Chapter III

The Draft Constitution:

1. The Institutions and Processes of Government

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

2. Parliament and its Members

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

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

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

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

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

On the structure of Parliament:

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

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

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

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

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

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

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

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

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

(a) One House of Parliament or Two?

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

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

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

It will have about 100 members:

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

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

amendment of the Constitution when special rules apply to anything affect the Districts.

3. Representation of the People: The Electoral System

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

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

On parliamentary elections they said:

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

The main issue relates to the electoral system: how votes get translated into number of parliamentary seats. The complaint about the existing system (known as

'first past the post'—(FPTP) is that the number of MPs a party gets will not really reflect the party's support in the country – indeed it is usual for the ruling party to have gained less than half of the votes cast. You could say that more than half the people did not want them to rule! The 'purest' system of proportional representation would be one in which the whole country would be one constituency: each party puts forward its list of candidates, and a voter would vote only for a party. This system operates in Namibia and South Africa, as well as Israel. This would have the result that no MPs would be elected by particular constituencies. But it is clear that most Kenyans also expected to retain constituency MPs, though with better ways to hold those MPs accountable – which we have discussed in the previous section of this Chapter.

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

There are a number of other advantages of the MMP system. Smaller communities will be likely to get some representation even if they do not win a constituency seat (provided their party gets 5% of the national vote). In the last Lesotho elections, operated for the first time on an MMP system, the opposition party did not win a single constituency seat but got about 20% of the seats due to the rules about proportionality on the national vote Another way in which minorities may get elected is by their members being placed on the party lists—women and men will have to nominated alternatively, and the disabled and minorities will also have to be placed high on the list. Parties will also be required to nominate at least one-third of candidates from among women. Parties will have an incentive to

campaign even in areas where they have no prospect of winning the constituency seat, for every vote they get will count toward proportionality. The MMP system was supported by all major political parties and by the Electoral Commission.

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

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

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

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

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

- The right to vote in secret elections is guaranteed
- The voting age is 18
- Voter registration is to be continuous

- Registration is based on an ID card or passport
- Prisoners who are on remand (not convicted) are able to vote
- Prisoners serving short sentences are able to vote

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

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

4. Political Parties

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

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

- People complained that the number of political parties causes confusion and recommended that we should limit number of parties; suggestions varied between 2 and 4.
- Parties should have nation wide support; some said that a party should have at least 10,000 members in every province
- Parties should not be based on ethnicity
- Parties should not be the only institution to nominate candidates
- A large majority said that parties should be funded from state resources; but a party would be entitled to state funding only if shows a minimum

degree of support; others wanted to restrict funding to parties with democratic credentials

- Registration of parties should not be done by the Registrar of Societies but by the Electoral Commission. Others said parties should not need to be registered; notification should be sufficient
- Parties which are not working well should be deregistered; some said that parties which do not win any seats in the legislature should be deregistered
- Kenya should become a no party state
- The constitution should entrench guarantees of multiparty system; these provisions should be unamendable.
- Parties should be regulated to ensure democracy and accountability

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

The draft Constitution says:

- The right to form and join political parties is protected.
- A political party can be formed by registration by the Electoral Commission.
- On the whole parties are free to carry out their functions, and the state must be strictly neutral between all lawful parties. There must be equal access to the state-owned and private-owned media.
- To be registered so as to take part in elections, a political party must have a national character, and not be formed on religious, linguistic, racial, ethnic, sex, corporatist or regional bases and must abide by democratic principles. Parties must respect the Constitution and laws, and human rights, including gender equity.

- Parties must not engage in or encourage violence or intimidation of its supporters or opponents. And they must not establish or maintain paramilitary or similar organisations.
- They must keep proper accounts. Political parties and independent must publish their manifestoes before elections
- Political parties can nominate candidates for local government elections

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

The draft Constitution:

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

The Commission also recommends in the draft Constitution:

- Foreign corporate bodies should be prohibited from donating funds or other resources to parties.
- Individual contributions should be restricted to a maximum to be determined periodically by the Electoral Commission.
- The Electoral Commission should have special responsibilities for the promotion of democracy and the supervision of political parties.
- The Electoral Commission must prescribe the maximum amounts a party or candidates may spend for electoral campaigns.

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

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

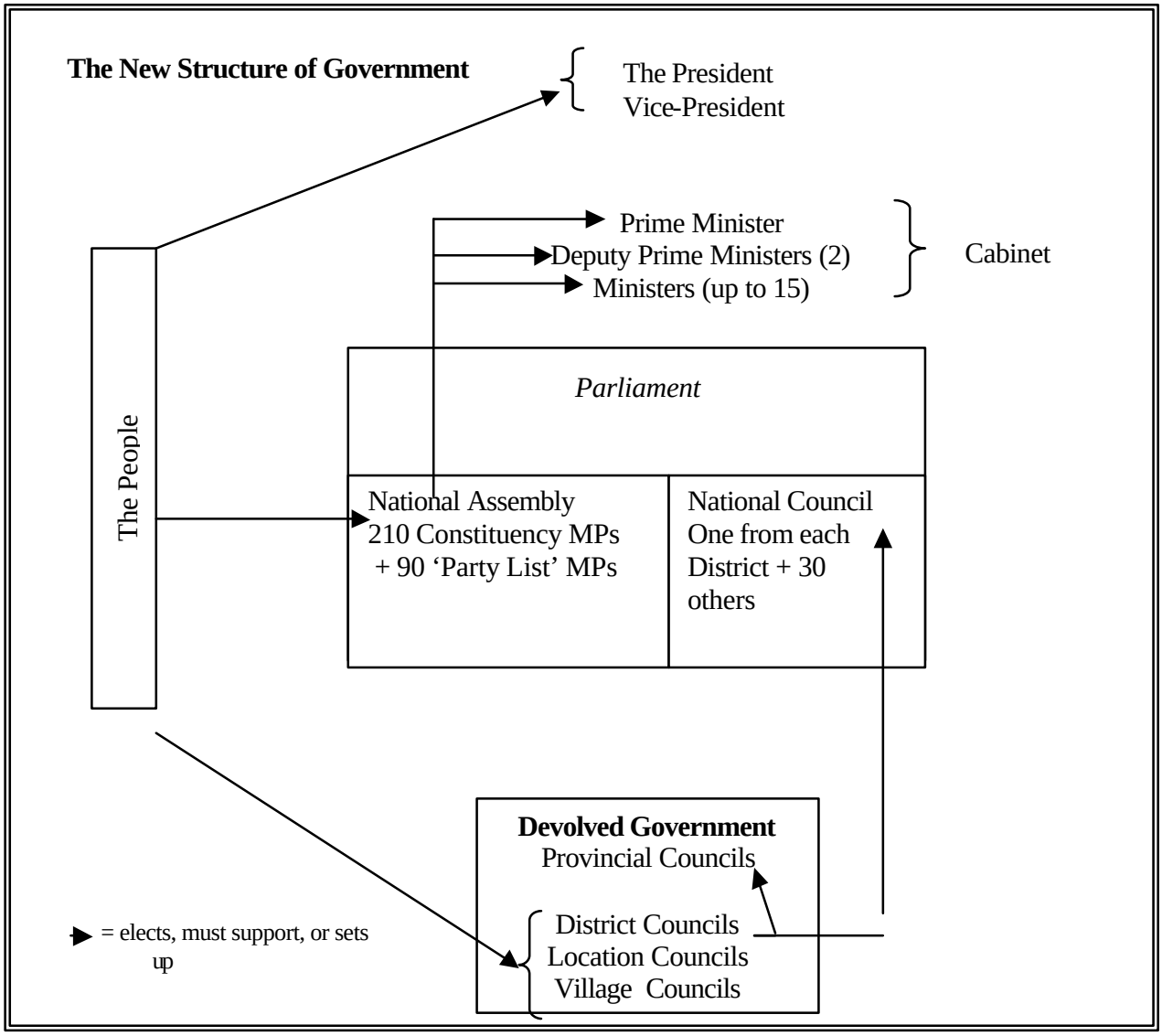
The main message which came to the Commission from the people – and came loudly and clearly – is that the current Constitution gives the President far too much power. In addition views included:

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

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

more common in continental European countries, and their former colonies, though it has also been adopted in Sri Lanka.

There are potential problems in such a system, and they have been experienced in both France and Sri Lanka especially. Very often the problems come because the President and the Prime Minister come from different parties. But they may simply be a matter of different personalities. If the President has real powers, especially if one of the functions of the President is to act as some check on the government and Parliament if it shows any sign of overstepping its powers, some degree of conflict is perhaps inevitable. To avoid unnecessary conflict, however, the Constitution should state clearly what the respective roles of the President and the Prime Minister are – and how disputes or disagreements are to be resolved.



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

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

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

understand the political side not the technical side of matters. The technicalities are for the civil servants. If the Minister knows – or thinks he knows – a lot about the subject this may lead to conflicts with the civil service. And his political sense may be weak. On the other hand, there is something to be said for having Ministers who have some qualification other than being loyal supporters. The proposal of the Commission is that the Prime Minister and the two Deputy Prime Ministers should be appointed from Parliament (the Prime Minister from the National Assembly) but the Prime Minister must choose his or her other ministers from outside Parliament. The appointment of Ministers must also be approved by Parliament. To make sure that this Prime Minister does take advantage of the wider choice, the Constitution draft says that Ministers must be chosen with a view to the experience and knowledge they bring to the task.

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

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

(a) The President

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

- President should be a symbol of national unity
- President should not be above the law
- President should continue to be directly elected
- The qualifications for President should include minimum and maximum ages, minimum educational qualifications, and being happily married

- The President should not be an MP and candidates for the presidency should not be able to stand for Parliament
- The Vice President should be the running mate of the President
- Parliament should be able to impeach the president
- The President's term of office is limited to 2 periods of 5 years, as now

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

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

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

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

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

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

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

- The President must safeguard the constitution and uphold the rule of law.

An important role relates to legislation:

- Presidential assent is necessary to bring legislative bills and regulations into effect. The President may send back a bill or regulations for re-consideration. The President must sign the bill or regulations if they are returned to her or him, with or without amendments, unless the President considers that it is unconstitutional, in which case s/he shall refer it to the Supreme Court for advisory opinion.

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

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

So that the President may perform the functions:

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

Then there are many symbolic roles – but nonetheless important:

- Commander in chief and presiding over the National Defence Council.
- Declaring a state of emergency after consultation with the Prime Minister Prime Minister and the National Security Council and with the approval of the National Assembly within two weeks
- The President shall have the power to declare war after consultation with the cabinet and approval of the National Assembly
- Appointing judges in accordance with the recommendations of the Judicial Service Commission and the consent of the Judiciary Committee of the National Assembly.
- The President has the power to initiate the process for the removal of judges for misconduct

- Formally ratifying treaties which have been concluded by the government and approved by the National Assembly, and shall ensure their implementation; s/he shall be kept informed of all negotiations for treaties;
- Accrediting heads of embassies/high commissions
- Formally appointing ambassadors and other key office holders, independent commissions and offices, in accordance with the provisions of the constitution.
- Formally granting pardons etc
- Award such honours established by an Act of Parliament on the recommendation of the Cabinet
- Presiding at the formal opening of Parliament

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

Brief Comparison of the President and the Prime Minister under the Draft Constitution

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

Although the President will not have as many powers as now, there could arise a situation in which the President is seen to be corrupt, or too sick to hold office, or simply too obstructive of government business. If there is a situation in which the

business of the country is being held up because the Prime Minister and the President cannot see eye-to eye, in the end the deadlock must be broken by Parliament. If they feel that the fault lies with the Prime Minister they can pass a vote of no confidence. If they feel that the fault lies with the President, they would be able to invoke the impeachment process:

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

6. Devolved Government and Local Government

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

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

There will be three levels of directly elected council:

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

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

The District Councils and Provincial Councils will have the power to make law. Lower level councils will have only executive powers to implement policies determined by higher levels, but will have the power of local initiatives for

development, and the power to make by-laws on very local issues, and will mainly be carrying out law made at higher levels.

(a) Making law at the different levels

There will be a list of powers which only the national government can make law on. This will include subjects like national defence, immigration, citizenship, currency, international airports, international trade, international relations etc. There will be a list of things the districts can make law about: including subjects like primary education, medical clinics, local roads, water supply, maintenance of law and order, etc. There will be a third list which both the central government and the districts can make law about, including subjects like agriculture, secondary education, hospitals, land, environment. Provincial Councils will have limited law-making power in connection with their coordination functions.

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

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

8. Courts and the Legal System

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

- make authoritative interpretations of the law, without directions or pressure from the executive or other sources
- settle legal disputes that are referred to them
- by settling disputes in accordance with the law and generally by enforcing the principle of legality or the rule of law, they help to create stability and maintain peace, and to provide predictability necessary for people to make contracts and other transactions.
- ensure the supremacy of the constitution in a variety of ways, including by declaring laws which are inconsistent with the constitution void,

> develop constitutional norms and help to adjust them to changing social and economic circumstances, inculcate respect for constitutional procedures and values, in part through persuasive and learned judgments, keep both the legislature and the executive within their lawful authority, and prevent arbitrariness and unfair conduct and protect the rights and freedoms of the people as well as the public interest

In recognition of the importance of its role, the judiciary is accorded much respect and many privileges; criticism of the judiciary, even when fully justified, is muted; judges have security of tenure to give them independence and to encourage them to be impartial, and their conditions of service are intended to secure them a comfortable existence to ward off temptations of accepting money or other inducements to favour particular litigants.

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

(a) Concerns

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

- Many people told us that they have lost confidence in the courts and wanted their disputes to be settled by their elders or in other traditional ways
- Very many recommended the establishment of a constitutional court or a Supreme Court
- The procedure for the appointment of judges should be open, transparent and accountable. Many suggested that the judges should be nominated by an enlarged and independent Judicial Service Commission with representation from the Law Society and law faculties and civil society, and that nominations for appointment as judges should be vetted by Parliament.

- A large number said that judges should have a university degree (as opposed to professional training only) or even a master's degree while some said that qualifications for judgeship should include moral and ethical standing of candidates.
- Many wanted to reform the procedure for the removal of judges; some suggested that any citizen should have the right to file a complaint with the Judicial Service Commission requesting removal.
- Many people and organisations, like the Law Society, recommended that the present judges should be removed.

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

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

The draft Constitution includes:

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

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

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

(b) The Kadhis' Courts

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

The Commission received a number of submissions on the expansion and reform of their jurisdiction and structures, primarily from the Muslim communities. They considered that neither Kadhis nor their courts are given sufficient respect and recognition. They identified a number of problems in the law and practice

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

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

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

- There should be a reasonable number of Kadhi courts so that all Muslims have access to them.
- The hierarchy of Kadhi courts will be as follows:
    - District Kadhi Courts as courts of first instance, presided over by a single judge
    - The Provincial Kadhi Court, presided over by a Senior Kadhi
    - Kadhi Court of Appeal presided over by the Chief Kadhi and two Kadhis (since many Districts with predominantly Muslim populations are far removed from Nairobi, where the Kadhi Court of Appeal would normally sit, the rules should provide that the Court should sit in these Districts on a regular basis)
    - The Supreme Court on appeal from the Kadhi Court of Appeal only on a constitutional matter.
- The Kadhi courts shall have jurisdiction to deal with civil and commercial law where all the parties profess the Muslim faith, in the manner of small claims courts (which are expected to be established shortly), without

affecting the rights of parties to go to other courts or tribunals with jurisdiction over the matter.

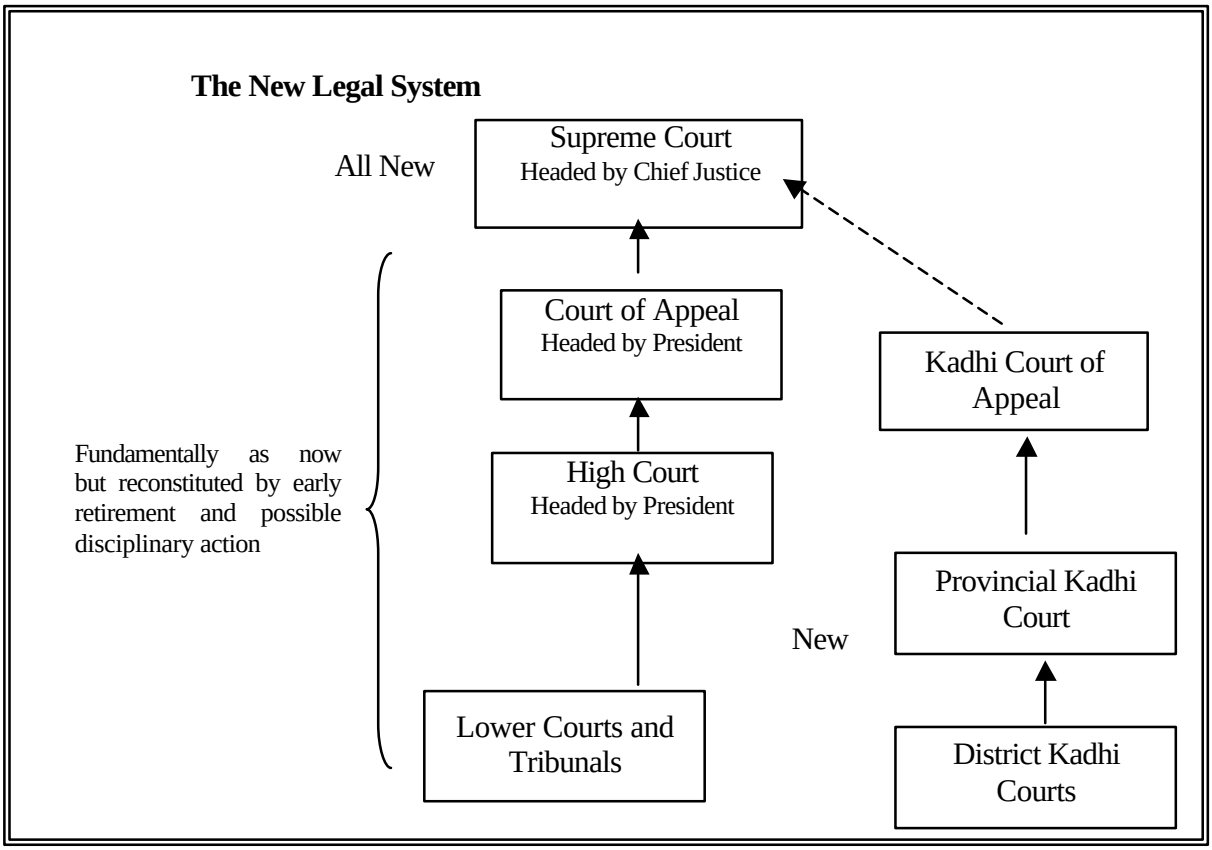
- The Chief Kadhi shall have the same status, privileges and immunities as a High Court judge, the Senior Kadhi as a Chief Magistrate and the Kadhi as a Resident Magistrate.
- The Chief Kadhi and other Kadhis shall be appointed in the same way as other judges. Apart from the Chief Kadhi, who shall be a member of the Judicial Service Commission, a Muslim woman, nominated by the national Muslim organisation.
- The qualification for appointment as Kadhis include having a degree in Islamic law from a recognised university and being an advocate of the High Court with, in the case of the Chief Kadhi, at least 10 years experience, and for other Kadhis, at least five years' experience as an advocate of the High Court.
- Kadhis shall be full time judicial officers and shall not have responsibilities of a spiritual nature.

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

(c) Accountability and control

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

- The retiring age for all judges is 65



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

- The system for removal of judges should be on the lines proposed by the expert panel:
  - The Constitution shall provide that any individual or institution, society or group of individuals may lodge a complaint against any judge with the Judicial Service Commission.
  - The Judicial Services Commission investigates and it request the President to appoint a Judicial Tribunal of eminent judges (including from judiciaries in East Africa) to conduct a hearing into the allegation.
  - The Judicial Tribunal reports its findings and recommendation to the President who must act in accordance with that recommendation.

- Removal should be only for inability to perform the judge's functions because of infirmity of body or mind or for misbehaviour, misconduct or incompetence so serious that it makes the judge unfit for office
- The Judicial Service Commission must draw up a Code of Judicial Conduct which should be widely publicised so that the judges themselves, the profession and the public know what is appropriate conduct for judges.

(d) Transitional measures

The most difficult issue on the judiciary the CKRC has had to deal with has been what should be done with the existing judges. The recommendation of the Expert Panel was that no wholesale dismissal of judges should take place. The Law Society proposed that this drastic step should be taken. The Commission is convinced that unless very serious steps are taken the whole future of constitutionality in Kenya will be placed in jeopardy. The judiciary is one of the keys to the effective functioning of a constitution. Yet there is overwhelming evidence that judges have been appointed for the wrong reasons, and many have demonstrated neither competence nor integrity. However, we have decided not to go so far as recommending the dismissal of the existing judiciary. It would be viewed internationally as a grave interference with the independence of the judiciary. Within the country it might be thought to weaken the 'taboo' against dismissing judges. And the honest judges might feel that they are being targeted equally with the guilty. We are therefore recommending:

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

9. Other Aspects of the Legal System

Judges are not the only element of a functioning legal system. In a number of other ways the existing constitution falls short of the ideal. The Commission

recommends the following measures designed to improve the independence of the system:

- An independent Director of Public Prosecutions
- A Public Defender – an independent constitutional officer to provide legal aid services in the first instance in connection with criminal cases
- A constitutional requirement to develop a policy for prosecuting – and this must be made public. The power to prosecute (or not to prosecute) is very important. Citizens ought to know what attitude the authorities will take to criminal offences. They ought also to know how politically important people will be dealt with
- Private prosecutions to continue to be permitted (subject to court approval)
- The nolle prosequi power (that is the power currently enjoyed by the Attorney-General to take over prosecutions brought by others and discontinue them) is modified by requiring that the court must approve its use
- An independent body to make the decision as to whether a pardon or commutation of sentence should be granted and this committee should recommend to the President who should be obliged to act on the recommendation

10. The Penal System

It has been clear from submissions from the public that things are seriously wrong in the penal system. Police brutality has been touched on in the Human Rights Chapter, as has the issue of the rights of prisoners. There were demands for the clear accountability of the police is also discussed. There are other points that the Constitution could make, relevant to the improvement of the system. The Commission is conscious that recent reports have indicated that a policy to encourage alternatives to imprisonment – particularly community service orders – is bearing fruit in terms of reduced numbers of inmates in prison. This is to be welcomed, and the judiciary to be congratulated on being prepared to adapt to changing needs. The Commission did receive a large number of submission from people concerned about the sentences inflicted on serious offenders – notably on sex offenders. In many countries there are similar complaints. Also, it sometimes happens that a somewhat reactive approach to public opinion on the part of the legislature leads to very severe sentences being legislated for. These may be essentially unconstitutional as violating basic principles of proportionality between crime and sentence (though this may not be expressed in the Constitution). Secondly, imposing very harsh minimum sentences may actually lead to courts

refusing to convict if they have no choice but to impose a sentence they think is unjust. Pressure to crack down on crime may also lead to rigid approaches such as the "three strikes and you're out" laws in the US. Such measures may also be viewed as unconstitutional, and may also lead to prisons being overcrowded and unable to carry out their basic functions. It is also very common that different courts give very different sentences for similar offences. And also that certain classes of society – economic or ethnic perhaps – get treated very differently by the courts. One solution to these various problems that is being adopted in many countries is that of a Sentencing Council which sets out guidelines which should be followed by the courts. A further constitutional problem has been that in some countries the law provides for the involvement of victims. It is suggested that in order to facilitate the development of sentencing polices which are consistent with each other and with the Constitution, a provision on the following lines could be included:

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

11. Public Service, Police and Defence Forces

(a) Public Service

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

with public servants: and it is from that quarter that they may first notice any chance, if change indeed occurs, after the new Constitution.

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

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

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

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

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

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

- The Public Service Commission is to be responsible also for public and police services, more independent and more reflective of society
- The Teaching Service Commission will be entrenched in the constitution
- The independence of these commissions will be stressed in the Constitution
- Proposals for the Commission on Human Rights and Administrative Justice and the Right to Administrative Justice provided elsewhere in the draft are also relevant
- There is a provisions which sets out clearly the fundamental responsibilities of the public service:
    - The services shall perform their functions in accordance with the Constitution and the laws
    - They shall protect the rights of the people
    - They shall ensure fair administration
    - They shall be appointed on merit
    - Appointments shall reflect the principle of proportionality to the diversity of Kenyan society
    - At all levels at least one third of appointments shall be women and one third men (with allowance for genuine need within particular grades and

professions) and the PSC etc shall endeavour to reflect this principles in promotions also

- The PSC must ensure that the public services are competent and committed and faithfully observe their provisions of the law and of relevant codes of ethics
- Public servants should not be penalised for carrying out their functions under the Constitution, including for complaining or reporting issues to the complaints mechanism of their service or to the Human Rights Commission
- The public service should operate on the basis that the members of the public should know who is dealing with their own particular problem

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

(b) Security services

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

ceremonial position – because he exercised almost all his functions on the advice of the Cabinet or a Minister (s. 79).

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

- One of the most persistent comments in submission to the commission was about police brutality.
- In a recent study by Transparency International Kenya the police topped the national bribery league.
- People making submissions to the Commission told of instances in which the police would arrest individuals on Fridays for no good reason apparently in the expectation that the prospect of a whole weekend in the cells would produce a more generous bribe.
- There is an impression that the police will stand by when citizens are under threat – a recent example being the failure of the GSU to come or to come promptly to the support of people being killed by Mungiki in Kariobangi only a short distance from the GSU Headquarters.
- There are accounts of police officers being actually engaged in criminal enterprises: such as car-jacking or robbery.
- People did suggest that the forces should be used in development work – such as road building, which is done in some countries, and was contemplated in the Poverty Reduction Strategy
- The police, particularly the Administration Police, are made use of by politicians for party political purposes.

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

- political neutrality
- civilian control
- respect for rule of law, democracy and human rights
- transparency and accountability
- regulated by legislation
- the only military force
- should not obey illegal orders

- should be involved in productive activity
- should defend sovereignty, help in emergencies
- disciplined and patriotic

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

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

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

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

- A statement of values and principles applying to all the defence forces
- A statement specific to each service setting out its principles and constitutional responsibilities
- The main services are renamed:
  - the Kenya Police Service
  - the Defence Forces and
  - the Correctional Services
  - The Administration Police should cease to exist as a separate force
- The following systems of civilian oversight:
  - For the police:
    - governance at the national level which includes a Board/Commission comprising legislators and respected members of society

- which should advise and encourage the police to move in the direction of more community interaction, higher standards etc, transparency, at a level between policy (which is the responsibility of Government) and operational management, and report to Parliament
- bodies at district level which perform a similar function reporting to the District Assembly
- liaison committees at the local level involving community leaders, women, affected groups

o For the Defence Forces:

- Legislation shall establish a body or bodies to advise the Government on defence matters, make necessary regulations, make appointments etc.
- The Parliamentary Committee with responsibility for defence issues must scrutinise the budget of the defence forces, review legislation relevant to the defence forces, receive annual reports from the defence forces etc

o For the Intelligence Service

- legislation must provide for a committee of Parliamentarians, not including Ministers, which include members of both Government and Opposition, and which reviews the work of the intelligence service and its budget, and reports to Parliament. The Act should provide for the maximum cooperation of the intelligence services with the Committee, while requiring secrecy where this is necessary.
- The legislation should provide for an independent complaints mechanism

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

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