

The People's Choice

The Report of the
Constitution of Kenya Review Commission
Short Version

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

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Foreword

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

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

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

Yash Ghai
Chairperson

18 September 2002

CHRONOLOGY OF THE COMMISSION

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

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

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

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

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

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

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

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

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

Chapter I: Introduction

1. The Background

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

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

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

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

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

What happens next?

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

2. The Process

(a) Goals and Values

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

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

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

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

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

(b) Civic Education: Preparing the People for Participation

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

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

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

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

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

(c) Analysis of Public Submissions

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

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

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

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

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

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

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

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

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

(e) Concluding Remarks on the Process

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

Thirteen main points from the people:

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

3. What the People told us: An Overview

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4. What we have tried to do in the new constitution

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

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

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

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

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

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

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

(a) *Equality and Equity*

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

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

What does the Draft Constitution do for Women?

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

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

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

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

- Structures: it sets up structures to make and enforce the law.

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

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

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

What does the draft Constitution do for people with disabilities?

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

(b) *Human rights*

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

(c) *Security*

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

(d) *Protecting the Constitution and its principles*

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

5. *Over to the People*

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

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

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

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

6. *The Document*

(a) *Drafting style*

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

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

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

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

(b) *Structure of the Constitution*

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

How is the New Constitution Different from the Old?

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

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

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