.

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Religious differences and the role of religious leaders will in future need to be carefully addressed. Religious leaders hold an important sway over their faithful and unless they are persuaded that their religious interests are not jeopardized, a future Constitution will not pass. Equally, the religious sensitivities of our diverse faiths must be addressed with caution.

The role of leaders and in particular, political leaders, more so, members of Parliament cannot be downplayed. The referendum has shown that to a larger or lesser extent, many members of Parliament are looked upon as champions of their peoples' aspirations. A process that alienates a significant number of members of Parliament and other political and ethnic leaders will stand little chance of success.

The role of the media will have to remain under scrutiny. Sections of the media did a great disservice to the country during the referendum. Some media openly promoted ethnic animosity in their partisan support for the different referendum sides. Objectivity and balance were relegated to the back burner and their place taken by unsanitised prejudice. Media houses that engaged in this blatant abuse of their privilege should probably be made to account for their shameful partisan acts. This way, the precedent setting impunity displayed will be nipped in the bud.

On the substance of the Proposed New Constitution, it was probably too detailed. With the benefit of hindsight, the Proposed New Constitution should probably have been heavier on principles rather than the details. Some of the details generated controversy even where the principles were not in contention. However, it is probably also true that large amount of

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detail in the Proposed New Constitution arose from the mistrust by the people of their members of Parliament. Many people still argued that the Proposed New Constitution, as detailed as it was, still left too much to be done by Parliament.

The composition of the Constitution of Kenya Review Commission deserves some mention. While both ethnic and political diversity was a strength and enabled the Commission to navigate through and survive tumultuous times, the diversity returned to haunt the Commission at the referendum. The baggage of ethnic and political loyalties of the commissioners to a greater or lesser extent, undermined and compromised their objectivity during the conduct of civic education on the Proposed New Constitution by the commissioners. A future Commission drawing from this experience should probably be a lean and purely professional outfit. Diversity though relevant and important, should not be overemphasized.

The same goes for the secretariat. Some members of the secretariat became inordinately involved in the referendum debate to the extent that their capacity to deliver sound and impartial service to the Commission was impaired. Like the commissioners, their loyalties were otherwise than to objectivity and impartiality in the conduct of civic education. A future secretariat will equally require to be lean and purely professional.

This view about a future process being handled purely by professionals is not uncontested. Questions are raised about who exactly is a “pure” professional. This process demonstrated that the influence of ethnicity in the national psyche is so strong and pervasive that it has penetrated virtually all

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sectors of national life. Not even the clergy have been spared. To think that professionals completely free from the influence of ethnicity can be found is probably naïve. Others also argue that any future constitutional review cannot be entirely detached and should of necessity remain partisan, in favour of the people.

As the Commission winds up and is dissolved, it is imperative that the enormous amount of work done does not go to waste. A few mistakes cost the country the opportunity to get a new Constitution. This should not mean that all the time and resources spent on the constitutional review project should go down the drain. In particular, it would be wasteful if any successor initiative did not build on these gains.