

**SPECIAL WORKING DOCUMENT
FOR THE NATIONAL
CONSTITUTIONAL CONFERENCE**

REPORT ON CULTURE

**PREPARED BY THE COMMISSION AND APPROVED FOR ISSUE AT A STEERING
COMMITTEE MEETING HELD ON 19TH AUGUST, 2003**

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FOREWORD

The Constitution of Kenya Review Commission is pleased to publish this Special Working Document on Culture along side that on Devolution for the National Constitutional Conference, to stimulate and assist the discussions during the Conference. The Commission has published five such working documents:

Working Document I	-	Summary of Key Recommendations of the Commission
Working Document II	-	Compendium of Public Comments on the Draft Bill
Working Document III	-	Annotated Version of the Draft Bill
Working Document IV	-	An Outline of Legislation, which will require Enactment, Revision or Repeal
Working Document V	-	Independence Constitution

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).

The Commission working through the Task Force on Culture and the National Constitutional Conference *Ad Hoc Committee on Culture* has prepared this particular working document.

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2. Commissioner Salome Muigai	-	Co-Chair
3. Commissioner Bishop Benard Njoroge	-	Member
4. Commissioner Ababukar Zein	-	Member
5. Commissioner Pastor Zablon Ayonga	-	Member
6. Commissioner Domiziano Ratanya	-	Member
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Dr. Isaac Were, Institute of African Studies, University of Nairobi

We, as Commissioners are pleased to release this working document to the public for perusal and discussion.

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EXECUTIVE SUMMARY AND RECOMMENDATIONS

This report is the result of the work of the Commission's Task Force on Culture and the National Constitutional Conference *Ad Hoc Committee on Culture*.

The Review Act in section 3 (e) required various organs of the review process to secure provisions therein "...respecting ethnic and regional diversity and communal rights including the right of communities to organize and participate in cultural activities and the expression of their identities." At the same time, the Commission in Section 17 (d) (x) was expected to examine and review the socio-cultural obstacles that promote various forms of discrimination and recommend improvements to secure equal rights for all. Section (d) (xi) specifically required that the rights of the child are examined and reviewed with a view to making recommendations on mechanisms that will guarantee protection thereof. Section 5 (c) (iii) requires that the review process is guided by respect for the universal principles of human rights, gender equity and democracy. Section 3(h) mandates the organs of the review to include provisions that aim at "... strengthening national integration and unity." Section 17 (d) (xiv) required the Commission to examine and make recommendations on the necessity of directive principles of state policy.

The Ad Hoc Committee on Culture established under Regulation 44 of the National Constitutional Conference was mandated by the Steering Committee of the National Constitutional Conference to conduct a careful analysis of the Draft Constitution with a view to determining whether, and the extent to which the provisions of Section 3 (e) of the Review Act had been reflected therein and, in particular to:-

- i) Explore ways of giving constitutional legitimacy to Kenya's rich cultural diversity and expression promoting the cultural expression and cultural activities of the people of Kenya;
- ii) Explore constitutional options for the protection and promotion of the rights of communities to organize and participate in cultural activities locally or countrywide;
- iii) Explore whether or not certain aspects of culture, custom or tradition should be prohibited or otherwise qualified in specific provisions of the Draft Constitution;
- iv) Propose, where necessary, amendments to any aspect of the Draft, with the view to strengthening Kenya's cultural identity in the context of national integration and unity;
- v) Review the various aspects of the Draft Bill with a view to identifying any aspects that may negate our cultural heritage; and
- vi) Explore the possibility of establishing an institutional framework for the promotion and development of Kenya's diverse cultural values and heritage.
- vii) Prepare a report for consideration to the Technical working Groups of the Conference.

The Commission's Task Force on Culture was mandated, pursuant to Sections 26 (2) and (7) and 27 (1) of the Constitution of Kenya Review Act (Cap. 3A), to:-

- i) Prepare a background paper on the "Constitutional Promotion and Protection of Kenya's Cultural Diversity and Activities."
- ii) Conduct an audit of the Draft Bill to determine the extent to which Kenya's cultural heritage has been provided for.

- iii) Explore and propose for other ways of giving constitutional legitimacy and protection to that heritage.
- iv) Prepare a report for consideration by the relevant Technical Working Committees of the National Constitutional Conference.

In order to execute the above tasks, the Commission working through the Task Force on Culture and the Ad Hoc Committee on Culture of the National Constitutional Conference, rigorously analyzed various policy, legislative and academic documents and carried out a careful analysis of the views of Kenyans collected by the Commission. The Task Force and the Ad Hoc Committee further analyzed the Hasard reports of the National Constitutional Conference. Expert papers presented to the Commission and other sources of literature were also used. This report is divided into five parts as briefly outlined below.

Part I of the Report presents the Concept of Culture and its Application consisting of the following: Definition of culture; Culture as applied to development; Culture, policy and development planning; Culture, linguistic diversity and language policy; and Globalization and culture. Part I concludes that culture is not merely an accumulation of works and knowledge which an elite produces, collects and conserves in order to place it within reach of all; or that a people rich in its past and its heritage offers to others as a model which their own history has failed to provide for them; that culture is not limited to access to works of art and the humanities, but is at one and the same time the acquisition of knowledge, the demand for a way of life and the need to communicate.

Part II of the Report presents Culture in International Policy and Law. It consists of the analysis of the International Covenant on Economic, Social and Cultural Rights (ICESCR), Universal Declaration of Human Rights United Nations Educational, Scientific and Cultural Organization Documents, Convention Concerning the Protection of the World Cultural and Natural Heritage and the African Charter on Human and Peoples' Rights. Most of these international instruments have been extensively incorporated in the Draft Constitution under the Bill of Rights.

Part III of the Report provides an analysis of the culture as it relates to the present Constitution of the Republic of Kenya, legislation and constitutional provisions on culture as found in other constitutions of the world. An assessment of the various constitutions as above reveals three distinct approaches. The first approach is that which treats culture as a retrospective phenomenon, which is intrinsically profane, backward, primitive, immoral and repugnant to justice and must be curtailed unless proven otherwise. The present Kenya constitution and other former British colonies such as Gambia have in their constitutions provisions on culture, which reflect this attitude. The second approach is that which recognizes and affirms culture as the most important aspect of national life and seeks to preserve, promote and protect culture as part of national goals. In this approach culture and cultural diversity are clearly provided for in the directive principles of state policy for purposes of building a blend of good traditional institutions and practices and the modern systems of open and democratic society and social, economic and cultural development of the nation. The third approach links culture, science and technology and this is found in most western countries such as Italy, Canada as well as Vietnam. The constitutions provide for research and culture and stipulate the responsibility of the state to promote the development of culture, and scientific and technical research including safeguarding the natural beauties and the historical and artistic heritage of the Nation.

Part IV of the Report presents Culture, Society and Peoples Views. It consists of a thorough analysis of the socio-cultural profiles of the Kenyan ethnic communities; and the Views of Kenyans as presented to Constitution of Kenya Review Commission. The analysis of the socio-cultural profiles of a number of Kenyan communities focused on: Philosophy of life; Political Organisation; Social Organisation including gender relations, Inter-Generational Relations and division of labour; Judicial System (Arbitration, Crime and Punishment); Representation; Socialisation and Education (Initiation and Informal Learning); Economy; Land, Property, Environment and Natural Resources. The section on the views of Kenyans examined the extent to which Kenya's cultural diversity has found expression in the draft Bill. The section identified the gaps or shortcomings with regard to provisions that sought to recognize, promote, and protect Kenya's cultural diversity and cultural life. The report notes that historical and the present political, economic, social and cultural factors greatly influenced the views people expressed.

Part V of the Report sets the platform for the movement towards a Multicultural Constitution for National Unity. It consists of: the Audit Report of the Draft Bill; Views of Delegates at the National Constitutional Conference (Bomas I); Towards a Multicultural Kenyans Society; and Recommendations on Constitutional Principles. The Report recognizes that the Constitution of Kenya Review Act in section 3 (e) sought to secure in the new constitution, provisions that aim to promote respect for ethnic and regional diversity and communal rights including the right of communities to organize and participate in cultural activities and the expression of their identities. The Commission in Section 17 (d) (x) is also expected to examine and review the socio-cultural obstacles that promote various forms of discrimination and recommend improvements to secure equal rights for all. In the Preamble of the Draft Bill to alter the Constitution early reference is made to the cultural diversity of the people of the people of Kenya. It starts thus

“We the people of Kenya, Aware of our ethnic, cultural and religious diversity and determined to live in peace and unity as one indivisible sovereign nation”

There is therefore a clear realization that Kenya as a nation is characterized by cultural diversity that calls upon a clear constitutional and democratic policy response in order to maximize on the benefits of our cultural and social diversity, and minimize the threats to our national unity. Indeed the emergence of the crisis of welfare state, economic and cultural globalization and massive increase in all forms of international population movements have come to present major threats to our national unity and inter-ethnic contacts requiring adoption of a multicultural policy approach.

The report provides an analysis of the challenges and values of a multicultural society and concludes that applying the principle of multiculturalism is now considered as a key approach to managing our cultural and ethnic diversity. Multiculturalism as principle embodies the ideals of reconciling respect for diversity with concerns for societal cohesion and the promotion of universally shared values and norms.

The Report presents a Schedule on the Peoples Of Kenya. The peoples of Kenya consist of diverse ethnic groups, which can be broken down into three main ethno-linguistic groupings, namely, Bantu speaking peoples, Nilotic speaking peoples and the Cushitic speaking peoples.

RECOMMENDATIONS

1.0 RECOMMENDATIONS

The task Force proposes an explicit multicultural approach as a response to cultural, ethnic, linguistic and religious diversity as a positive attempt of alleviating deeply entrenched social injustice and inequalities in the Kenyan society. The Constitution by taking a multicultural approach seeks to provide an enabling environment for the recognition and promotion of consensus on the value of diversity in cementing national unity and peace.

1.1 General Recommendations

- Create a chapter entitled “**CULTURE, EDUCATION, SCIENCE AND TECHNOLOGY**”.

1.2 General Principles on Culture

1. Recognize and respect all Kenyan communities

- Identification and acceptance (Preamble & Art 14 (3))
- Equality (Preamble & Art 33)
- Non-discrimination(Art 34)
- Inclusion (Preamble & Art 33)

2. Right to manifest and practice

- Right to maintain, protect and develop the past, present and future cultural manifestations (Art 14 & 63A),
- Right to observe, practice and reclaim customs, traditions, rituals, convention including dress mode, food. (Art 63 A)

3. History and Heritage

- Right to transmission to future generations, histories, languages, oral traditions, philosophies writing and other communication, systems, and literature. (Art 30 & 63 A)
- *Cultural Heritage will include monuments, artifacts, architectural works, elements or structure of archaeological nature, creative and artistic works, designs, inscriptions, caves and forest dwellings, other structures or features which are of outstanding value from the point of history, art or science. (Art 63 A, Interpretation Chapter)*

4. Historical and Religious sites

- Recognition, respect, preservation, protection and promotion of religious, historical, sacred and archeological sites. (Art 63 A)
- Acceptance of rights and claims including property rights, access and visitations and other related rights. (Art 63 A)

5. Intellectual Property of the people of Kenya

- To cover indigenous and local knowledge and know-how including: folklore, design, creative and performing arts (including song, music, dance, drama, storytelling, stories, painting, sculptures, ceremonies, festivals, games and symbols. (Art 14 & 63 A)
- To include knowledge of scientific, agricultural, technical and ecological, including cultigens, medicines and sustainable use of flora and fauna, seeds and other biodiversity. (Art 14 & 63 A)
- To include human genetic material including DNA and tissues. (Art 14 & 63 A)
- There is need for greater consideration as to how innovations and intellectual property laws might assist the people achieve their cultural and human development with greater international avenues being explored so as to ensure that the international documents have an aspect that protect Kenyan cultural heritage.
- Most specifically instruments relating to copyrights should include the protection of cultural rights of communities. Where ownership of a cultural work is communal, then the group should be given the right of attribution and cultural integrity. There should be no limit on period as far as copyrighting of cultural heritage by a community goes. This too should extend to indigenous knowledge including biodiversity, and upon this, legislation touching on intellectual property ought to be amended accordingly.
- The Constitution should, therefore, make provisions on innovations and intellectual property by securing the exclusive rights of innovators, creators, inventors, authors and performers. Incorporating innovation and intellectual property in the Kenya Constitution will hence be a major step in bringing these core values unto the national political, economic, social, cultural, judicial and development agenda. Clearly, the challenges have never been greater; and the opportunities have never been more abundant.

6. Right to be involved in national life

- All communities to have equal opportunity in decision- making process particularly when decisions may affect them directly or indirectly. (Art 1, Art 14, Art 30, Art 213)

- That national institutions should reflect the national character of diversity such as in education, employment, recruitment into police and the armed forces, and in national institutions e.g. parliament, judiciary and executive. (Art 14, Art 30, Art 271)
- Measures including affirmative action to be used to re-dress past injustices, and/or neglect. (Art 14, Art 109)

7. National Culture, identity, values and symbols

- Designate certain days as cultural days when various communities celebrate their cultures
- That our shared experience and values should form the basis for building our national cultural identity (Preamble & Art 14)
- To promote African and other Kenyan cultures, (Art 14)
- To promote Pan-Africanism and the integration of African (East African) nations, (Art 14)
- To establish national days that will be celebrated using Kenyan values, (Art 13)
- To safeguard and promote the national anthem and flag, (Art 11)
- To recognize and respect freedom fighters past, present and future (Preamble & Art 13)
- To establish a heroes and heroine acre, (Art 13 & Schedules)
- To establish institutional framework to promote the national culture and shared experiences e.g. KBC, (Art 13 & Schedules) (Chapter 2)
- To affirm the use of African and other Kenyan values and symbols in national institution including: (Chapter 2, new clauses, Art 14 & Art 63A)
 - Mode of dress or dress code, in parliament, Judiciary,
 - Formal and national government functions,
 - For avoidance of doubt cultural dress codes will be highly encouraged.

8. Family and Marriage

- All marriages including cultural, religious etc. should be recognised by law and issued with marriage certificate, (Art 38)
- Recognise marriage under any tradition or system of religious, personal or family law, (Art 38)
- Recognise marriage between individuals of opposite sex,
- Outlaw same sex unions. (Art 38)
- Recognise the extended family and its role as a social support system)

9. Cultural Institutions (Art 47, Art 63 A, Art 287)

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

- National archives,
- KBC,
- Kenya Cultural Centre,
- Kenya National Library.

10. National Council for the Promotion and Protection of Cultural Heritage

It is proposed that the Draft Bill provides for the establishment of the National Council for the Promotion and Protection of Cultural Heritage (under Chapter Two - the Republic or Article 287 of Chapter Seventeen on Constitutional Commissions or Chapter on Culture, Education, Science and Technology) whose functions shall be:

- Advising the government, Parliament and judiciary on matters of cultural importance to the people of Kenya.
- Overall administration of cultural activities,
- Promoting investments in Kenya's culture, literature, visual and performing arts and create favorable conditions for the people's enjoyment of their valuable works
- Identifying, protecting, and maintaining cultural sites,
- Designing and implementing policies and programmes that promote cultural diversities and enhance national cohesion,
- Developing the national identity for Kenya through the promotion and appreciation of Kenya's diverse cultures.
- Protecting the intellectual property of the indigenous communities technologies, alternative medicine, music, poetry and arts
- Promoting investment in Kenya's cultural industry
- Documenting Kenya's culture for purposes of adapting and incorporating cultural values in the national and local governance system of the Kenyan society
- Protecting the national cultural heritage,
- Promoting the development of the Kiswahili and other indigenous languages through education and media
- Promoting the development of a sign language for the deaf;
- Promoting the technological or scientific studies, which enhance cultural values and the preservation ancient monuments.
- Promoting and preserve those cultural values and practices, which enhance the dignity and well being of Kenyan people
- Encouraging the development, preservation and enrichment of all Kenyan languages;
- Preserving and developing Kenyan culture, which shall be national, modern, and humanistic and shall inherit and promote the values, thought, morality and style of the cultures of all nationalities in Kenya,
- Identifying, harnessing and developing all creative talent among the people of Kenya.
- Promoting inter-ministerial dialogue in information, preservation of cultural heritage, health care, education and training and overall management of the national system of education, science and technology, physical culture and sports.
- Promoting cultural tourism and tourist activities and to expend international intercourse and cooperation in the fields of culture.
- Strengthening, institutionalizing, reforming and developing the traditional legal system and the Common Law of Kenya

- Recommending the establishment, in accordance with national legislation, of:
 - Kenya Institute of National Languages (KINLA)
 - Kenya Institute of Common Law and Research (KICLaR)
 - National Forum for Community Leaders (Bringing together leaders of village governments)

11. Conflict management and resolution (Art 184)

- Encourage the use of traditional conflict resolution mechanism where applicable,
- Allow alternative conflict resolution on civil matters where both parties consent,
- Recognize the traditional oathing system in the judicial system

12. Media (Art 47, new clause)

- Make KBC an independent institution as a primary information and cultural source for the Kenyan people,
- Propose how to govern media houses to include:
 - Education and local content-require merit. (Also recommendations on Policy Principles on Media and culture under 12.4 number 15.0)
 - As a policy question, people need to be informed about the existing cultural heritage laws and how these impact on their culture and intellectual property rights. They need to be informed how the existing cultural heritage laws might benefit their needs regarding the use and control of their cultural material. Acceptability by the people of the laws is the sine qua non to their implementation.

13. Legislation

- Parliament shall enact such legislation as necessary to ensure the promotion, protection and access to cultural heritage and to establish such institutional arrangements necessary for the promotion of cultural development.
- Legislation should include provisions that:
 - Prohibit the willful distortion and destruction of cultural material
 - Prevent misrepresentations of the source of cultural material
 - Allow payments to indigenous groups/owners for the commercial use of their cultural material
 - Provide special protection for sacred and special materials
- Legislation should not inhibit the further cultural development of materials within their originating communities. Customary and traditional use should not be affected.
- Legislation should consider how imitation/appropriation and stylized rip-offs of cultural material should be dealt with. Prior authorization provisions should be included based on respect, negotiation and free and informed consent.

- Legislation should allow particular groups of people or communities to bring civil actions against infringers of their cultural and intellectual property and obtain remedies

1.2.1 Specific Task Force Recommendations on culture:

- The definition of culture should be included in the interpretation Chapter;

In this Constitution unless the context otherwise requires Culture means the *totality and diversity of life, the expression of our civilization and the symbolic and learned aspect of Kenyan society, including language, custom, traditions, convention eating habits, dressing habits, architectural designs, art, education, science and technology, how people spend their leisure time, ethics, morality, religion and politics.*
- Preamble and National Goals: the preamble should endeavor to identify the commonalities in our culture and nurture it while at the same time maintaining diversity.
- Rephrase Article 5(1)(c) to read African Customary law *in civil matters*”.
- Article 9(i): all Kenyan languages shall enjoy equal status and recognition and Article 9(ii): that official languages shall be English and Kiswahili.
- Article 32(1): A comprehensive definition of “life” should be captured. Life begins at conception till death.
- Culture should be integrated in the schools’ curricula and extra curricula activities.
- Ethnicity should only be used positively.
- As a principle, the state should endeavor to eliminate tribalism, racism, etc.
- Expound Article 37(5)(d) to include female circumcision, early childhood marriage and tattooing of children.
- Add clause (5), Article 63A(5)(5) to read, *“all cultural practices that dehumanize or are injurious to the physical and mental well being of a person are prohibited”*.
- Rephrase Article 63(2)(a) to read: “to enjoy their cultural *diversity...*”.
- Article 239 explicitly provides that the cultural and social principles for the management of the environment and the natural resources traditionally applied by any community within Kenya shall be applied in so far as they are relevant. The expressions *they are (not repugnant to justice and morality) should be removed and instead leave* ”inconsistent with the constitution”.
- The Republic shall promote the development of culture, and scientific and technical research.

- It should be noted that an express provision that calls for the duty upon *the state and the Kenyan citizens to conserve the natural heritage, historical heritage the artistic heritage and the natural beauties of the nation should be expressly provided for.*
- Amend Article 14(3) to read, “ ...shall recognize ***cultural equality, diversity*** and promote ***cultures that contribute to national cohesion including inter- cultural relations***”.
- Insert a clause under Article 14 stating that ***the “Republic shall establish, enhance and devolve an institutional framework that ensures documentation, preservation and development of all Kenya’s cultures for posterity”.***
- Article 38(3) should be rephrased to mean marriages between opposite sexes.
- Traditional brews should be registered, licensed and controlled by the relevant authorities. The revenues generated from their tax collection should go the respective devolved governments.
- Article 57 should be amended to read, “every person has the right to health, which includes the right to health care services, ***whether allopathic or complementary and alternative medicine***, including reproductive health care”.
- Insert a clause; Article 103(5) that appointment shall be on the basis of merit, gender and regional balance.

1.2.2 Summary of Culture Principles

1. All Kenyan peoples’ Cultural, linguistic and religious communities are equal;
2. All Kenyan peoples’ cultural, linguistic and religious communities have a right to manifest, practice and revitalise their cultural heritage. This include the right to maintain, protect and develop the past, present and future manifestations of their cultures such as archaeological and historical sites, material culture, design, ceremonies, knowledge, technologies and visual and performing arts, and literature, as well as the right of restitution of cultural, intellectual, religious and spiritual property taken without their free will and consent or in violation of their laws, traditions and customs.
3. All Kenyan peoples’ cultural, linguistic and religious communities have the right to gain directly from benefits arising from their cultural heritage this include monuments, archaeological sites, historical sites, material culture, knowledge, designs, technologies, ceremonies, visual and performing arts, and literature.
4. All Kenyan peoples’ cultural, linguistic and religious communities have a right to have their sacred places including burial sites to be preserved, respected and protected,
5. All Kenyan peoples’ cultural, linguistic and religious communities have a right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing and other communicating systems, and literature and to designate and retain their own name for communities and persons.
6. All Kenyan peoples’ cultural, linguistic and religious communities have a right to establish and control cultural institutions, at their own cost, this may include educational

institutions. This right includes the right to providing education in their own language and in a manner appropriate to their cultural methods of teaching and learning.

7. All Kenyan peoples' cultural, linguistic and religious communities shall be respected and not discriminated in any form,
8. No Kenyan peoples' cultural, linguistic and religious community may be addressed by pejorative and offensive terms, stereotyped or profiled,

1.2.3 Recommendations on policy principles

14. The State shall recognize that culture is essential for national unity, peace, development and progress;
15. The State shall recognize, respect and reaffirm all Kenyan communities by promoting the principles of acceptance, equality and equity, non-discrimination, inclusion, and cultural synergy;
16. The State shall remain to multiculturalism as a principle in the sense of tolerance and respect for plurality of cultures in its policies and programs. The state shall protect all cultural rights of minorities and shall commit itself to stamping out ethno-centricism, racism, xenophobia, prevention of politicization of religion and concomitant rise of extremism and general empowerment in education and communication.
17. No Kenyan peoples' cultural, linguistic and religious community may be addressed by pejorative and offensive terms, stereotyped or profiled,

i) Commitment to multiculturalism

ii) Creativity and empowerment;

The technological knowledge and expertise gained must reflect the local needs and circumstances. Power must not be equated with knowledge and expertise alone but also from both social and technological capabilities and which must be harnessed to create a cultural resource.

iii) Culture and media;

- The ultimate aim should be to strive for a media system that enables each and all citizens to have their voices heard and that freedom of expression be balanced against the rights of others.
- There is need for standards of decency and morality in information channeled through various media outlets.
- There is need to put in place certain standards and benchmarks without falling into trap of censorship on the percentages of local programmes to be aired in national media.
- There is need to deregulate the media and ensure its accessibility to the people.

iv) Gender and culture;

There is need to look at issues like equity, social efficiency, women's productive capacities and equality with relation to the following;

- Women's rights as human rights
- Reproductive freedom
- Gender-Awareness planning
- Enhancement of civic/cultural programmes

v) Children/Young people /cultural continuity

The focus should be to impart sense of meaning and value to their lives through provision of basic services and giving them full responsibility to ensure the infinite diversity of cultures are better understood and assimilated.

- There is need to protect them from marginalisation and neglect by ensuring social inclusion in civic and cultural programmes.
- The elderly need to act as role models in the preservation and continuity of cultural transmission.

vi) Cultural heritage;

Our museums should mirror the knowledge, experience and practices of all those who contribute to the human dimension in both rural and urban context. They should not be seen just as collection of artifacts only but to reflect total cultural infrastructure of the nation.

There is further need for greater emphasis and support to our archives for the sake of our social history and relationships.

There is also need to achieve proper balance between cultural heritage and tourism, as the latter remains a leading foreign exchange earner in the Country

vii) Culture and environment;

The local ecological knowledge and traditional practice should be given priority as they tend to offer solutions founded on generations of experimentation and observation.

viii) Dual citizenship or Naturalisation;

Strong measures should be put in place to ensure that foreigners who want to become citizens of Kenya must be those who will add to the value of the Country. For instance it should be mandatory that they are professionals and should learn Kiswahili and possibly the indigenous language of the devolved region he/she intends to reside in.

ix) Priority of the indigenous culture over other foreign cultures;

The new policy should ensure that our Kenyan culture takes priority over all other foreign cultures in terms of preservation, promotion and diversity.

Our multicultural policy framework should adopt the following approach;

- Human development: individual and community empowerment in terms of access to culture, active full participation and meaningful citizenship.

- Pluralism: greater recognition of cultural and linguistic diversity, cultural rights, gender equity and combating exclusion
- Creativity, innovation in governance and decision-making, community arts and specialized education and training which encourages creativity.
- Balancing culture and the market place to resolve the inevitable tension between free play of commercial forces and need for content that reflects cultural diversity.
- Forging new alliances for funding and partnership between governments, market forces and civil society through various collaborative strategies.

1.2.4 Recommendations on consequential legislation

Although there are a number of legislative provisions touching on culture, most of them are inadequate and negative in approach. By their very nature and design they do not adequately address the question of multiculturalism especially with regard to recognizing and protecting the cultural heritage of the people of Kenya. While there is need for review and audit of various laws from a cultural perspective, broadly, the inadequacies and gaps that need to be addressed by the legislation arising from a new constitutional order include: -

- Ownership of cultural heritage by the community
- Focus of the laws on to not only the tangible cultural heritage but also on intangible aspects such as stories and songs. Legislation should provide for protection of works that are intangible and not just the material form. The rights should exist in perpetuity.
- Focus on living heritage rather than merely the past heritage.
- Protection of cultural values and normative systems
- The participation of the community in protecting and promoting culture.
- Access to culture heritage by the communities
- Protection of cultural heritage by the communities
- Development of and Investment in the cultural industry
- Institutional arrangements for the promotion and protection of national cultural heritage
- Protection of intellectual property rights

1.3 Education

- The State shall take all necessary measures to design and develop a national education system that will nurture and emphasize creativity, *knowledge acquisition*, talent development, innovativeness and functional application of learned skills through formal and non-formal means for sustainable development and *the greatness and security of Kenya*. The education system shall be designed in such a manner as to adequately prepare every citizen to lead productive and dignified life.
- Parliament shall establish such institutional arrangements and procedures to enable the national educational system to periodically report to the people of Kenya on the quality of its teaching and its relationship with the requirements of national development.
- The State shall take appropriate measures to afford every Kenyan an equal opportunity to attain the highest education possible. The State shall direct its policy towards ensuring that

there are equal and adequate educational opportunities at all levels. The State shall be responsible for the promotion of free and compulsory basic education.

- The State shall lay down general rules for establishment and organization of public schools and education institutions of all kinds and grades. Private organizations, citizens and communities are entitled to found schools and educational institutions which do not involve charges on the State.
- The State shall encourage and subsidize where appropriate educational enterprises in the country which are operated with good record by private organizations and citizens, and support persons who have made discoveries or inventions in the fields of learning and technology; and specially recognize and reward persons who have rendered long and meritorious services in the field of education.
- The State shall protect and promote the academic freedom and freedom of art and science, instruction, teaching, expression and dissemination of thoughts through words, writing or any other means of reproduction. The law shall regulate the right to the protection of the clause on science and professional secrecy in the exercise of these freedoms.
- There shall be a National Education Service Commission that shall continually review the terms and conditions of service, training and qualifications of public officers in the education system and matters connected with their management and welfare.

1.4 Science and Technology

- i) The Constitution should recognize that innovation, intellectual property rights, Science and technology are essential for national development and progress.
- ii) The State shall give priority to research and development, invention, innovation, and their utilization; and to promote science and technology education, training, and services.
- iii) The State shall support indigenous, appropriate, and self-reliant scientific and technological capabilities, and their application to the Republic's productive systems and national life.
- iv) The Parliament shall provide for incentives, including tax deductions, to encourage private participation in programs of basic and applied scientific research.
- v) The State shall regulate the transfer, and promote the adaptation of technology from all sources for the national benefit. It shall encourage the widest participation of private groups, local governments, and community-based organizations in the generation and utilization of science and technology.
- vi) The State shall protect and secure the exclusive rights of scientists, inventors, artists, community innovators and other gifted citizens to their intellectual

property and creations, particularly when beneficial to the people, for such period as may be provided by law.

- vii) The State shall take appropriate policy, legislative and program measures to:
- Encourage or provide incentives for innovation, disclosure and commercialization of innovations, and protecting and rewarding innovators,
 - Fostering Kenya's export of value-added products
 - Identifying, trapping, nurturing and developing a national reservoir of creative and innovative talent
 - Regulating and promoting innovation, technology, Intellectual Property and trade
 - Promoting and investing in research and development in information technology and services
 - Protecting and securing respect and appropriate compensation or reward for creativity, innovation and intellectual property.
- viii) The state shall take necessary legislative, policy and program measures to strengthen the capacity of Kenya Industrial Property Organization and Kenya Copyright Board to efficiently regulate patents, trade marks and copyright and where necessary make licensing provisions intended to prohibit restrictive practices especially in cases of non-working patents or where the copyright holder refuses to distribute or license the work on reasonable terms.
- ix) Parliament shall formulate and establish an appropriate policy, legislative and institutional framework to promote innovation, and facilitate the development, acquisition, transfer, diffusion and assimilation of science and technology including cultural innovations in Kenya.
- x) Parliament shall formulate and establish an appropriate framework of intellectual property policies, laws and institutions to recognize, protect and reward authors, composers, performers, innovators, inventors, researchers, scientists technologists and specially gifted citizens in Kenya.
- xi) The Judiciary needs to establish an Intellectual Property and innovation Bar and Bench in order to develop a jurisprudence that would inform the transactional, legislative and policy processes.

PART I: THE CONCEPT OF CULTURE AND ITS APPLICATION

1.0 MANDATE

One of the key objects of the Review Act in section 3 (e) is to secure provisions therein “...respecting ethnic and regional diversity and communal rights including the right of communities to organize and participate in cultural activities and the expression of their identities.” At the same time, the Commission in Section 17 (d) (x) was expected to examine and review the socio-cultural obstacles that promote various forms of discrimination and recommend improvements to secure equal rights for all. Section (d) (xi) specifically required that the rights of the child are examined and reviewed with a view to making recommendations on mechanisms that will guarantee protection thereof. Section 5 (c) (iii) requires that the review process is guided by respect for the universal principles of human rights, gender equity and democracy.

Section 3(h) mandates the organs of the review to include provisions that aim at “...strengthening national integration and unity.” Section 17 (d) (xiv) required the Commission to examine and make recommendations on the necessity of directive principles of state policy.

2.0 THE CONCEPT OF CULTURE AND ITS APPLICATION

2.1 Definition of Culture

Culture has been defined variously by different social scientists. Sociologists and anthropologists define ‘culture’ as “...*the symbolic and learned, non-biological aspect of human society, including language, custom and convention, by which human behaviour can be distinguished from that of other primates.*”² This implies that culture is a uniquely human enterprise.

Roger Garaudy defines culture as “...*the sum total of the solutions supplied by human beings to the problems environment sets them.*”¹ This position has been echoed by Dr. Ruth Kibiti who defines culture as *the totality of a people’s way of life*. She elucidates that culture is the *universal phenomenon in human society, which is complex and dynamic in nature.*⁵ Dr. Ruth Kibiti, however, adds a gender perspective to the definition of culture – a concept that is only implied, or completely obliterated in literally all previous definitions. She posits that *culture provides an identity to both men and women as members of society*. Indeed her presentation on culture and gender proceeded sees “...*culture as the ideology, which provides justification for the oppression of women, creates justification for their exploitation, and creates adequate space for male domination and control over women*”.

¹Article 27 (1) of the United Nations Universal Declaration of Human Rights, adopted by the General Assembly on 10 December 1948.

³ A.B.C. Ocholla-Ayayo “*Culture as a Lived Experience*”: Seminar paper on Culture, Ethics and Ideology: Naivasha: 7th – 8th February 2002

⁴Thierry G Verhelst (Translated by Bob Cumming) *No Life without roots: Culture and Development*: London and New Jersey: Zed Book Ltd, 1990.

⁵ Ruth Kibiti “*Culture, Ethics and Ideology: The Gender Implication*” Seminar paper on Culture, Ethics and Ideology: Naivasha: 7th – 8th February 2002

Hon Mwandawiro Mghanga has attempted to capture an all-encompassing definition of culture:

*Culture is the sum total of a peoples life. It is about people's struggles against nature for subsistence, survival and development, as well as struggles and accommodation of other human beings. It includes eating habits, dressing habits, housing trends and designs, art, education, science and technology, how people spend their leisure time, ethics, morality, religion, politics, traditions, and customs. It is, in short, the expression of our civilization.*⁶

UNESCO defines culture as "...a set of distinctive spiritual, material, intellectual and emotional features of society of a social group and that it encompasses, in addition to art and literature, lifestyles, ways of life, ways of living together, value systems, traditions and beliefs". It includes customs, values, language, attitudes, behavior patterns, belief systems, systems of production as well as social and political organization.

Culture gives its members their identity and shared heritage that is passed on from one generation to another. Culture is thus the totality of people's way of life. One key definitive element of culture is that it is dynamic. Culture changes in the same way as human beings do. It is a continuous, gradual change, yet as Mghanga puts it, *always giving communities a sense of dignity, identity, continuity, and security and bonding societies together.* Culture all over the world has been changing to suit the needs and requirements of peoples concerned at different times. It is viewed as ideas and products of interaction that is never static but is in continuous motion and change.

2.2 What Culture is not

UNESCO in its recommendation on participation by the people at large in cultural life and their contribution to it states that Culture is not merely an accumulation of works and knowledge which an elite produces, collects and conserves in order to place it within reach of all; or that a people rich in its past and its heritage offers to others as a model which their own history has failed to provide for them; that culture is not limited to access to works of art and the humanities, but is at one and the same time the acquisition of knowledge, the demand for a way of life and the need to communicate.

2.3 Culture As Applied To Development

In understanding culture in the context of development, it is unfortunate that development theories over the years have tended to undermine the role of culture in development. Indeed, many a definition of development theory (which have a Western inclination) presuppose a much narrower notion portraying culture as merely art, music, dance and literature. This misnomer has been traced to colonialism, which presided over wanton plunder of natural resources, prejudices

⁶ Mwandawiro Mghanga. "Let the new Constitution Develop a Progressive Cultural Policy" an article submitted to the Ad Hoc Committee on Culture at the National Constitution Conference (Wednesday, 28 May, 2003)

against indigenous knowledge and erosion and eventual destruction of the colonized peoples. African people were persuaded to believe that culture is an add-on frill that could be safely ignored.

In his article, “*The Drawbacks of Cultural Globalization*”, Wole Akande traces the genesis of cultural hegemony to the sixteenth century when Western adventures (colonizers) imposed Western religions and cultural practices on people who had their own way of life. This pervasive foreign invasion was equated to civilization and modernization! The trend was promulgated until late twentieth century.

Until the late twentieth century, it was assumed that development for the colonized peoples must involve a denial of history, a rejection of their cultural heritage and the adoption of Western Cultural practices.”⁷

The tragedy brought about by this policy was brainwashing of the African Psyche, the aftermath being decimation of African cultures. Colonialism became the conduit through which cultural intrusion pervaded and subdued the African continent. Hon Mghanga (op cit) laments that *colonialism directly and indirectly waged a ruthless war against our people’s cultures. The colonialist knew that in order to dominate our societies, they had to destroy the bond that cultures builds in society.* As the protagonist in Chinua Achebe’s celebrated novel *Things Fall Apart*, Okonkwo says; “*the white man has put a knife on the things that held us together. The centre cannot hold. Things fall apart...*”

The systematic and endemic erosion of culture has been aggravated by globalization, which apparently threatens to wreck havoc on the prevailing African lifestyles and ways of life. In an article entitled ‘*Big Development Needs Cultural Impact assessment*’ the Executive Director of the United Nations Environmental Programme (UNEP), Klaus Toepfer laments that, “*many cultures and their indigenous knowledge are being lost, partly as a result of the globalization of trade, of media, and the rising dominance of western or northern-style values and traditions.*”

Mr. Toepfer further advanced a radical departure on the view held by previous theories regarding the cultural dimension in development policy. He observes that: “*Conserving and promoting cultural diversity was no nod in the direction of nostalgia*”.⁸ He observed that culture was an *economic imperative*.

Thierry G Verhelst (1990) observes that Western models of social change based on consumption, competition, and acquisition have damaged Third world values. To aggravate the status quo these values have occasioned manipulation of human aspiration. It is now widely acceptable that “culture” is the missing link (forgotten dimension) in the realm of development. Thierry (ibid) articulates that:

⁷ Wole Akande *Yellow Times* November 10, 2002

⁸ Klaus Toepfer “*Big Development Needs Cultural Impact assessment*” UNEP. November 18, 2002

'Open-minded people are becoming aware that the catching-up theory of development is guilty of excessive Eurocentrism... The indigenous cultures of the peoples of the Third World have been largely neglected.'

Hon Wangari Maathai, notes that the marginalization of indigenous African culture by officialdom is partly a colonial legacy and partly lack of awareness on the role of culture in development.⁹ It is, prudent for development ventures to recognize the enduring quality of indigenous cultures and discover their validity and vitality. It should be recognized that indigenous cultures are economic, social and political sources of life. There must be concerted efforts to suppress political, economic and cultural hegemony (imperialism) perpetrated by the major blocks, which continue to ravage the countries of the South with impunity.

However, it is worth mentioning that any abrupt change in culture deals a devastating blow on a people's cultural behaviour. Therefore, though culture is resilient and has the propensity to absorb change it shows defiance to spontaneous and arbitrary change. In Kenya, for instance, in spite of protracted campaigns against the dangers of the dreaded HIV/AIDS pandemic, social, cultural behaviour and attitudes have not changed significantly.

⁹ Wangari Maathai excerpts from "*Missing Link*"; a speech presented at the Sixth P7 of Global Greens, Nairobi, 2003.

2.4 Culture, Policy And Development Planning

Realizing that the country has perpetually exploited and dominated by alien values, the Government of Kenya has since independence attempted to develop a progressive National cultural policy. The following development policy documents give an overview of how the Republic of Kenya has grappled with cultural aspects in various development blueprints.

2.4.1 Sessional Paper No. 10 Of 1965: African Socialism And Its Application To Planning In Kenya.

The paper expresses endeavours of a nascent Kenya State to achieve development on the basis of the concepts and philosophy of *Democratic African Socialism*. It marks a point of departure, (*at least in principle*) from both Western Capitalism and Eastern Communism towards a uniquely African inclined experience in the operations of both the economy and public service. The most fundamental tenets of African socialism promulgated in Session paper NO. 10 are outlined as:

- (1) The economic, social and political development of Kenya will be guided by and on the basis of African socialism
- (2) Control on use of resources will be selected and designed to promote the African tradition of mutual social responsibility in Kenya's development.
- (3) *Africanization* of the economy (The system of African socialism must draw on the best of African traditions). The African traditions here encompassed:
 - (i) *Political democracy* (equality, protection of communities, freedom of expression devoid of social status, and checks and balances against excessive use of power.
 - (ii) *Mutual social responsibilities* – Members do their very best for each other; equal opportunities to all citizens; elimination of exploitation and discrimination and availability of social services such as education, medical care and social security.

In such a system, the nation's productive assets were to be used in the interest of society and its members. For instance, in many African communities, land was essentially communally owned. Members of a 'tribe' (ethnic group) or clan regulated management of land and its resources. Members of the clan/community ensured that resources were properly utilized and the benefits accruing from available resources appropriately distributed. This notion contrasts sharply with the European tradition of absolute ownership.

Under African Socialism, the power to control resources however, resided with the state. Although the objectives of African Socialism placed high priority in political equality, social justice and human dignity, the most important policy was to provide a conducive environment for economic growth. To attain rapid economic growth, the government expected the people to participate fully in the country's development. Conservation of natural resources through national land-use planning, effective use of natural and human resources were also viewed as integral components for the state founded on the framework of African socialism.

However, in spite of the plausible ideals espoused in the above document there was no practical application visible. To the contrary, the country reneged on the philosophy of African Socialism envisaged in the sessional paper, heralding an unprecedented scenario of great economic disparity among Kenyans. More and more Kenyan degenerated to unmitigated poverty while a few affluent people wielded and controlled enormous resources. The document was, therefore, a façade, as it did not initiate any pragmatic application as earlier projected!

2.4.2 Culture in National Development Planning

The National Development Plans since independence have sought to promote various principles of cultural diversity. The National Development Plan of 1966-1970 viewed culture and development in terms of:

- Political equality.
- Social justice
- Human dignity including freedom of conscience
- Equal opportunities, without discrimination on the basis race, tribe, belief etc.

The principles of equity and self-reliance were recognized as engines for balanced and meaningful development. Hard work and self-initiative (through self-based activities) were, therefore, encouraged as the cornerstone of nation building and as being in conformity with the African traditions and aspirations. The vision for a sustainable development was therefore modeled along the African way of life (African Socialism).

The National Development Plan also attempted to address the value of *Kenyanization* as a general strategy for economic development of the Country. The spirit of the plan was to raise living standards and welfare of the Kenyan people by increasing their skills, education, experience, and increasing and spreading the domestic ownership of productive process.

The plan however added that *development of a modern economy required transformation of traditions and patterns of behaviour, which though may be appropriate to traditional economy, are not conducive to development in modern sense.*

The National Plan perceived community development as a process of involving the people in planning and working for their own development and hence national building and economic development. The community development aimed at encouraging people to participate in development by preparing them for change, helping them to understand their role as citizens, to acquire knowledge and skills necessary to carry out responsibilities and meet their needs through voluntary self-help organizations. The ideals of participatory and all-inclusive development, collective responsibility and shared leadership have been effectively captured as sound bases for nation building.

The 1970-1974 Development Plan was basically an enhanced model of the previous plan, but with minor amendments and additions. The National Development Plan defined *culture of people as sum of knowledge, belief and organized action possessed by those people.*

It recognized that the Kenyan people are heirs of diverse cultural traditions and that this richness and diversity must always be preserved, protected and enriched at all costs for continuity. As a

result numerous cultural programmes were embarked on by the Government to address the preservation and dignity of the Kenyan culture. These included;

- (a) The establishment of the National Archives
- (b) The National Library Services
- (c) The National Museums of Kenya and
- (d) The Kenya Cultural Centre - basically for the performing arts. This led to the establishment of the National Theatre School.

National Archives and National museums are mainly concerned with the preservation of the artifacts, while the National cultural Centre and Bomas of Kenya deal with performing arts. All these reflect the diversity and beauty of Culture.

The National Library Services was established as an institutional reference centre for educational development and evolvement of the Kenyan people. All these institutions have played a crucial role in the cultural development of the Kenyan people.

The National Development Plan 2002 – 2008 states that although the Kenya Cultural Centre has been providing a forum for the development and popularization of performing arts both in schools and at the community level the efforts have been undermined by the following factors: declining use of indigenous food management technologies and erosion of African arts and cultural practices by foreign influence.

During the Plan the Government aspired to achieve the following objectives: -

- Empower cultural institutions through advancement of grants to socio-cultural activities
- Establish a National Arts Council to monitor and promote cultural arts
- Establish a research foundation to spearhead research into alternative medicine
- Establish cultural centres in every district

Despite the hype about cultural development in Kenya through various National Development Plans, the Plan implementation processes have not genuinely sought to:

- (i) Discover through intensive study, the role and importance of community's life, customs and general attitude in development. Although recognition is increasingly being given to such cultural attributes as active participation and involvement in community development, dual development systems have persisted with people's talents, beliefs and attitudes in various fields being ignored.
- (ii) Ensure that National development plans are designed to promote a sense of national identity, collective spirit and unity among the people and hence a bargaining point for socio-political and economic strength of a nation.
- (iii) Protect and preserve positive cultural values through information and broadcasting institutions. Some provisions should have been put in place to ensure that local/ Kenyan or African programmes were given prominence at the expense of foreign programmes. Foreign programmes now threaten to undermine our African traditional and cultural values. Furthermore free flow of information should have been qualified further lest our youth are exposed to unwarranted literature available in the modern information media like Internet, movies and televisions.

2.4.3 The Draft National Cultural Policy Of The Republic Of Kenya – 2003

The Draft Cultural Policy follows the UNESCO definition of cultural Policy as a body of operational principles, administrative and budgetary practices and procedures, which provide a basis for cultural action by the state. The following are some highlights of the draft 'Cultural policy'

a) Religion:

The government permits the existence of multiple religious faith as long as those faiths teaches respect for life, personal liberty and do not undermine peaceful coexistence among Kenyans.

b) Social Organization

- The government should endeavour to establish a cohesive nation in which cultural diversely does not jeopardize its national unity and cultural identity.
- The family should be protected from the constraints of external pressures, which threaten to undermine this basic institution of a healthy society.
- While culture should be promoted and respected, retrogressive cultural practices should be discarded.
- Revive, develop and popularize traditional and modern games and sports (Recreational activities) provided they are not detrimental to persons involved.
- Kenya is a multicultural and multi-ethnic society and therefore requires a cultural policy that recognizes its diversity.

c) Food And Drink

Kenya has a variety of food products, dishes and drinks, which meet nutritional values, and aesthetics and these varieties should be explored with the aim of increasing food security.

d) Languages

The Draft Cultural Policy document proposes for the study of traditional languages to a means to address dwindling cultural values. It, therefore recommends for the following pragmatic measures to be carried out:

- Promote the development of all these languages
- Establishment of a national body or council to research, develop and popularize Kiswahili and indigenous languages.
- Elevation of the status of Kiswahili to the level of official national and international language
- The government should support individual public and private organizations to undertake research/write/publish/translate and disseminate in Kiswahili and vernacular languages.

- Encourage and support the use of Kiswahili in Information Technology (IT)

e) Media (T.V. And Radio)

The draft policy proposes the following:

- The government should ensure that radio and television media disseminate Kenyans culturally oriented programmes, and at-least 50% of them (programmes) in the national language (Kiswahili).
- The government should encourage community based, culturally oriented and high based, culturally oriented and high professional quality broadcasting programmes

f) Print Media

- The government should undertake to publish documentaries, diaries and maps on cultural events and sites in the country and make them accessible to all and sundry.
- Review of the copyright Act and other relevant legislation/convention relating to published materials to ensure freedom of expression and protect intellectual property.

g) Cultural Institutions

- Emphasis should be placed on protection and promotion of institutions, which propagate African cultural values.
- Individuals, and institutions must be encouraged to create art galleries, identify, establish and preserve national monuments, museums and sites and cultural centers
- The government should undertake to establish **National Council for Cultural Affairs** that will co-ordinate cultural development in the country.
- Establish a periodic national award scheme to honour and recognize outstanding artistes and other persons in the cultural sector.

h) Tourism

- The government should encourage the public, private institutions and individuals to promote cultural tourism.
- The government should protect peoples against the commercialization and loss of cherished material culture items.

i) Kenya National Dress/Costume

- There is need to take stock of dress designs that will reflect the cultural identity of Kenyan peoples.
- The government should encourage and support efforts of institutions and individual designers involved in the evolution of a national dress.
- The design of the Kenyan dress/costume in official circles should be culturally permissible and acceptable

j) Traditional Medicine

The existing health policies are inadequate for the development of traditional medicine, yet many Kenyans depend on them, notwithstanding the presence of modern Western medicine.

- The government should encourage the recognition of traditional medical practitioners.
- Provide policies and guidelines regarding the practice of alternative medicine
- Protect the patent rights of traditional medicine practitioners.
- Protect sustainable biodiversity and indigenous knowledge and medical practices.
- The government encourages the development of traditional medicine institutions.

While the long overdue draft *Cultural Policy*¹⁰ released recently seems to be progressive, issues of implementation need to be considered.

2.5 Culture, Linguistic Diversity And Language Policy

2.5.1 Definition Of Language And Its Role

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

Ngugi wa Thiongo states that “*Language as culture is the collective memory bank of a people’s experience in history*”¹¹ According to Ngugi, every language has two aspects: One aspect is its role as an agent that enables us to communicate with one another in our struggle to find the means of survival. The other is its role as a carrier of the history and the culture build into the process of that communication over time. “*The two aspects are inseparable; they form a dialectical unity.*”¹² The language is only relevant as far as communication is concerned. The domination of a people’s language by the languages of the colonizing nations was crucial to the domination of the mental.

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

¹⁰ Cultural Policy of the Republic of Kenya (Draft)

¹¹ Ngugi wa Thiong’o *Decolonising the Mind: the politics of Language in African Literature*. Nairobi: Heinemann Kenya, 1986.

¹² Ngugi wa Thiong’o *Moving the centre* Nairobi: EAEP, 1993.

Crucially, precise policy formulations and the inscription of implementation mechanisms must drive the choices. Choices require effective planning. When we say that a language policy requires planning, we mean that its implementation is systematized. This is because language planning is "an explicit and systematic effort to resolve language problems and achieve related goals through institutionally organized intervention in the use and usage of language." (Christian 1989:197). As is commonly recognized, there are two primary paths that may be followed in language planning: status planning, and corpus planning. Status planning refers to a situation in which the status of a language or dialect is repositioned.

For example, Singapore has four official languages – Malay, Tamil, Mandarin, and English—largely due to historical, social and pragmatic reasons. The nation recognizes ethnic diversity by assigning official status to four languages, and promotes the use of all languages in the media and education. Corpus planning refers to efforts to develop a language by, for example, expanding its domains of use. It accompanies status planning, Ferguson (1968) has suggested that there are three types of corpus planning: graphization, modernization and standardization. Whereas graphization may involve orthographic refinement, modernization (elaboration) involves vocabulary expansion, among other things. On the other hand, standardization refers to the creation of models for imitation and their promotion over other models.

Let us revisit Ferguson's "National Social linguistic profile formulas" in order to get a glimpse of how languages can be classified. In his study of the languages of Burkina Faso, Ferguson combined language functions, status and demographic size to distinguish three types of languages within a country. These three types of languages are referred to as "major language", "minor language" and "language of special status".

A major language in a given country, according to Ferguson, is a language, which has one or more of the following characteristics:

- It is spoken as a native language by more than 25% of the population or by more than one million people.
- It is an official language for the Nation
- It is the language of education of over 50% of the secondary school graduates of the nation.

A minor language in Ferguson's definition, is a language which has one or more of the following characteristics:

- It is spoken as a native language by no more than 25% of the population and by either more than 5% or more than 100,000 people;
- It is used as medium of instruction above the first years of primary school, having textbooks other than primers published in it.

Finally Ferguson defines a language of special status in a given country as; one which does not fall into the two preceding categories, but is used in one of the following ways:

- It is widely spoken for religious purposes;
- It is widely used for literacy purposes;

- It is widely taught as subject in secondary school;
- It is used by a substantial number of people as a **lingua franca** within the country
- It functions, as a major language for an age sector of the population.

At the advent of political independence in the late 1950s and early 1960's most African countries adopted their colonial masters' languages as their official languages. Former French Colonies adopted French and became 'Francophone' countries, while former British colonies adopted English hence becoming 'Anglo-phone' countries. Yet others were labeled Lusophone on account of their use of Portuguese. Among the various factors, which determined those important choices were, among others, linguistic diversity, prejudice against indigenous languages, the state of development of these languages, and claims that Western languages were the only ones capable of bringing social and economic development in Africa.

2.5.2 Language Situation In Kenya

Kenya is a multi-lingual and multi-ethnic country. There are about 90 languages in Kenya spoken by about 90 distinct ethnic, sub ethnic and foreign linguistic groups, which have their own traditions, customs and history. Generally the name of the language also depicts the culture of the people that speak it. 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 in terms of linguistic competence and communication competence; being able to communicate does not necessarily refer to knowledge of the culture.

In the absence of reliable statistical data, we have no precise knowledge of the demographic size of the languages spoken in Kenya. We do know, however, that the distribution by language is very uneven ranging from a few hundred to about 3 million speakers.

According to Ferguson's definition of language the major languages in Kenya are English and Kiswahili. English is the official language of the nation and the language of education at all levels of the educational system and Kiswahili is the national language through which a national identity is constructed.

On the same breadth it would be logical to say most of the ethnic languages would be grouped as minor languages by virtue of being "... spoken as a native language by no more than 25% of the population and by either more than 5% or more than 100,000 people. However, Ferguson's classification could be misleading because it is potentially prescriptive and judgmental. Languages initially spoken by a smaller population could be promoted and developed to become icons of national identity.

2.5.3 Current Constitution

The current constitution of Kenya has not specifically addressed the language issue except in Section 53 (1) where there is reference 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.”

Subsequent sub-sections (2) and (3) go on to single out the use of English for 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 of parliamentarians. Section 34(c) of the constitution requires that at the time of nomination for election into 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 for the physically challenged. Contestants not competent in English have legally been barred from contesting elections. In parliament, parliamentarians are allowed to debate in Kiswahili bills drafted in English.

Although English is the official language, functioning as the language of government, Kiswahili plays a quasi-official role in parliament. Certain national documents, such as registration forms for the national identity card and passport, are found in both languages. But Kiswahili is viewed as national language important for national unity and cohesion. The current constitution under review does not recognize it as an official language *per se* despite its importance nationally, regionally and continentally. Further more the current constitution is silent on the role of other Kenyan languages and there are no mechanisms for their protection, promotion and development.

2.5.4 Functions Of National Languages

a) Language and National Unity

At independence Kenya adopted English as the official language. This language therefore remained the language of the government, education, justice, administration and the national system as a whole. The reasons for maintenance of English as the exclusive official language are often attributed to ethnic and linguistic diversity. The general belief is that the choice of one language over others would inevitable trigger ethnic rivalries and threatens National Unity. It erroneously assumed that a foreign language would necessarily create national unity and cohesion.

In addition, the elite have a negative attitude towards African languages. From their perspective, it would seem that progress and modernity can only be achieved through English. As is currently recognized linguistic diversity as a natural phenomenon does not need to be divisive, and linguistic homogeneity does not necessarily lead to social or national cohesion. The ongoing cases of some African countries that are predominantly monolingual (Rwanda, Burundi, Somali for instance) are convincing evidence of this fact. Linguistic diversity, obviously represents a challenge for language planning in multi lingual societies.

b) Language and Education system

The central goal of British colonial government policy was to undertake “ a modernizing mission” in Africa through linguistic and cultural assimilation in order to prepare a market for

their goods, made possible by the industrial revolution. The school system was conceived to be the most effective instrument to achieve this. With such objective, the colonial government (power) regarded African languages as an obstacle to its assimilation goals. The target became the African youth whose transformation was naturally easier than that of the adult. In consequence, these languages were often associated with derogatory terms or ridiculed and were actively discouraged in the school setting. The use of a “disc” in schools as an instrument of punishment and ridicule is an example of such attitude towards the indigenous languages in the formal schooling system. The transformation through the school system was so effective that even in the post-independence era, it is not rare to find African intellectuals who consider African languages inconsequential. Transformed to the colonial way of thinking and clearly bent to British customs and values, these African intellectuals and representatives helped to maintain English as the exclusive medium of instruction and of the administration of the colonies. In so doing, they created the myth that mastering the English language was “the best preparation for personal and national development.”

c) Language and Religion

The use of language for religious purposes is limited to the case of Arabic which is the only language of prayer for Muslims. However, most of the adherents of Islam have no practical knowledge of Arabic as a language. Such knowledge is the privilege of some of the religious leaders who have been trained in the madrasa. The Christian churches, on the other hand resort to the local languages, English and Kiswahili for evangelization.

Despite the gloomy picture of language policy in most third world countries, there are a number of countries, which have registered some success in dealing with the language policy. In this regard, we shall single out India and Tanzania, as a pointer that linguistic diversity is still manageable.

2.5.5 Linguistic Diversity And Language Policy

Due to the multi ethnic nature of most African countries, a national language survey in many sub-Saharan countries of Africa would lead one to identify multiple ‘ethnic languages’. The term ethnic language refers to the fact that many ethnic groups speak different languages which are very distinct and these ethnic groups have their own territory, their own history and traditions. Linguistic diversity in most African countries remains and is still perceived by many as being stumbling block and a handicap to language policy and language planning in Africa. Yet linguistic diversity could function as a resource and motivator for effective language policy.

Fasold (1984) in viewing multilingualism as a resource has suggested the following scenarios in language policy, namely:

- The use of a colonial language and a national language as official languages;
- The promotion of societal multilingualism which can lead to an impressive dynamism in society (the multiplicity of life-styles, and world views can make a nation exciting and stimulating); and

- Multilingualism can serve as an interactional resource for the multilingual speaker. It may create greater inter-ethno-linguistic tolerance because of increased avenues of communication.

Although major languages are now well investigated and could be prepared to assume official functions at different levels, effective interventions would need to deal with attitudes, vagueness, arbitrariness, inconsistencies in policy formulations and lack of implementation mechanisms.

When a policy of avoidance seems difficult to sustain, most African governments resort to vague “accommodation policies” which lack clear vision of language problems. More often than not, there are no clear statements of the objectives to be attained. Since such policies offer no decisive action, and are only debate platforms for literacy discourses based on an exoglossic medium (French, English, Portuguese or Spanish), they act as barriers to mass involvement in national affairs, education and the diffusion of knowledge.

We cannot continue denying the African people crucial specialized information in this century. Indeed, Nida and Wonderly (1971:67) had anticipated the current dilemma. They claimed, “...if so-called developing nations do not wish to condemn themselves to perpetual dependency and to an ever-increasing lag they must make provision for either:

- A sufficient number of persons fully educated in a language of specialized information and continually provided with books in such languages, or
- Adequate programs of translation and publication of such materials in the national language, or
- Even better a combination of these two approaches. In other words, Nida and Wonderly (1971) recommend increased literacy in a language of specialized information and translation and publication programs of materials in the national language. But must the carrier of specialized information be a single language? Is it not possible to have specialized information in all languages at our disposal?

As Okombo (2001:29) has correctly observed, “...we need to allow specialized information to be passed and received in all the three language types, at least to the extent required by the public development needs of the country.” Language alternatives are socially and economically significant. It is vital to recognize that language fulfils symbolic functions in society in addition to facilitating communication.

Thus, the choices made by individual speakers may result from socio-psychological factors, in everyday conversation, or may be planned. In any case, policy decisions may be pegged on the recognition of language as a unifying or separatist force and the need for in-group and out-group communication and interaction. (Garvin & Mathiot 1957; Christian 1989). Consequently, language planning is set in motion not only by linguistic consideration but more so by political, social and economic concerns.

African languages are playing a central role in society even when they are not buttressed by precise language policies. In Kenya for example, the informal sector is wholly made possible by

the presence of African languages. Clearly, national development has a linguistic dimension, yet the general feeling among the African elite is that language problems are not urgent and can wait. African languages are absolutely crucial if we are to "claim the 21st century" (World Bank 2000). According to the World Bank, Africa can only claim this century if it solves its human development crisis. Such a development will need to take a number of thrusts. First, the broad political participation of ordinary people in governance and the development of a democratic culture are virtually impossible without recourse to our indigenous languages.

Language policy is of vital importance for the political stability and legitimacy of the state. Most contemporary African states are experiencing acute economic, social and political problems, while in education there are many symptoms of crisis, according to a study by the World Bank (1988), due to the fact that the majority of Africans run governments and the affairs of the nation in a language they do not understand. 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.

2.5.6 Comparative Analysis Of Language Policy And Planning In Multi-Lingual Setting

a) The Case of India

The most illustrative case of how a nation can assume its linguistic and ethnic diversity is probably India. As depicted by L. M Khubchandani, this country is regarded as "one of the socio-linguistic giants, representing languages and culture of diverse linguistic and ethnic groups. It represents a vivid example of linguistic heterogeneity with a picturesque mosaic of about 200 classified languages spread throughout the country." Like Kenya, India also experienced colonial domination for a long time. Moreover, the linguistic and ethnic diversity of India is probably greater than that of all African countries put together. Although Khubchandani mentions 200 classified languages other authors report that India has more than 1,600 languages. To a certain extent India also experienced a policy of assimilation through its colonial education system. In 1835, Macaulery, a member of the supreme council of India, considered that the goal of education in India was to develop "a class of Indians in blood and colour, but English in tastes, in opinions, in morals and intellect." The Indian situation was also seen by many as hopeless and Weiner considers its "multiplicity a barrier to communication and particularly the development of Indian tribal languages as divisive."

As a newly independent federal country, India had to face the national language question. Although Hindi is by far the most widely spoken language in the country, it could not be selected as the sole official language without hurting the feeling of other nationalities. This has led the Indian government to take a very pluralistic stance by making it possible for each state to determine its own official language(s) and by using the "Three language formula" in education and by making English and Hindi the co-official languages at federal level. In proceeding in this way, India has come to function with a total of 18 languages including English, which according to Le page, accounts for 90% of the population of India.

In conclusion to this short survey of India, we consider that this country has been reasonably successful in implementing its language-planning programme. Some problems remain, but still the Indian experience, indeed, deserves respect and admiration in view of its exceptionally complex situation and its accomplishments.

b) The Case of Tanzania

Tanzania a federation of former Tanganyika and Zanzibar, covers an area of about 350,000 square with an estimated population of about 30,000,000 people. Tanzania is a multi-ethnic and a multilingual country with 135 languages, according to Polome (1967). The country was first under German rule until the end of First World War. Then it became a British colony until 1961, the year of its accession to political independence. Tanzania was fortunate enough to have a wide spread lingua franca, Swahili, which was already used by Germans, and later by the British for administration as well as for primary education.

To that extent, it can be said that Tanzania has inherited more favourable conditions with regard to the national language. It was, therefore, less a problem for Tanzania to determine its national/official language than it was for most other African countries. Swahili was already widely used as a second language by the population and is structurally similar to other indigenous Bantu languages. Furthermore, it was not the mother tongue of any of the powerful socio-cultural groups of the country. Because of all these favourable conditions and because it meets the needs of most people, the adoption of Swahili could hardly meet any resistance.

We must also give credit to the Tanzania Government under the leadership of the late Julius Nyerere, for his determination and his clear vision without which the successful managing of the language situation of the country could have been jeopardized. After declaring Swahili, and Swahili alone, as its national language and later on as its official language, the Tanzanian government has expended considerable efforts for its standardization and diffusion in all parts of the country. Civil servants, for instance were transferred in certain regions of the country where they had no other alternative other than to use Swahili at their work places. The Ujamaa villages also contributed to the spread of Swahili in that they brought together peasants from various ethnic backgrounds having in common Swahili as their second language. The standardization of Swahili made it possible to extend its use as a medium of instruction in secondary schools. English is taught as a subject in primary schools and is a medium of instruction in institutions of higher learning. Indigenous languages have limited use and are mainly restricted to their catchment areas. Kiswahili has functioned efficiently as the language of national unity and consciousness. It has facilitated high levels of literacy.

The National Swahili Council of Tanzania (BAKITA) is established through an Act of Parliament. The Act, passed August 1, 1967 stipulates the functions of the Council as follows:

- a) To promote the development and usage of the Swahili language throughout the United Republic;
- b) To co-operate with other bodies in the United Republic which are concerned to promote the Swahili language and to endeavor to co-ordinate their activities;

- c) To encourage the use of the Swahili language in the conduct of official business and public life generally;
- d) To encourage the achievement of high standards in the use of the Swahili language and to discourage its misuse;
- e) To co-operate with the authorities concerned in establishing standard Swahili translations of technical terms;
- f) To publish a Swahili newspaper or magazine concerned with the Swahili language and literature;
- g) To provide service to the Government, public authorities and individual authors writing in Swahili with respect to the Swahili language.

Tanzania has sought to inscribe the place of Kiswahili in the legal statutes and has set up important organs for the implementation of its policy- the Institute of Kiswahili Research and the National Kiswahili Council.

The Tanzanian experience is generally viewed as a near instance of successful planning in the African continent. As R. Fasold simply puts it “Tanzania has achieved a near-optimum mix of unity and diversity.” It has two official languages: English and Kiswahili, and one national language, Kiswahili.

The possibility of having more than one official language receives support from Israel where Hebrew and Arabic are official languages; Canada, where English and French are official languages, and Singapore which has four official languages – Malay, Tamil, Mandarin, and English. The nation recognizes ethnic diversity by assigning official status to four languages, and promotes the use of all languages in the media and education

From the above overview of the Indian and Tanzanian experiences of language planning, the following conclusions can be drawn: -

- 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:
- Language planning is primarily a matter of political will. It does not need to be successful at first shot.

2.6 Globalizations and Culture

Globalization has now become a household term, used to characterize, explain and justify many current economic and social developments. Globalization is a phenomenon describing the

processes characterizing the multiplicity of linkages, interconnection and interdependence in the world (between states and societies), economically, culturally (Global village) and politically.

The term and its common usage convey the impression that it is potentially and actually possible for local people to get in touch, interact with other people and communities world-wide. In other words, our consumption, production, exchange, leisure and cultural activities are more integrated with the rest of the world than widely appreciated.

The aggressive spread of communication technologies (often controlled by western multinationals) however, now poses new challenges to local cultures and values in Africa and other non-Western Societies. This tidal wave of Western culture through ICT is encroaching across the globe like bush fire with the people of Africa rapidly embracing western cultural values. Young people are the most vulnerable to succumb to the global cultural forces and influences and consequently are faced with a serious identity crisis.

The global media, music and film and publishing companies have permeated the world with unprecedented verve. Currently, M.T.V. television station reaches nearly 300 million households in over 70 countries. Local television stations in many African countries have filled their transmissions with cost effective foreign programmes for fear of losing viewers. Currently, KTN station is running *Big Brother Africa* show (a prototype of *Big Brother UK*), watched by approximately 30 million viewers in Africa and which has been characterized thus

“the housemates are promiscuous, profane and obnoxious. They seem to have no problem in conducting multiple love affairs, or in consummating them on camera. They are deceitful and duplicitous... Getting drunk is usually the highlight of the week. Their long tedious conversations contain not a hinge of intellectual in-depth, nor of any spiritual or religious depth”¹³

Many Africans identify heroes/heroines of American Soap Operas of Western Programmes and dream of living like them.

The Information and Communication Technology the driving force of cultural globalization has been cited as a veritable instrument for propagating Western Culture. In his paper on Globalization and Culture, Robert Davison confirms that:

Information and Communication Technologies are widely considered to be enablers of globalization processes, that is processed, which cut across national boundaries, integrating and connecting communities in a new space-time combinations, and making the world in reality and inexperience more interconnected.

As a result research has established that half of the world's 6,000 documented languages face extinction and so are the cultures, which gave rise to them. UNESCO has set up systems to monitor endangered languages (languages no longer spoken by at least 30 percent of the

¹³ Sunny Bidra *In Africa, Big Brother is always watching us'* Sunday Nation July 13, 2003.

community's children). Indeed, "*the agency (UNESCO) is urging countries to protect languages as natural and cultural treasures.*"¹⁴

The Atlas of the *World's languages in Danger of Disappearing* records that the reasons for a steady increase in the pace of disappearing languages are among other factors, intrusion by foreigners, official sanctions against the use of minority languages in schools, local authorities and the media.

In many quarters, English is considered to be the language of globalization and that by 2050 half the world will be more or less proficient in English. The implication here is that many languages and by extension cultures, will be obsolete by then. Clark Judge has equated this phenomenon to *cultural imperialism* in his book *Hegemony of the Mind* quoted in *Policy Review Website*. The aftermath is the end of cultural diversity, and the triumph of uni-polar culture serving the needs of transnational corporation. Hence *the world drinks coca-cola, watches American movies and eats American junk food* (Globalization Guide website).

In Kenya, according to a recent report by UNESCO "Extinct and Endangered Languages," sixteen out of Kenya's '42' languages (*though this number is not representative as there are about 90 languages in Kenya*) are at a serious risk of disappearing. The report advises that:

*It is important to develop and sustain languages and protect them, from being adulterated and overwhelmed by outside influences, as happens when one culture dominates another.*¹⁵

It is against this backdrop that the Centre for Endangered languages (CEL) was established in Nakuru in 2002 to address the threat of extinction to which most of the languages in Kenya are exposed. The National Coordinator of the Center for Endangered Languages (CEL) in Kenya, Mr. Kiplangat, argues that minority communities experience intense pressure - economic, social and political – and are threatened to abandon their cultures, including their languages. Some of these minorities include the *Ogiek, Elmolo, Sengwer, Yaaku* and *Waata*, most of them traditionally hunters and gathers.

Overall, research indicates that 90% of world's languages will disappear in the next century (21st C) and that production and consumption of cultural goods and services will be the order of the day as the globalized "cultural" industries take over the traditional forms of creation and dissemination of culture. Cultural globalization destroys diversity and displaces the opportunity to sustain human life through a crucible of many different cultures.

One significant handicap of globalization trends is that the process would lead to cultural homogeneity. However, globalization is not a homogenous process that can be mutually transferred across national boundaries without a devastating visitation on local cultures. An article located at *Globalization Guide*, a Canadian website supported by the Stanley Foundation states that, *it does not make sense to talk of a world of 6 billion people becoming a monoculture.*

¹⁴ Daniel Nelson *Last World Looms for Half of the World's Languages* *One World* February 21, 2002

¹⁵ Kiplangat Cheruiyot "Our Languages are dying" *One World* February 24, 2003

While there are values in embracing multiculturalism to enhance political stability, economic development and national unity, the impact of globalization on multiculturalism has presented heavy challenges to the world. As a result, many countries, Kenya included, are at cultural cross-roads confronted by a multitude of crises epitomized by poverty. Other influences like the media, the role of multinational companies and Bretton Woods in development and the general lifestyles confirm this fear.

PART II: CULTURE IN INTERNATIONAL POLICY AND LAW

3.0 INTRODUCTION

There are several international instruments that provide for the promotion and protection of culture and cultural rights. These include the International Covenant on Economic, Social and Cultural Rights (ICESCR), Universal Declaration of Human Rights United Nations Educational, Scientific and Cultural Organization Documents, Convention Concerning the Protection of the World Cultural and Natural Heritage and the African Charter on Human and Peoples' Rights

3.1 The International Covenant on Economic, Social and Cultural Rights (ICESCR)

This instrument provides in Art 1(1) that all people's have the right of self determination. By virtue of that right they determine their political status and freely pursue their economic, social and cultural development. The instrument further requires the state party to undertake to guarantee that the rights in the Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status and to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the covenant.

The State Parties should recognize that in the enjoyment of those rights provided, people have the right to work, social security and social assurance and that the widest possible protection and assistance should be accorded to the family, which is the natural and fundamental unit of the society, particularly for its establishment and while it is responsible for the care and education of dependant children. Marriage must be entered into with the free consent of the intending spouses. Further that special protection should be accorded to mothers during a reasonable period before and after childbirth and that special measures of protection and assistance should be taken on behalf of all children and young persons without discrimination for reasons of parentage or other conditions.

The state parties should also recognize the right of everyone to education and to have respect for the liberty of parents to choose schools for their children schools to ensure the religious moral education of their children in conformity with their own convictions.

State Parties further recognize the right of everyone to take part in cultural life; enjoy the benefits of scientific progress and its applications; and benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production. This right shall include those necessary for the conservation, the development and the diffusion of science and culture.

3.2 The Universal Declaration of Human Rights

The Universal Declaration of Human Rights while affirming all the social, economic cultural rights of the individual and people emphasizes the right to freedom of thought, conscience and religion including freedom to change his religion or belief, and freedom, either alone or in

community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

It provides for the right to freedom of opinion and expression which includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers. Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

Article 27 specifically, provides that everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits; and everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author. Article 29 states that everyone has duties to the community in which alone the free and full development of his personality is possible.

Article 16 provides that men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution; and that marriage shall be entered into only with the free and full consent of the intending spouses. The family is the natural and fundamental group unit of society and is entitled

3.3 The African Charter on Human and Peoples' Rights

The African Charter on Human and Peoples' Rights affirms the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights (ICESCR). It however takes into consideration the virtues of African peoples historical traditions and the values of African civilization, which should inspire and characterize their reflection on the concept of human and peoples' rights. It further *recognizes* that fundamental human rights stem from the attributes of human beings, which justifies their international protection and that the reality and respect of peoples' rights should necessarily guarantee human rights.

The African Charter on Human and Peoples' Rights *expresses the Consciousness* of peoples' duty to achieve the total liberation of Africa, the peoples' of which are still struggling for their dignity and genuine independence, and undertaking to eliminate colonialism, neo-colonialism, apartheid, Zionism, and to dismantle aggressive foreign military bases and all forms of discrimination, particularly those based on race, ethnic group, colour, sex, language, religion or political opinion. ;

Article 17 provides that every person may freely take part in the cultural life of his community and that the promotion and protection of morals and traditional values recognized by the community shall be the duty of the State.

Article 18 stresses that the State shall have the duty to assist the family, which is the custodian of morals and traditional values recognized by the community and to eliminate every

discrimination against women and also ensure the protection of the right of the women and the child as stipulated in international declaration and conventions. The aged and the disabled shall also have the right to special measures of protection in keeping with their physical and moral needs.

Article 20 provides that all peoples shall have right to existence and that all peoples have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.

Chapter two of the Charter provides for the duties of the individual.

- Article 27: Every individual shall have duties towards his family and society, the State and other legally recognized communities and the international community; The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.
- Article 28: Every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance.
- Article 29: The individual shall also have the duty: to preserve the harmonious development of the family and to work for the cohesion and respect of the family; to respect his parents at all times, to maintain them in case of need; to preserve and strengthen positive African cultural values in his relation with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, the contribute to the promotion of the moral well-being of society;

3.4 Convention Concerning the Protection of the World Cultural and Natural Heritage

This instrument notes with concern that cultural heritage and the natural heritage are increasingly threatened with destruction not only by the traditional causes of decay, but also by changing social and economic conditions which aggravate the situation with even more formidable phenomena of damage or destruction. The Convention considers that that deterioration or disappearance of any item of the cultural or natural heritage constitutes a harmful impoverishment of the heritage of all the nations of the world; and that the protection of this heritage at the national level often remains incomplete because of the scale of the resources which it requires and of the insufficient economic, scientific, and technological resources of the country where the property to be protected is situated.

The Convention provides the definition of cultural heritage as:

*“monuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science;
groups of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science;
sites: works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view”.*

Article 4 requires the state to recognize its duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage.

Article 5 provides that the state should ensure that effective and active measures are taken for the protection, conservation and presentation of the cultural and natural heritage including adoption of appropriate policies. The aims such policies are to:

- Give the cultural and natural heritage a function in the life of the community and to integrate the protection of that heritage into comprehensive planning programmes;
- Set up such services for the protection, conservation and presentation of the cultural and natural heritage;
- Develop scientific and technical studies and research and to work out such operating methods as will make the State capable of counteracting the dangers that threaten its cultural or natural heritage;
- Take the appropriate legal, scientific, technical, administrative and financial measures necessary for the identification, protection, conservation, presentation and rehabilitation of this heritage; and
- Foster the establishment or development of national center for training in the protection, conservation and presentation of the cultural and natural heritage and to encourage scientific research in this field.

Article 27 requires the State to endeavor by all appropriate means, and in particular by educational and information programmes, to strengthen appreciation and respect by their peoples of the cultural and natural heritage and that the state shall undertake to keep the public broadly informed of the dangers threatening this heritage and of the activities carried on.

3.5 The United Nations Educations, Scientific and Cultural Organisation Documents

The United Nations Educations, Scientific and Cultural Organisation has developed a number of instruments and documents aimed at facilitating international circulation of visual and auditory materials of an educational, scientific and cultural character; prohibiting and preventing the illicit import, export and transfer of ownership of cultural property; and facilitating participation by the people at large in cultural life and their contribution to it. They are as follows:

3.5.1 Agreement For Facilitating The International Circulation Of Visual And Auditory Materials Of An Educational, Scientific And Cultural Character (The "Beirut Agreement"), 1948

Basically concerned with customs and importation, this Convention covers the following kinds of materials: films, filmstrips, microfilms, sound recordings, slides, static and moving models, charts, maps and posters. If they are educational, scientific or cultural in nature, these items are exempted from custom duties, quotas and import licences when they are imported by a Contracting State. In addition, they are not subject to higher internal taxes than those applied to like items produced in the importing country, and they receive equally favourable treatment in so far as regulations concerning sale, transport, distribution, reproduction and display are concerned. A certificate issued by the authorities of the exporting country must testify to the nature of the materials covered by the Agreement. Contracting States also undertake to seek together means of reducing restrictions not covered by this instrument. The Agreement came into force on 12 August 1954

3.5.2 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property

The purpose of this Convention is to prohibit and prevent the illicit import, export and transfer of ownership of cultural property. While considering that the interchange of cultural property among nations for scientific cultural and educational purposes increases the knowledge of the civilization of Man; enriches the cultural life of all peoples; and inspires mutual respect and appreciation among nations, the Convention underscores the fact that illicit import, export and transfer of ownership of cultural property is an obstacle to understanding between nations.

It states that cultural property constitutes one of the basic elements of civilization and national culture, and that its true value can be appreciated only in relation to the fullest possible information regarding its origin, history and traditional setting. The Convention therefore requires the state to protect the cultural property existing within its territory against the dangers of theft, clandestine excavation, and illicit export. To avert these dangers, it is essential for the State to become increasingly alive to the moral obligations to respect its own cultural heritage

and that of all nations. In this regard *various* cultural institutions, museums, libraries and archives should ensure that their collections are built up in accordance with universally recognized moral principles.

3.5.3 Recommendation on Participation by the People at Large in Cultural Life and their Contribution to It

The spirit of this document is captured in its preamble, which makes reference to the provisions of Article 27 of the Universal Declaration of Human Rights, "everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits."

There is recognition that the wide diffusion of culture, and the education of humanity for justice and liberty and peace are indispensable to the dignity of man and that each culture has a dignity and value which must be respected and preserved and that one of the aims of international cultural co-operation is "to enable everyone to have access to knowledge, to enjoy the arts and literature of all peoples, to share in advances made in science in all parts of the world and in the resulting benefits, and to contribute to the enrichment of cultural life".

It notes that cultural development not only complements and regulates general development but is also a true instrument of progress. It recognizes that:

- (a) culture is an integral part of social life and that a policy for culture must therefore be seen in the broad context of general State policy, and that culture is, in its very essence, a social phenomenon resulting from individuals joining and co-operating in creative activities,
- (b) culture is today becoming an important element in human life and one of the principal factors in the progress of mankind, and that an essential premise for such progress is to ensure the constant growth of society's spiritual potential, based on the full, harmonious development of all its members and the free play of their creative faculties,
- (c) culture is not merely an accumulation of works and knowledge which an élite produces, collects and conserves in order to place it within reach of all; or that a people rich in its past and its heritage offers to others as a model which their own history has failed to provide for them; that culture is not limited to access to works of art and the humanities, but is at one and the same time the acquisition of knowledge, the demand for a way of life and the need to communicate,

It takes into account that participation by the greatest possible number of people and associations in a wide variety of cultural activities of their own free choice is essential to the development of the basic human values and dignity of the individual, and that access by the people at large to cultural values can be assured only if social and economic conditions are created that will enable them not only to enjoy the benefits of culture, but also to take an active part in overall cultural life and in the process of cultural development,

It also takes into account that access to culture and participation in cultural life are two complementary aspects of the same thing, as is evident from the way in which one affects the other - access may promote participation in cultural life and participation may broaden access to culture by endowing it with its true meaning - and that without participation, mere access to culture necessarily falls short of the objectives of cultural development,

It notes that cultural action often involves only a minute proportion of the population and that, moreover, existing organizations and the means used do not always meet the needs of those who are in a particularly vulnerable position because of their inadequate education, low standard of living, poor housing conditions and economic and social dependence in general, and that there is often a wide discrepancy between the reality and the proclaimed ideals, declared intentions, programmes or expected results.

It is borne that while it is essential and urgent to define objectives, contents and methods for a policy of participation by the people at large in cultural life, the solutions envisaged cannot be identical for all countries, in view of the current differences between the socio-economic and political situations in states, yet the problem of access and participation can be solved by collective approaches extending to many sectors and aspects of life; that such approaches should be diversified according to the special characteristics of each community, the whole forming a true design for living calling for basic policy options,

Access to culture and participation in cultural life are essential components of an overall social policy dealing with the condition of the working masses, the organization of labour, leisure time, family life, education and training, town-planning and the environment. It takes into account the important role that can be played in cultural and social life by:

- Young people, whose mission is to contribute to the evolution and progress of society;
- Parents, particularly because of the decisive influence which they exercise on the cultural education of children and the development of their creativity;
- Elderly people who are available to discharge a new social and cultural function;
- Workers, because of the active contribution they make to social changes;
- Artists, as creators and bearers of cultural values;
- Cultural development personnel whose task is to secure the effective participation in cultural life of all sections of the population and to ascertain and express their aspirations, relying for this purpose on the collaboration of the spontaneous leaders of the community.

Access and participation provide everyone with the opportunity not only to receive benefits but also to express himself/herself in all the circumstances of social life, imply the greatest liberty and tolerance in the fields of cultural training and the creation and dissemination of culture. Participation in cultural life presupposes an affirmation of the personality, its dignity and value, and also the implementation of the fundamental rights and freedoms of man attested by the Charter of the United Nations and international legal instruments concerning human rights, and that the cultural development of the individual is hindered by such phenomena as the policy of aggression, colonialism, neo-colonialism, fascism and racism in all its forms and manifestations, as well as by other causes. Such participation in cultural life takes the form of an assertion of identity, authenticity and dignity -integrity of identity is threatened by numerous causes of erosion stemming, in particular, from the prevalence of inappropriate models or of techniques which have not been fully mastered.

This document consider that assertion of cultural identity should not result in the formation of isolated groups but should, on the contrary, go hand in hand with a mutual desire for wide and frequent contacts, and that such contacts are a fundamental requirement without which the objectives of the present recommendation would be unattainable. It recognizes the fundamental

part played by general education, cultural education and artistic training, and the use of working time and free time, with a view to full cultural development, in a context of life-long education.

It notes that mass media can serve as instruments of cultural enrichment, both by opening up unprecedented possibilities of cultural development, in contributing to the liberation of the latent cultural potential of individuals, to the preservation and popularization of traditional forms of culture, and to the creation and dissemination of new forms, and by turning themselves into media for group communication and promoting direct participation by the people.

Considering that the ultimate objective of access and participation is to raise the spiritual and cultural level of society as a whole on the basis of humanistic values and to endow culture with a humanistic and democratic content, and that this in turn implies taking measures against the harmful effect of "commercial mass culture", which threatens national cultures and the cultural development of mankind, leads to debasement of the personality and exerts a particularly harmful influence on the young generation.

In a nutshell, this document recognizes the following means to access to and participation in culture: -

- Decentralization of activities, facilities and decisions
- Concerted action
- Trade unions and other workers organizations
- "Animation"
- Artistic creation
- Cultural industries
- Dissemination
- Research
- Communication
- Education
- Youth
- Environment

PART III: CULTURE, CONSTITUTIONAL AND LEGISLATIVE PRACTICES

4.0 CURRENT CONSTITUTIONAL PROVISIONS ON CULTURE

The current Constitution of Kenya is made up of eleven chapters touching on the Republic of Kenya, the Executive, Parliament, The Judicature, the protection of fundamental rights and freedoms of the individual, citizenship, Finance, Public Service, Trust land, General and transitory provisions. The Constitution however, has very few provisions that directly refer to and deal with culture. These are those that deal with:

- The making of Swahili an official language in the National Assembly as in Section 53,
- The creation of the Kadhi Courts as in section 66,
- The right to be informed of the charges made against one in a language that one understands as in Section 77,
- The right to the application of one's personal law in matters of personal law including adoption, marriage, divorce, burial, inheritance of property on death as in section 82.
- The requirement to know Swahili before one is naturalized as in Section 93.
- The holding of Trust Land by the county council, for the benefit of the persons ordinarily resident on that land under the African Customary law as in Section 115.
- The payment of full compensation to an owner of land under the African customary law before his land is set apart as in section 117.
- The extinguishing of the land rights accruing under customary law to a family, tribe, group or individual, once the county council has set apart that particular area of land as in section 118.

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

5.0 LEGISLATION THAT HAS RELEVANCE TO CULTURE

Item	Legislation	Outline of the Legislation	Remarks on the Cultural aspect in question	Recommendations
1	<p align="center">The Judicature Act, CAP 8</p>	<p>This legislation provides for the sources of the law of Kenya. Section 3 lists African customary law as a source of law in civil cases so long as it is not repugnant to justice and morality or inconsistent with written law.</p> <p>The substance of common law, doctrines of equity and statutes of general application applicable in England on 12th August 1897 are under this Act too recognized as a source of the laws of Kenya.</p>	<p>The place of customary law in the Kenya jurisprudence is recognized under this Act.</p> <p>The application of customary law is however hampered by the fact that it is unwritten. There have been problems arising from intermarriages and where people have opted for a more cosmopolitan way of living as opposed to practicing/up holding their traditions especially in cases of death.</p> <p>The phrase, “repugnant to justice and morality” is amorphous and can be used to prevent the application of customary law. The standards of determining repugnancy are subjective and could be used to block out the application of customary law.</p> <p>The Judicature Act has created a hierarchy with the African customary law ranking lowest.</p>	<p>Customary law ought to be recognized as a source of Kenyan law at an equal footing with the subsidiary legislation.</p> <p>There should be developed a common law of Kenya to substitute the common law of England.</p> <p>Application of customary law should not be tied to the repugnancy clause. It should simply provide that customary law is a source of law in civil cases/matters of personal law. What is repugnant should be set out and criminalized under the criminal law.</p>

Item	Legislation	Outline of the Legislation	Remarks on the Cultural aspect in question	Recommendations
2	The Magistrates' Courts Act, CAP 10	This Act gives jurisdiction to subordinate courts. Under Section 9B it gives jurisdiction to a panel of elders to handle cases relating to land i.e. beneficial ownership, division of and determination of boundaries and trespass to land.	Cultural institutions of governance such as councils of elders have not been recognized. The recognition by this statute of the panel of elders in the settlement of land disputes is therefore unique.	The recognition of traditional courts or courts constituted by panel of elders e.g the Njuri Nchenke of Meru should not only be limited to land disputes. There jurisdiction should be extended to matters of personal law.
3	Public Archives, CAP 19	This Act establishes the Kenya National Archives and Documentation Service and provides for the preservation of public archives and records.	Preservation of culture	
4	Penal Code, CAP 63	This Act establishes a code of criminal law. It sets out the criminal offences and recognizes that they are punishable through the courts of law.	This Act does not recognize the trial for acts listed as criminal traditionally/ customarily. Some actions that are not necessarily wrong under various customs are criminalized. Wife beating for example is under most traditions accepted while it is an offence under the laws of assault.	Retrogressive culture should be expressly criminalized under the Act. These include wife beating and female genital mutilation.

Item	Legislation	Outline of the Legislation	Remarks on the Cultural aspect in question	Recommendations
			Most communities had specific penalties for every crime committed, an aspect that has been taken up by the penal code.	
5.	Criminal Procedure Act, CAP 75	This Act makes provision for procedure to be followed in criminal cases.		
6.	Witchcraft, CAP 67	This Act provides that any person who holds himself out as a witch doctor able to cause fear, annoyance or injury to, another in the mind, person or property or who pretends to exercise any kind of supernatural power, witchcraft, sorcery or enchantment calculated to cause such fear, annoyance or injury shall be guilty of an offence. Professing to knowledge of witchcraft or using witch medicine with the intent to injure and the possession of charms all	This Act attempts to eliminate harmful customs. It perceives witchcraft as repugnant. However this is a statutes that has suppressed expression and documentation of some of the beliefs of certain people.	This Act ought to be repealed.

Item	Legislation	Outline of the Legislation	Remarks on the Cultural aspect in question	Recommendations
		amount to offences.		
7.	Chang'aa Prohibition, CAP 70	This Act prohibits the manufacture, supply and possession of chang'aa.	Many communities in Kenya have traditional drinks a number of which have been illegalised under this statute.	Repeal the Act.
8.	Statistics, CAP 112	This Act among others provides for the taking of census.	Often when the census is taken people are grouped ethnically. This can be a check to prevent extinction an ethnic group.	In taking census, people should be properly identified. Smaller ethnic groups for example should be identified as such instead of being grouped as part of larger groups.
9.	Traditional Liquor, CAP 122	This is an Act of Parliament for the control of the manufacture for sale and sale of intoxicating liquor, other than spirits of traditional types. It defines traditional liquor as an intoxicating liquor manufactured by African methods, which is intended to be offered for sale in a state of continuing fermentation, or one that the Minister declares as traditional liquor.	Traditional liquor has/had a lot of significance among most of the Kenyan ethnic groups as it plays an important role in the social and economic ceremonies and rituals.	This Act should be repealed.

Item	Legislation	Outline of the Legislation	Remarks on the Cultural aspect in question	Recommendations
10.	The Children Act, 2001	<p>This Act makes provision for parental responsibility, fostering, adoption, custody, maintenance, guardianship, care and protection of children.</p> <p>In providing for the protection of children, the Act provides that children are protected from harmful traditional practices. These are practices such as female genital mutilation and early child marriages.</p> <p>The identity of a person which is very crucial to the culture of a people is identified here wherein the Act provides that every child has a right to a name and nationality.</p>	<p>While making provision to ensure that the best interests of the child are paramount, the Act has failed to take certain key customs into account. For example as relates to parental responsibility in relation to a child born outside wedlock, the Act provides that parental responsibility shall be with the mother except in instances whether the father applies for parental responsibility. This is a total contradiction to some of the customs that hold it the child belongs to the father whether or not born within wedlock (e.g. Meru, Luhya, Luo)</p> <p>The Act is nevertheless very progressive.</p>	
11.	Marriage, CAP 150	This Act provides for civil marriages.	The Act is modeled on the English marriage system. It for example provides that no marriage in Kenya shall be valid which if celebrated in England would be null and void	

Item	Legislation	Outline of the Legislation	Remarks on the Cultural aspect in question	Recommendations
			<p>on the ground of kindred or affinity or where either of the parties thereto at the time of the celebration to any person other than the person with whom such marriage is had.</p> <p>Section 37 provides that persons married under this Act are incapable during the continuous of that marriage to contract a valid marriage under any law or custom. This section prevents a person married under the Act from converting the marriage into a customary one. Considering that a person married under the customary laws has an option converting the marriage into one under the Act, this inferiorities the customary marriage.</p>	
12.	African Christian Marriage and Divorce, CAP 151	The Act provides for marriages of African Christians and dissolution thereof. It has gone further to provide for the status of Christian widows i.e. that they shall not be bound to cohabit with the brother or	The Act while progressive, fails to bring out the positive African aspect of marriages.	Incorporate the positive aspects of African marriages e.g. the need for ceremonies that were conducted to bind the families together.

Item	Legislation	Outline of the Legislation	Remarks on the Cultural aspect in question	Recommendations
		any other relative of her deceased husband or any other person.		
13.	Subordinate Courts (Separation and Maintenance, CAP 152	This Act allows married women to apply to subordinate courts for separation and maintenance orders. The grounds for which the woman may rely on are listed in the Act.	Under most of the African customs it is the responsibility of the man to support his wife and children and this has been reflected under this Act.	Retain the Act in its current state.
14.	Mohammedan Marriage, Divorce and Succession, CAP 155	This Act provides for the registration of Mohammedan marriages and divorces.	This Act has carried forth and legitimized the Islamic beliefs on marriage and divorce.	Retain the Act in its current state
15.	Hindu Marriage and Divorce, CAP 157	The Act regulates the marriage of and provides for matrimonial causes between Hindus and persons of allied religions.	This Act has carried forth and legitimized the Hindu beliefs on marriage and divorce.	Retain the Act in its current state
16.	Law of Succession Act, CAP 160	The Act defines and consolidates the law relating to intestate and testamentary succession and the administration of estates of deceased persons. Certain groups have been excluded from having the Act apply to	Whereas customary law is applicable in cases of succession, being customary, it ranks at a lesser level than statutory law.	Harmonise this Act with the laws relating to marriages and allow the application of customary law that is not discriminatory.

Item	Legislation	Outline of the Legislation	Remarks on the Cultural aspect in question	Recommendations
		them i.e. Muslims and certain communities.		
17.	Public Trustees Act, CAP 165	This Act makes provision for the appointment of a public trustee to administer the estates of deceased persons where a person dies intestate, or there's a will and the executors are dead, denounced or unwilling.		
18.	Kenya Literature Bureau, CAP 209	<p>This Act establishes the Kenya Literature Bureau whose functions are among others</p> <p>a) To carry on the business of publishing, printing and distributing literary, educational, cultural and scientific books, periodicals, journals magazines and works of every description;</p> <p>b) To acquire the copyrights in and rights and licences over literary and other works of every description;</p> <p>c) To promote</p>	To sustain a culture, it is desirable that certain aspects of the culture be reduced into writings for reference purposes.	The Bureau should have the mandate of publishing the customs and traditions of all the groups of the people of Kenya.

Item	Legislation	Outline of the Legislation	Remarks on the Cultural aspect in question	Recommendations
		through appropriate Government agencies the production of low cost adult literacy, educational, cultural and scientific literature and materials and make them available for distribution throughout Kenya.		
19.	Antiquities and Monuments, CAP 215	This is an Act of Parliament to provide for the preservation of antiquities and monuments. It allows the Minister to declare a specified place or immovable structure that he considers as of historic interest to be a monument; or a site on which a buried monument or object of archaeological or palaeontological interest exists or is believed to exist to be protected; or a specified object whether or not part of an immovable structure, which he considers to be historical	Most communities have structures, places or sites that of cultural interest that can be protected under this Act.	

Item	Legislation	Outline of the Legislation	Remarks on the Cultural aspect in question	Recommendations
		or cultural interest to be protected.		
20.	National Museums, CAP 216	This is an Act of Parliament for the establishment, control and management and development of National Museums whose functions are to serve as a national repository of things of scientific, cultural, technological and human interest and serve as a place where research and dissemination of knowledge in all fields of scientific, cultural, technological and human interest may be undertaken.	This has been an avenue to exhibit and preserve culture.	It should be provided that there shall be established museums in every district to serve as a repository of materials of cultural interest.
21.	Kenya Cultural Centre, CAP 218	The Act incorporates the Kenya Cultural Centre.	Act creates avenue for the promotion of culture.	
22.	Kenya National Library Service Board, CAP 225	This Act establishes the Kenya National Library Service Board which has the functions of among others promoting,	Allows for the preservation of culture.	

Item	Legislation	Outline of the Legislation	Remarks on the Cultural aspect in question	Recommendations
		establishing, equipping, maintaining, managing and equipping libraries in Kenya.		
23.	Science and Technology, CAP 250	This is an Act of Parliament to establish the machinery for making available to the Government advice upon all matters relating to scientific knowledge, technological activities and research necessary for the proper development of the Republic and for coordination of research and experimental development.	This is an Act that would enable that science and technology in the country is limited to that which is culturally acceptable.	
24.	Human Tissue CAP 252	This Act makes provision with respect to the use of parts of bodies of deceased persons for therapeutic purposes of medical education and research and for matters connected therewith and incidental thereto. This Act allows a person who is ailing to will his/her body upon his/her		

Item	Legislation	Outline of the Legislation	Remarks on the Cultural aspect in question	Recommendations
		demise for use in research.		
25.	Medical Practitioners and Dentists CAP 253	This is an Act that provides for the licensing of medical practitioners and dentists.	The Act does not make reference to the licensing of traditional healthcare practitioners.	Create modalities for the licensing of traditional health care practitioners.
26.	Copyright 2001, CAP 130	This Act makes provision for copyright in literary, musical and artistic works, sound recordings and broadcasts, artistic works includes paintings, drawings, etchings, lithographs, woodworks, engravings and prints, works of sculpture, works of architecture in form of buildings or models, artistic craftsmanship, works of tissues and articles of applied handicrafts and industrial arts.	Aspects of communally owned intellectual property not protected e.g. folklore, <i>kiondo</i> .	Need to address intellectual property question from a communal point of view.
27.	Industrial property, 2001	This is an Act that provides for the protection of patent rights.		

6.0 PROVISIONS ON CULTURE IN OTHER CONSTITUTIONS

An analysis of various constitutions of the world show that most of the countries that have directly provided for culture in their constitutions have done so in the chapters on the directive principles of state policy and/or in the Bill of Rights. The following are some countries whose constitutions we have been looked at:

a) Swaziland

The current constitution of Swaziland has no direct provisions on culture. The Draft Constitution has however taken up on the issue. The preamble of the Draft Constitution makes reference to the necessity to blend the good institutions of traditional law and custom with those of an open and democratic society so as to promote transparency and the social, economic and cultural development of the Nation.

Official languages are stated as being siSwati and English and it is provided that Swaziland has adopted Christianity as the official religion.

Chapter three of the Draft is devoted to the Monarchy. Succession to the office of the King is noted as being hereditary and governed by the Swazi law and custom.

Chapter fifteen is dedicated to traditional institutions. It provides that the Swazi traditional government is administered according to Swazi law and custom and the traditional institutions that are pillars of the monarchy. It guarantees a listed number of Swazi traditional institutions and goes ahead to describe each of these institutions.

Chapter nineteen has miscellaneous provisions that provide for a council of chiefs whose responsibility among others is to advise the King on customary issues and other matters relating to or affecting chieftaincy. There is also provided the Law of Swaziland and among them is recognized the principles of Swazi Customary Law to be enforced as part of the law of Swaziland.

The application of these principles is qualified by providing that they shall not apply in respect of any custom that is, and to the extent that it is, inconsistent with a provision of the constitution or a statute, or repugnant to natural justice or morality or general principles of humanity. Parliament has the mandate to provide for the proof and pleading of the rule of custom for any purpose, to regulate the manner or purpose in which the custom may be recognized, applied or enforced and to provide for the resolution of conflicts of customs or conflicts of personal laws.

The application of culture can be discerned from a number of other Articles in the Draft Constitution. Reference to a number of things in the Constitution is made in the siSwati language. As is the case with most African culture, constitution of the kingdom of Swaziland provides that children have the duty to respect their parents at all times and to maintain those parents in case of need.

b) Uganda

The Constitution of Uganda in its Chapter on Directive Principles of State Policy has a provision on culture objectives, which provides that culture and customary values, which are consistent with fundamental rights and freedoms, human dignity, democracy and with the constitution may be developed and incorporated in aspects of Ugandan life. The directives provide that the State shall;

- a) Promote and preserve those cultural values and practices which enhance the dignity and well being of Ugandans;
- b) Encourage the development, preservation and enrichment of all Ugandan languages;
- c) Promote the development of a sign language for the deaf; and
- d) Encourage the development of a national language or languages

Under the Bill of Rights provisions, Uganda provides under Article 37 for the right to culture and similar rights by providing that every person has a right as applicable to belong to, enjoy, practice, profess, maintain and promote any culture, cultural institution, language, tradition, creed or religion in community with others.

The Ugandan Constitution's Chapter 16 is devoted to the institution of tradition or cultural leaders. It recognizes their existence, their nature, their entitlements and their relationship with the Government and Local Government.

c) South Africa

Article 30 of the South African constitution recognizes the right of everyone to use the language and to participate in the cultural life of their choice, so long as the right is not exercised in a manner inconsistent with any provision of the Bill of Rights.

Article 31 provides for cultural, religious and linguistic communities. Specifically, it provides that persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community.

- (a) to enjoy their culture, practice, their religion and use their language and
- (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

The right under this Article may not be exercised in a manner inconsistent with any provision of the Bill of Rights.

The constitution of South Africa also creates a Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (Article 185). The primary objects of the Commission are:

- (a) to promote respect for the rights of culture, religious and Linguistic communities.
- (b) To promote and develop peace, friendship, humanity, tolerance, national unity among cultural, religious and linguistic communities
- (c) Recommended the establishment of recognition, in accordance with national legislation, of a cultural or other council on councils for a community or communities in South Africa.

Chapter 12 of the South African constitution provides for traditional leaders. Article 211 of this Chapter recognizes the institution, status and role of traditional leadership according to customary law, while Article 212 provides for the role of traditional leaders.

Article 6 of the Constitution of South Africa provides for the languages. Eleven official languages are recognized. Under clause 2, the historically diminished use and status of the indigenous languages of the people is recognized and the state is obligated to take practical and positive measures to elevate the status and advance the use of these languages.

d) The Gambia

Reference to culture under the Constitution of Gambia is made in the Bill of Rights that guarantees the right of every person to enjoy, practice, profess, maintain and promote any culture, language, tradition or religion subject to the terms of the constitution to the condition that the rights do not impinge on the rights and freedoms of others or the national interest, especially unity.

e) Namibia

The Constitution of Namibia provides:-

“Article 19 [Culture]

Every person shall be entitled to enjoy, practice, profess, maintain and promote any culture, language, tradition or religion subject to the terms of this Constitution and further subject to the condition that the rights protected by this article do not impinge upon the rights of others or the national interest”.

f) Albania

The Constitution of Albania has a chapter on Social Objectives one of the clauses [59 (1) (j)] being that the State shall within its constitutional powers and the means at its disposal aim to supplement private initiative and responsibility with protection of national cultural heritage and particular care for the Albanian language.

g) Ethiopia

Ethiopia's Constitution provides:-

“Article 91 Cultural Objectives

1. The State shall have the responsibility to promote the equal development of customs and cultures in so far as they are not inconsistent with the fundamental rights, human dignity, democracy and the Constitution
2. The State and all Ethiopians citizens shall have the duty to preserve the natural resources and historical heritage.
3. The State shall have the duty, within the limits of its resources, to promote the Arts, Science and technology. “

Article 5(1) provides for the languages. That all Ethiopian languages shall enjoy equal state recognition. Clause 3 provides that Amharic is the working language of the Federal Government. Members of the Federation may by law determine their respective working languages.

h) Italy

Article 9 of the Constitution of Italy provides for Research and Culture. It stipulates that;

- (1) The Republic shall promote the development of culture, and scientific and technical research.

- (2) It shall safeguard the natural beauties and the historical and artistic heritage of the Nation.

i) Ghana

Article 26 of Ghana's Constitution under the Bill of Rights Provisions provides:-

- (i) Every person is entitled to enjoy, practice, profess, maintain and promote any culture, language, tradition or religious subject to the provisions of the Constitution.
- (ii) All customary practices, which dehumanize or are injurious to the physical and mental well-being of a person are prohibited.

Under the directive principles of State policy the Constitution directs the State;

- to take steps to encourage the integration of appropriate customary values into the fabric of national life through formal and informal education and conscious introduction of cultural dimensions to relevant aspects of national planning;
- to ensure that appropriate customary and cultural values are adapted and developed as an integral part of the growing needs of the society as a whole and in particular to ensure that traditional practices which are injurious to the health and well-being of the person are abolished and
- to foster the development of Ghanaian languages and pride in Ghanaian culture and preserve and protect places of historical interests and artifacts.

j) India

Article 29(1) of the constitution of India in protecting the interests of minorities provides that “Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script and culture of its own shall have the right to conserve the same.”

Article 49 under the directive principles of state policy, it is provided that it shall be the obligation of the State to protect every monument or place or object of artistic or historic interest, declared by or under law made by Parliament to be of national importance, from spoliation, disfigurement, destruction, removal, disposal or export, as the case may be.

The Indian Constitution has sought to illegalize retrogressive traditions. Under Article 17 "Untouchability" is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of "Untouchability" is deemed as an offence punishable in accordance with law.

On governance the constitution, Article 40, provides that the State shall take steps to organise village panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-government.

k) Lesotho

Under the directives of State Policy under the constitution of Lesotho, Article 35 provides for participation in cultural activities. It provides that Lesotho shall endeavour to ensure that every citizen has an opportunity to freely participate in the cultural life of the community and to share in the benefits of scientific advancement and its application. Under Article 35(2) Lesotho shall adopt policies designed to protect the interests of any citizen in any scientific, literacy or artistic production of which he is the author.

l) Liberia

Article 5 of the Liberian Constitution, which falls under the chapter on General principles of National Policy provides that the Republic shall;
“(b) preserve, protect and promote positive Liberian culture, ensuring that traditional values which are compatible with public policy and national progress are adopted and developed as an integral part of the growing needs of the Liberian Society as a whole.”

m) Nigeria

Article 21 of the Constitution of Nigeria is directive on State Policy on Nigerian Cultures. It provides that the state shall

- (a) Protect, preserve and promote Nigerian cultures, which enhance human dignity and are consistent with the fundamental objectives as provided in the chapter.
- (b) Encourage development of technological and scientific studies, which enhance cultural values.

n) Zambia

Article 112 of the Constitution of Zambia provides for directive principles of state policy. Under clause (g) the state shall take measures to promote the practice, enjoyment and development by any person of that person's culture, tradition, custom and language is so far as these are not inconsistent with this constitution.

o) Vietnam

Chapter three of the Constitution of Vietnam is titled "Culture, Education, Science and Technology." Article 30 provides that the State and society seek to preserve and develop Vietnamese culture, which shall be national, modern, and humanistic and that it shall inherit and promote the values of the cultures of all nationalities in Vietnam, the thought, morality and style of Ho Chi Minh, the quintessence of human culture and that all creative talent among the people shall be developed to the full. Under this provision, the State also undertakes the overall administration of cultural activities. It forbids the propagation of all reactionary and depraved thought and culture and eliminates superstitions and harmful customs.

Under these provisions, the state undertakes to create favorable conditions for the citizens to develop all-sidedly; to make investments for the promotion of culture, literature and art and create favorable conditions for the people's enjoyment of valuable works.

Other aspects of culture that have been dealt with under this constitution are information, preservation of cultural heritage, health care, education and training and overall management of the national system of education, science and technology, physical culture and sports.

The State has undertaken to promote tourism and tourist activities and to expend international intercourse and cooperation in the fields of culture.

p) Cambodia

The Constitution of Cambodia under Article 69 provides that the state shall protect and promote the Khmer language and shall preserve the ancient monuments, artifacts and restore historic sites.

q) Yugoslavia

Article 11 of the Constitution of the Federal Republic of Yugoslavia shall recognize and guarantee the rights of national minorities to preserve, foster and express their ethnic, cultural,

linguistic and other peculiarities, as well as to use their national symbols, in accordance with international law.

r) Laos

Article 19 of the Constitution of the Lao People Democratic Republic which falls under the Chapter on Socio-economic system provides that the objectives of the educational, cultural and scientific activities are to raise the level of knowledge, the patriotic spirit, the spirit of cherishing the People's Democratic Regime, the spirit of maintaining unity and harmony among the people of various ethnic groups; enhance the sense of being masters of the country ; and implement the compulsory education system at primary levels. It further provides that the state develops and expands the fine, traditional culture of the nation in combination with adopting the progressive culture of the world; eliminates all negative phenomena in the ideological and cultural spheres; promotes culture, art, literature and information activities, including in mountainous areas; and protects the antiques and shrines of the nation.

Under the fundamental rights and freedoms, Lao citizens have the right and freedom to conduct study and to apply advanced sciences, techniques and technologies; to create artistic and literary works and to engage in cultural activities which are not contrary to the law (Article 32).

The Constitution in making reference to the citizenry over and over again addresses them as “the multi-ethnic Lao people.”

s) Canada

Canada has provided in its Constitution a schedule that contains the Canadian Charter of rights and freedoms. Under this Charter, English and French are recognized as the official languages of Canada. However, Citizens of Canada:

- a. Whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or
- b. Who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province, have the right to have their children receive primary and secondary school instruction in that language in that province.

Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language.

This Charter further provides that Aboriginal rights are not affected by the Charter. It specifically provides that;

“The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including:

- c. Any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
- d. Any rights or freedoms that now exist by way of land claims agreements or may be so acquired.”

On multicultural heritage, it is provided that:

“This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.”

Part II of this charter provides for the recognition of existing aboriginal and treaty rights.

An assessment of the various constitutions as above reveals three distinct approaches. The first approach is that which treats culture as a retrospective phenomenon, which is intrinsically profane, backward, primitive, immoral and repugnant to justice and must be curtailed unless proven otherwise. The present Kenya constitution and other former British colonies such as Gambia have in their constitutions provisions on culture which reflect this attitude.

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

The application of these principles is qualified by providing that they shall not apply in respect of any custom that is, and to the extent that it is, inconsistent with a provision of the constitution. The approach is progressive and is found in the countries, which have recently reviewed their constitutions such as Uganda, South Africa, Ethiopia and Swaziland among others. Such constitutions have created specific mechanisms for the promotion and protection of the culture, cultural rights, development and values of peace, friendship, humanity, tolerance and national unity among cultural, religious and linguistic communities.

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

PART IV: CULTURE, SOCIETY AND PEOPLES VIEWS

7.0 ANALYSIS OF THE SOCIO-CULTURAL PROFILES OF THE KENYAN ETHNIC COMMUNITIES

The Task Force on Culture examined various Socio-Cultural Profiles of a number of Kenyan communities focusing on the following issues:

- Philosophy of life (Preamble, Sovereignty of the People, National Goals/Values/Principles),
- Political Organisation (Executive, Legislature and Devolution),
- Social Organisation (Gender Relations, Inter-Generational Relations, Division of Labour),
- Judicial System (Arbitration, Crime and Punishment),
- Representation,
- Socialisation and Education (Initiation and Informal Learning),
- Economy,
- Land, Property, Environment and Natural Resources.

7.1 The Philosophy Of Life:

Africans are essentially religious people. They have strong belief in the existence of a supreme being who has control over their day-to-day life. Although different communities have different names for God, they all mean one and the same thing. The higher authority is believed to reside at different locations in the universe such as in the mountains or in the sky, forests inter alia. The higher authority is also expected to bless His people with wealth and many children and offer protection against natural calamities. The beliefs are guided by various values and principles. Prayers are offered through ancestors who were supposed to intercede between God and the people. Some of the communities had sacred worship sites where the community could offer sacrifices and worship. However, communal prayers were performed in cases of natural disasters.

7.2 The Political Organisation:

Decision-making among most Kenyan communities is done both at the individual and societal levels. Most Kenyan societies have no central political organizations but have gerontocratic systems of leadership. Although leadership was sometimes based on the hereditary authority, or recognized through the foretellers, most of the indigenous communities have specific requirements for their leaders. The leader must:

- Be Married with children;
- Own some wealth in stock;
- Have reputation as warriors;
- Have positive personality;
- Lead through example; and
- Have spiritual and healing powers.

Leaders could also be spokesmen, arbitrators and mediators.

For effective regulation and smooth running of the communities, the societies organized themselves into hierarchies. The hierarchy of leadership among these ethnic groups followed a specific chain of command, the lowest being the head of the homestead. Normally, a man who is responsible for making decisions that concern the family held this position.

At a larger community level there is/was the traditional Council of Elders. Different clans would choose a representative who would ultimately represent the clan in the council. The Council is/was the ultimate decision maker within the community.

However, gerontocracy played an important role in the maintenance of law and discipline in the society and when it came to decision-making, they could not take decisions without first consulting other Clan Elders. This is participatory governance in its proper meaning.

In the event of war, consultations would involve as few people from the Council of Elders, as possible. The Council of Elders had no authority to impose their decisions on the people, but rather, would inform the people on the consequences of violating the rules of the land. This shows that enforcement of law and order was through full knowledge of societal norms and values.

The general administration of the villages was by the Council of Elders, which was composed of older men with the following qualities:

- Men of integrity and wisdom,
- Brave and well versed with the customs of the community,
- Had a mastery of oratorical skills,
- Commanded respect from the people,
- Displayed sense of maturity and impartiality in the making of judgements.

Women mostly played a background role in the councils of Elders.

In the recent past some communities such as the Wanga and the Teso have claimed to have centralized systems of governance based on Kingship.

7.3 The Judicial System

In most Kenyan societies, there was no clear separation between the political and the legal system. However, the legal system was directly based on the moral, values principles, norms and customs of the peoples' social lives. The Council of Elders was the Supreme justice instrument and decision-making organ in most communities.

The Council of Elders involved in the legal system and conflict resolution had to possess the following qualities:

- Should display wisdom and integrity.
- Had a mastery of oratorical skills.
- Commanded respect from the community.
- Displayed sense of maturity and impartiality in the making of judgements.

Above all, the Elders had to possess values such as honesty, organization skills, alertness and self-motivation.

The Council had the responsibility of arbitration on all issues that arose amongst the community members. The Elders enforced law, order and discipline in the village.

In the administration of justice, compensation was given according to the seriousness of the injustice inflicted. The Council of Elders ensured that the culprit's family paid compensation in cases of murder to the victim's family.

Adjudication of disputes between rival claimants either within or between lineages or clans was a matter, first of the Local clan Elders, then of the Council of Elders. In earlier times, one party moving away could resolve serious disputes over land or inheritance.

To compel the accused to tell the truth, a medicine man had to administer an oath that had to bind the accused to tell the truth. So this was a very strong and reliable way of getting the truth told during the arbitration. Special legal oaths were administered, where the offender was required to tell the truth. Anybody who took the oath and failed to tell the truth could be met with very severe psychological repercussions. Other consequences of lying under oath included falling sick, madness, and contracting serious diseases like leprosy or even death of the accused or a close relative. It was unlikely that anyone could take the oath and proceed to tell lies.

The Council of Elders meted out punishment on offenders depending on the nature of the crime but before any punishment the system demanded the establishment beyond reasonable doubt that the accused was guilty.

In most communities, punishment was only directed to the offenders and not their dependants. These punishments made by the Council had psychological and corrective effects on the offenders.

Lastly, further disciplinary measures were taken by the youth especially, the boys who took special oath in the forest to swear that they will observe the laws and regulations of the community discipline and uphold the good name of the clan. This encouraged discipline and good morals among the youth.

7.4 Representation Of The People

The Council of Elders is highly representative among African communities, as it recruits members from various families purely on the basis of their ability to interpret and execute the formulated laws effectively. Leadership was recognised, not appointed or elected. In some instances, leaders were appointed from spiritual leaders, warriors with the most scars, and some would be chosen amongst elders who have proved wisest, patient and competent to mediate in disputes.

The composition of membership is on the basis of age sets and these members are appointed, not recruited, on the basis of family lineage. Each age set would appoint one member to the Council for representation. The young members of the community were represented through the Council of War, which was made up of those between ages of about thirty and forty. This Council also serves as the Military Council. Women were also involved in the legal process. In certain circumstances women were represented in the Councils.

In most communities decisions are always reached on the basis of consensus rather than voting. This portrayed the sense of unity within and between communities.

7.5 The Social Organization

In the Kenyan indigenous societies, marriage plays a very special role. Most of these indigenous communities are patrilineal in structure, patrilocal in residence, and, as a result, patriarchal in authority structure and in the inheritance of property. Most of these communities practice polygamy. In atypical traditional society, sexual relations before marriage are highly restricted. In most of the ethnic communities, families are not allowed to marry from the same relatives, or from the same age sets.

Marriage among the Kenyan communities is a social obligation that every adult member of the community had to fulfill and any one who failed to do so was ridiculed and considered a social failure. Divorce among the Kenyan indigenous communities is very rare, but would only be allowed if one party grossly wrongs the other and no compromise can be reached. In this case, the woman has a choice of carrying away her personal belongings back to her home. If the woman decides to take her children with her, part of her bride-wealth would be also be returned to her.

Most of the Kenyan ethnic groups are stratified on the basis of age or generation-sets. Each of these generation sets have specific rights and responsibilities and the members have to go through the laid down procedures to perform the rituals of graduating from one generation set to the next. On defense and security, each village had warriors to protect the family and the clan in general from attacks by wild animals and notorious enemies.

As to gender relations, most communities have a very defined scheme of gender-relation; both women and men play very specific roles in the community and thus the division of labour is clearly defined. Communal labour is common among these communities, especially in the various stages of crop production and in the construction of shelter. This form of traditional gender relations has however, been greatly destabilized by modern social and economic systems based on formal education and employment.

The land allocated in the name of a man to be held in custody and trust of the whole family not as personal property. The land is shared amongst all wives and/or married sons for use and upon his demise. The brother or eldest son takes over the land and distributes it to the surviving sons and wives of the deceased. Usually, the clan Elders supervise this succession.

Traditional beer has social importance among the indigenous communities. It plays an important role in the social, economic, ritual and ceremonial lives of the people. It is also important in the traditional system of communal assistance under which people were rewarded for their labour. The traditional brew also plays an important role in most ceremonies.

7.6 Socialization And Education:

The family is the basic social, economic and training unit. The young people receive training on how to grow up into responsible and productive members of society from the family. But the elderly members of the clan have a duty to educate the young. Children belong not just to their biological parents; they belong to the community at large and could, therefore, receive training and even discipline from any elderly member of society.

Parents and grandparents, have the greatest responsibility for imparting accepted societal morals to the children. Girls were taught various skills and crafts which include making necklaces, while boys were taught how to look after livestock, hunting and generally on how to become men.

Traditional education was designed to create flexibility in behaviour and personality patterns. These communities thus maintained a well-organized society through this training, which facilitated the preservation and growth of the society.

Education was based on oral tradition through story telling, proverbs, use of riddles, idioms and dances for their own amusement or for the relief of boredom. The children are also trained in herbal medicine, blacksmith, music and craftsmanship. Dances are also used as an expression of thanks on a joyous occasion. Children above 6 years would be taught on the different roles that they are expected to play in the society.

The moral education of children with regard to family life, clan history and social relationships in the community is inculcated from an early age, starting at home where the parents are the first and main teachers.

Initiation rites among most Kenyan communities are part of socialisation of the young men and women of the communities. This is where they are taught about bravery, perseverance, wisdom, and all about the community traditions. Both girls and boys underwent initiation rites, which, posed as an important tool through which children were taught functional education and rigorous training through instructions and practice of what is expected of them as adults, wives, husbands, and parents. These rituals also stressed on discipline and fighting skills.

Male children spent time with their grandfathers where they were taught about their rights and obligations through myths, legends, stories and jokes.

Children are instilled with values such as honesty, respect, truthfulness, obedience and good manners. If their misbehaviour warrants discipline, then the father or the mother carries out the punishment.

7.7 Land, Environment And Economy

In most Kenyan Communities land, environment and economy were intertwined. Depending on the nature of the environment, communities were involved in various economic activities that range from agriculture, pastoralism, fishing, hunting and gathering, blacksmith and pottery and technological activities among other income generating activities. A person's level of wealth was measured by the holdings that he possessed, either in terms of livestock or acreage of land his family cultivated, how many granaries of food he owned, herds of cattle or the number of wives and children he had.

Agriculturally productive areas were involved in farming activities. Large scale and small scale farming was carried out. In other regions that were not climatically favourable for farming, subsistence farming was carried out for the primary purpose of providing food for the family. Subsistence as well as commercial farming is amongst the common economic activities that the Kenyan communities indulged in. Others include fishing, hunting and gathering, blacksmith and pottery among other income generating activities.

Pastoralism, as a way of life, plays a major role in contributing to the economy. This was practiced in the arid and semi arid regions. Meat, hides and skins and dairy products were traded for commercial purposes or other necessities.

There was no over-utilization of land, thus the land was very productive.

Although some communities allowed individual ownership of land, most practiced communal ownership of land, where land was owned by the clan and governed by the Elders. The clan leaders are the custodians of the land and are familiar enough with the clan boundaries in order to be ready to arbitrate in land issues.

While, land can be communally owned, the other form of property ownership is vested in the individual; either the husband/father or the woman/mother or in both. Wells, wilderness, grazing land, salt licks and other facilities were also communally owned. An individual could however lay claim and cultivate it. But this claim is subject to some qualifications such as if the man has no place, for one reason or another to cultivate or establish a home.

Although division of land was done between wives, the husband was the head of the family and the he contributes his labour equally to all the wives. He belongs to all and all belong to him. The eldest son inherited all the land and all the livestock of his father, while the youngest son(s) inherited the piece of land left for the subsequent wives to cultivate. The father has to consult his son(s) before he disposes of property, and the sale must be witnessed.

Land was never to be sold. But in a situation where a family had some constrain which they could not settle easily, they could give part of the land as a holding for a favour received and the land could be returned to them after they have repaid the favour so extended.

The sons could share the land equally but with the eldest son of each wife getting a slightly bigger share than the rest. This is in recognition of the position he occupies in the family-he is, literally speaking, the second in command in the family.

Today, most of the traditional ways of obtaining extra land are restricted and this poses a major problem, especially in polygamous households, where all the wives and their children may have to be maintained on one piece of land.

8.0 VIEWS OF KENYANS ON CULTURE

The people of Kenya gave their views to the Constitution of Kenya Review Commission on various aspects of life as they relate culture. The historical and the present political, economic, social and cultural factors influenced the views they expressed. This section examines the extent to which Kenya's cultural diversity has found expression in the draft Bill. Any gaps or shortcomings with regard to provisions that seek to recognize, promote, and protect Kenya's cultural diversity and cultural life are therefore addressed in the recommendations of the Task Force.

The Kenyan colonial experience greatly demeaned our culture in its bid to impose a foreign, political, economic, legal and social order to an extent that Kenyans had come to regard their cultures as retrogressive, backward and incapable of being incorporated in the modern society. The recognition and appreciation of our culture as a good order if applied today with modification needs to take root in the country. In addition to having an indigenous constitution we will also need a radical change in our minds and our perception so that we do not embrace foreign cultures at the expense of our own.

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

8.1 Ethnicity

- Ethnicity should be discouraged;
- The integration of all cultural groups should be encouraged;
- Drama festivals should be used to harmonise ethnic diversities;
- The Constitution should establish a national advisory board of elders to forge a unity of diversity;
- The Constitution should establish all ethnic groups which form Kenya as a nation;
- All Kenyans should be taught national patriotism to wipe out ethnocentrism/tribalism;
- Ethnicity should be used to harmonize our cultural values and traditions but not to be used as a basis for discrimination;
- Seminars should be organised to enlighten people of the diverse ethnical diversities;
- The Constitution should ban all tribal names given to districts to allow neutrality;
- The Maasai manyatta should be abolished;
- The cultural interest of the Kurias should be taken care of;
- The Kuria Council of Elders should be recognized by the constitution;
- Witchcraft should be banned;
- Some outdated cultural practices should be removed and retain the cultures of good morals;
- The mode of dressing, traditional practice and age sets should be captured in the constitution;

- Ethnic differences on clashes, dialogue and peaceful conflict resolutions through arbitration should immediately be effected;
- The Constitution should ban all tribal and ethnic organizations;
- Ethnic district and provincial boundaries should be replaced with economic boundaries;
- The Constitution should set up a commission to unearth the tribalism factor in the civil service;
- The constitution should alleviate tribalism, nepotism and racism in all aspects;
- Intermarriages should be promoted to end ethnicity;
- Ethnicity and discriminations should be discouraged to ensure unity in diversity and security of the persons and property;
- The constitution should NOT promote cultural and ethnic diversity;
- Favouritism and Tribalism should be impeachable offences under the constitution;
- The constitution should cement the 42 tribes together to form a national culture;

8.2 Education:

- Recruitment into national institutions should be on the quota system to avoid ethnic bias;
- The constitution should use education as a means of creating national unity and building national heritage;
- Informal education by family which is related to culture on morals and religion should be retained in the Constitution;

8.3 Community rights

- Community rights should not be hampered by the state;
- Each community should be given a day to celebrate cultural events;
- Cultural practices such as moranism should be outlawed;
- Sacred Maasai rights and sites should be protected;
- The Constitution should provide that the government enforce patent laws to safeguard the cultural practices of the Maasai against commercial agents copying of cultural materials and artefacts;

8.4 Supremacy of the People and Sovereignty of The Constitution:

- No group should feel superior over the others and there is need to develop a national outlook to progress in the country.
- Each group of people needs to be given equal importance and recognition;
- Customary laws, cultures and traditions should not take precedence over the legal structure.

8.5 Preservation and Documentation of Cultural practices:

- Cultural systems of sport and cultural dances should be documented for the benefit of future generations;
- The government should create an institution to enable all cultural backgrounds to be researched, documented and preserved with the original identity;
- The Constitution should establish an institution that will research, document and preserve all cultural backgrounds;

- Community, cultural museum and cultural heritage centre should be opened at localities in the country to act as a supermarket for our cultural exhibition;
- The constitution should provide for the establishments of District Archives and Museums where material culture of the District inhabitants can be preserved;
- All indigenous groups in Kenya should be protected to guard them from extinction. i.e. Ogiek, Rendile, Maasai, Kenyan Arabs and Tiriki etc;
- The constitution should facilitate the promotion of our culture and its protection through such avenues as music, film, fashion design, art works and architecture among others;

8.6 Judiciary:

- Traditional oaths should be recognised in the Constitution;
- Oath of office should be administered traditionally;
- When swearing in public officers, traditional oathing practices should be used;
- Oath taking should be forbidden;
- The constitution should allow every community to have an independent Court of Elders to preserve their culture;
- A committee should be established to recommend against the unnecessary customary laws.
- The constitution should give legal recognition to practises and unwritten customs within our society, especially those that promote fairness and equality;
- Women adulterers should forfeit some of the dowry just like men;
- The breach of communal guidelines and rules should be left to the competent elders to arbitrate. Their decision should not be overruled by a Court of Law.
- The constitution should reserve culture norms associated with adultery and cohabitation, because they ensure morality was upheld.
- Positive forms of traditional punishments should be upheld;
- Rural people should be required to live a will that should supersede the customary requirements;
- Forced wife inheritance should be considered a crime;
- Action should be taken against men who inherit wives for exploitative reasons;
- Traditional cultures and traditions that are acceptable to communities and allowed by law should be promoted in the constitution;
- The Constitution should provide that each tribal list of customs and traditions be incorporated in the law;

8.7 Media:

- The public media should air African programmes and do away with the European soaps;

8.8 National Goals and Values:

- Peace, harmony and unity should be captured in the constitution;
- The Constitution should specify cultural values from our collective experience such as respect for elders, women, payment of dowry, land boundaries, and social life values;
- The constitution should reflect on the diverse social and cultural diversity and ensure that there is no conflict between National unity and tribal autonomy;
- Our common belief in God should be captured in the constitution;

8.9 Female Genital Mutilation

- Those who practise FGM should be severely punished;
- FGM should not be practiced because of health reasons;
- The constitution should allow Kisiis to circumcise their children as per their tradition;
- Traditional behaviours in every community should be respected i.e. circumcision of both male and female in Kisii land;
- The constitution should respect Kenyan cultures such as female circumcision;

8.10 Language:

- Kenyan Sign Language should be made a national language;
- Besides English and Kiswahili, the nations should be divided into five language zones; Kiswahili - Coast, North Rift Valley - Kalenjin, Western – Luo, North Eastern – Somali. Each of these languages should be taught;
- Indigenous languages are ways through which specific tribal groups cultures express cultural affiliations. For this reason, the use of indigenous languages should be promoted and protected;
- The Constitution should recognise and promote indigenous languages. They should be left to grow;
- All books should be translated into local languages;
- Local languages should be acknowledged but not necessarily promoted;
- Mother tongue should take centre stage to educate the children in the primary up to 6 standard;
- Kiswahili should be the national language, while English the official language;
- Indigenous languages should be recognised as a way of passing information and communication;
- The constitution should be written in local languages;
- The government should establish a National Language Training Centre where indigenous languages can be taught;
- The constitution should NOT promote indigenous languages;
- Only Kiswahili should be recognised as the national language;

- Instruction at primary level of schooling should be administered in the various indigenous languages;
- Kenyan`s styles of languages and music-tradition should be among the ethnic values captured in the constitution;

8.11 Material Culture:

- Traditional culture of the various communities of Kenya should be protected;
- People should be sensitised to learn about traditional medical care and technology, like pottery and indigenous foods;
- Herbal medicines should be promoted in the constitution;
- Cultural rights, which are not repugnant to justice and morality, should be implemented. Positive aspects of the cultures of Kenyan diverse communities should be incorporated into the constitution;
- The government should check the smuggling of the country` culture material, and introduce high levies of such material to develop a national reservoir;

8.12 Minorities:

- “**Waswahili**” should regarded as an ethnic group as they have their own cultural identity;
- The Constitution should guarantee and protect the rights of all the minority tribes, such as “*Lembus*”, *Nubian*, *Dorobo*, *Ogiek*, *Mandi*, *Terik*;

8.13 Traditions:

- The constitution should guarantee protection of culture and specify progressive culture promotion;
- The traditional aspect of a woman marrying another woman should be discouraged;
- Original culture should be maintained;
- Widow/widower should be protected against harassment from relatives;
- The constitution should protect against the discriminatory aspects of culture e.g. FGM, wife inheritance, bride price;
- The widows should have the right to decide whether to remarry or not;
- The constitution should protect the Kenyan traditions that promote equality and fairness;
- Permanent communal boundaries of land should be established to reduce tribal clashes;
- Traditional practices such as removal of teeth and female circumcision should be retained and protected;
- Men should not be allowed to wear women`s dressing and vice versa;
- The culture of feasting and dancing should be discouraged during funerals;
- Tradition must be respected and people from the same clan should not marry;
- The constitution should draw a balance whereby the negative cultures do not unnecessarily hinder, harm, act as an obstacle to people especially women and girls enjoyment of their inalienable human right and development;
- Certain aspects of our cultures such as, traditional dances, weapons, foods, marriage ceremonies should be recognised by the Constitution;
- Traditional culture and customs of different ethnic groups should be recognised as long as they are not repugnant;

8.14 Governance and Representation:

- The Ministry of Culture and Social services should enhance their efforts to promote the people's culture e.g. by encouraging cultural entertainment;
- Tribal rights should be recognised so that nomination of candidates for elective posts is done by the respective tribe;
- All ethnic groups should be represented in Parliament;
- No candidate to parliamentary elections should be discriminated against due to tribal backgrounds;
- Police recruitment should be done from each tribe;
- All those who seek elective positions should be indigenous people of the area and should speak the indigenous language;

8.15 Family and Marriage:

- Certificates of Marriages should be issued for Customary marriages;
- The government should substitute the modern ways of family planning with the traditional ways;
- The families should be encouraged to use their clan names to preserve cultural diversity in Kenya;
- African family values should be captured in the constitution;
- The constitution should protect the issues of dowry and marriage;
- The constitution should outlaw marriage between men or between women;
- Traditional marriage, initiation to manhood or womanhood, recognition of a man as the head of family and woman/wife to play her role as helper should be included in the constitution;
- Women should be involved in the issuance and distribution of dowry;

8.16 Compensation

- The constitution should protect and promote the cultural concept of compensation of fines paid by men or women who commit adultery to the spouses of those who they are committing adultery with;
- The Mau Mau Freedom fighters, political detainees should be taken care of by the Constitution;

8.17 Traditional brews:

- Traditional brews should be allowed for traditional practices that go with them;
- The constitution should allow brewing of traditional brews by local communities;
- The constitution should recognise local brews as sources of entertainment and income;

8.18 Intellectual Property Rights:

- Traditional intellectual property rights should be institutionalised under the realm of traditional diversity;
- All herbalists in a region should show proof of running established medicinal arboretum, upon which they should be registered and licensed;
- Laws should be enacted to guide cultural values;
- Traditional medicine men and their drugs should be protected, promoted and allowed to serve as curative measures for Kenyans;
- Places with cultural values should be gazetted and protected;

BOX 1: A SUMMARY OF VIEWS OF KENYANS ON CULTURE

1. The Constitution should recognize and celebrate diversity of Kenyan People. “Our differences should be seen as a strength and not a weakness”
2. That all Kenyan communities should be respected and treated equally and should not be discriminated upon. Establish a mechanism to establish number of communities “not mythical 42 only.”
3. Ethnocentrism, racism and other forms of discrimination should not be allowed.
4. Culture and cultural heritage, norms, customs, traditions, beliefs, rituals, rites etc should be respected, recognized, promoted, preserved and protected so long as they are not harmful, oppressive and discriminatory and or forced on an individual.
5. All Kenyan peoples, cultural, linguistic and religious communities, right to organize, practice and manifest their culture, identity and heritage.
6. All Kenyan peoples, cultural, linguistic and religious communities have right to maintain, protect and develop their culture (past, present and future) this include historical, archaeological and religious sites, material culture, designs, ceremonies, festivals, knowledge, folklore, literature, creative, visual and performing arts, artifacts, ornaments, customs, traditions, rites, rituals and names.
7. All Kenyan people, cultural, linguistic and religious communities have a right to compensation and or restitution for cultural, intellectual, religious, spiritual and other properties taken without their free will and consent or in violation of their laws, traditions. Special efforts should be made to return property appropriated by colonial forces.
8. All Kenyan peoples, cultural, linguistic and religious communities have a right to compensation, and or restitution for cultural crimes committed against them including crimes:
 - committed during the colonial and post colonial period;
 - to include crimes against, humanity, murders, rapes, collective communal punishment and humanitarian, torture and other crimes.
9. Kenyan’s resistance and fight against oppression, and colonialisation should be recognized, documented and preserved:

- records being held by Kenyan government and other governments should be made public;
- we should establish a mechanism to recognize and celebrate all freedom fighters, past, present and future;
- we should establish a freedom fighters acre (as a burial site).

10. Establish a mechanism to deal with historical claims and rights: including property rights, land rights, appropriation, access and visitational.

11. The Kenyans collective experience and shared values should form the basis for development of national culture.

12. That national celebrations, symbols, designs etc, have Kenyan Values this include national days, national currency, Coat of Arms etc.

13. Establish national holidays that symbolize national and shared values. Do away with parochial or divisive holidays.

14. Recognise and respect all Kenyan linguistic communities.

15. That all Kenyan languages should respected, promoted, reserved, protected and developed.

16. Kiswahili be the national language.

17. Kiswahili and English be the official languages.

18. Nairobi be the capital of the nation and should have special status.

19. The name Kenya be retained.

20. Cultural institutions should be recognized and the state should facilitate their development and reform, preservation, promotion and protection.

21. The state should promote co-existence peace and solidarity among all Kenyan communities.

22. The state should recognize, remote and facilitate the work of cultural workers e.g. artists.

23. The state should promote creative, visual and performing arts.

24. The state should promote the development of radio, television and film industries.

25. The state should promote and facilitate the media and encourage the development of local content and programming.

26. The Constitution should recognize and respect traditional land tenure and use.

27. Traditional knowledge on land should be recognized, preserved, protected and respected.

28. Traditional knowledge on the environment including utilization use and conservation should be recognized, preserved, protected and respected.
29. Cultural knowledge and technology should be taught in schools.
30. The state to promote cultural and cultural and cultural related industries such as textiles, fashion, food, architecture, film, radio and television, theatre, visual arts and design and publishing.

As evident in the above views and the profiles of Kenyan communities, the historical and the present political, economic, social and cultural factors have greatly influenced the views expressed to the Constitution of Kenya Review Commission. It is noteworthy that the colonial experience greatly demeaned Kenya's culture and cultural heritage as it systematically imposed foreign political, economic, legal and social order to an extent that Kenyans had reached a point that they started regarding their cultures as retrogressive, backward and incapable of being incorporated in the modern society.

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

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

PART V: TOWARDS A MULTICULTURAL CONSTITUTION FOR NATIONAL UNITY

9.0 AUDIT REPORT OF THE DRAFT BILL FROM A CULTURAL PERSPECTIVE:

This section of the report presents an examination of the extent to which culture has found expression and treated in the draft Bill as basis for addressing any shortcomings in the recommendations of the Task Force.

9.1 THE PREAMBLE

The draft Bill makes very early reference to the cultural diversity of the people of the people of Kenya, the well being of communities and the future generations as it starts by providing that:

- We are aware of our ethnic, cultural and religious diversity and determined to live in peace and unity as one indivisible sovereign nation
- Committed to nurturing the well-being of the individual, family and the community
- ‘Do adopt and give to ourselves and to our future generations this Constitution.’
- God Bless Kenya

9.2 SOVEREIGNTY OF THE PEOPLE, SUPREMACY OF THE CONSTITUTION AND SOURCES OF LAW

This chapter has put the people and their sovereign authority at the centre of the new Kenyan constitution and has given recognition to the African customary law as a constitutional source of law.

The sources of law are not provided for in the current Constitution, it can be seen therefore that over time our African culture has been positively perceived and has gained prominence to such a great extent that it has attained constitutional significance. This is stipulated by the following:

Article 5(c) & (d) The Laws on Kenya comprise-

- African Customary Law
- Islamic and Hindu personal law
- The East African Community law.

As said earlier religion is part of the culture of a people and by referring to the African, Islamic and Hindu law as sources of personal law the Draft Bill has expressly taken cognizance of the culture of a people.

However, the Draft Bill has been criticized for having given more prominence to minority groups such as Muslims and leaving out the majority. This is because it did not expressly include Canonical laws as a source of law yet the majority of Kenyans follow Christianity. The hierarchy of the laws has not been suggested; perhaps it needs to be so that future conflicts in the application of the body of law can be sorted out. Our cultural laws should not be or perceived to be accorded the lowest recognition

In a radical departure from the current scenario, this chapter has made reference to the common law of Kenya. This is shown below:

- **Article 2(5) & (c)** The Constitution shall be interpreted in a manner that promotes good governance and in a manner that permits the creative development of the provisions of the Constitution and of the **common law of Kenya**. This is a very progressive provision, as it seems to direct that a common law of Kenya should be codified and developed for reference so that the interpretation of the Constitution would have regard to the unique socio-economic and cultural circumstances prevailing in Kenya.

The practice at present in the Kenyan courts has been to apply the English common law but with modifications because of the unique circumstances prevailing in Kenya. This is because the Judicature Act Cap 8 of the Laws of Kenya recognized the English common law as part of body of laws governing Kenya.

The Draft Bill has also recognized the Common Law and the doctrines of equity as they relate to the practice and procedures of the Court of Kenya. {**Art. 5(c)**} The common law of England is basically the cultures of the Englishmen codified over time. The draft Bill retains the importation of English common law but it protects Kenyan culture by qualifying its application in order to avoid suppression of the Kenyan culture by the bringing about of foreign cultural domination.

It is envisioned that continued application of the modified common law would give rise to a body of law known as the common law of Kenya. It would further be developed on the basis of what is positive and common across the cultures and also take into account the diversity of the cultures with a view to promoting national unity. It is hoped that this would be a major step in the journey towards attaining independence from domination from foreign cultures.

Special mention has also been given to the East African community Law in the move towards regionalisation. The East African Community Law is still yet to be developed but in the future regional cultural questions will also arise which will hopefully find protection in the E.A community laws.

9.3 THE REPUBLIC

The provisions of this chapter of the Draft Bill have a lot of cultural connotations. The provisions below touch on:

- i. Structure and protection of the territory,
- ii. Promotion of indigenous and national language,
- iii. Status of religion,
- iv. Preservation of cultural symbols, special feast and cultural days, these are matters that are at the heart of the African culture.

These provisions are:

- Art. 7 (2) The Republic of Kenya is divided into districts and provinces
- Art. 4 Every citizen has the right and duty to defend the Republic against any person who threatens the political independence, territorial integrity or the constitutional order of the Republic by unconstitutional means.
- Art. 9 The official languages of Kenya are Kiswahili and English and all official documents shall be made available in both languages and the national language is Kiswahili. The State shall promote and protect the diversity of language of the people of Kenya and shall promote the development and the use of Kiswahili, indigenous languages, sign language and Braille.
- The state shall treat all religions equally.
- There shall be no state religion
- The state shall treat all religions equally
- Art. 11. The national symbols of the Republic of Kenya consist of the Coat of Arms.
- Art. 12 The National oaths and affirmations.
- Art. 13 National Days- The 1st June- **Madaraka Day &**
- Art. 13. National Day –**Jamhuri Day**

One of the factors that led to the structure of the territory was the geographical location of certain communities. These have been retained in the Draft Bill and so the territory has maintained its cultural outlook even if the provinces and districts may be said to be imperfect. This is desirable for the sake of preserving the identity of communities. Whereas historically certain territories were exclusively owned by certain communities the territory of Kenya belongs to the people of Kenya irrespective of their ethnic group. This is a positive cultural development.

The Language of a people is a major definitive component of their culture. The Draft Bill beautifully outlines the provisions on languages and pro-actively calls for the development of Kiswahili and indigenous languages. Whether these indigenous languages should also be made national languages in the spirit of entrenching culture like the case of South Africa is debatable, as Kenya has very many indigenous languages.

The making of oaths was part of the cultural life of the communities regardless of whether it was based on cultural or religious grounds. In traditional African society oaths were taken seriously and they were believed to cause dire consequences if the person went back on the oath

or took it falsely. The traditional oaths still exist although the oaths and the methods involved are sometimes viewed with a lot of suspicion, skepticism and superstition. The communities can still practice these oaths in so far as they are not inconsistent with the Constitution or the penal code. The modern day oaths are entered into before public officers take office or before giving evidence in court. The Penal code Cap 63 of the Laws of Kenya prohibits the taking of some oaths. The Draft Bill has taken cognizance of the right not to be forced to take an oath as some religions and cultures prohibit this e.g. Islamic law prohibits Muslims from taking an oath. A positive cultural development on oaths is the possibility of affirming instead.

Religion is sometimes very much intertwined with the morality and culture of a people sometimes so closely such that it is difficult to have a pure religion. Nonetheless all the religions have been given equal status. In traditional African societies religion was factored into the political and social –cultural life of the community. In modern day societies the notion of a secular state is generally accepted.

The Draft Bill has separated the state from religion although some have criticized this by saying that the people's belief in God should have been given more recognition. Some have suggested that we should provide for a state religion i.e. Christianity should be unapologetically adopted as a state religion as Christians are the majority. In Arab countries for example Islam is a state religion as Muslims are the majority and Islam is their culture. The ideology of secularism of the state cannot hold any water in such circumstances, as it would be in direct conflict with their Islamic culture. Some have heavily criticized the Draft Bill for it has given more prominence to a minority religion. As Islam is a way of Life/ a culture it cannot be overemphasized that the Draft Bill entrenched some Muslim culture e.g. the Islamic law as a source of law, the structure of the Judiciary-the Kadhi courts and the limitations of the provisions on equality to Muslims.

The Celebration of the Madaraka Day and the Jamhuri days are in remembrance of the days when Kenya received independence from her colonial masters and became a sovereign nation free from political, economic, social and cultural domination. These two days mark the birth of a new era, when the people of Kenya gained their self –determination, which was a form of political and cultural expression. Since then we have been in a cultural journey of redefining our cultural and national identity.

9.4 NATIONAL GOALS, VALUES AND PRINCIPLES

This chapter takes cognizance of the following issues that are part and parcel of culture:

- ii) The need to protect the diversity of a people
- iii) The need to protect the dignity of the communities
- iv) The responsibility towards future generations
- v) The need to be a good citizen of Africa
- vi) The work ethic and the welfare of the members of the Communities
- vii) Protection of the Family life
- viii) Protection of the environment

The following provisions of the Draft Bill support the promotion of the above cultural pillars.

- The Republic shall **recognize the diversity of its people and promote the cultures** of its communities.
- The Republic is fully committed to respect, protect and promote human rights and fundamental freedoms and **enhance the dignity of individuals and communities**.
- The Republic shall ensure the fullest participation ofmarginalized communities
- The Republic shall recognize its **responsibilities to future generations of Kenyans**, by pursuing policies for the sustainable management of the environment.
- The Republic shall be a **good citizen of Africa**.
- Art. 15.
 - Engage in **work including home making**, for support and welfare of themselves and their families
 - Contribute to the welfare and advancement of the community where they live
 - Strive to foster national unity and live in harmony with others.
 - Promote family life and act responsibly in the context of the family
 - Protect the environment and conserve natural resources

9.5 CITIZENSHIP

Acquisition of citizenship

A sense of belonging and membership in a particular community was vital in the traditional African society. Membership into a community depended on which community one was born in. Women married into a certain community and became part of that community. This cultural aspect has also informed the acquisition of modern day citizenship on the basis of birth and marriage. These have found expression in the Draft bill as follows;

- Art. 18. Citizenship may be acquired by Birth and Naturalization
- Art.22 A child found in Kenya who appears to be less than eight years of age and whose parents are not known is presumed to be a citizenship of Kenya

9.6 THE BILL OF RIGHTS

It is in the Bill of Rights that the Draft Bill has made most provisions on culture. Under the Bill of Rights the Draft Bill has made provisions that recognize equality of all peoples and protection from discrimination. The following are the provisions that relate to culture in the Bill of Rights.

- i) Protection of the right to life
- ii) Equality
- iii) Non-discrimination
- iv) Protection of Children
- v) Marriage and family
- vi) Older members of the Society
- vii) Basic needs
- viii) Liberties of the Individual
- ix) Protection of Cultural rights

The draft bill has provided as follows on the above issues:

- Art. 29 The Bill of Rights is the foundation stone of Kenya's democratic state and is the framework for the adoption of social, economic and cultural policies.
- Art. 31 The rights set out in the Bill of rights may be limited in reasonable and justifiable manner in an open and democratic society.
- Art.31 (4) The provisions on equality shall qualified to the extent strictly necessary for application of Islamic law to persons who profess the Muslim faith in relation to personal status, marriage, divorce and inheritance.
- Art. 32. Every person has a right to life.
- Art.36 Older members of society are entitled to continue to enjoy all the rights and to participate fully in the affairs of the society, pursue their personal development and be free from all forms of exploitation and abuse and to live with dignity and respect. They are also entitled to reasonable care and assistance from the family and the State.
- Art. 37. Children hold a special place in the Society and it is the duty of their parents, wider family, society and the state to nurture, protect and educate them so that they can develop in a safe and stable environment.

- Art. 38 The State shall recognize the family as the natural fundamental unit of the Society and as the necessary basis for social order.
- Every person who is at least eighteen years of age has the right to marry, based upon the free consent and has the right to found a family
- Art. 38. Marriages concluded under any tradition or system of religious, personal or family law or family law or systems of personal and family law under any tradition or adhered to by persons professing a particular religion.
- Art. 44. Every person has a right either individually or in community with others in public or in private to manifest any religion or belief through worship, observance, practice or teaching. To establish and run places of education.
- A person may not be compelled to take an oath or take it in a manner that is contrary to that person's religion or belief or that involves expressing a belief that the person does not hold.
- Art. 45. Every person has the right to freedom of expression which includes freedom to receive or impart information or ideas and freedom of artistic creativity however this right does not extend to propaganda for war or war-like activities incitement to war like activities Incitement to violence advocacy of hatred based on discrimination.
- Art. 51 Every person has the right to freedom of movement.
- Art. 55 Everyone has the right to fair labor practices
- Art. 56. Every person has the right to social security including if they are unable to support themselves and their dependants' appropriate social security and assistance by the State.
- Every person has the right to have access to adequate housing.
- Everyone has the right to be free from hunger and to have access to food in adequate quantities and of adequate quality and cultural acceptability.
- Art. 62 Everybody has the right to a reasonable standard of sanitation including the ability to dispose of the bodies of the dead with decency.
- Art. 63. Everyone has the right to have the environment protected for the benefit of present and future generations through reasonable legislative and other measures
- Art. 63A
 - Everyone has the right to use the language and to participate in the cultural life of their choice but no one exercising these rights may do so in a manner inconsistent with any provision of this Bill of Rights.
 - Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community to enjoy their culture, practice their religion and use their language or to form, join, and maintain cultural, religious and linguistic associations and other organs of the civil society.
 - No person may compel another person to perform observe or undergo any cultural or religious practice or rite.
 - No person may be compelled to indicate or define his or her ethnic or racial affiliation.
 - Every person has the right to have any dispute that can be resolved by application of law decided in a fair public hearing before a court or where appropriate another independent and impartial tribunal or forum.
 - No person may be remanded in custody for an offence if that offence is punishable by a fine only or imprisonment of not more than six months.

- Art.69 The right to fair trial includes the right to have without payment the assistance of an interpreter where the accused person cannot understand the language used at the trial.
- Art. 73 The Commission of human rights and administrative justice will have the right to receive complaints from a person acting as a member of or in the interest of, a group or class or persons association acting in the interest of its members.
- Art. 75 The bill of rights does not deny the existence of any other rights or freedoms that are recognized or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

The cultural norms in traditional African society were all-rounded in that they were concerned with the human rights of the people, their basic needs, care for the older persons, protection of children and the conservation of the environment and the general protection of the cultural and religious associations.

The protection of the right to life and property was of central importance to the communities. The wanton destruction of life and property was prohibited except in times of war or self-defense as life and property was sacred. The draft bill has retained these rights.

The draft Bill has however, been heavily criticized for what others have called an implied right to abortion and euthanasia. This is primarily because the two go against the culture of Kenyans and is generally unacceptable. Suggestions for reformulating the right to life have been made which talk of a right to life from conception until natural death.

The family was a fundamental unit of the society that was not individualistic; it looked out for the welfare of the extended family and other members of the community. Marriage and families were polygamous or monogamous or extended and they were conducted in conformity with the community's cultural or religious laws on marriage. Some communities practiced female genital mutilation before marriage, child marriages and forced marriages. The Draft bill has prohibited some of these cultures as viewed against the general spirit of Kenyans, as one cannot marry before they are eighteen years of age or before they give their consent. Perhaps the Draft Bill could allow for the registration of customary marriages.

The provisions on marriage have also elucidated a lot of hue and cry from the public. This is principally because those provisions impliedly allow same sex marriages. In Kenya, gay marriages are generally viewed, as being against nature and the moral fabric of the communities, as in Kenya men do not marry other men even if they two of them are consenting adults. Although gay rights are widely getting globalised and getting recognition in Constitutions of western countries and to a limited extent in African countries e.g. like in South Africa, *Kenyans have refused to follow suit for religious and cultural reasons and have said that marriages should be between the opposite sex.*

Older members of the society, widows and children held a special place in the society. As is our culture, the Draft bill has afforded a lot of protection to the older persons and children with the State playing a more pro-active role. Parents have the right to discipline their children and this should be provided in the Draft Bill as it is currently omitted.

The Draft Bill There provides for affirmative action for women and other marginalized groups. In a positive radical departure from the current discriminative elements of the Kenyan society,

women and other marginalized groups have been provided for and given equality status. In further departure, women have been allowed to inherit land and other property from their husbands and their fathers even if they were married.

With regard to work all the communities had a work ethic and also a rest and leisure ethic. The Draft Bill has been criticized for not having adequately provided for the worker's rights. These should allow for a right to reasonable time for rest and leisure. Also the stereotype definitions of work have not considered home making as work because it had no monetary gains. However, the Draft Bill has defined work so as to include home making, which is part of our culture. Home making is a tedious occupation that is widely the preserve of women, who are considered as the nurturers. This is a positive gain for women.

The draft bill also needs to recognize the place of our African traditional medicine such that our healthcare system can have regard to our alternative medicine

Although the Bill of Rights has a limitation clause, for the avoidance of doubt, we should expressly say that *all cultural practices that dehumanize or that are injurious to the physical and mental well-being of a person are prohibited and that secondly that one is entitled to practise their culture but they should not impinge upon the rights of others or the national interest.*

The Bill of Rights has also been criticized for having an overall foreign tone. The Bill of Rights need to be localized and made indigenous to Kenya even if the many of the principles in it have global and universal recognition. The right to food has captured this very well as it says that one should be free from hunger and that one is entitled to food that is culturally acceptable. The rights to education should be localized to give effect to informal education, apprenticeship and possibly even making the language of instruction the indigenous language at the lower primary levels. The freedom of the media needs to be curtailed such that more regard is given local programmes that promote pride in our culture are aired and that whatever is aired is culturally acceptable for viewing.

The tension between individual rights as citizens and communal rights as people need to be qualified in order to reduce and rationalize the western preoccupation with "individual" and African emphasis on "community and commons".

9.7 REPRESENTATION OF THE PEOPLE

The Draft Bill has overtly provided for affirmative action in ensuring fair representation of minorities and vulnerable groups and states that demarcation of boundaries should have regard to the community of interest and its population. The draft bill has some of the following provisions on representation:

- Art. 76 (6) the elections shall ensure fair representation of women, the disabled and minorities
- Parliament shall enact a law to provide for the number of constituencies for the election of members of parliament of the provincial councils, district, locational and village councils and any other local authority.

- Art.77 A political party shall ensure that at least one third of its candidate for direct elections are women and that fifty per cent of its candidate for proportional representation at public elections are women and that the remaining fifty percent are distributed remaining fifty per cent are distributed among persons with disabilities the youth, ethnic minorities and other interest groups.
- Article 86 (2) In the demarcation of the boundaries of constituencies the Electoral commission shall consult with the interested parties and take into account the population density and the community of interest, the geographical features and the latest census of the population in accordance with the law.
- Article 90. The Electoral commission shall not register a political party if the party is founded purely on religious, linguistic racial, ethnic, sex or regional basis.

The above articles address affirmative action for women and this is a positive modification on the African culture. The traditional African society was patrilineal such that only men could govern and own property even though as trustees of women. Women were considered as homemaker providers and the children's nurturers who had little say in general community leadership or governance. The men folk in their communities represented them but on the contrary the draft bill proposes that women can represent themselves and as it has outlined a mechanism that would enable a women get a third of the people's representation.

On the demarcation of boundaries, the electoral commission would have to take into account a certain criteria, which includes the community of interest and its population. These are very positive criteria because they give recognition to ethnicity and minorities, which are characteristics of Kenya's cultural diversity.

In a protective mechanism against the negative and divisive aspects of our culture the draft bill has prohibited the registration of the political parties that are founded purely on an ethnic, linguistic or a religious basis as such parties may not enhance the promotion of national unity.

9.8 THE LEGISLATURE:

The Draft Bill's proposed bi-cameral legislative system aims to protect the diversity in our cultures. This provision has established a mechanism of maintaining unity in diversity, as all communities will find representation in the national parliament.

The draft Bill has also provided affirmative action provisions that ensure adequate representation for women and other marginalized or minority groups. Further to that the mixed member proportional system guarantees women and minorities seats in the National Assembly. This is a radical departure from the current situation, which has engendered under or non-representation of the diverse members of the Kenyan society. The mixed member proportional system also guarantees that the vulnerable members of the society i.e. the disabled, youth and the minorities will find representation in Parliament.

Parliament's legislative making power also has a cultural connotation as it is not permitted to pass legislation that is discriminatory on the basis of culture, ethnic or social origin or language as that would be unconstitutional and inconsistent with the Bill of Rights.

In article 103, the parliamentary approval criteria for appointments have not been set out. Perhaps, criteria first based on merit and secondly on the regional diversity may need to be expressly provided for.

Provisions on parliament also provide for people's participation and have established the committee on Good governance and Public participation. Members of the public are also allowed to present private bills and to petition parliamentary decisions.

9.9 THE EXECUTIVE

The Draft Bill has departed from the current Presidential system of Government and has created a hybrid executive structure. Culturally, traditional leaders were very powerful executive leaders. A question that is still open for debate and interpretation is whether the president proposed by the Draft Bill is an executive one or a ceremonial one.

The role of the traditional leaders although recognized by establishing the village government, they have not been included in the executive structure yet they have had a pivotal role in local, cultural, family and intercommunity governance. *There is need to establish a clear systems of traditional leadership and a mechanisms for integrating traditional leaders into the national executive and decision making structure such as in Uganda, Swaziland and South Africa.*

In appointing his cabinet the President works in consultation with his Prime minister but no criteria e.g. merit and proportional regional balancing is provided to cure the mischief of having members of one ethnic group dominating and being appointed to the cabinet.

9.10 JUDICIAL AND LEGAL SYSTEM

The Judicial structure proposed by Art. 185 of the Draft Bill proposes that the superior and subordinate courts. The draft bill, in a progressive effort to recognize our cultural methods of the determination of disputes, has proposed the creation of a traditional or local tribunal (a subordinate court.) with limited jurisdiction on issues of local significance that may be established by an Act of Parliament.

Perhaps these local courts should have been addressed in as much detail as the Kadhi courts (which are also subordinate courts that are informed by the Muslim culture). They should have qualifications for appointment of officers and the express jurisdiction of these courts. It is not clear why the operation of these courts has been limited in that these courts have to be established by an Act of Parliament when the others do not have that limitation.

For the avoidance of doubt, we should probably provide that *the African customary law and the Islamic law are not part of the criminal law of Kenya even though they are listed as sources of the Kenyan law.*

9.11 DEVOLUTION

Chapter 10 of the Draft Bill primarily gives powers of self-governance to the people at all levels and it especially enhances the participation of communities. It seeks to promote national unity by firstly, recognizing the diversity of the communities and secondly it hopes that all the diverse communities will have a sense of sharing in the national government.

It further calls for the equitable sharing of national and local resources through out Kenya with special provisions for the marginalized areas. The devolved governments are entitled to the benefit of the local resources in order to ensure that these benefit the local community. The devolved governments are required to ensure the participation of the communities in policing and in maintaining national order, and in the decisions relating to the exploitation of natural resources in their areas and the preservation of the environment.

The system and instrument of devolution is one such provision of the Draft Bill that seeks to include traditional and cultural values of governance as well as cultural building blocks for a truly people based system of governance and decision making.

9.12 CHAPTER 11 - LAND AND PROPERTY

This chapter has greatly and indigenously incorporated our culture in that it has given constitutional recognition of the communal system of land tenure and resource management.

Communal ownership of land is given constitutional recognition in Art 234(3). Whereby all land held under the trust land Act and all land registered in the name of the group representative under the provisions of the Land (group) Representatives Act and all land held or managed by specific communities e.g. community forests, water sources, grazing areas or shrines and land hereafter ceded to a specific community by way of any process of alienation, transmission or conversion.

Public land is the collective property of present and future generations. While the community land shall vest in and be held by communities identified on the basis of ethnicity, culture or community of interest.

The provisions of resettlement of landless people have a cultural connotation as traditionally every member of a community had access to land. The draft Bill has also pro-actively called for the ascertainment and adjudication of any land held for the benefit of any community by any person or agency and the transfer of such land to the communities. The draft bill has also proactively called for the establishment of a mechanism by parliament, which would review and assess all claims to unjust expropriation of land in the coast, northeastern and Rift valley provinces and determine how best they can be justly, peacefully and equitably resolved.

The land provisions have also addressed the land and gender debate by providing that property rights are protected without any discrimination on the basis of gender. This positive measure will mitigate against the historical injustices that have been perpetuated through the discriminative aspects of our culture.

9.13 CHAPTER 12: ENVIRONMENT AND NATURAL RESOURCES

This Chapter has made progressive provisions recognizing the role of communities in the management and governance of environment and natural resources of the community. It provides for the following:

- i. Retention and application of modified traditional environmental conservation methods
- ii. Expansion of the *locus standi* to allow for community actions on environmental matters
- iii. Protection of the historical heritage, the natural beauties and the artistic heritage

Article 239 explicitly provides that the cultural and social principles for the management of the environment and the natural resources traditionally applied by any community within Kenya shall be applied in so far as they are relevant and they are (*not repugnant to justice and morality*) or inconsistent with the constitution.

The provisions on enforcement of environmental rights allow for community actions in that it is not necessary for one to prove that one will suffer personal loss or injury.

It should be noted that an express provision that calls for the duty upon *the state and the Kenyan citizens to conserve the natural heritage, historical heritage the artistic heritage and the natural beauties of the nation should be expressly provided for.*

9.14 CHAPTER 13: PUBLIC FINANCE & REVENUE MANAGEMENT

This Chapter provides for cultural principles of equitable sharing of resources among the Kenyan communities.

The principles of a public finance and revenue management system are to enhance the participation of people, communities and ensure the equitable sharing of national and local resources taking into account the special provisions for marginalized areas. Article 257 provides for the formation of an economic and social council.

9.15 PUBLIC SERVICE

The draft Bill provides the following in relation to culture:

- Article seeks to provide for merit as the basis of appointments and promotions
- It also calls for the reflection of ethnic composition of the population in the composition of the public service at all levels.
- Article 265(5) creates the police service and provides that it should work closely with communities to ensure security and safety for all citizens through community policing.
- The civil servants in the devolved district governments should be recruited from the local inhabitants but the National government also has powers to deploy staff to those areas.

9.16 CHAPTER 15: DEFENCE AND NATIONAL SECURITY

This Chapter recognizes the place and role of traditional systems and methods of conflict resolution and peace building and calls for the adoption of the community methods of peace making. Article 271 provides that the defense forces should endeavor to learn from the community and make use of the experience and traditions of the diverse communities within Kenya and their leaders in making and maintaining peace.

9.17 CHAPTER 16: LEADERSHIP AND INTEGRITY

The upholding of one's moral and ethical integrity was a strong underlying theme in African leadership. It was primarily to maintain the moral fabric in the society. Upholding of moral and ethical integrity in one's official and personal capacities is therefore typically African. *This virtue needs to be recognized and clearly stated in the Draft Bill.*

9.18 CHAPTER 17: CONSTITUTIONAL COMMISSIONS:

There is no Commission or other institutional framework created to look into cultural linguistic or religious matters in the Draft Bill. It is assumed that culture and cultural affairs will be addressed through the Commission on Human Rights and Administrative Justice and the executive. In South Africa they have established a Commission for the promotion and protection of the rights of cultural, religious and linguistic communities whose primary objects are:

- a) To promote respect for the rights of culture, religious and linguistic communities.
- b) To promote and develop peace friendship, humanity, tolerance, national unity, among cultural, religious and linguistic communities
- c) To recommend the establishment, in accordance with national legislation, of a cultural or other council or councils for a community or communities in South Africa

In Swaziland, Draft Constitution in Chapter 19 provide for a council of chiefs whose responsibility among others is to advise the King on customary issues and other matters relating to or affecting chieftaincy.

The Ugandan Constitution's Chapter 16 is devoted to the institution of tradition or cultural leaders. It recognizes their existence, their nature, their entitlements and their relationship with the Government and Local Government.

It is therefore proposed that the Draft Bill provides for the establishment of the National Council for the Promotion and Protection of Cultural Heritage. The Council can be charged with the responsibility of:

- a) Developing the national identity for Kenya through the promotion and appreciation of Kenya's diverse cultures.*
- b) Protecting the intellectual property of the indigenous communities technologies, alternative medicine, music, poetry and arts*
- c) Promoting investment in Kenya's cultural industry*
- d) Documenting Kenya's culture for purposes of adapting and incorporating cultural values in the governance of the Kenyan society*
- e) Protecting the national cultural heritage,*
- f) Promoting the development of the Kiswahili and indigenous languages*
- g) Promoting the technological or scientific studies, which enhance cultural values and the preservation ancient monuments.*
- h) Promoting and preserve those cultural values and practices, which enhance the dignity and well being of Kenyan people*
- i) Encouraging the development, preservation and enrichment of all Kenyan languages;*
- j) Promoting the development of a sign language for the deaf; and*
- k) Preserving and developing Kenyan culture, which shall be national, modern, and humanistic and shall inherit and promote the values, thought, morality and style of the cultures of all nationalities in Kenya,*
- l) Identifying, harnessing and developing all creative talent among the people of Kenya.*
- m) Promoting inter-ministerial dialogue in information, preservation of cultural heritage, health care, education and training and overall management of the national system of education, science and technology, physical culture and sports.*
- n) Promoting cultural tourism and tourist activities and to expend international intercourse and cooperation in the fields of culture.*
- o) Recommending the establishment, in accordance with national legislation, of:*

- a) *Kenya Institute of National Languages (KINLA)*
- b) *Kenya Institute of Common Law and Research (KICLaR)*
- c) *National Forum for Community Leaders (Bringing together leaders of village governments)*

9.19 CHAPTERS 18, 19 AND 20 (AMENDMENT TO THE CONSTITUTION, INTERPRETATION, TRANSITIONAL PROVISIONS)

The Draft Bill has not mentioned culture in the remaining chapters of the Draft Bill possibly because of the nature of the chapters. *However, there is need to give an interpretation of the meaning of culture in Chapter Nineteen.*

Conclusion

Even though the Draft Bill can be said to be very rich in the recognition of culture in the design and provisions of the Draft Bill to alter the constitution, it still has a number of gaps and shortcomings as to the role and place of culture in our national constitution and reconstruction especially with regard to forging a unique Kenyan Identity. In order to make the Kenyan Constitution truly Kenyan, indigenous and homegrown, there is a need therefore to expressly entrench cultural provisions in the Draft Bill.

10.0 VIEWS OF DELEGATES AT THE NATIONAL CONSTITUTIONAL CONFERENCE

10.1 Preamble

- Struggle for independence should be recognized in the preamble.
- Second paragraph of preamble should read "committed to nurturing and protecting the well being of other members of community".
- We should say 'God bless Kenya' at the top of the preamble and not at the bottom.
- The constitution should recognize and respect the principle of intergenerational equity,
- The constitution should recognize the role of freedom fighters.
- There should be a policy on independence fighters of this country.
- The appendix of the constitution should bear names of the national heroes.

10.2 Family and Marriage

- (Article 32 (1) Insert “from conception henceforth”, that life be recognized from the time of conception henceforth until the day God shall recall life because only God has the right to recall life.
- There is need to specify that right to life applies from conception to natural death.
- (Article 60) Insert "Religion " alongside cultural acceptability.
- Article 38 (3) should specify that marriage must be between male and female.
- Article 38 (3) “Family” be defined and that consent to marry be between man and woman of over 18 years of age.
- Family is an important value in African culture and it should be given its real place...Family be defined to ensure that it is a union between man and woman.
- There should be distinction between child labor and child work
- Insert an article that states: “Every child has right to a name and a nationality from birth and have their names including tribal names”
- All marriages should be legally registered.

10.3 Welfare, Basic Needs and Social Security

- Older members of the society should have right to live. Persons aged 75 and above be provided for by the state.
- Person aged between 50 to 60 and over be considered as aged to be supported with social assistance
- The state makes provisions for the maintenance and welfare of the aged.

10.4 Language

- Article 9 (1) Kiswahili and English should be official language.
- The official languages of Kenya are Kiswahili and English.
- Article 9 (1) should be amended to read "all indigenous languages to be national and to be declared as national languages".
- All Local languages should be elevated to the national languages.
- All Kenyan languages should be made national languages and if need be, we should codify who are the people of Kenya, all the communities of the republic of Kenya.
- National language should be Kiswahili.
- All Kenyan languages are national languages that should be recognized in the constitution.

10.5 Council of Elders

- Elders at the village should be trained in basic law such that handling issues at village reflect general legal background.
- Village Courts should be recognized in the constitution.
- Village Courts and Council of elders should be recognized in the constitution.
- Customary Courts should be recognized in the constitution.
- Council of elders should be recognized in the constitution.
- Family Court should be established in the constitution so that people get access to justice.
- The commission should consider setting up a board, which will be responsible for quantifying African customary law.

10.6 Kenyan Communities

- The constitution should protect indigenous community from exploitation by other communities.
- Article 233 In defining communities, it must state clearly who the communities are and where they live.
- The constitution should declare who these communities are, where they are supposed to live and what was going on there especially at the advent of colonial conquest in this country.
- There should be an article on culture that captures cultural heritage, national pride and national identity.

10.7 Land and Economy

- While classifying land, we should recognize and protect public land being used by religious organizations for purposes of worship.
- Article 234 (2) c the constitution should be very clear about vacant land.
- Article 234 (3) Pastoral land should be classified as community land.
- Article 234 (3) Community land tenure should be scrutinized to avoid minorities like Ogiek losing their ancestral land.

- Article 234 (3) in the definition of Trust land indigenous community should be added.
- Article 232 should read: “ The communal land shall be clearly alienated and invested in communities”.
- The National Constitutional Conference should determine the cut-off date for the review and assessment of all claims to unjust expropriation of land in the coast, North Eastern, Rift Valley and elsewhere.
- Entrench communal land policy in the constitution.
- Communal Land Policy should be entrenched in the constitution.
- Grazing land belongs to the community and any projects unbeneficial to the community as far as their basic livelihoods are concerned should necessitate compensation for the community.
- Communal grazing land should be protected in the constitution that pastoralist right to water and pasture access is guaranteed.
- Include a clause in chapter 29 that shall recognize pastoralism as a way of life, because it has not been recognized in this nation by the present constitution
- Create a clause for the protection of marginalized people, their resources, especially land be protected by the constitution.
- The constitution should recognize customary land rights especially as they relate to alienation of land and inheritance.
- If land belongs to the communities, then there should be a code or an identity number and a schedule of those communities with their land.
- The interpretation of land belonging to the community should be very clear.
- Article 233 (1) This article should read, "Land should belong to the indigenous communities of that place".
- The constitution should make it extremely expensive for multinationals to come and pollute our environment.

10.8 Communal Rights

- Grazing right of the minorities should be promoted and protected such that they have access to water, pasture and marketing.
- Our cultural richness and distinctiveness must also inform our structures of governance.
- The natural resources must be seen to benefit initially the communities where those resources are found.
- Article 75 Add that when interpreting the Bill of Rights, a Court, Tribunal or forum shall recognize the importance of considering the interests of other species, aspects of the environment and future generations.

11.0 TOWARDS A MULTICULTURAL KENYA SOCIETY

The Constitution of Kenya Review Act in section 3 (e) seeks to secure in the new constitution, provisions that aim to promote respect for ethnic and regional diversity and communal rights including the right of communities to organize and participate in cultural activities and the expression of their identities. The Commission in Section 17 (d) (x) is also expected to examine and review the socio-cultural obstacles that promote various forms of discrimination and recommend improvements to secure equal rights for all.

In the Preamble of the Draft Bill to alter the Constitution early reference is made to the cultural diversity of the people of the people of Kenya. It starts thus

“We the people of Kenya, Aware of our ethnic, cultural and religious diversity and determined to live in peace and unity as one indivisible sovereign nation”

There is therefore a clear realization that Kenya as a nation is characterized by cultural diversity that calls upon a clear constitutional and democratic policy response in order to maximize on the benefits of our cultural and social diversity, and minimize the threats to our national unity. Indeed the emergence of the crisis of welfare state, economic and cultural globalization and massive increase in all forms of international population movements have come to present major threats to our national unity and inter-ethnic contacts requiring adoption of a multicultural policy approach.

Perhaps W.B. Kyijomanyi in his article “*Proposed Federal Units of Uganda* presents the most powerful argument for a multicultural approach to managing ethnic and cultural diversity in a nation-state. He disputes arguments fronted by skeptical modernization theorists like the late Samora Machel (President of Mozambique), who upheld the distorted notion that, “*for the nation to live, the tribe must die*”. Modernization theorists claim that ethnicity is a hindrance towards modernization. He (Kyijomanyi) however, advances the argument that it is the right time to acknowledge a concept called the *distinctive duality of ethnicity*. The concept advocates for perception of *ethnicity as both a cultural identity, and consciousness laden with the possibilities for political mobilization and a discourse, which arranges collective memory as a basis for political action*. Mr. Kyijomanyi asserts that, “*if Uganda is to survive and flourish, the tribe must be recognised and promoted*”.¹⁸

Applying the principle of multiculturalism is thus now considered as a key approach to managing our cultural and ethnic diversity. Multiculturalism as principle embodies the ideals of reconciling respect for diversity with concerns for societal cohesion and the promotion of universally shared values and norms.¹⁷ Multiculturalism involves managing differences in culture from the point of view of understanding different cultures. It also involves managing power relations among people of different cultures. It takes into account of one being aware of an individual’s own cultural background and values and more important the contribution that

¹⁸ W.B. Kyijomanyi Proposed Federal Units in Uganda

¹⁷ Christine Ingles “*Multiculturalism: A Policy Response to Diversity*”, paper prepared on the occasion of the ‘1995 Global Cultural Diversity Conference, April, 1995.

their values, perceptions and expectations can make. It further tends to promote co-existence of diverse ethnic groups in the general social structure of society and hence recognizing that all ethnic communities are equal.

Whereas multiculturalism confronts a critical perspective in the co-existence of different cultures, it also functions as a program for integration for a nation in a crisis. The rediscovery of ethnicity and cultural identities created an awareness of the need to cope with the management of ethnic and cultural diversity through policies which promote ethnic and cultural minority group's participation in, and access to the resources of society, while maintaining the unity of the Country.

The relevance of multicultural policy in multi-ethnic societies can be addressed from the following three levels:

- **Demographic-descriptive usage:** This is a situation where multiculturalism is used to refer to existence of diverse ethnic and racial segments in the population of a society or state. The importance of it is that it is based on perceived cultural differences but mainly associated with forms of structural differentiation. It expresses precise ethnic groupings which exist in a state and it shows significance of ethnicity for social participation in societal institutions and processes through which ethnic differential is constructed and maintained. It is important to mention that this varies considerably between individual states and over time.
- **Programmatic-political usage:** In this scenario multiculturalism refers to specific types of programmes and policy initiatives designed to respond to and manage ethnic diversity.
- **Ideological-normative usage:** The understanding here is that acknowledging existence of ethnic diversity and ensuring rights of individuals to retain their culture should go hand in hand with enjoying full access to, participation in and adherence to constitutional principles and commonly shared values prevalent in the society. This will ensure equity and protect the disadvantaged in society.

11.1 Challenges in implementing multicultural approach to national unity

The following are some of the challenges in managing multicultural societies:

- The fact that existing policy models are failing. For instance the assimilation model that seek to create one homogenous nation- state is being questioned in that there is a growing sense of alienation among many of those from ethnic minority backgrounds. From an individual perspective assimilation increasingly represents an unrealistic model even in those ‘immigrant’ societies, which have used immigration as a means of nation building. Also associated with it is the growing level of international mobility.
- Ensuring a ‘separate but equal’ outcome for ethnic minorities in a country of multi-ethnicity of lead to pressing demands for social justice often associated with strengthening of minority group solidarity.
- In situations characterized by extended and violent conflict, any attempt at reconciliation will inevitably be problematic.
- Where there is long history of inter-ethnic hostilities and failure of alternative policy models to result integration, the task of multicultural model to turn around the existing situation is immense.
- Commitment to diversity carries a powerful positive message to minority groups, which can counter their perceived need to argue in terms of broad ambit claims, or to retreat into a fundamentalist isolation and resistance to integration.
- Financial constraints on state expenditure, corrupt distribution of national resources in favor of a few mostly to those associated with people in power, and high levels of unemployment have already exacerbated existing inter-ethnic relations.
- The need to identify specific strategies in implementing the policy as it involves institutional and ultimate personal change. The challenge is that the strategies appropriate and feasible vary from one stage of implementation to the next
- A further complication is that evaluation should normally take a long-term perspective but this is not possible in present situation where policy makers seek urgent solutions.
- Effectiveness of multiculturalism depends on the cumulative effect of various strategies, which together ensure that cultural diversity is encouraged.

It is also important to mention that in societies where sub-national regions have a considerable role in policy-making and implementation, multicultural initiatives at this level are of particular significance. For example where minorities are concentrated in certain regions, local initiatives are extremely valuable on what can be achieved through an explicitly multicultural policy.

There is a general feeling however, that overt support for a multicultural model would be politically unacceptable in the sense that it deprives many local programmes of legitimacy and resources. The scenario is such that such programmes face difficulties in becoming institutionalized, however their existence is valuable as a model for others involved in policy development and implementation.

There is also the argument that positive support of cultural diversity or multiculturalism has potential to foster highly divisive social conflicts. Criticism has been directed at what has been perceived to be the outcome of the implementation of multicultural policies. Case examples which have been cited include the educational reforms in the USA which allowed for the inclusion of alternative perspectives into the history or literature curriculum and which are now

leading to the disuniting of the American society and even the alleged undermining of the foundations of the western civilization as a clear response to shifts in educational programmes and practice. Advocates of these changes often frequently justify them due to the pressure of multiculturalism and hence attempt to highlight it as an alternative policy model to redress perceived ethnic disadvantage and injustice. There is an assertion that continuous threats to social cohesion posed by ethnic and cultural diversity is derived from one strand of theorizing about modernity. It has been argued that the contemporary processes and confusion over the so-called globalization and modernity have thwarted the application of multiculturalism.

The important contribution of multicultural model lies not merely on the way it involves specific programmes and practices but on management of integration through provisions of services to minorities by a more participatory and consultative process. This practically represents a major advance in the democratic process in multi-ethnic societies.

Without belaboring the point there is indeed an urgent need in Kenya to find durable constitutional, policy and institutional approach to managing our multi-ethnic society so as to reduce ethnic conflicts and violence in a manner acceptable within a democratic society. Reasons, which have necessitated this new thinking, include political instability, economic changes and ever increasing levels of international migration, which must be addressed.

11.2 Values of multicultural constitution and policy for national unity

Experiences of states which explicitly espoused it as a state policy in response to ethnic diversity, has shown their considerable durability with positive attempts of alleviating deeply entrenched social injustice. In this regard multicultural approach plays a crucial interventionist role of the state through an enabling environment for the struggle and recognition of legitimacy and resources for a balanced, equitable and effective development. A major advantage of a multicultural approach is its ability to address issues democratically for it to succeed. This will hence counter the pessimistic assertion that the democratic majority is inherently opposed to the rights of minority groups, as the task of multicultural policy is to achieve such consensus on the value of diversity. The approach seeks greater acknowledgement of the rights of cultural and ethnic minorities and the marginalized in particular.

The attempt to indicate that diversity is not merely tolerated but welcomed as a benefit for the whole nation gives it power and efficacy to bring together both the majority and the minority in a Country.

Other Values of multicultural constitution and policy for national unity include the following:

- (i) It will address ethnic conflicts and suspicion and ensure peaceful coexistence and harmony between and among different communities in the Country. This will help in eradicating tribalism and racism in the Country.
- (ii) It will ensure equity and balanced development for all regions including representation through elective and appointive processes.
- (iii) It will provide a conducive environment and a strategy for diverse cultural exchanges, reflections and harmonious understanding on such issues like marriages, language, religion, gender, knowledge and other specific customs and traditions.

- (iv) Its implementation is likely to create an inclusive and participatory environment for all Kenyan communities. This includes both the minority and majority groups and the marginalized in general. The end result is an identity of true nationhood, patriotism, dignity and the development of national unity in the Country. Strategies of ensuring and achieving equality and stability in the Country would have been greatly achieved for the benefit of all Kenyans.
- (v) Empowerment of different Kenyan communities to enable them to effectively deal with cultural conflicts and evolution particularly on issues like globalization and international development.
- (vi) It will enable them to guard against cultural erosion and to maintain and be proud of their culture
- (vii) Kenyans are eager to live and work in a secure and peaceful environment. This can only be achieved if and when efforts towards peace through policies like multiculturalism are effectively put in place. Such an atmosphere is ripe for sound cultural, political and economic development in the Country.

12.0 RECOMMENDATIONS

The task Force proposes an explicit multicultural approach as a response to cultural, ethnic, linguistic and religious diversity as a positive attempt of alleviating deeply entrenched social injustice and inequalities in the Kenyan society. The Constitution by taking a multicultural approach seeks to provide an enabling environment for the recognition and promotion of consensus on the value of diversity in cementing national unity and peace.

12.1 General Recommendations

- Create a chapter entitled “**CULTURE, EDUCATION, SCIENCE AND TECHNOLOGY**”.

12.2 General Principles on Culture

1. Recognize and respect all Kenyan communities

- Identification and acceptance (Preamble & Art 14 (3))
- Equality (Preamble & Art 33)
- Non-discrimination (Art 34)
- Inclusion (Preamble & Art 33)

2. Right to manifest and practice

- Right to maintain, protect and develop the past, present and future cultural manifestations (Art 14 & 63A),
- Right to observe, practice and reclaim customs, traditions, rituals, convention including dress mode, food. (Art 63 A)

3. History and Heritage

- Right to transmission to future generations, histories, languages, oral traditions, philosophies writing and other communication, systems, and literature. (Art 30 & 63 A)
- *Cultural Heritage will include monuments, artifacts, architectural works, elements or structure of archaeological nature, creative and artistic works, designs, inscriptions, caves and forest dwellings, other structures or features which are of outstanding value from the point of history, art or science. (Art 63 A, Interpretation Chapter)*

4. Historical and Religious sites

- Recognition, respect, preservation, protection and promotion of religious, historical, sacred and archeological sites. (Art 63 A)
- Acceptance of rights and claims including property rights, access and visitations and other related rights. (Art 63 A)

5. Intellectual Property of the people of Kenya

- To cover indigenous and local knowledge and know-how including: folklore, design, creative and performing arts (including song, music, dance, drama, storytelling, stories, painting, sculptures, ceremonies, festivals, games and symbols. (Art 14 & 63 A)
- To include knowledge of scientific, agricultural, technical and ecological, including cultigens, medicines and sustainable use of flora and fauna, seeds and other biodiversity. (Art 14 & 63 A)
- To include human genetic material including DNA and tissues. (Art 14 & 63 A)
- There is need for greater consideration as to how innovations and intellectual property laws might assist the people achieve their cultural and human development with greater international avenues being explored so as to ensure that the international documents have an aspect that protect Kenyan cultural heritage.
- Most specifically instruments relating to copyrights should include the protection of cultural rights of communities. Where ownership of a cultural work is communal, then the group should be given the right of attribution and cultural integrity. There should be no limit on period as far as copyrighting of cultural heritage by a community goes. This too should extend to indigenous knowledge including biodiversity, and upon this, legislation touching on intellectual property ought to be amended accordingly.
- The Constitution should, therefore, make provisions on innovations and intellectual property by securing the exclusive rights of innovators, creators, inventors, authors and performers. Incorporating innovation and intellectual property in the Kenya Constitution will hence be a major step in bringing these core values unto the national political, economic, social, cultural, judicial and development agenda. Clearly, the challenges have never been greater; and the opportunities have never been more abundant.

6. Right to be involved in national life

- All communities to have equal opportunity in decision- making process particularly when decisions may affect them directly or indirectly. (Art 1, Art 14, Art 30, Art 213)

- That national institutions should reflect the national character of diversity such as in education, employment, recruitment into police and the armed forces, and in national institutions e.g. parliament, judiciary and executive. (Art 14, Art 30, Art 271)
- Measures including affirmative action to be used to re-dress past injustices, and/or neglect. (Art 14, Art 109)

7. National Culture, identity, values and symbols

- Designate certain days as cultural days when various communities celebrate their cultures
- That our shared experience and values should form the basis for building our national cultural identity (Preamble & Art 14)
- To promote African and other Kenyan cultures, (Art 14)
- To promote Pan-Africanism and the integration of African (East African) nations, (Art 14)
- To establish national days that will be celebrated using Kenyan values, (Art 13)
- To safeguard and promote the national anthem and flag, (Art 11)
- To recognize and respect freedom fighters past, present and future (Preamble & Art 13)
- To establish a heroes and heroine acre, (Art 13 & Schedules)
- To establish institutional framework to promote the national culture and shared experiences e.g. KBC, (Art 13 & Schedules) (Chapter 2)
- To affirm the use of African and other Kenyan values and symbols in national institution including: (Chapter 2, new clauses, Art 14 & Art 63A)
 - Mode of dress or dress code, in parliament, Judiciary,
 - Formal and national government functions,
 - For avoidance of doubt cultural dress codes will be highly encouraged.

8. Family and Marriage

- All marriages including cultural, religious etc. should be recognised by law and issued with marriage certificate, (Art 38)
- Recognise marriage under any tradition or system of religious, personal or family law, (Art 38)
- Recognise marriage between individuals of opposite sex,
- Outlaw same sex unions. (Art 38)
- Recognise the extended family and its role as a social support system)

9. Cultural Institutions (Art 47, Art 63 A, Art 287)

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

- National archives,
- KBC,
- Kenya Cultural Centre,
- Kenya National Library.

10. National Council for the Promotion and Protection of Cultural Heritage

It is proposed that the Draft Bill provides for the establishment of the National Council for the Promotion and Protection of Cultural Heritage (**under Chapter Two - the Republic or Article 287 of Chapter Seventeen on Constitutional Commissions or Chapter on Culture, Education, Science and Technology**) whose functions shall be:

- Advising the government, Parliament and judiciary on matters of cultural importance to the people of Kenya.
- Overall administration of cultural activities,
- Promoting investments in Kenya's culture, literature, visual and performing arts and create favorable conditions for the people's enjoyment of their valuable works
- Identifying, protecting, and maintaining cultural sites,
- Designing and implementing policies and programmes that promote cultural diversities and enhance national cohesion,
- Developing the national identity for Kenya through the promotion and appreciation of Kenya's diverse cultures.
- Protecting the intellectual property of the indigenous communities technologies, alternative medicine, music, poetry and arts
- Promoting investment in Kenya's cultural industry
- Documenting Kenya's culture for purposes of adapting and incorporating cultural values in the national and local governance system of the Kenyan society
- Protecting the national cultural heritage,
- Promoting the development of the Kiswahili and other indigenous languages through education and media
- Promoting the development of a sign language for the deaf;
- Promoting the technological or scientific studies, which enhance cultural values and the preservation ancient monuments.
- Promoting and preserve those cultural values and practices, which enhance the dignity and well being of Kenyan people
- Encouraging the development, preservation and enrichment of all Kenyan languages;
- Preserving and developing Kenyan culture, which shall be national, modern, and humanistic and shall inherit and promote the values, thought, morality and style of the cultures of all nationalities in Kenya,
- Identifying, harnessing and developing all creative talent among the people of Kenya.
- Promoting inter-ministerial dialogue in information, preservation of cultural heritage, health care, education and training and overall management of the national system of education, science and technology, physical culture and sports.
- Promoting cultural tourism and tourist activities and to expend international intercourse and cooperation in the fields of culture.
- Strengthening, institutionalizing, reforming and developing the traditional legal system and the Common Law of Kenya

- Recommending the establishment, in accordance with national legislation, of:
 - Kenya Institute of National Languages (KINLA)
 - Kenya Institute of Common Law and Research (KICLaR)
 - National Forum for Community Leaders (Bringing together leaders of village governments)

11. Conflict management and resolution (Art 184)

- Encourage the use of traditional conflict resolution mechanism where applicable,
- Allow alternative conflict resolution on civil matters where both parties consent,
- Recognize the traditional oathing system in the judicial system

12. Media (Art 47, new clause)

- Make KBC an independent institution as a primary information and cultural source for the Kenyan people,
- Propose how to govern media houses to include:
 - Education and local content-require merit. (Also recommendations on Policy Principles on Media and culture under 12.4 number 15.0)
 - As a policy question, people need to be informed about the existing cultural heritage laws and how these impact on their culture and intellectual property rights. They need to be informed how the existing cultural heritage laws might benefit their needs regarding the use and control of their cultural material. Acceptability by the people of the laws is the sine qua non to their implementation.

13. Legislation

- Parliament shall enact such legislation as necessary to ensure the promotion, protection and access to cultural heritage and to establish such institutional arrangements necessary for the promotion of cultural development.
- Legislation should include provisions that:
 - Prohibit the willful distortion and destruction of cultural material
 - Prevent misrepresentations of the source of cultural material
 - Allow payments to indigenous groups/owners for the commercial use of their cultural material
 - Provide special protection for sacred and special materials
- Legislation should not inhibit the further cultural development of materials within their originating communities. Customary and traditional use should not be affected.
- Legislation should consider how imitation/appropriation and stylized rip-offs of cultural material should be dealt with. Prior authorization provisions should be included based on respect, negotiation and free and informed consent.

- Legislation should allow particular groups of people or communities to bring civil actions against infringers of their cultural and intellectual property and obtain remedies

12.2.1 Specific Task Force Recommendations on culture:

- The definition of culture should be included in the interpretation Chapter;

In this Constitution unless the context otherwise requires Culture means the *totality and diversity of life, the expression of our civilization and the symbolic and learned aspect of Kenyan society, including language, custom, traditions, convention eating habits, dressing habits, architectural designs, art, education, science and technology, how people spend their leisure time, ethics, morality, religion and politics.*
- Preamble and National Goals: the preamble should endeavor to identify the commonalities in our culture and nurture it while at the same time maintaining diversity.
- Rephrase Article 5(1)(c) to read African Customary law *in civil matters*”.
- Article 9(i): all Kenyan languages shall enjoy equal status and recognition and Article 9(ii): that official languages shall be English and Kiswahili.
- Article 32(1): A comprehensive definition of “life” should be captured. Life begins at conception till death.
- Culture should be integrated in the schools’ curricula and extra curricula activities.
- Ethnicity should only be used positively.
- As a principle, the state should endeavor to eliminate tribalism, racism, etc.
- Expound Article 37(5)(d) to include female circumcision, early childhood marriage and tattooing of children.
- Add clause (5), Article 63A(5)(5) to read, *“all cultural practices that dehumanize or are injurious to the physical and mental well being of a person are prohibited”*.
- Rephrase Article 63(2)(a) to read: “to enjoy their cultural *diversity...*”.
- Article 239 explicitly provides that the cultural and social principles for the management of the environment and the natural resources traditionally applied by any community within Kenya shall be applied in so far as they are relevant. The expressions *they are (not repugnant to justice and morality) should be removed and instead leave* ”inconsistent with the constitution”.
- The Republic shall promote the development of culture, and scientific and technical research.

- It should be noted that an express provision that calls for the duty upon *the state and the Kenyan citizens to conserve the natural heritage, historical heritage the artistic heritage and the natural beauties of the nation should be expressly provided for.*
- Amend Article 14(3) to read, “ ...shall recognize ***cultural equality, diversity*** and promote ***cultures that contribute to national cohesion including inter- cultural relations***”.
- Insert a clause under Article 14 stating that ***the “Republic shall establish, enhance and devolve an institutional framework that ensures documentation, preservation and development of all Kenya’s cultures for posterity”.***
- Article 38(3) should be rephrased to mean marriages between opposite sexes.
- Traditional brews should be registered, licensed and controlled by the relevant authorities. The revenues generated from their tax collection should go the respective devolved governments.
- Article 57 should be amended to read, “every person has the right to health, which includes the right to health care services, ***whether allopathic or complementary and alternative medicine***, including reproductive health care”.
- Insert a clause; Article 103(5) that appointment shall be on the basis of merit, gender and regional balance.

12.2.2 Summary of Culture Principles

9. All Kenyan peoples’ Cultural, linguistic and religious communities are equal;
10. All Kenyan peoples’ cultural, linguistic and religious communities have a right to manifest, practice and revitalise their cultural heritage. This include the right to maintain, protect and develop the past, present and future manifestations of their cultures such as archaeological and historical sites, material culture, design, ceremonies, knowledge, technologies and visual and performing arts, and literature, as well as the right of restitution of cultural, intellectual, religious and spiritual property taken without their free will and consent or in violation of their laws, traditions and customs.
11. All Kenyan peoples’ cultural, linguistic and religious communities have the right to gain directly from benefits arising from their cultural heritage this include monuments, archaeological sites, historical sites, material culture, knowledge, designs, technologies, ceremonies, visual and performing arts, and literature.
12. All Kenyan peoples’ cultural, linguistic and religious communities have a right to have their sacred places including burial sites to be preserved, respected and protected,
13. All Kenyan peoples’ cultural, linguistic and religious communities have a right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing and other communicating systems, and literature and to designate and retain their own name for communities and persons.
14. All Kenyan peoples’ cultural, linguistic and religious communities have a right to establish and control cultural institutions, at their own cost, this may include educational

institutions. This right includes the right to providing education in their own language and in a manner appropriate to their cultural methods of teaching and learning.

15. All Kenyan peoples' cultural, linguistic and religious communities shall be respected and not discriminated in any form,
16. No Kenyan peoples' cultural, linguistic and religious community may be addressed by pejorative and offensive terms, stereotyped or profiled,

12.2.3 Recommendations on policy principles

i) Commitment to multiculturalism

The Government of Kenya and her people must make a commitment to multiculturalism as a principle in the sense of tolerance and respect for plurality of cultures.

There is need for protection of cultural rights of minorities and need for a real national commitment to stamp out ethno-centrism, racism, xenophobia, prevention of politicization of religion and concomitant rise of extremism and general empowerment in education and communication.

ii) Creativity and empowerment;

The technological knowledge and expertise gained must reflect the local needs and circumstances. Power must not be equated with knowledge and expertise alone but also from both social and technological capabilities and which must be harnessed to create a cultural resource.

iii) Culture and media;

- The ultimate aim should be to strive for a media system that enables each and all citizens to have their voices heard and that freedom of expression be balanced against the rights of others.
- There is need for standards of decency and morality in information channeled through various media outlets.
- There is need to put in place certain standards and benchmarks without falling into trap of censorship on the percentages of local programmes to be aired in national media.
- There is need to deregulate the media and ensure its accessibility to the people.

iv) Gender and culture;

There is need to look at issues like equity, social efficiency, women's productive capacities and equality with relation to the following;

- Women's rights as human rights
- Reproductive freedom
- Gender-Awareness planning
- Enhancement of civic/cultural programmes

v) Children/Young people /cultural continuity

The focus should be to impart sense of meaning and value to their lives through provision of basic services and giving them full responsibility to ensure the infinite diversity of cultures are better understood and assimilated.

- There is need to protect them from marginalisation and neglect by ensuring social inclusion in civic and cultural programmes.
- The elderly need to act as role models in the preservation and continuity of cultural transmission.

x) Cultural heritage;

Our museums should mirror the knowledge, experience and practices of all those who contribute to the human dimension in both rural and urban context. They should not be seen just as collection of artifacts only but to reflect total cultural infrastructure of the nation.

There is further need for greater emphasis and support to our archives for the sake of our social history and relationships.

There is also need to achieve proper balance between cultural heritage and tourism, as the latter remains a leading foreign exchange earner in the Country

xi) Culture and environment;

The local ecological knowledge and traditional practice should be given priority as they tend to offer solutions founded on generations of experimentation and observation.

xii) Dual citizenship or Naturalisation;

Strong measures should be put in place to ensure that foreigners who want to become citizens of Kenya must be those who will add to the value of the Country. For instance it should be mandatory that they are professionals and should learn Kiswahili and possibly the indigenous language of the devolved region he/she intends to reside in.

xiii) Priority of the indigenous culture over other foreign cultures;

The new policy should ensure that our Kenyan culture takes priority over all other foreign cultures in terms of preservation, promotion and diversity.

Our multicultural policy framework should adopt the following approach;

- Human development: individual and community empowerment in terms of access to culture, active full participation and meaningful citizenship.
- Pluralism: greater recognition of cultural and linguistic diversity, cultural rights, gender equity and combating exclusion
- Creativity, innovation in governance and decision-making, community arts and specialized education and training which encourages creativity.
- Balancing culture and the market place to resolve the inevitable tension between free play of commercial forces and need for content that reflects cultural diversity.

- Forging new alliances for funding and partnership between governments, market forces and civil society through various collaborative strategies.

12.2.4 Recommendations on consequential legislation

Although there are a number of legislative provisions touching on culture, most of them are inadequate and negative in approach. By their very nature and design they do not adequately address the question of multiculturalism especially with regard to recognizing and protecting the cultural heritage of the people of Kenya. While there is need for review and audit of various laws from a cultural perspective, broadly, the inadequacies and gaps that need to be addressed by the legislation arising from a new constitutional order include: -

- Ownership of cultural heritage by the community
- Focus of the laws on to not only the tangible cultural heritage but also on intangible aspects such as stories and songs. Legislation should provide for protection of works that are intangible and not just the material form. The rights should exist in perpetuity.
- Focus on living heritage rather than merely the past heritage.
- Protection of cultural values and normative systems
- The participation of the community in protecting and promoting culture.
- Access to culture heritage by the communities
- Protection of cultural heritage by the communities
- Development of and Investment in the cultural industry
- Institutional arrangements for the promotion and protection of national cultural heritage
- Protection of intellectual property rights

12.3 Education

- The State shall take all necessary measures to design and develop a national education system that will nurture and emphasize creativity, *knowledge acquisition*, talent development, innovativeness and functional application of learned skills through formal and non-formal means for sustainable development and *the greatness and security of Kenya*. The education system shall be designed in such a manner as to adequately prepare every citizen to lead productive and dignified life.
- Parliament shall establish such institutional arrangements and procedures to enable the national educational system to periodically report to the people of Kenya on the quality of its teaching and its relationship with the requirements of national development.
- The State shall take appropriate measures to afford every Kenyan an equal opportunity to attain the highest education possible. The State shall direct its policy towards ensuring that there are equal and adequate educational opportunities at all levels. The State shall be responsible for the promotion of free and compulsory basic education.
- The State shall lay down general rules for establishment and organization of public schools and education institutions of all kinds and grades. Private organizations, citizens and

communities are entitled to found schools and educational institutions which do not involve charges on the State.

- The State shall encourage and subsidize where appropriate educational enterprises in the country which are operated with good record by private organizations and citizens, and support persons who have made discoveries or inventions in the fields of learning and technology; and specially recognize and reward persons who have rendered long and meritorious services in the field of education.
- The State shall protect and promote the academic freedom and freedom of art and science, instruction, teaching, expression and dissemination of thoughts through words, writing or any other means of reproduction. The law shall regulate the right to the protection of the clause on science and professional secrecy in the exercise of these freedoms.
- There shall be a National Education Service Commission that shall continually review the terms and conditions of service, training and qualifications of public officers in the education system and matters connected with their management and welfare.

12.4 Science and Technology

- i) The Constitution should recognize that innovation, intellectual property rights, Science and technology are essential for national development and progress.
- ii) The State shall give priority to research and development, invention, innovation, and their utilization; and to promote science and technology education, training, and services.
- iii) The State shall support indigenous, appropriate, and self-reliant scientific and technological capabilities, and their application to the Republic's productive systems and national life.
- iv) The Parliament shall provide for incentives, including tax deductions, to encourage private participation in programs of basic and applied scientific research.
- v) The State shall regulate the transfer, and promote the adaptation of technology from all sources for the national benefit. It shall encourage the widest participation of private groups, local governments, and community-based organizations in the generation and utilization of science and technology.
- vi) The State shall protect and secure the exclusive rights of scientists, inventors, artists, community innovators and other gifted citizens to their intellectual property and creations, particularly when beneficial to the people, for such period as may be provided by law.
- vii) The State shall take appropriate policy, legislative and program measures to:

- Encourage or provide incentives for innovation, disclosure and commercialization of innovations, and protecting and rewarding innovators,
 - Fostering Kenya's export of value-added products
 - Identifying, trapping, nurturing and developing a national reservoir of creative and innovative talent
 - Regulating and promoting innovation, technology, Intellectual Property and trade
 - Promoting and investing in research and development in information technology and services
 - Protecting and securing respect and appropriate compensation or reward for creativity, innovation and intellectual property.
- viii) The state shall take necessary legislative, policy and program measures to strengthen the capacity of Kenya Industrial Property Organization and Kenya Copyright Board to efficiently regulate patents, trade marks and copyright and where necessary make licensing provisions intended to prohibit restrictive practices especially in cases of non-working patents or where the copyright holder refuses to distribute or license the work on reasonable terms.
- ix) Parliament shall formulate and establish an appropriate policy, legislative and institutional framework to promote innovation, and facilitate the development, acquisition, transfer, diffusion and assimilation of science and technology including cultural innovations in Kenya.
- x) Parliament shall formulate and establish an appropriate framework of intellectual property policies, laws and institutions to recognize, protect and reward authors, composers, performers, innovators, inventors, researchers, scientists technologists and specially gifted citizens in Kenya.
- xi) The Judiciary needs to establish an Intellectual Property and innovation Bar and Bench in order to develop a jurisprudence that would inform the transactional, legislative and policy processes.

12.5 First Schedule: The Peoples Of Kenya

The peoples of Kenya consist of diverse ethnic groups, which can be broken down into three main ethno-linguistic groupings, namely, Bantu speaking peoples, Nilotic speaking peoples and the Cushitic speaking peoples. These different peoples not only speak different languages, but also occupy diverse ecological zones. The ecological diversity presupposes different modes of resource appropriation. The respective population groups are, thus adapted each in their own unique ways to those zones. There are also other non-African groups such as Kenyan Europeans, Kenyan Americans, Kenyans of Asian origin; and Kenyan Arabs.

BANTU SPEAKING GROUP

Western Bantu

- (a) Abaluyia (Bukusu, Maragoli, Banyore, Idakho, Kisa, Marachi, Bakhayo, Banyala, Wanga, Tachoni, Isukha, Kabras, Marama, Tirigi, Samia)
- (b) Abagusii
- (c) Abakuria

Central Bantu

- (a) Agikuyu
- (b) Akamba
- (c) Aembu
- (d) Ameru (Aigembe, Atigania, Aimentu, Amwimbi, Amuthambi Achuka, Atharaka)
- (e) Ambeere

Coastal (Eastern) Bantu

- (a) Waswahili (Bajun, Pate, Mvita, Vumba, Ozi, Fundi, Siyu, Shela, Amu).
- (b) Miji Kenda (Digo, Duruma, Rabai, Ribe, Kambe, Jibana, Chonyi, Giriama, Kauma)
- (c) Segeju
- (d) Pokomo
- (e) Ataita
- (f) Adawida
- (g) Ataveta
- (h) Amalati

NILOTIC SPEAKING GROUP

Eastern (Plains) Nilotic

- (a) Maasai
- (b) Samburu
- (c) Turkana
- (d) Teso
- (e) Ilchamus
- (f) Elmolo
- (g) Sakweri
- (h) Ndorobo

Highland Nilotic (Kalenjin Group)

- (a) Nandi
- (b) Marakwet
- (c) Pokot
- (d) Tugen
- (e) Kipsigis
- (f) Elkony
- (g) Elgeyo
- (h) Sabaots
- (i) Terek
- (j) Lembus
- (k) Mandi
- (l) Ogiek
- (m) Sengwer

River-Lake Nilotic

- Luo
- Nubians

CUSHITIC SPEAKING GROUP

Southern Cushitic

- a) Boni

Eastern Cushitic

- (a) Somali
- (b) Rendile
- (c) Oromo
- (d) Borana
- (e) Gabbra
- (f) Sakuye
- (g) Dushnek
- (h) Munyoyaya
- (i) Burji
- (j) Wata

NON-AFRICAN GROUPS

- (a) Kenya Europeans/Americans
- (b) Kenyan Asians
- (c) Kenyan Arabs
- (d) Non-Kenyan Africans

BIBLIOGRAPHY

A.B.C. Ocholla-Ayayo “*Culture as a Lived Experience*” Seminar on Culture, Ethics and Ideology: Naivasha: 7th – 8th February 2002

Daniel Nelson Last World Looms for Half of the World’s Languages One World February 21, 2002

Daniel Salau ‘Globalization Entrenches Itself On The Maasai’, Civicus September 2002

Grigori Lazarev, Gre’goire de Kalbermatten and Bernard Michel PEOPLE, POWER AND ECOLOGY: Towards Participatory Eco-Development (UNDP/UNCDF) London: Macmillan, 1994.

Kiplangat Cheruiyot “*Our Languages are dying*” One World February 24, 2003

Klaus Toepfer “*Big Development Needs Cultural Impact assessment*” UNEP. November 18, 2002

Mwandawiro Mghanga. “*Let the new Constitution Develop a Progressive Cultural Policy*” an article presented to the Ad Hoc Committee on Culture at the National Constitution Conference (Wednesday, 28 May, 2003)

Ngugi wa Thiong’o Decolonising the Mind: the politics of Language in African Literature. Nairobi: Heinemann Kenya, 1986

Ngugi wa Thiong’o Moving the Centre Nairobi: EAEP, 1993.

Nicholas Abercrombie, et al The Penguin Dictionary of SOCIOLOGY (2nd) Nairobi: Penguin Books, 1984.

Oyaya Charles and Kaseje Dan “*Health, Poverty and Dignified Living*” Development, Partnership in Health and Poverty (Volume 44 No 1) A publication in the Journal of the society for International development, of March, 2001

Paul Rubinstein Pigeons and Angels; “*Devolution and Culture in the North*” – Centre for Urban and Regional Development Studies (New Castle University)

Prof. Dani W. Nabudere “*The African Renaissance In The Age Of Globalization*”

Republic of Kenya, 2003, Cultural Policy of the (Draft)

Ruth Kibiti *Culture, Ethics and Ideology: The Gender Implication* Seminar on Culture, Ethics and Ideology: Naivasha: 7th – 8th February 2002

Satish K. Sharma “*Multiculturalism and Ethnicity*”

Sunny Bidra *In Africa, Big Brother is always watching us*’ Sunday Nation July 13, 2003.

Thierry G Verhelst (Translated by Bob Cumming) *No Life without roots: Culture and Development* London and New Jersey: Zed Book Ltd, 1990.

United Nations, Article 27 (1) of the United Nations Universal Declaration of Human Rights, adopted by the General Assembly on 10 December 1948.

UNESCO CULTURAL POLICY RESOURCES; Our Creative Diversity

W.B. Kyijomanyi *Proposed Federal Units in Uganda*

Wangari Maathai excerpts from “*Missing Link*”; a speech presented at the Sixth P7 of Global Greens, Nairobi, 2003.

William F. Ryan S.J. Culture, “Spirituality And Economic Development”

Wole Akande *Yellow Times* November 10, 2002