REPUBLIC OF KENYA

REPORT OF THE COMMITTEE OF EMINENT PERSONS

Chairperson

Amb. Bethuel A. Kiplagat

Presented to:

His Excellency Hon. Mwai Kibaki, C.G.H., M.P.,
President of the Republic of Kenya and Commander-in-Chief of the Armed Forces

30th MAY 2006

Committee of Eminent Persons,
20th Floor Co-operative Bank House,
P. O. Box 10526 -00200,
Nairobi.

30th May 2006

His Excellency Mwai Kibaki, C.G.H., MP.,
President of the Republic of Kenya and Commander-in-Chief of the Armed Forces,
Nairobi.

Your Excellency,

RE: REPORT OF THE COMMITTEE OF EMINENT PERSONS

Sir, you appointed us as members of the Committee of Eminent Persons on 24th February 2006 to undertake an evaluation of the constitution review process and recommend a roadmap for the successful conclusion of the process.

We have carried out and completed the task in accordance with the terms of reference and now have the honour to submit this report, which contains our unanimous conclusions and recommendations.

We take this opportunity to thank Your Excellency for the honour and trust which you have bestowed on us.

Accept, Sir, the assurances of our highest regard.

Yours faithfully,

Amb. Bethuel A. Kiplagat (Chairperson) .....

Dr. Kaendi Munguti (Vice-Chairperson) .....

Prof. Onesmo ole MoiYoi (Member) .....

Dr. Karuti Kanyinga " .....

Mr. Juma Mwachihi " .....

Mr. Mwambi Mwasaru	"	.....
Dr. Jacinta Muteshi	"	.....
Dr. Richard Barasa	"	.....
Eng. Peter Wambura	"	.....
Dr. Nemwel Nyamwaka Bosire	"	.....
Prof. Ng'ethe Njuguna	"	.....
Prof. Patricia Kameri Mbote	"	.....
Justice (Rtd.) Abdul Majid Cockar	"	.....
Ms. Wanza Kioko	"	.....
Prof. Kassim Farah	"	.....

FOREWORD

1. On 24th February 2006, His Excellency the President appointed a Committee of Eminent Persons to undertake an evaluation of the Constitution of Kenya review process and to make recommendations on how to conclude the process. The appointment of the Committee followed the verdict of Kenyans not to ratify the Proposed New Constitution (PNC) of Kenya in the referendum held on 21st November 2005. The journey to the PNC of Kenya was long, expensive and complex. The referendum also deepened the political and ethnic divisions in the country.

2. The Committee has compiled this report after listening to the views of Kenyans from all walks of life. This report is also informed by the findings of several studies and a national survey that the Committee commissioned in order to ensure that the views of Kenyans all over the country were captured. We heard views from individual Kenyans, corporate leaders, political leaders and various groups of Kenyans. The sample for the national survey was representative of the diversity of Kenyan society. The findings, therefore, are a reflection of what Kenyans think about what went wrong as well as the successes gained in the long and arduous review process.

3. From what we heard and the findings of the national survey, the Committee concludes that the President holds the key to unlocking the review process and only dialogue, between the different political factions that manifested during the referendum, will bring about a new Constitution. It is our recommendation that His Excellency the President reaches out to the opposition and those who opposed the proposed new Constitution of Kenya to discuss mechanisms and modalities for restarting the review process. This will constitute the beginning of the process to heal the nation and to settle the ethnic differences that are continuing to deepen every day because of mistrust and suspicion among the politicians.

4. The Committee worked under a difficult political environment. Many people expressed misgivings about the Committee and doubted our objectivity because of what they considered as lack of adequate consultations prior to our appointment. This perception of the Committee is, in our view, one of the reflections of a divided society. In all, ethnic hatred, suspicion and mistrust among leaders and Kenyans are problems that require urgent action. From what we have heard, Kenyans are desirous of a peaceful and better society. They want these divisions to be a thing of the past. Kenyans want to talk and walk together to a prosperous future.

5. We wish to acknowledge and thank many individuals, professional groups and institutions who offered their views to the Committee. We are grateful to Hon. Martha Karua EGH., M.P., and Minister for Justice and Constitutional Affairs, for finding time to consult with us. We greatly benefited from her wise counsel and were impressed by her concern for a peaceful and united Kenya under a new Constitution. The smooth flow of our work would not have been possible without the moral and material support we received from the Permanent Secretary, Ministry of Justice and Constitutional Affairs, Ms. Dorothy Angote, Mr. Gichira Kibara, Director of Legal Affairs and other staff of the Ministry.

6. The Committee also wishes to express its gratitude to the Joint Secretaries, Mr. Jeremiah Nyegenye and Mrs. Lillian Mahiri-Zaja, for their research, technical and logistical support without which the Committee would not have completed its task. The Committee is grateful to Ms. Eunice Gichangi (Progamme Officer); and Ms. Noor Awadh (Data Analyst) for their research and technical support throughout the tenure of the Committee. We are also indebted to Mr. Noel Okoth (Media Relations Officer), Mr. Lawrence Kasungi (Documentalist) and Mr. John Koross for providing logistical support with enthusiasm throughout the period. Without the support of all these people, it would have been difficult to conclude this task.

7. The Committee also wishes to acknowledge Mr. Peter K. Thuku for providing administrative support. We are grateful to the following for their support in the secretariat: Mr. James Wamugo, Mrs. Patricia M. Mwangi, Ms. Hellen Kimari-Kanyora, Ms. Sophie Naimutie Ntore, Ms. Saida Abdalla, Ms. Susan Njeri Kimiti, Ms. Eunice Ajwang, Ms. Catherine N. Nambisia, Ms. Mary W. Wanjau, Ms. Mary K. Mbogori, Mr. Joash Aminga, Mr. Stephen M. Kimani, Mr. Suleiman Orang'o, Mr. Josephat Nzioka, Mr. John Thuranira, S/Sgt. David Leatoro, CPL. Joseph Mwaniki, APC. Shadrack Kaivi, APC. Isaac A. Kirui, APC. Titus P. Kemboi, Mr. Nusu Mwamanzi, Mr. Jim Masolo, Ms. Christine Kung'u and Ms. Susan Kiiru.

8. Last but not least, the Committee would like to specially acknowledge two members of the Committee, Prof. Njuguna Ng'ethe and Dr. Karuti Kanyinga, whose assistance and devotion during the most critical phase of the report-writing exercise went beyond the call of duty.

9. The Committee of Eminent Persons is pleased to submit this report to His Excellency the President with great respect and humility. It is our hope that the recommendations herein will be found useful in unlocking the constitution review process and also in beginning the process of healing this divided nation.

Signed,

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Ambassador Bethuel A. Kiplagat,
Chairperson,
Committee of Eminent Persons,
May 2006.

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PART III
THE WAY FORWARD

LIST OF ACRONYMS

CBG	Consensus Building Group
4Cs	Citizens' Coalition for Constitutional Change
CDF	Constituency Development Fund
CKRC	Constitution of Kenya Review Commission
EU	European Union
IPPG	Inter-Parties Parliamentary Group
JPC-K	Justice and Peace Convention Kenya
KADU	Kenya African Democratic Union
KANU	Kenya African National Union
KHRC	The Kenya Human Rights Commission
LDP	Liberal Democratic Party
LSK	Law Society of Kenya
NAK	National Alliance of Kenya
NARC	National Rainbow Coalition
NCA	National Convention Assembly
NCC	National Constitutional Conference
NCEC	National Conventional Executive Committee
NCPC	National Convention Planning Committee
PM	Prime Minister
PNC	Proposed New Constitution

EXECUTIVE SUMMARY

A. Background

1. His Excellency the President appointed a Committee of Eminent Persons on 24th February 2006 to evaluate the constitution review process; make recommendations on how to conclude the process; and recommend a process for healing and reconciliation. This followed the verdict of the referendum held on 21st November 2005 in which Kenyans did not ratify the Proposed New Constitution (PNC) of Kenya.

2. The Committee has listened to the views of Kenyans and commissioned several studies on what went wrong with the review process and what ought to be done in order to jumpstart it. The Committee also conducted a national survey to solicit views from those unable to present their views to the Committee in Nairobi.

3. This report presents our analysis of the views of the Kenyan people. We have been loyal and faithful to these views. We are convinced that only a candid presentation and analysis of these views will begin the process of healing this divided nation and re-start the stalled constitution review process.

B. Findings and Conclusions

4. We find that Kenyans need a new Constitution urgently. However, successful conclusion of the review process depends on dialogue, entrenchment of the legal framework and a credible mechanism for resolving contentious issues.

5. The Committee is of the view that the President holds the key to dialogue but the opposition parties and all other leaders must also reciprocate. Further, without broad-based and genuine dialogue, the process of reconciliation and healing will take a very long time to bear fruit.

6. In our view, the current constitution should be amended in order to entrench the review process in the constitution. This should be done with a view to providing for a people-driven review process as well as to provide for a viable process through which the constitution can be replaced.

7. The Committee has found that short-term interests and visions of politicians increasingly shaped the review process. Narrow partisan interests as well as ethno-regional concerns as opposed to national interests, heavily dictated the pace and direction of the stalled review process. There is need, thus, to insulate the review process from extraneous, ethnic, narrow and parochial factors.

8. Many people argued for locking out politicians from the review process. The Committee argues, however, that it is not possible to keep out key stakeholders such as politicians from the review process. Therefore, parliamentarians will be involved in enacting the relevant legal instruments; in the reconciliation and healing process; and in negotiating the options presented in this report.

C. General Recommendations

9. A general recommendation from our findings is that the completion of the review process must pay as much attention to the process as to the content. In our view, the process is as good as the product; the product will not be accepted if the process leading to it is flawed. It is our recommendation that an institutional framework be established to complete the review process after extensive consultations.

10. Civic education as provided by CKRC was neither well planned nor adequate. We recommend that a structured, systematic and continuous programme of civic education be built into the future constitution review process.

11. We are of the view that the constitution review process is far too important to be linked to electoral politics and cycles. We, therefore, recommend that the review process be conceived as a process with a life of its own. The process should, however, be neither open-ended nor indefinite.

12. It is important that the review process be guided by negotiated and legally binding timeframes. It should be governed by a clear timeframe that is agreed upon by all stakeholders especially the political leadership.

13. We note that divisions arose out of the review process in general and the referendum in particular. We also note that reconciliation and healing are not events, but rather constitute part of a continuous process which cannot be confined to a timeframe. The general recommendation arising out of this is that there is need to create mechanisms for addressing the broad divisions in society. Creation of these mechanisms is a pre-condition for the successful completion of the process.

D. Specific Recommendations

Reconciliation and Healing

14. We recommend that the President begins the process for the reconciliation and healing of the nation by reaching out through extensive consultations with all the ethno-political and regional leaders.

15. We also recommend the establishment of a lean national team on reconciliation and healing to spearhead the process of reconciliation and healing. The primary function of the team will be to catalyze reconciliation and healing, conceptualize the sequencing of events and monitor progress.

16. Further, we recommend that consideration be given to the invitation of eminent peace building experts to facilitate dialogue between various

political and ethno-regional leaders. Honesty, trust and candidness are the main values to guide this process.

17. We, further, recommend that the process of reconciliation and healing be guided by certain principles, including the principles of co-existence, people's participation, dialogue, trust and hope creation.

18. We recommend that some key institutions take the lead in reconciliation and healing. These are the President, Parliament, Faith-based Groups, Professional Associations, Civil Society Organizations and other socio-cultural institutions.

Mechanisms for Completing the Review Process

Legal and Legislative Framework

19. The Committee recommends that the review process be entrenched in the Constitution. We recommend that a legal and legislative framework be established to underpin the review process and the mechanisms adopted. Such a framework should amend section 47 of the Constitution and any other section with a bearing on concluding the review process. It should also establish an adequate statutory framework to cover all envisaged processes, including a referendum.

Institutional Options

20. We recommend a number of institutional options for consideration and that one or a combination of several options be adopted as the vehicle for completing the review process. The three options that we consider as the most feasible and in order of priority are:

    i. A Constituent Assembly, supported by Experts, and a Referendum;
    ii. A Committee of Experts and a Referendum; and
    iii. A Multi-Sectoral Forum backed by a Committee of Experts and a Referendum.

21. In all the options presented, a back-up team of deadlock breakers should be established to facilitate resolution of contentious and would-be

contentious issues. It would also resolve any other disputes that may arise.

22. We have recommended a roadmap towards the conclusion of the constitution review process in which we set out the activities which will have to be undertaken in order to conclude the process. The roadmap consists of six stages and commences with reconciliation and healing process. In the second stage, the various options we have proposed are discussed and agreed upon. The third stage is the enactment of the legislative framework to underpin the identified option. The fourth stage is the implementation of the identified option. In stage five, a draft constitution is produced culminating in a referendum as the final stage.

23. To insulate the review process from short-term interests and other extraneous factors, the Committee recommends that those elected or appointed to make the Constitution should be barred from taking up specified categories of public office – whether elected or appointed – for a specified period preferably not less than 10 years.

Resolution of Contentious Issues

24. We recommend that deadlock-breaking mechanisms be established to facilitate negotiation of contentious issues in the constitution review process.

25. We, further, recommend that the contentious issues be categorized and each category be handled separately. If it is not possible to arrive at a consensus, then the issues should be voted on separately in the referendum, and if rejected they should be consigned to a constitutional category of "unfinished business" to be addressed at stipulated periods.

PART I

INTRODUCTION AND HISTORICAL OVERVIEW

CHAPTER ONE

INTRODUCTION

1.1 Background and Introduction

1. In a general sense, a constitution is a basic set of rules and values that people agree upon to govern their relations. A constitution sets out the principles, rules and institutions of the state. Further, a constitution describes and guides the conduct of societal affairs; it spells out how power shall be exercised and provides safeguards against the abuse of power. Constitutions evolve through processes that involve negotiation, compromise, consensus and agreement among people or groups of people. Generally constitutions are arrived at after people have reached consensus on how they want to be governed and how they want power to be exercised.

2. In Kenya, constitutional reform has been an important feature of the country's political development since independence in 1963. Indeed, the country has witnessed one of the most arduous and protracted constitutional reform processes in the world. Beginning in the early 1990s, demands and struggles for constitutional reform spread throughout the country. The Government invariably reacted violently to these demands. The struggles, nonetheless, led to the repeal of section 2A of the Constitution to allow for multiparty democracy.

3. Demands to review and reform the Constitution of Kenya grew out of several factors. One of these was the desire of the people of Kenya and vision for a better and prosperous nation; a nation governed by the rule of law and democratic principles of good governance and social justice.

4. There was also clamour to address the negative consequences of amendments made to the independence Constitution. The amendments had led to concentration of power in the President, created a powerful executive

and weakened mechanisms for democracy and accountability. The amendments also created a one party state that became an instrument of repression. Kenyans experienced continued decay of governance and economic institutions. The consequences of these included poor economic growth, deepening poverty and collapse of infrastructure. Divisions along ethnic lines deepened sometimes leading to violent ethnic conflicts as was the case in the periods preceding the 1992 and the 1997 elections.

5. The constitution-making process in Kenya has been a bumpy ride. Needless to say, the country is where it is today on the constitution-making front partly because of the history of constitution making itself and partly because of other challenges identified in this report.

6. The cumulative effect of the historical and other challenges is that the PNC failed to "pass" by 57% "No" votes against 43% "Yes" votes when it was taken to the referendum for ratification on 21st November 2005 by the people of Kenya.

7. At the same time, the verdict of Kenyans not to ratify the PNC did not imply that Kenyans were not desirous of a new Constitution. The post-referendum debates have continued to show that Kenyans still want a new Constitution as a matter of urgency. However, the divisions referred to above would act as a major obstacle in jumpstarting the review process.

8. At the end of the referendum, the country displayed major divisions, some of them historical, but this time round exacerbated by the referendum contest. The divisions manifested along factional political lines and also ethnic, religious and in some cases socio-economic lines. Hence the current need for national reconciliation and healing.

9. In light of the above, the Government appointed a Committee of Eminent Persons to evaluate the review process and make recommendations on how

to jumpstart the review process and to propose mechanisms for reconciliation and healing.

1.2 The Committee of Eminent Persons

10. His Excellency the President appointed the Committee of Eminent Persons, on 24th February 2006, through a Kenya Gazette Notice 1406 to undertake an evaluation of the review process and recommend a roadmap for successful completion of the review process *(see the Appendix: Gazette Notice No. 1406: 24th February 2006, The Constitution of Kenya: Appointment of Committee of Eminent Persons)*. The specific terms of reference for the Committee were to:

i. facilitate the airing of views by the people of Kenya on the constitution review process so far in terms of what Kenyans consider the weaknesses, strengths, successes or failures of the process, and make proposals on the way forward;
ii. identify any legal, political, social, economic, religious, governance or other issues or obstacles, whether past or present, which stood in the way and/or may stand in the way of achieving a successful conclusion of the constitution review process;
iii. receive written memoranda and/or oral presentations by organized groups and individuals on all foregoing matters and matters incidental thereto; and
iv. undertake consultations and receive advice from local, regional and international constitutional experts on the foregoing issues and in particular, on how to establish an effective legal framework for the completion of the review process.

11. This report is based on what we heard from the public as well as the findings of a national survey which we conducted in order to ensure that

our findings and recommendations are a true reflection and representation of the views of the Kenyan people.

1.3 Method of Work

12. The Committee has used several methods to collect data on which this report is based. These include public hearings and review of written memoranda; national survey; and review of relevant documents including the various Constitution of Kenya Review documents, the various drafts of the Constitution and other relevant reports. The Committee consulted and received advice from experts and commissioned studies on various aspects of its terms of reference. It is noteworthy that use of these documents was in line with our legal mandate to use official records of any of the organs of the review process under the Constitution of Kenya Review Act and other materials or records relevant to its mandate.

Media

13. The Committee began its task by first profiling its work through the media. Advertisements on the purpose and scope of work for the Committee as well as calls for members of the public to give their views to the Committee were carried by all the leading daily newspapers before the public hearings commenced. Several members of the Committee appeared on radio talk shows and television programmes where they explained the Committee's mandate. The use of the media was meant to inform the public about the purpose of the Committee and remove the misconception that the Committee had been tasked with writing a new Constitution.

Public hearings and written memoranda

14. Public hearings commenced on 17th March 2006 at the Kenyatta International Conference Centre in Nairobi. During the public hearings, the Committee provided the public with a checklist of questions and issues to guide their presentations. These questions were:

i. What do you think were the major weaknesses or obstacles of the constitution-making process?
ii. What do you think were the major successes of the constitution-making process?
iii. What do you think are the key challenges or obstacles likely to impede the constitution-making process?
iv. The constitution-making process and the referendum resulted in major divisions in the country. How best and by whom can these divisions be addressed through reconciliation and healing?
v. Which is the best mechanism for completing the constitutional review process?

15. We heard from people of all walks of life; *wananchi*, members of Parliament in their individual capacity, clergy, university and college students, civil servants, organised groups such as political parties, women organisations, organizations representing persons with disabilities, youth groups, and professional associations. We also heard from trade unions, ethnic minority groups and a host of welfare groups. We heard from representatives from civil society, the public and the private sector.

16. The Committee held private consultations with several organisations and private individuals. Some of these requested private consultations to effectively engage with the Committee. The Committee found these consultations to be very useful and informative.

The National Survey

17. As mentioned earlier, the Committee also undertook a scientific national survey to solicit views relevant to its terms of reference. The target population for this survey was Kenyan adults aged 18 years and above – or those of voting age. The survey design was scientifically representative and supplemented the views gathered from the public hearings in Nairobi.

18. The interviews were done at household level. Household interviews were preferred because they allow for pure random sampling ensuring full representation of the various demographics and also for quality control. These face-to-face in-home interviews are also preferred because they allow for further probing as respondents have more time to respond to questions as compared to street interviews. The data collection involved the use of a semi-structured questionnaire having both open and closed ended questions.

19. The survey questions were structured in an open manner, with all possible options provided, including "no opinion". This manner of structuring ensures that there is no bias in the way the questions are asked. All the interviews were done face-to-face between April and May 2006.

1.4 Challenges and Limitations

20. The Committee experienced a number of challenges in the course of fulfilling its mandate. One was a hostile political environment. The political environment was characterised by suspicion and mistrust emanating from the outcome of the referendum. Those who were opposed to the PNC saw the Committee as representing the Government and/or the Banana/Yes faction of the referendum. This perception had the effect of dissuading some of the people from submitting their views to the Committee. However, our interactions with the public at various fora and also with the media helped to correct this perception. We thus had some people - including those who were initially critical of the existence of the Committee – coming to give their views.

21. A second challenge arose from the outright condemnation of the Committee by the main opposition political parties and some members of the public in general. They challenged the appointment of the Committee and questioned its mandate and its ability to deliver a legitimate and credible report. Their resolve not to give their views to the Committee as well as their

announcement that they would begin a parallel process to some extent constrained the Committee from effectively reaching out to their constituencies. Some opposition leaders nonetheless presented their individual or personal views to the Committee.

22. The third challenge was a general misgiving about the Committee arising from misinterpretation of its terms of reference. Some people claimed that the Committee was appointed to draft a new constitution. This misconception was common even among the media. Because of this, many people had misgivings about the work of the Committee arguing that consultations to appoint a Committee to 'review and draft a Constitution' should have taken place. Some of the leading dailies even wrote editorial comments insinuating that the Committee was 'drafting a new Constitution'. Given that editorial comments are generally persuasive and widely read, the attack on the Committee by the media added to the erosion of the moral and political legitimacy of the Committee. Again our interactions with the media helped to correct this distortion and cast the Committee in proper light.

23. Related to the above was the public dissatisfaction with the manner in which the Committee was constituted. Some of the people – including those who came to give their views - observed that the appointment of the Committee by the Government without broad consultations meant exclusion of significant constituencies. They also argued that the composition of the Committee did not reflect the ethnic diversity of the country. This, they argued, would undermine the confidence of the public in the report produced by the Committee.

24. Finally, the terms of reference were restrictive. Although the Committee was required to collect views through public hearings, the requirement confined collection of views to Nairobi. Many people brought this limitation to the attention of the Committee arguing that it was unfair to lock out those living outside Nairobi from making presentations to the

Committee. As already noted, the Committee responded to this concern by commissioning several studies and a national survey with a sample size representative of the Kenyan society.

1.5 Organisation of the Report

25. This report is organised into three parts and eight chapters. Part I consisting of two chapters, is the introduction and history of the review process. Part II consisting of three chapters summarizes the views of the people as presented to the Committee. These are views on obstacles and successes, the legal and legislative challenges, and views on other issues in our terms of reference, namely: divisions, reconciliation and healing and on the completion of the process. Part III consisting of three chapters discusses the way forward on reconciliation and healing, and mechanisms for completing the review process. The last chapter is a summary of conclusions and recommendations.

CHAPTER TWO

THE HISTORY OF CONSTITUTIONAL REVIEW IN KENYA

2.1 Introduction

26. This background chapter documents the history of constitution making in Kenya, specifically the history during the early 1990s onwards. The chapter buttresses the argument that it is virtually impossible to comprehend where the process of constitution making is today without understanding its history.

27. The chapter seeks to draw some conclusions, namely that the quest for a new Constitution began, not because of a quest for a new nationhood but out of the necessity to remove an oppressive regime; that the history of the review process is characterized by contention, confusion, poor planning and lack of clarity on the roles of the particular actors. Further, it the process has been characterized by lack of synchronization of events, lack of fallback positions, lack of trust, sometimes lack of meaningful involvement of the people and consistent failure. The debate on the content has been marked by historical fears and poor definition of contentious issues. Overall, it is difficult to separate content from the process.

28. Kenya attained independence in 1963 under a Constitution that provided for multi-party system of Government, parliamentary democracy and a federal structure of Government or *majimbo*. The Constitution created mechanisms for separation of powers between the executive, the legislature and the judiciary. This Constitution was the product of intense negotiation among the various political parties (all formed on ethnic and regional basis) on the one hand and the British Government on the other. The independence

Constitution, therefore, reflected the interests of different groups and how these were balanced and accommodated.

29. Although Kenyans were fairly united during the struggle for independence, discussions on the independence Constitution began to create divisions and differences between different groups. Divisions among politicians, who represented ethnic and regional interests, took centre stage with the prospect for political power being the driving force.

30. The ethnic logic of these differences had its origin in the colonial restrictions that prevented Africans from establishing nationwide political parties. Parties were formed along ethnic or district lines and therefore tended to have strong ethnic membership. This resulted in consolidation of ethnic consciousness among the African political leaders. Once these restrictions were removed, leaders made several attempts to form national political parties. Some of the parties that evolved were an amalgamation of ethnic political parties or alliances of different ethnic groups. As already noted, the two main political parties were KANU (supported by the Kikuyu and Luo ethnic groups – two big groups) and KADU which arose from the merger of several political parties, mostly representing smaller ethnic communities.

31. Immediately after independence, the Government embarked on a process to dismantle some of the institutions agreed upon and entrenched in the Constitution. Notably, the Government carried out several amendments that led to a unitary state, semi-presidential system, a weak bill of rights and a unicameral legislature. This resulted in concentration of power in the president and dismantling of the constitutional safeguards against abuse of office. The majimbo structure of Government was dismantled and a centralist state emerged. Over time, a one party state evolved and reigned for decades until December 1991 when section 2A of the Constitution was repealed to allow for multi-party democracy.

32. This background has continued to inform the constitution-making process in Kenya. The present is generally informed by the past.

2.2 The Return of Multi-Partyism and Constitutional Change

33. In 1990, Kenya experienced unprecedented civil and political upheaval. This civic energy was activated by the campaign for pluralism and created two opposing blocks, one a coalescence of forces committed to preserving the *status quo* and the other of those committed to fundamental reforms. In response, the KANU regime formed the Constitutional Review Committee, chaired by the then Vice-President George Saitoti, in June 1990 ostensibly to bridge the gap between the opposing political groups. The Committee completed its work in November 1990.

34. As it turned out, although the terms of reference of the Saitoti Committee were narrow in scope, which did not satisfy the majority of the citizens, citizens all the same spoke out on diverse opinions and issues. They made the case for strengthening of democratic institutions, improving public accountability, restoration of faith in the electoral process, strengthening commitment to the rule of law and respect for human rights.

35. By mid-1991, the pressure for democratisation was accelerating. The church and the opposition activists were at the forefront in demanding change. The church unveiled the Justice and Peace Convention—Kenya (JPC-K), while the opposition activists on their part formed a pressure group known as the Forum for the Restoration of Democracy (FORD).

36. The twin assault of the JPC-K and FORD among other local pressure groups and the external forces spearheaded by donor countries who accused Kenya of human rights abuses, corruption and lack of democracy, finally compelled the KANU regime to repeal Section 2A of the Constitution in

December 1991, thus paving way for the December 1992 multi-party elections.

2.2.1 Multiparty Elections of 1992

37. The 1992 elections triggered a new round of contestation on constitutional reforms this time in the context of multi-party politics. Prior to the 1992 elections the then opposition parties, religious bodies and civil society forces were at the forefront in making demands for constitutional reforms as opposed to the then ruling party KANU which was reluctant to effect any changes. But even then, the opposition played some role in derailing the process because they were convinced that they were capable of winning power with the constitutional framework then in place. Thus, both the ruling party elites and opposition elites were strange bedfellows with regards to the existing constitutional framework as befitting their interests. But following their defeat in the 1992 elections the opposition elites changed their mind and became more accommodating to the process of reforms.

38. The constitutional reforms debate gained momentum again in 1993 when KANU stalwarts declared that they had a draft majimbo Constitution, which they would table in Parliament. The church was the first to react to the Majimboists when in March 1994 the 18 Bishops of the Roman Catholic Church released a pastoral letter in which they called for among other things "complete revision of the Constitution" by a large constituent body of experienced and competent citizens representing all shades of society and not just a small group of politicians. However, no meaningful response to this demand came from the KANU regime.

2.2.2 Civil Society Pressure for Reforms

39. The debate was further accelerated when the Law Society of Kenya (LSK), the Kenya Human Rights Commission (KHRC) and the Kenya Chapter of the International Commission of Jurists (ICJ-K) unveiled a proposal for a Model Constitution in late 1994. The Model Constitution was unveiled

after discussions and consultations with scholars from different backgrounds as well as constitutional experts, thus giving it a measure of intellectual integrity.

40. The KANU regime realised that the civil society forces had taken the initiative to manage the constitutional review process and was now on the verge of mobilising the masses. The Government's reaction was, therefore, to institute measures that would enable it to regain control and steer the constitutional review process. Thus, President Moi in his New Year message of 1995 assured Kenyans that the Constitution would be reviewed, leading Kenyans to believe that they had finally made common ground on the one issue that they had disagreed on for a long time.

41. The mood for constitutional reforms created by the Government in the President's 1995 New Year message changed drastically in June of the same year when the President ruled out radical constitutional changes. Opposition parties and civil society forces immediately accused the president of reneging on his earlier promise to give Kenyans an opportunity to participate in the country's reform process. They thus demanded that all Kenyans should first discuss constitutional changes and that Parliament should only be called to ratify what Kenyans had agreed on.

42. This trend continued throughout 1995 when the ruling party became even more intransigent by taking a tough stand in regard to opposition parties and non-governmental organisations (NGOs). The ruling party indicated that henceforth it would no longer be liberal in registering new opposition parties and on the same note clearly stated that it would be uncompromising with NGOs and diplomats who engaged in politics.

43. In a bid to regain the lost initiative, the civil society forces through the Kenya Human Rights Commission (KHRC) initiated a popularisation process through the solicitation of comments, seminars and submissions, on

the draft Model Constitution. This continued to attract trade unions, women groups, NGOs, religious groups and the media. It also lobbied foreign missions, political parties and constitutional experts. Meanwhile, a closer collaboration was developing between the Human Rights NGOs and the mainstream churches, which seemed to be the most decisive institutions of the civil society because they had the ability to reach the grassroots directly and also possessed a strong legitimacy in the rural areas.

44. These struggles consolidated into the Citizens' Coalition for Constitutional Change (4Cs), which set up a secretariat and a steering committee of 42 members representing various organisations within the civil society movement. The 4Cs then demanded fundamental constitutional reforms in the country proposing that the process be via a National Convention. The 4Cs argued that such a convention would assume the role of a referendum and hence represent the will of the citizens.

45. Altogether, although, the civil society forces and opposition political parties were unanimous on the need for a constitutional convention, the same bodies ultimately disagreed over who should initiate the talks, especially over the control and leadership of the process of convening a National Constitutional Conference.

46. The Attorney-General announced in June 1996 that constitutional changes could not be effected until after the 1997 elections. However, the Attorney-General's pronouncement was also partly a reaction to a show of unity by the pro-reform forces through the formation of the National Convention Planning Committee (NCPC), which was formed as an umbrella body to represent all the factional interests in both the opposition parties and the civil society. The NCPC out of the partnership between the Inter-Party Parliamentary Committee (formed in 1998), the 4Cs and other civil society forces.

47. The NCPC finally called the delegates conference on 5th April 1997, where the National Convention Assembly (NCA) was established and on 6th April 1997 the NCA resolved that the former NCPC together with 16 provincial delegates and the representatives of the Youth Movement would serve as the National Conventional Executive Council (NCEC), which was to be the executive organ of NCA. It was under the direction of the NCEC that pro-reform activities took place throughout 1997.

2.2.3 The Inter-Parties Parliamentary Group (IPPG) Reforms

48. The measures that NCEC took to pressurise the Government to undertake reforms bore fruit on 17th July 1997 when the Government announced that it would, after all, undertake reforms before the 1997 general elections. This was preceded by President Moi's initiation of dialogue when he met religious leaders from the Christian and Muslim sectors on 15th July 1997. With the prospects for reform talks, the tension in the country eased and the opposition front started to disintegrate.

49. In the meantime, the process of negotiation seemed to be prospering when both the NCEC and KANU consented to constitutional reform mediation by the religious community. By asking the religious community to mediate, Moi succeeded in neutralising constitutional reforms activities once again. He was later to disengage the reformers from their role as mediators and therefore out of the whole process when during the launch, only the NCEC turned up while KANU stayed away asserting that it could only negotiate with representatives of the people.

50. The events of the last week of August 1997 broke the short-lived unity between the civil society forces and the opposition parties. While the NCEC chose the radical path, the opposition parties went for the softer option and became moderate. They went separate paths.

51. The then Vice President of Kenya, Hon. George Saitoti, invited KANU and opposition MPs to discuss ways of averting a crisis and it was under these auspices that the Inter-Parties Parliamentary Group (IPPG) was born. This begun to restrict reform discussions to parliamentarians. Most opposition MPs abandoned the NCEC and decided to participate in the IPPG reform discussions.

52. The IPPG comprising 36 opposition MPs and the KANU parliamentarians finally agreed on a wide range of reforms that hardly any observer expected. The Government conceded to most of the proposals in order to defuse the situation and appease the opposition before the crisis got out of hand. Apparently opposition MPs feared the consequences of further escalation of the conflict, as did religious leaders. On the other hand, KANU leaders saw the making of concessions as providing an opportunity to drive a wedge between the 'moderates' and the 'radicals' in the civil society and Parliament. Furthermore, some opposition MPs were not comfortable with the fact that extra-parliamentary forces that were now setting the pace had seized the initiative.

53. The IPPG proposals introduced minimum reforms and certainly served to regulate the electoral process in a better manner than the 1992 electoral process.

2.2.4 Legal Framework for Constitutional Change

54. The IPPG amendments were enacted in November 1997 as the Constitution of Kenya (Amendment) Act of 1997. A major component of the IPPG proposals was the inclusion of a Constitution Review Commission to be answerable to a Select Committee of Parliament and to work under a set time schedule so as to prevent a stalling exercise. The Constitution Review Commission Act was subsequently passed before the dissolution of Parliament.

55. In the month of July after weeks of deliberation which were characterised by a lot of wrangling, the IPPG at its Safari Park I meeting appointed a

Committee of 12 members to draft amendments to the Constitution of Kenya Review Act of 1997. And during Safari Park II meeting, the various parties reached a consensus on some of the key modalities of the Constitution Review Process. It was hailed in various quarters as another significant step towards the overhaul of the country's Constitution.

56. The Safari Park II meeting resolved to have a three-tier structure of the constitution review process, with the National Consultative Forum as the supreme decision-making organ in the process, a Constitution Review Commission and District Committees. But the meeting did not agree on many of the contentious details of the three groups and how they would be appointed. There was still a rift between those who favoured district and ethnic representation in both the National Consultative Forum and the Review Commission and those who advocated representation through interest groups. It was tentatively agreed that the National Consultative Forum should have two representatives from each district with Nairobi counting as four districts and Mombasa as two plus one representative each from the various civic, religious, human rights and youth interest groups. However, the NCEC and other groups within the NGOs argued that this would give too much weight to ethnically based administrative districts. They felt that KANU with its enormous grassroots organisation would infiltrate the National Consultative Forum with its supporters at the expense of other interest groups and political parties.

57. In the meantime, against all expectations, Safari Park II provided a breakthrough to the constitutional review process when the president caught extremists on both sides unawares by delivering a conciliatory address.

58. After the President's speech, which was accepted by both sides of the political divide, the meeting adopted the three tier structure suggested in the earlier forum and also appointed a committee of 12 chaired by the Catholic Bishop for Kakamega, the Rt. Rev. Phillip Sulumeti to draft suitable amendments to the Constitution of Kenya Review Commission Act of 1997, which would then be approved by the last forum of the Safari Park round of meetings. The most contentious issue that remained was the number and composition of the Commission. After some heated arguments, the number of Commissioners was fixed at 25 after the majority of the stakeholders rejected suggestions ranging from 65-100. A Committee, Sulumeti Committee was charged with working out a formula that would ensure the widest possible representation in the Commission.

59. The final Safari Park forum adopted the Draft of the Constitution of Kenya Review Act of 1997 with some modifications as presented by the Sulumeti Committee. The committee recommended that the 25 persons be nominated by the Inter-Parties Parliamentary Committee of whom at least two would be women; 3 persons from the religious sector—one each from the Muslim Consultative Council, the Kenya Episcopal Conference and the NCCK; one person from NCEC; five persons nominated by women organisations through the Kenya Women Political Caucus; and four persons nominated by the civil society through the National Council of NGOs of whom at least one would be a woman.

60. The Sulumeti Committee also adopted the three-tier structure comprising the Commission, the District Forums and the National Forums. The District Forums were to be composed as follows: three elected representatives from each location; elected representative from major religious organisations; and all MPs and all Councillors from local authorities in the district; and two coordinators elected by the locational and religious representatives. The National Consultative Forum on the other hand would comprise all MPs, all Commissioners and representatives from the District Forums.

61. The recommendations were translated into a Bill, which was debated and passed in Parliament with the president giving his assent towards the end of December 1998. This became the Constitution of Kenya Review Act, 1997.

2.3 The Constitution of Kenya Review Act

62. The rationale behind the creation of the CKRC Act was a 'people-driven' process. The process had to be inclusive—accommodating the diversity of the Kenyan people including socio-economic status, race, ethnicity, gender, religious faith, age, occupation, learning, persons with disabilities and the disadvantaged. The process had to ensure that the final outcome of the review process faithfully reflected the wishes of the people of Kenya. All the organs of review were to be accountable to the people.

63. The Act carefully set out the tasks and stages involved in the process and the organs which would undertake them, with the intention that each organ should be suited to the tasks assigned to it. The process was to be started by the Constitution of Kenya Review Commission ('CKRC'), appointed by the president on the nomination of parliament. It was intended to be an independent and expert body while reflecting the diversities of the country.

64. The Constitution of Kenya Review Commission's tasks were to provide civic education to the public on constitutional issues, seek the views of the people on reforms, and prepare a draft constitution for consideration at a National Constitutional Conference ('NCC'). The CKRC also had to establish constitutional forums (of locally elected leaders) in each of the 210 electoral constituencies to promote discussions on reform and to facilitate the CKRC' consultations with the residents of the constituency. In order to assist its work in constituencies, the CKRC appointed a co-ordinator for, and set up a small library in, each of the 74 districts. These arrangements gave the CKRC a presence in every part of the country and greatly facilitated its communications throughout Kenya.

2.4 The Constitution of Kenya Review Commission (CKRC)

65. The Constitution of Kenya Review Act provided for the establishment of a Constitution of Kenya Review Commission. The Constitution of Kenya Review Commission was appointed and gazetted on 10th November 2000.

66. As mentioned above, when the Commission was established, a parallel initiative to review the current Constitution, the Ufungamano initiative as it came to be known (by the venue where they held their meetings), had already been started by civil society organisations, religious groups and other non-governmental stakeholders.

67. The Ufungamano Initiative appointed a People's Commission of Kenya made up of 20 members. The existence of the Commission and the Ufungamano Initiative side by side was obvious evidence of a serious fracture in the political landscape. The Commission was perceived as an instrument of the ruling political party and the Ufungamano Initiative as that of those in opposition to it. This was a clear indication of lack of consensus about and commitment to what was to be perhaps the most fundamental political project in Kenya's forty–year history as an independent state.

68. Consequently, Prof. Yash Pal Ghai, the Chairperson of the Commission undertook to broker an agreement between all relevant stakeholders with a view to facilitating a merger of the two institutions and starting the review of the Constitution as a unified process. Further negotiations were conducted with all relevant stakeholders, resulting in an agreement in December 2000, to merge the Commission with the Ufungamano Initiative.

69. The Constitution of Kenya Review (Amendment) Act (No. 2/2001), enacted in May 2001, reconstituted the Commission and expanded its membership from seventeen to twenty-nine.

70. The fundamental assumptions of the Act were undermined from the very start, in the way that CKRC was composed and the interference of its independence by the government and political parties sponsoring commissioners. Overall, on account of the manner of appointment of commissioners and the different interests they represented, the constitution review process suffered from the lack of a united Commission which ought to have served as a centre of expertise and independent advice.

2.5 The National Constitutional Conference (NCC)-BOMAS Conference

71. Under section 27(1) of the Review Act, the Commission was required after compiling its report and preparing a draft Bill, publishing the same and disseminating them, to convene a National Constitutional Conference for discussion, debate amendment and adoption of its report and draft Bill.

72. In exercising of these powers, the Commission published a notice convening the National Constitutional Conference to commence in October 2002. Before the Conference could begin however, the then President, Daniel arap Moi, dissolved Parliament and called the general elections. The Conference could not thereupon proceed, as it would have been without members of Parliament, who comprised one-third of the Conference.

73. After the elections, CKRC once again published a notice convening the Conference to commence on 28th April 2003 at the Bomas of Kenya in Nairobi. After the Conference had been convened and had commenced, its life including the number and duration of adjournments was, under the law, in the hands of the Conference itself.

2.5.1 Bomas I Conference

74. The President, Mwai Kibaki, officially opened the Conference as reconvened on 30th May 2003. In his address, he reiterated the Government's support for the constitution review process and called upon all organs of review to affirm commitment to the foundation principles agreed to prior to commencement of the review process.

75. Debate at the NCC was divided into daily sittings and sessions at which chapters of the Report and corresponding provisions of the Draft Bill were presented by the Commissioners of the CKRC and discussed by the Conference simultaneously. No decisions on the Report and Draft Bill were taken in general debate; this being reserved for subsequent stages of the Conference proceedings as prescribed by Clause 20 of the Regulations.

76. A wide range of issues were raised, discussed and, in appropriate cases, resolved, in general debate, before the Conference adjourned on 6th June 2003.

2.5.2 Bomas II Conference

77. The National Constitutional Conference re-convened on 18th August 2003 and ran until 26th September 2003 in what was known as Bomas II.

78. The core business of Bomas II was the consideration and or deliberations of the Report and Draft Bill presented by the Commission to the Conference during Bomas I through the established twelve technical working committees.

79. It was necessary to devise a system which would ensure that various statutory delegate categories were distributed as equitably and evenly across committees as possible. Conference dynamics were, however, rather different. Delegates tended to caucus along provincial lines rather than in terms of those statutory categories. Consequently, the Steering Committee decided that delegates be organized on that basis and that coordinators be identified for purposes of assigning delegates evenly to the committees.

80. A number of Committees reported that some delegates were not able to make effective use of documentation provided by the Commission. Quite often, issues being raised by some delegates were taken care of in these documents; implying, therefore, that these were not being carefully scrutinized. Besides, some delegates wanted new documentation

requisitioned for purposes of second guessing the Commission's formulation of specific proposals. Other delegates thought that the documents were too voluminous to be carried or consulted on a day-to-day basis.

81. What made issues contentious was not so much the propriety or constitutional value of proposals made in the Draft Bill, but rather their implications and consequences in contemporary Kenyan politics. For example, some delegates were clearly apprehensive about the radical changes proposed in the Draft regarding the overall system of Government (legislature, executive, judiciary) since these had profound implications for existing power arrangements. Yet others were unable to extricate themselves from deep-seated cultural and religious loyalties when it came to debate on the corpus of Kenyan law or the structure of the Courts. The debate on the Kadhi's Courts thus drew such loyalties from all religions.

82. It was apparent that debate on proposals to restructure the legislature and the role of legislators were more often hampered by fears of loss of status and privilege currently enjoyed by sitting members of Parliament than by strict constitutional principles. Clearly, attention to these concerns was inevitable and not in the least surprising. After all, constitution-making, it has been said, is the continuation of politics by other means. In the event, however, many of these issues were managed with far less acrimony than what many delegates had anticipated.

2.5.3 Bomas III Conference

83. On 26th September 2003, an adjournment motion was moved and carried by the Conference. Although the adjournment motion as carried had fixed the date of resumption of the Conference for 17th November 2003, this was not to be. A number of roadblocks suddenly emerged soon after the delegates went home making it impossible for the Conference to reconvene on that date.

84. First, there was indication that powerful political forces did not want the Conference to reconvene at all. Pointers to this could be seen in the filibustering that had gone on in some Technical Working Committees, during Bomas II. Second, a joint meeting of the Parliamentary Select Committee on Constitutional Review, and the Business Committee of Parliament, at which the Constitution of Kenya Review Commission was invited, decided that Parliament had urgent business which needed to be dispatched before the end of the year. Rather than adjourn in or about the second week of November 2003, the Commission was informed that Parliament would extend its sittings well past the date of the expected reconvening of the Conference. Since approximately one-third of the Conference delegates were Parliamentarians, and given the fact that a large proportion of the staff of the Conference also came from Parliament, postponement of the date of resumption appeared prudent at the time.

85. That announcement, however, touched off another round of scepticisms among delegates who saw it as evidence of high level manoeuvres designed to scuttle the Conference. A number of delegates led by one of the Vice-Chairs of the Conference, Mr. W. Ole Kina and the Convenor of the Technical Working Committee on Constitutional Commissions, Mr. Kiriro wa Ngugi, went to court against the Commission to challenge the legality of that postponement. Their argument, which had considerable merit, was that once the Conference was convened, no authority other than itself, not even the Commission, had the power to adjourn or determine the time and place of its sittings.

86. Once Bomas III reconvened, there was dramatic change. Delegates appear to have resolved that they would complete the mandate of the Conference without unnecessary interruptions or sideshows. Work in committees, therefore, began to move much faster and more efficiently than had been the case in Bomas II. Records of committee proceedings indicate that the attendance levels were generally high, debates more focused, and decisions on articles of the Bill more precisely formulated. In committees dealing

with politically sensitive or contentious issues, a genuine spirit of negotiation and reconciliation was clearly evident. Indeed by 31st January 2004, practically all committees had discussed/debated and/or amended articles of the Draft Bill assigned to them.

2.5.4 Consensus-building Initiatives at the National Constitutional Conference

87. In the course of the work of committees, a number of issues which some stakeholders regarded as particularly contentious were isolated and subjected to mediation through several consensus-building initiatives both outside and within the Conference. An initiative by Parliamentary political parties spearheaded by the Kenya African National Union and Ford-People (the Coalition of National Unity) held a high profile meeting at Safari Park Hotel between 10th and 11th January 2003. Although a lot of ground was covered at this meeting, the initiative was abandoned once it became clear that unless owned by the Conference, its recommendations would not be respected. Indeed the fact that a number of Government ministers began to project this initiative as a process alternative to the Conference made rejection of its recommendations virtually certain.

88. The collapse of the CNU initiative led the Steering Committee of the Conference to establish its own consensus-building group. The group, which was composed, essentially, of political party representatives, was moderated by Bishop Philip Sulumeti (Chair of the Technical Working Committee the on Judiciary). The group held numerous meetings and produced a report on a number of issues identified in advance by the Rapporteur-General of the Conference, as contentious.

89. It is important to note that the mandate of the Steering Committee Initiative was merely to hammer out a common basis for the resolution of issues submitted to it. It was understood that its recommendations would have to be processed through and be incorporated into the reports of relevant Technical Working Committees of the Conference. The initiative had no

mandate, therefore, to make decisions binding on committees or the Conference.

90. On the executive, the recommendations of the group were similar to those earlier presented by the second initiative. This time round, the recommendations were presented directly to the Conference. On devolution, however, the group made recommendations which were radically different from what the relevant committee had decided. Indeed, their recommendations represented a significant departure from those of the Steering Committee initiative.

91. The Conference did not accept any of the recommendations of this third initiative. The result was further acrimony and confusion leading, eventually, to the withdrawal of a group of delegates led by the then Minister for Justice and Constitutional Affairs, Hon. Kiraitu Murungi from the Conference. The withdrawal of these delegates did not derail the Conference proceedings. Once it was established that the Conference was still quorate, proceedings continued, this time with greater urgency until all outstanding matters were concluded.

2.5.5 Preparation of the Draft Constitution of Kenya, 2004

92. Between 16th and 19th March 2004, the Revised Zero Draft, as amended and adopted by the Committee of the whole conference, was subjected to an exhaustive technical audit by the Drafting Team.

93. The Revised Zero Draft as amended by the Conference and audited by the Drafting Team was circulated to all delegates as The Draft Constitution of Kenya, 2004. That Draft was again adopted by acclamation by the Conference sitting in Plenary on 23rd March 2004 and handed over to the Constitution of Kenya Review Commission.

2.6 The Challenges of Enactment of the Draft Constitution of Kenya, 2004

2.6.1 Court Cases

94. Just before the Conference adjourned a number of delegates and observers went to court challenging the validity and/or legitimacy of the entire constitutional review process and its outcome. These cases raised both technical legal, and political challenges to the remaining phases of the review process.

95. Some of the cases that beset the constitutional review process included:

- *Timothy Njoya & Others v CKRC and the National Constitutional Conference*, High Court Misc. Application No. 82 of 2004;
- *Njuguna Michael Kung'u, Gacuru wa Karenge & Nichasius Mugo v the Republic, Attorney General and CKRC*, High Court Misc. Application No. 309 of 2004;
- *The Martin Shikuku Case; and Peter Mwalimu Miwa v the Attorney General and CKRC HCCC No. 1 of 2004*

96. In the *Njoya Case*, the Constitutional Court held, among other things, that section 28(4) of the Review Act requiring the Attorney General to table the draft Bill before the National Assembly for enactment was unconstitutional. It further ruled that the people of Kenya have a right to ratify the Draft Bill in a mandatory referendum or plebiscite, and that Parliament had no jurisdiction under section 47 of the Constitution to abrogate the existing Constitution and enact a new one in its place. It is noteworthy, however, that the Court did not provide for the procedure for the holding of the referendum.

97. In the *Wa Karenge Case*, the High Court, in its ruling, prohibited the Commission from preparing its Final Report and the Draft Bill in relation to the chapters on the Legislature, the Executive, Devolution, Public Finance

and Revenue Management, and Transitional and Consequential Provisions until the matter was heard and determined. The Attorney General was similarly also prohibited from receiving the final report and the draft Bill from the Commission until the final determination of the matter.

98. In the *Martin Shikuku Case,* following on the decision in the Njoya case, the applicants sought orders, among other things, that the constitutional amendments since 1963 are unconstitutional and that Kenya should revert to the 1963 Independence Constitution. They also sought a declaration that the Bomas draft be submitted as it is to the people of Kenya for ratification in a referendum. In the interim all debate, discussion and action on the Bomas draft be prohibited pending determination of the case. The court granted the prayers that all debate, discussion and action on the Bomas draft be prohibited. Up to the time of writing this report, this case has not been determined.

99. The *Peter Mwalimu Miwa Case* was a constitutional reference seeking a declaration that the Review Act was null and void on the ground that it was inconsistent with section 47 of the Constitution. This case was later withdrawn.

100. Following the decision in the *Njoya* Case and its pronouncement on the necessity of a referendum, questions arose on whether there was need to amend the Constitution to provide for the referendum or whether amendments to the Review Act would suffice. The basic question was whether the current Constitution of Kenya could be extinguished and another given life in its place otherwise than as provided for in the Constitution and on the basis only of the provisions of an ordinary Act of Parliament. One school of thought argued that the essence of the principle of the supremacy of the Constitution is its superintendence over all other law, which other law is null and void to the extent of that it is in conflict with the Constitution.

101. The other people argued that in line with the Ruling of the High Court, the sovereign power of the people to replace their Constitution by a referendum was primordial and did not require to be in any text, whether a Constitution or otherwise. Such power, this school argued, was exercisable independent of the Constitution.

102. The Attorney-General in an opinion on 25th August 2004 to the Parliamentary Select Committee subscribed to the first school of thought. He noted that the people's primordial power to make a new Constitution must flow from the Constitution itself. The Constitution must recognize the right of the people to exercise their constituent power through a referendum and provide the necessary legal framework to exercise this right. This, he argued, "is to be prudent to ensure that the birth of a new Constitution is based on a sound constitutional and legal basis."

103. The matter was considerably more complicated than this. Since a referendum was now required to be held, whether with or without constitutional or legislative amendments, the question which arose was what the document upon which the referendum would be held would be. This question arose because, thanks to the *Wa Karenge Case*, there was now no Draft Constitution upon which a referendum could be held. It was at this point that the Parliamentary Select Committee on the Constitution Review Process came actively into the scene. The paralysis in the constitution review process led to a number of processes that sought to undo the imbroglio. These processes included:

2.6.2 The Naivasha Accord

104. The manner in which the Bomas Conference was concluded and the decisions of the courts on the various Bomas related cases created broad divisions in the Kenyan body politic. These divisions were replicated in the political leadership of the country. The President had not long before incorporated members of the opposition into his Cabinet, a move that did not go down well with some of the partners in the ruling coalition. These divisions found their way into the Parliamentary Select Committee on Constitution Review.

105. The view had by this time gained currency that the main obstacles to the realization of a new Constitution were the so-called contentious issues and that if the political leadership could agree on these, Parliament could amend the Constitution and pass a law validating the draft so produced upon which a referendum could then be held.

106. Based on this premise the PSC began a series of meetings to seek agreement among the political players on the contentious issues. These meetings culminated in the famous Naivasha Retreat of the PSC that came up with the Naivasha Accord.

107. The Naivasha Accord was a series of broad agreements on what were perceived by the political players to be the sticking points in the Bomas Draft. Among these agreements was agreement on the structure of the Executive. The PSC agreed to retain an executive presidency as both head of state and Government and a prime minister (PM) in charge of coordination and implementation of Government business and programmes. The PM was to be appointed from the leader of party with majority of seats in the House. Also agreed was a two-tier devolution of power to the district level and merger of small and economically unviable districts. It likewise recommended the scraping of the Provincial Administration.

108. Further, the proposal to have a Senate was done away with and replaced with a forum meeting at least 4 times a year. The Naivasha retreat, which was attended, by 22 of the 27 members saw the members agree that although the president appoints the PM he would have no power to sack him/her; this would require a 50 per cent vote in Parliament for his/her dismissal.

109. It was agreed at the Naivasha Retreat that the Government would publish a constitutional amendment Bill that would provide for the procedure for the replacement of the Constitution with a new Constitution in terms of the

Ringera Ruling and that additionally, a new Bomas Draft, incorporating the Naivasha Accord would be prepared on the basis of which a referendum on a proposed new Constitution would be held. The country breathed a sigh of relief as it appeared that political differences had been settled and that the country was now on its way to a new constitutional dispensation. This was not to be.

110. It did not take long before the differences emerged again. The Government soon backtracked on the agreement. Kiraitu Murungi, the then Minister for Justice and Constitutional Affairs, overruled the Attorney General who had taken to the Government Printer a Bill that incorporated the Naivasha Accord.

111. The Constitution review process had hit another stalemate. The two NARC factions, NAK and LDP, decided to back different Bills to jump-start the process. Subsequently, the Government announced that it would not publish a Bill that proposed two-thirds requirement to alter the Bomas Draft, whereas LDP and KANU said they would not negotiate to change their position on the Bomas draft and the Naivasha Accord. The Constitutional Affairs Minister was later also to say that the Government would not support the Naivasha Accord.

112. The next battleground became the PSC itself where the Government moved to replace William Ruto of KANU as chair with Ford-People leader and Cabinet Minister Simeon Nyachae. NAK leaning members similarly replaced LDP members of the PSC. These events saw the withdrawal of KANU and LDP members from the PSC leaving the PSC exclusively as a Committee of Government MPs. This move eroded public trust in the Committee and further undermined the Constitution review process.

2.6.3 Consensus Building Group

113. As Government manoeuvres to control the Constitution review process were proceeding, an informal group of Government-friendly members of Parliament led by John Koech and Jimmy Angwenyi were spearheading a process, which they claimed was aimed at building consensus on contentious issues arising from the Bomas Draft under the banner of the Consensus Building Group (CBG). These members explored ways of introducing legislative amendments to the Review Act to take the process forward. Most importantly, however, this group subscribed to the view that there was no need to amend the Constitution in order to conclude the constitution-making process and was thus validating the Government refusal to honour the Naivasha Accord.

114. The efforts of CBG culminated in the publication of the Constitution of Kenya Review (Amendment) Bill, 2004 also known as the Consensus Bill, which was later to metamorphose into Consensus Act. The thrust of the Bill was to permit Parliament to be seized of the Bomas Draft and to make amendments to it before submitting it to the public for the referendum. As passed by Parliament, the Bill stipulated that for any clause in the Bomas Draft to change, a sixty-five per cent majority would be required. This provision considerably mollified the opposition because it reassured them that the Government side would not be able to impose its position on them. It served the same purpose as the constitutional amendment that had been agreed upon by the PSC under William Ruto. The way again seemed to have cleared towards a new constitutional dispensation.

115. A new obstacle soon emerged. The President refused to assent to the Bill as passed by Parliament on grounds that it was in conflict with section 54 of the Constitution, which provides as follows –

> *54(1) Except as otherwise provided in this Constitution, any question proposed for decision in the National Assembly shall be determined by a majority of the votes of the members present and voting.*

116. This meant that the Bill had to be amended and re-introduced in Parliament. Before the adjournment of Parliament in early December 2004, the Bill was re-introduced in Parliament with the offending clause deleted and substituted with a simple majority. Because the Government side was sure of securing a simple majority on any question, thanks to the incorporation of opposition members into the Government, it seemed that the Government was determined to have its way in making changes to the Bomas Draft and taking its preferred draft to a referendum. This caused considerable acrimony in Parliament. The matter was aggravated by the fact that a provision requiring the PNC to be passed by at least sixty-five per cent of the voters had also been replaced with one requiring only a simple majority. There was similarly no requirement for a minimum turnout to validate the vote. Matters were further made worse by the fact that a provision requiring that at least 25% of the voters in more than half of the Provinces should support the PNC had similarly been removed.

117. In our evaluation, the process by which the Consensus Act was passed and its contents set the stage for acrimony that was to ensure at the referendum. It became clear that there was nothing to prevent the Government side from pushing through with a Draft Constitution of their choice. There was no incentive in the Consensus Act as passed by the Government side to negotiate with the opposition. The way was now clear for the Government to proceed all the way to referendum with or without the co-operation or even the participation of the opposition. This was probably an important turning point in the politics of the constitution review process. The opposition and their supporters countrywide dug in and so did the Government and its supporters. The battle lines were drawn.

2.6.4 Kilifi Retreat

118. After the passage of the Consensus Act, and in terms of that Act, the PSC under Nyachae began consultations on proposals for amendment of the Bomas Draft. Because of the bad blood and suspicion already generated, the opposition members of Parliament and their supporters ignored the PSC

consultations. They were waiting already for whatever draft Constitution would emerge from the process so as to defeat it at the referendum since they would lack the numbers to defeat it or change it in Parliament.

119. At the conclusion of their consultations, the Nyachae-PSC organized what has come to be known as the Kilifi Retreat in which members of Parliament were invited to join the PSC and put together its recommendations for the amendment of the Bomas Draft. Predictably, the retreat was boycotted by the opposition and became a forum only of Government-friendly members of Parliament.

120. The Kilifi Retreat made amendments to the Bomas Draft, which were hailed by the Government side but denounced by the opposition as watering down the gains made in the Bomas Draft. Significantly, the PSC not only proposed amendments to the Bomas Draft, but also went further to prepare what came to be known as the Kilifi Draft. The Speaker of the National Assembly was later to rule that the PSC had exceeded its mandate in purporting to prepare a Draft Constitution instead of merely proposing amendments to the Draft to be considered seriatim by the Assembly.

121. The National Assembly debated the PSC Report and the Kilifi amendments on 21st July 2005 in one of the longest and most chaotic sittings of the House. In the end, the Government side triumphed over a spirited opposition and the stage was now set for the Attorney General to prepare the final draft of the PNC for submission to the people in the referendum. The political climate was by this time intractably poisoned as the stage was being set for a titanic battle at the referendum. The "Yes" and "No" campaigns began even before the Attorney General commenced work on the PNC.

2.6.5 The Proposed New Constitution (PNC)

122. The function of the Attorney General under the Consensus Act was stated in the following terms –

> *Within thirty days after the National Assembly submits the draft Bill to the Attorney General, the Attorney General shall publish the Proposed New Constitution based on the draft Bill and amendments as approved by the National Assembly.*

123. The mandate of the Attorney General was, therefore, purely technical and limited to the reduction of the Kilifi amendments to a single intelligible, flowing and sound document. It was probably a thankless and onerous task, as the Kilifi amendments as passed by Parliament were already the subject of such momentous controversy. Be as it may, on 22nd August 2005, the Attorney General published the PNC.

124. By this time, a clear pattern had already been established on the national plane. The opposition and their supporters roundly attacked and dismissed the PNC (dubbed the Wako Draft), while Government and its supporters were overflowing in their praise of the document.

125. Opponents of the Wako Draft also tried to stop its publication by legal means. The LDP and KANU cases sought to stop the Attorney General from publishing the Draft Constitution Bill and holding the referendum. Civil society under the umbrella of the 'Yellow Movement' likewise moved to court to stop the referendum, a case that was to drag on up to the very last week preceding the referendum and spilt over into the vote. The question of the legality of the referendum was the bone of contention in the case *of Patrick Ouma Onyango and Other vs the Hon Attorney-General and Others (dubbed the Yellow Movement Case).*

126. On 15th November 2005 the High Court ruled that: *The referendum does in a way, for a split second give the people executive, legislative and judicial powers to determine whether they were sufficiently involved and consulted and whether the final product has the content and the substance, whether the final product was properly framed and whether it is a document they would want to enact. Upon enactment in the referendum they shall have put their final seal of approval.*

127. This decision though it paved the way for the holding of the referendum by declaring the referendum to be lawful did nothing to bridge the big divide into which the Kenyan people had by this time been cast.

128. On November 21st 2005, the people of Kenya, rejected the PNC in the historic referendum. The defeat of the PNC was not an endorsement of the current Constitution. In fact, the current Constitution was never an issue. Although the journey in pursuit of a new Constitution in Kenya has been long and winding, the one thing that Kenyans long agreed about is that the current Constitution does not answer to the needs of the Kenyan nation. The choice before the voters on 21st November 2005, therefore, was to determine whether the PNC as presented met the dreams and aspirations of our people when they first set out on this journey.

129. The verdict of the people was that the PNC fell short of their dreams and aspirations. It failed to pass the test of the minimum standards set out in the Constitution of Kenya Review Act, the legislative framework through which the constitutional review process was conducted. That Act has provisions on the guiding principles and values of the constitutional review process as well as the concomitant institutional framework and relationships. In short, the Act has minimum objective criteria relating to process as well as content that had to be met for the PNC to be acceptable to Kenyans.

2.7 Summary and Conclusion

130. The above review of the constitution-making process in Kenya suggests a number of conclusions revolving around several issues. The first issue is that of the genesis of the review making process. The review process began as a quest for the removal of an oppressive leadership. Many observers have made this point before; some have argued quite simply that the review began as an anti-Moi enterprise and, therefore, took on many negative connotations rather than expressing itself positively as a means of creating better constitutional order.

131. The second issue is that the history of the constitution review process has been characterized by contention. This contention has revolved around the process as well as the content. On the surface it would appear that there has been even more contention over the process than the content. This issue can be sub divided into several sub-issues. The first sub-issue is that the process has been informed by the political undercurrents of the day. This becomes obvious, when one analyzes for example the change of positions by the various actors. Depending on the political undercurrents of the day, some would support the review process on one day and oppose it on the very next day.

132. The second sub-issue is that the process has been characterized by a lack of clarity on which actor should be doing what. There is a lack of clarity on the roles of the various actors and the rules governing those roles. In this case, the principle actors have been the Executive, political parties, civil society, parliament, the Judiciary and the people in general. Overall, it would seem that the roles for these particular actors were never conceived clearly at the beginning of the review process and emerged as the process unfolded.

133. The third sub-issue under the process is that the process itself has not been a properly planned activity. In a sense, it has been so dynamic that it has

had many *ad hoc* characteristics that react to the prevailing circumstances rather than follow a pre-planned path with a clear direction of what should come first, what should follow that and what the results should be.

134. It has been a somewhat chaotic process and unpredictable process. An aspect of this and in a sense this is a separate sub-conclusion, is that there has not been any synchronized unfolding of the events including how these events should be timed and how one output from an event will lead to the next event. There has not been any synchronized timing of the various activities.

135. Related to this, is the question of having fallback positions. Because the process has not been properly planned and synchronized, there is a sense in which the outcome of events has caught the country unawares and because of this, one gets the feeling that the country has reacted without pre-planned fall back positions. Perhaps this is to be expected given the lack of synchronization discussed above. The multiplicity of the actors, the lack of proper consultation between the various actors; all these have tended to result in perhaps more spontaneity than would be good for an important process like this.

136. Related to this is the question of trust between the various actors. Quite evidently, the process has been characterized by lack of trust. There has certainly been a lot of what might be called *Machiavellian politics* where promises are made and broken, which of course has led to more mistrust thus making it very difficult for the process to move forward. This is quite clear from the days of the Safari Park round of meetings, to the Bomas round of meetings, all the way to the referendum. This issue will be revisited when we look at what the people said as we analyze the presentations made to the Committee.

137. Another important issue related to the process is that it has not always involved the people at all stages of the process. Indeed it has not been easy

to clearly identify what the "people" means. Whereas a forum like the Bomas of Kenya and some of the civil society initiated fora of the earlier sessions such as the Safari Park meetings had a good measure of people's representation, it is not clear that later on, particularly during the consensus seeking stages, the people were involved. It is also clear that the only time that the people were clearly involved directly was during the referendum.

138. It can therefore be said that the overall conclusion on the process of constitution making in Kenya is that it has been a somewhat confused process, it has been a protracted process; it has been an unplanned process and this explains why up to now the process has not been completed.

139. On the issue of the content, one can arrive at one or two major conclusions. The first one is that the content has been equally contentious and this also explains why the process is yet to be completed. Several things stand out with regard to contentions about the content of the Constitution.

140. One, the debate on the content has been informed by historical fears and historical baggage something which we discuss later in this report. These fears have not always been clearly expressed but they are clearly identifiable in the views expressed by the people, and the political ambience surrounding the process.

141. The second point that one observes on the contestations about the content is that it has not always been clear what constitutes contentious issues. Indeed one of the features of the various draft constitutions produced is that the contentious issues have tended to shift over time. Although there are clearly identifiable primary ones, others have tended to crop up from time to time. For example, what were the contentious issues at the NCC might not be the only contentious issues after the referendum, as new ones did come up during the referendum. Again, we shall revisit this issue in ensuing chapters.

142. Apart from the difficulties of identifying the contentious issues, a third related question is whether the process has had any meaningful mechanism for addressing the contentious issues. Clearly, what emerges from this history is that the process has tended to improvise on mechanisms for addressing contentious issues. Perhaps a better alternative and this will be discussed later, would have been to build such mechanisms into the process itself right from the start.

143. Fourthly, with regard to the content, there is the question of areas of agreement. It seems from the review of the history, that the process has not fully appreciated the importance of areas of agreement or if it has, then, there has not been any strategy on how to exploit these. For this reason, the agreements have tended to be overshadowed by the contentious issues. Again, this is something that we shall revisit later on.

144. Finally, the overall conclusion to be drawn from the review of the constitution-making process in Kenya is that it is very difficult to separate the process from the content because the two are mutually influencing each other. A contentious issue, for example, will hold up the process as happened at the NCC. Contentious issues will require creation of *ad hoc* mechanisms to resolve the issues as happened with the Kilifi Accord and the Naivasha Accord. Therefore, even though our task is to look at the process, we would like to make the plea that it is very difficult to separate the process from the content.

PART II

THE REVIEW PROCESS

VIEWS FROM THE PEOPLE

CHAPTER THREE

OBSTACLES TO AND SUCCESSES OF THE REVIEW PROCESS

3.1 Introduction

145. The first part of this chapter presents the people's views on what went wrong with the review process. The second part of the chapter summarizes what the people told us about the successes of the review process. The chapter indicates that the people had given considerable thought to the twin issues of obstacles and successes, though on balance they were more inclined to dwell on obstacles.

146. The terms of reference required us to "identify any legal, political, social, economic, religious, governance or other issues or obstacles, whether past or present, which stood in the way and/or may stand in the way of achieving a successful conclusion of the constitutional review process". The terms of reference also required us to identify the successes of the review process.

147. We start by observing that some people felt that the first obstacle now was the Committee of Eminent Persons, arguing that it had been constituted without extensive consultations. Others were of the opinion that the findings of the Committee would be used to derail the review process because the Committee would "speak the language of the Government". All the same, they were willing to discuss the challenges/constraints and the successes of the review process. We reproduce these views here, together with our own analysis where necessary.

3.2 Challenges and constraints

Voices of the people

"The political elite hijacked the process and used it for political expediency. This politicized process"

"Ethnicity was actually a result of political selfishness"

"What I dislike about Kenya is divisions among ethnic groups, because they can weaken us and make us go backwards"

"Ethnicity in the Kenyan context is a complex issue that can only be effectively addressed by a new constitutional dispensation where every community is guaranteed equal benefits to public resources ..."

Excerpts from public hearings

148. The overall picture that emerges from this chapter is that people were able to identify the key linkages between the review process and the political dynamics of the Kenyan society. Many were of the view that the political context, more than anything else, shaped the various phases of the review process. In their view, the process is as important as the product and therefore it is important to have consensus at every phase of the process.

149. The views presented to the Committee were varied partly because of the complex nature of the review process and partly because of the long and arduous journey that Kenyans have travelled during the process. We have nonetheless been able to identify about six different types of general constraints or obstacles. These constraints include those located in the broader social-political and economic context; the legal or legislative context; the referendum and the draft document itself; and those concerning the media, among others.

3.2.1 Social, Political and Economic Context

150. The social-political context of the constitution review process in Kenya is fairly well understood. It suffices to mention that that ethnic and political factors increasingly shaped the review process as well as its outcome. Division and disagreement spilled over into the constitution-making process at the very early stages of the process and continued to inform its progress. This ultimately shaped the referendum and the subsequent results. This was quite evident in the public hearings and the written memoranda received from the public.

151. The economic context had a role too. In the early 1990s when the struggle for democratic reform gained momentum, the economic growth rate was sluggish - generally under 2 per cent per annum. Increased poverty and widening income inequalities became a characteristic feature of Kenyan society. Notably, close to half of the population lived below the poverty line while the gap between the rich and the poor widened. This context, which arguably continues to prevail today, has affected the review process as well. Many people told the Committee that poverty informed people's perception of the review process because many were concerned about unemployment, poor governance and rising poverty levels. In the view of many, poverty provided the political elite with opportunities to influence the ordinary wananchi in many ways.

152. Many youth who spoke to the Committee spoke with passion about widespread poverty, unemployment and poor governance. They said they were apathetic and disillusioned about the review process. Many also argued that the poor state of the economy and infrastructure significantly influenced how people voted during the referendum.

153. From the public hearings, individual consultations, commissioned studies, and the national survey, we have identified several social-political factors that acted as an obstacle to the review process. These include the political history of the review process, ethnic and political divisions, the

Government's conduct of the review process, as well as short-term vision of politicians (both those supporting and those opposed to the PNC). These are discussed below.

History of the review process

154. From the public hearings and our analysis of the written memoranda, it is clear that the review process has a long history. There were recollections on negotiations over the independence Constitution at the Lancaster House constitutional conference in London. Many argued that the outcome of those negotiations continues to have an impact on the review process.

155. From the analysis of various sources, it is clear that Kenyans were fairly united during the struggle for independence. As negotiations on the independence Constitution continued, differences between different groups emerged. Ethnic consciousness among various groups was heightened with the formation of political parties along ethnic lines. The constitution-making process became increasingly dominated by issues of, among other things, numerically small versus large ethnic groups.

156. As explained above, both KANU and KADU agreed to, among other things, a parliamentary democracy, a federal or majimbo system of Government and multi-party democracy. However, the majority party, KANU, quickly dismantled some of these institutions after independence with a view to consolidating political power. The problems facing Kenya's review process can be traced to this period. Many people told us that the amendments that followed aimed at establishing a centralist state and creating a presidential system without consulting the people.

157. The amendments that followed created a semi-presidential system, a weak bill of rights and removed the majimbo system of Government altogether. The executive was strengthened and a unicameral legislature created. The struggle for constitutional reform has consequently centred on how to address the consequences of these amendments.

158. Many people told us that, in their view, the Constitution was being turned into a political tool to strengthen the presidency. In their view, the presidency, throughout Kenya's independent history has been used to dispense favours to loyal supporters and kinsmen. The amendments thus removed mechanisms for democracy and political accountability.

159. The consequence of the above is that leaders from different communities have been competing for control of the state and its institutions. The competition, according to many people, is inspired not by national interest but by personal and parochial interests of political leaders. Once in power, the elite have little commitment to a review of the Constitution for the common good. This has adversely affected the constitution review process.

Ethnicity/ethnic interests constrained ratification of PNC

160. Many people argued that social-political factors influenced the review process more than other factors. Many identified ethnicity and political divisions among the political elites, as significant factors in this regard. They observed that 'ethnicity played a major role in the review process and would continue to do so as long as politicians from different ethnic communities continue to turn the review process into an instrument for fighting each other. Many argued that the review process had been turned into an instrument of settling political grievances among leaders representing ethnic interests.

161. We were told that there exist deep historical ethnic grievances on the sharing of national resources and that unless these are addressed to the satisfaction of all affected communities, the grievances would continue to undermine any constitution-making process in this country. In the view of many people, good governance and adherence to democratic principles in the management of public affairs is inseparable from the way national resources are distributed.

162. In respect of the PNC, ethnicity was used to rally support or opposition to it. People opposed or supported it on the basis of ethnicity. Many of those who appeared before us were of the view that the PNC was tailored to favour the interests of people from the Mt. Kenya region. The region was thus inclined to support the PNC because of this perception while others remained opposed to the document. Indeed, the findings from the national survey show that many people (59%) in Central were unhappy that the PNC was rejected. Many people in other regions were happy that the draft was rejected – 75% in Coast province; 89% in Nyanza; 63% in Rift Valley, 54% in Eastern; and 57% in both Western and North Eastern Provinces.

163. On the whole, there was a glaring ethnic pattern of voting in the referendum. Except in Central Province where support for the PNC was resounding and Eastern where support for or against the PNC was almost equal, other regions of the country voted overwhelmingly against the draft. Many told us that political leaders and other local elites deliberately distorted the contents of the PNC and gave guidance on how their communities should vote. We were also told that politicians used the review process to engage in propaganda and to make hate speeches against other ethnic communities.

Politicians' personal interests and short term vision acted as an obstacle

164. We have already observed that politicians, acting as ethnic leaders, lacked commitment to producing a new Constitution and had short term political interests. Those who presented their views before us said that the politicians used the review process to settle political scores and to advance their political ambitions. The national interest was clearly lacking.

165. On the whole members of public showed deep distrust for political leaders whether from their own communities or outside. Many of those who came to give their views advised that politicians should not be involved in future review processes if they are to succeed. This, they argued, was because

politicians would bring their short term political differences into the process.

166. The national survey indicates that Kenyans are realistic enough to understand that politicians cannot be entirely excluded from the review process. Asked how much politicians should be involved in the future, 28% said that politicians should be very much involved; 41% said politicians should be partly involved while 28% said politicians should not be involved at all. Thus, a majority (28%+41%) do see some role for politicians even though there is some worry about the nature and intensity of their involvement.

167. The message we got from those who appeared before the Committee was fairly clear. People were unhappy with how politicians – both in the opposition and those in Government and others who supported the PNC – participated in the review process. Their participation in both the "Yes" and "No" camps was clearly not in line with the people's aspirations and the national interest. Nonetheless they cannot be entirely excluded from the process even though the people were unhappy with the manner of their participation.

Politics of MOU spilled over to the review process

168. The MOU entered into just before the 2002 general elections by the major partners in the National Rainbow Coalition (NARC) found its way into the review process. Although the content of the MOU was not well understood by the public until the disagreements came to the fore, failure to resolve those disagreements caused permanent tension and suspicion between the two factions of the ruling coalition - NAK and LDP. Many people argued that these divisions deepened after the President invited members of opposition parties, including KANU, to take up cabinet posts and other positions in Government. One of the presenters argued that –

> *"There were attempts at Bomas, and this continued even up to the referendum, of either*

effecting the MOU between the two major parties or to abrogate that MOU."

169. Some of those who made presentations before us argued that this constrained the review process. Factional fights within NARC found expression in the constitution-making process, especially in the later stages of the NCC. The constitution-making process thus remained captive to partisan politics even after the departure of KANU from power.

170. The MOU was mentioned as an important factor contributing to the rejection of the PNC. We were told that both factions sought to manipulate the constitution-making process to achieve different goals in the context of the MOU. It was argued that there was a sense in which the NAK sought to use the process to frustrate the MOU and finally defeat the LDP side. On the other hand, the LDP sought to use the constitution-making process as the means of enforcing the MOU and fighting the NAK onslaught.

171. We are persuaded that the MOU raises fundamental issues about trust and confidence between and among leaders. Failure to honour the MOU, we were told, eroded the basis of trust and confidence among leaders and different ethnic communities. Considering the sentiments expressed by many people during the period of our consultations, we find it important to underline the need to rebuild trust and confidence among leaders.

172. It is not in the place of the Committee to determine whether or not the MOU can or should be honoured. In view of the national time and energy that the MOU has occupied, we are of the view that it is in the interest of the nation that the matter be brought to an amicable conclusion.

Conduct of the Government in the review process

173. The manner in which successive governments have conducted themselves in the review process was identified as an obstacle to the success of the process. We were told that, from the outset, the previous regimes had no interest in a new Constitution; they were interested in making amendments that would protect their power and the political and economic fortunes of those loyal to them. Those who held this view argued that the current constitution provides for a powerful president. We were told that, those in government today, therefore, though they championed the cause of a new Constitution before the 2002 elections, are keen to govern using the current Constitution as they would not want a reduction of their powers.

174. We were told that the Government turned the PNC into a 'Government project' yet Kenyans demanded a 'people-driven' review process. Those opposed to the PNC, we were told, took advantage of this and convinced their constituencies that the Government had hijacked the review process from them and was imposing its views on the people.

175. We were also told that the Government failed to dialogue and to reach out to other groups; that the Government failed to provide leadership. Some presenters cited the Government's walk out at the NCC as an example. The Government was said to have been hostile to those opposed to the PNC and to have gone to great lengths to use state resources to support the 'Yes' campaign. In this regard, some presenters claimed that the Government had sought to "buy" support from various groups by agreeing to meet their community demands. Many people interpreted this as an attempt by the Government to bribe voters and communities into supporting the PNC.

176. These perceptions raise the need to carefully consider the role of the Government in future constitution review initiatives. It is important to limit the Government's role to objective facilitation of the process. This can be done without taking a direct role in supporting or opposing any draft document. In our view and as already mentioned, the process is as

important as the product. The Government should only facilitate the process and leave the organs of the review process to carry forward with the process. Any attempt to influence or shape the review process will be interpreted as an attempt to hijack the review.

The role of religious leaders

177. Many of those who spoke before us questioned the sincerity of religious leaders during the review process. We were told that religious leaders played partisan roles. Some called their faithful to either support or oppose the PNC without educating them on the content. Others allied with ethnic interests and were afraid of advising against what their ethnic leaders stood for. Yet others chose to sit on the fence despite their own convictions. Religious leaders were generally blamed for failing to offer guidance and leadership when the nation required them most – they did not come to the aid of Kenya at her hour of need. Furthermore, they were also deeply divided over religious matters as dealt with in the PNC. Their divisions were a matter of public concern; religious leaders were as divided as the politicians were. This led one presenter to conclude as follows:

> *"We think that the mistrust and loss of confidence in the various forms of leadership in the country whether they are religious leaders, be they civil society leaders or political and many acts of betrayal and shifting of positions by these leaders and goal posts have made Kenyans lose trust and confidence in their leaders. So we think the process or how to conclude this impatient exercise. We have to contend with the fact that ordinary Kenyans out there unfortunately do not even trust the bishops, they do not trust the archbishops, they do not trust any form of leadership in the country."*

178. This sense of frustration is depicted in the national survey results. The survey reveals that only 5% of Kenyans would want the religious leaders to

move forward the review process. Only 9% feel that the religious leaders can be given the task of facilitating the healing of the nation and resolving differences arising from the referendum.

179. The failure of the religious leaders to effectively guide the nation when the disagreements over the review process were at their peak has dented their credibility as honest brokers. Future review processes need to identify roles and responsibilities of various actors including religious leaders so that the country is not left without credible arbiters when differences emerge.

180. We now turn to what people said about the referendum process and the Proposed New Constitution of Kenya.

3.2.2 The referendum and the Proposed New Constitution of Kenya

A flawed and faulty process to the referendum

181. We were repeatedly told that the process leading to the referendum and to the proposed Constitution was flawed from the outset. Some observed that the review process was too complex to understand given that there were many processes that had been initiated from the early 1990s. None of these was ever completed successfully. Further, the actors were too many and their roles unclear throughout the process.

182. We were also told that although the CKRC managed to produce a draft Constitution, the manner of appointment of CKRC Commissioners infused parochialism, ethnicity and divisive politics into the review process. The differences between the Ufungamano Initiative and the Government review process took long to address. This may have spilled over to the process at the beginning. We were told that the Commissioners were constantly fighting and back -stabbing each other and were busy running errands for politicians in Government and the opposition. This, according to some people, had the effect of poisoning the process. This shortcoming, we were told was to later manifest itself in the biased manner in which the

Commissioners handled the Bomas Conference and the partisan positions they took during the civic education exercise ahead of the referendum.

183. We were told that lack of confidence in the review process began from the time the Bomas Conference was constituted. Some presenters argued that appointment of delegates was flawed and resulted in a situation where the quality of some delegates was quite low. We were told that some delegates had been appointed not on the basis of capacity but on the basis of nepotism and corruption. As a result of this, some of those at Bomas could not make any contributions to discussions.

184. There were presenters who complained that MPs at Bomas did not regularly attend the sessions; that their participation was irregular and ineffective. Some claimed that the MPs were arrogant and intimidating; and often warned other delegates that whatever was passed without their support would not pass during the debate in Parliament. Those who made such presentations argued that the MPs, for example, collectively fought other delegates so as to delete the "recall" provision that would have allowed constituents to recall non-performing MPs.

185. We heard from the public that the Government erred by walking out of the Bomas after Government leaders failed to have their way. In the view of many who spoke before us, the walk out by the Government reflected its lack of sensitivity to the review process. People argued that attempts to get consensus continued to be informed by this particular event because from then on no one trusted the Government. Various actors, we were told, continued to read mischief on the part of the Government.

186. Suspicion and mistrust finally found its way into the PNC. The environment under which the draft was produced was already tense, divided and full of suspicion and mistrust.

187. Based on what we heard and our analysis of various documents, we must restate that the constitution review process is intractably linked to the content. We think that it will be impossible to arrive at a document that can be agreed upon by all if the process is not amicable. The people must feel that they have participated in a fair process and that the content represents the outcome of that process.

188. In our evaluation, the process commencing from the close of the Bomas Conference all the way to the production of the PNC, regardless of the content of the draft, had several weaknesses, which required genuine negotiations. It is our evaluation that after the Bomas Conference, the political leaders hijacked an otherwise people-driven constitution review process. For this, the Government and the opposition are to blame. Both turned the review process into an instrument for political contestation. In our view, the future review process should put in place mechanisms for behind-the-scenes negotiations rather than leaving the negotiations to take place publicly in a politically charged atmosphere.

A contentious Proposed New Constitution

189. The outcome of the contentious process was also contentious. The PNC was prepared by the Attorney-General's Office. During the public hearings, we were told that the Attorney-General did the work in a hurry and included matters that were never discussed at any stage of the contentious review process. Many argued that the hasty and non-inclusive manner in which the PNC was produced resulted in general mistrust of the document. Furthermore, we were told that people who had contributed to the various stages of the review process were opposed to the unilateral steps taken by the Government to produce a final document. This alienated the people; they felt that their views did not count.

190. Significant also was that people felt several issues in the draft document were still outstanding and had not been agreed upon. In their view, the

Government rushed into preparing the document without reaching out to those opposed to the process. This caused more suspicion about the document and its content.

191. The Committee heard that contentious issues include: the executive power-sharing between the President and the Prime Minister; structure and levels of devolution; land ownership and use; the structure of the legislature and accountability of members of Parliament to their constituents; religious courts; provincial administration; transitional provisions; amendment of the Constitution; abortion and citizenship to mention only a few. However, people also argued that the contentious issues have been shifting and that the menu has been increasing. Contentious issues therefore "lie in the eye of the beholder."

192. The PNC, we were told, contained provisions that were not acceptable to different groups for different reasons. Many people were of the view that the contentious issues should have been isolated from the issues that were generally agreed upon. Indeed, the failure to isolate contentious issues at the outset led to some non-contentious issues becoming contentious as debates on the PNC raged in the run-up to the referendum.

193. Still others argued that the document was too detailed to guide people in voting. It contained matters that should have been addressed by statutory provisions. In the view of some people, the details in the document created opportunities for arguments in favour or against the document. Some of these details were the subject of great controversy during the referendum. According to some presenters, a future document should concern itself with key values and principles rather than details that ordinary laws can handle.

194. We note with concern that although both sides of the referendum agreed that there were contentious issues, they did not agree or were generally unwilling to resolve them.

195. Some of those who spoke to us underlined that they were surprised the Government agreed to take the matter to a referendum when contentious issues had not been addressed. In their view, asking Kenyans to vote 'Yes' or 'No' on the whole document was unfair. The pursuit of a national consensus was discarded and replaced with a lose-lose situation. The desire to defeat or win motivated both the "Yes" and "No" campaigns. This is an important lesson for the future; consensus and dialogue should be the principles that guide the review process.

Civic education

196. Civic education was cited as one of the obstacles and challenges to the review process. Although on the whole, civic education was hailed as having considerably enlightened the people on constitutional matters, concerns were also raised about its adequacy as well as access to civic education materials. A major concern of the people was that civic education should have included education on the current Constitution to enable comparisons with the PNC. The overall view on civic education was that it was not done well and was not adequate.

197. Although the CKRC Act provided for civic education before the referendum and charged the Constitution of Kenya Review Commission with the responsibility of implementing or supervising civic education, we were told that civic education by the Commission was inadequate and erratic. It did not take place as envisaged in the Review Act. The polarized political climate that dominated the period leading up to the referendum vote affected delivery of civic education. We were further told that the struggle between the NAK and the LDP factions within the ruling NARC coalition also founded the platform for political education rather than civic education based on the content of the document. This increasingly undermined civic education initiatives that were taking place.

198. We were also told that although there were other groups outside CKRC who were providing civic education, these, we heard, came in late and well

after politicians had already ignored the law by starting their version of "civic education" before the official civic education had kicked off.

199. We were told that the political campaigns for the referendum started well before the PNC left the Government Printers. Indeed, as the scheduled civic education timetable began, the referendum campaigns had reached fever pitch. Consequently, civic education providers (both organizations and individuals) were trapped in positions already defined by "political education" and referendum campaigns.

200. Neutrality in civic education was impossible to achieve. Officials of the CKRC openly took partisan positions. As already mentioned, religious leaders, especially those from the dominant Christian churches, refused to give direction and urged their followers to vote according to their conscience.

201. Ethnicity, religion and political differences were used and abused in the referendum campaigns. Because of this, it was difficult to provide civic education. Furthermore, the time given for civic education was too short to do any meaningful work even if the political climate was not as tense as it was.

202. Community Based Organisations (CBOs) were not impartial in their provision of civic education. They adopted positions already held by local leaders thereby defeating the purpose of giving people objective information.

203. The above notwithstanding, we were told that the civic education materials were generally objective and balanced. The Popular Version of the PNC, however, contained some factual errors. The title 'popular' was also criticised because it should have read 'simplified'. Some thought this was an attempt to popularise the PNC.

204. *In our view, CKRC did not provide adequate civic education to enable Kenyans to make informed opinions. The capacity of CKRC to provide civic education was also tested. Other civic education providers came in late and the environment in which they provided civic education was already influenced by positions taken by politicians. In some instances, providers were told that they were wasting their time because people had already taken positions. Politicians in particular, misinformed the public in the guise of providing civic education.*

205. *In our view, although it is difficult to dissuade politicians from political campaigns, future civic education should precede political campaigns and should not be the sole responsibility of any organ of the review process. Other providers should participate in civic education from the outset. This should be provided for in the law underpinning the review process to ensure that other bodies too have the mandate to provide civic education without authority from any body.*

206. Existing civil society groups have the experience and the capacity to roll out non-partisan civic education. Use of consortia plus other existing arrangements should be considered.

3.2.3 The role of the media

207. The media attracted both positive and negative comments from those who appeared before the Committee. On the positive side, we were told that the media is a necessary institution in the sustainability of democracy. It has kept the review process on top of the national agenda for the last two decades. It also played some role in civic education during the referendum. Those who identified the media as an obstacle to the review process argued that the media houses showed bias in what they reported during the referendum. We were told that some of them were so partisan that they fell just short of directing people on how to vote.

208. Objectivity and balanced reporting on issues of national concern such as the referendum ought to be the guiding principles for all the media houses. Unfortunately, many argued, some media houses did not censure what they aired or printed. We underline here that it is important to develop a code of conduct and enforcement mechanisms for the media during the future review process. Media houses, like the rest of Kenyans, have a responsibility to promote national unity rather than ethnic chauvinism/nationalism which some of them promoted with impunity.

209. In future therefore, there is need to reflect on how the media plays its role in order to establish clear parameters to guide media coverage of national events such as the referendum. Those who spoke about the role of the media further argued that the conduct of some media houses could have led to violent ethnic confrontation had the referendum campaign period gone on for a longer period. This was especially true of the media houses airing in local languages.

3.3 Successes of the Review Process

> ***Voices of the people***
>
> *"Kenyans are now more informed than before on the Constitution, the ice has been broken...despite the challenges that the review process experienced, the process did increase people's civic consciousness ... it enabled ordinary Kenyans to rediscover their sovereign power to check and hold accountable those in positions of power...."*
>
> *"Everything else was not good ... but Kenyans showed maturity and voted peacefully'.*
>
> ***.....Excerpts from public hearings***

210. Our terms of reference required the Committee to identify successes of the review process. We again heard from many people and analysed existing materials. As stated earlier, many individuals as well as groups of people were more concerned with analyzing what went wrong rather than on the gains achieved through the review process. We interpret this to mean that the people are frustrated by the failure of the review process to produce

results; a fact that led the people to discuss the failures, challenges and constraints with passion and emotion. It is also a reflection of the pessimism surrounding the review process, a fact that was captured in our national survey.

211. Based on what we were told, the review was a success in several ways. The successes include increased public knowledge and awareness about the Constitution; compilation of public views through a participatory process; and holding Government accountable. These and other factors are discussed below. This is what the country should build on so as to jumpstart the process.

Increased public awareness and knowledge

212. The Committee heard that that the process leading to the referendum had increased people's awareness on the meaning and importance of the Constitution and constitutionalism. Some people said that the review process gave them an opportunity to read the Constitution for the first time. As one presenter stated:

> *"People were able to read various constitutional issues like what it means to have a President. The actual details of a Constitution, which is healthy. It provides people with an opportunity to understand, to appreciate and to critique their Constitution."*

213. Many presenters told us that although the current Constitution has been in existence for many years, they had not read it before. Our national survey was more revealing. Asked whether they had read or studied the current Constitution or parts of it, or whether they had had its content explained to them, 41% said yes while 58% said they had not. But very many Kenyans had read the draft Constitution (PNC); 74% said yes to this same question while only 26% said they had not.

214. The figures clearly show that while less than half of Kenyans had an idea about the content of the current Constitution, many knew the content of the PNC. This can be attributed to the debates around the review process as well as the "political education" by politicians. Indeed some of those who came to the public hearings said that their knowledge of the PNC was derived principally from what they heard in public meetings.

Public participation

215. Many people told us that the review process was participatory in nature and that collecting views was a success on its own. They observed that CKRC collected views from every corner of the country and did not restrain or restrict people from presenting their views. Indeed this is well acknowledged by CKRC in all its documents.

216. We were also told that the review process was open; "you could say what you don't like about the rules that govern society". Everyone who wanted to give views did so without any hindrance. Generally, people said they expressed themselves without any restrictions. Furthermore, the review process provided people with opportunities to be heard and to express themselves about how they wanted to be governed.

217. It is this participation of the people in terms of presenting and contributing their views to CKRC and the review process in general that cemented the concept and notion of a 'people-driven process'. People identified with some aspects of the review process while remaining critical of others. They were critical of the role of the Government, the attitude of some delegates in the NCC and internal dissention in the various organs of the review but did not lose sight of the extensive consultations that took place during the review process.

218. And it is clear that people want to continue playing a central role in the review process. They would prefer to elect members of the forum to come up with a draft Constitution and want a referendum again to ratify any

proposed new Constitution. The findings from the national survey attest to this. Asked whether they would want another draft to be produced and taken to a referendum, 77% said 'yes' while only 21% said 'No". Further asked how members of a national forum to review a Constitution should be constituted (if people prefer such a forum), 72% said that its members should be elected while 25% said the members should be appointed.

Corpus of documents and collation of views for the future

219. We were told by many people that whatever the future circumstances, the next phase of the review process should not involve collecting views because these have already been collected and documented. There are many documents in place and a huge mass of information to tap from.

220. We do concur with these views. There is plenty of information that any future review process can use to produce an acceptable new Constitution. Views collected and collated at the constituency level form an important entry point for cross-checking the various draft documents to ascertain out whether people's views were adequately captured. Many of the presenters were alive to this fact.

Kenyans voted peacefully in spite of ethnic and political divisions

221. We were told by many presenters that one of the most important outcomes of the review process is that it demonstrated that Kenyans can be peaceful in spite of their disagreements and divisions. We were told that that the referendum campaigns caused the build up of tension that could have escalated into violence in some places, but the people resolved to remain peaceful. This was especially the case in multi-ethnic areas.

222. The Committee concurs that the fact that the referendum was conducted and concluded relatively peacefully despite divisions along ethnic and political lines is an important gain in the constitution review process. Kenyans took a major step towards political maturity during the review process.

Kenyans generated a consensus on many issues

223. A good number of the presenters argued that although we do not yet have a new Constitution, Kenyans were able to generate a consensus on about "80%" of the PNC. Those making this point further argued that this achievement of the review process is often overlooked in the din about contentious issues, yet the broad areas of agreement are the foundation for jumpstarting the process.

The Government was called to account

224. Some people argued that the defeat of the referendum was a success in its own way. It demonstrated that people are sovereign and have ultimate control of their destiny. In the view of some presenters, the referendum and the 'Yes' campaign were Government projects and their rejection should be a wake up call to the Government to reflect on its proper role and responsibilities in the constitution review process.

225. There were others who were of the opinion that the Government also demonstrated a sense of political maturity and commitment to respect for democracy by agreeing to conclude the referendum even when it was clear that its project would fail. Those holding this view added that it is rare for an incumbent Government to lose a public vote and accept the results without seeking to interfere with the results. They argued that the Government ought to be given some credit on account of the bold decision to concede defeat and not to interfere with the final results. The lessons from the referendum should be used to inform the conduct of general elections in the future.

3.4 Summary and Conclusions on Obstacles, Challenges and Successes

226. This aspect of the evaluation of the review process received most attention from the people. Many people were able to give a broad catalogue of causes of failure of the review process. Some people focused on broader issues while others paid attention to considerably minute issues. We observe that

many Kenyans were interested in pointing out as many details as possible. This demonstrated the passion and concern that many people have about a new Constitution for the country.

227. A point to note is that there were dissimilarities between the views of political elites and those of the ordinary citizens. While citizens were concerned about largely 'locking out' politicians from the future review processes, politicians were much more concerned about how to limit the role of the Government in the review process. However, some politicians also agreed that 'politics' had generally interfered with the review process. What they meant with politics of course differed from one individual politician to another.

228. The role of the Government in facilitating the constitution-making process should always be clear from the onset of the process. A balance must always be established between the role of the Government, the people, and the review organs. Given the political and ethnic divisions in the country, domination of the Government in the review process generates suspicion and mistrust. Although not many people were able to spell out what the exact role of the Government should be in a review process, it is important for the Government to define only a facilitative role for itself.

229. We must observe again that consensus and dialogue are critical for the success of the review process. It will not be advisable to go forward to any stage if any of the parties in the review process is dissatisfied. 'Walking the talk' is the key to a successful process.

230. Although the ordinary Kenyan is understandably disillusioned with the review process and therefore inclined to dwell on the obstacles, there are successes, and these too were identified by those who made presentations to the Committee. The successes did not, however, receive as much public attention as the obstacles. Yet, the next phase of the process will have to build on the successes.

CHAPTER FOUR

THE LEGAL AND LEGISLATIVE CHALLENGES

4.1 Overview of the legal and legislative challenges

231. Our terms of reference required us to identify legal and legislative challenges to the review process. The Committee received views from a wide cross-section of the public, a good number of whom comprised legal experts. The Committee also commissioned a study on the subject.

232. This chapter summarizes the views from the public as well as our own understanding of the issues. Our conclusion is that there are several legal and legislative challenges and obstacles facing the process and that these need to be addressed upfront if the process is to be jumpstarted and concluded successfully.

233. During the public hearings and consultations we had with various people, we were told about the inadequacies in the legal framework that should underpin the review process. We were told that the legal framework contained many gaps and therefore it could not successfully support the complex review process. Consequently, these gaps were responsible for the legal disputes that faced the review process.

234. Presentations on the challenges posed to the review process by the legal framework took two broad lines. Firstly, some people argued that the constitutionality of the entire review process was always in doubt because of the failure to "entrench" the review process in the existing Constitution. In their view, section 47 of the Constitution remains an important challenge in this regard.

235. The second line of presentations centred on the statutory framework for the review process. This related particularly to the much amended Constitution of Kenya Review Act, Cap 3A, Laws of Kenya.

4.2 The Constitutional Position

236. We were told that from the onset the review process was accompanied by controversy over section 47 of the Constitution and the role of Parliament in the review process.

237. The Constitution has provisions that envisage its amendment under section 47. The section states that Parliament may alter the Constitution by at least sixty five percent (65%) of all the members of the National Assembly voting for the proposed alteration during both its second and third reading in Parliament. The section clarifies that alteration of the Constitution means the amendment, modification or re-enactment of any provision of the Constitution, the suspension or repeal of such a provision or the replacement of a provision of the Constitution.

238. Proponents of a Parliament-driven process relied upon their interpretation of Section 47(6)(b). In their view, reference to "amendment, modification or re-enactment" in that section was broad enough to be interpreted to mean that Parliament, in the exercise of its legislative power vested in it through the provisions of sections 30 and 47(2) of the Constitution, has constitutional authority to alter any section of the Constitution, and therefore all sections of the Constitution. It followed, therefore, from their contention, that Parliament was duly authorized to replace the Constitution with a new Constitution.

239. This position is supported in the Commonwealth, by the decision of the *High Court of Singapore in the Case of Teo So Lung v Minister for Home Affairs*. In that case, the Singaporean High Court held that if the framers of the Constitution of Singapore had intended to limit Parliament's power to

amend the Constitution, they would have expressly provided for such limitations. The Court observed that that Article 5 of the Singaporean Constitution did not put any limitation on that amending power. The courts could not therefore impose limitations on the legislature's power of constitutional amendment. In the view of the Court, to do so would be to usurp Parliament's legislative function, contrary to the Constitution.

240. At this point, in the history of the review process in Kenya, those who sought amendment of the Constitution to entrench the review process were primarily concerned about premature termination of the review process by the ruling party or the Government. They argued that the review process had to be people-driven and could not, therefore, be anchored on an ordinary statute. By extension, it could not be left to the control of Parliament.

241. Despite the controversies over section 47 of the Constitution, the review process proceeded on the premise that whether or not the Constitution needed to be amended, section 47 was adequate in terms of completing the review process. The assumption implicit in the Review Act was that Parliament was competent to receive the product of the National Constitutional Conference and to enact it as the new Constitution of Kenya.

242. The scope of section 47 of the Constitution, however, was challenged in the *Njoya Case*. The High Court ruled that the people of Kenya had the exclusive power to replace their Constitution. Parliament could not exercise that power on behalf of the people. This ruling threw the constitution review process off track as Parliament could not receive the draft and enact it as a new Constitution. The Court also made a referendum on the product of the National Constitutional Conference mandatory.

243. The ruling in the *Njoya Case* re-opened the debate on section 47 of the Constitution. We were told that the Attorney-General advised on the need to amend section 47 in order to put matters to rest and beyond doubt. This

did not happen. Political expediency, it was argued, superseded legal considerations.

244. Those who gave us expert opinion also argued that on account of the failure to amend the Constitution, the current Constitution of Kenya could not be extinguished and another given life in its place. This could not happen on the basis only of the provisions of an ordinary Act of Parliament.

245. We were told that the essence of the principle of the supremacy of the Constitution is its superintendence over all other laws. Any other law is null and void if it is in conflict with the Constitution. In this view, an ordinary statute prescribing the manner in which the Constitution of Kenya would cease to have effect and how another Constitution would come in its place was unconstitutional and null and void to that extent.

246. These arguments occupied public debate up to the very last week preceding the referendum. As we explained in Chapter Two, these were issues in the *Yellow Movement Case*. The decision in this case underlined that the referendum was lawful. This decision implied that people are sovereign, and that their verdict, through a referendum is sufficient to mend any defects constitutional or otherwise that may have occurred in the course of the constitution review process.

247. We were told, and we agree, that neither the decisions in the *Njoya Case*, nor that in the *Yellow Movement Case*, nor indeed in any of the other related cases, settled the controversy over section 47 with any finality. Legal scholars remain divided as to the correct interpretation of these decisions as well as on the soundness of their grounding in constitutional theory.

4.3 The Constitution of Kenya Review Act

248. As indicated earlier in Chapter Two, the Constitution of Kenya Review Act was first enacted in 1997. Consensus raised by stakeholders led to the Review Act not coming into operation until it had been re-negotiated and extensively amended. Even after commencement one year later in 1998, the Act still ran into difficulties necessitating further amendments. More amendments were to follow each year from 2000 to 2002 and later in 2004. Each amendment was the result of protracted negotiations.

249. We were told that one of the major strengths of the Review Act was that it evolved from negotiations over a number of years and that it involved key stakeholders. Further, the broad framework it proposed for constitution review was acceptable to Kenyans.

250. On the flip side, we were also told that, the Act contributed to the politicization of the constitution review process. This manifested itself in the selection method of members of the Commission and of the National Constitutional Conference. In allowing political parties to be the main sponsors of members to the Commission and the National Constitutional Conference, it was inevitable that such members would represent particular political interests or preferences, which they then championed in the constitution making process.

251. In respect of the delegates to the National Constitutional Conference, many views were expressed. Many people argued that the statute did not provide for a fair process of selection of these delegates. Some presenters argued that this led to appointment of delegates who were unequal to the important business of constitution making. We were also told and this was one of the issues in the Njoya Case; that the delegates were not fairly representative of the country and that some parts of the country were over-represented while others were underrepresented. Those holding this view were highly critical

of the draft Constitution produced by the Conference, popularly referred to as the Bomas Draft.

252. There were also presentations in praise of the Conference as constituted and conducted. Presenters supportive of Bomas were also in favour of the Bomas Draft and went so far as asking that it be put to a referendum. In our evaluation the views on Bomas accurately mirror the divisions in Kenyan society.

253. Many people before us pointed out that failure to entrench the review process in the Constitution left the Review Act amenable to manipulation as the political fortunes of the various actors fluctuated. We were told that amendments made to the Act were motivated by self-centered and partisan interests. Concern was raised in particular about the manner in which the Consensus Act was introduced. The Act was passed for the purpose of kick starting the review process after the paralysis occasioned by the *Njoya Case*.

4.4 The Consensus Act

254. The Consensus Act was ostensibly introduced to facilitate the exercise of the right and power of the people of Kenya to replace the Constitution with a new Constitution. The Consensus Act charted the process for the proposal and enactment of the new Constitution. It provided, *inter alia* that-

- CKRC Conference, prepare its final report and draft Bill;
- Within thirty days of the coming into operation of the Consensus Act, the Commission would submit its final report and draft Bill to the Attorney-General for presentation to the National Assembly;
- The National Assembly would consider the final report and the draft Bill and subsequently submit them to the Attorney-General together with any changes that the National Assembly may have made;

- Thirty days thereafter, the Attorney-General would prepare and publish a proposed new Constitution based on the draft Bill and any changes made by the National Assembly;
- Ninety days after the publication of the proposed new Constitution, a referendum would be held to give the people an opportunity to ratify he proposed new Constitution;
- If the people were to ratify the Constitution, the President was to, without delay, publish the text of the new Constitution in the Gazette and by notice in the Gazette proclaim the new Constitution.

4.4.1 Gaps in the Consensus Act

255. There were several weaknesses in the Consensus Act. The Act did not provide for a minimum voter turnout for the referendum to be valid as is the case in some jurisdictions. Doubt was expressed about the political legitimacy of the referendum if the national turnout had been low.

256. The Consensus Act had no requirement for a minimum number of votes to be cast for ratification. It provided only that a simple majority of votes was required in order for the PNC to be ratified. It had been proposed in the Bill preceding this Act that the rule applicable in presidential elections should apply - that the PNC in addition needed to receive 25% approval in more than half of the provinces for it to be ratified. Parliament deleted this provision from the Bill.

257. In our assessment, this was not a prudent thing for Parliament to do. The suspicion, fear and mistrust that prevailed required that efforts be made to reach out to and re-assure all ethnic communities - big and small - that there was a genuine commitment to take their concerns on board. The 25% rule should have been left to apply.

258. We are of the view that the removal of the 25% rule upset some groups and in particular the smaller communities. We were also told that smaller communities felt threatened by the larger or the more populous communities because the latter could pass the PNC with or without the former.

4.5 The Referendum Law

259. The absence of a legislative framework for the conduct of the referendum was a source of concern. The High Court decision in the *Yellow Movement Case*, notwithstanding, the Electoral Commission repeatedly underlined that its superintendence of the referendum process was severely constrained by the absence of a statutory framework. The referendum took place in the absence of a law to govern the campaigns. Thus campaigns begun prematurely even before the Proposed New Constitution was published and way before the time allowed by the Electoral Commission of Kenya (ECK).

260. The referendum campaigns were characterized by the use of inciteful and inflammatory language. There were also incidents of violence and the unlawful use of force at rallies by the police. There were several violent incidents in which several people died, among them children, in Kisumu and Mombasa. By its own admission, the Electoral Commission found itself unable to act in the face of open violation of the electoral rules by, among others, senior Government officials. The Commission was reduced to merely threatening to withdraw from the entire referendum process, an abdication of a constitutional duty whose validity would be subject to debate.

261. The campaigns, during the referendum could not be characterized as having been free and fair. We were repeatedly told that the campaign period served to create a situation of fear and national anxiety about the outbreak of violence on or after the polling date.

262. In our view, the absence of a referendum law made the referendum a legally and politically risky venture. If the draft was ratified, it was probable that it still would have occasioned unending legal and political disputes.

4.6 Summary and Conclusions

263. Several conclusions can be drawn from this discussion and on the basis of what the people said about the legal framework as an obstacle to the review process. The legal framework was a problem on its own. This is because it had legal gaps that were exploited and manipulated by different parties at different times. There were different interpretations as well as misinterpretations about section 47 of the Constitution.

264. We were repeatedly told, and we agree, that the law on the review process was not entrenched in the Constitution. In our view, the legal framework to guard the review process and facilitate replacement of the current Constitution should be entrenched in the Constitution, in order to put the matter to rest and beyond doubt. The principles for this law are spelt out in detail in Chapter Seven of this report.

265. The law governing the review process went through a series of amendments because its objectives kept changing to reflect the changing circumstances. Some of the amendments paved way for more disputes over the review process. They provided opportunity for partisan politics within CKRC itself. The law on the review process became a law of unending amendments principally because of the manner in which it was first conceptualized. The original spirit of the law and the outcome of the amendments therefore were different. Amendments were introduced on piece-meal basis with the effect that the Act became a discordant patchwork of legal provisions.

266. Our evaluation leads us to the conclusion that the legal status of the review process has remained unsettled. We come to the view that the review process should be entrenched in the Constitution in a way that leaves no doubt about the mechanisms of its replacement. Again we deal with this subject in greater detail in the chapters that follow.

CHAPTER FIVE

DIVISIONS, RECONCILIATION AND HEALING, AND THE REVIEW PROCESS

5.1 Introduction

267. Our terms of reference required us to solicit public views on: the questions of divisions created by the review process, particularly the referendum phase of it; the issue of how these divisions can be handled through reconciliation and healing; how to handle the contentious issues; and how best to complete the review process. This chapter reports what we heard from the public. The overall conclusion is that, except for a few presenters, the public accepted these as legitimate issues meriting evaluation. They accepted that there are divisions and that a way needs to be found to address them through reconciliation and healing, that contentious issues are a major cause of the divisions and that a way must be found to complete the process.

5.2 On Divisions

Voices of the people

"there is little doubt that the process of review has led to division along ethnic, political and religious lines. Tensions between a nation and her international development partners have been exacerbated. Relationship within the civil society realm have been stretched. The media has partly become an instrument or heightened these division and tensions. There are wounds all round!"

Excerpts from public hearings

268. A small minority of the views expressed during the public hearings were to the effect that no serious divisions arose from the review process and the referendum among Kenyans. This category of presenters argued that if any divisions existed, they were shallow, superficial and were in fact the creation of politicians. Other presenters were of the opinion that such divisions could not be blamed on the review process but existed even prior to the referendum and had only been made worse by the referendum. Most of the presenters however, 65% from our national survey, accepted that there existed major divisions in society as a result of the review process. The divisions, we were told, are historical, political, social and economic.

269. At the historical level, people's views acknowledged that Kenya's history of divisive politics had left the country more divided over the years. Ethnic allegiances as opposed to allegiance to the nation had made it common place for politicians to constantly appeal to the ethnic biases of Kenyans in order to further their own agenda.

270. Other historical reasons were also adduced as the source of the divisions surrounding the review process. The Committee heard that the divisions emanated right at the inception of the review process due to the lack of a real consensus in the Inter-Parties Parliamentary Group (IPPG) initiative. We were also told that CKRC was constituted on the bases of political, ethnic and even personal loyalties.

271. At the political level, the actions and utterances of the political class were perceived by presenters as intended to create divisions. A number of presenters were of the view that the political class was responsible for creating the current polarization in Kenyan society.

272. We were also told that the divisions widened within the NARC due to the failure to honour the pre-election MOU. This, we were told, led to mistrust among key politicians and loss of public confidence in the NARC coalition.

273. We further heard that the divisions were aggravated by the lack of real consensus in the contentious issues that arose during the deliberations at the NCC. Disagreement on these issues resulted in the walkout from the NCC by Members of Parliament allied to the Government.

274. On the whole, we were told that the "Yes" and "No" campaigns in the run-up to the referendum confirmed the divisions that exist in the Kenyan society.

275. At the social level, it was stated that the review process had divided Kenyans along religious and cultural lines. We were told that the provisions of the PNC on religious courts had given rise to disagreement among religious leaders and this spilled over to their followers.

276. The PNC was also perceived by some presenters as failing to be attentive to the social-cultural sensibilities of local communities, for example, giving women the right to inherit land.

277. At the economic level, unequal distribution of resources, high unemployment rate and the ever widening gap between the rich and the poor, were cited as factors that served to enhance divisions in the society.

278. It is evident, from the foregoing, that Kenya's history of divisive politics was replayed during the referendum. It has now become common place, much more so than in the past, for Kenyans to identify with their ethnic groups and for politicians to appeal to the ethnic biases of Kenyans.

5.3 Reconciliation and Healing

279. Many of those who made presentations to the Committee were of the view that the country needs reconciliation and healing. Some went a step further to argue that the appointment of COEP was in itself an initial step.

280. We must note however, that this view was not uncontested. Some felt that the manner of appointment of our Committee was itself aggravating the existing divisions.

281. There was no general trend in the presentations on who should take the lead in the reconciliation and healing process. A good number of presenters indicated that the Government through the President should take the lead. Others argued that faith groups should take the lead, while still others wanted civil society groups specializing in the area of conflict resolution and reconciliation to take the lead. There were also those who suggested that international mediators be engaged to oversee the reconciliation and healing process.

282. Out terms of reference required us to recommend a process for national healing to facilitate reconciliation and fruitful dialogue. Views presented to us suggested a process that would include:

- acknowledgement of the existence of the divisions in Kenyan society;
- apology and repentance by those who caused these divisions;
- all parties putting aside their pride in the interest of the nation;
- dialogue and negotiations between both sides of the political divide;
- reconciliation of both sides of the political divide;
- appreciation of the need for national unity, peace and stability for the nation to move forward;
- a win-win mechanism that would embrace inclusivity and enable all parties to escape with their honour;
- the involvement of all the stakeholders in the review process;
- political goodwill from all concerned in taking the review process towards its successful completion.

5.4 Dealing with the Contentious Issues

283. The Committee received many of presentations on how to handle the contentious issues. Clearly, this is an issue that a number of the presenters had given some thought to.

284. A good number of presenters argued that the first step towards resolution of the contentious issues should be an acknowledgement by all that contentious issues exist even though some are fluid and changing overtime. We were told that the contentious issues that had been identified during the Bomas Conference were not necessarily the contentious issues during the referendum. The post-referendum period had also generated its own contentious issues.

285. We were further told that in restarting the review process, the areas of agreement should first be isolated, leaving the contentious issues for discussion and debate by the constitution-making organ.

286. On the mechanisms for the resolution of contentious issues, it was suggested that the contentious issues be handled through mediation by a person or persons who would not be a member(s) of the constitution-making organ. This person(s) would be a renowned and highly respected international mediator(s) who would be tasked with monitoring the progress on the discussions, noting the emerging areas of disagreement on the contentious issues and convening "out of public view" a parallel forum to negotiate agreement. The mediator(s) would be backstopped by technical experts.

287. A related view was that the contentious issues outstanding at the end of the constitution-making period be subjected to a referendum on an-issue-by-issue basis. This would be done at the same referendum seeking ratification of the Constitution but each issue would be listed separately for a "Yes" or "No" vote.

288. Another view was that if a contentious issue was rejected at the referendum, then it would be confined to a constitutional category of "unfinished business" to be discussed every so often (say every five years) in an effort to reach agreement. If agreement was reached, then the issue would be incorporated into the Constitution through a constitutional amendment.

289. The Committee further received the suggestion that the best way to jumpstart the review process would be to structure it around the contentious issues. Thus whatever organ was chosen to complete the process, its mandate would be solely to deal with the contentious issues. This view was however, countered with the more compelling view to the effect that a Constitution cannot be "broken into parts". It must be crafted as a whole contract between and among members of society. Therefore, it would be philosophically imprudent to deal with contentious issues alone without paying attention to how resolution of each contentious issue would affect the other constitutional provisions. The logic of this view is that the new review process should look at the document as a whole.

5.5 Completing the Review Process

Voices of the people

"I see very interestingly, an opportunity that has presented itself... in my view, technocrats, politicians, you and I are all agreed that there is need for a new Constitution, so at least, this is one thing all Kenyans seem to agree about".

Excerpts from public hearings

290. Our terms of reference required us to make proposals for appropriate mechanisms for the completion of the review process.

291. We note at the outset that few of the presentations made to the Committee sufficiently addressed the question of the mechanisms for completion of the review process. Despite guidelines being issued to the presenters to address the issue, most presenters tended not to be certain on this issue.

292. Although the mandate of the Committee was to focus on the review process rather than the content of the Constitution; it became evident from the views presented to the Committee that separating content from process was difficult for many of those presenting views. This was so because the collapse of the process had also hinged on the content of the PNC.

293. Broadly speaking the views on completing the process can be captured as twofold: There were some views advocating for abandoning the review process and continuing with the current Constitution. From the national survey, a significant number of those interviewed were of this view. However, a much higher proportion was in support of continuing the review process to conclusion.

294. The survey results more or less tallied with views presented to the Committee. The majority of the presenters agreed that Kenyans were still desirous of a new Constitution and that the review process should therefore be jumpstarted and continued to its conclusion.

295. Views on the way forward for completion of the review process were diverse. Presenters were however agreed that the next review initiative must be people-driven, all-inclusive and fully-representative. In this respect, we note that the survey found that an overwhelming number of Kenyans (77%) would want another referendum to be held on any proposed new Constitution. Of these, nearly tow-thirds (65%) would want the referendum to be on the contentious issues only.

296. The majority of the views presented were concerned that the way forward be practical, building on earlier successes; that the review process be based on legally sound principles and be acceptable to all stakeholders.

297. Several scenarios for moving the review process forward were recommended during the hearings and the national survey supported many of the scenarios. They include the use of the following options and mechanisms: (discussed in some detail in the next section of this report).

298. There was general agreement among presenters on the important role of experts in completing the review process. The results of the survey reveal that a sizeable majority (31%) wanted the involvement of experts in the review process as compared to 17% who were for the involvement of Parliament, 13% for Government, 22% for a national forum and 11% got civil society. Suggestions on the exact role of the experts differed and ranged from preparation of a draft Constitution to resolution of the contentious issues.

299. Most of those who spoke to us proposed that a Constituent Assembly directly elected by the people be established to conclude the review process. Diverse views were however expressed on the unit for elections to the Constituent Assembly. In general, the constituency and the district or a combination of both, were suggested.

300. Some presenters held the view that the only way to a successful completion of the review process would be through a multi-sectoral national stakeholders' forum. This, they said, would engage all the major stakeholders in the review process and would be highly consultative. Those of this view went further to give the categories from which such a forum would be drawn. These included: the religious groups, professional organizations, women organizations, organizations representing persons with disabilities, and other interest groups.

301. Many presenters held the view that politicians should be excluded from any future review initiatives. Some presenters however, felt that politicians could not be entirely dispensed with. In the national survey 28% of the respondents were of the opinion that politicians be excluded entirely from the review process, 41% stated that they be "partly involved" while 26% were of the opinion that they should be 'very much involved'. The more realistic as supported by the survey's findings, is that there continues to be some role for politicians in the review process.

302. The Committee was also told that the way forward in the review process was to convene a forum similar to the national constitutional conference.

303. It was also suggested that an IPPG-like forum could be a useful means for negotiating a new Constitution.

304. As already noted, most presenters argued for the holding of a national referendum as a prerequisite to the enactment of a new Constitution. This was so regardless of the option chosen for the debate and preparation of a proposed new Constitution.

305. The Committee also received views on the timing of the new Constitution vis-à-vis the 2007 general elections. Some (49% from our national survey) were of the firm view that the constitution review process needed to be completed as a matter of urgency and priority before the 2007 general elections. Others (46%) however felt that that it was necessary to de-link the constitution review process from the electioneering phase. They therefore proposed that any further efforts towards completion of the review should be undertaken after the elections. There were also suggestions to the effect that in order to complete the review process at minimal cost, a referendum should be held simultaneously with the 2007 general elections. Interestingly, in the national survey, when asked whether it is likely that the country would have a new Constitution before the next election, 63% answered in the negative. Despite their hopes, there is,

therefore, a good measure of pessimism in the public mind on the possibility of completion of the constitution review process before the 2007 elections.

5.5 Conclusion

306. As stated earlier, the Committee received plenty of views on the issues under discussion. The views acknowledged that divisions exist, that the nation requires reconciliation and healing, that contentious issues need to be addressed and that a way forward can be found if there is trust and goodwill.

PART III

THE WAY FORWARD

CHAPTER SIX

THE WAY FORWARD ON RECONCILIATION AND HEALING

6.1 Introduction

307. The Committee's terms of reference required recommendations on a process for reconciliation, fruitful dialogue and national healing.

308. As noted in Part II of this report, many people told us that the country needed reconciliation and healing because of the divisions caused by the referendum and in some cases, divisions that existed before the referendum. These divisions were categorized as historical, political, social-cultural and economic. As also noted in Part II of this report, most of those who made presentations before us did not offer concrete suggestions on mechanisms for the reconciliation and healing of the nation although they noted the need and urgency. We must acknowledge, however, that a few groups did offer concrete suggestions on the matter.

309. As a way forward, we wish to start by pointing out that reconciliation and healing is not an event but a continuous process. Therefore, it cannot be confined to a specific timeframe. However, the process is amenable to phasing in such a manner that some activities can be designed as short-term activities, others as medium-term activities and still others as long-term activities. This is the approach we recommend. Reconciliation and healing be undertaken from multi-level platforms rather than being left to a single institution because it is too important an activity to be predicated on, monopolized by or delegated to a single entity, or a few individuals. It is a process that encompasses public and private institutions and policies, but also one that must be guided by certain principles.

6.2 Dialogue and Reconciliation: Proposed Platforms

6.2.1 Platforms and Strategies

310. Reconciliation and healing should be undertaken through a multi-level platform on short term, medium term and long-term approaches.

311. In the short-term we are recommending setting up of carefully constructed and multiple level platforms for building and restoring confidence among Kenyans through key institutions in the society namely: the President, Parliament, religious leaders, peace-building experts, professional bodies, civil society and the media. The objective should be to foster reconciliation and healing and broaden consensus, thereby increasing ownership of the constitutional review process as well as its legitimacy.

312. In the medium-term, the country should institute measures for acknowledging and dealing with the cumulative hurts, traumas and injustices of the past. We believe that the bumpy constitution-making process and the polarization around the referendum campaigns had their roots in historical fears, animosities and injustices that need to be acknowledged and dealt with.

313. In the long-term, we recommend that Kenyans should carefully and seriously consider inculcating a national ethic and patriotism that binds the country together and defines acceptable and unacceptable behaviour, particularly of leaders. Such an ethic should seek to set guidelines with regard to the conduct of political protagonists. It should encourage political leaders and Kenyans as a whole to exercise a high degree of restraint and moderation, encourage sensitivity to and respect for Kenyan's diversity and discourage any form of divisive rhetoric, intemperate and abusive language. The overall purpose of developing a national ethic should be the creation of a united, just and stable nation, marked by respect for human rights and the rule of law, where national interests override personal ones, and where all leaders are held accountable to high standards of ethical behaviour.

314. We recognize that inculcating and enforcing a national ethic is a tall order. However, Kenyans are challenging their leaders, for example Ministers, to take responsibility for any failures within their ministries. This is part of building a national ethic.

315. As part of the reconciliation and healing process, the unequal distribution of resources in the country should be addressed both socially and economically. This was expressed during the public hearings through the view that the PNC was meant to favour a particular community or communities. It is a general perception that once persons from a particular ethnic group are in the top leadership of the country, that community stands to benefit and develop more than other communities.

316. This state of affairs has created mistrust for leaders, especially among smaller ethnic groups, which feel marginalized in the development agenda of the country. There have been efforts through, for example, the Constituency Development Fund to deal with the question of allocation of resources. With time the results may become evident. But again there are concerns that some politicians have meddled in the management of these funds and that the loopholes in the law need to be sealed to address this issue.

317. The Committee was advised that a nation is reconciled and heals as it talks to itself. Therefore, it is suggested that effective platforms for dialogue and functioning relationships based on trust, recognition and respect for each other be established. These platforms could then be used to build consensus on the way forward in the constitution making process and beyond. The more solid the platforms through inclusive and honest engagement, the more likely they are to withstand the challenges of constitution making. In the next sections we discuss these platforms in detail.

6.2.2 The Platforms

6.2.2.1 The President

318. The Committee subscribes to the views of those presenters who argued that the President, as the leader of the nation, custodian of the Constitution and an important arbiter, is looked upon by the people of Kenya to initiate dialogue at the political level and create an enabling environment for national reconciliation and healing. The expected dialogue and enabling environment will go a long way in the successful conclusion of the constitution-making process. In view of the divisive nature of the process, we suggest that the President use his leadership role to create an enabling environment while, at the same time, acting as an important arbiter.

319. The action by the President is envisioned as an immediate and short-term activity. Dialogue should be initiated with the aim of achieving reconciliation and an environment of trust. These are prerequisites for honest and constructive engagement. These may in part include:

- Reconciliatory overtures to the political leadership and the nation at large;
- Reconciliatory messages in speeches during important occasions;
- Reaching out to key political leaders across the political divide.

6.2.2.2 Parliament

320. Parliament was viewed as a possible peace-maker by some presenters. We also recognize that there exist a number of cross-party platforms in the Kenyan Parliament that seek to promote peaceful dialogue.

321. These Parliamentary groups should be encouraged in their efforts towards uniting Kenyan Parliamentarians and their electorate on matters of national importance. Peace-building experts, prominent persons, civil society and religious leaders should be invited to support these groups in designing a process of dialogue among parliamentarians across the political divide and the Kenyan people at large. The initial focus should not be the content of a

new Constitution, but rather consensus building on how the process should be restarted. This will enable Parliament to enact or amend appropriate legislation and provide political support, which will underpin the review process and lead to its conclusion.

322. Peace minded parliamentarians should be encouraged to play a lead role in consensus-building through -

- Parliamentary Prayer Groups, for example, the National Prayer Breakfast Meetings;
- Promotion of dialogue among parliamentarians with a view to building trust and reaching consensus on key issues;
- Engaging parliamentary committees in ongoing peace-building efforts.

6.2.2.3 Faith-Based Organizations and Groups

323. As stated earlier, most of those who presented their views before the Committee, gave "mixed reviews" on the faith-based organizations and their role in reconciliation and healing. On our part, we accept that faith-based organizations and groups have a role to play in reconciliation and healing. Faith-based organizations and groups need to come together again to mobilize Kenyans towards reconciliation, healing and consensus. However, while a forum such as the Ufungamano Initiative focused outwards on the contribution of the faith communities to the constitution making process, an initial focus of a new initiative, this time round, should be on rebuilding trust and focus among and between the faith communities themselves.

324. We believe that very few Kenyans, including faith groups, have been spared by the divisions and mistrust that have surrounded the review process. By signalling a desire to start again and offer spiritual leadership, faith communities would send a strong message to their congregations and to the politicians on the need to move the country forward.

325. The constitution review process in Kenya shows that at the crucial moment the two key religions, Christianity and Islam "were unable to meet". It is crucial that religious leaders from different faiths meet in different initiatives aimed at using religious leadership to foster support for peace. There should be a deliberate attempt to build religious organizations upon the foundation of ecumenical collaboration that encourages a common commitment towards peace building. Working together with members and interested organizations, the religious organizations should promote reconciliation and dialogue. This may be initiated using religious structures and, if new ones are necessary they should be created through consultation and dialogue.

6.2.2.4 Professional Associations and the Business Community

326. Some of those who appeared before the Committee wished to see the Professional Associations and the Business Community play a role in jumpstarting the constitution review process. We are of the view that professional associations and the business community can play an important role in consensus building by creating the space for fruitful dialogue. In particular, professional associations could be called upon to articulate a new process of consensus building free from emotive and political pressures.

6.2.2.5 Civil Society Organizations

327. A small group of those who appeared before us, and only 8% of the respondents from the national survey, thought that civil society organizations could play a key role in moving the constitution review process forward. That notwithstanding, civil society organizations have wide networks and the ability to interact with various groups. They have the capacity to initiate and promote dialogue at all levels of society. They are key stakeholders and partners in reconciliation and healing and ultimately in the process of completing the review process.

328. Civil society organizations need to recognize, however, that they are a microcosm of Kenya and divisions in the country affect them along with everyone else. We are of the view that civil society organizations should come together and review their place and role in building consensus for reconciliation and healing. Civil society organizations could also lend their creativity and resources towards suggesting a process of consensus-building for a new Constitution.

6.2.2.6 Promotion of Inter and Intra-Cultural Integration

329. As we have seen, cultural issues featured prominently among the divisive issues of the referendum and the post-referendum debates. In order to confront and address the prevailing forces of division, the Committee proposes the promotion of inter and intra- cultural socialization platforms through:

- establishment and utilization of socio-cultural institutions working in collaboration with cultural experts and others to discuss how cross-cultural biases can be isolated and dealt with to foster unity;
- promotion of an educational policy that promotes gender-equality and ethnic and cultural integration at all levels of learning; and
- promotion of national cultural festivals which encourage the appreciation of our national diversity.

6.2.2.7 The Media

330. The committee learnt that most media houses did not play a positive role in promoting national unity during the referendum. However, the role and the power of the media cannot be gainsaid. The leading media houses should be encouraged, through a body such as the Media Owners Association, to come together to deliberate on their contribution to the process of reconciliation and national healing. Media houses need to be proactive in initiating programmes that promote peaceful co-existence and harmony. They should examine their practices and how they relate to national peace, security and unity.

331. Many presenters during the public hearings noted that during the referendum campaigns some media houses deliberately distorted information and fanned ethnic hatred, which served to aggravate an already polarized situation. There is, therefore, need to strengthen ethical guidelines for the media. In particular, media houses should examine their modes of reporting, particularly around such an important process as constitution making. The media are an important pillar and medium for the creation of the dialogue and relational platforms suggested here.

332. While the media has perhaps the greatest potential for reaching the masses in whose opinions the fate of the reconciliation and healing efforts may ultimately lie, the existence of joint endeavours in this sector is quite limited. The media needs to create an effective communication strategy for the promotion of co-existence and tolerance. There is therefore a need for the media to:

- Explore a variety of methods by which to communicate the value of co- existence;
- Communicate success stories of co-existence; and
- Encourage and sustain programmes promoting diversity.

6.3 Summary and Conclusions

333. National reconciliation and healing are long-term processes that will not be achieved solely through short-term and medium term arrangements. Long-term engagements must also be envisaged. In the medium term, there is need to entrench dialogue as a way forward in fostering unity and managing the constitution making process. This may require reviewing the recommendations of the Report of the Task Force on the Establishment of a Truth, Justice and Reconciliation Commission.

334. The long-term goal should be to institutionalise mechanisms for reconciliation and healing through the creation of a framework and structures that would articulate and entrench a binding national ethic. It is

also important to create early warning mechanisms to monitor situations as they happen and take appropriate action.

335. The process envisaged will require resources and the inclusion of other actors in order to sustain it. Kenyans will be called upon to offer suggestions based on Kenya's rich and unique experiences as well as best practices observed elsewhere.

336. In this respect we recommend the setting up of an independent team to co-ordinate the reconciliation and healing process. The team should be lean and comprise non-partisan individuals and be arrived at by consensus after broad based and exhaustive consultations and negotiations among ethno-political, religious and other leaders.

337. The effectiveness of such a body will be dependent on its accountability across the political spectrum as well as by the public at large. The primary function of the team will be to catalyse reconciliation and healing, conceptualise the sequencing of events and monitor progress.

338. We take this view with the full knowledge that there is a general fatigue among the public in the establishment of committees, commissions and taskforces. We make this proposal nevertheless, because we are of the firm mind that reconciliation and healing efforts cannot be undertaken devoid of structured institutional mechanisms.

339. The process of dialogue, reconciliation and peace-building is dynamic and requires trust, flexibility and creativity, which are the basic principles that ensure success. The above suggestions are but a guideline to the process and each stakeholder will be expected to be innovative in initiating programmes geared towards reconciliation and healing.

CHAPTER SEVEN

MECHANISMS FOR COMPLETING THE REVIEW PROCESS

7.1 Introduction

340. Our terms of reference required us to make recommendations on the establishment of an effective legal framework for completing the review process. In addition, we were required to provide a roadmap for the conclusion of the review process. We start by outlining the issues that should be covered in the legislative framework and the referendum law, both of which are critical in jumpstarting the review process. We then present a number of institutional options for restarting the process.

7.2 Legislative Framework

341. The Constitution of Kenya Review Act was a self-repealing Act, providing that the Constitution of Kenya Review Commission would stand dissolved thirty days after the final results of the Referendum were announced, and that the Review Act would expire with the dissolution of the Commission.

342. There are three main issues that emerge that will require consideration and clarification within the context of a legal framework. They are as follows:

(a) There is need to consider the process leading to the completion of the review process in terms of the preparation and adoption of a new Constitution as the end product of the process. Key aspects that will need to be addressed in this regard include:

- The entry point in the context of the legislative history of constitutional developments in Kenya.
- Responsibility for the drafting of the new Constitution.

- The manner of dealing with and resolving the contentious issues
- Participation by the people;
- The manner of adoption of the constitutional document.

(b) There is need to consider the legal options available to facilitate the replacement of the current Constitution with a new Constitution, and especially the need, if any, for an amendment to the Constitution.

(c) There is need to develop a legal framework to underpin the entire review process and the mechanisms adopted. Such a framework must be one that will stand the test of time and be informed by the demands of posterity. The resolve of the Kenyan people to secure for themselves a new and better constitutional order is still very firm. This being so, whatever the outcome of any new constitution reform initiative, it must not culminate in a dead end. The legislative framework developed must be one that endures and continues to apply until the dream of a new Constitution is realized.

7.2.1 Legal Framework for Completing the Constitution Review Process

7.2.1.1 Amendment of the Constitution

343. As matters now stand, the Constitution of Kenya must be read in the light of the ruling in the *Njoya Case*. The varied interpretations of section 47 have already been canvassed above. To settle the debate around section 47, there is arguably a need to amend the Constitution to specifically recognise the inherent right of the people of Kenya to replace their Constitution. This is important on account of the lessons learnt from the review process.

344. The minimum that should be accomplished by this constitutional amendment will be:

(a) Recognition of the people's inherent right to replace the Constitution;

(b) Provision for the mechanisms through which the people may replace their Constitution. Such mechanisms include both the process of producing the constitutional document and its ratification. The *Njoya Case* in our evaluation is to the effect that the prerequisites for the replacement of a Constitution are:

- A constituent assembly to prepare the constitutional document and ratify it; or
- A constituent assembly to prepare the constitutional document and forward it to the people in a referendum; or
- A referendum without a constituent assembly.

345. *The operationalization of these constitutional provisions would require the enactment of relevant legislative instruments. We recommend that the relevant legislative instruments be put in place as expeditiously.*

7.2.1.2 Enacting the Review Legislation

346. The Constitution review experience has illustrated that an acceptable legislative framework for the constitution review process must be one that is broadly negotiated.

347. To avoid the pitfalls of the past, the review legislation must have anchorage in express provisions of the Constitution. The review law that will be enacted will have to provide for a process that will finally be settled on after a consideration of several options that are available to the country. We cannot therefore overemphasize the need for genuine consultation and negotiation as the basis for the choice of a suitable option.

348. The legislation should:

(i) identify a body and vest it with the power to shepherd the review process through the various stages culminating in the enactment or rejection of the draft Constitution;

(ii) identify the membership of the body charged with conducting the review process;

(iii) lay out the functions of the members of the body, charged with conducting the review process;

(iv) identify mechanisms for engagement with the people to give views and proposals on what should be in the Constitution;

(v) minimize the role of political players in the review process. As earlier mentioned, a majority of those who presented their views to us, argued that the role of politicians in the constitution review process should be limited; and

(vi) provide for a dispute resolution process.

7.3 Enacting a Referendum Law

349. The 2005 referendum provided the people of Kenya with the opportunity to assert their primordial and inherent sovereign power to make a Constitution for themselves. From presentations made before us, which were and overwhelmingly confirmed by our national survey, it is our evaluation that the people of Kenya would want the referendum to be the means by which they ratify a new Constitution. *It is clear therefore, that any future process of constitution making must include a referendum.*

350. We were, however, told that the referendum process as undertaken in 2005 was not satisfactory. Concern was particularly raised about the lack of constitutional anchorage of the referendum and the absence of a legislative framework to guide the referendum process.

351. The referendum needs to be specifically recognised in the Constitution. Such a constitutional provision should then be operationalized by a referendum law. In our view, at the minimum, the referendum law should:

(i) identify the circumstances under which a referendum will be conducted in Kenya;

(ii) identify the body charged with conducting a referendum on the question of the adoption of a new Constitution;

(iii) identify the persons eligible to participate;

(iv) specify the threshold for the expression of the constituent will of the people and provide for a mechanism to ensure that any decision reached in a referendum truly reflects a national consensus; and

(v) provide a dispute resolution mechanism.

352. *We recommend that a referendum law be enacted prior to the conclusion of the review process in anticipation of a referendum as the concluding activity of the review process.*

7.4 Process and Institutional Options for Completing the Review Process

353. Those who appeared before the Committee and others who sent memoranda to the Committee proposed the following as possible options for completing the review process:

(i) A Constituent Assembly, Experts and a Referendum;

(ii) A Committee of Experts and a Referendum;

(iii) A Multi-Sectoral Forum backed by a Committee of Experts and a Referendum;

(iv) Electing the 2007 Parliament to also act as a Constituent Assembly;

(v) Minimum reforms and amendments;

(vi) Gradual amendments to the Current Constitution; and

(vii) An Interim Constitution, a Constituent Assembly and a Referendum.

354. It is imperative to note that each option should integrate a deadlock-breaking mechanism. In addition, whichever option or combination of options is adopted, civic education would need to be conducted.

355. We now proceed to discuss each of these options.

7.4.1 A Constituent Assembly, Experts and a Referendum

356. This option proposes the establishment of a Constituent Assembly. A small team of experts would provide technical support to the Constituent Assembly. A referendum would finally be held on the draft produced by the Assembly.

357. The establishment of the Constituent Assembly would be worked out in a negotiated review law. We propose that the members of the Constituent Assembly be elected directly by the people and be given a time limit within which to complete their work. We also propose that all persons elected to the Constituent Assembly be barred from taking up specified categories of public office – whether elected or appointed – for a specified period, preferably not less than 10 years. This has been repeatedly articulated as one way to insulate the review process from short-term political interests in which the managers of the process or key participants create Government positions or organs of Government with their personal interests in mind.

358. The unit to be used as the basis of election for representation in the Constituent Assembly requires careful consideration. The argument for one-person one-vote makes the current constituencies and districts controversial as the units for representation in the Constituent Assembly. However, a shift from established units to novel ones would be more controversial. This is because minorities and smaller ethnic groups would perceive it as a clever way of imposing domination by bigger ethnic communities. The various court decisions on the constitution review process have acknowledged the importance of the principle of one-person

one-vote. They have, however, also acknowledged that in a divided multi-ethnic society such as Kenya, that principle cannot be the sole basis for representation.

359. The Constituent Assembly's merits include the fact that it would be people-driven and participatory, especially because the delegates would be elected. The Constituent Assembly has the potential of being shielded from political interference; it would be inclusive; enjoy legitimacy and would restore trust among the actors. This route is seen as likely to resolve the political problems that have faced the review process from the outset.

360. The demerits of the option include the fact that it is likely to be a costly and time consuming exercise and has the potential of further polarizing Kenyans. There may also be contention over the unit of representation. The Constituent Assembly could attract unqualified delegates, in addition, it would have the potential of being infiltrated and interfered with by politicians. It could also be perceived as creating rivals for politicians and would thus have the potential of being rejected by politicians who would perceive it as a threat.

361. To ensure the success of this option, a sound legal framework and clear rules of procedure would need to be enacted. These rules would, among other things, provide for election of delegates to the Constituent Assembly, define the role and responsibility of the Constituent Assembly, specify the qualifications of delegates through setting minimum educational levels, and define the practice and procedure of the Constituent Assembly including the voting procedure. The Assembly would also require a parallel negotiating mechanism to resolve disputes that may arise. It should be informed by the principle of inclusion and representation and should have a time limit within which to complete its tasks.

OPTION	MERITS	DEMERITS	PREREQUISITES FOR SUCCESS
Constituent Assembly, Experts and Referendum	• People-driven and participatory; • Delegates are elected directly and specifically for the task of constitution-making; • Shielded from political interference; • Potential for inclusivity (takes diversity into account); • Legitimacy; • Restores trust among Kenyans.	• Costly and time consuming exercise; • Potential to polarize Kenyans further; • There may be contention over the unit of representation; • Potential to be infiltrated and captured by politicians; • Potential for rejection by politicians.	• Clear electoral rules; • Precise and clear rules of procedure; • Clear rules of responsibility of Constituent Assembly (what it can and cannot do); • Minimum requirements for delegates' level of education; • Trust and confidence among political class; • To be backstopped by a team of technical advisors and a parallel negotiating mechanism to resolve disputes; • Principle of inclusion and representation; • Time limits • Members not to seek any elective or other public office for a specified term.

7.4.2 A Committee of Experts and a Referendum

362. Some of the people who appeared before us favoured this route to complete the constitution review process. They argued that a lot of work has already been done in the review process and that there was therefore no need to spend more money and time on those aspects of the process. We were told, and we agree, that the views of the people have been collected and debated for a long time and that what now remains to be done is to iron out any outstanding issues.

363. Proponents of this view called for the appointment of a Committee of Experts after broad stakeholder consultations. If necessary, they proposed that a forum be constituted to agree on the membership of that Committee. Others proposed that the positions be advertised after which those short-listed would be vetted and endorsed by Parliament.

364. The main merits of this option are that it would be relatively cheap and cost effective. Additionally, under this option, the work would be completed in a relatively short span of time as it requires no additional institutional arrangements.

365. Its demerits include the fact that it is neither participatory nor inclusive; it is not people-driven. It has the potential to generate controversy and court wrangles on the choice of experts and also runs the danger of reducing constitution-making into a mere technical exercise. In addition, it has low legitimacy.

366. To ensure the success of this option, intensive civic education would need to be conducted. Key stakeholders would also need to agree on the size of the Committee, the criteria for their selection and the terms of reference of the experts. The experts would also be barred from taking up specified categories of public office – whether elected or appointed – for a specified period, preferably not less than 10 years.

OPTION	MERITS	DEMERITS	PREREQUISITES FOR SUCCESS
Committee of Experts and Referendum	• Cheap and cost effective; • Limited time needed to complete its work; • Potentially fast • De-linked from obvious partisan politics;	• Not participatory and inclusive – not people-driven; • Potential controversy on choice of experts; • Danger of reducing exercise into mere technical exercise;	• Intensive civic education; • Consensus and understanding among key stakeholders; • Criteria of selection of experts to be transparent and above board;

OPTION	MERITS	DEMERITS	PREREQUISITES FOR SUCCESS
	• No need for other institutional arrangements.	• Possibility of court cases over representation; • High possibility of rejection in referendum; • Low legitimacy.	• Experts not to seek any elective or other public office for a specified term; • Not to be perceived as a permanent employment; • Number of experts and terms of reference to be agreed on.

7.4.3 A Multi-Sectoral Forum, Experts and a Referendum

367. The Committee also received proposals for the establishment of a Multi-Sectoral Forum that would be broadly representative of key stakeholders. This Forum, though somewhat similar to the option of a Constituent Assembly, differs from the latter in that: first, the Forum would not have the constituent power of the people; and second, its manner of constitution is not necessarily predicated on direct elections. It is expected that membership of the Forum would be drawn from organised groups. Such groups, we were told, could be identified along the lines of those that were at one time listed in the lapsed Constitution of Kenya Review Act.

368. It was proposed that the Forum be mandated to resolve the contentious issues and produce a draft Constitution. This Forum would be backed by a committee of experts who would help it to resolve the contentious issues and produce a draft Constitution. This option is premised on the assumption that a lot of work has already been done.

369. This route is perceived as expedient and likely to save the nation much needed financial resources and time. The expectation is that the membership of the Forum would be relatively small and that it would provide a platform for negotiating the contentious issues both technically

and politically. It would be inclusive of organized interest groups representative of the face of Kenya and would bring together groups that are interested in constitution review. There is potential to complete the work fairly quickly.

370. The demerits of this route include possible lack of clarity on the membership of the Forum. There is a likelihood that there would be a lot of wrangling over the membership of the Forum even before the Forum settles on the membership. This is likely to take valuable time. The Forum is also perceived as having the potential to tilt the constitution in favour of the interest groups incorporated in it and as being elite-driven and therefore having low legitimacy which lends it to challenges in court from excluded groups.

371. As prerequisites for the success of this initiative, there would be need for a clear definition of contentious issues. Key stakeholders would also have to agree to use existing documents as the basis for moving ahead. Legal framework to be enacted would need to provide for clear rules for selection and nomination of members. It would also be necessary to bar members to the Forum from taking up specified categories of public office – whether elected or appointed – for a specified period, preferably not less than 10 years.

OPTION	MERITS	DEMERITS	PREREQUISITES FOR SUCCESS
Multi-Sectoral Forum backed by Experts & Referendum	• Small in size; • Cost effective; • Inclusive of organized interest groups; • Brings together groups that are interested in constitution review; • Potential to	• Not all inclusive; • Not people-driven; • Elite-driven; • Potential to tilt constitution to interests of interest groups; • Low legitimacy; • Can be challenged in court; • Difficulty to select	• Clear definition of contentious issues; • Use of existing documents as basis for moving ahead; • Conducive political climate; • Clear rules of selection and nomination; • Legal provisions to secure it;

OPTION	MERITS	DEMERITS	PREREQUISITES FOR SUCCESS
	complete its work.	delegates and organizations to be represented.	• Delegates should not offer themselves for elections or be appointed to public office for a specified term; • Identification of Convenor.

7.4.4 Electing the 2007 Parliament to also act as a Constituent Assembly

372. Proposals were made to elect the next Parliament (during the 2007 elections) as a Constituent Assembly. The argument is that it will be cost effective and also save time. The country will therefore be electing a Parliament whose mandate is to make a new Constitution for Kenya and also deal with the normal parliamentary business of that term.

373. This route is likely to be cost effective since it does not require additional institutions and involves only one election. The prospect of a multiplicity of elections was of great concern among most presenters that came before us.

374. This option is likely to be opposed by the Kenyan people who have maintained all along that the review process must be people-driven. It will also be opposed by significant groups such as faith-based organizations and civil society who will see it as exclusionary. A person may want to serve in the Constituent Assembly and not in Parliament. Considering that Parliament has to perform all its other constitutional functions, this option is likely to overburden the House and may lead to a protracted review process. Most significantly, this route has potential to be held hostage by politicians and makes it impossible to lock out transient political interests that have been cited by Kenyans as one of the key reasons why the country has not been able to realize its dream of a new constitution.

375. The success of this route is predicated on there being a conducive political atmosphere, minimum political divisions; and a competent team of experts. It is also predicated on efficient management and re-organization of the parliamentary calendar to enable Parliament to execute the dual mandate.

OPTION	MERITS	DEMERITS	PREREQUISITES FOR SUCCESS
2007 Parliament elected to double up as Constituent Assembly.	• Cost effective – one election; • More acceptable among parliamentarians; • Does not require extra institutions.	• Overburdens Parliament and makes it ineffective in performance of its other roles; • Not people-driven; • Potential for being held hostage by politicians; • Captive to short-term interests; • It will be linked to electoral cycle and Kenyans are distrustful of politicians; • It is against the *Njoya* decision; • No guarantee that Constitution will ever be completed.	• Conducive political atmosphere; • Minimum political divisions; • Healing, dialogue and reconciliation should begin; • Competent team of experts to do background work; • Civic education to inform the public that the next Parliament would be elected as a Constituent Assembly; • Highly efficient management and re-organization of the parliamentary calendar.

7.4.5 Minimum Reforms and Amendments

376. The 'minimum reforms approach' is reminiscent of the 1997 Inter-Parties Parliamentary Group (IPPG) negotiations that led to the enactment of a series of constitutional and legislative reforms considered to be the minimum package necessary as a condition precedent for holding the general elections of that year. Under this proposal, those parts of the PNC that are broadly agreed upon would be "migrated" into the current

Constitution by way of amendments to the current Constitution. It is argued that this would consolidate the gains so far made towards a more democratic order and secure them from the possibility of roll-back from rogue leadership.

377. This approach is perceived as expedient insofar as it involves minimal cost and is precedented. This approach may be embraced by Parliamentarians. The major drawbacks from this approach are that it addresses the short-term gains of politicians and is not people-driven. It could therefore widen the gap between Kenyans and parliamentarians. From hindsight, this approach is likely to entail horse trading and cutting of deals in constitutional matters on the basis of extraneous issues. Most importantly, this option is a fundamental departure from the goal of comprehensive constitutional review that is the aspiration of the Kenyan people and it will also run foul of the decision in the *Njoya Case* unless the amendments made are not fundamental and do not go to the basic structure of the state as established in the current Constitution.

378. For this approach to succeed, parliamentarians would have to talk and agree on the reform package. There would be need for a genuine desire across the political divide for a set of constitutional reforms; and mechanisms for consultation between parliamentarians and all stakeholders as agreements are made. This calls for dialogue among and between political parties and other stakeholders.

OPTION	MERITS	DEMERITS	PREREQUISITES FOR SUCCESS
Minimum Reforms (IPPG Type)	• Expeditious; • Minimal cost; • Precedent for it; • Consolidating gains already made such as areas of agreement in previous drafts;	• Meets short-term gains of politicians; • Not people-driven; • Widen gap between Kenyans and parliamentarians; • Delay process of	• Parliamentarians have to talk and agree on the reform package; • Decisions should be through consensus; • Linked to specific timeframe – before 2007;

OPTION	MERITS	DEMERITS	PREREQUISITES FOR SUCCESS
	• Potential for bringing politicians close together because of common interests; • Safety valve.	comprehensive constitutional review; • Potential to link constitution review to 2007 elections; • Conflict of interest; • Lack of quorum in Parliament could hamper progress.	• Mechanism for consultation with other stakeholders as parliamentarians reach agreements; • Dialogue among parties.

7.4.6 Gradual Amendments to the Current Constitution

379. Another option is to effect gradual amendments to the current Constitution reflecting issues that are agreed on from time to time. This approach maintains the *status quo* for it is hinged on the existing framework for amending the Constitution. It allows for gains that have been made to be captured easily.

380. Critical to pursuing this path is the existence of political trust and good will. Such an approach is perceived as incremental, entailing no major cost implication. It is based on the theory of a *constitutional moment.*

381. Under this approach, constitutional reform is contingent on the existence and seizure of a *constitutional moment* as, when and if it happens. This approach is not people-driven and plays into the hands of those that have an interest in the *status quo.* It is also amenable to capture by short term-vision resulting in selective amendments and is an implicit admission that the constitution review process as envisaged has failed.

OPTION	MERITS	DEMERITS	PREREQUISITES FOR SUCCESS
Amendments to the current Constitution	• Incremental; • Precedent (39 amendments); • Quick; • No major financial cost implication; • Gains can be captured.	• Not people-driven; • Danger of conflict of interest; • Short term vision; • Fundamental alteration of Constitution without involvement of people; • Could paralyze Parliament if amendment causes further major divisions; • Selective amendments; • Lack of quorum.	• Political trust and will.

7.4.7 An Interim Constitution, a Constituent Assembly and a Referendum

382. The proposal here is to amend the current Constitution to allow Parliament to convert the current Constitution into an interim Constitution which will convert the Government into an interim Government, and Parliament into an interim Parliament. This would secure the democratic gains so far made that are or may be under threat in the event that a retrogressive leadership takes the reigns of power.

383. The country would therefore go into the 2007 elections with an interim Constitution that would facilitate the election of an interim transitional Government whose main task would be to facilitate the completion of the review process. This would, among other things, deal with the presumed permanence of the current Constitution read into section 47 of the Constitution that has been cited as one of the key obstacles to constitutional reform in Kenya.

384. Among other things, the Interim Parliament would facilitate the establishment of a Constituent Assembly which would produce a draft that would be released to the public for civic education, discussion and debate after which a national referendum for its ratification would be held.

385. The Interim Constitution option is quite complicated. It is a venture into legally uncharted terrain and likely to lead to legal and political deadlocks.

7.5 Recommendation on Key Options

386. After giving the matter long and careful consideration and after an evaluation of the merits and demerits of each option the Committee recommends the following options in order of priority:

1. A Constituent Assembly backstopped by experts and culminating in a referendum.
2. A Committee of Experts and a referendum.
3. A Multi-Sectoral Forum backed by experts and culminating in a referendum.

387. It cannot be gainsaid that the option eventually adopted by the country must be one that is negotiated and broadly agreed upon.

388. It is important, though, that consideration of these options be undertaken within the context of the broader socio-economic and political context. It must also be undertaken against the yardstick of certain objective criteria.

389. We must point out that these options are not linked to the 2007 elections. We received many views in this respect and there are summarized in Part II of this report.

390. We do not think it appropriate, or even necessary for us to delve into the question of whether the constitution review process can, or indeed whether

it should, be concluded before the 2007 elections. To do so we think would be to pre-empt the dialogue and negotiation that we so keenly advocate. It would also be to pronounce ourselves on a matter upon which there are a host of imponderable factors outside our control. We can say, however, that processes for restarting the review process need to begin immediately. We consider it useful to make a few comments on each of the options we have favoured and to point out some of the activities that have to be undertaken to bring each of these options to fruition.

391. In terms of the first option, a Constituent Assembly was highly favoured by an overwhelming majority of presenters. The High Court in the *Njoya Case* endorsed a Constituent Assembly as a legitimate means of constitution making. The Constituent Assembly would require to be backstopped by experts. Everyone agrees that experts are an integral part of the constitution making process. Differences only arise as to the role that should be played by such experts. Under this option, the experts are "support staff" to the Assembly.

392. The document produced by the Constituent Assembly is then forwarded to the referendum which, as we have argued before, is central to all our options.

393. We think that this option passes highly the tests of legality and "people drivenness". The main components of this option could include:

- dialogue on reconciliation;
- enactment of legal and legislative framework for the Constituent Assembly and the referendum;
- conduct of Constituent Assembly;
- appointment of a team of experts;
- appointment of consensus building team;

- launch and holding of Constituent Assembly up to the production of a draft Constitution;
- civic education on the draft Constitution; and
- referendum.

394. The second option differs from the first by the absence of a Constituent Assembly and by the central role to be played by the experts since it is they who produce the document that then goes directly to a referendum. The main attraction of this option is the relatively short time that the process can take and its cost effectiveness.

395. The main components of this option could include:

- dialogue on reconciliation and healing;
- legal and legal framework for the Committee of Experts and the referendum;
- appointment of Committee of Experts;
- launch the work of Committee of Experts up to the production of a draft Constitution;
- civic education on the draft Constitution; and
- referendum.

396. The third option is a variation of the first option but substitutes the Constituent Assembly for a stakeholder Multi-Sectoral Forum. Its principal attraction is that it can be broad-based and representative of stakeholders who may not be able to secure representation through ordinary democratic elections. It can mitigate the imperfections of democratic elections.

397. The main components of this option include:

- dialogue on reconciliation and healing;

- legal and legal framework for the Multi-Sectoral Forum and the referendum;
- appointment of members of Multi-Sectoral Forum;
- launch of the work of Committee of Experts up to the production of a draft Constitution;
- civic education on the draft Constitution; and
- referendum.

7.6 Dealing with Contentious Issues

398. On the contentious issues, the Committee accepts the argument that these are fluid and have been shifting over time. The list appears to have been growing since the completion of the National Constitutional Conference.

399. This is in keeping with the argument that the referendum and subsequent post-referendum debate may have generated additional issues of contention. We, therefore, recommend that jumpstarting of the review process should not be directly linked to contentious issues. We think however, that the mandate of the organ or organs to take forward the review process should include the definition of mechanisms for isolating and reaching agreement on the contentious issues.

400. Specifically, we recommend the following procedure for handling the contentious issues:

Step I: The contentious issues should be classified into three categories. These are: specific issues that can be sorted out by specific stakeholders, broad issues that require wide consultations and issues that need not be in the Constitution because they cause unnecessary divisions.

Step II: Negotiate the issues within any of the institutional options recommended above.

Step III: Alongside Step II, where agreement is not reached, establish a legal framework to subject the unresolved contentious issues to a referendum. For example, provision could be made to put the issues to a referendum on an issue-by-issue basis with a stipulated "pass" threshold. This procedure would address the observation frequently made by presenters before us that one of the main reasons why the PNC was defeated, was that it unfairly offered the voter only a "Yes" or a "No" option on the entire document. The "pass" threshold for a contentious issue could be higher than that of the rest of the Constitution.

Step IV: If a particular contentious issue fails to go through during a referendum, then it should be listed in a constitutional category called "unfinished business", created for that purpose. The category would be discussed at stipulated periods (say every five years) with a view to finding out whether the issue can be resolved through a constitutional amendment, failing which it remains in the category of "unfinished business."

7.7 The Proposed Roadmap

401. The foregoing discussion on mechanisms for completing the review process suggests the following roadmap, which we now recommend.

402. Restarting the review process and begin a process of reconciliation and healing must be seen as inter-related processes rather than distinct events. In this regard, the roadmap to both the conclusion of the review process and reconciliation and healing will be characterized by continued dialogue and various activities around reconciliation and healing. We now propose a six-

stage roadmap comprising several activities. Some of these will be carried out simultaneously; activities will be overlapping throughout the process. These stages are enumerated and discussed below.

403. Stage one. This will commence with reconciliation and healing using the various platforms suggested above. This process will be continuous and will run throughout the period of constitution making and beyond.

404. Stage two: Through a consultative process, undertake discussions on the proposed options for moving the review process forward. Discussions shall seek to agree on an option, timeframe for completing the constitution; and mechanisms for dealing with contentious issues. Parliament should be involved in the discussions and in legislating the outcomes.

405. Stage three: Upon agreeing on option or options, a legislative and legal framework to underpin the chosen option is put in place. It is envisioned that stage two and three can run simultaneously or sequentially.

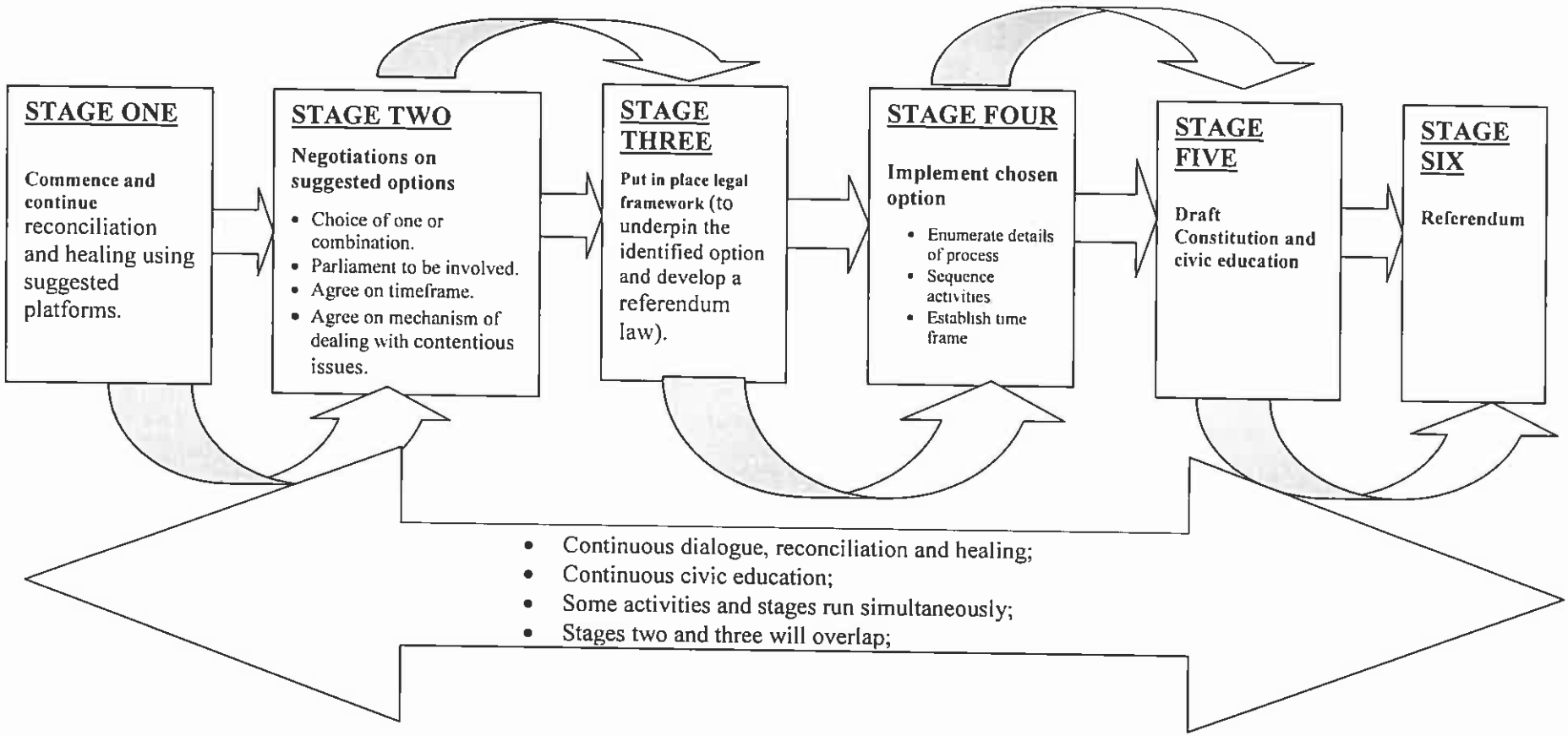
406. Stage four: Undertake implementation of what will have been agreed upon. The implementation for this will commence with a detailed discussion of the specific activities to be undertaken, means of putting them in place as well as their sequencing and timing.

407. Stage five: Draft constitution is produced and intensive civic education programme is launched.

408. Stage Six: Referendum will be held to get people's verdict on the draft constitution.

409. Below is a graphic representation of the proposed roadmap to the conclusion of the constitution review process.

PROPOSED ROADMAP TO THE CONCLUSION OF THE REVIEW PROCESS



7.8 Summary and Conclusion

410. It is important to point out that some of the mechanisms envisaged in the way forward can run parallel to each other. Thus the process of reconciliation and healing, and that of enacting the legal and legislative framework for the review can take place simultaneously. The only prior requirement for the two is that an enabling environment for dialogue be first established. Choice on the appropriate institutional mechanism for completing the review process also presupposes existence of dialogue. The roadmap, therefore, begins with dialogue.

CHAPTER EIGHT

OBSERVATIONS, CONCLUSIONS AND RECOMMENDATIONS

8.1 General Observations

411. The Committee has listened to views of Kenyans and commissioned several studies on what went wrong with the review process and what ought to be done in order to jumpstart the review process. On the basis of the views from the public and the findings from these studies, the Committee is of the view that Kenyans need a new Constitution urgently. However, the successful conclusion of the review process depends on dialogue, entrenchment of the legal framework and a credible mechanism for resolving contentious issues.

412. The Committee is of the view that the President holds the key to dialogue but the opposition parties and all other leaders must also reciprocate. Further, without broad-based and genuine dialogue, the process of reconciliation and healing will take a very long time to bear fruit.

413. The Committee is of the view that the current constitution should be amended in order to entrench the review process in the constitution. This should be done with a view to providing for a people-driven review process as well as a viable legislative mechanism through which the constitution can be replaced.

414. The Committee is of the view that there are some genuine contentious issues and suitable mechanisms should be put in place to address them. This will not only move the process forward but will reassure any aggrieved individuals.

415. The Committee is of the view that short-term interests and visions of politicians increasingly shaped the review process. Narrow partisan interests as well as ethno-regional concerns as opposed to national interests, heavily dictated the pace and direction of the stalled review process. There is need thus to insulate the review process from extraneous, ethnic, narrow and parochial factors.

416. Many people argued for locking out politicians from the review process. The Committee argues however, that it is not possible to keep out key stakeholders such as politicians from the review process. Therefore, parliamentarians will be involved not only in enacting the relevant legal instruments required to navigate the new review process to conclusion, but also in the reconciliation and healing process, and in negotiating the options presented in this report.

417. The review process must be people-driven and any chosen option must be anchored in this principle taking into account issues of marginalized groups such as women, persons with disabilities and the youth. We recommend a mechanism that will ensure that people remain at the heart of the review process. Any future constitution making process must contemplate a referendum.

418. It is important that the review process is guided by negotiated and legally binding timeframes. The future review process should not run indefinitely. It should be governed by a clear timeframe that is agreed upon by all stakeholders especially the political leadership.

8.2 General Conclusions and Recommendations

419. A conclusion arising from a review of the constitution making history in the country is that it has been a contentious process. It has been characterized by lack of clarity on its general direction, the existence of too many initiatives, historical fears and lack of trust between the various actors. The

constitution making history also reveals that the review process has often sought to respond to short-term objectives. Further, the political dynamics, more than anything else, shaped the various phases of the review process. On the whole, the review process has had as many obstacles as successes, but the latter are rarely highlighted.

420. In our view, the remaining part of the process should not repeat the mistakes of the past. Its overall direction must be clear; all actors should be persuaded to work towards that general direction. The entire process must be founded on trust. This theme runs throughout the report.

421. A general recommendation arising from the foregoing is that the completion of the review process must pay as much attention to the process as to the content. In our view, the process is as good as the product; the product will not be accepted if the process leading to it is flawed. This theme runs throughout this report.

422. It is our recommendation that the institutional framework to be established to complete the review process should be constituted after extensive consultations in order to maximize the legitimacy of the institutions in the eyes of the public. Again, this theme runs throughout the report.

423. The general recommendation arising out of successes of the review process is that a concerted effort must be made to bring the successes to the attention of the wider public so as to reduce the level of public disillusionment in the constitution review process.

424. It is our general observation that civic education on the constitution review process played an important role in creating awareness on matters constitutional and enabling the people to make informed choices. We observe however that civic education as provided by CKRC was neither well planned nor adequate. We recommend that a structured, systematic

and continuous programme of civic education be built into the constitution review process.

425. We generally recommend that the constitution review process is far too important to be linked to electoral politics and cycles. We therefore recommend that the review process be conceived as a process with a life of its own. This is not to say that the process be open ended and indefinite.

426. It is true that major divisions have emerged in the country as a result of the review process. This is especially true of the referendum in that it divided the country into two opposing camps, something that threatened the stability of the country and unity of the nation.

427. We also note that the Proposed New Constitution of Kenya had several contentious issues which deepened the divisions among Kenyans. It is true that the review process has generated a "shifting list" of contentious issues. Narrowly speaking, the contentious issues are to be found in the various draft Constitutions so far produced. Broadly speaking, the contentious issues are also to be found in the wider divisions in society, some of which are historical and extra-constitutional. The country is, therefore, in need of reconciliation and healing as an integral part of charting the way forward.

428. The general recommendation arising out of our discussions with the public on divisions, contentious issues and the completion of the review process is that there is need to create mechanisms for addressing the broad divisions in society as well as the contentious issues. Creation of these mechanisms is a pre-condition for the successful completion of the process.

429. We recommend that the President begins by reaching out through extensive consultations with all the ethno-political and regional leaders and constitute a team to design the process for reconciliation and healing. Further, we recommend that consideration be given to the invitation of eminent peace building experts to facilitate dialogue between various political and ethno-

regional leaders. Honesty, trust and candidness are the main values to guide this process.

8.3 Specific Recommendations on the Way Forward

8.3.1 Reconciliation and Healing

430. We recommend the establishment of a lean national team on reconciliation and healing to spearhead the process of reconciliation and healing. The primary function of the team will be to catalyze reconciliation and healing, conceptualize the sequencing of events and monitor progress.

431. We recommend that the process on reconciliation and healing be conceived as a process with several phases rather than as a simple event confined to a short timeframe. Some of the reconciliation and healing activities should be undertaken as short-term activities, others as medium term activities and still others as long-term activities.

432. We further recommend that the process of reconciliation and healing be guided by certain principles, including the principles of co-existence, people-involvement, dialogue, and hope creation.

433. We further recommend that reconciliation and healing be undertaken from multi-level platforms because it requires the participation of several key institutions.

434. Finally, we recommend that some key institutions take the lead in reconciliation and healing. These are the President, Parliament, Faith-based Groups, Professional Associations, Civil Society Organizations and other socio-cultural institutions.

8.3.2 Mechanisms for Completing the Review Process

8.3.2.1 Legal and Legislative Framework

435. We recommend that a legal and legislative framework be established to underpin the review process and the mechanisms adopted. Such a framework should amend section 47 of the Constitution and any other section with a bearing on the matter so as to finally settle the constitutional concerns that have long assailed the constitutional review process. It should also establish an adequate statutory framework to cover all envisaged processes.

436. The Committee recommends that the review process be entrenched in the Constitution. The Constitution should also be amended to provide for the process by which the replacement of the Constitution can be undertaken.

437. We recommend that in addition to constitutional recognition of the referendum as the process by which the people of Kenya ratify a new Constitution, a referendum law should be enacted.

8.3.2.2 Institutional Options

438. We recommend a number of institutional options for consideration and that one or a combination of several options be adopted as the vehicle for completing the review process. As noted above, some of these options can result in a new Constitution within a short period of time, while others would take longer. The three options that we consider as the most feasible and in order of priority are:

iv. A Constituent Assembly, supported by Experts, and a Referendum;
v. A Committee of Experts and a Referendum; and
vi. A Multi-Sectoral Forum backed by a Committee of Experts and a Referendum.

439. In the first option, a Constituent Assembly would be established. A small team of experts would provide technical support to the Constituent

Assembly. A referendum would be held on the draft produced by the Assembly.

440. The second option proposes appointment of a small team of experts drawn from all relevant disciplines. The experts would review the various drafts and draft a document for presentation to the people in a referendum.

441. In the third option, we recommend a multi-sectoral forum, supported by experts and culminating in a referendum. Experts will provide technical support to the forum. The draft Constitution will be presented to the people in a referendum.

442. In all the options presented, a back-up team of deadlock breakers should be established to facilitate resolution of contentious and would-be contentious issues and to resolve any other disputes that may arise.

443. To insulate the review process from short-term interests and other extraneous factors, the Committee recommends that those elected or appointed to make the Constitution should be barred from taking up specified categories of public office – whether elected or appointed – for a specified period preferably not less than 10 years.

444. As emerges from the foregoing, regardless of the institutional option adopted, we recommend that a referendum be held as the final activity in the process. This is in order to give the people of Kenya the final say in the process and a chance to affirm the outcome, in keeping with the principle of a people-driven process.

8.3.3 Resolution of Contentious Issues

445. We recommend that whatever institutional mechanism is adopted, a deadlock-breaking mechanism should be established to facilitate

negotiation of contentious issues out of public limelight. The mechanism should be headed by an experienced negotiator.

446. We further recommend that the contentious issues be categorized and each category be handled separately. If it is not possible to arrive at a consensus, then the issues should be voted on separately in the referendum. If rejected in the referendum, such issues should be consigned to a constitutional category of "unfinished business" to be addressed at stipulated periods.

8.4 A Final Word

447. We have come to the end of our report and consider it necessary to make a few final remarks.

448. The first point we must underline is the continuing desire of the people of Kenya to have a new Constitution. This desire was expressed to us throughout the discharge of our mandate. It is also evident that the people of Kenya desire an early end to the constitution review process. They want a new Constitution sooner rather than later. They do not want an endless process for making a new Constitution.

449. One of the enduring concerns about the review process has related to the time and expense it has taken. We are alive to these concerns. We however underline that the constitution making process must be understood as occupying a foremost place in the priorities of this country. The constitution review process can therefore not be detained, postponed or otherwise obstructed on grounds of concerns about resources or administrative difficulties. It is our assessment that the constitution review process is an endeavour for which the people of Kenya are willing to pay the price. There cannot be, there must not be any short cuts.

450. Although we have proposed a number of options, which may be considered, we reiterate that goodwill and trust among the all the key players in the political arena are key to the success of any of these options.

Reconciliation and healing is critical in this regard. Dialogue must be the starting point.

451. In our view, a referendum now occupies a central place in the hearts and minds of the people of Kenya as the most legitimate means for ratifying a new Constitution. Any option chosen to conclude the review process should include a referendum as the final mechanism for ratification of the proposed Constitution.

452. The Constitution needs to be understood not as an end in itself but as a means to a peaceful, happy and prosperous Kenya. The Constitution is also a living document that must adapt to changing societal dynamics. For this reason, the country must start asking whether it is necessary to put everything in a Constitution and to settle all the questions at once.

453. The people of Kenya are desirous of a new constitution and need one as a matter of urgency. The remaining part of the review process must build on the successes of the process in order to speed up the delivery of a new constitution. We have identified several options and mechanisms to jumpstart the review process. The options we have presented here should be given serious consideration because they all have merits and demerits. Some can result in a new constitution within a relatively short period of time while others will require a longer period of time to produce a new constitution.

APPENDIX

GAZETTE NOTICE ON THE APPOINTMENT OF THE COMMITTEE OF EMINENT PERSONS

SPECIAL ISSUE

THE KENYA GAZETTE

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GAZETTE NOTICE No 1406

THE CONSTITUTION OF KENYA

APPOINTMENT OF COMMITTEE OF EMINENT PERSONS

WHEREAS the Constitution of Kenya Review Commission Act (Chapter 3A of the Laws of Kenya) which facilitated a comprehensive review of the Constitution by the people of Kenya, provided that the review process be conducted through the Constitution of Kenya Review

Commission, the constituency constitutional Forum, the National Constitutional Conference, the National Assembly and the Referendum;

AND WHEREAS all the above organs have duly executed their mandate under the Act culminating in the referendum on the proposed Constitution of Kenya on the 21st November 2005, in which the people of Kenya did not ratify the proposed new Constitution;

AND WHEREAS The Constitution of Kenya Review Act has now lapsed;

RECOGNIZING that the people of Kenya are still desirous of a new Constitution and the Government is committed to facilitating the review process; and,

TAKING INTO account that –

(i) during the referendum debate, some issues which appeared not to have been adequately debated and resolved arose;

(ii) substantial progress towards the development of a new Constitution has been made and that all the records of the organs involved in the process are available;

(iii) there is need to heal the nation from divisions emerging during the referendum campaigns in order to create an enabling environment for a participatory process,

NOW THEREFORE, it is notified for general information that His Excellency Mwai Kibaki, President and Commander-in-Chief of the Armed Forces of the Republic of Kenya, has appointed a Committee of Eminent Persons to undertake an evaluation of the constitutional review process and provide a roadmap for the conclusion of the process.

1. The Committee shall comprise –

May 2006, recommending:

(i) a process for national healing to facilitate reconciliation and fruitful dialogue;

(ii) a process that will facilitate the resolution of contentious issues;

(iii) legislation that will underpin the review process and lead to a new Constitution of Kenya.

6. In the performance of its functions, the Committee-

(a) hold such meetings, in Nairobi and at such times as the Committee shall consider necessary for the proper discharge of its functions;

(b) may, at its discretion, hold any meetings for the execution of its mandate under paragraph (5)(a) in private in order to instil confidence in the people appearing before the committee and allay their fears of adversity or reprisals;

(c) may use the official records of any of the organs of the review process under the Constitution of Kenya Review Act and other materials or records relevant to its mandate;

(d) may carry out or cause to be carried out such studies or research as may inform committee on its mandate;

(e) subject to the foregoing, the committee shall have all powers necessary or expedient for the proper execution of its mandate.

7. The Secretariat of the Committee shall be based at the 20th floor of the Co-operative Bank House, Haile Selassie Avenue, Nairobi.

Dated the 24th February, 2006.

MWAI KIBAKI,
President.