

# **The People's Choice**

The Report of the  
**Constitution of Kenya Review Commission**  
**Short Version**

Dated, Sealed and Issued by the Constitution of Kenya Review Commission in Mombasa at 10.00 a.m. on  
Wednesday the 18<sup>th</sup> day of September, 2002.

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## **Foreward**

The Constitution of Kenya Review Commission is pleased to publish this report on its work and recommendations for a new constitution. A longer version of this report, in three volumes, will be published very shortly. The Commission is also publishing at the same time as this document a report on each of the 210 constituency constitutional forums which were responsible for mobilising people in constituencies for participation in the review. A draft bill for the new constitution has been prepared and will be published on 25 September 2002. With these publications the Commission will have concluded its principal tasks, which were to conduct and facilitate civic education, listen to Kenyans and recommend proposals for constitutional reform. Our report and recommendations are being offered to the public for them to study and comment on them before the commencement of the National Constitutional Forum in late October 2002 to debate, amend and adopt the Commission's report and draft bill. In the face of extraordinarily difficult circumstances, with attempts internal and external to derail the process, the Commission has focused on its tasks and tried to fulfil our mission to the best of our abilities.

The Commission has been extremely honoured to have been entrusted with this task. It realises the great importance of a new constitution as the long presidency of President Daniel arap Moi comes to an end and as Kenyans look forward to a new future. It has listened very carefully to the views of Kenyans throughout the country. It has been touched and moved by their stories and found much wisdom in their recommendations. We have analysed social, political, economic and constitutional developments in Kenya over the last four decades, and tried to imagine the future in which the new constitution will operate.

For all of us in the Commission, this has also been a journey of self-discovery. We have learnt a great deal about our country and people that we did not know before. Although we have been quite shocked at the levels of poverty in which the majority of our people live, the sad decline in the economy, the ethnicisation of politics and the violence which accompanies it, we are confident that given the right system of governance and enlightened leadership committed to goals of unity and equitable development, Kenya can rapidly recover its former place as one of the most developed economies in Africa. We set out in this report the aims, which we expect to achieve through our constitutional proposals, which place people at the centre of politics and development. We know that people have high expectations of the review and we know that the new constitution makes many promises to them. We believe that if our proposals are fairly implemented, those promises can be delivered. We plead with our leaders not to let the people down.

**Yash Ghai**  
**Chairperson**

**18 September 2002**

## CHRONOLOGY OF THE COMMISSION

The present Constitution of Kenya Review Commission arose as a result of the merger of two parallel processes. After the failure of the government and civil society to agree on a common process of review, the *Ufungamano Initiative* set up the People's Commission of Kenya to review the Constitution in June 2000, under the chairmanship of the late Dr. Oki Ooko-Ombaka. In October 2000 Parliament passed the Constitution of Kenya Review Act under which the 15 members Constitution of Kenya Review Commission headed by Professor Yash Pal Ghai was established. In March 2001 agreement was reached on the merger of the Commissions and in June 2001 the Constitution of Kenya Review Act was amended to increase the membership of the Constitution of Kenya Review Commission by expanding the membership of the Commission by including 10 members from the People's Commission and 2 nominees of the Parliamentary Select Committee on the Constitution.

Original appointments to the Constitution of Kenya Review Commission were gazetted on November 10<sup>th</sup> 2000, as follows:

- |                              |   |                               |
|------------------------------|---|-------------------------------|
| 1. Prof. Yash P. Ghai        | - | Member and Chairperson        |
| 2. Ms. Kavetsa Adagala       | - | Member                        |
| 3. Mrs. Phoebe M. Asiyu      | - | Member                        |
| 4. Pastor Zablon F. Ayonga   | - | Member                        |
| 5. Mr. Ahmed I. Hassan       | - | Member                        |
| 6. Mr. John M. Kangu         | - | Member                        |
| 7. Bishop Bernard N. Kariuki | - | Member                        |
| 8. Mr. Githu Muigai          | - | Member                        |
| 9. Prof. H.W.O. Okoth-Ogendo | - | Member                        |
| 10. Mr. Domiziano M. Ratanya | - | Member                        |
| 11. Prof. Ahmed I. Salim     | - | Member                        |
| 12. Dr. Mohamed Swazuri      | - | Member                        |
| 13. Mr. Keriako Tobiko       | - | Member                        |
| 14. Mr. Paul M. Wambua       | - | Member                        |
| 15. Mrs. Alice Yano          | - | Member                        |
| 16. The Attorney General     | - | Ex-officio Member             |
| 17. Mr. Arthur O. Owiro      | - | Ex-officio member & Secretary |

The following 10 members from the People's Commission of Kenya were gazetted on 11<sup>th</sup> June, 2001:

1. Dr. Oki Ooko-Ombaka
2. Mrs. Abida Ali-Aroni
3. Dr. Charles M. Bagwasi
4. Ms. Nancy M. Baraza
5. Mr. Isaac Lenaola
6. Dr. Wanjiku M. Kabira
7. Mr. Ibrahim A. Lethome
8. Ms. Salome W. Muigai
9. Mr. Abubakar Zein Abubakar
10. Mr. Riunga L. Raiji

At the same time the following, as nominees of the Select Committee, were gazetted:

1. Dr. Mosonik arap Korir
2. Dr. Abdirizak A. Nunow

Between June 2001 and September 2002, two significant changes took place in the membership of the reconstituted Commission. The first was the resignation of Mr. Arthur O. Owiro as the Secretary and Commissioner in August 2001 and the appointment of his replacement Patrick L. O. Lumumba on 4<sup>th</sup> October, 2001.

On 15<sup>th</sup> July 2002 Dr. Oki Ooko-Ombaka, the First Vice-Chairperson of the Commission died. Dr. Andronico O. Adede whose appointment was gazetted on 13<sup>th</sup> August 2002 replaced him.

## Chapter I: Introduction

### 1. The Background

Kenyans began to debate constitutional reform in the late 1980s. The reform movement started with the struggle to change the political system from one party to a multi-party democracy. The movement gathered great momentum in the 1990s. It brought together individuals and organisations from many sectors of society and many parts of the country. In the forefront of the movement were religious, gender and human rights organisations. At first the government resisted demands for reform. However, in the middle of the 1990s, it entered into discussions on the method for the review of the constitution with those agitating for reform. An agreement was reached on the purposes and method of review which was included in an Act of Parliament in 1998. The new constitution was to be based on the principles of democracy, accountability, people's participation, human rights and social justice. A broadly based review commission was to be established to collect the views of the public and prepare a draft constitution for consideration by a special constitutional assembly.

However, political parties were unable to agree on the composition of the review commission and the agreement collapsed. The struggle for reform continued but the efforts to bring about a national process of review were unsuccessful. Religious communities, through the *Ufungamano Initiative* and in co-operation with opposition political parties, professional societies, and civil society, launched a process of review in June 2000 by establishing the People's Commission of Kenya, chaired by the Dr. Oki Ooko Ombaka, which would collect the views of Kenyans and prepare a draft constitution in accordance with the goals of review previously agreed on by all stakeholders. Parliament sponsored a parallel process through the Constitution of Kenya Review Act 2000 ('Review Act') under which the National Assembly and the President appointed the Constitution of Kenya Review Commission ('CKRC'), chaired by Professor Yash Ghai in November 2000. The goals of review remained the same as in the 1998 Act, as, with minor amendments, did the stages and institutions of review.

The existence of parallel processes, although both committed by their terms of reference to the same goals of review, deeply divided Kenyans, produced great social and political tensions, and threatened to lead to violent conflict. Nor was there any real prospect that the draft constitution produced through either process would be enacted since neither side had a two-thirds majority in the National Assembly. It was important that the review process should bring Kenyans together, heal wounds of the past, and produce a consensus on the new

constitution to renew our commitment to national unity and define national goals and policies. Consequently Professor Ghai decided to persuade all the stakeholders to merge two processes, and initiated negotiations between the parliamentary Select Committee on the Constitution and the *Ufungamano Initiative*. Backed by massive public support throughout the country, the efforts succeeded and in March 2001 the terms of the merger were agreed. The CKRC was expanded to include representatives of the People's Commission in June 2001 following the amendment of the Review Act.

The Review Act specified a period of two years (ending on 3 October 2002) for the completion of the review. In June 2002, the Commission decided that the process could not be completed on time and, under section 26(3) of the Act, requested the National Assembly for an extension until June 2003. The National Assembly, responding to the general public wish both for timely elections and that the elections be held under the new constitution, agreed to an extension but only until 3 January 2003. At the same time it amended the Act, principally to shorten the period of public consultation and debate on the report and recommendations of the Commission from 60 to 30 days in order to facilitate the completion of the process on time. It also revised the voting rule in the National Constitutional Conference from an absolute two-thirds majority to two-third majority of those present and voting. The deadline imposed by the National Assembly imposed considerable pressure on the Commission, but the Commission has tried its utmost to meet the challenge.

#### **What happens next?**

The people have 30 days to debate and comment on this report and the Draft Constitution. Then it will be discussed at the National Constitutional Conference which will start its work just about one month after this Report is published. The Conference includes all the current MPs, the members of the Commission (who have no vote), one representative from every political party that was registered when the process began in 2000, three people from each District (only one of these may be a Councillor and one must be a woman), and representatives from civil society: women's organisations, professional associations, trade unions, religious groups and other NGOs. This Conference is the real decision making body. It will discuss the Draft the Commission has prepared, and may make changes if a two-thirds majority agrees. The final version then goes to Parliament, which must totally accept it or totally reject it (since the MPs will have been part of the Conference we can see no reason why they should not accept the draft accepted there as an expression of the people's will).

## **2. The Process**

### *(a) Goals and Values*

The goals, institutions, processes and stages of review are set out in detail in the Review Act. The goals represent a wide consensus among Kenyans, which was endorsed during constitutional talks and recorded in the 1998 legislation. The overarching theme and goal of the Act is the sovereignty of the people. The review has provided Kenyans for the first time ever a chance to decide on the values and rules by which they wish to govern themselves. The review is to be comprehensive, so that every provision of the present constitution is to be scrutinised. The process must be inclusive, accommodating all the diversities of the Kenyan people. People must be given ample opportunities to participate in the review. The Commission's report and recommendations must reflect the wishes of the people. The process allows the people to determine their system of governance for themselves.

The primacy of the people is also acknowledged in the goals of review. The primary goal is the establishment of a democratic order which maximises people's participation in public affairs. The decentralisation of power to people at levels of government where they can participate effectively in decision making and mechanisms of accountability follows from this objective. Closely related are the goals of good governance, the Rule of Law, and the accountability of public leaders and officials. These goals are to be achieved in part through the separation of state powers and rules which give organs of state authority to mutually check or supervise the exercise of their powers. Other important goals are the protection of human rights, including particularly the principle of equality and equity, so that all citizens and communities are fairly treated. There is constant emphasis on gender parity and equity, in order to promote the greater participation of women in political, social and economic life of the nation. Fundamentally given Kenya's economic situation and widespread poverty, the Review Act says that the new constitution must ensure the basic needs of all Kenyans. Basic needs are those which are essential to life in comfort and dignity, and includes adequate food, decent health, shelter, education, safe and clean environment, culture and economic security.

Underlying these objectives is the critical need for national peace, unity and integrity in order to safeguard the well-being of the people. This goal takes a particular significance from the ways in which Kenya's politics and much else have become so deeply ethnicised. The Act recognises that the path to national peace and unity does not lie in imposing some kind of artificial homogeneity as many countries seemed to think in early days of independence. Kenya consists of many communities and groups with different histories, languages, religions and

traditions. National unity is threatened when specific communities feel marginalized or victimised, or their culture is not given due respect.

Unity has to be built on these diversities, so that within a common national identity, laws and practices accommodate the exercise of cultural, social and religious differences.

*(b) Civic Education: Preparing the People for Participation*

The Commission, in accordance with its mandate, conducted and facilitated civic education relating to the process, the present constitution, constitutional concepts and issues for reform. It encouraged numerous civil society organisations to conduct civic education and entered into formal arrangements with other groups to assist the Commission in providing civic education by ensuring them financial and other resources. The Commission prepared a national curriculum and teaching materials for civic education, including *Reviewing the Constitution*, which were widely distributed. It also distributed a booklet, *The Constitutional Review Process in Kenya: Issues and Questions for Public Hearing*, to stimulate reflections on reform and to elicit recommendations. It facilitated the use of teaching materials prepared by other groups. Whenever possible, papers and documents, originally prepared in English, were translated into Kiswahili.

Commissioners travelled throughout the country providing information about the process and the reform agenda; and addressed numerous meetings of professional, gender, religious, administrative and social organisations. It also made extensive use of the electronic and print media for civic education and sponsored several public meetings and workshops. The public conducted their own debates and many organisations held a series of meetings to prepare their submissions to the CKRC. The media regularly carried items about the process and articles on key constitutional issues.

Civic education and discussions on constitutional issues were facilitated by the establishment of documentation centres in every district. The documentation centres contained materials on Kenya's constitutional history and the current constitution, comparative constitutions, and documents and records of the CKRC, including conference and workshop reports and proceedings of the Commission. These materials were also housed in public libraries. Secondly, the CKRC set up in every constituency a constituency constitutional forum (CCF) to facilitate meetings and promote debates. The work of the CCF was facilitated by constituency committees whose main task to mobilise various sectors of society to participate in the review and participate in public hearings. Thirdly, district co-

ordinators were appointed to mobilise people in districts and constituencies, and played a central role in the management of documentation centres, the co-ordination of civic education, the activities of the CCF and in facilitating public participation in the CKRC hearings. A website was established which contained all the materials put in the district documentation centres, including submissions to the Commission. For Kenyans overseas this was the main source of information about the review. The chair and first vice-chair of the Commission addressed meetings of Kenyans in Britain and the United States on private visits to these countries.

The Commission began **(c) Listening to the People** public hearings in Nairobi and provincial capitals in early December 2001. Hearings continued in Nairobi until the end of July 2002. From late April to early August 2002, the Commission visited every constituency for hearings, in panels of five or three commissioners, spending two days in every constituency and three days in the larger constituencies. Altogether 35,015 submissions were received, many from organised groups, like political parties, religious communities, professional organisations, trade unions, NGOs, and ethnic communities, so that through formal hearings and memoranda, millions of Kenyans, throughout the country and overseas, have spoken to the Commission.

*(c) Analysis of Public Submissions*

The Commission employed a large number of researchers, analysts, data clerks, and short hand typists, to transcribe records of hearings and analyse these and other submissions. Reports of constituency constitutional forums, including summaries as well as transcripts of public views, were prepared and sent to them. Through computer programmes especially devised for the CKRC, all the submissions were analysed and tabulated. This enabled the Commission at a glance to determine the preferences of Kenyans on a host of issues, by constituency, district, province and nationally. The preferences were also broken down by gender and the nature of the person or group making submissions. Aggregated and disaggregated tables were made available to the Commission when it began its deliberations. Commissioners took very careful note of public views and made every effort to reflect them in the report, recommendations and the draft bill.

*(d) The Preparation for and the Writing of the Report and Draft Constitution*

The Commission began its work by exploring its mandate under the Act. It organised 14 workshops and conferences to discuss issues for reform identified in

the Act. Local and overseas experts helped the Commission to think through the issues and learn about the experience of foreign countries. It also commissioned some research and secured other forms of assistance from Kenyan think tanks and scholars. Research officers prepared background papers, with special emphasis on comparative experiences. The Commission benefited greatly from the research and findings of numerous organisations and of the task forces set up by the Attorney-General which have addressed constitutional issues over the last decade. By the time it began its deliberations, its members had become familiar with the major options on reform issues.

The sources on which the Commission based its recommendations included the reform agenda as set out in the Review Act, the analysis of the failings of the current constitution, the views of the public, and the general knowledge and assessment of the Commissioners as to appropriateness of values, institutions and procedures to achieve the goals of review. We have paid the utmost attention to the views of the public, but did not automatically follow all that we were urged to do. On many points there is a remarkable convergence in the views of the general public and organised groups, but on some critical points there is no consensus. The Commission did not consider that in these cases it was obliged to follow the majority views. Nor was it compelled to follow public recommendations if they conflicted in fundamental ways with the directives in the Review Act. For the most part, we are glad to say, people's views were largely in accordance with the goals in the Review Act, and on the whole they were well thought out, based on the reality of everyday experiences.

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

Various documents supplement the report and the draft constitution. There is a longer version of this report, which provides detailed analyses of what the people told us and the underlying principles and justifications of our recommendations. Another volume reproduces seminar and research papers prepared for the Commission. Yet another volume describes the methodology of our work and a list of our activities. It also contains detailed analyses of people's views. Finally,

there are 210 reports of the activities conducted by each constituency constitutional forum. These supplementary materials will help Kenyans to assess the effectiveness of our work and the degree to which we have been faithful to our mandate, particularly the requirement to listen to the people and reflect their views.

Inevitably, not all the recommendations the Commission has received could be accommodated within the draft constitution—without making it an impossibly long document or unduly restricting the discretion and judgement of the government and the legislature as to future policy. However, the longer version of the report includes much more detail on the views of Kenyans, and some policy recommendations of the Commission, as guidance to Parliament for future legislation.

*(e) Concluding Remarks on the Process*

The Commission is very happy with the way the people responded to the chance to participate in the review. It is grateful to them for the support they have always given to it and which has enabled the Commission to overcome several hurdles and to resist attempts to derail the process. We believe that the process so far has been very valuable. We have always considered that the review is more than merely agreeing on the terms of the new constitution. It is about self-discovery and identity. It is to give voice to the people and to affirm their sovereignty. It is to give them an opportunity for reflection on our national and constitutional history. It is also an audit on our state and government, the first truly popular assessment of the record of present and past administrations. It is a process to discover how the ordinary person defines what it is to be a Kenyan, and to articulate their singular and multiple identities. It is to reaffirm our commitment to a united Kenya and the resolve to find a framework for the co-existence of communities. It is to agree on, and strengthen, national values and goals. It is to find, together, the devices to realise our collective vision of a caring, humane and justice society. These aspects are particularly important when a state is trying to transform itself into a nation. The function of constitution is not merely to provide a framework for society but to bring into being or consolidate society itself. We believe that the process for the review has been critical to the success of these objectives.

**Thirteen main points from the people:**

- Give us the chance to live a decent life: with the fundamental needs of food, water, clothing, shelter, security and basic education met by our own efforts and the assistance of government
- We want a fair system of access to land for the future and justice for the wrongs of the past
- Let us have more control over the decisions which affect our lives, bring government closer to us – and let us understand better the decisions we can't make ourselves but affect us deeply
- We don't want power concentrated in the hands of one person
- We want our MPs to work hard, respect us and our views – and the power to kick them out if they don't
- We want to be able to choose leaders who have the qualities of intelligence, integrity and sensitivity which make them worthy of leading
- We want an end to corruption
- We want police who respect the citizens – and who can be respected by them
- We want women to have equal rights and gender equity
- We want children to have a future worth looking forward to - including orphans and street children
- We want respect and decent treatment for the disabled
- We want all communities to be respected and free to observe their cultures and beliefs
- We assert our rights to hold all sections of our government accountable – and we want honest and accessible institutions to ensure this accountability

#### **4. What the People told us: An Overview**

As the Commission travelled round the country, or sat in its own headquarters where organised groups of all kinds came to submit memoranda, various issues emerged very clearly. It became obvious that there is a great deal that unites Kenyans in their views on where the nation is now, and what went wrong in the past and what the future should be.

Some of the problems were brought home to the Commissioners very forcefully as they travelled. They knew, of course, that statistics showed that about 60% of Kenyans live below a poverty line (of US\$1 a day). They saw with their own eyes what this means and found the experience a humbling one. For they found people struggling with the lack of almost everything needed for a decent life, yet working hard, and asking not for ‘handouts’ but for the means to help themselves. They found people who, having so little, were most hospitable to the Commission teams, and prepared to raise their eyes from the daily struggle to participate with enthusiasm in the process of review. And they found a nation which the existing system of government, and constitution, have grievously let down.

For that 60% of the people the dominant concern is what the Review Act calls ‘basic needs’. The most basic of all is for food and water. From farmers there were calls for irrigation so they could grow more crops – or grow crops at all. In many places there is no piped water, and women have to walk long distances each day to collect water in buckets. In many communities there is no form of health facility, not so much as a clinic – or there is a building with no nurse (a doctor within reach is a mere dream) and no drugs. There may be a school – but schools fees and other charges mean that many people cannot afford to send their children to it. Literacy and school attendance rates, instead of going up, have actually declined, and people who went to school many years ago complain that their grandchildren cannot go, even to primary school. A key to the improvement of the quality of life in many communities would be a road worth the name. But in many places roads, even in the dry season, are so bad that there is no way of getting crops to market, children to school, sick people to hospital – there were communities where people said the roads are so bad they can’t even use a wheelbarrow to take sick people to a clinic. For many there is inadequate housing – either in a physical sense, or in the sense that they lack security because they are squatters, or because they have not received title deeds to land to which they are entitled.

Farmers complained not only of need for water and for roads, but that there was no market for their crops because the processing plant had closed (as with the cashew factory in Kilifi, or various sugar factories). Or because of the inefficiencies of the

marketing body. Sometimes they complained that there was no marketing organisation. Livestock farmers complained that agriculture was treated as serious farming, but the improvement of livestock rearing received no attention. Farmers have been badly hit by world coffee and tea prices of course, and some complain that the government should make it possible for them to have some alternative and reliable cash crop. Many complained that crops and products produced locally were being imported into the country, often without the payment of duty, which undermined local industry. . Pastoralists complained of recurrent draughts and absence of water supply, lack of infrastructure and the lack of marketing outlets (e.g., the collapse of the Kenya Meat Commission).

In some parts of the country insecurity is acute. The crime rate in Nairobi may hit the headlines – but not the extent to which this affects the poorest of the capital’s residents. Though the Commission knows that the wealthy feel targeted, and insecurity is damaging to domestic and international investor confidence, and to the tourist industry, it heard how the residents of slums dare not go out after dark because of risk of attack, of robbery and of rape. Women nationwide are exposed to violence in the home as well as outside it, with complaints of domestic violence coming from all communities (sometimes in sessions closed to men). In rural areas there are communities plagued by cattle rustling, by hostility between pastoral and settled communities, and by plain banditry – fuelled by the availability of arms from regional conflicts. In 1999 the ratio of police persons to citizens was 1:787; the UN recommended figure is 1:400.

The Review Act also mentions the needs of marginalized communities. You might almost say that the Commission found a marginalized nation. Whole communities feel neglected or even targeted by government. Pastoralists feel their way of life is despised, and their need for land misunderstood. Communities near the national borders, especially the northern borders, feel that their loyalty is doubted, and that the facilities they receive from government are inferior and often inappropriate, their needs not appreciated. Muslims feel they are a religious minority who have suffered discrimination and whose rights have been trampled upon, and values and institutions denigrated. Some communities are Muslim, live on the border and are pastoralists, and thus suffer from triple discrimination. Some small communities feel they are faced with extinction: notably the Ogiek who face eviction from the forest where they live, and effectively from their way of life. Some communities complain that their very existence has remained unacknowledged. Asians feel politically marginalized, even though not economically (Goans specifically are economically weak, and, by reason of historical chance, often stateless). Communities who live near game parks (especially if they used to live or graze their cattle in the parks areas) feel marginalized by their exclusion from that land,

and also by what they see as the preference for wildlife over human life. On the Coast people see that valuable plots are occupied almost entirely by non-local people; communities near refugee camps feel that the UNHCR prefers not to employ local staff; there are communities who see water piped from their areas to tourist hotels while they have no reliable supply, or electricity cables passing by their lightless villages.

Kenyans with disabilities feel marginalized: unable even physically to participate because buildings, footpaths (where they exist), transport are inaccessible, their needs in terms of communication (for example through sign language and Braille) and education not met. Women feel marginalized: one of the lowest proportions of female legislators in the world, a lower rate of participation in education than men and otherwise not involved in the worlds of business and government to the same extent as men. The elderly are relegated to the sidelines of life in many ways, especially when they are frail. Even the youth, who are normally in need of special protection, face in Kenya great difficulties. Many are without jobs, even when they hold university degrees. Their sense of frustration was palpable as we met them in our tour of the country.

Marginalisation is not the same as discrimination – though they often go together. People with disabilities (or with conditions that are not disabling like albinism and HIV+) are denied the same rights as others, either by positive act or by neglect. Religious and racial groups also experience discrimination, as do women. The discrimination is carried out by government and by fellow citizens, some the result of ignorance or prejudice, and some of deliberate choices by others. Customary law denies women inheritance of land and often leaves widows and their children destitute. Or the widows may be ‘inherited’ by in-laws.

The whole nation feels alienated from the government and structures of authority. People feel neglected, and victimised. They consider they have no control over their life or destiny. Outside elections, participation is almost non-existent. There are no authorities to whom they can, or feel they want to, make complaints—least of all the police. Even the privileged class of business people complain about the vagaries of the organs of the state, and the denial to them of justice by judges through incompetence, corruption or the lack of impartiality that arises from dependence on the executive. There is a strong sense of the decay of institutions. The system has become the means of aggrandisement and enrichment for the few, and the impoverishment of the many. Discrepancies of wealth are among the most extreme in the world, and Kenyans feel no surprise that high crime rates, and public servants unmotivated to perform with fairness or efficiency, have resulted.

Some of the problems of today are legacies of the past – maybe as old as nineteenth century land issues in the Coast, or as recent as the ethnic clashes of 1992 and 1997. There are communities which still suffer as the result of colonial land policies, while some communities see that other Kenyans live on land which was once theirs. There are groups which are denied access to their sacred sites.

Many submissions identify problems with the policies of governments in the past. Apart from the failures to address issues of livelihood and basic needs mentioned before, there is a chorus of protest about economic mismanagement – the impoverishment of the nation – about failure to deal with corruption, about the degradation of the environment, including inability to deal with waste, deforestation, air pollution from industry, soil erosion, the rivers that have become open sewers, and also about land grabbing, which has seen land for public open spaces and facilities ‘privatised’, and even land previously allocated to organisations which - remarkably – was reallocated to influential individuals.

People have pinpointed many concerns with the existing political system. Everyone thinks that the President has too many powers. They don’t trust their MPs: after they are elected they are not seen again until the next election, and they have no faith in what they are doing in Nairobi, and see no benefit for themselves and the nation—and yet there is nothing the people can do about it . They are convinced that there is a great need for more control and accountability. A very strong message about government was that it should be brought closer to the people. They wanted decisions that affect them made by people they trusted and could have contact with. Many people complained about the Provincial Administration, its highhanded and arbitrary ways, and lack of responsiveness to people’s needs or wishes. They called for it to be abolished – or partially abolished, for some wanted to retain chiefs and assistant chiefs or even DOs.

The machinery which supports the government is also the subject of deep dissatisfaction. The courts are seen as expensive, geographically and in other ways remote, and corrupt. Complaints of police harassment, brutality, corruption and indeed complicity in petty and major crimes, were among the most persistent themes of submissions. The prisons were described as unfit for human beings.

Not every suggestion for change on a particular topic was the same; and many people had criticisms of the way government and the constitution had worked, but

without having specific ideas for moving forward – there was no reason why people should not limit themselves to this, for it was the responsibility of the Commission to think about how the complaints and problems could be addressed in a Constitution. But there were many suggestions made on some of which there was unanimity: for not concentrating power in the hands of one person, for a system of complaints mechanisms – many specially mentioned an ombudsman – for more accountability mechanisms generally, for stronger human rights provisions, for appointments to important public offices to be independently made, and for better and equitable distribution and use of resources. People wanted the Constitution to recognise the people in a way which it has not done in the past. The want to capture the Constitution: it should be in language that is accessible, and translated into local languages. They would relish the opportunity to ‘recall’ non-performing MPs.

In some other areas there is less unanimity about means, though agreement on ends. There are signs of some people wishing for a reintroduction of features of the independence Constitution long lost, or for ideas derived from Uganda which has a relatively new Constitution, and sometimes of ideas propagated by political interests. How they want decision making nearer home to be translated into constitutional terms varies: there were demands for *Majimbo*, or for strengthening of local government, for the involvement of elders. Less concentration of power translates in some views into a parliamentary system, while for others it means something like the existing system with less power in the hands of the president. Some want a second chamber in parliament – representing local interests. Many want the date of elections to be fixed.

## **5. What we have tried to do in the new constitution**

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

We propose using the constitution to strengthen the sense of belonging to a common political community. The constitution provides incentives to move

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

The draft constitution aims to make politics responsible and peaceful—and national in outlook. We are proposing the regulation of political parties to ensure internal democracy and public accountability and the discipline of a Code of Conduct under which the rights of all to participate in the political process without violence or threats of violence, are secured. The powers of the Electoral Commission to ensure free and fair elections, and to eliminate violence and corruption, will be strengthened. The exercise of the powers of the state will be governed by new norms and institutions. There will be a greater dispersal of powers at the central level, between the legislature, the executive, the judiciary, public services and independent commissions and constitutional office holders. The capacity of Parliament to participate in policy making and to exercise supervision over the executive will be greatly enhanced. The President will have special responsibilities to promote national unity and safeguard the constitution. Most executive powers will be with the cabinet, headed by a prime minister who will be assisted by two deputy prime ministers, appointed by the President and approved by Parliament. Except for the prime minister, the two deputy prime ministers, ministers will be drawn from outside Parliament to ensure appropriately qualified persons and to free them from constituency responsibilities. Such Ministers shall be ex-officio members of Parliament (so that they will not be able to vote). Ministers shall also have the right to speak in both houses of the legislature.

We have tried to place the people at the centre of the constitution—constantly emphasising people's participation; bringing power closer to them; giving them greater control over their every day lives. State powers will be devolved to provinces, districts and lower levels of government, right down to village assemblies. The structures for devolution and the powers given to them will be entrenched and any alterations will require the approval of three-fourths of the members of the new National Council (which represents provinces and districts).

We have tried to produce the constitutional framework for a just and humane society—to deal, among other objectives, with poverty and corruption. We have recommended affirmative action where it would help to remedy past injustices or disadvantage, whether of gender or communities or regions. We have proposed principles and institutions for equitable development and the fair allocation and effective management of resources. As the strategy for securing to all Kenyans their basic needs, we have given a central place to social, economic and cultural rights, which will not only be enforceable in courts, but provide the framework of laws and policies. We have thought of our responsibility to future generations, and have recommended principles of sustainable development and the protection of the environment.

Our proposals seek to make Kenya a good regional and global citizen, promoting peace, economic development and human rights and welfare. We want Kenya to play a constructive role in African and international affairs. We believe that a Kenya which governs itself through a democratic, participatory and just constitutional order will have great moral authority in international forums.

*(a) Equality and Equity*

The Review Act stresses both equality and equity. Equity means fairness. Equality suggests treating everyone the same – but sometimes sameness is not fair. Everyone should be given the same chances, or equality of opportunity. But for those who in the past have been unfairly treated, or who because of disability or other circumstances start with a disadvantage, apparent equality may not be enough. In order to have an equitable system, it was necessary to identify the causes of inequality, and also who were unequal.

The Act gave a starting point when it talked of gender, of disability and of marginalized communities. And the people in their submission added other groups, such as the elderly. And the people responded to the challenge to identify the causes: suggesting traditional attitudes, historic injustice, before during and after the colonial period, geographical distance and intolerance and incomprehension.

### **What does the Draft Constitution do for Women?**

- Prohibits discrimination on grounds of sex, pregnancy and marital status; requires new laws to make this effective
- Introduces Mixed Member Proportional system; requires that 50 % of 'top-up' members be women; permits independent candidates so women are not dependent on party nomination; and ensures fair representation of women in the second legislative chamber and in district and local councils
- establishes a general principle of membership of women of at least one third of the total of elective posts, public appointments and commissions
- Due account must be taken of need to include women in public bodies and judiciary
- Political parties must be democratic, including involvement of women
- Equal rights will include equal right to land, education, office etc
- Customary rules must conform to constitutional principles
- Equal rights to pass citizenship to children; equal rights of husbands and wives of Kenyans to acquire citizenship
- Protects interests of women in connection with motherhood by rights to maternity leave etc
- Protects rights in connection with work by general non-discrimination provision: specific provisions on work rights
- Equal rights to marry, within marriage and at its end
- Rights of women prisoners to be respected: including protection from violence; separation from men; right to wear clothing which is acceptable to religion etc:

Multi-faceted causes of inequity require varied and appropriate responses. So many of the problems of Kenya today are aspects of general under-development, lack of commitment on the part of politicians and public servants. Without being specifically targeted, a new constitution, with a new commitment to the national good, would generate resources to remove some of the causes of inequity. A better paid public service including police, for example, would be better placed to resist corruption. Better educated citizens will be better watchdogs for their rights. But the Constitution should be more than a blueprint for a society moving in the direction of development (indeed, achieving this is not at all easy for a constitution). The independence constitution was supposed to be that – and Kenyans have learned how easily people operating it can distort it for their own interests. More precise guidelines for government, and better watchdog mechanisms are necessary to stop old habits resurfacing.

The ways in which the draft tries to chart the new direction towards equity are:

- Rights: it gives the basic right to equality of all people, and also the approval of special measures where existing inequalities are in danger of being perpetuated. These rights are supported by enforcement mechanisms.
- Attitudes: it provides that the state, the media and other opinion formers must educate citizens about the constitution and its values including equity.
- Policies: it talks of policies which government must follow to fulfil the promise of the Constitution.
- Structures: it sets up structures to make and enforce the law.

Boxes in this chapter and the next indicate some of the ways in which these principles are applied to women, children, the elderly, and to issues of groups within society which feel their positions are undervalued and they suffer discrimination.

Another group within society are what are sometimes called ‘minorities’. The draft does not use this language – for reasons we explain in the longer version of this Report. But the concerns of communities which were expressed to the Commission about discrimination, lack of respect for tradition, religion and cultures, and marginalisation are met in many ways. Rights to religious freedom, rights to language and to expression of culture, the basic rights of respect for dignity and non-discrimination are relevant. So are provisions for devolved government, for fair distribution of national resources, for dealing with historic land issues. And the system of government - designed to give a fairer reflection of the people’s electoral wishes, to be more responsive to everyone’s needs, to be

more accountable and to some extent less confrontational - should also be conducive to a fairer nation.

**What does the draft Constitution do for people with disabilities?**

- Discrimination on grounds of disability is prohibited
- Definition of disability is wide and covers, e.g., albinos and those with HIV
- Disabled people have the same rights as others including the right to marry and found family
- Establishes the principle that the disabled must be represented at all levels of decision-making and governing institutions
- The state must not use - and must - discourage demeaning language
- Right to maximum possible involvement in society guaranteed by general provisions on participation, and statement that disabled enjoy all rights
- Needs of disabled children specially mentioned under rights of children
- There is specific mention of rights of disabled prisoners
- Sign language and Braille are to be recognised and promoted in various ways e.g. in court system, education, duty of state to encourage and develop
- There is special mention in human rights provisions of education needs including where possible integrated education
- There is provision for social security but this is only if means permit
- Disabled people have same rights as others – which would include not being disinherited because of disability
- There is a general duty on government to facilitate and promote access to buildings, transport, electronic communications, facilities generally
- Affirmative action for disabled would be possible under provision enabling affirmative action
- The Human Rights Commission to have special focus on disability

***(b) Human rights***

The Review Act lays great emphasis on human rights. Some of the human rights issues have just been mentioned – but not all human rights are primarily concerned with equity. Many are essential for full participation in the democratic life of the country. These rights: of speech, assembly, association etc are standard in modern constitutions, and there are full proposals in the draft – as well as some more discussion later in this Report.

***(c) Security***

Security: a basic demand of members of society and something which has been shown to be of great concern to Kenyans. The report addresses this in a number of ways. It imposes a clear duty on the state and its organs to protect the security of citizens. It proposes significant reorganisation of the police and security forces in ways which will make them more accountable to the nation. It proposes changes to the criminal justice system at its various stages that should produce a more just and effective regime for citizens, suspects and convicted offenders alike.

***(d) Protecting the Constitution and its principles***

Finally, we have proposed a number of provisions for securing the constitution from hasty and ill-considered amendments (including in relation to critical provisions, after a referendum), the abuse of power and the corruption of public institutions. We have recommended extensive use of independent commissions, national standards of conduct and probity, and new complaints procedures and enforcement agencies.

***5. Over to the People***

The Commission believes that it has gone as far as is reasonable in trying to secure the constitution and its values. But it also recognises that a constitution is ultimately a piece of paper. Although its effectiveness depends in part on internal mechanisms for enforceability, its success depends fundamentally on public attitudes and the commitment to constitutionality. The involvement of civil society institutions in political and constitutional processes is critical to the success of the constitution. A national commitment to constitutionalism is essential to the full implementation of and respect for the constitution. What the new constitution will do is to create principles, procedures and institutions for the exercise of public power and for accountability; it is up to the people and associations to ensure through the use of the vote, access to courts and other institutions of accountability, etc. that these principles, procedures and institutions become effective. Very heavy responsibility lies on political leaders to respect the letter and spirit of the constitution and to follow the values of tolerance and conciliation

and to promote national political parties and coalitions. We have recommended the principles of good citizenship including these and other prescriptions that will place key responsibilities on us all to ensure the success of the aspirations of the new constitution.

People and their leaders should be given opportunities to learn about the values and procedures of the new constitution and how to use its mechanisms to achieve these values. Civic education courses on the constitution should be compulsory in schools. As people read our report, they should constantly be thinking of their own responsibility for the mobilisation and enforcement of the constitution. The people in whose name the constitution has been designed are its ultimate custodians.

Despite the difficulties facing Kenya in establishing democratic principles and the revival of the economy, the prospects are good since Kenyans are ready for change. We believe that if the constitution is faithfully implemented, it would provide the framework for releasing and channelling people's energies. Indeed with this constitution, Kenya has an opportunity to be an example to the rest of Africa, in social justice, participatory democracy, and clean government.

## **6. *The Document***

### **(a) *Drafting style***

The existing Constitution is drafted in a way, which is virtually impossible for anyone who is not a lawyer to understand without a great deal of time and patience. Indeed, some parts are difficult even for a lawyer. In addition it is available only in English. It is perhaps more important that a Constitution be comprehensible by an ordinarily educated reader than in the case of most laws. Otherwise it is hard to see how the Review Act objectives of participation, accountability and enforcement of rights of citizens are to be achieved.

It is possible to adopt a simpler drafting style, and the drafting team has set out to do so. It uses shorter sentences, less cross-referencing to other part of the Constitution, straightforward language such as 'must' rather than 'shall', and avoiding ugly unnatural English such as 'whereby', 'provided that', 'such', and 'notwithstanding'. Inspiration has come from the Constitution of South Africa. We believe that the result is a constitution which in its English version is easier for people to understand, and easier to translate into Kiswahili and other languages. We also believe that this has been done without losing essential precision (this is easier to do in a Constitution because it is accepted that the courts have the duty to

try to fulfil the purposes of the document, and not to be restricted by technicalities). The team of drafters is to be congratulated on this achievement.

The tradition of drafting in laws in Kenya, adopted from England, has been that the word ‘man’ is used to include woman, ‘his’ to include ‘her’ and so on. Although this is understood by lawyers, it may be unclear to citizens, and even in the minds of lawyers may induce an assumption that normality is that the President etc. is a man. It is not very difficult to use language which does not carry this implication: sometimes ‘he or she’ or ‘she or he’ can be used, while sometimes the problem is avoided altogether by using a plural phrase such as ‘citizens’ instead of ‘a citizen’. In South Africa the drafters went further: they made it clear that a person of either sex could hold the office or perform the role, even when this was not required by the sentence structure: so the Constitution says for example “The Auditor-General must be a woman or a man who is a South African citizen”. Secondly the Constitution consistently puts the woman before the man. Thirdly the drafters avoided the necessity ever to say ‘him or her’. The draft Kenyan Constitution takes a similar approach.

***(b) Structure of the Constitution***

A Constitution is not a story – though it reflects a nation’s story. It has to be looked at as a whole, and the way one part of it works cannot be considered in isolation from other parts. One objective – such as gender equity or participation – will not be dealt with in one part only. And the effect of the Constitution working as a whole may be more than the sum of specific rules and institutions. But order is significant: the way in which the human rights provisions were ‘demoted’ from Chapter II in the 1963 Constitution to Chapter V as now, says something about the priority given to citizens’ rights. The draft Constitution begins with a statement of principles and values: what is the purpose of government. That purpose is the benefit of the people of the nation – all the people. The values are those of tolerance, democracy and the sovereignty and participation of the people. Then human rights are set out in detail, preceded by the provisions on citizens: who are the people of Kenya? The parts of the Constitution dealing with the structures of government at the national and local levels give priority to the representation of the people, through parliament, before moving on to those who exercise executive power on the people’s behalf. Then come the institutions, which are designed to keep the constitution functioning as it is intended: the courts, control of public finance, the human rights commission. Then the procedures for amending the constitution if necessary (which are also procedures for protecting it against casual or manipulative amendment), and for bringing in the new Constitution in an orderly way.

## **How is the New Constitution Different from the Old?**

Here is a list of the main ways in which the draft Constitution is different from the old:

- It is the people's Constitution: in recognition of the sovereignty of the people, in language used, in style. Its language is 'gender-sensitive'. It invites the understanding and the support of the people. And it will become law because the people want it.
- It reflects what the people are concerned about – instead of being mainly a set of governmental structures
- It contains a Preamble – the fundamental philosophy of the Nation – and a list of principles to guide the government and the people in the achievement of a just society
- There are provisions designed to ensure respect for all citizens, regardless of their ethnicity, religion, way of life or where they live
- The provisions on citizenship are fair as between the sexes, and offer more rights to become a citizen, less based on discretion of bureaucrats
- Human rights provisions are wider than in the old, taking account of modern developments in the understanding of human rights, of international treaties on human rights, and of the issues which people have raised, and on the basis of thinking about how the provisions of the existing constitution worked, or failed to work
- There is provision for the enforcement of human rights provisions, which involves a user-friendly special mechanism, as well as new procedures for access to court – as compared with the old Constitution which had a limited provision only implemented recently
- Parliament will consist of two Houses: the National Assembly and the National Council
- The election process will produce a Parliament, which is far closer in its composition to the wishes expressed by the people about the parties they support, than the First-Past-the-Post system used before – which tends to produce a government which had the support of only a minority of the electorate. But the proposed system retains constituency MPs so that the public feel they have some contact with the people whose decisions affect their lives
- A person does not have to be a member of a party in order to stand for election
- Political parties must observe certain principles of democracy and respect for the constitution in order to be registered to put up candidates for election.
- Political parties will be entitled to receive a certain amount of public financial support: designed to reduce the corrupting effects of private finance. They must also make public what financial support they receive from other sources and account for their use
- Parliament is strengthened: it approves the appointments to many significant posts, and it has a greater role in foreign affairs and in budget control and in the monitoring of government than before
- MPs will no longer have the power to fix their own salaries.
- There is a procedure under which in extreme circumstances the electors in a constituency can cause their MP to leave office
- There will be a Leadership Code governing the behaviour of MPs and other leaders, and a machinery for enforcing its principles
- The President is still directly elected by the people but must have over 50% of the popular votes and 20% of votes in a majority of provinces; if no candidate achieves this, a run off between the top two candidates, with the candidate who gets the higher vote to be elected President

- The President has far less in the way of powers than before: his or her role is far more that of a partly ceremonial president, representing the entire nation, and partly that of guardian of the Constitution, acting as a check on potential excesses of the government, and being part of the machinery for ensuring respect for the Constitution.
- The government is headed, for the purposes of day-to-day business, by the Prime Minister. He or she would be chosen from members of Parliament and would have to have the support of a majority of Parliament. The Prime Minister will be assisted by two deputy prime ministers.
- Ministers will be appointed outside of Parliament; once appointed, they will become ex officio Members of Parliament.
- The President can be removed from office by a process of impeachment at the instance of Parliament.
- The Prime Minister can be required to resign by a vote of no confidence in the Assembly Except when there is a vote of no confidence or there is some form of deadlock which cannot be resolved by the president, elections will be on a fixed date.
- There will be a system of Devolved Government which is entrenched in the Constitution and based on Districts, though these will also form a Provincial Council. There must also be village and location councils.
- Provincial Administration will be abolished.
- There will be a new Supreme Court at the head of the judicial system with all new judges.
- There will be a process under which existing judges will be given the chance to benefit from a retirement package; those who do not take it will be and have allegations of misconduct against them will be investigated; and all who continue will have to make a declaration of compliance with the Leadership Code.
- The Kadhi courts are given enhanced status in the Constitution
- The independence of the Judges and of various Commissions and offices like the Electoral Commission and the Auditor-General will be much enhanced
- There will be a strong complaints body to which people can go direct to complain of incompetence, corruption and unfair treatment by the public services, including the police
- The Administration Police are to lose their separate identity.
- The police are to be more responsive to the community, and their governance system will involve more citizen participation
- The defence and intelligence forces will be more accountable to Parliament
- All the land in the country is to be vested in a Land Commission which holds the land on trust for the nation. The administration of land by public authorities must have as its first purpose the protection of the rights of the people, and special consideration must be given to rights under customary law.
- The government must take steps to protect the environment and to achieve sustainable development
- National resources must be used equitably in a way which benefits the entire nation and not the elite or certain parts of the country.

## **Chapter II**

### **The Draft Constitution: Values, Principles, Rights and Policies**

#### *1. The Preamble*

Many submissions to the Commission urged that the new Constitution should have a preamble. Constitutional preambles are usually used to establish a few of the most fundamental principles of the state, and to affirm the fact that the Constitution is rooted in the people and owes its very existence and legal force to the people. It is common to refer, if briefly, to elements of history. It should emphasise what unites the country. Its appeal should be in its inclusiveness. It should strike the notes of emotional commitment, acknowledgement of the past and aspiration for the future, in a style, which is direct, signalling the style of the entire document. It does not need to be long – especially as there is to be a statement of values and aspirations of the Constitution shortly thereafter.

The submissions suggest that the following should be mentioned:

- the people in all their diversity, ethnic, religious and cultural
- the sovereignty of the people as the foundation of the state
- the history of the nation including the struggle for independence and the role of the freedom fighters, and the wounds of the post-independence period
- moving forward into the future
- national unity and social justice
- the values of democracy, constitutionalism and the rule of law
- a reference to God

#### *2. National Values and Aspirations*

Many recently drafted constitutions have what are described as “directive principles of state policy”. Very often these have been used to introduce a level of protection for economic social and cultural rights – but that protection is less than if given to the more familiar civil and political rights such as freedom of expression. The Kenyan draft constitution, however, does not draw a distinction between civil and political and economic social and cultural rights in this way.

Rights such as education, health and food (typical economic rights) are proposed to be integrated into the general Human Rights provisions.

However, this does not mean that there is no room for a statement of the fundamental values of the state and the constitution (but these should not be called “Directive Principles of State Policy” because this phrase has a fairly clear meaning to lawyers). This is an appropriate place in the Constitution to set down the fundamental principles which have guided the preparation of the Constitution and which should guide the government and the nation in the implementation of the Constitution. This should not try to restrict political parties in their development of policies and ideologies. But it is the closest that one would find to a national ideology. In the nature of things it will also have a universal quality: Kenya does not exist in a vacuum, and looking into the future it is inevitable that links with other countries will increase, and specifically the East African Community and the African Union will – Kenyans hope – grow in strength.

More specifically, it would be to this part of the Constitution that one would look in order to understand references later to the values of the Constitution: for example, political parties should commit themselves to those values and should not be registered if their objects are to overthrow those values. A President, or others, taking office, will undertake to respect the Constitution – and this is not just a commitment to uphold a set of rules, but a set of values, too.

Another related aspect is that of aspirations or goals of the nation. These reflect the sort of society towards which the nation under the constitution is aiming.

The Values will be more specific than those in the Preamble, but less so than those in the Human Rights provisions. The proposed draft refers to the following:

- The Sovereignty of the People
- National Unity and specifically a reference to Kiswahili and to other languages
- The equal value of all communities
- Democracy good governance and the rule of law
- Human Rights
- Equality and equity for all: including men and women

- Striving to fulfil basic needs
- Participation, openness and transparency in public life
- Personal and national integrity
- Toleration and respect for others' views and beliefs
- Kenyan traditions and values
- Bringing government closer to the people
- Peaceful resolution of disputes
- International solidarity and African unity

A final issue relates to the status of these provisions in law. It will be clear that most of them cannot be made the subject of legal disputes like provisions on specific rights and duties. But they could be referred to as part of an argument in court. The Constitution will make it clear that these values and principles should guide the nation and its organs, and that those organs include the courts.

### 3. *The People of Kenya*

The provisions of the existing Constitution on who is a Kenyan citizen are extremely complex in both their effect and their legal language. There are several different ways to become a Kenyan: by being born in the country of a Kenyan parent, by being born outside the country to a Kenyan father, in various circumstances people have the right to be registered as a citizen even if not born a citizen, or they may apply to be registered, and in some circumstances a person may apply to become a citizen by the slightly different process of naturalization. The provisions give a great deal of discretion – saying that certain people “may” be granted citizenship. They do not permit a person to hold Kenyan citizenship and the citizenship of another country at the same time. They do not contemplate the possibility that a person may have the right to live in Kenya, without needing to renew a visa constantly, but not have full citizenship. They permit the citizenship of someone who was not born a Kenyan to be taken away, but not that of someone born a citizen – thus discriminating between two types of citizen. And finally they discriminate between men and women: particularly because the wife of a Kenyan man has a right to be Kenyan but not the husband of a Kenyan woman, and the child born outside the country of a Kenyan father become an automatic citizen but not the child of a Kenyan mother. The Review Act singled out the last feature for particular mention.

Submissions to the Commission:

- Were strongly in favour of removing the sex discrimination aspect.
- Opinions on dual nationality were somewhat divided; those in favour included not only people born or living overseas but members of pastoral communities or other communities which straddle borders and whose lifestyles involve frequent cross of the borders.
- Some people thought that all those born in the country should be citizens.

The recommendations in the Draft Constitution are on the following lines (qualifications for citizenship are in the box):

- All citizens are equal in their enjoyment of the rights of citizenship. This includes equality as to losing citizenship. That residence within the country also gives rights and responsibilities; that the system should be transparent and fair
- There is a right to an ID card and a passport
- There must be no discrimination on the basis of sex
- Dual nationality is possible
- A law must be passed creating a category of people who have the right of residence after having lived in the country for a significant time.

**Who is a Kenyan citizen?**

- Someone born in Kenya either of whose parents is a citizen
- Someone born outside Kenya either of whose parents is a citizen
- The husband or the wife of a citizen can also become a citizen
- A person adopted by a Kenyan can become a citizen
- A child found in the country with no known nationality is Kenyan
- People who are stateless by reason of history but who were born in Kenya whether before or after independence are Kenyan
- Others may apply for citizenship

4. *Human Rights*

Ever since the American revolution, human rights have been an important part of a constitution. Constitutional provisions on human rights have gradually become more complex and comprehensive. National provisions on human rights have been supplemented and reinforced by international and regional treaties which impose obligations on states and other entities to promote and protect rights, and establish machinery for international supervision of national implementation of these obligations. They are one of the most important ways to declare national values and express the purpose of the state. Today it is hard to imagine a constitution without a bill of rights.

Rights are regarded as inherent in the human being and are not surrendered to the government when people form a political community. They are necessary for

human beings to live in dignity, to fulfil their potential, to satisfy their physical and spiritual needs, etc.; They empower citizens and residents, giving them central role in decision making in organs of the state and the right to associate and by protecting their vital interests against violation by the state. They limit the power of the state and protect against the excesses of ‘majoritarianism’. Many rights, such the right to vote, the freedom of expression and of the media, access to information, are necessary for the establishment and protection of democracy, including the accountability of public authorities. They justify special treatment of minorities and other disadvantaged communities Rights define the relationship of the state to the people; in this way they provide a framework for the entire constitution.

The Review Act gives a high priority to human rights. It refers expressly or by implication to protection of human rights and democracy (democracy, as understood today, cannot exist without rights—right to assemble, associate, vote and be candidates, expression, minority protection), to gender equity and issues of discrimination generally, to the basic needs of the people through the establishment of an equitable framework for economic growth and equitable access to national resources to securing equal rights of all to the rights of child.

Human rights are important in the existing Constitution as well. The current Bill of Rights guarantees the following rights:

- The rights to life and liberty
- The rights to be protected against slavery; forced labour; and from torture, inhuman or degrading treatment;
- The protection of the right to private property;
- The right to be protected against arbitrary search and seizure
- The protection of the rights of conscience, expression, assembly, association, movement
- The right not to be discriminated against on the basis of sex, race, tribe, place of origin or residence or other local connection, political opinions, colour or creed.
- The right to a fair trial before an independent tribunal established by law in a criminal case including the right to be considered innocent until proved guilty and to a lawyer.

The scope of the human rights protections is rather limited, in terms of those who are protected, in the types of rights protected and in the range of those who are bound by the duties associated with the rights. There is no provision of social and economic rights; and nothing to ensure the basic needs of Kenyans. There is nothing on solidarity rights (peace, development, or environment). Such cultural rights as exist are somewhat negative; culture, in the form of customary law, justifies exceptions to equality rights, which mainly disadvantages girls and women. There are no special provisions for minorities; the constitution says nothing about the rights of the child, the elderly or disabled persons; the protection against discrimination applies only to citizens of Kenya. Even in the area of civil and political rights, not all are protected: for example there is no recognition of privacy, or rights of political or other forms of people's participation'; the right of an accused to fair trial does not oblige the state to provide a lawyer to the accused even in cases where the death penalty may be imposed. Many modern constitutions are more explicit in the rights of particular sections of society, which in the Kenyan context should include pastoral communities, consumers, prisoners and people on remand, refugees, trade unionists. It does not give citizens a right to obtain information held by the government and thus minimises opportunities for people to scrutinise the efficiency, integrity and honesty of public authorities. It places few obligations on corporations or private actors to respect or promote fundamental rights. The constitution itself provides for a large number of exceptions even to those rights which it does create. Several rights can be suspended during a war or a declaration of 'emergency'. A law passed with a view to safeguarding the interests of defence, public order, public morality, public health or the control of nomadic peoples, may take away from constitutional rights and freedoms. The protection against discrimination does not apply with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law. In effect, African customary laws that discriminate against women or girls, or person with disabilities, are exempt from human rights provisions.

The Bill of Rights is weak by modern standards in enforcement procedures and institutions: It has no specialised bodies like an Ombudsman or Human Rights Commission for promoting or enforcing rights; there is no proper legal aid to enforce rights, and few effective remedies. Since the Bill was drafted, new international procedures have been developed for the enforcement of human rights and these are not reflected in the Constitution.

Very many of the submissions made to the Commission centred on, or implied, better protection of human rights, and – strikingly – not only for the benefit of those making the submissions. People demanded better protection for their own

rights – especially groups who felt discriminated against such as women, persons with disabilities and some ethnic and religious groups. They want a better deal for street children – and children more generally, including refugee children, children with disability, and the girl child. The basic needs of society for food water shelter should be met.

Rights are sometimes thought of as including different types: political and civil rights—the protection of life and liberty, civil rights like right to associate and assemble, freedom of expression, political rights, the right to vote and stand for elections, and the right to participate in public affairs are the best known and best established. The next group are social, economic and cultural rights. They include the right to education, employment, shelter, health, and food. Solidarity rights (i.e., rights which pertain to the whole community) include the right to a clean, healthy and sustainable environment, to peace, to nurturing of one’s culture and to development. These rights are important for the community as well as for the individual. In the draft constitution various types of rights are included in the Bill of Rights, and there is no ‘hierarchy’ of rights with some being more important than others. It is not true that civil and political rights protection requires only state restraint, and the other require positive state action and state expenditure: for example, the protection of people from discrimination (a civil right) requires not only that the state not discriminate but that it prevent others from doing so, while elections (a political right) are extremely expensive. On the other hand, the state can be a positive violator of economic, social and cultural rights (for example by unfairly evicting squatters which may violate the right to housing) as well as a ‘mere’ negative violator by failing to provide services. The Covenant on Economic Social and Cultural Rights obliges a government to ‘take steps,... to the maximum of its available resources, with a view to achieving progressively the full realization of the rights ... by all appropriate means’ (Art. 2) – not to achieve miracles. The nature of the obligation has been analysed in some detail by the Committee on the Covenant. Firstly the state must achieve ‘at the very least, minimum levels of each of the rights’ and to give priority to achieving this minimum level. Beyond that the duty is to ‘respect, protect, promote and fulfil’ the rights: respect means not to interfere itself with the right; protection is against infringement by others; promote involves education and encouragement; fulfilment involves the positive action of the state to achieve the right. In fact this way of analysing the duty of the state fits perfectly well its duty with respect to civil and political rights, too.

### **What does the draft Constitution do for children?**

- Tries to ensure a more peaceful and prosperous future
- Gives them the same rights as adults – except where there is good reason
- Gives them, as they leave childhood, the right to vote at age 18
- States the duty of the state to provide free primary education
- States the duty of the state to work towards providing subsidized education at other levels
- Protects the rights to maternity leave
- Says that adopted children can be Kenyans
- Gives children a right to have their births registered
- States the duty of parents and society to protect children
- Gives a right to health to all
- Gives a right to a healthy environment
- Gives a right to food and water (which the state must not interfere with and must do what is reasonable to protect and ensure)
- Children should not be forced to attend religious services against their or their parents' will
- Imposes a duty on the state to implement treaties including the Convention on the rights of the Child

(a) A Brief Survey of Draft Bill of Rights

- The rights that are protected in the draft Constitution include what one might term rights of dignity, equality, non-discrimination, culture and religion. They cover the most fundamental concerns of people in society: the rights to be treated with basic respect and on a par with other members of society. With these we can include the right to privacy.
- Then there are rights of special sections of the community: women, people with disabilities, children, the elderly, refugees. These emphasise the fact that these groups are entitled to the range of rights enjoyed by people generally – in response to the sense that some of the groups have of being marginalized in society. Then concerns particular to the individual groups are picked up and detailed responsibilities of society to them are spelled out.
- The rights of political participation including the right to vote, freedom of speech, of assembly and association are standard in constitutions. We have added a relatively recent right: that of obtaining access to information held by Government often called the freedom of information.
- The rights of people accused of criminal offences to fairer treatment when arrested and detained, and to a fair trial are also usually found in constitutions. The proposal strengthens these to some extent, and also adds the rights of prisoners, which is a recent addition to the range of human rights, and responds to concerns expressly strongly in many submissions to the Commission.
- The draft also proposes the abolition of capital punishment: the death penalty. Many submissions recommended this step
- Rights to an existence of basic human dignity include not just an attitude of respect, but require some basic level of food, health, housing and education. Here the duty of the state is expressed in terms of respecting as well as promoting and fulfilling the rights.
- The work situation also involves certain rights: the rights to choose one's occupation, the right to fair treatment within work, to equal pay for the sexes, and to standards of health and safety at work. Within the family context there is also the right to choose whether or not to marry, and the rights to equality and respect within the family.
- The enforcement mechanisms for human rights are also stronger than under the existing constitution. There is to be a Commission on Human Rights and Administrative Justice, which will have the task of receiving individual complaint about breaches of human rights. It will have the power to try to resolve these disputes by mediation between the parties, and also by recommending compensation, It will have the responsibility of keeping the

laws and policies of the government under review – including considering planned law – to see whether they are satisfactory by human rights standards. The Constitution also provides that when applying the provisions about human rights the courts and other people must try to achieve the objective of human rights. They must look at how human rights law has developed elsewhere.

- Kenya is a party to a number of international human rights treaties (such as that on the rights of the child and the elimination of discrimination against women). Under these treaties the country is supposed to report periodically on its own performance in meeting the standards laid down. Organisations within the country also have the opportunity to comment on the government's human rights performance. And the government's report will then be discussed in the committee set up to monitor each treaty. Kenya's performance in meeting this reporting obligation has been dismal. The Constitution makes it a duty in Kenyan law for the government to carry out these duties – and also to make its reports public and provide adequate opportunity for public discussion within the country.
- Finally, the Constitution has something to say about the circumstances in which rights can be suspended or reduced in the public interest. It is very important that these possibilities are strictly limited or there is a risk that the Constitution will give with one hand and take away with the other. First there is the possibility that the rights given may be limited in the wider interest of society, or of other values, which must also be protected. A simple example is that freedom of speech cannot be totally unlimited – it must respect the reputations of others. But the essential nature of the right must be protected. It is proposed that there should be a general provision which says that rights may be limited but the requirements should be demanding: reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, and the major factors should be indicated for the guidance of courts.
- Then there is the possibility of declaring a state of emergency. Certain rights may need to be suspended during a grave situation of national emergency, war or disaster. The draft Constitution restricts the circumstances in which the power to declare an emergency can be used, and the time for which it can be used, those who may declare it (it must be under the control of Parliament) and the rights which may be limited during such a situation. Also special precautions are necessary for people who are detained during such a period.

5. *Land, Environment, Economy and Natural Resources*

Land is the basis for Kenya's economy and for the livelihood, directly or indirectly, of most of its people. Agriculture and livestock raising are the activity of most of its people. Tea, coffee, flowers and horticultural products are its main exports. And tourists come for its game parks and its beaches. For farmers in the traditional way, for pastoralists and for forest dwellers, land and their way of life are intertwined. The situation is not fundamentally different for fishermen.

The experience of colonialism when the people were robbed of the whole of their land, and many were robbed of rights to own or even to live on or use the specific tracts of land which belonged to their ancestors, gives an added dimension - one of a continued sense of injustice - to the land issue. Post-independence developments have failed to address the deprivation of many; while new forms of land accumulation, even hoarding, by some, and land impoverishment for others, have been created and refined. Many who are landless feel that access to land is their only hope, while many who have land cannot make a living from it, because plots are too small, or the rewards of farming too low. Land, ethnicity, identity and way of life have been closely intertwined. For some the land issue breeds despair, for others anger, ethnic tension, and sometimes violence, and for the country as a whole, and for many communities, unresolved issues make it difficult to move on.

The Review Act says that the people of Kenya in reviewing the Constitution shall:

- examine and review the place of property and land rights, including Private, Government and Trust land in the constitutional frame-work and the law of Kenya and recommend improvements that will secure the fullest enjoyment of land and other property rights.

The Act also mentions equitable access to national resources as a route to attaining the provision of basic needs and to economic development, a process with which issues of the environment and natural resources are closely linked.

Under the 1963 'majimbo' Constitution, all the rights of the government to land were given to the region where the land was situated. This meant the 'government land', and the underlying title in freehold and in leased land (when the lease ends the land goes back to the government). All land in the 'native reserves' became 'Trust Land' and was held by the county councils. The councils were to hold that land for the benefit of those who live on it, and were required to recognise rights under customary law that applied to that land. When the provisions of the constitution relating to devolution were repealed, Trust Land remained with the

country councils, but all rights in land given to the regions were transferred to the central government. That is still the case, but the current Constitution is now silent on land apart from Trust Land.

(a) *What people told the Commission about land*

- Many people said that issues of land management should be a matter for local bodies.
- They complained of land grabbing: land which is earmarked for community/public use being allocated to members of the elite, including road reserves being allocated or even seized (making future road development difficult), forest areas being ‘degazetted’, allocated to individuals, and deforested, in disregard of environmental and resource considerations or even of resident communities, even markets, cemeteries and public toilets being handed over to individuals.
- They complained that many people who are entitled to titles to land have been unable to get the necessary documents. The effects of unjust deprivation of land during the colonial period are still felt by some communities. Some communities are deprived of access to important cultural sites. People complained that county councils allocated trust land to individuals, and there were calls in some places for the restoration of community land rights.
- There was a great deal of complaint about land problems going back many years – very often traceable to colonialism. For example, while the Maasai complain of being dispossessed by the colonial power, the Pokot complain that they were in turn displaced by Maasai.
- There is a good deal of land lying idle while others are crying out for access to land; some hold land as a source of power, rather than for productive use. Many asked for an upper limit on the amount of land that can be held by an individual or organization.
- Not all problems are in rural areas. 65% of Nairobi dwellers, and many in other towns, live in slums, often as squatters with no rights, no facilities, and no incentive to improve their living conditions. Land grabbing is a problem everywhere.
- A great deal of concern was expressed over environmental degradation in various ways. Pollution of land, air and water, deforestation, waste disposal problems, unplanned building development are all causes of complaint.
- On resources one of the most common areas of complaint related to the use of land for game parks for the national benefit but to the exclusion of the local people. In Taita-Taveta about 75% of the land is included in national parks, and most of the rest is in the hands of a very small number of people, with the local people owning only 11% of the land. Ironically, about 90% of the country’s wildlife is outside the boundaries of the parks. This is the

- most dramatic example of a sense experienced very widely: that local control of resources, and therefore of their lives, had been wrested away.
- Finally: on the economy more generally. There were submissions about the importance of encouraging scientific and technological advancement, and of protecting the rights of those who develop scientific and other advances. The need for considering the development needs of all parts of the country was also mentioned frequently.

It is not possible for the Constitution to provide a detailed blueprint for dealing with land issues. All it can do – and this is what the Commission is suggesting – is to set out a set of principles which must be used as the basis of land policy and law in the future. The principles are in the box.

## **Land Principles for the New Constitution**

- 1 All land belongs to the people of Kenya.
  - the people will hold such land in accordance with systems of tenure defined by legislation.
  - Non-citizens of Kenya would be prohibited from acquiring land except on the basis of leasehold tenure.
- 2 Land in Kenya shall be classified as public, private or commons.
- 3 Public land shall be clearly delineated and held in trust for the people in Kenya in terms of legislation defining the nature and extent of such trust.
- 4 Private land may be acquired and held by individuals or other jural persons in accordance with systems of tenure defined legislation.
- 5 The commons shall be clearly delineated and vested in communities or agents thereof in accordance with systems of tenure defined by legislation.
- 6 Property rights lawfully acquired shall be protected and may be freely by alienated without discrimination as to gender subject only to such restriction as are inherent in the tenure systems creating them.
- 7 All land however acquired or held are subject to the inherent power of the state to acquire or regulate such land in the public interest or for the public benefit.
- 8 There shall be established a Land Commission whose functions will include: -
  - Holding title to public land
  - Periodic review of land policy and law
  - Developing principles for the sustainable use and management of land
  - Exercising residual land administration functions.
- 9 Parliament shall make law within two years of its first sitting under this constitution providing for: -
  - The incorporation of the above principles
  - Mechanisms for resolving land disputes under different tenure categories
  - An expeditious and cost-effective system of land alienation (transfers and transmissions)
  - Equitable distribution of land including the resolution of problems of landlessness, or spontaneous settlements in urban areas.
  - The investigation and resolution of historical claims especially within the Coast, Rift Valley and North Eastern Provinces and other areas.
  - The introduction of tax on idle and underutilized of land, and
  - The coordination and simplification of land laws.

6. *Environment*

On the environment, certain basic principles are included in the draft human rights provisions: right to a healthy environment, and the basic principles of sustainable development. Sustainable development includes the idea that there should be equitable development among the people alive in the world today, but also that the rights of future generations to the resources of the world must be respected. These ideas are should be further developed in the Land chapter, drawing to some extent on the recent Environmental Management and Coordination Act.

- Those making decisions and laws must have regard to the following principles of sustainable development: public participation, the cultural and social principles traditionally applied by any community on Kenya for the management of the environment or natural resources, the principle of equity as between present and future generations and as between those living at the same time, the polluter pays principle, the precautionary principle
- Government must protect the wildlife, genetic resources and biological diversity of Kenya. to protect forests, practice, encourage and where practicable require waste minimisation and recycling, water conservation, the use and development of energy efficient technology and the use of renewable energy sources.
- Government must set up and ensure the effective functioning of a system of environmental impact assessment and environmental audit and monitoring; and ensure that environmental standards enforced in Kenya keep up with developing standards internationally.
- All minerals and water resources belong to the people of Kenya. And the National Land Commission holds any such natural resources as are formally vested in or managed by it in trust for the people of Kenya, but a share of the income must go to the people who own the land.
- So far as reasonably possible, the administration of natural resources must involve the participation of the local community, while not losing sight of the need for natural resources to be protected and developed for the benefit of the nation as a whole

**The Principles of Sustainable Development**

Development which meets the needs of the present generation while not compromising the ability of future generations to meet their needs

- Equity within generations
- Equity between generations
- The precautionary principle
- The polluter pays principle
- Public participation
- Respect for traditional environmentally friendly ways
- International cooperation

- The law must provide for Parliament, as Guardian of the rights of citizens, to be consulted on major decisions affecting the use of the land and natural resources of the nation.

#### 7. *Economy*

A constitution cannot prescribe detailed rules for the economic management of a country. Only the most general principles can be included:

- The encouragement through education and other means of the development of relevant scientific and technological techniques and knowledge
- The principles of even development in the country
- The protection of intellectual property rights
- the protection and development of indigenous knowledge
- The encouragement of trading relations within the African continent
- Assistance to various sectors of the economy including agriculture, livestock

#### 8. *Public Finance*

Raising and spending public money are self-evidently functions which require careful regulation – especially in a country like Kenya where most people are poor and can hardly afford any wastage of their own or public money and where, even more importantly, there has been massive criticism of impropriety in the use of public money.

The Review Act (s. 17 (d)) provides that one of the functions of the Commission is to ensure that Kenyans:

...(viii) examine and review the management and use of public finances and recommend improvements thereto;...

Kenyans told the Commission that

- That steps should be taken to ensure that everyone liable to pay tax actually pays; for example if there is any waiver of the obligation to pay tax this should be made public; the Constitution to include principles of fair and prudent taxation
- There should be greater involvement of the public and parliament in the preparation and approval of the budget
- In various ways parliamentary control of budget processes should be tightened
- The independence and powers of the Auditor-General should be strengthened

- There should be better controls over expenditure of state revenue outside the budget
- The whole process should be more transparent
- The two functions of budget control and audit should be performed by separate bodies
- The office of the Governor of the Central Bank to be established by Constitution and given security of tenure and independence of operations

The existing Constitution has some standard provisions: setting up the main accounts into which public money is paid, providing for the procedures to pass law raising taxes and incurring expenditure, providing for the creation of the independent post of Auditor-General to audit the accounts of the public. There are various ways in which these provisions can on the one hand be tightened to exercise better control over financial matters. Secondly they restrict severely the powers of Parliament to make laws, which involve public expenditure, or to propose changes in the budget. Thirdly the whole process could be much clearer to the public. The fact is that at present the whole budget process is too much in the hands of the executive. Neither Parliament nor people fully understand the process or what is planned. They are not provided with enough information, or enough time, to evaluate the executive's plans.

The draft Constitution includes the following main principles:

- a statement that budgetary processes must be transparent, and must involve the participation of Parliament and of civil society as much as possible; they must ensure accountability and the effective financial management of the economy, debt and the public sector.
- The process of preparing the annual estimates must involve much more openness and participation, especially of Parliament. In order to make this possible:
  - the material presented to Parliament must be in such a form that members are able to understand and contribute to discussions on the budget
  - the budget for a particular financial year should not be presented in isolation, but showing the place of the proposed income and expenditure in the context of the previous year, and of plans for the following year
  - the budget submissions must be prepared and presented to Parliament by a date to be set by legislation which gives sufficient

time for useful discussions, which should take place before the beginning of the next financial year

- Parliament must set up a Committee to consider the estimates, and provide it with the necessary resources
- There will be tighter controls on the expenditure of funds:
  - the amount which can be advanced at the beginning of the financial year but before the budget is approved should be reduced (at present it is 50% of the planned budget)
  - there will be tighter conditions on the use of the contingency fund
- There will be tighter regulation of the power of the government to borrow money – the control of Parliament over and the transparency of this process being increased.
- The draft Constitution is more specific about the requirement that, subject to the Constitution, all raising of tax should require the authority of Parliament.
- It requires that decision to waive the obligation to pay taxes must be made by Parliament.
- There will be an office of the Controller of the Budget – with the responsibility of authorising expenditure from governments accounts to ensure they are in accordance with the law and only for the purposes approved - separate from the Auditor General whose office currently has this responsibility but without the capacity to do it thoroughly.
- There are clearer requirements on the timing of submission of the Reports of the Auditor General.
- The independence of the office is increased.
- The Auditor General is to report direct to Parliament.
- The Central Bank is recognised in the Constitution and the Governor is given security of tenure (to protect him or her from pressure from the Government to increase the money supply, or permit the Consolidated Fund to have an overdraft, for example).

## 9. *Kenya and the World*

Kenya is an international citizen: it is a Member of the United Nations, of the African Union, the Common Market for Eastern and Southern Africa (COMESA) and of the East African Community. It has agreed to be bound by many international agreements, including on human rights and the environment. These

are probably very mysterious to most people! What do they mean to the ordinary Kenyan? Are they of any benefit to his or her daily life? Do they involve the government – and therefore the taxpayer – in new expenditure? Is Kenya a good international citizen? These are all questions to which the answers ought to be readily available – and are not.

The draft Constitution puts all this much more in the public domain. But first it's necessary to explain a little about how international law works: International agreements may be made by an agreement between two nations (bilateral), or between many nations (multilateral). A treaty may be sponsored by an international organisation (such as the United Nations). The government will agree to a treaty, but it then has to be 'ratified' locally; what the process of ratification involves depends either on local law or on the provision of the treaty itself. In Kenya, treaties are ratified by signature by the President. International law may also develop as a practice of nations (called customary international law) or it may be made by an international court interpreting treaties, such as the International Court of Justice at the Hague. Customary international law is part of the law of Kenya – though the Constitution does not say so. Under Kenyan law a treaty does not automatically become part of Kenyan law - usually an Act of the Kenyan Parliament must be passed bringing the new international rules into local law. It may be many years before this is done. And the fact that Kenya has accepted an international obligation creates no right on the part of a Kenyan citizen - even if the treaty was intended to benefit Kenyans.

The Commissions' proposals will make the system a bit clearer, and also place it more in the control of Parliament as the people's representatives:

- The Constitution states that customary international law (unless it is inconsistent with the Constitution or an Act of Parliament) and treaties to which Kenya is a party are part of the laws of Kenya.
- The Government negotiates and signs treaties – as part of the executive functions which are vested in the Government, but with the participation of Parliament.
- Before a treaty is finally approved, it must be approved by Parliament (by at least half the members of Parliament and if the treaty would require an amendment of the Constitution there must be approval by the same percentage of the people as the constitutional amendment would require). Parliament must be given adequate opportunity to debate the treaty.
- Some treaties may have effect in Kenya without an Act – this is because of the terms of the treaty itself. This is permissible under the draft.

- Existing treaties, which have not yet been brought into effect in the country by an Act of Parliament, must be brought into effect within one year of the enactment of the new Constitution.

There is another topic on which the Constitution needs to say something: the possibility of Kenya declaring war or committing its troops (for example to a peace-keeping force), though many constitutions say nothing on the subject.

- The draft Constitution provides that a Declaration of War is made by the President, after consultation with the National Defence Council but requires the prior approval of at least two-thirds of the entire Parliament within a fortnight.
- Any other Commitment of the Defence Forces outside the boundaries of the state would require the approval of an absolute majority of Parliament.

## **Chapter III**

### **The Draft Constitution:**

#### *1. The Institutions and Processes of Government*

The most important decision in making a constitution is the design of the system of government. The system of government determines the composition and powers of the state and the manner of the exercise of these powers. It determines who has access to the powers and resources of the state. It also regulates the relationship between the organs of state, and between them and the people. The structure of government affects politics, the organisation of parties, how ethnicity is respected, or manipulated, how efficient government is, and how the people participate in it. On it depends whether people feel involved in or alienated from the business of government. In many countries today politics are largely about getting control of the apparatus of the state, to fulfil personal or ethnic agenda. Yet the system of government can be structured to achieve and enhance values of the nation, promote democracy, strengthen national unity, ensure efficiency of administration, facilitate economic growth, and increase the accountability of the government and its officials. This is the challenge the review process faced. Here we look at the recommendations for Parliament and the electoral system, the organisation of the executive, and the judiciary: the traditional three arms of government. The Review Act directed that the process consider the separation of powers and the creation of checks and balances between these organs of government. This chapter also includes the recommendations of the CKRC about devolution – another topic mandated by the Review Act. There is also a discussion of political parties and how they can be better regulated in order to improve the way the system of government works.

#### *2. Parliament and its Members*

The legislature (Parliament) now consists of the National Assembly and the President. The President is not only, formally, a part of Parliament, but is also a constituency member of the National Assembly. The National Assembly in Kenya today has one chamber: there are 222 members of whom 210 are elected directly from single member constituencies, and 12 nominated by political parties in proportion to their elected seats, to represent ‘special interests’ and achieve some degree of gender equality. The Speaker and the Attorney-General are also members by virtue of their offices.

In their submissions to the Commission the people were very critical of the way in which Parliament operates and to some extent of its make-up. The general disillusionment was shown by the following common submissions:

- Parliamentarians should work full time
- Introduce moral and ethical qualifications for candidates
- Some said that the academic qualifications of MPs should be a university degree
- An independent commission should determine parliamentary salaries  
Parliamentary proceedings should be broadcast (so that people could see how the MPs perform)
- Increase the quorum for the National Assembly
- Very many wanted to be able to withdraw the mandate of non-performing MPs

On the other hand, the basic faith in the notion of elected representative showed in the suggestions often made that the power of Parliament should be strengthened:

- Control over state finances should be strengthened: there should be an estimates committee to scrutinise budget proposals; stronger system of committees.
- Parliament should vet and approve key presidential appointments.
- Parliament should have the power to dismiss government through a vote of no confidence.
- Parliament should control its own calendar

On the structure of Parliament:

- There was considerable support for a second chamber, although views differed on its role and composition
- Also: there was little support for the concept of nominated members of Parliament, and those who supported the idea said that nominated members should represent special interest groups (such as women, disabled, farmers)
- Many women's groups – and indeed men – said that there should be a minimum percentage of women members

A huge majority said that the president should not have the power to dissolve Parliament – an issue which goes not just to the powers of Parliament but to the power of the executive to manipulate the political system.

The Commission has made recommendations that it believes will meet many of the concerns of the public, first of all on accountability:

- Higher standards of education and moral integrity will be required of candidates
- More information about candidates must be available to the public
- Rules will be stricter about MPs who are guilty of misbehaviour – whether in breach of the law or of the Leadership Code which must be introduced
- MPs lose their seats if they fail to turn up for a certain proportion of sittings
- There will be a procedure for the recall of MPs who fail to discharge their functions satisfactorily
- A member who leaves the party on whose ticket he or she was elected must resign
- Parliament must meet for a certain number of days in the year

There is a connection between the system of Government and the role of MPs. The draft Constitution includes a separation between Ministers and Parliament. This is partly so that MPs can concentrate on their responsibilities as such. Secondly, Ministers need not have been MPs at all. Thirdly, there is a limit on the number of Ministers. All these have as one of their objectives ensuring that MPs take their responsibilities seriously, and accept that it is a full-time job and not just a path to being a Minister.

There are a number of recommendations designed to enhance the capacity and influence of Parliament as a body:

- There should be training for MPs
- The research capacity of Parliament must be strengthened
- There must be proper administrative support
- Parliament must set up certain committees (this is where the serious work of Parliament is often done: away from the temptation to ‘perform’ and where MPs of different parties can work together in the interests of the country)
- Parliament must approve appointment to certain key offices such as senior judges, the Auditor-General, and ambassadors
- Parliament is to have more of a role in preparation of the national budget
- Parliament is to have more of a role in treaty making

And it is proposed that there should be more of a role for the people:

- There should be a right to petition Parliament
- groups or citizens have the right to appear before Parliamentary Committees discussing or investigating particular issues
- one function of parliamentary committees is to enhance the participation of the people, through, for example, public hearings, in Nairobi and other parts of the country

**(a) One House of Parliament or Two?**

On the question of a second chamber (in the 1963 Constitution this was the Senate) the Commission debated long and hard. In the end it is recommending that there should be two. The main reason for this is to protect the system of devolved government, but it has other objectives, too. The Commission is conscious that this is not a cheap option – but it believes that the savings to the nation, and the growth in investment and production, as a result of good governance would be many times the cost of a second chamber.

In recognition of the main purpose of the new House, the Commission recommends that it is called the National Council. Its functions are to:

- Act as a mechanism of inter-linkage between the district governments and the central government
- To check and balance the activities of the Lower House
- Represent the interests of provinces and districts and minorities
- participate in the legislative process
- Try the president on impeachment charges brought by the lower house.

It will have about 100 members:

- One from each District elected by its residents.
- 30 from provinces to represent women interests

Legislative bills may be introduced in either house. If the two houses cannot agree on a bill, there must be a meeting between committees of the two houses which must make serious efforts to resolve the disagreement. If no agreement is reached, the decisions of the National Assembly shall prevail - except in relation to the amendment of the Constitution when special rules apply to anything affect the Districts.

### 3. *Representation of the People: The Electoral System*

Many submissions to the Commission expressed dissatisfaction with the current electoral system. People expressed their view on elections to Parliament and to the Presidency:

- They were very clear that the President should be directly elected.
- And that the President should have to get more than 50% of votes.
- There must be a run off if no one obtains this degree of support at the first vote.
- Opinion was divided on whether the president should have 25% support in five provinces: there was considerable support for it, but some suggested that it should be 20% in four provinces, while a few said that more than 50% national support was sufficient.
- President should not have more than two terms of five years each.

On parliamentary elections they said:

- Constituencies are very unequal in size.
- It is difficult to get registered as a voter.
- It is difficult to get nominated as a candidate.
- Elections are rigged.
- The Election Commission is not sufficiently independent.
- They want the possibility of independent candidates.
- Many demand representation of women, the disabled, youth, trade unions.
- Several recommended additional basis of representation, especially professionals etc. (people who are unlikely to go into politics).
- Many said that there should be a system of proportional representation.
- Voter registration should be continuous.
- Some young people suggested that the age for voting should be lowered
- Counting of ballots should be in the polling station.
- Ballot boxes should be transparent.

The main issue relates to the electoral system: how votes get translated into number of parliamentary seats. The complaint about the existing system (known as ‘first past the post’—(FPTP) is that the number of MPs a party gets will not really reflect the party’s support in the country – indeed it is usual for the ruling party to have gained less than half of the votes cast. You could say that more than half the

people did not want them to rule! The ‘purest’ system of proportional representation would be one in which the whole country would be one constituency: each party puts forward its list of candidates, and a voter would vote only for a party. This system operates in Namibia and South Africa, as well as Israel. This would have the result that no MPs would be elected by particular constituencies. But it is clear that most Kenyans also expected to retain constituency MPs, though with better ways to hold those MPs accountable – which we have discussed in the previous section of this Chapter.

In order to reconcile these views, the draft Constitution has adopted the mixed member proportional (MPP) system for the election of the members of Parliament and district councils. 210 members will be elected in single member constituencies with the candidate who obtains the largest number of votes, as at present. In order to achieve a more ‘proportional’ Assembly, the directly elected members are supplemented by members drawn from lists of candidates presented by political parties contesting the elections (the total number of such members will be 90). The aim of these additional members is to ensure that a party gets the number of seats in proportion to its national votes. Voters will cast two votes, one for the candidate and the other for a party. If a party does not get the number of constituency seats in proportion to its national vote, it will get additional members from the party list. This system combines the virtues of the single member constituency which produces a close connection between the MP and her or his constituents and overall national proportionality so that each party is fairly represented. If constituencies of unequal size are deliberately created or their boundaries are drawn to favour a particular party, the proportionality element, to a significant extent, will cancel the effects of gerrymandering (manipulation of electoral boundaries).

There are a number of other advantages of the MMP system. Smaller communities will be likely to get some representation even if they do not win a constituency seat (provided their party gets 5% of the national vote). In the last Lesotho elections, operated for the first time on an MMP system, the opposition party did not win a single constituency seat but got about 20% of the seats due to the rules about proportionality on the national vote. Another way in which minorities may get elected is by their members being placed on the party lists—women and men will have to be nominated alternatively, and the disabled and minorities will also have to be placed high on the list. Parties will also be required to nominate at least one-third of candidates from among women. Parties will have an incentive to campaign even in areas where they have no prospect of winning the constituency seat, for every vote they get will count toward proportionality. The MMP system was supported by all major political parties and by the Electoral Commission.

The President will be elected on a national vote and the winning candidate would have to secure an absolute majority of the voters (as well as 20% support in a majority of provinces). If no candidate satisfies these conditions, there will be a run off election between the two candidates who get the highest and second highest votes. The candidate who gets the higher number of votes will become the President. This system is designed to ensure that the President commands support and respect in substantial parts of the country, but also enjoys the support of a majority of Kenyans. This degree of support and legitimacy will be necessary for the discharge of the important presidential tasks of promoting national unity and safeguarding the constitution.

The capacity of the Electoral Commission to ensure free and fair elections and to enforce the Code of Conduct will be enhanced. The electoral process will be more transparent and the rights of voters will not be denied through administrative delays or cumbersome procedures for registering of voters.

A constituency boundaries commission will be appointed periodically to determine electoral boundaries for elections at the central and devolved levels. It will take into account both population and geographical factors.

Elections are also important in the smooth transfer of power from one Government and Parliament to the next (which is something the review Act directs the Review Commission to deal with). Elections under the draft Constitution will be held 45 days before the expiry of the term of Parliament and the President. This means that successful candidates will be known well in advance. When parliament finally sits it will be able to go straight to work (unlike the current situation where it sits briefly and then adjourns for several weeks).

The rights of the individual voters are also clearly spelled out, and protected, in the draft Constitution. The main provisions are:

- The right to vote in secret elections is guaranteed
- The voting age is 18
- Voter registration is to be continuous
- Registration is based on an ID card or passport
- Prisoners who are on remand (not convicted) are able to vote
- Prisoners serving short sentences are able to vote

The integrity of the process is to be enhanced by the following provisions:

- Counting of votes must take place in the polling station and in the presence of observers from parties and civil society
- Ballot boxes must be transparent
- People who have been convicted of an election offence are disqualified for standing in elections for specified period
- The existing power of the President to remove the disqualification on a person convicted of an electoral offence to register as a voter or stand as a candidate is removed.

#### 4. *Political Parties*

Our political parties play an important role in politics and administration, but it cannot be said that they have contributed to peaceful and responsible politics or promoted the cause of democracy and accountability. The importance of parties in the functioning of the system has often been overlooked by constitution makers in the past – there was no mention of parties in the 1963 Constitution, and there is little mention in the current version and no regulation at all of the internal workings of parties.

Submissions to the Commission raised a large number of concerns about political parties and the way they operate in Kenya today, and made many suggestions for change.

- People complained that the number of political parties causes confusion and recommended that we should limit number of parties; suggestions varied between 2 and 4.
- Parties should have nation wide support; some said that a party should have at least 10,000 members in every province
- Parties should not be based on ethnicity
- Parties should not be the only institution to nominate candidates
- A large majority said that parties should be funded from state resources; but a party would be entitled to state funding only if shows a minimum degree of support; others wanted to restrict funding to parties with democratic credentials
- Registration of parties should not be done by the Registrar of Societies but by the Electoral Commission. Others said parties should not need to be registered; notification should be sufficient

- Parties which are not working well should be deregistered; some said that parties which do not win any seats in the legislature should be deregistered
- Kenya should become a no party state
- The constitution should entrench guarantees of multiparty system; these provisions should be unamendable.
- Parties should be regulated to ensure democracy and accountability

What seems to be necessary is to protect rights to form parties, but to regulate their internal management, and their sources of funding. They should be required to respect the principles of the Constitution, and in order to provide for this degree of regulation there should be a registration system for parties which wish to contest elections. We are not accepting the proposal to limit the number of parties – though we do respect the view that many people recommended this. In fact very few countries have ever had such a constitutional provision (unless it is to have only one party). Other countries which have few parties have them because of the way the political system works, not because the number of parties is limited by law. We believe that fewer parties will be formed when it is possible for independent candidates to stand for election.

The draft Constitution says:

- The right to form and join political parties is protected.
- A political party can be formed by registration by the Electoral Commission.
- On the whole parties are free to carry out their functions, and the state must be strictly neutral between all lawful parties. There must be equal access to the state-owned and private-owned media.
- To be registered so as to take part in elections, a political party must have a national character, and not be formed on religious, linguistic, racial, ethnic, sex, corporatist or regional bases and must abide by democratic principles. Parties must respect the Constitution and laws, and human rights, including gender equity.
- Parties must not engage in or encourage violence or intimidation of its supporters or opponents. And they must not establish or maintain paramilitary or similar organisations.
- They must keep proper accounts. Political parties and independent must publish their manifestoes before elections

- Political parties can nominate candidates for local government elections

A principal reason for corruption among political parties is the need to raise money for elections, and sometimes also for the costs of running the party organisation. Often parties which support the rich and powerful are able to raise more money – and make a bigger impact in campaigns. Such companies may be given corrupt favours such as contracts in return. In Kenya problems about party finances are aggravated by the general poverty of the people which means that membership is not a real source of finance for parties. In order to eliminate unfair influences on parties, some subsidies should be provided by the state in an open, impartial and fair manner. State funding can only be justified if political parties accept in return conditions relating to transparency, accountability and proper conduct. Thus state funding could act also as a method of supervision and control. Some countries, for example, restrict payment to parties which have won a minimum degree of support at the previous general elections. The Commission considers that some such rule is necessary in order to prevent the proliferation of parties whose interest is purely pecuniary. On the other hand, new or minority parties are placed at a disadvantage in this way, and political options open to the public tend to be restricted, and new ideas hard to disseminate.

The draft Constitution:

- Provides for state funding - according to a formula taking account of the support received by the party at the previous general election (new political parties should be entitled to retroactive payment if they cross the qualifying threshold)
- Funding should be for
  - election expenses
  - for civic education in democracy and electoral procedures.
  - in addition an amount not exceeding 10% of the total of these expenses may be given to parties for organisational expenses

The Commission also recommends in the draft Constitution:

- Foreign corporate bodies should be prohibited from donating funds or other resources to parties.
- Individual contributions should be restricted to a maximum to be determined periodically by the Electoral Commission.

- The Electoral Commission should have special responsibilities for the promotion of democracy and the supervision of political parties.
- The Electoral Commission must prescribe the maximum amounts a party or candidates may spend for electoral campaigns.

5. *The President, Vice-President, Prime Minister and Ministers*

Now we turn to what is often thought of as “the Government”, the importance of which does not need to be spelled out. The Review Act gives no mandate to the Commission as to what specific system should be adopted. It also speaks of consensual decision making and the importance of participation of the people.

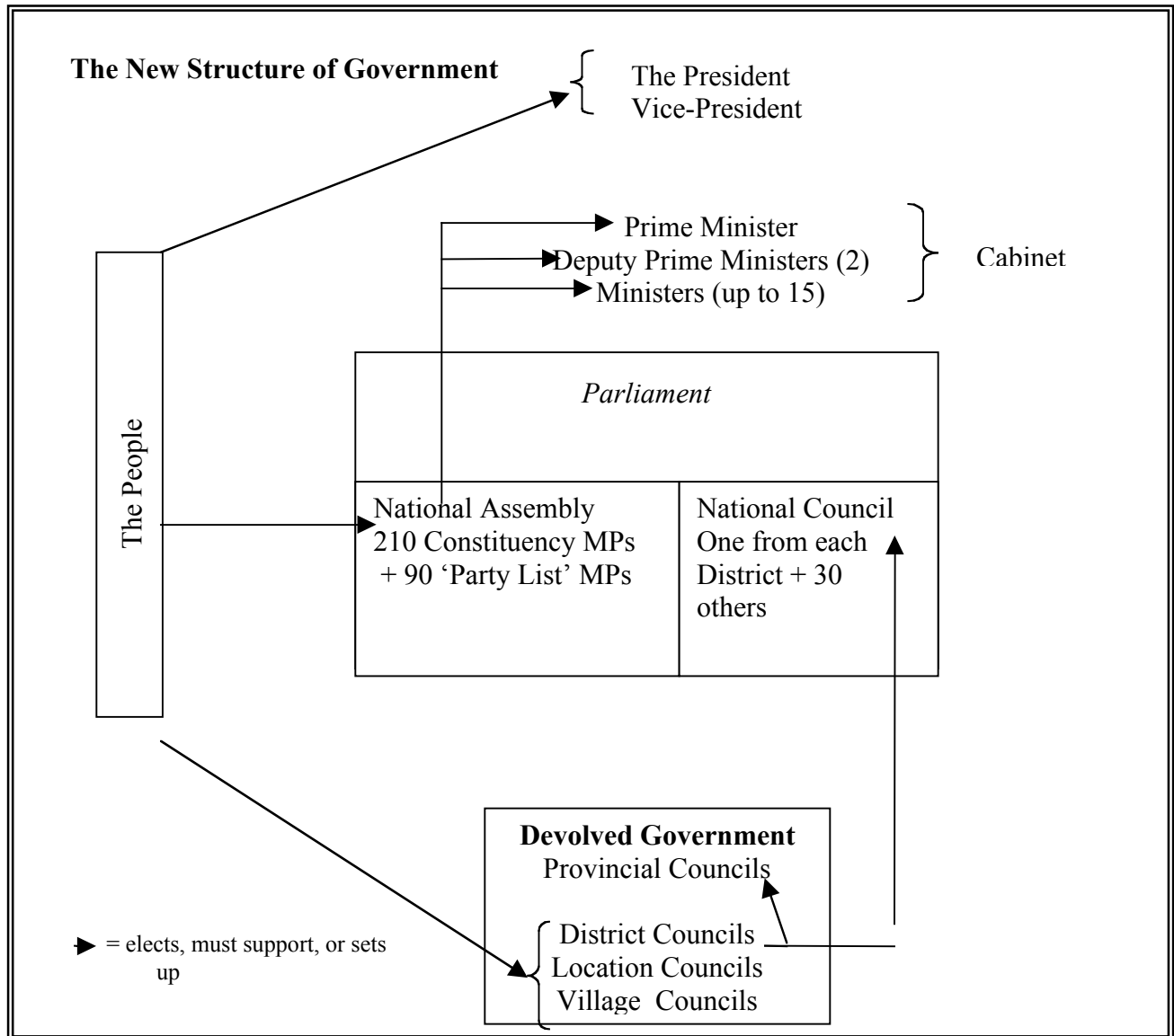
The main message which came to the Commission from the people – and came loudly and clearly – is that the current Constitution gives the President far too much power. In addition views included:

- Many people said they favoured ‘Coalition’ government
- More people favoured a Parliamentary system than any other (this was the system at independence)
- Some people clearly anticipated that the present system would continue but with greatly reduced powers for the President, and other modifications
- Some people – including political parties – wanted a system with a President and a Prime Minister, with various distributions of power between them

As far as the various possible systems were concerned, views were very much divided. The system under which there is not only a President but also a Prime Minister was supported by several political parties. This is a way of dividing the powers – on the other hand, if the President is given only ceremonial powers the Prime Minister can become as powerful, almost, as the President has been in the Kenyan system for many years. For a purely ceremonial president must act on the advice of the Prime Minister (just like the Monarch in a constitutional monarchy like that in the UK). The Commission is recommending a system under which both the President and the Prime Minister have ‘real’ powers. This model is much more common in continental European countries, and their former colonies, though it has also been adopted in Sri Lanka.

There are potential problems in such a system, and they have been experienced in both France and Sri Lanka especially. Very often the problems come because the President and the Prime Minister come from different parties. But they may simply be a matter of different personalities. If the President has real powers,

especially if one of the functions of the President is to act as some check on the government and Parliament if it shows any sign of overstepping its powers, some degree of conflict is perhaps inevitable. To avoid unnecessary conflict, however, the Constitution should state clearly what the respective roles of the President and the Prime Minister are – and how disputes or disagreements are to be resolved.



So – if there is a risk of conflict, why is the Commission proposing this system? One purpose is precisely to spread power - even between parties. Many submissions to the Commission expressed a preference for a “Coalition” government. This means a government that is formed of more than one party. There is an extreme form of such an arrangement in the Constitution of Fiji – any

party which wins more than 10% of the national vote may have a Minister or Ministers in Government. This may sound like a wonderful idea: but it has disadvantages. First of all the Government may be made up of Ministers who have very different views on policies – which may turn out to be unworkable. Even worse – those Ministers are not there because they have chosen to work together, but because the Constitution almost forces them to! The worst example of the risks was shown in that country in 2000 when the Prime Minister said he thought that the second strongest party would be happiest in opposition, and the second party leader said that he would go into government in order to be an opposition within government. Not a recipe for collaborative government! But there is some virtue in being able to build a coalition between parties – and this may be necessary with a system of proportional representation, such as is being proposed for Kenya. And politicians being what they are this may be easier if they can be offered positions other than ‘mere’ ministers. So the possibility of being able to offer ‘Deputy Prime Minister’ may be very valuable. This is not just cynical politicking - voters may be far readier to accept this. The role of the Prime Minister under this system is that of Head of Government. He chooses the Ministers, and he and his Cabinet together make policies. The Prime Minister must have support of the people’s representatives – that is Parliament. In this respect the system is like that in the UK. In fact the Prime Minister must be an MP.

Many people have said that they are unhappy with the present system of appointing Ministers. At present a Minister must be an MP. The result of this is that the Ministers constituents hardly see him – they get even less attention from their MP than most constituencies. And if the constituency benefits because its MP is a ‘big man’ – a Minister – this is a form of corrupt benefit as electors will recognise. And because the head of government’s choice of Ministers is restricted to MPs, and this plum will go to people who have proved their political loyalty, there is little guarantee that the Minister has any other qualifications.

Many people said that they wanted Ministers to be qualified to hold the particular portfolio; this suggests that the Minister of Health should be a doctor, the Minister of education and teacher and so on. There are problems about such an arrangement: the role of a Minister is that of a politician. He needs to be able to

understand the political side not the technical side of matters. The technicalities are for the civil servants. If the Minister knows – or thinks he knows – a lot about the subject this may lead to conflicts with the civil service. And his political sense may be weak. On the other hand, there is something to be said for having Ministers who have some qualification other than being loyal supporters. The proposal of the Commission is that the Prime Minister and the two Deputy Prime Ministers should be appointed from Parliament (the Prime Minister from the

National Assembly) but the Prime Minister must choose his or her other ministers from outside Parliament. The appointment of Ministers must also be approved by Parliament. To make sure that this Prime Minister does not take advantage of the wider choice, the Constitution draft says that Ministers must be chosen with a view to the experience and knowledge they bring to the task.

The draft also proposes that there should be far fewer Ministers than in the past. There should be no more than 15 ministers and 15 Deputy Ministers (including the offices of the Deputy Prime Ministers). The function of the Deputy Ministers is to represent and defend the Ministry in Parliament. Ministers must attend Parliament when major bills or policy statements of the ministry are to be presented, and when requested to do so by a Committee.

Parliament must support the Prime Minister when he or she is appointed. What happens if he or she loses the confidence of Parliament? Can there be a vote of no confidence as now? The answer is yes. This would cost the Prime Minister his or her post – but would not necessarily mean there would be a general election. The President would then have to try to identify someone who would have the confidence of Parliament. He or she would do this in consultation with party leaders. If after 30 days it proved impossible to form a new government there would have to be a general election.

*(a) The President*

It is not surprising that very many submissions to the Commission referred to the President for the office has been the focus of government in Kenya for many years. Among the common suggestions were:

- President should be a symbol of national unity
- President should not be above the law
- President should continue to be directly elected
- The qualifications for President should include minimum and maximum ages, minimum educational qualifications, and being happily married
- The President should not be an MP and candidates for the presidency should not be able to stand for Parliament
- The Vice President should be the running mate of the President
- Parliament should be able to impeach the president
- The President's term of office is limited to 2 periods of 5 years, as now

The recommendations of the Commission contained in the draft Constitution reflect many of these proposals. Other provisions relating to appointment are:

- Candidates may be nominated by a registered political party or be independent.
- Candidates for the presidency must be at least 35 years of age and not more than 70 (although this rule will not apply to the next election).
- Candidates for the presidency must be persons of highest integrity
- Presidential candidates cannot at the same time be candidates for parliament
- A candidate must stand with a 'running-mate' who will be Vice-President if the candidate wins

Some of the features of the system as they relate to the President have been discussed earlier – including the election.

What is the role of the President in a system with a Prime Minister which the Commission is recommending?

We have just seen one function – that of identifying a Prime Minister. The President does not have a free choice. Basically he or she must choose the Prime Minister who leads the party with the largest support. Where there is no single party the role of negotiating to identify a Prime Minister falls primarily on the party leaders. But the President could have an important role – how effective would depend on the respect in which the President is held.

The basic role of the President as envisaged in the draft Constitution is that of the symbol of the nation. But the role is not merely symbolic. There will be roles which are designed to keep the government on the path of constitutionality. The draft Constitution states that the role of the President includes:

- The President symbolises and enhances national unity. resign from any post in a political party.
- The President must protect national sovereignty.
- The President must promote pluralism and the protection of human rights.
- The President must safeguard the constitution and uphold the rule of law.

An important role relates to legislation:

- Presidential assent is necessary to bring legislative bills and regulations into effect. The President may send back a bill or regulations for re-consideration. The President must sign the bill or regulations if they are

returned to her or him, with or without amendments, unless the President considers that it is unconstitutional, in which case s/he shall refer it to the Supreme Court for advisory opinion.

Other important roles that the President performs without needing to follow the advice of anyone else are:

- The President has the power to ask the Supreme Court for an advisory opinion on a constitutional question
- The President has the right to address the National Assembly
- The President shall ensure that suitable funding arrangements are made for institutions established to protect and promote rights and democracy
- The President may recommend legislative measures for the consideration of the cabinet

So that the President may perform the functions:

- The President must be kept informed of government business by the Prime Minister

Then there are many symbolic roles – but nonetheless important:

- Commander in chief and presiding over the National Defence Council.
- Declaring a state of emergency after consultation with the Prime Minister and the National Security Council and with the approval of the National Assembly within two weeks
- The President shall have the power to declare war after consultation with the cabinet and approval of the National Assembly
- Appointing judges in accordance with the recommendations of the Judicial Service Commission and the consent of the Judiciary Committee of the National Assembly.
- The President has the power to initiate the process for the removal of judges for misconduct
- Formally ratifying treaties which have been concluded by the government and approved by the National Assembly, and shall ensure their implementation; s/he shall be kept informed of all negotiations for treaties;
- Accrediting heads of embassies/high commissions
- Formally appointing ambassadors and other key office holders, independent commissions and offices, in accordance with the provisions of the constitution.
- Formally granting pardons etc

- Award such honours established by an Act of Parliament on the recommendation of the Cabinet
- Presiding at the formal opening of Parliament

Provisions have been made to ensure that the powers of the President are derived and derived only from the Constitution.

<b>Brief Comparison of the President and the Prime Minister under the Draft Constitution</b>	
<b>The President</b>	<b>The Prime Minister</b>
Is directly elected by the people	Is formally appointed by the President but must have the support of the House of Assembly
Serves maximum of 2 terms	No constitutional limit on term of office
Can be impeached by the National Assembly before the National Council	Can be voted out by the National Assembly on a vote of no confidence
Must not be a Member of Parliament	
Is not a member of the Cabinet	Chooses Cabinet members and chairs the Cabinet
Has certain important functions in which he or she has a discretion, e.g.:	Runs the Government on a day to day basis
May return a Bill to the National Assembly for reconsideration	
Has many important ceremonial functions	
May address the nation or Parliament	Must attend National Assembly

Although the President will not have as many powers as now, there could arise a situation in which the President is seen to be corrupt, or too sick to hold office, or simply too obstructive of government business. If there is a situation in which the business of the country is being held up because the Prime Minister and the President cannot see eye-to eye, in the end the deadlock must be broken by Parliament. If they feel that the fault lies with the Prime Minister they can pass a vote of no confidence. If they feel that the fault lies with the President, they would be able to invoke the impeachment process:

- The president is liable to impeachment proceedings for breach of the constitution or law or serious misconduct on charges brought by a majority of the members of the House of Assembly and determined by National Council by a two-thirds majority

## 6. *Devolved Government and Local Government*

This - along with whether to have a second house of Parliament - was the most controversial issue within the Commission, as it was in the country. In fact the two issues are connected: a main function of an upper house is often to protect the system of devolved Government. The proposals which we have made are designed to achieve a number of objectives:

- Bring Government closer to the people - particularly to strengthen bodies which can help in the fair distribution of resources, and have decisions made by people who are respected in the community
- Use entities which the people have some understanding of and may feel understand them: hence the stress on Districts and villages, but also a use of Provinces and Locations
- Strengthen the separation of powers and therefore weaken tendencies to accumulate power in a few hands, and strengthen accountability.

There will be three levels of directly elected council:

- Districts (cities and municipalities will be at this level, and their councils will be city council or municipal council as appropriate)
- Locations (towns and market centres will be at this level)
- Villages

The Districts will form Provincial Council to help co-ordinate activities. Nairobi will have its own status as the national capital.

The District Councils and Provincial Councils will have the power to make law. Lower level councils will have only executive powers to implement policies determined by higher levels, but will have the power of local initiatives for development, and the power to make by-laws on very local issues, and will mainly be carrying out law made at higher levels.

### *(a) Making law at the different levels*

There will be a list of powers which only the national government can make law on. This will include subjects like national defence, immigration, citizenship, currency, international airports, international trade, international relations etc. There will be a list of things the districts can make law about: including subjects like primary education, medical clinics, local roads, water supply, maintenance of law and order, etc. There will be a third list which both the central government and

the districts can make law about, including subjects like agriculture, secondary education, hospitals, land, environment. Provincial Councils will have limited law-making power in connection with their coordination functions.

7. *Elections of the President, the National Assembly, the National Council and the Devolved Authorities*

Rules for the election of these offices and institutions has already been discussed. Here we deal with the timing. A very large number of people told us that Presidential and Parliamentary elections should be held at separate times. Although this might entail some additional costs, we endorse this view and recommend that elections for all the bodies listed above should be held at separate times.

8. *Courts and the Legal System*

The courts are a very important part of the constitutional set-up of a country. Many of the institutions and rules which the draft Constitution includes will only have ‘teeth’ if the courts and other mechanisms are unbiased, speedy, honest and accessible to the people. More generally, the courts:

- make authoritative interpretations of the law, without directions or pressure from the executive or other sources
- settle legal disputes that are referred to them
- by settling disputes in accordance with the law and generally by enforcing the principle of legality or the rule of law, they help to create stability and maintain peace, and to provide predictability necessary for people to make contracts and other transactions.
- ensure the supremacy of the constitution in a variety of ways, including by declaring laws which are inconsistent with the constitution void, develop constitutional norms and help to adjust them to changing social and economic circumstances, inculcate respect for constitutional procedures and values, in part through persuasive and learned judgments, keep both the legislature and the executive within their lawful authority, and prevent arbitrariness and unfair conduct and protect the rights and freedoms of the people as well as the public interest

In recognition of the importance of its role, the judiciary is accorded much respect and many privileges; criticism of the judiciary, even when fully justified, is muted;

judges have security of tenure to give them independence and to encourage them to be impartial, and their conditions of service are intended to secure them a comfortable existence to ward off temptations of accepting money or other inducements to favour particular litigants.

The Commission is specifically required to make recommendations on the judiciary generally and in particular, the establishment and jurisdiction of the courts, aiming at measures necessary to ensure the competence, accountability, efficiency, discipline and independence of the judiciary’ (sec. 17(d)(v)). It is required to include provisions for separation of powers between the judiciary, legislature and executive and checks and balances ‘to ensure accountability of the Government and its officers to the people of Kenya’ (s. 3(c)) (this acknowledges the judiciary as a principal organ of the state, and its role to check the legislature and the executive, especially with respect to constitutional rules)

**(a) Concerns**

The judiciary rivals politicians and the police for the most criticised sector of Kenyan public society today. For ordinary Kenyans the issues of delay, expense and corruption are the most worrying. For lawyers there is concern about competence and lack of independence from government.

- Many people told us that they have lost confidence in the courts and wanted their disputes to be settled by their elders or in other traditional ways
- Very many recommended the establishment of a constitutional court or a Supreme Court
- The procedure for the appointment of judges should be open, transparent and accountable. Many suggested that the judges should be nominated by an enlarged and independent Judicial Service Commission with representation from the Law Society and law faculties and civil society, and that nominations for appointment as judges should be vetted by Parliament.
- A large number said that judges should have a university degree (as opposed to professional training only) or even a master’s degree while some said that qualifications for judgeship should include moral and ethical standing of candidates.
- Many wanted to reform the procedure for the removal of judges; some suggested that any citizen should have the right to file a complaint with the Judicial Service Commission requesting removal.
- Many people and organisations, like the Law Society, recommended that the present judges should be removed.

It is important to emphasise that the CKRC is not saying that all judges are either incompetent or corrupt. Secondly, it accepts that the judicial system includes many people who are not judges – magistrates, registrars, clerks etc, and that some of these people have their own contribution to the poor repute of the Kenyan legal system. Thirdly – corruption involves two parties, and lawyers and clients who have given bribes or accepted improper deals are also to blame. The same goes for government interference – the Minister who steps in to ask a judge to decide a case in a particular way is as guilty as the judge who gives in to the pressure. Lawyers who do not provide the arguments, evidence and legal authorities for the cases in which they appear have to shoulder responsibility for indefensible decisions. And finally, there is something about the entire legal system – in common with most others – which is remote, mysterious and ultimately alien.

Because of the sensitivity of this issue the Commission invited a Panel of distinguished judges from other Commonwealth countries to make a fact finding visit and recommend some courses of action. The Panel said in its report: ‘While many of Kenya’s judges continue to fulfil their judicial office faithfully to their judicial oath, public confidence in the independence and impartiality of the Judiciary has virtually collapsed’. A group invited by the Government to advise on the issue of corruption which reported early in 2002 was even more damning, and it said there was unanimity amongst all interviewees that the judiciary lacks integrity and is corrupt. This sentiment was expressed across the political divide, the business community, the religious community and other interest groups. The Chief Justice did not share this view.’ The Group were also told by a reliable source that when consideration was being given to appointing a judge to head KACA, only three judges were considered to be untainted by corruption.

The draft Constitution includes:

- An article setting out the basic principles of a fair and acceptable judicial system, including:
  - impartiality and accessibility,
  - the make-up of the courts should include the principle of proportionality to reflect national diversity and gender balance,
  - the judges must be independent, the system must be accountable,
  - justice should not be delayed,

- the judges should consider it their role to develop the law and not be too rigidly bound by precedent nor by technicalities,
  - in all but exceptional cases there should be a right of appeal, courts should normally sit in public,
  - they should be open to opportunities to encourage reconciliation,
  - in principle the involvement of the people in the administration of justice should be encouraged,
  - the system should be properly resourced and
  - the legal profession should view itself as having a duty to help facilitate these values and objectives, keeping in mind their twin duties to their clients and society .
- A statement that the judicial power is exercised by the judiciary
  - A new Court at the apex of the system: a Supreme Court, staffed by entirely new judges. It should hear appeals in cases from lower down in the system, and have special constitutional powers. Its functions are to establish new standards of integrity and quality in the administration of justice – not just in constitutional matters but generally.
  - A provision that the most senior judge of the Supreme Court is to be appointed Chief Justice of the entire judicial system (with special provisions for initial appointments)
  - The most senior Judge of the Court of Appeal is President of the Court of Appeal
  - The most senior Judge of the High Court is Chief Judge of the High Court/President of the High Court
  - Requirements of accessibility are spelled out: physical accessibility especially to those with disabilities, use of Braille and Kenya Sign language, an ethos of public service, issues of fees.

The independence of the judiciary is a core value which constitutions always provide for. Provisions in the draft constitution are significantly strengthened, including in the following ways:

- The Judicial Service Commission which appoints judges is reconstituted so as to be more independent and involve more people who are not part of the legal system
- Certain judicial appointments must be confirmed by Parliament

- There is a statement that the judiciary shall be independent, expanding on this to say that
  - salaries etc shall not be changed during a judge's tenure to his or her disadvantage, that offices shall not be abolished during a judge's tenure
  - that the cost of the judiciary shall be met from the Consolidated Fund
  - that salaries and terms of service must be such as to encourage integrity and independence
  - providing that judges shall not be liable civilly or criminally for what they do in their capacity as judges (it might be best to make it clear that this does not cover corruption); the purpose of this is so that judges feel free to give their honest views on the law and the case before them
- As well as the normal requirements of having been in the legal profession for many years which apply to judges of the higher courts, there should be a statement to the effect judges must be of unimpeachable integrity.

***(b) The Kadhis' Courts***

The current constitution provides for Kadhi's courts for the application of Islamic law on matters of personal status, marriage, divorce and inheritance in proceeding in which all the parties profess the Muslim religion (s. 66). The constitutional status of Kadhi's court is based on a treaty to which the British, Kenya and Zanzibar governments were parties in 1963 when the Sultan of Zanzibar agreed to cede his sovereignty over the coastal strip to Kenya. On its part the Kenya government undertook to implement various measures for the protection of the former subjects of the Sultan, among them the system of Islamic law and courts.

The Commission received a number of submissions on the expansion and reform of their jurisdiction and structures, primarily from the Muslim communities. They considered that neither Kadhis nor their courts are given sufficient respect and recognition. They identified a number of problems in the law and practice regarding the application of Islamic law. Kadhi's courts have neither been satisfactorily integrated into the national legal system nor given their own proper structure and hierarchy, and no distinction made between the judicial role of the Chief Kadhi and his role as a spiritual leader. For example appeals lie to the High Court from Kadhi's courts to the High Court which has few judges with knowledge of Islamic law. The rules of procedures or evidence have not been enacted, and reliance is placed on the Evidence Act although that Act states expressly that it is not to apply in Kadhi's courts. Islamic law on personal matters has not been codified, and the matter is left to individual courts. The absence of the reports of their judgements has hampered the growth of Islamic jurisprudence.

More specifically, the Muslim community asked the Commission to ensure that there were sufficient Kadhi courts throughout the country; that their jurisdiction be extended to civil and commercial matters, that the qualifications of Kadhis should be raised to ensure their competence, and that a separate structure of appeals be established for Islamic law. It was necessary to ensure that some Kadhis should be appointed from the Shia communities to cater to their needs. The Muslim community to be consulted on the appointment of the Chief Kadhi and other Kadhis.

After a careful consideration of the possible tension between the goal of national unity and the recognition of religious diversity, the Commission endorsed most of these recommendations as follows:

- There should be a reasonable number of Kadhi courts so that all Muslims have access to them.
- The hierarchy of Kadhi courts will be as follows:
  - District Kadhi Courts as courts of first instance, presided over by a single judge
  - The Provincial Kadhi Court, presided over by a Senior Kadhi
  - Kadhi Court of Appeal presided over by the Chief Kadhi and two Kadhis (since many Districts with predominantly Muslim populations are far removed from Nairobi, where the Kadhi Court of Appeal would normally sit, the rules should provide that the Court should sit in these Districts on a regular basis)
  - The Supreme Court on appeal from the Kadhi Court of Appeal only on a constitutional matter.
- The Kadhi courts shall have jurisdiction to deal with civil and commercial law where all the parties profess the Muslim faith, in the manner of small claims courts (which are expected to be established shortly), without affecting the rights of parties to go to other courts or tribunals with jurisdiction over the matter.
- The Chief Kadhi shall have the same status, privileges and immunities as a High Court judge, the Senior Kadhi as a Chief Magistrate and the Kadhi as a Resident Magistrate.
- The Chief Kadhi and other Kadhis shall be appointed in the same way as other judges. Apart from the Chief Kadhi, who shall be a member of the Judicial Service Commission, a Muslim woman, nominated by the national Muslim organisation.

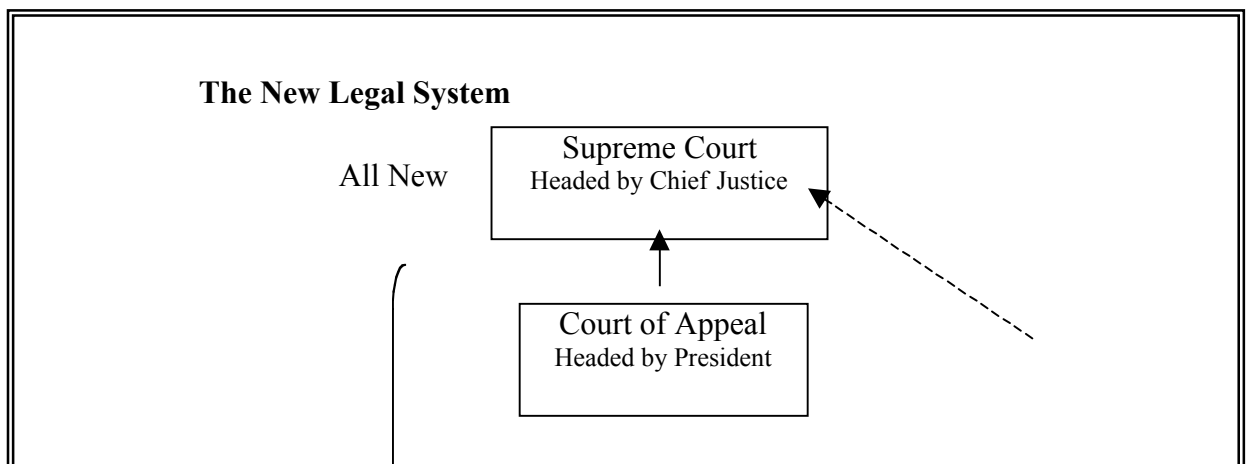
- The qualification for appointment as Kadhis include having a degree in Islamic law from a recognised university and being an advocate of the High Court with, in the case of the Chief Kadhi, at least 10 years experience, and for other Kadhis, at least five years' experience as an advocate of the High Court.
- Kadhis shall be full time judicial officers and shall not have responsibilities of a spiritual nature.

The Muslim community also asked the Kadhi courts to be given jurisdiction over the administration of Wakf properties. While the Commission considers that Muslims themselves should have responsibilities for the administration of Wakf properties, it does not believe that courts are best equipped for this task, and recommends instead that appropriate amendments should be made to the Wakf Commissioners Act to meet the concerns of the Muslim community. Legal disputes about Wakf properties involving questions of Islamic law will be handled by Kadhi courts.

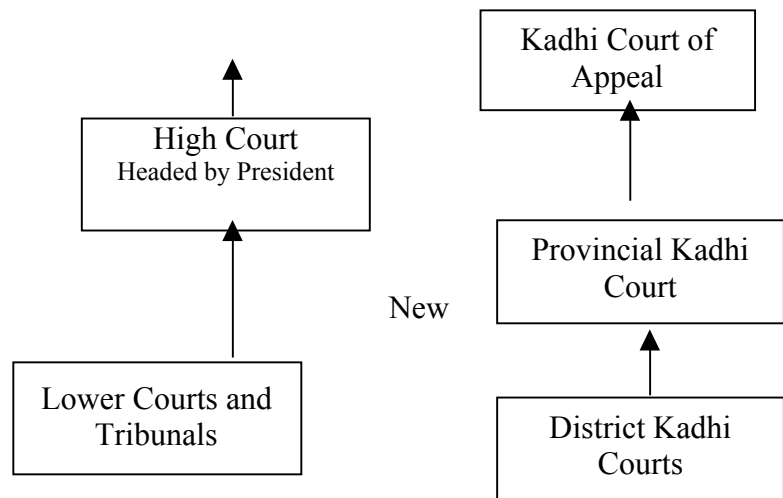
**(c) Accountability and control**

It is an important constitutional principle that judges should have security of tenure. It used to be the case that they could not even be required to retire – but these days most countries have a retirement age for judges. The draft states that:

- The retiring age for all judges is 65



Fundamentally as now  
but reconstituted by early  
retirement and possible  
disciplinary action



It is also necessary to have a system under which judges can be removed for incompetence or misbehaviour – but it is equally important that removal should be very difficult. The draft provides:

- The system for removal of judges should be on the lines proposed by the expert panel:
  - The Constitution shall provide that any individual or institution, society or group of individuals may lodge a complaint against any judge with the Judicial Service Commission.
  - The Judicial Services Commission investigates and it request the President to appoint a Judicial Tribunal of eminent judges (including from judiciaries in East Africa) to conduct a hearing into the allegation.
  - The Judicial Tribunal reports its findings and recommendation to the President who must act in accordance with that recommendation.
- Removal should be only for inability to perform the judge’s functions because of infirmity of body or mind or for misbehaviour, misconduct or incompetence so serious that it makes the judge unfit for office
- The Judicial Service Commission must draw up a Code of Judicial Conduct which should be widely publicised so that the judges themselves, the profession and the public know what is appropriate conduct for judges.

**(d) Transitional measures**

The most difficult issue on the judiciary the CKRC has had to deal with has been what should be done with the existing judges. The recommendation of the Expert Panel was that no wholesale dismissal of judges should take place. The Law

Society proposed that this drastic step should be taken. The Commission is convinced that unless very serious steps are taken the whole future of constitutionality in Kenya will be placed in jeopardy. The judiciary is one of the keys to the effective functioning of a constitution. Yet there is overwhelming evidence that judges have been appointed for the wrong reasons, and many have demonstrated neither competence nor integrity. However, we have decided not to go so far as recommending the dismissal of the existing judiciary. It would be viewed internationally as a grave interference with the independence of the judiciary. Within the country it might be thought to weaken the 'taboo' against dismissing judges. And the honest judges might feel that they are being targeted equally with the guilty. We are therefore recommending:

- That judges shall retire at the age of 65 years
- Judges who choose to retire when the new constitution comes into effect will be offered a retirement package
- Judges who decide not to take this offer up may be the subject of an inquiry into their fitness for office by the Judicial Service Commission, based on material held by bodies such as the Attorney-General's Department, the Law Society, the Chief Justice, the Anti-Corruption Unit of the Police and the former KACA
- All judges who remain will be subjected to the standards of the new Constitution and Leadership Code and those who do not qualify will be dismissed.

#### *9. Other Aspects of the Legal System*

Judges are not the only element of a functioning legal system. In a number of other ways the existing constitution falls short of the ideal. The Commission recommends the following measures designed to improve the independence of the system:

- An independent Director of Public Prosecutions
- A Public Defender – an independent constitutional officer to provide legal aid services in the first instance in connection with criminal cases
- A constitutional requirement to develop a policy for prosecuting – and this must be made public. The power to prosecute (or not to prosecute) is very important. Citizens ought to know what attitude the authorities will take to criminal offences. They ought also to know how politically important people will be dealt with

- Private prosecutions to continue to be permitted (subject to court approval)
- The nolle prosequi power (that is the power currently enjoyed by the Attorney-General to take over prosecutions brought by others and discontinue them) is modified by requiring that the court must approve its use
- An independent body to make the decision as to whether a pardon or commutation of sentence should be granted and this committee should recommend to the President who should be obliged to act on the recommendation

#### 10. *The Penal System*

It has been clear from submissions from the public that things are seriously wrong in the penal system. Police brutality has been touched on in the Human Rights Chapter, as has the issue of the rights of prisoners. There were demands for the clear accountability of the police is also discussed. There are other points that the Constitution could make, relevant to the improvement of the system. The Commission is conscious that recent reports have indicated that a policy to encourage alternatives to imprisonment – particularly community service orders – is bearing fruit in terms of reduced numbers of inmates in prison. This is to be welcomed, and the judiciary to be congratulated on being prepared to adapt to changing needs. The Commission did receive a large number of submission from people concerned about the sentences inflicted on serious offenders – notably on sex offenders. In many countries there are similar complaints. Also, it sometimes happens that a somewhat reactive approach to public opinion on the part of the legislature leads to very severe sentences being legislated for. These may be essentially unconstitutional as violating basic principles of proportionality between crime and sentence (though this may not be expressed in the Constitution). Secondly, imposing very harsh minimum sentences may actually lead to courts refusing to convict if they have no choice but to impose a sentence they think is unjust. Pressure to crack down on crime may also lead to rigid approaches such as the “three strikes and you’re out” laws in the US. Such measures may also be viewed as unconstitutional, and may also lead to prisons being overcrowded and unable to carry out their basic functions. It is also very common that different courts give very different sentences for similar offences. And also that certain classes of society – economic or ethnic perhaps – get treated very differently by the courts. One solution to these various problems that is being adopted in many countries is that of a Sentencing Council which sets out guidelines which should be followed by the courts. A further constitutional problem has been that in some countries the law provides for the involvement of victims. It is suggested that in order to facilitate the development of sentencing polices which are consistent with

each other and with the Constitution, a provision on the following lines could be included:

- The law and the practice in relation to sentencing should strive to achieve the following objectives:
  - proportionality to the seriousness of the offence and the blameworthiness of the offender
  - consistency as between courts and offences
  - appropriateness to the circumstances of the particular offender
  - restoration of the rights of victims
  - protection of the public
  - restoration of the offender to society with the greatest possible chances of not re-offending
- In order to achieve these objectives the State must establish a board to devise sentencing guidelines

## *11. Public Service, Police and Defence Forces*

### **(a) Public Service**

The public service is a vital part of the system of government of any country, yet much of it is not very visible to members of the public, who are familiar with the police, schools and hospitals, but who relatively rarely come into contact with other public servants, and have a hazy idea of what they do. An efficient, balanced public service, free from political interference and patronage, is important for the effective delivery of public services, for the formulation of policy, and for national unity and independence. For many people their only contact with government is with public servants: and it is from that quarter that they may first notice any change, if change indeed occurs, after the new Constitution.

The structure and functioning of the various elements of the public service, and its interaction with the various other parts of the governmental and political systems, as well as with the public, are central to the achievement of many of the objectives of the review process. These include good governance (s. 3 (b)), accountability (s. 3(c) and s. 17(d)(xv)), people's participation (s. 3(d) and (j)) and checks and balances (s. 17(d)(i), as well as meeting the basic needs of the people (s. 3(f)) and strengthening national unity (s. 3(h)).

Submissions to the Commission and other sources show many problems with the public service, some of which are to be traced to the service itself, and some to political interference.

- An Anti-Corruption Police Unit study showed that 60% of Kenyans had been victims of corruption and of those 50% had paid a bribe to get a service from a public servant
- Those who have to deal with immigration officers complain about them
- Those who have to deal with marketing boards complain about them
- There are supposed to be roads but there are none worth the name
- There is supposed to be a water supply - but for many there is none
- The service in public hospitals is deplorable
- There are schools with no desks or chairs and where the roof leaks
- At the local government level people pay for rubbish collection – but the rubbish is not collected
- Parastatals have often collapsed with important knock-effects to local business or agriculture that depends on them
- Some industries have been privatised to people whose only interest was to strip their assets
- People suggested repeatedly that many of the problems of the public service can be traced back to the decision to permit public servants to engage in business
- Someone suggested that the civil service should be uniformed

Problems are not restricted to the service offered to the public. There were also critical observations on the appointments and other internal processes of the public services.

- There is an awareness that teachers especially have a strong sense of grievance over how their pay has been dealt with, and that they are paid very badly indeed
- The same is true of the police
- There is corruption, discrimination and nepotism in the appointments process
- Generally the processes is seen as lacking in transparency
- Promotions are sometimes unfair
- Retrenchment has been carried out ‘without a human face’

In response to the suggestions of the public the Commission is recommending a number of changes. To some extent these flow naturally from the changes already recommended in the structure of Government: the President will have far less power than hitherto. But this must not simply be substituted by power in the hands of other politicians notably the Prime Minister and the Cabinet. The recommendations in the draft Constitution include:

- The Public Service Commission is to be responsible also for public and police services, more independent and more reflective of society
- The Teaching Service Commission will be entrenched in the constitution
- The independence of these commissions will be stressed in the Constitution
- Proposals for the Commission on Human Rights and Administrative Justice and the Right to Administrative Justice provided elsewhere in the draft are also relevant
- There is a provision which sets out clearly the fundamental responsibilities of the public service:
  - The services shall perform their functions in accordance with the Constitution and the laws
  - They shall protect the rights of the people
  - They shall ensure fair administration
  - They shall be appointed on merit
  - Appointments shall reflect the principle of proportionality to the diversity of Kenyan society
  - At all levels at least one third of appointments shall be women and one third men (with allowance for genuine need within particular grades and professions) and the PSC etc shall endeavour to reflect this principle in promotions also
  - The PSC must ensure that the public services are competent and committed and faithfully observe their provisions of the law and of relevant codes of ethics
  - Public servants should not be penalised for carrying out their functions under the Constitution, including for complaining or reporting issues to the complaints mechanism of their service or to the Human Rights Commission
  - The public service should operate on the basis that the members of the public should know who is dealing with their own particular problem

- Over a period of time the decision to permit the civil servants to engage in business must be reversed. It has the corollary that the public service must be properly paid.
- There is a special Commission set up to deal with the salaries of senior public servants, and there is also to be a tribunal to deal with other public officers

**(b) *Security services***

The security services consist of the Police, the Administration Police, the Military Forces: army, navy and air force, and the intelligence service. There are also other uniformed services: the prison service and the National Youth Service. These bodies are almost invisible in the existing Constitution. The President appoints the Commissioner of Police (s. 108) while other senior police officers are appointed by the Public Service Commission (PSC). Apart from the section which declares the President to be Commander in Chief (s. 4) there is no other provision about the forces generally; any law under which they are regulated is ordinary legislation, except for one broad provision which prevents disciplinary steps taken under law with respect to the armed forces, police, prison services and even the National Youth Service being challenged on the basis of some of the human rights provisions (s. 86(2)). This is a very different situation from that which prevailed at the time of Independence. In 1963 the Constitution provided expressly for the police force to be set up by legislation. There was a separate Police Service Commission (s. 160). There was a National Security Council (consisting of the Minister; and the Chairman of the Law and Order committee of each Regional Assembly) to keep under constant review all matters relating to the organization, maintenance and administration of the Police Force (s. 157). The Inspector General of Police (equivalent of the Commissioner) was appointed by the Head of State acting on the recommendation of the Police Service Commission (s. 162). The Governor-General was the Commander in Chief, but this was a purely ceremonial position – because he exercised almost all his functions on the advice of the Cabinet or a Minister (s. 79).

Most submissions to the Commission centred on the police force. These related especially to brutality and corruption.

- One of the most persistent comments in submission to the commission was about police brutality.
- In a recent study by Transparency International Kenya the police topped the national bribery league.
- People making submissions to the Commission told of instances in which the police would arrest individuals on Fridays for no good reason

apparently in the expectation that the prospect of a whole weekend in the cells would produce a more generous bribe.

- There is an impression that the police will stand by when citizens are under threat – a recent example being the failure of the GSU to come or to come promptly to the support of people being killed by Mungiki in Kariobangi only a short distance from the GSU Headquarters.
- There are accounts of police officers being actually engaged in criminal enterprises: such as car-jacking or robbery.
- People did suggest that the forces should be used in development work – such as road building, which is done in some countries, and was contemplated in the Poverty Reduction Strategy
- The police, particularly the Administration Police, are made use of by politicians for party political purposes.

The following principles (derived from constitutions elsewhere, and other documents relating to control and transparency in relation to security forces) can be applied generally to security forces:

- political neutrality
- civilian control
- respect for rule of law, democracy and human rights
- transparency and accountability
- regulated by legislation
- the only military force
- should not obey illegal orders
- should be involved in productive activity
- should defend sovereignty, help in emergencies
- disciplined and patriotic

The nature of civilian oversight will vary according to the responsibilities of the force. But some degree of oversight is possible for any services, and is found in the law and the constitutions of other countries – even where the security services are concerned. Indeed there are the elements of civilian oversight in Kenya, either through law (as for the intelligence services) or practice (as with the defence forces).

Specifically in connection with the police, the UN Code of Conduct includes:

- use of force should be proportional to circumstances
- use of firearms should be only in extreme situations
- respect for privacy
- care for health of those in their custody
- avoidance of corruption
- taking steps to avoidance breaches by others

The Commission is recommending the following measures in the draft Constitution in relation to the various security forces:

- A statement of values and principles applying to all the defence forces
- A statement specific to each service setting out its principles and constitutional responsibilities
- The main services are renamed:
  - the Kenya Police Service
  - the Defence Forces and
  - the Correctional Services
  - The Administration Police should cease to exist as a separate force
- The following systems of civilian oversight:
  - For the police:
    - governance at the national level which includes a Board/Commission comprising legislators and respected members of society
    - which should advise and encourage the police to move in the direction of more community interaction, higher standards etc, transparency, at a level between policy (which is the responsibility of Government) and operational management, and report to Parliament
    - bodies at district level which perform a similar function reporting to the District Assembly
    - liaison committees at the local level involving community leaders, women, affected groups
  - For the Defence Forces:

- Legislation shall establish a body or bodies to advise the Government on defence matters, make necessary regulations, make appointments etc.
- The Parliamentary Committee with responsibility for defence issues must scrutinise the budget of the defence forces, review legislation relevant to the defence forces, receive annual reports from the defence forces etc
- For the Intelligence Service
  - legislation must provide for a committee of Parliamentarians, not including Ministers, which include members of both Government and Opposition, and which reviews the work of the intelligence service and its budget, and reports to Parliament. The Act should provide for the maximum cooperation of the intelligence services with the Committee, while requiring secrecy where this is necessary.
  - The legislation should provide for an independent complaints mechanism

Some changes will also be necessary in appointments procedures and machinery especially for the police. The draft Constitution makes provisions for this and also for the proper resourcing, and training of the police, and for codes of practice to be made available to the public. There will be a complaints mechanism as part of the Commission on Human Rights and Administrative Justice.

It is also recommended that it is clear that apart from the forces/services mentioned specifically no other armed forces should be created. The draft Constitution also requires the passing of legislation to register security firms, to specify the purposes for which they may be set up, and to set some criteria for who may be employed as security guards.

## Chapter IV: Constitutionality

This chapter tries to answer the following kinds of questions by proposing institutions and procedures:

- Considering how quickly and fundamentally the 1963 constitution was amended, how can we protect the new constitution from a similar fate?
- How can we prevent the decay of constitutional institutions and state organs as has happened with the institutions of the present constitution?
- How can we be sure that the changes introduced by the new constitution will be implemented?
- How can we ensure that powers given under the constitution are not abused?
- How can we hold ministers and public servants accountable for their policies and actions?
- What remedies will the people have against violations of their rights?
- How can we be sure that judges will interpret the law and decide cases impartially?
- What do we need to do to ensure free and fair elections?
- How can we protect constitutional values like consensus, people's participation, the independence of and resources for constitutional offices and bodies?
- How can we eliminate corruption which is responsible for the denial of so many rights and is an important reason for our poverty?

The Review Act requires the new constitution to include the following provisions which are devices to establish and maintain 'constitutionality':

- A system enshrining constitutionalism and the rule of law (s. 3(b))
- Separation of powers and checks and balances 'to ensure accountability of the Government and its officers to the people of Kenya' (s. 3(c))
- People's participation (sec. 3 (d))

- ‘Examine and recommend improvements to the existing constitutional commissions, institutions and offices and the establishment of additional ones to facilitate constitutional governance and the respect for human rights and gender equity as an indispensable and integral part of the enabling environment for economic, social, religious, political and cultural development’ (sec. 17(d) (iii))
- Make recommendations on the judiciary generally and in particular, the establishment and jurisdiction of the courts, aiming at measures necessary to ensure the competence, accountability, efficiency, discipline and independence of the judiciary’ (sec. 17(d)(v)).

*Devices to safeguard constitutional values and provisions include*

- Requiring that the exercise of certain kinds of state power, which have a major impact on the fair operation of the political and administrative system, such as the enforcement of law, the recruitment of civil servants, currency policies, and the conduct of elections, should be insulated from political influence. This is achieved by giving these powers to independent institutions and commissions.
- Giving the courts the power to review and declare laws or policies unconstitutional and therefore void.
- Supplementing the courts with other institutions for receiving, investigating and dealing with complaints by the public against the administration, because access to courts is difficult and expensive and legal proceedings take a long time.
- Connected with the previous approach is the establishment of ‘multi-purpose’ institutions for the protection of the rights of all persons or some special category of persons (such as women). These institutions receive and investigate complaints, but also promote the knowledge of and respect for human rights and develop regulations to enforce rights.
- Establishing institutions to ensure the accountability of public authorities, taking action on their own, without waiting for complaints from the public. The best known of these is the Auditor-General; recent examples include anti-corruption bodies.
- Establishing a strong, effective and independent legal system, for it is only through the rule of law that some of the most blatant abuses of power can be checked. An effective legal system requires that the Attorney-General, who is head of the system and the chief legal adviser to the government, should be independent. It is also requires an independent system of prosecutions. It requires a strong and competent

legal profession. In order to enable people to seek the help of courts to enforce their rights, legal aid should be provided to the needy.

- Ultimately the people have to be guardians of the constitution. To perform this role people have to understand the constitution and know their rights. They have to know how to use the machinery of the constitution and the law to hold public authorities accountable. They should be involved in the conduct of public affairs. They can also act as agents of accountability: for example by
  - providing alternative budgets or analysis draft state budgets
  - publishing annual assessments of the record of government and corporations of human rights, social justice, environment and natural resource policies, etc
  - providing alternative reports to regional and international human rights supervising bodies on the national record
  - undertaking constitutional litigation to prevent the state or private interests from breaching the constitution or law
  - Since individuals work together with others, the role that civil society and non-governmental organisations can play is some times recognised and protected in the constitution, such as in the Philippines.

An important asset for civil society is access to the information collected, commissioned and stored by public authorities—such access is now provided in many countries.

#### *1. What Kenyans told the Commission*

After the experience of seeing the 1963 Constitution emasculated by a process which began almost as soon as the country became independent, Kenyans were very concerned in their submissions to the Commission that the new Constitution should not be lightly amended, and also that it should be respected.

- One of the most frequent suggestions was for an Ombudsman – an office to which members of the public can go to complain about their treatment at the hand of the public service, without having to pay a fee, and which will investigate the complaint, make recommendations for putting the situation right, and for improving the performance of the public service in the future.
- Women wanted a Gender Commission – which would receive and investigate complains from women about violation of their rights, and laws and policies which are detrimental to women.
- Advocates for children wanted a Children’s Commission.

- Many groups wanted an independent Human Rights Commission. People who complained about the Police wanted a Police Complaints Commission.
- Others wanted a corruption commission (like the Kenyan Anti-Corruption Commission that the courts declared unconstitutional in 2001).

It will be clear that there is a strong belief in the virtue of independent bodies to investigate complaints. Perhaps it will also seem that there is a risk of too many commissions being set up. None of this can be done without expense, and some of the functions and tasks will be similar between the various commissions.

There are also certain other functions which will require the establishment or the confirmation of a commission: running elections is the most obvious, which should continue to be the function of the Election Commission. Another is the Auditor-General: he/she may sound like an individual but in reality the office needs a large staff and functions like a commission.

The experience of Uganda and South Africans cautions us against having too many independent institutions. They are expensive, it is hard to raise money for them and it is not easy to find enough people with the necessary skills to staff them. Their functions overlap; this is likely to cause confusion among both the public who may have some doubt as to where to take their complaints (for example, would treatment by a public official which suggests bias against women be a matter for the Gender Commission or the Human Rights Commission?). And officials too may get confused – different commissions are likely to develop different approaches to similar issues. And, unfortunately, it is hard to avoid competition between commissions, especially if more work means better resources.

## 2. *Proposed Constitutional Bodies*

We should therefore restrict the number of new institutions. The CKRC recommends the following bodies, some of which are new, others are old:

### **(a) *The Various Service Commissions***

- o Public Service Commission
- o Judicial Service Commission
- o Parliamentary Service Commission

- o Constitutional Commissions and Constitutional Offices Service Commission

This may seem to violate the principle of not having too many commissions! But in reality some of these bodies already exist. Any detailed discussion of them comes under relevant sections of this report.

***(b) Commission for Human Rights and the Administrative Justice***

This would include the functions of people's protector, gender/equality commission, the human rights commission, and accountability of and complaints against disciplined forces. Its structure would be 'federal'—each commissioner would have a specific responsibility and resources (in addition to general responsibility)—gender, children, disability, 'minorities', the conduct police and armed forces, complaints against administration, etc.). The institutions which are proposed to be merged in this way have overlapping responsibilities. They have similar functions. These functions centre around human rights; they include education in human rights, advocacy, lobbying, setting of standards, receiving and dealing with complaints, giving advice. A special responsibility would be to ensure that people's basic needs are met. One of the early tasks of the CHR and Administrative Justice would be to deal with the backlog of complaints of harassment and oppression.

Advantages of this arrangements include

- Economy
- Better co-ordination
- Pooling of resources—library, premises, vehicles, research staff
- Provide 'one stop shop': a person with a complaint or suggestion would not be turned away because she has come to the wrong institution (it would be the responsibility of this commission to refer the matter to the most relevant commissioner/division); there would be one field office in every district or constituency for advice and receiving complaints, etc, thus increasing presence throughout the country
- More effective lobbying
- Better able to protect its independence/resources
- Means that all these responsibilities and functions would commence at once when the Commission is set up—it is possible that if there were to be many commissions, some may not be set up for a long time (as experience elsewhere shows)

**(c) *Ethics and Integrity Commission***

This body is recommended to deal with the very important and difficult issues of corruption and integrity in public life. It would be the body responsible for giving operational effectiveness to the Leadership Code. It would also be the body to deal with allegations of corruption – which would be breaches of the Leadership Code but also of the criminal law.

There would be some unavoidable overlap with the CHRAJ, and a system of coordination would have to be developed between the two. Both would receive complaints from the public, and both would have important educational functions: directed both at the public and at public functionaries. But the CHRAJ would need a mediatory style of operation, avoiding confrontation between the public and the public service, and between the Commission itself and the public service. The style of the EIC would inevitably be rather different. The Leadership Code will require political leaders and public functionaries of all types, at a senior level, to declare their assets. And it will investigate allegations of serious criminal conduct. It is difficult to combine these with a mediatory style. It needs considerable investigative capacity; there is a great need for confidentiality; and the activities of the EIC are likely to incur the anger of politicians and civil servants. Bodies in some parts of the world which have both ‘ombudsperson’ style functions and corruption investigation functions have often found that the latter tends to swamp the former – either in terms of their actual allocation of time and resources, or because the public and media tend to concentrate on the corruption aspect.

**(d) *The Electoral Commission***

This is retained but it is smaller, the Chair must be qualified to be high Court Judge; members must be of proven integrity

**(e) *Salaries and Remuneration Committee***

This body would be appointed periodically, say once every four years, to review salaries and remuneration of the President, ministers, Members of Parliament, judges, senior commanders of the armed forces, independent office holders, full time members of commissions, etc.

**(f) *Fiscal Commission for Devolution***

It will consist of three members appointed by the National Council to represent districts and three appointed by the central government. It will advise on the

allocation of financial grants to districts, including equalisation grants to the less development districts.

**(g) *The Constitution Commission***

This body is to have the primary responsibility for overseeing the implementation of the constitution, and is discussed under Transition below)

**(h) *The Judiciary***

The Chief Justice and judges of the Supreme Court, the President and judges of the Court of Appeal and the President and judges of the High Court (including the Chief Kadhi)

**(i) *The Attorney General*** to provide independent legal advice to the Government and to uphold the rule of law

**(j) *Director of Public Prosecutions*** to decide on and conduct prosecutions without political interference

**(k) *The Public Defender***

This office would provide legal representation to people unable to afford legal costs; it would be publicly funded and have branches in all provinces.

**(l) *The Governor of the Central Bank*** to ensure the management of state currency in accordance with sound economic principles

**(m) *The Controller of the Budget*** to supervise the disbursement of state revenue and to ensure that funds are spent for the purpose for which they are given, and are spent efficiently

**(n) *The Auditor-General and the National Audit Office*** to audit accounts of public bodies and to bring corruption and other breaches of the law to the attention of Parliament and the Director of Public Prosecutions.

**(o) *The Director of the Central Bureau of Statistics*** to ensure, *inter alia*, proper census and collection and analysis of politically sensitive information.

**(p) *The Land Commission***

This body is to hold the land in trust for the people of Kenya and to develop land policies which, among other things, respect constitutional principles

**3. *Principles Governing the Constitution of Independent Commissions***

Certain principles should be observed in setting up these commission and bodies (not all these apply equally to all bodies):

- They should have assured finance
- They should not be subject to direction by government
- They should have security of tenure
- Each commission should not be too large
- They should reflect the diversity of Kenyan society in terms of gender, disability, geography and ethnicity, economic, occupational and professional roles
- They must have the powers they need to operate effectively
- There should be a procedure and mechanism(s) to ensure that their reports are scrutinised and where appropriate acted upon
- They should report to the people or to the people's representatives (Parliament)
- Where they interact with the public they should be accessible – physically, financially and in terms of operating 'style'
- They should operate fairly and with regard to the human rights of those whose conduct they inquire into as well as of the members of the public who bring complaints or issues to them

**4. *The President as Guardian of the Constitution***

The proposed Constitution envisages a new role for the President. Rather than being, as in the past, the head of the executive in a day-to-day sense, one of his or her functions is to be a key element in the maintenance of constitutionality. The President's functions will include:

- referring proposed legislation back to Parliament for reconsideration with reasons
- asking the courts for a ruling on constitutionality of legislation

## 5. *Amending the Constitution*

It may seem strange the question of amending the Constitution is raised even before its enactment – until you remember how soon the independence constitution was amended. This has caused a great deal of criticism. The essential problem is that, although the Constitution will be given to the people of Kenya by the people themselves, in future their control over lawmaking will be less direct. But if there were a rule which said the Constitution could never be amended, this would mean that quite desirable activities by government might be impossible. Times change, constitutions are a product of their own times, and, if the Constitution can never change, the only solution might be some sort of revolution. The answer must be to strike a balance between it being too easy to change, and too difficult. This balance is not necessarily the same for all the provisions of the Constitution. It is also important that certain groups of people have the right at least to be consulted, and perhaps to have a veto over proposed amendments. Some provisions of the Constitution may be so important that they should not be able to be amended at all, and some would require a referendum: a vote in which all electors could participate.

The Commission is proposing that amendments of the constitution can only be done by three fourths of the vote in each house of Parliament, except for specially entrenched provisions which will require, in addition, a referendum so that the people can decide directly.

## Chapter V: Transition

A new Constitution involves a big upheaval in the legal and political life of the country. It is impossible to bring all the legal changes into effect straight away, and decisions have to be made about speed and about priorities.

### 1. *Maintaining the old*

In fact most things about life in Kenya will remain the same – even legal things. The system of law will continue. Civil servants and other public employees will keep their jobs. People will continue to own what they owned before – except for some provisions about land improperly acquired or ‘grabbed’.

### 2. *Bringing in the new*

The things that are likely to change soonest are those connected with the political system and structure of government. This is partly because it is likely that there will be a general election soon after the new Constitution comes into force. Indeed, many have been saying that they want the elections to be under the new Constitution. But this means not just that the electoral system will change but the political roles for which people are elected will also change.

The electoral system will be very different from the existing one – because electors will have to choose not just an MP for their constituency, but they will also have to cast a vote for a party. So there will have to be new ballot forms. Returning officers and counters will have to be trained. Parliament will have to accommodate 90 extra MPs. And the ballot paper for the Presidential election will also be rather different

- To give time to the Electoral Commission to organise the elections the Commission is recommending that the National Constitutional Conference should consider whether elections should take place in April 2003 (this would not represent an extension of Parliament under the existing Constitution)

Some existing bodies will have to be restructured. These include the Electoral Commission, the Judicial Service Commission and the Public Service Commission.

The Commission is proposing various dates for this to happen, depending on urgency. The new JSC is a very urgent matter – especially because of the proposal for the establishment of a Supreme Court.

- Parliament must set up its Committee to consider judicial appointments as a matter of urgency

The new structure of government – with new powers for the President, the Prime Minister etc. will come into effect after the first general elections under it.

The system of devolved government will take some time to organise and the Commission is recommending that that it should be fully in place by 2004.

Constituency boundaries for national elections must be considered and if necessary redrawn in good time for the election of 2008. The Commission is recommending a National Boundaries Commission to be set up in 2004 to recommend on provincial, district and constituency boundaries.

The life of the Parliament elected in 2003 may be slightly longer than 5 years in order to make it possible to hold the 2008 elections at the best time of the year, namely August.

The CHRAJ must be set up before the end of 2003.

The Land Commission must be created before the end of 2003.

Policies to deal with historic injustice in the area of land will take a long time to set up and must be done with great care. But the difficulty and sensitivity must not be allowed to delay the process excessively

Some of these dates can be fixed in the Constitution. But other arrangements may need some flexibility. But how can the people be sure that the new arrangements are put into place with reasonable speed? The Commission is proposing the creation of an independent body specially to deal with this: the Constitutional Commission. This body will come into existence after the Constitution is passed into law. It will be responsible, in conjunction with the office of the Attorney General and other relevant organisations to implement the outstanding provisions of the constitution in accordance with the timetable in the transitional provisions of the constitution. It will also keep a watch on what the government and other bodies are doing to implement the Constitution, and produce periodic reports on progress. It will report directly to the people and also to Parliament. And if progress is not fast enough it will have the power to go to the courts and get a declaration of failure to implement the Constitution – and in some circumstances even a direction to someone who has failed to do what is necessary to implement. It will have an initial tenure of three years, which could be extended for another two years.

## **Conclusion**

The Commission has recommended a constitution that departs in radical ways from the present constitution. It believes that these radical departures are necessary to find directions to national unity, economic and social development, the dignity of individuals and communities, and social justice as well as for the renewal of our national institutions. The draft constitution establishes an ambitious agenda which cannot be achieved overnight. What must be done as a start is the establishment of the broad framework of governance, particularly the institutions and the values that must guide them. A democratic, participatory and responsive government is critical to the success of other institutions that we have proposed. We therefore recommend that the constitution along with the electoral system should be brought into force as soon as Parliament enacts the constitution. We also recommend for the consideration of the National Constitutional Conference that the next general elections should be conducted under the new constitution. In order to ensure that adequate time is available for civic education on the new constitution, voter education on the new electoral system, and the administrative arrangements for the election, we recommend that the next general elections should be held in March or April 2003. This is consistent with the present constitution as regards the time within which elections should be held. We hope that the National Constitutional Conference will consider and endorse our recommendation.

It is possible that some people may be uncomfortable with the number and size of new institutions that we are recommending, particularly due to increased demands on state revenues. Most of the new institutions we are recommending are to ensure public participation, accountability of ministers and public authorities, honest administration, and the fair exercise of politically sensitive powers - as well as in some cases to provide a framework for policy making which is inclusive and professional, guided by the overall objectives defined in the constitution. And the principles of which are the costs of running them. We believe that this framework will save the state a great deal of revenue that seeps out of its coffers illegitimately into private pockets, that it will energise our people and give them opportunities for productive employment and entrepreneurial activities, and bring in foreign investment and technology.

The new constitution makes many promises to the people of Kenya. We have shared with them their dreams of a peaceful, prosperous and caring society. We believe that the constitution we are proposing, if properly implemented, can deliver on these promises. We plead with our leaders not to let the people down.

**Dated, Sealed and Issued by the Constitution of Kenya Review Commission in Mombasa at 10.00 a.m. on Wednesday the 18<sup>th</sup> day of September, 2002.**