

THE LEGISLATIVE FRAMEWORK FOR THE REVIEW OF THE CONSTITUTION

1 What is a constitution

The constitution of a state is first and foremost an agreement or compact among the people. It acknowledges the existence of a political community and symbolises the sovereignty and nationhood of the state. The subject of the agreement is how the country should be governed and ruled. The agreement constitutes the framework within which public policies are made and implemented, and differences and disputes among the people are resolved. Once a constitution has been adopted, it forms the source of all state power in the country, and all laws and administrative policies and acts must be consistent with it. The decision on how the country is to be governed must be made by the people because the sovereignty of the state lies with them. Typically a constitution determines, firstly, the relationship between the people themselves, between communities and individuals, and secondly, between the people and the government. It sets out social, economic and political goals of the country and the values by which people want to live and regulate their affairs. These values usually include democracy, the protection of individual and collective rights, equitable distribution of resources, special assistance to disadvantaged groups, and respect for the law.

The constitution also establishes the system and organs of government, and distributes power among them. Unlike in small scale societies, where there are communal controls over the exercise of power, in modern states, consisting of various communities, and covering a large geographical area, it is essential that the constitution itself should regulate the exercise of powers of government so that they are used in a fair and responsible way to avoid the oppression of the people, and to uphold their sovereignty. One way to do this is to separate the powers to make, implement, and interpret and enforce laws, and to vest them in separate institutions, the legislature, the executive and the judiciary respectively. The executive itself may be divided into the political leadership and the public service, the latter enjoying considerable operational independence from ministers. Power can also be dispersed through federalism or other forms of devolution, for then it is shared between the central and regional authorities. Another method to avoid oppression is to place limits on the powers of government. Modern constitutions also set up independent authorities like the electoral commission, anti-corruption bodies, public and judicial service commissions, and the auditor-general to ensure that the exercise of powers essential to fair and open government are protected against political or improper influence.

In order to maintain the special legal status of the constitution as the compact between the people on how to govern the country, the constitution is often called the supreme law. This means that all other laws and public policies must be consistent with it, and if they are not, they cannot be enforced. There are normally special legal procedures to ensure that the provisions of the constitution are respected and enforced. In this way the constitution acts, among other goals, to protect the rights of the people. The

status of the constitution is also preserved by special procedures for its amendment. The legislature cannot change the compact the people have made for governance by the ordinary procedure for law making. Normally a constitution can only be changed by special majorities in the legislature or by the participation of other institutions in addition to the legislature, such as regional authorities or the people themselves through a referendum.

II The history of the process for the review of the constitution

Since the constitution is so essential to the well being and stability of society, it is important to have special procedure to make or review it. When Kenya became independent, the constitution was not made directly by the people. It was negotiated in London at Lancaster House between the British government and representatives of Kenya's political parties. The people of Kenya were not consulted, and the constitution itself was adopted, not by the Kenya legislature, but by the British Parliament. The independence constitution established a parliamentary system of government with most powers of the executive vested in the cabinet headed by the prime minister. It also set up a system of regional government in what were previously called provinces with a second chamber of the national legislature, the Senate, with special responsibility to protect regional interests. On the first anniversary of independence, the constitution was changed fundamentally—the executive became presidential, although the president continued to be a member of the National Assembly, regionalism (known as majimboism) and the Senate were abolished. Since then the constitution has been changed many times—at one time Kenya was made into one party state and safeguards against the arbitrary dismissal of judges and other independent officers were removed, although subsequent amendments restored multi-partyism and safeguards for independent officers. The people had no direct say in the making of these changes, most of which were rushed through Parliament. No time was allowed for public discussion of proposed changes. The present process of constitution review is therefore the first time that the people have the opportunity to play a key role. The Constitution of Review Act, under which the review is being carried out, provides for the full participation of the people, and the Review Commission as well as other organs of review are required to ensure a constitution which reflects the views of the people.

The reason why the constitution is being reviewed is the perception that there are some serious weaknesses in the present constitution or the way in which it is enforced or disregarded. The Review Act itself is the result of long and extensive discussions among various sections and organisations, including political parties, religious groups, professional associations, non-governmental organisations, and groups representing women, youth, workers and the disabled. It was not easy to get a consensus among these groups on the terms and process of review—reflecting the divisions in our country. Several acts were passed in efforts to establish a common process of review. At one time a common process seemed impossible, and two separate processes were started in 2000, one statutory and the other under even the sponsorship of religious organisations, even though it was clear that it was only through a common process that a new constitution was likely to be adopted. Eventually the two processes were merged and new legislation

was passed in June 2001 to establish the present process with one review commission. We now have a wide consensus on the need and the method of review, which provides the people of Kenya with the best opportunity they have ever had to review the impact of and experience with the present constitution, and to decide for themselves the national values and the system of government they want them and their children.

III Object and purpose of the review

The Review Act provides the framework for the comprehensive review of the Constitution by the people of Kenya. In general role of the Act is to facilitate the process of review and to establish the method for the change of the constitution. It does this by setting up the organs of review and establishing their functions and powers. The ultimate decision is to be made by the people or their representatives. However, the Act also establishes certain objects and purposes of the review, which must be included in the new constitution. These objects and purposes themselves represent a national consensus, as they were achieved over a series of meetings and negotiations between key stakeholders, first through the Inter-Political Parties Group and subsequently in the process leading to negotiations at Safari Park. To a large extent the objectives of review represent what are considered to be the weaknesses of the present constitution. These objectives, which are binding on all organs of review, are outlined in section 3 of the Act. They are supplemented by section 17 (d) which require the Constitution of Kenya Review Commission to enable the people to examine various options for constitutional change, with a view to achieving specified objectives, such as the improvement of the electoral system.

National Unity and Ethnic Identity

The most important object of the review is guaranteeing peace, national unity and integrity of the Republic Kenya in order to safeguard the well-being of the people (secs. 3(a) and 3(h)). The same objective underlies another purpose of the review—enabling Kenyans to resolve national issues on the basis of consensus (sec. 3(k)). At the same time the Act requires the new constitution to respect ethnic and regional diversity and communal rights, ‘including the right of communities to organise and participate in cultural activities and the expression of their identities’ (sec. 3(e)). These objects recognise that people have many identities—apart from their national identity and citizenship— which derive from their ethnic or regional background, religious or linguistic affiliation, gender or even profession. At one time it was believed that these other identities had to be suppressed or moderated in the interests of national unity. Today the importance of these identities is being increasingly recognised, as are the rights of minorities, and it is realised that they need not threaten national unity—on the contrary, if recognised, they may in fact strengthen national unity, and enrich society through diversity. However, if too much scope is given to ethnic or regional identities, they can threaten national unity, as happened in the former Yugoslavia, and in some of our neighbouring countries. Therefore an important challenge for the review process will be to balance national with these sub-national identities.

Democracy, Good Governance and the Rule of Law

The new constitution must establish a democratic system of government, and the Act identifies some methods for achieving this goal (sec. 3(b)). There must be good governance, by which is meant that the process of government must be transparent, public authorities must be accountable to the people, administration must be fair and public officers, including ministers, must be free from corruption or other abuse of power (sec. 17(d)(xv)). Powers of the state must be divided among various organs and there should be maximum checks and balances between these organs, which must be independent (sec. 3(c) and sec. 17(d)(i)). Through the people, the Commission must examine recommend improvements to the electoral system (sec. 17(d)(iv)). These provisions recognise that democracy means more than majority rule. Moreover the Act requires that the democratic system of government must include constitutionalism, the rule of law, human rights and gender equity.

The Act requires the new constitution to incorporate constitutionalism and the rule of law. These concepts are closely associated. Constitutionalism means that not only must the letter of constitutional provisions be respected by all, including the government, but that so should their spirit, of fairness and good governance. It also means that there must be limitations on the power of state organs. One way in which the Act envisages that constitutional governance would be facilitated is through the establishment or improvement of independent constitutional commissions (sec. 17(d)(iii)). The rule of law requires that the exercise of state powers must not be arbitrary or discriminatory, and that all state organs must act according to the law. It also requires that the judiciary should be independent so that it is able to bind the government to act lawfully at all times. The separation of powers is one way to give this independence to the courts. The powers and organisation of judiciary are expressly made a topic for review, 'aiming at measures necessary to ensure the competence, accountability, efficiency, discipline and independence of the judiciary' (sec. 17(d)(iv)).

Human Rights and Gender Equity

Today, almost universally, one method to limit state power is through the protection of human rights and freedoms. Human rights are entitlements of a person by virtue of being a human, as they are necessary to live a life of dignity and to fulfil his or her potential as a human person. Increasingly, human rights are regarded as inherent in all persons, although their protection requires laws and enforcement by state authorities. The Act regards the protection of human rights and gender equity, along with constitutional governance, 'as an indispensable and integral part of the enabling environment for economic, social, religious, political and cultural development' (sec. 17(d)(iii)). The importance of human rights is manifest in another objective—creating conditions conducive to a free exchange of ideas (sec.3(i)). Through international treaties, Kenya has undertaken obligations to protect human rights, and the Act requires these and other international obligations to be implemented and observed (sec. 17(d)(xiii)). The rights of women and children are covered by international treaties, and the Act directs special attention to these rights (sec. 17(d)(iii) and (xi)). One of the purposes of another

objective, regional and international co-operation, is to ensure support for democracy and human rights (sec. 3(g)). An essential principle of human rights is the equality of all persons. Accordingly, the Act requires the review process to 'examine and review the socio-cultural obstacles that promote various forms of discrimination and recommend improvements to secure equal rights for all' (sec. 17(d)(x)).

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

Basic Needs of all Kenyans

The framework of human rights is relevant to another objective—ensuring the provision of basic needs of all Kenyans (sec. 3(f)). Basic needs are those which are essential to human life in comfort and dignity, and includes adequate food, decent health, shelter, education, safe and clean environment, culture and economic security. These needs are usually secured through the protection by the state of social, economic and cultural rights. The Act explicitly states that this goal should be met through the establishment of an equitable framework for economic growth and equitable access to national resources. This is an extremely important goal in view of both the high degree of poverty in Kenya, where nearly 60% of the people live below the poverty line, as many are out of employment, and the number of people without access to health or educational services is increasingly by the day, and the fact economic policies associated with globalisation are critical of state subsidies for education, health and shelter, as expressed in structural adjustment policies and aid conditionalities.

People's Participation in Government

Connected to both democracy and human rights, which emphasis the sovereignty and self-determination of the people, is the goal of ensuring the full participation of people in the management of public affairs (sec. 3 (j)). The Act emphasises the accountability of the government and its officers to the people of Kenya (sec. 3(c)). Among other measures, people's participation in the governance of the country is to be promoted through democratic, free and fair elections and the devolution and exercise of power (sec. 3(d)). On the whole, constitutions are lacking in provisions for the direct participation of people in public affairs. One method may be to recognise the importance and role of civil society organisations in institutions and procedures of government and other public affairs at all levels. Normally it is easier to find a direct role for the people and their organisations at the local government level than at the national level. An example of the role of civil society organisations' at the national level includes their participation in Kenya Authority Against Corruption (KACA) under the legislation which was declared unconstitutional by the High Court—although not on account of this provision.

Devolution of Powers

The Act requires the devolution of powers to facilitate the participation of the public in the governance of the country. The Commission is required to examine and review the place of local government in the constitutional organisation of Kenya and the degree of the devolution of power to local authorities. Otherwise there is no explicit requirement of federalism or devolution. But devolution of some kind would be consistent with the general emphasis in the objectives on constitutionalism, public participation and the accountability of government to the people, which are easier to achieve the nearer the location of power is to the people as would be the case with devolution. The public—and politicians—have shown much interest in *majimbo*, and debates on devolution would undoubtedly be central in the review process.

Constitutional Commissions and Offices

The review must examine existing constitutional commissions, institutions and offices to improve them and to recommend new ones to 'facilitate constitutional governance and the respect for human rights and gender equity' (sec. 17(d)(iii)). Examples of such commissions include the Judicial Service Commission, which advises the President on the appointment of all judges, except the Chief Justice, and other judicial officers, the Public Service Commission which is responsible for the appointment and discipline of all but a few specified public servants, whose appointment is made by the President directly, the Electoral Commission which has responsibility for the conduct of national and local elections, and the Controller and Auditor-General, whose tasks include ensuring that the government follows regulations for the supply and administration of finances and the conduct of financial audit. The characteristic of the bodies is that they are supposed to act independently, in what are politically sensitive areas, and cannot be given directions by any one on how they should perform their duties. However, the scope of their tasks as well as their independence can be increased to make them more efficient. The review may also wish to consider the establishment of new commissions, such as to receive and investigate complaints about the abuse by officials or public authorities of their powers, to implement and supervise the protection of human rights, or to promote the rights and welfare of women or children.

Foreign Affairs and Regional and International Co-operation

Amendments to the constitution must promote and facilitate regional and international co-operation to ensure economic development, peace and stability and support democracy and human rights (sec. 3(g)). More specifically, the review must recommend on the treaty making and implementation powers of the Republic 'and any other relevant matter to strengthen good governance and the observance of Kenya's obligations under international law' (17(d)(xiii)). This indicates the commitment to the rule of law in international relations, and provides the basis to strengthen the role of the National Assembly and other national institutions in the manner in which the state assumes and fulfils international obligations—an increasingly important matter as the sphere of international co-operation increases.

Conclusion

The organs of review are thus bound to ensure that the values and institutions outlined above are incorporated in the new constitution. In that sense Parliament has already decided on some parameters of the new constitution—but in this it has reflected the national consensus as it was developed in the 1990s. It should also be noticed that the principles adopted in the Act are broad, and the people still have considerable discretion on how they should be implemented. For example, the requirement to establish democracy can be implemented in a number of ways, through a presidential or parliamentary system, with or without elements of power sharing. Similarly there are different forms of devolution and ways to increase people's participation in public affairs.

Moreover, the emphasis on and the implementation of particular values must be determined within the contemporary national and international context. Kenya is now deeply divided along ethnic lines, with most political parties based on ethnic support, and much of the political discourse revolves around ethnicity. The emphasis on national unity and integrity in the Act requires the review to examine ways in which the political salience of ethnicity can be moderated. Secondly, Kenya is a poor country, with a GDP of \$280 per person as compared to an average of \$460 for sub-Saharan Africa and a world average of \$4,470, making it the 17th poorest country in the world. A large proportion of Kenyans do not have access to electricity, safe water, regular food, and medical or educational facilities. Thirdly, there is rampant corruption, and recently Kenya was listed as the world's fourth most corrupt country in the world. Finally, there has been a breakdown in the effectiveness of state institutions—and there has been poor enforcement of the constitution and laws. Tackling these issues within the broad parameters must be a particular concern of the review.

IV The process of review—underlying principles

The Act requires the review to be comprehensive, so that apart from the values and institutions mentioned above, any other matter can be examined necessary for the comprehensive review.

Secondly, the review process must be inclusive, accommodating the diversity of the Kenya people, 'including socio-economic status, race, ethnicity, gender, religious faith, age, occupation, learning, persons with disabilities and the disadvantaged' (sec. 5(b)). As we shall see, the composition of the organs of review is designed to reflect this diversity. The merger in June 2001 of the two commissions brought the review process closer to this goal.

Thirdly, the process must be open, democratic and accountable to the people (sec. 5(a) and (c) (ii)). Meetings of the Commission to receive the proposals of the public must be held in open sessions (sec. 21(3)). The records of the made available to the public through public libraries, documentation centre and the media (sec. 22). The entire review process must be guided by respect for the universal principles of human rights, gender equity and democracy (sec. (5) (c) (iii)). The third schedule to the Act sets out the

Principles for a Democratic and Secure Process for the Review of the Constitution which the Government, political parties, NGOs, Kenyans and the organs of review have undertaken to observe (the schedule is reproduced in the appendix to this paper). They recognise the importance of confidence building, engendering trust and developing a national consensus for the review process. They agree to avoid violence or threats of violence or other acts of provocation during the review process, and not to deny or interfere with any one's right to hold or attend public meetings or assemblies, or other rights and freedoms.

Fourthly, the process must be consensual, so that the process as well as its outcome enjoys the widest measure of support in Kenya. Apart from the above undertakings, the rules of decision-making in the organs of review reflect the importance of consensus. Decisions on constitutional changes must be made by consensus, but if no consensus is achieved on any point, decisions must be made by a two-thirds majority of all the members of the relevant body (secs. 21(6) and 27(5) of the Act, and sec.47 of the Constitution). If the National Constitutional Conference, the principal body for deciding on the changes, is unable to agree on any change, the people will decide the matter in a referendum. The emphasis on consensus reflects the view that the constitution must be acceptable to the widest cross section of the country, as it is the basis of governance, laws and policies, which affect all Kenyans. If decisions can be reached by consensus, it would also strengthen national unity.

Fifthly, the highest importance is attached to the participation of the people. The organs of review must provide the people 'with an opportunity to actively, freely and meaningfully participate in generating and debating proposals to alter the Constitution' (sec. 5(c)(i)). Moreover, they must ensure that the 'final outcome of the review process faithfully reflects the wishes of the people of Kenya' (sec. 5)(d)). The Review Commission will conduct and promote civic education to facilitate people's participation in the review process (for the conduct of civic education, see the Commission's policy paper on civic education). The importance of the participation of the people follows from the nature of the constitution as a compact among the people on governance. Public participation will also increase the knowledge of the people of constitutional issues. It will enable them to become familiar with the new constitution, and thus better able to exercise their rights and fulfill their duties under it, thus helping in its implementation. It will also ensure the legitimacy of the new constitution and its acceptance as the framework for the development of consensus on the formulation and implementation of national policies and settlement of differences.

These principles underlying the process are important not only to ensure a good and acceptable outcome, but also to generate habits of rational and honest debate, to heal the divisions in society, to settle differences through discussions and negotiations, and to strengthen national unity and national resolve to identify and tackle the urgent problems facing Kenya. If the process succeeds in these objectives, it will also ensure a favourable environment and political culture in which the new constitution will be able to take root and flourish.

V The process of review—stages and organs of review

Organs of review

There are several organs of review, which have been prescribed specific functions, and which have principal responsibilities for different stages of the process, and whose composition is related to the specificity of their tasks. The organs are: (a) the Constitution of Kenya Review Commission ('Commission'); (b) the Constituency Constitutional Forum; (c) the National Constitutional Forum; (d) the referendum; and (e) the National Assembly.

The Commission consists of 29 commissioners (of which two are ex-officio, the Attorney-General and its secretary), who are appointed by the President on the nomination of the National Assembly. The President appoints the chairperson from among the commissioners. The Commission reflects Kenya's ethnic, geographical, cultural, political, social and economic diversity, and the principle of gender equity (sec. 6(5)). Commissioners are appointed for their legal qualifications or experience of public affairs (sec. 8(1)(a) and (b)). The Commission is independent and cannot be instructed by any one regarding the discharge of its functions. The tenure of commissioners lasts until the conclusion of the review process (sec. 33). Its members can be dismissed only by the Commission itself for good cause (sec. 15). They are bound by a code of conduct to prevent conflicts of interests and other improprieties. These characteristics are necessary for the discharge of its functions, the principal function being the preparation of a draft constitution. The Commission has the power to make regulations for the more effective implementation of the process (sec. 34).

Constituency Constitutional Forums are to be established for every constituency for the purposes of debate, discussion, collection and collation of the views of the members of the public on proposals to alter the Constitution (sec. 20). The Forum will also provide the basis for consultations with the Commission. The Commission facilitates the establishment of the Forums, but the composition and form of the Forum are to be determined by the people of the constituency and their political and other leaders.

The National Constitutional Conference ('Constitutional Conference') consists of about 574 members, of whom there are 220 members of the National Assembly, 210 representatives of districts elected by the county councils, 29 Commissioners, and about 115 representatives of political parties, and religious, professional, women's and youth groups as well as representative of trade unions and NGOs and of persons with disability (sec. 27 (2)), in accordance with regulations made by the Commission. This is the most representative body assembled in Kenya for the function of agreeing on the constitution.

The next organ, the referendum, means in effect the forum whereby the people or more accurately, the electors, decide directly on the constitution, if the need arises. The final organ is the National Assembly, which is assisted by the Select Committee on Constitutional Reform (sec. 10). Their functions are described below.

In addition to these formal organs, it is hoped and expected that a large number of individuals and organisations will participate in the process, by debating and discussing constitutional reforms and giving their views to the Commission.

Stages of review


The first stage is to prepare the Commission as well as the people for the review, during which the Commission examines its mandate and terms of reference and conducts and facilitates civic education order to stimulate public discussion and awareness of constitutional issues (sec. 17(a)). The Commission has adopted a national curriculum for civic education, prepared or certified course materials, and decided on a code of conduct which binds all civic education providers in order to ensure effective and impartial instruction (for details see the Commission's paper on civic education policy). The public must be enabled to understand and evaluate the present constitution as well as the experience of the constitutional experience of other countries (sec. 17(c)). Discussions of the present constitution and changes which may be desirable will also be conducted at the constituency constitutional forums. People's awareness of constitutional issues and the progress of the review will be facilitated by the establishment of documentation centres in each district (sec. 23) as well as information and discussion programmes through the electronic and print media.

The next task during this stage is the consultation by the Commission with the people, directly as well as through organisations and groups, to receive their views and proposals on constitutional change. For this purpose the Commission is required to visit every constituency (sec. 18(1)(a)). After the consultations, the Commission prepares its report and recommendations, which will also be presented in the form of a draft constitution (sec. 26(7)). The Commission's report and recommendations have to reflect the wishes of the people as expressed to it (sec. 5(d)). The expertise as well as the independence of the Commission should ensure that the objects of review stipulated in the Act are given effect to and that the national interest is given priority over party or factional interests.

The next stage of the review will be distribution of the report and recommendations of the Commission and the draft constitution to the public and to civil education providers (sec. 27(a)). The Commission will endeavour to ensure the widest dissemination of its report (in English and Kiswahili), including through the electronic and print media. Summaries will be prepared for easy access to the recommendations of the Commission. Two month after the publication of these documents, the Commission will facilitate public discussion and debate on them by holding public hearings in all provinces and by inviting memoranda (sec. 27(b)). It is hoped that the media, professional associations and civic education providers will assist in the dissemination and understanding of the Commission's report and in securing the feedback on it.

The third stage is the holding of the Constitutional Conference which will be convened by the Commission and chaired by its chairperson (sec. 27(c)). The Commission will submit its documents to the Conference along with the feedback on

them received from the public. The procedure of the Conference will be determined by the Commission. The composition of the Conference, made by of MPs and other categories of representatives indicate that it a forum for negotiations. It will be free to amendment or reject the recommendations of the Commission and substitute its own (sec. 27(c)). If the Conference is able to reach a consensus on all matters, the Commission will, if necessary, redraft the constitutional bill to reflect decision of the Conference, and along with a report on Conference, submit it to the Attorney-General for transmission to the National Assembly.

 If there is no consensus on one or more matters, those matters will be referred to the people for resolution in a referendum to be organised by the Commission after consultation with the Electoral Commission (secs.27(6)). The questions to be put to the referendum will be drafted by the Commission, which must be held within two months of the Conference (sec. 27(7)). The Commission will prepare its final report and the draft bill after the referendum and submit it to the Attorney-General for presentation to the National Assembly (sec. 28). The Attorney-General has to publish the draft constitution in the form of a Bill to amend the Constitution and after 14 days to table it, along with the report, before the National Assembly for enactment within seven days of the next sitting of the Assembly (sec. 28 (3) and (4)). A referendum which is held before the decision by the National Assembly is called an advisory referendum, since its purpose is to advise and guide the National Assembly. In practice, the National Assembly will find it hard to ignore the wishes of the people. Moreover, in the case of the referendum under the Review Act, the referendum may be more than advisory, for the Act says that the constitution bill drafted after the referendum shall be sent to the National Assembly for 'enactment', suggesting a somewhat formal role for the National Assembly. It can also be argued that the whole point of the review exercise is destroyed if the National Assembly can ignore the wishes of the people, and would contravene the explicit provision binding on the organs of review to 'ensure that the final outcome of the review process faithfully reflects the wishes of the people of Kenya' (sec. 5(d)).

VI Funding.

The funding for the review process, including expenses for the Constituency Constitutional Forums, the National Constitutional Conference and the referendum, comes from the Consolidated Fund. Although the Review Act says that the expenses of the review process 'shall be charged on and issued out of the Consolidated Fund without further appropriation than this Act' (sec. 29(1)), in practice the National Assembly has appropriated funds as part of the regular budgetary process. The Act sets up the Constitution of Kenya Review Fund into which parliamentary appropriations for the Commission are paid (sec. 30). The Commission is also free to receive other donations, grants and gifts for the expenses of the process (sec.29(2)). The Commission will be using this provision to secure funds to supplement the parliamentary appropriations, to ensure that the review process is adequately funded. Parliament granted Shs. 300 million for the financial year 2000-2001 (covering the period from November 2000 to June 2001), and has allocated Shs. 1.1 billion for the financial year 2001-2002.

The Fund is administered on behalf of the Commission by its secretary (sec. 30(1)). He or she has to consult with the Permanent Secretary to the Treasury in administering the Fund. The budget of the Commission (and the remuneration and allowances of commissioners) is approved by the Minister of Finance in consultation with the Parliamentary Select Committee (sec. 31). The framework for the administration of the Fund is the Exchequer and Audit Act (sec. 30(4)), and the audit of the Fund is done by the Controller and Auditor-General in accordance with that Act (sec. 32). These provisions ensure the operational autonomy of the Commission regarding its finances.

VII Timetable for the review

The Commission has to complete its work within 24 months of the commencement of the Review Act, i.e., by September 2004. The 'work of the Commission' is defined to include all stages of the review process up to the presentation of the Constitution Bill to Parliament for enactment (sec. 26). The Commission has planned its work so as to meet this statutory obligation (see the Strategic Plan of the Commission July 2001) and will do its utmost to meet this deadline.

However, the Review Act authorises the Commission to request an extension of this period, at least twelve months after the commencement of its work, if it considers the period inadequate (sec. 26(3)). If the extension is granted, the Commission may recommend to the National Assembly such 'minimum amendments to the Constitution or any other law as may be necessary towards the fulfillment of any of the objects of the review process' (sec. 26(4)).

If an extension becomes necessary, it is unlikely that the next general elections can be held under the new constitution. It will therefore be necessary to consider a number of options, including to hold elections at the time they are due with minimum changes to the electoral law to ensure free and fair elections, or the extension of the life of Parliament for a short period, say six months, either with or without a transitional government of national unity. These are important political matters on which the views of the public will be sought, should an extension of the period of work of the Commission become necessary.

VIII Conclusion

The Review Act set out one of the most detailed legislative frameworks anywhere for the review of the constitution. The procedure outlined above emphasises the independence and autonomy of the review process. The Act specifies the composition and responsibilities of different organs of review. It prescribes the time table for the different tasks. The most independent of these organs, the Commission, has the responsibility for the observance of the procedure and the time table. Once its final report and the draft constitution is ready, it goes straight to the National Assembly and not through the government. The reports (and other documents) of the Commission are released by it directly to the people. A central role is provided for the participation by the people in the process. The goals of review—democracy, the rule of law, diffusion and

accountability of state power, protection of rights and freedoms, meeting of the basic needs of all Kenyans—have the support of the people. The emphasis throughout is on consensus.

Kenyans now therefore have a good framework for the review of the Constitution. However, to put beyond legal doubt the integrity, legal validity, and security of the process, it is necessary to entrench the Review Act in the Constitution. The entrenchment was agreed as part of the negotiations on the merger of the two review processes in May 2001. A bill to entrench the Review Act has already had its first reading in the National Assembly. The National Assembly should therefore as a matter of urgency pass the entrenchment legislation.

Appendix (Section 5 and the Third Schedule of the Review Act).

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Section 5. In the exercise of the powers or the performance of the functions conferred by this Act, the organs specified in section 4(a), (b), (c), and (e) [i.e., the organs of review] shall:

- (a) be accountable to the people of Kenya;
- (b) ensure that the review process accommodates the diversity of the Kenyan people, including socio-economic status, race, gender, religious faith, age, occupation, learning, persons with disabilities and the disadvantaged;
- (c) ensure, particularly through the observance of the principles in the Third Schedule that the review process:
 - (i) provides the people of Kenya with an opportunity to actively, freely and meaningfully participate in generating and debating proposals to alter the Constitution;
 - (ii) is, subject to this Act, conducted in an open manner; and
 - (iii) is guided by respect for the universal principles of human rights, gender equity and democracy;
- (d) ensure that the final outcome of the review process faithfully reflects the wishes of the people of Kenya.

Third Schedule (s.5)

PRINCIPLES FOR A DEMOCRATIC AND SECURE PROCESS FOR THE REVIEW OF THE CONSTITUTION

The Government of the Republic of Kenya, the organs of review of the Constitution, political parties, non-governmental organizations, and all Kenyans shall-

- (i) recognize the importance of confidence building, engendering trust and developing a national consensus for the review process;
- (ii) agree to avoid violence or threats of violence or other acts of provocation during the review process;
- (iii) undertake not to deny or interfere with any one's right to hold or attend public meetings or assemblies, the right to personal liberty, and the freedoms of expression and conscience during the review process, save in accordance with the law;
- (iv) ensure that the police shall protect the safety of all persons who attend meetings or exercise their other rights from violence from whatever source;
- (v) ensure that the meetings of all organs of review are held in peace;
- (vi) respect the independence of the Commission and its members; and
- (vii) desist from any political or administrative action that will adversely affect the operation or success of the review process.